ETHICS OPINION

RO-02-01

OFFICE OF GENERAL COUNSEL

QUESTION:

In formal opinions RO-91-01 and RO-91-28, the Disciplinary Commission of the Alabama State Bar held, in substance, that conflicts of interest resulting from nonlawyer employees changing law firms can be overcome by building a "Chinese wall" to screen the newly hired employee from involvement with any matter on which the employee worked while employed at his or her old firm. In recent years, however, an increasing number of jurisdictions have concluded that such screening procedures are ineffective when a nonlawyer employee has obtained confidential information concerning the matter in litigation. Consideration of the positions taken by these jurisdictions calls into question the factual and ethical validity of the rationale upon which these two opinions were predicated and the Disciplinary Commission has, therefore, determined that the conclusions reached therein should be reconsidered.

ANSWER:

A nonlawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a nonlawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and must therefore be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case.

DISCUSSION:

In some jurisdictions the "Chinese wall" cure for conflicts resulting from changing firms has been applied to lawyers as well as nonlawyers. The Alabama

Supreme Court, however, has taken the position that the "Chinese wall" concept should not apply to practicing lawyers. In *Roberts v. Hutchins*, 572 So.2d 1231 (Ala. 1990), the Court held, by way of dicta, that the "Chinese wall" could not provide an effective screen to attorneys in private practice but should apply only to government or other publicly employed attorneys. 572 So. 2d 1231, 1234 at n. 3.

More significantly, in 1990 the Alabama State Bar proposed, and the Alabama Supreme Court adopted, the Alabama Rules of Professional Conduct, which became effective January 1, 1991. Rule 1.10(b) of the Rules of Professional Conduct governs conflicts of interest on the part of a firm which employs an attorney previously employed by opposing counsel in ongoing litigation and provides, in substance, that an attorney with confidential information about a former client has a conflict of interest which precludes representation by the firm. The rule makes no mention of, or provision for, any type of "Chinese wall" screening process.

Based upon the above, the Office of General Counsel and the Disciplinary Commission have consistently held that such conflicts on the part of an attorney cannot be cured or overcome by erection of a "Chinese wall" or any other type of screening procedure. The Disciplinary Commission refused, however, to disallow the "Chinese wall" concept in addressing conflicts of interest which can result when a nonlawyer changes law firms.

In recent years, various jurisdictions have begun to question the effectiveness of screening procedures when a nonlawyer employee who changes firms is in possession of confidential information concerning the matter in litigation. One of the first jurisdictions to reject screening and to hold nonlawyer employees to the same standard as lawyers was the U.S. District Court for the Western District of Missouri. In *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037 (W. D. Mo. 1984), the court made the following statement:

> "Nonlawyer personnel are widely used by lawyers to assist in rendering legal services. Paralegals, investigators, and secretaries must have ready access to client confidences in order to assist their attorney employers. If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney's nonlawyer support staff left the attorney's employment, it would have a devastating effect on both the free flow of information between the client and the attorney and on the cost and quality of legal services rendered by an attorney. Every departing secretary, investigator, or paralegal would be free to impart confidential information to the opposition without effective restraint. The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these 'agents' of lawyers to the same disability lawyers have when they leave legal employment with confidential information." 588 F. Supp. at 1044.

Subsequently, as more states began to adopt the Model Rules of Professional Conduct, or some variation thereof, more and more jurisdictions concluded that Rule 5.3(a)&(b)[1] when read in conjunction with Rule 1.10(b)[2] requires that non-lawyer employees be held to the same standards as attorneys with regard to client confidentiality and conflicts of interest resulting from changing firms. Typical of the jurisdictions which employed this analysis is the opinion of the Supreme Court of Nevada in *Ciaffone v. District Court,* 113 Nev. 1165, 945 P.2d 950 (1997). The Nevada Supreme Court concluded as follows:

> "When SCR 187 [ARPC Rule 5.3] is read in conjunction

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[1] Rule 5.3(a)&(b) provides as follows:

> "With respect to a nonlawyer employed or retained by or associated with a lawyer:
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> (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
>
> (b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

[2] Rule 1.10(b) provides as follows:

> "When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter."

> with SRC 160 (2) [ARPC 1.10 (b)], nonlawyer employees become subject to the same rules governing imputed disqualification. To hold otherwise would grant less protection to the confidential and privileged information obtained by a nonlawyer than that obtained by a lawyer. No rationale is offered by Ciaffones which justifies a lesser degree of protection for confidential information simply because it was obtained by a nonlawyer as opposed to a lawyer. Therefore, we conclude that the policy of protecting the attorney-client privilege must be preserved through imputed disqualification when a nonlawyer employee, in possession of privileged information, accepts employment with a firm who represents a client with materially adverse interests." 945 P.2d at 953.

The Nevada Supreme Court characterized the "Chinese wall" approach as having been "roundly criticized for ignoring the realities of effective screening and litigating that issue should it ever arise." The court cited as an example of such criticism an article in the *Georgetown Journal of Legal Ethics*, viz.:

> "For example, one commentator explained that a majority of courts have rejected screening because of the uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosures. M. Peter Moser, *Chinese Walls: a Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm*, 3 Geo. J. Legal Ethics 399, 403, 407 (1990)." 945 P.2d at 953.

There are numerous other decisions which reach the same or similar conclusions, e.g., *Cordy v. Sherwin Williams,* 156 F. R. D. 575 (D.C. N.J. 1994);

MMR/Wallace Power & Industrial, Inc. v. Thames Associates, 764 F. Supp. 712 (D. Conn. 1991); *Makita Corp. v. U.S.*, 17 C. I. T. 240, 819 F. Supp 1099 (CIT 1993); *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 129 A.D.2d 678, 514 N.Y.S. 2d 440 (1987); *Smart Industries v. Superior Court*, 179 Ariz. 141, 876 P.2d 1176 (1994); *Koulisis v. Rivers*, 730 So.2d 289 (Fla. Dist. App. 1999); *Daines v. Alcatel*, 194 F. R. D. 678 (E. D. Wash. 2000) and *Zimmerman v. Mahaska Bottling Co.*, 270 Kan. 810, 19 P.3d 784 (2001).

In *Zimmerman, supra*, the Supreme Court of Kansas pointed out that disqualification is not inevitable in every instance.

> "Our holding today does not mean that disqualification is mandatory whenever a nonlawyer moves from one private firm to another where the two firms are involved in pending litigation and represent adverse parties. A firm may avoid disqualification if (1) the nonlawyer employee has not acquired material and confidential information regarding the litigation or (2) if the client of the former firm waives disqualification and approves the use of a screening device or Chinese wall." 19 P.3d at 793.

For the reasons stated above, the Disciplinary Commission of the Alabama State Bar is of the opinion that a nonlawyer employee who changes law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. A firm which hires a nonlawyer employee previously employed by opposing counsel in pending litigation would have a conflict of interest and must

therefore be disqualified if, during the course of the previous employment, the employee acquired confidential information concerning the case. However, as indicated in *Zimmerman*, *supra*, the client of the former firm may waive disqualification and approve the use of a screening device or Chinese wall.

LGK/vf

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