Law Practice Management and Technology

The Bottom Line Volume 35, No.6 , December 2014

Content

MCLE Self-Study Article Protect Your Firm From Disqualification: Screen New Employees

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In today's economic climate, legal secretaries, paralegals, law clerks, and other non-professional staff move from one law firm to another. Nonlawyers who apply to your firm for employment may have previously worked at a firm representing a party in litigation that is adverse to a current client of your firm. There has been extensive discussion regarding the ethical problems created by attorneys changing employment from a law firm representing one party in litigation to a firm representing an adverse party. However, much less attention has been paid to the potential ethical issues created when a nonlawyer changes firms. The good news is that with early detection and careful screening, nonlawyers possessing confidential information about an adverse party may be effectively screened from working on the litigation, thus virtually eliminating the risk that your firm will be disqualified from the case in question.

An attorney should be aware of the proactive steps that are necessary when hiring nonlawyer employees to avoid disqualification. This article outlines the steps a hiring attorney should take when hiring *any* nonlawyer employee, with a focus on the proactive steps required to institute an effective screen of a nonlawyers who possesses confidential information obtained from an adverse party.

California Rule of Professional Conduct Rule 3-310(E)

To protect the confidentiality of the attorney-client relationship, Rule 3-310(E) of the California Rules of Professional Conduct prohibits attorneys from accepting employment adverse to clients or former clients "where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment," unless the former client has given informed written consent.[1]

An attorney does not have a broad duty to an adversary in litigation.[2] However, an attorney has an ethical obligation to avoid the disclosure of confidential information.

While not directly commenting on nonlawyer employees, Rule 3-310(E) imposes a duty on attorneys to ensure that various ethical rules are not violated by the activities of nonlawyers they employ. Nonlawyers are extensively utilized by lawyers to assist in rendering legal services. If Rule 3-310(E) is not adhered to by nonlawyers, the effects could be as devastating on the client's right to confidentiality and the legal profession as if a lawyer disclosed client confidentialities to an opposing party.

The competing interests between these ethical obligations and the freedom to change employment are recognized by the courts, which weigh a client's right to counsel with the need to maintain ethical standards of confidentiality in the profession.[3] Attorneys and their support staff should have the right to change employment or go into business with each other. The First Appellate District emphasized that it is the court's duty to ensure that people going into business must not "be prevented from engaging in any business they may obtain fairly and honorably." [4] So, despite the fact that you may hire a nonlawyer employee who possesses confidential information obtained from an adverse party, Courts have created a mechanism for you to remain involved in the litigation.

Hiring Attorney's Responsibility to Investigate

There are no regulatory or ethical rules governing nonlawyer staff; nonlawyer employees are not subject to the Rules of Professional Conduct. It is the attorney's responsibility to meet the ethical obligations. To satisfy the ethical obligations under Rule 3-310(E), an attorney should conduct a reasonable inquiry to determine if, in a position of prior employment, a prospective or new employee may have been exposed to or acquired confidential information pertaining to an adverse party.

Therefore, to meet the obligations under Rule 3-310(E), the attorneys at a firm hiring a new employee have a duty to conduct a reasonable inquiry to determine if a prospective employee has been exposed to confidential information in his/her prior employment regarding a material matter that may affect the new employment.[5] This inquiry must be made before the employment begins or at the outset of the employment.

To satisfy the reasonable inquiry standard, a hiring attorney could generally ask questions about the names and types of cases that the applicant or new employee worked on or present a list of cases that the two firms have in common.[6]

Because any inadvertent disclosure of confidential client information may result in disqualification, any inquiry into a possible conflict with a potential employee should be made with great care to ensure no confidential client information is disclosed during the discussion. The questioning should not seek to delve into the substance of the client information or confidences the prospective or new employee may have acquired.

If Inquiry Reveals Prior Exposure to Confidential Client Information

The mere discovery that the applicant or new employee appears to possess confidential information from an adverse party does not preclude hiring the individual, or require a firm to be disqualified, in all conflicted matters if proper screening methods are employed.

In the seminal holding on nonlawyer client confidentiality issues, *In re Complex Asbestos Litig.* (1991) 232 Cal. App.3d 572, a firm was disqualified in nine asbestos personal injury actions because it employed a paralegal who had previously been employed by opposing counsel, and who had worked on asbestos cases during that employment On appeal, the First District upheld the disqualification, holding that the firm should be disqualified because the paralegal possessed confidential attorney-client information acquired through his previous employment.

The First District held that a hiring firm should be disqualified when it hires a nonlawyer who possesses attorney-client confidences from an opposing firm unless there is either:

- informed written consent from the adversary client; or
- the nonlawyer employee is effectively screened from involvement in the litigation to which the confidential information relates.

The first step a hiring attorney should take is to obtain the informed written consent of the former employer to allow the hiring attorney and his firm to remain in the matter, as one who consents to an act is not wronged by it.[7] Receiving consent is an unlikely scenario.

