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A Second Look At Secondment Advantageous To All, But Not Without Risk

BY JEREMY R. FEINBERG

In an economic environment fraught with client cost-cut-ting and an increased willingness of clients to look to multiple law firms and lawyers for their legal needs, law firm managing partners may well be asking how to compete for new business. Although there is no simple answer to their quandary, one approach gaining acceptance and increased usage among American law firms, and firms with practice in New York specifically, is secondment.

Secondment, in the context of legal practice, generally means a procedure in which a law firm temporarily loans out an associate to a host organization, usually a client of the firm, to act as an inside counsel. The practice of secondment was, historically, far more common in European law firms. Indeed, I have been told of some international clients who will consider the availability of associates for secondment as a factor in their decision-making on which law firm to retain. In recent years, however, more and more domestic law firms have been exploring the practice, in an effort to build stronger ties to their clients.

Secondment is undoubtedly beneficial to the law firm, the client, and the attorney who is seconded. it is not without significant ethical risks, however. After a discussion of the benefits, this article will examine the opinion of a bar association's ethics committee which both outlined the risks and proposed practical approaches to addressing and mitigating them.

The Benefits of Secondment

On paper, secondment is a practice that produces a desirable outcome for all involved. The client receives talented legal help and does not have to worry about the expense or uncertainty of billable hours to obtain that assistance. If the seconded attorney has previously worked on the client's matters while at the law firm, the client may even obtain the services of someone who can "hit the ground running" because that lawyer will already possess some knowledge of the client's structure and operations. Once the seconded lawyer departs, the client has an attorney it knows well at the firm that it can look to when the need arises. Speaking of five associates seconded to his company, one general counsel noted, "[w]henever I've got any litigation matters, I've got five people who've lived with us and know us very well." Leigh Jones, Firms Lend Associates To Clients, The National Law Journal, December 4, 2007 (Available at http://www.law.com/jsp/ihc/PubArticleiHC.jsp?id=1196676275514&rss=newswire [last visited 10/1/08]).

The law firm builds a better relationship with the client hosting the seconded lawyer, and, at the end of the secondment, can receive back a lawyer who is particularly well-suited to represent that client going forward and manage the relationship. Even if the seconded lawyer is offered a permanent position with the client, that, too, can help improve the firm's relationship with the client on a going-forward basis.

For the seconded lawyer, there are the dual advantages of invaluable in-house experience (e.g., multi-tasking many different internal matters, working closely with the company's business people) and new perspective on how clients perceive and react to their outside lawyers. The seconded lawyer may well complete the term with the client with a better understanding of how clients react to, and process, discovery requests, view deadlines for action set by outside counsel, and receive invitations for business development and entertainment. All of this knowledge can be extremely useful information for an outside lawyer to have. The lawyer may also pick up useful experience in an industry the law firm serves and in which it represents multiple clients.

The Risks of Secondment: Imputation of Conflicts

As great an opportunity as secondment is for all involved, there are multiple ways in which it can create, or exacerbate, conflicts of interest problems for the law firm, the seconded lawyer, and the client. This was the problem the New York City Bar Association's Committee on Professional and Judicial ethics (the "Committee") addressed, and for which it presented practical solutions, in its Opinion 2007-2. (research has not revealed any other bar association ethics committee or court case addressing these issues, so, for the moment it appears that Opinion 2007-2 is the only resource to speak to the ethics of secondment). For ease of reference, as the Committee did, I will use the phrase "host organization" to describe the client to which the attorney is seconded.

The Committee recognized that under the applicable conflict rules, including DR 5-101, Dr 5-105(A) and (B), DR 5-108(A) and (B) and DR 9-102, the lynchpin is whether or not the seconded lawyer remains "associated with" the law firm during the time he is at the host organization. The Committee catalogued a number of the conflicts that would arise (and be imputed, through operation of DR 5-105[D]), if the seconded lawyer is still deemed to be associated with the law firm.

For example, the Committee pointed out that the seconded lawyer may gain access to confidences and secrets of the host organization. These confidences and secrets may well be material to one or more of the law firm's other clients. If the lawyer is still associated with the law firm, each and every one of those confidences and secrets is imputed to the law firm under DR 5-105(D). Through a simple example, the Committee described the mischief that this could work:

> For example, the seconded lawyer may learn that the host organization has been approached on a confidential basis to extend a critical working-capital financing to Corporation Y. At the same time, the firm may represent Client Z that intends to launch a hostile bid for Corporation Y. Through its continuing association with the seconded attorney, the law firm would be considered to possess information "that is so material to the second representation," i.e., of Client Z, that the law firm would be representing differing interests. NYC Bar 2007-2.

Assuming that neither the host organization nor "Client Z" was willing to make necessary disclosures and/or waive the conflict, the law firm (and the seconded attorney) would be precluded from representing either. One could easily imagine the number of potential and actual conflicts generated if the host organization were a major accounting firm or investment bank, involved in countless numbers of clients' transactions and financial affairs. The resulting inability of the law firm to take (or continue) engagements would be disastrous to its bottom line.

