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by Grace M. Giesel

Lawyers rely on all sorts of assistance in practicing law. Law offices teem with paralegals, secretarial assistants, runners, investigators, student law clerks, and such. Two questions often arise regarding these non-lawyer employees. First, for purposes of ethics, to what extent is the lawyer responsible for the actions of the non-lawyer employees? Secondly, can non-lawyer employees create conflict-of-interest problems for the employing attorney?

General Responsibility for Non-Lawyers

Rule 5.3 of the Rules of Professional Conduct (Kentucky Supreme Court Rule 3.130(5.3)) sets out a lawyer’s duties with regard to non-lawyer employees. Section (a) provides that 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.” The use of “partner” is an attempt to indicate that the rule applies to lawyer with “managerial authority.” The employing lawyer must see that all employees are instructed on the lawyer’s ethical duties so that the entire office engages in conduct in accordance with the ethical responsibilities of the lawyer. For example, all employees should be instructed at the beginning of the employment and periodically thereafter of the lawyer’s duty of confidentiality stated in Rule 1.6. While the lawyer cannot be certain that an employee will not talk outside the firm about information relating to the representation of a client, by instructing the non-lawyer employees, the lawyer has taken steps to see that employees do not violate the duty of confidentiality owed to clients. Some lawyers may require employees to sign confidentiality agreements to further protect confidentiality.

For purposes of the law in general, the employer-employee relationship is governed by traditional master-servant concepts. Thus, if a non-lawyer employee negligently or otherwise reveals to a third party information that would have been protected by the attorney-client privilege, it is very possible that a court would find that the action was action of the attorney. The client and the court would then determine whether such a disclosure amounted to a waiver of the privilege.

Rule 5.3(b) states that any lawyer with “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.” This provision is different from Section (a) of Rule 5.3 in that Section (a) states a general duty whereas Section (b) is a specific requirement of supervision of the work of the non-lawyer employee. The duty is that of any lawyer, not only one with “managerial authority” in the firm. In a recent case in Louisiana, a lawyer was disciplined for a failure to supervise when a paralegal met with opposing counsel in a domestic relations matter and appeared in court. The paralegal petitioned the court for and obtained a temporary order on joint custody for the client. Unfortunately, the paralegal neglected to tell the judge that another judge had issued a temporary restraining order prohibiting the client from approaching the child. In finding a violation of Rule 5.3 the court found that the attorney did not supervise the matter but rather delegated it entirely to the paralegal.

While a lawyer may violate Sections (a) and (b) of Rule 5.3 by failing to instruct or monitor non-lawyer employees, Section (c) does not provide a new substantive rule violation. Rather, Rule 5.3(c) defines the situations in which a lawyer can be responsible for non-lawyer conduct that violates other ethics rules. Rule 5.3(c) provides that a lawyer is responsible for a non-lawyer employee’s conduct if the lawyer orders or ratifies the conduct or if the lawyer is a partner in the employing firm or has “direct supervisory authority over the person” and the lawyer “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial actions.” The effect of this rule is that the attorney may be disciplined for violation of another rule. So, for example, if a non-lawyer employee of a sole practitioner improperly solicits clients in violation of the solicitation rule, the attorney may be disciplined for violating the solicitation rule if the attorney ordered or ratified the conduct or knew of the conduct but did not take “reasonable remedial actions.”

Conflicts of Interest

No provision of the Rules of Professional Conduct address conflicts created by non-lawyers. Yet, non-lawyer employees who move from employment at one firm to employment at another do create the danger of improper dispersal of confidential information and improper use of that information. As a result, ethics entities have addressed the issue, and many courts have faced the issue by way of disqualification motions. In 1988 the American Bar Association in Informal Opinion 88-1526 considered the situation of a non-lawyer employee moving from one firm to another. When a non-lawyer moves to a firm whose clients’ interests conflict with the interests of the former firm’s clients, the ABA opined that the employing firm must screen the non-lawyer from any matters upon which the non-lawyer employee. The former firm must counsel the non-lawyer upon termination of the employment relationship about the non-lawyer’s obligation to protect the confidentiality of the former firm’s clients. If the non-lawyer is not screened properly or if the non-lawyer employee negligently or otherwise reveals to a third party information that would have been protected by the attorney-client privilege, it is very possible that a court would find that the action was action of the attorney. The client and the court would then determine whether such a disclosure amounted to a waiver of the privilege.

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lawyer inappropriately shares confidential information about the former firm’s clients, the conflict is imputed to all lawyers in the employing firm.6

Disqualification
Aside from the issue of attorney discipline for conduct not in accord with the rules, the conflicts created by non-lawyer employees are the subject of disqualification motions. Courts reach varying results depending on the particular court’s view of the value of screening as well as the particular facts of the situation. Many courts recognize that screening may rebut the presumption that the non-lawyer employee will share confidential information about the former firm’s clients. Of course, screening must be done properly to have such an effect.

