ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009–3

CONFLICTS ARISING WHEN HIRING LAW SCHOOL GRADUATES WHO PARTICIPATE IN LAW SCHOOL LEGAL CLINICS

TOPIC: Addressing conflicts faced by law firms when hiring law school graduates who work in legal clinics operated by law schools.

DIGEST: Upon hiring a law school graduate, law firms generally may accept or continue representations adverse to clients of the clinic where the graduate worked. When the firm's representation involves a matter substantially related to the one previously handled by the graduate at the clinic, or the graduate acquired confidential information from her client that is material to the matter handled by the firm, the firm should implement adequate measures to screen the graduate upon commencement of employment to protect the confidences and secrets of her former client.

CODE DR 4-101; DR 5-101a; DR 5-105; DR 5-108; DR 9-101

QUESTION: What are a law firm's ethical obligations when addressing conflicts that arise in connection with hiring a law school graduate who previously provided legal services to a client under the auspices of her school's legal clinic?

OPINION

I. Introduction

Most law schools run clinics offering free legal services to eligible clients. According to a recent survey, 85 percent of American law schools sponsor at least one clinic, and many operate multiple clinics covering a wide variety of legal fields ranging from family law to securities arbitration.[1]

The law students who staff the clinics gain invaluable real world experience helping clients resolve their legal problems. But this "on-the-job" training may create conflicts of interest once the students seek to parlay their academic achievements and practice skills into

[1] Eliza Strickland, *Lawyers-To-Be Give Free Help to Environmental Groups*, Christian Science Monitor, July 26, 2005 at 14.

employment with law firms. For example, if the student's clinical experience included representation of a client with interests adverse to a client of the law firm she hopes to join, the provisions of DR 5-108 of the Code of Professional Responsibility (the "Code") would be implicated, requiring the firm to determine whether it can hire the student and continue to represent its client without violating the rule. This opinion provides guidance to firms for addressing that question.

II. Application of DR 5-108 and DR 5-105

When hiring a law school graduate who worked at her school's legal clinic, a law firm must consider conflicts of interest that may arise once the graduate commences employment with the firm. *See* N.Y. State 774 (2004); N.Y. State 720 (1999); DR 5-105(E). This conflicts screening process necessarily would include consideration of the potential applicability of DR 5-108,[2] which imposes certain restrictions on, among other things, representations affecting the interests of former clients of newly-hired lawyers joining the firm. DR 5-108(A) provides:

> A. Except as provided in DR 9-101(B) with respect to current or former government lawyers,[3] a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure:
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> 1. Thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.
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> 2. Use any confidences or secrets of the former client except as permitted by DR 4-101(C) or when the confidence or secret becomes generally known.

In addition, DR 5-108(B) further provides:

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[2] The Justices of the four Appellate Divisions of the Supreme Court of the State of New York have approved and adopted new Rules of Professional Conduct (the "Rules"), which will become effective and replace the Code on April 1, 2009. New Rule 1.9 is substantially identical to DR 5-108.

[3] DR 9-101(B) in general provides that when a government lawyer accepts employment with a private law firm, other lawyers at the firm may represent a client in connection with a matter previously handled by the government lawyer, provided that the lawyer is effectively screened from any participation in the matter.

B. Except with the consent of the affected client after full disclosure, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

1. Whose interests are materially adverse to that person; and

2. About whom the lawyer had acquired information protected by DR 4-101(B) that is material to the matter.[4]

In situations where DR 5-108 prohibits a lawyer from continuing or commencing the representation of a client, DR 5-105(B) prohibits the other lawyers associated in the same law firm from undertaking the representation. DR 5-105(B) provides in pertinent part:

> While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under . . . DR 5-108(A) or (B) . . . .[5]

The provisions of the Code generally, and DR 5-108 and DR 5-105(B) in particular, are addressed to and regulate the conduct of "lawyers," *i.e.*, individuals admitted to the Bar, and do not specifically purport to regulate the activities of law students.[6] Nevertheless, the provisions of the Code have been found applicable "to law students functioning as lawyers in clinical education programs." ABCNY Formal Op. 1991-1, *see also* ABCNY Formal Op. 79-37 (same). Moreover, "unless the Code otherwise provides, the rules governing law firms are equally applicable to [a] law school's legal clinic." N.Y. State 794 (2006). Consequently, if a law student, L, worked at a clinic representing client C in a wage dispute with C's employer, Company A, and law firm F represented Company A in that dispute, then absent the prior consent of C, DR 5-108(A) generally would impose the following restrictions following F's employment of L: (i) L could not represent Company A in the wage dispute with C, and no other lawyer employed by F could continue to represent Company A in that dispute; and (ii) neither L

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[4] DR 4-101(B) provides in pertinent part that "a lawyer shall not knowingly: 1. Reveal a confidence or secret of a client. 2. Use a confidence or secret of a client to the disadvantage of the client. 3. Use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure."

