Nebraska Ethics Advisory Opinion for Lawyers
No. 94-4

Opinion 73-14 is limited, and Opinion 93-2 is rescinded.

A LAW FIRM MUST AVOID THE PRESENT REPRESENTATION OF A CAUSE AGAINST A CLIENT OF A LAW FIRM WITH WHICH ANY PRESENT LAWYER, LAW CLERK, PARALEGAL, SECRETARY OR OTHER ANCILLARY STAFF MEMBER WAS FORMERLY ASSOCIATED, AND WHICH CAUSE INVOLVES A SUBJECT MATTER WHICH IS THE SAME AS OR SUBSTANTIALLY RELATED TO THAT HANDLED BY THE FORMER FIRM WHILE SUCH PERSON WAS ASSOCIATED WITH THAT FIRM.

A "CHINESE WALL" OR "CONE OF SILENCE" IS INSUFFICIENT TO AVOID AN APPEARANCE OF IMPROPRIETY AND MAY NOT BE USED TO AVOID IMPUTED DISQUALIFICATION IF A LAWYER IN THE FIRM WOULD BE DISQUALIFIED, OR TO AVOID DISQUALIFICATION IF THE FIRM IS DISQUALIFIED BECAUSE OF THE PRIOR EMPLOYMENT OF A NON-LAWYER EMPLOYEE. BECAUSE OF THE APPEARANCE OF IMPROPRIETY, NO EXCEPTION IS MADE FOR GOVERNMENTAL LAWYERS OR LAW OFFICES.

CANON 9 A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.

Neb. Rev. Stat. § 7-105 (Reissue 1991). It is the duty of an attorney and counsellor: ... (4) to maintain inviolate the confidences, and at any peril to himself, to preserve the secrets of his clients, ..."

CANON 4 A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.

DR 4-101(D). A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer

may reveal the information allowed by DR 4-101(C) through an employee.

DR 5-105(D). If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or the firm may accept or continue such employment.

CHINESE WALL

In Opinion 93-2, this Committee opined that a Deputy Public Defender could move to a County Attorney's office in the same county under certain circumstances. The Committee concluded as follows relying in large part on ABA Formal Opinion 342 (November 24, 1975):

> "A Deputy Public Defender may accept employment as a Deputy County Attorney in the same county if the following precautions are taken:
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> (1) All cases pending at the time of the transition in which the attorney was substantially involved as a Deputy Public Defender must be examined by the County Attorney to assure that the attorney neither provided prejudicial information relating to the pending case nor personally assisted in any capacity in the prosecution of the case. After a determination that such has not occurred, the cases must also be examined to determine whether recusal of the County Attorney's office appears reasonably necessary to insure the fairness or appearance of fairness of trial or the orderly and proper administration of justice or to preserve the integrity of the fact-finding process or public confidence in the criminal justice system. If the County Attorney's office determines that recusal is appropriate, the case(s) must be transferred by the County Attorney's office to retained outside counsel, until they are completed.
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> (2) A "chinese wall" or "cone of

silence" must be erected as to all other cases in which the defendant, juvenile or other person whose interests are adverse to those of the State's, was represented by the Public Defender's office against the County Attorney's office at the time of transition.

(3) In the future, the attorney must decline to participate on the State's behalf in a case involving the prosecution of a former client if the case appears to be substantially similar to the matter in which the attorney previously served as counsel."

NON-LAWYERS

In Opinion 73-14, this Committee opined that if a secretary moved from Law Firm A to Law Firm B, that instruction to the secretary to maintain confidences, and the taking of certain precautions, might suffice, opining in the following terms:

"In other words, EVERY lawyer - and this means the lawyers in both Law Firm "A" AND in Law Firm "B", must maintain the integrity of the bar, avoid the appearance of impropriety, and make certain that all lawyers preserve the confidences of their clients. While this was formerly the primary responsibility of the lawyers in "A", the lawyers in "B" are not relieved of that responsibility. The latter have an obligation also to make certain that this ethical responsibility of "A" is upheld and not violated. Hence, the lawyers in "B" are under a duty to instruct the new secretary and impress upon her the obligation to preserve all confidences, acquired at "A", and for her to take all reasonable precautions against releasing any such information to "B", as well as to advise her of the possibility of actions based on civil liability resulting from improper disclosure of such confidential information.

> The effect of the foregoing would be to place an ethical responsibility on "B", if and when they undertake to hire the secretary of a competing law firm. The lawyers in "B" cannot absolve themselves of this obligation to make certain that nothing whatever will be done to have the confidences of the clients of another lawyer violated.
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> As a practical matter, we have young lawyers leaving one law firm and going to other firms and this transfer of employment does not seem to pose any particular problem, the only difference being that in their case, the ethical responsibility must be born by them, as lawyers, whereas, where lay employees are involved, that obligation and responsibility shift to the new employer or employers, who then must lean backward to make certain that none of the confidences of the clients of the prior lawyer have been violated. Hence, subject to the foregoing, it is not necessarily unethical for a competing law firm to hire a former secretary of another law firm, where the secretary is not solicited from her previous employment but voluntarily seeks subsequent employment in a competing law firm."