In Lamb v. Pralex Corporation,7 the defendant corporation moved to disqualify plaintiff’s counsel because a paralegal employed by plaintiff’s counsel had worked on the matter before the court while at the firm representing the defendant. The defendant claimed that the paralegal’s possession of confidential client information “violates the notions of fairness and integrity in the judicial process.”8 The court noted that the paralegal submitted a list of all matters she worked on at the former firm that could cause conflicts when she began working at the new firm. The new firm circulated the list to all employees along with a memo warning all employees not to discuss these cases with the paralegal. The firm posted the memo in office common areas as well. The paralegal did not know of the location of the problematic files at the new firm, and that firm locked the paralegal out of the electronic filing system regarding the problematic cases, including the one before the court. The court refused to disqualify the plaintiff’s counsel because the court held that the presumption that the paralegal had shared confidential information had been rebutted.

Similarly, in Liebowitz v. Eighth Judicial District Court of Nevada,9 a case involving a divorce action in which the firms, in effect, traded paralegals, the court did not disqualify the firms. The court stated that a firm has an obligation to screen any employee who had access to adversarial client files and the firm must also notify opposing counsel of the situation and of the screen. If information is transferred or if screening would otherwise be ineffective, the employing attorney must be disqualified.10

In contrast, in Owens v. First Family Financial Services, Inc.,11 the court disqualified the attorneys for the plaintiffs because a non-lawyer employee of the plaintiffs’ attorneys worked on the matter for the plaintiffs and had worked on very similar matters for the defendants while employed at a firm representing the defendants. The court determined that the matters the paralegal worked on for the defendants were substantially related to the case before the court. The court then applied an irrebuttable presumption that confidential information would be shared by the paralegal.12

While the typical scenario involves a paralegal or legal secretary, the same concepts apply to other employees such as law students who work in firms during the summer or during the school year. In Actel Corporation v. Quicklogic Corporation,13 a law student summer clerk, Mr. Olenik, billed two hours to client Quicklogic relating to the Actel matter. After graduating from law school, Olenik joined the firm representing Actel in the Quicklogic matter and worked on the matter on behalf of Actel. Quicklogic moved to have Olenik’s new firm disqualified and succeeded in this endeavor. The court found that though Olenik did not remember anything about the work as a summer clerk, the evidence proved that Olenik had possession of confidential information materially related to the matter before the court. The court took the position that Olenik’s firm should have verified that he had not worked on the matter before forgoing a screen.14

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Endnotes

1 See Rule 5.3, cmt 1.

2 Rule 1.6 states the general confidentiality rule as follows: “A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).”

3 See also Kentucky Bar Association Ethics Opinion 406 (1998) (addressing the issues raised by a lawyer sharing a secretary with another lawyer not in the same firm).

4 See In re Mospik, 902 So. 2d 991 (La. 2005) (attorney suspended for 60 days). See also Curtis v. KBA, 959 S.W.2d 94 (Ky. 1998) (attorney suspended for 60 days for several violations including violation of Rule 5.3(a) and b); secretary/wife used a trust account check to purchase a dog); Kelley v. KBA, 883 S.W.2d 492 (Ky. 1994) (attorney allowed to resign bar membership upon admission of guilt to fraudulent credit card scheme and violation of rule 5.3(b) by permitting a non-lawyer employee to use improperly a criminal case to gain an advantage in a civil case).

5 See, e.g., In re Jenkins, 816 P.2d 335 (Idaho 1991) (requiring and convincing evidence to find an attorney responsible for the employee’s violation of the solicitation rule).

6 See also Kentucky Bar Association Ethics Opinion 308 (1998) (applying the Code of Professional Responsibility, the rules that were in effect in Kentucky until 1990, to this issue).


8 Id. at 365.

9 78 P.3d 515 (Nev. 2003).

10 See also Daines v. Alcatel, S.A., 194 F.R.D. 678 (E.D. Wash. 2000) (no disqualification on the basis of a side-switching paralegal; screening acceptable as a cure for the conflict of interest); Mulhern v. Calder, 763 N.Y.S.2d 741 (N.Y. Sup. Ct. 2003) (screen was sufficient to prevent disqualification on the basis of the shifting employment of a secretary).


12 See also Zimmerman v. Mahaska Bottling Co., 19 P3d 784 (Kan. 2001) (attorney disqualified as a result of employing legal secretary; screening not acceptable as a cure of the conflict of interest); Smart Indus. Corp. MFG. v. Superior Court, 876 P.2d 1176 (Ariz. Ct. App. 1994) (attorney disqualified as the result of a moving non-lawyer secretary/paralegal)

The issue can be the basis of discipline. See In re Lowell, 784 N.Y.S.2d 69 (N.Y. Sup. Ct. App. Div. 2004) (attorney disciplined, in part, for requiring a paralegal to work on a matter on behalf of a wife when the paralegal worked on the same matter while employed by the firm representing the husband).


14 See also In re TXU U.S. Holdings Co., 110 S.W.3d 62 (Tex. Ct. App. 2002) (law student worked as a legal assistant during law school for firm representing plaintiffs; after graduation she worked as an attorney for the firm representing the defendant but left that firm at approximately the same time that the present action was filed; court applied an irrebuttable presumption that paralegal had confidential information and shared it with the second firm and disqualified the firm); Makita Corp. v. U.S., 17 C.I.T. 240 (Ct. of Int’l Trade 1993) (attorney may have had access to confidential information of Makita while working as a paralegal, law clerk, and summer clerk and then was representing a party adverse to Makita as a lawyer).