[5] Rule 1.10 sets forth the provisions governing imputation of conflicts under the new Rules. Rule 1.10 effects no change to DR 5-105(B) altering the analysis of this opinion.

[6] DR 1-104 indirectly regulates the conduct of non-lawyers (including law students) by requiring lawyers who hire non-lawyers to supervise those employees, and by holding lawyers responsible for the misconduct of non-lawyers under certain specified circumstances. *See* N.Y. State 774 (2004); DR 1-104(C) and (D). In addition, courts have sanctioned lawyers for misconduct occurring before their admission to the Bar in the exercise of the courts' inherent power to regulate the conduct of attorneys. *See In re Wong*, 275 A.D.2d (1st Dep't 2000).

nor any other lawyer at the firm would be able to represent any firm client with interests materially adverse to *any* client of the clinic, unless L could show that she did not personally represent the adverse clinic client and did not acquire any material confidential information regarding the client while working at the clinic.

III. Screening Law School Graduates

As noted, in general, the Disciplinary Rules of the Code do "not apply to non-lawyers." NY Code of Prof'l Responsibility (prelim. stmt.). Nevertheless, the Code (and the newly adopted Rules) "do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment." Id.

Law students, of course, are not members of the bar. Yet, when working in a legal clinic, a law student typically "will be functioning as a lawyer, [and] the clients involved justifiably will regard the student as a lawyer." ABCNY Formal Op. 79-37. Mindful of this dual status, we must also consider the salutary objective of encouraging practical legal training without unduly limiting a student's prospects for employment. Balancing the two, we believe that the conflicts rules can and should be applied to protect client confidences without unduly hampering students' mobility following graduation.

In this connection, we note that the level of student involvement, and thus access to client confidences, varies among clinics. In many cases, the services rendered by law students may be substantial and ongoing when, for example, the students have primary responsibility for representing pro bono clients over an extended period of time. In those situations, a law firm/employer must take appropriate precautions whenever the interests of the student's client are materially adverse to those of the client of the firm, the matters in question are substantially related, and/or the pro bono client has divulged confidences or secrets to the student that, if disclosed, would be material to the matter handled by the firm. In that event, the law firm employing the student following graduation should use an ethical screen to rebut any presumption (and eliminate any risk) that the new hire would share any confidences and secrets of her former pro bono client with other lawyers at the firm.

While the Code "specifically endorses the use of screens only in cases involving government attorneys and judges," ABCNY Formal Op. 2006-2, the Code's failure to mention screens with respect to law students is not dispositive. (*See id.*) As noted above, the Code does not specifically regulate the conduct of individuals, such as law students, occurring prior to their admission to the bar. Moreover, the New York Court of Appeals has refused to adopt an irrebutable presumption that all lawyers in a law firm have knowledge of all confidences or secrets disclosed to any one lawyer in the firm. Indeed, the court has held that such a rule "unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of [a] former client's confidences and secrets." *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 309 (1994). It therefore has found that a firm may in appropriate circumstances avoid imputation of the knowledge of a disqualified lawyer by "erect[ing] adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation." *Kassis v. Teacher's Insurance & Annuity*

Ass'n, 93 N.Y.2d 611, 618 (1999). We believe that such measures are appropriate in this context and will be effective in achieving the salutary objective of protecting the confidences and secrets of affected clients without unduly restricting students' employment opportunities.

The propriety of screening law school graduates finds support in the American Bar Association's construction of its own imputed disqualification rule, Rule 1.10(a), which is substantially identical to DR 5-101(D). Indeed, the ABA specifically has recognized that screening is an appropriate procedure to ensure that law students refrain from communicating confidences or secrets learned from the clients they represented while still in law school. As explained in the Comment to Rule 1.10 of the ABA Model Rules:

> [The imputed disqualification rule] [does not] prohibit representation [by the law firm] if the [conflicted] lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter [handled by the firm] to avoid communications to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect.