An opposing firm who refuses to consent will likely seek disqualification. A party seeking disqualification merely has to show that its former employee "possesses confidential attorney-client information materially related to the proceedings before the court." [8] Once it makes this showing, "a rebuttable presumption arises that the information has been used or disclosed in the current employment." [9] However, the First District refused to make this presumption of shared confidences inflexible, noting that nonlawyer "training, responsibilities, and acquisition and use of confidential information" differ from those of lawyers."[10]

In order to rebut the presumption that confidential attorney-client information has been used or disclosed in the new employment, the hiring attorney must institute a screening process.[11] A Court may disqualify both an attorney and the attorney's firm only if the challenged attorney fails to demonstrate a full and proper screening.

As stated in *In re Complex,* in order to rebut the presumption:

> .....the challenged attorney has the burden of showing that the practical effect of formal screening has been achieved. The showing must satisfy the trial court that the employee has not had and will not have any involvement with the litigation, or any communication with attorneys or coemployees concerning the litigation, that would support a reasonable inference that the information has been used or disclosed.[12]

To establish a showing that no client confidences have been disclosed, a hiring attorney must promptly screen the nonlawyer at the earliest opportunity, preferably before the employee is hired, in order to create a "cone of silence."[13]

Effective Screening Techniques

When hiring a nonlawyer who possesses confidential client information acquired through previous employment, a screening procedure must be initiated. *In re Complex Asbestos Litig.* outlines the elements of an effective screening procedure to rebut the presumption of shared confidences:

- implement the screening process "at the outset to prevent any confidences from being disclosed;"
- preclude the tainted individual "from any involvement in or communication about the challenged representation;" and
- circulate a memorandum warning the legal staff to isolate the individual from communications on the matter and to prevent access to the relevant files, to protect against disclosure and establish a record. [14]

The Los Angeles County Bar Ethics Committee, in Opinion 524 dated May 16, 2011, has offered further recommendations on the elements of an adequate screen of a nonlawyer: [15]

- written notification to all legal staff to isolate the screened employee from communication regarding the matter;
- prevent the screened employee's access to the relevant files;
- admonish the employee not to discuss the prior matter with the new firm;
- protect electronic files if you have an electronic file management system by putting a password on it;
- document the continued existence and impermeability of the screen, for example by periodic electronic or written reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen.

While these are the elements of screening, a court will evaluate the elements on a case-by-case basis to determine if the screen is effective. *Kirk v. First Am. Title Ins. Co.* (2010) 183 Cal. App. 4th 776 illustrates that a court will question if the employee "has not had and will not have any improper communication with others at the firm concerning the litigation."[16] Every element of the screening recommendations "need not necessarily be present for an ethical wall to be sufficient to rebut the presumption of imputed knowledge," to satisfy the burden on the hiring attorney to prove an effective screen.[17] *In re Complex Asbestos Litig.* establishes that courts should not apply the rules of disqualification "broadly and mechanically," but rather to afford cases of disqualification judicial scrutiny to protect justice.[18]

Conclusion

It is incumbent on hiring attorneys to conduct a reasonable inquiry to determine if a prospective or new employee acquired confidential information pertaining to an adverse party during previous employment. If the hiring attorney discovers the applicant possess this type of information, an attempt must be made to obtain the informed written consent from the adversary client. If this is unsuccessful, the new employee must be effectively screened from involvement in matters which relate to the confidential information to avoid disqualification. With proper proactive steps, planning, and a diligent screen, a hiring law attorney should have no ethical issues when hiring nonlawyer staff even if they bring confidential information about an adverse party.

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Notes:

1. California Rules Prof. Conduct, rule 3–310(E); Western Continental Operating Co. v. Natural Gas Corp. (1989) 212 Cal.App.3d 752, 759.

2. In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 588.

3. Comden v. Superior Court (1978) 20 Cal. 3d 906, 915.

4. In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 586.

5. Los Angeles County Bar Association, Professional Responsibility and Ethics Committee Opinion No. 524, entitled What Are The Ethical Responsibilities Of An Attorney With Regard To The Hiring Of Nonlawyer Employees Who May Be In Possession Of Confidential Information, available http://www.lacba.org/Files/ Main%20Folder/Documents/%20 Ethics%20%20%20Opinions/Files/ Ethics_Opinion_524.pdf.

6. Los Angeles County Bar Association, Professional Responsibility and Ethics Committee Opinion No. 524, entitled What Are The Ethical Responsibilities Of An Attorney With Regard To The Hiring Of Nonlawyer Employees Who May Be In Possession Of Confidential Information, available at: http://www.lacba.org/Files/ Main%20Folder/Documents/%20E thics%20%20%20Opinions/Files/ Ethics_Opinion_524.pdf, at 4.

7. California Rules Prof. Conduct, rule 3–310(D). In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 592-93.

8. In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 596.

9. In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 596.

10. In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 593.

[11] In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 593.

[12] In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 596.

[13] In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 593.

[14] In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 594.

[15] Los Angeles County Bar Association, Professional Responsibility and Ethics Committee Opinion No. 524, entitled What Are The Ethical Responsibilities Of An Attorney With Regard To The Hiring Of Nonlawyer Employees Who May Be In Possession Of Confidential Information, available at: http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20%20Opinions/Files/Ethics_Opinion_524.pdf.

[16] Kirk v. First Am. Title Ins. Co. (2010) 183 Cal. App. 4th 776, 811.

[17] Kirk v. First Am. Title Ins. Co. (2010) 183 Cal. App. 4th 776, 814.

[18] In re Complex Asbestos Litig. (1991) 232 Cal. App. 3d 572, 586.

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