An inference could be drawn from the foregoing that disqualification might be avoided if the proper instructions and precautions to avoid disclosure of confidences or secrets were instituted. While the instructions and precautions remain sound, no inference that disqualification could be thus avoided should be drawn.

CURRENT DECISIONS

In State of Nebraska ex rel. FirsTier Bank, N.A., Omaha, Relator v. Bucklev. 244 Neb. 36. 503 N.W.2d (1993) the

Court adopted a "bright line" rule at 503 N.W.2d 844:

> "It is difficult to explain to an individual client how an attorney who was once associated with a firm can leave that firm and now bring suit against that client involving the same or substantially similar subject matter formerly handled by his or her prior firm. Resort to affidavits stating that "I didn't look at the file" or asserting the existence of Chinese walls are of little consolation to that client and do little or nothing to erase the appearance of impropriety. Although the record does not disclose what information the former members of the Fitzgerald, Brown firm possessed, nothing has been shown in the record which demonstrates that the structure of either law firm is such that it is unlikely that any attorney now or formerly associated with Fitzgerald, Brown could have had access to a client's secret. See Id. (emphasis supplied).
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> [9] To avoid the necessity of agonizing over this type of decision, to aid the bar in its coping with situations such as this, to properly preserve not only the actual existence, but also the appearance, of propriety, and to eliminate as nearly as possible unnecessary and unwarranted criticism of the legal profession, we find it necessary to adopt a "bright line" rule. We now hold that an attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while the present attorney was associated with that firm." (emphasis supplied).

The Court did not specifically address governmental lawyers or law offices such as a county attorney's office. Nonetheless, in view of the Court's reliance on the appearance of impropriety, and the fact that a similar appearance of impropriety is inherent in the circumstances described at our Opinion 93-2, this Committee believes that this Opinion should be and is rescinded.

In State ex rel. Creighton University v. Hickman, 245 Neb. 247, 512 N.W.2d 374 (1994), the court applied the rule to a non-lawyer employee (who had been a lawyer when working with the former firm) at 512 N.W.2d 378:

> "Although Walzak was not an attorney at the time she was employed by Bickel & Brewer, and although she may have performed only clerical tasks for Bickel & Brewer, the "bright line" rule announced in State ex rel. FirsTier Bank is applicable and requires disqualifying Bickel & Brewer from representing AMI and AMISUB in the underlying action.
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> We are not unmindful of the hardship this places upon AMI and AMISUB in the underlying action. However, this hardship is outweighed by the necessity of maintaining the confidentiality of Creighton's communications with McGrath, North and of avoiding the appearance of impropriety. See, Canon 9 of the Code of Professional Responsibility; Neb Rev. Stat. § 7-105 (Reissue 1991). That Walzak is no longer an attorney and did not function as an attorney at Bickel & Brewer is of no consequence. As has been our policy with regard to lawyers switching sides, we refuse to entertain the notion that exchanges of confidences were not made by this nonlawyer. See, State ex rel. FirsTier Bank v. Buckley, supra; State ex rel. Freezer Servs., Inc. v. Mullen, supra. Regardless of whether the Code of Professional Responsibility applies to

> Walzak, it applies to Bickel & Brewer. Canon 9 requires an attorney to avoid even the appearance of impropriety. Employing, in any capacity, one who was an attorney on the other side of a case carries with it the appearance of impropriety."

While the Creighton case deals with one who had formerly been a lawyer, it appears sufficiently broad to include all ancillary staff members of a law firm.

CONCLUSION

It is the opinion of the Committee that the "bright line" rule is intended by the Court to apply not only to lawyers or former lawyers, but also to law clerks, paralegals, secretaries or other ancillary staff members who change law firms. Therefore Opinion 73-14 is hereby limited insofar as it may imply that instruction to a non-lawyer employee and precautions to maintain confidences is sufficient.

The Committee believes that the following, paraphrased from the FirsTier opinion is applicable in addition to the cautions expressed in Opinion 73-14:

> A law firm must avoid the present representation of a cause against a client of a law firm with which any present lawyer, law clerk, paralegal, secretary or other ancillary staff-member was formerly associated, and which cause involves a subject matter which is the same as or substantially related to that handled by the former firm while such person was associated with that firm.

In view of the Court's position that a "Chinese wall" does "little or nothing to erase the appearance of impropriety," the Committee is of the opinion that any further reliance on our Opinion 93-2 by governmental lawyers (or others) would be misplaced and the same is hereby rescinded.

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