See also Mulhern v. Calder, 196 Misc. 2d 818, 823 (Sup. Ct. Albany County 2003) (denying motion to disqualify law firm where firm screened potentially tainted non-lawyer from any involvement in matters handled by non-lawyer's prior employer, an adversary of the firm); *Restatement (Third) of The Law Governing Lawyers*, § 123, Comment f (2000) (for purposes of the imputed disqualification rules, absent special circumstances, law students who clerk in law firms should be considered non-lawyer employees of the firm whose duties of confidentiality are not imputed to subsequent employers); D.C. Rules of Prof. Conduct, Rule 1.10(b) (2007) ("When a lawyer becomes associated with a firm . . ., [t]he firm is not disqualified if the lawyer participated in a previous [adverse] representation . . . prior to becoming a lawyer in the course of providing assistance to another lawyer").

There may be some instances, however, where screening will not adequately protect the secrets and confidences of the law student's former clients. For example, screening may be insufficient to avoid disqualifying a law firm if the law student had substantial exposure at the clinic to confidential information relevant to a matter handled by the law firm, and the size and structure of the firm make it difficult to effectively screen the law student from the firm lawyers involved in the matter. In that event, the firm may not be able to continue or accept a representation adverse to the law student's former client unless the firm (a) obtains the informed consent of the former client, (b) does not hire or terminates the employment of the law student, or (c) withdraws from or declines the adverse representation. *See* N.Y. State 774 (2004).

Of course, if the firm determines that screening would be appropriate, it must adopt measures adequate to isolate the newly-hired lawyer and eliminate any involvement in the matter in question to ensure that confidential client information will not be disclosed by the new lawyer to others at the firm. In ABCNY Formal Op. 2006-2, we discussed the factors considered by courts in determining whether a law firm has effectively screened a conflicted lawyer from the rest of the firm, thereby enabling the firm to represent a client with materially adverse interests to the lawyer's former client in a substantially related matter. Those factors include,

among others, the timeliness of implementing the screen, the size of the law firm, the size of the office space, the accessibility of files and the relative informality of office interaction, including the extent of the disqualified lawyer's contact with the firm lawyers working on the matter in question. The same factors are appropriately considered when assessing the effectiveness of measures used to screen a law school graduate upon commencement of her employment with the firm.

IV. Application of DR 5-101-a

Not all clinical representations are substantial and ongoing. Some may be limited and short-term, such as where a law student has only a single meeting with a client who seeks narrowly circumscribed advice regarding, for example, how to respond to a summons. In that event, the provisions of DR 5-101-a may become applicable. Effective as of November 9, 2007, DR 5-101-a creates certain exemptions from the conflict rules of Canon 5 of the Code for lawyers who provide limited representation to pro bono clients under the aegis of a qualified legal assistance organization. That rule provides in pertinent part as follows:

> A. A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
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> 1. shall comply with DR 5-101, DR 5-105, and DR 5-108 of these rules concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in this part, only if the lawyer has actual knowledge at the time of commencement of representation that the representation of the client involves a conflict of interest;
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> 2. shall comply with DR 5-101, DR 5-105 and DR 5-108 only if the lawyer has actual knowledge at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by those sections.
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> B. Except as provided in paragraph (A)(2), DR 5-105 and DR 5-108 are inapplicable to a representation governed by this section.

As set forth above, when the conditions of DR 5-101-a(A) are satisfied, *i.e.*, a lawyer has no actual knowledge of any conflict upon commencement of a qualifying pro bono representation, neither the lawyer nor her law firm need comply with DR 5-105 or DR 5-108 to the extent either rule would otherwise be triggered by the representation. The question, then, is whether DR 5-101-a applies to a law school graduate who provided limited legal services at a clinic operated by her law school. If so, then when the graduate, L, accepts employment with a law firm, F, any conflicts resulting from L's prior work at a legal clinic will not be imputed to F when she joins the firm, and F will not be disqualified from continuing or accepting any representation adverse to the clients of the clinic, provided that L had no actual knowledge of

any conflict at the outset of her representation of C, her client at the clinic.[7] *See* ABA Model Rules of Professional Conduct, Rule 6.5, Comment 4 ("a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices").[8]

In construing DR 5-101-a, we note that the rule, while "not a model of draftsmanship," apparently was not adopted with the clinical training activities of law students in mind. *See* Roy Simon, *Simon's Code of Prof'l Resp. Ann.*, DR 5-101-a at 771 (West 2008). Rather, it appears principally intended to encourage pro bono work by relaxing the conflict of interest rules for members of law firms who, in addition to representing paying clients, wish to simultaneously provide short term pro bono legal services through programs sponsored by legal services organizations, courts or government agencies. *Id*. To that end, the rule, among other things, permits lawyers to represent pro bono clients without conducting a conflicts check unless they have "actual knowledge" of a conflict with a firm client upon commencement of the representation. The rule provides this accommodation because the programs to which the rule applies "are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest . . . before undertaking a representation." *Id*. (quoting ABA Model Rule 6.5, Comment 1) DR 5-101-a also dispenses with the imputed disqualification rule, DR 5-105(B), because the limited nature of the services provided in a qualifying pro bono program "reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm." ABA Model Rule 6.5, Comment 4.

The provision eliminating the need to clear conflicts plainly is designed to facilitate the ability of an admitted lawyer working full time at a law firm to simultaneously represent pro bono clients under the auspices of a qualifying legal services program. Law students, in contrast, typically would not need to rely on this provision when, as is usually the case, they begin their clinical work before receiving or accepting offers of employment from a law firm. But the provision potentially could be applicable where, for example, the student accepts an offer of employment with a firm during her third year of law school while still working at the school's clinic, albeit without knowledge of any existing conflict.[9] We see no

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[7] This conclusion is subject to the proviso, found in DR 5-101-a(E), that the "provisions of this section shall not apply where the court before which the representation is pending determines that a conflict of interest exists or, if during the course of the representation, the attorney providing the services becomes aware of a conflict of interest precluding continued representation."

[8] ABA Model Rule 6.5, DR 5-101-a and New York Rule 6.5 are substantially identical.

[9] We note that if the student had substantial responsibility for representing a client at a clinic and had knowledge of a conflict at the time she sought or considered accepting future employment with a law firm, she could not continue her representation of the pro bono client absent receipt of the client's consent following full disclosure of the conflict. *See* ABCNY Formal Op. 1991-1. Conversely, if the law student played a minor role at the clinic, the student might be able to continue the representation while seeking employment with the firm *(cont'd)*

reason why in this context a law student should be treated any differently under the rule than an admitted attorney already working at a law firm. Indeed, the student would have, if anything, even greater justification for relying on the rule because until she joins the firm, she would have little, if any, ability to systematically screen for conflicts of interest.

We further note that for the rule to apply to a law school graduate, the graduate's prior work at the clinic would have to be limited to "short-term limited legal services," defined to mean the provision of "legal advice or representation free of charge as part of a [qualified legal services] program with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." DR 5-101-a(C)[10] If the clinical assignment meets the definition of "short-term limited legal services," there is less risk that conflicts will arise between the pro bono representation at the clinic and the other matters handled by the law firm that subsequently employs the law student. *See* ABA Model Rule 6.5, Comment 4.

CONCLUSION

When addressing conflicts that may arise in connection with hiring a law school graduate who represented one or more pro bono clients through participation in her school's legal clinic(s), law firms must balance a number of competing interests, including: (i) the interest of the graduate's former client in protecting her secrets and confidences; (ii) the interests of other clients in being represented by the counsel of their choice; and (iii) the interests of both law students and law firms in not unduly restricting the students' employment opportunities. In most cases, when the interests of the graduate's former client are directly adverse to a current client of the law firm, the appropriate balance is struck by permitting the law firm to continue representing its client, while effectively screening the graduate from any involvement with the matter in question or from contact with the firm lawyers handling it. There may be instances, however, where screening would not adequately protect the confidentiality interests of the graduate's former client, such as where the graduate gained significant exposure to the client's confidences, and the structure and practices of the firm make it difficult, if not impossible, to assure that the confidences will not be shared with others at the firm. In that event, the firm may conclude that it must withdraw from the adverse representation unless it can obtain the former client's consent to the representation after full disclosure of the conflict.

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without needing to obtain client consent. *See* Peter A. Joy and Robert Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical L. Rev. 493, 549 (2002); ABA Formal Op. 96-400.

[10] In addition, the legal clinic or law student "must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of DR 4-101," i.e., the student will have a continuing obligation to preserve the confidences and secrets of the client during and after the representation. DR 5-101-a(D).