As another example, the Committee said that if the seconded lawyer is still associated with the law firm, the conflicts of the law firm and of the host organization would be imputed from one to the other. NYC Bar 2007-2 (citing NYSBA Op. 793 [2006]). Although the law firm, absent waiver, would not normally have been able to act adversely to the host organization even before the secondment, because of imputation under DR 5-105, if the seconded lawyer is still associated with the law firm no lawyer at the host organization could take on matters adverse to any other client of the law firm. That, undoubtedly, would be a problem the host organization's legal department would not want.

Having identified some of the problem areas for conflict analysis, the Committee next turned to the definition of "associated with" and explained that, under the case law and existing ethics opinions, it was an entirely fact-driven analysis that defied simple bright line rules. NYC Bar 2007-2 (citing *Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d. 127 [2d Cir. 2005]; ABA Op. 88-356; NYSBA Op. 715). The Committee reasoned, however, that the two questions most central to the analysis are "the nature of the lawyer's relationship with the law firm," and "whether the lawyer has access to the confidences and secrets of the law firm's clients." NYC Bar 2007-2. On this latter point, following the holding of the *Hempstead Video* case, the Committee concluded that use of ethical screens, and other similar measures, to prevent a lawyer from knowing about a law firm's client matters other than those she is working on, are effective means to prevent the lawyer from having "access to the confidences and secrets of the firm's clients." NYC Bar 2007-2 (citing *Hempstead Video*, *supra*, 409 F.3d at 134-136).

The Committee struck a balance between the key factors courts and other ethics committees have focused on and the realities of law firm practice. It thus concluded:

> when (i) any ongoing relationship between the seconded lawyer and the law firm is narrowly limited, including that the seconded lawyer works solely under the direction of the host organization and (ii) the seconded lawyer is securely and effectively screened from the confidences and secrets of the law firm's clients, the seconded lawyer should not be considered associated with the law firm, and conflicts should not be imputed to the law firm.
> NYC Bar 2007-2.

To further protect the seconded lawyer's ability to return to the law firm after employment at the host organization, and to prevent injury to the lawyer's financial and employment interests, the Committee also opined that:

> Our conclusion is not altered by the mere fact, for example, that the seconded lawyer (a) is expected to return to the firm at the end of the secondment, (b) retains the lawyer's "class rank" at the firm, (c) retains the lawyer's benefits under the firm's pension plan, or (d) can send and receive e-mails through the firm's e-mail servers (but without access to the confidences and secrets of the firm's clients). Id.

Although establishing this limited safe harbor to enable the seconded lawyer to avoid the imputation of conflicts, the Committee also made clear that at the opposite extreme, where an attorney is simultaneously splitting work between the host organization and the law firm, the "partial secondment" will necessarily lead to the imputation of conflicts, as described above. *Id.* (citing NYC Bar 1996-8; ABA 90-357).

The Committee then grappled with another practical question generated by many secondments. Can the law firm continue to supervise the work of the seconded lawyer on matters for the host organization? Put differently, if the lawyer were part of a litigation team defending the host organization before the secondment, could the law firm continue to supervise the work of that lawyer on the same matter during the secondment? The Committee concluded that for two reasons, there was no basis to impute conflicts in this circumstance. First, the law firm and host organization had been working on this matter together already, and nothing about the law firm's staying involved in the lawyer's work on that same matter during the secondment raised any new or different conflicts. Moreover, there was little functional difference between the seconded lawyer's serving as in-house counsel responsible for the matter and overseeing the law firm's work, and having the law firm supervise the work of the seconded lawyer on that same matter. To conclude otherwise, the Committee wrote, would "elevate form over substance and create an unjustifiable rift between the host organization on the one hand and the seconded lawyer and the law firm on the other, undermining the host organization's right to counsel of its choice." NYC Bar 2007-2 (citing *Levine v. Levine,* 56 N.Y.2d 42 [1982]).

The Committee distinguished this limited circumstance from other ways in which the law firm could continue to supervise the seconded lawyer. If the law firm should wish to supervise a lawyer in taking on new matters for the host organization, the Committee warned that this "would likely result in conflicts being imputed and the lawyer being considered associated with the firm," because the practical considerations described above would be less compelling. And, if the law firm were to supervise the seconded lawyer on any other new matter for any other client, that would be a "partial secondment" which would also lead to the imputation of conflicts. NYC Bar 2007-2.

Factors Not Determinative of "Associated With" Test

The takeaways from the first portions of the Committee's opinion are that the law firm's supervisory role with respect to the seconded lawyer, and the lawyer's access to the confidences and secrets of the law firm's other clients are the key determinative factors in assessing whether or not the lawyer is still associated with the law firm. The Committee concluded however, that there were a number of factors that were not, in and of themselves, determinative of that analysis, and it addressed them as well.

Should who pays the seconded lawyer during time of the secondment matter? The Committee concluded that this did not affect the analysis absent other factors. Thus, if the law firm paid the seconded lawyer, so long as the lawyer's professional judgment was not affected and she did not have access to the firm's other clients' confidences and secrets, the lawyer should not be deemed to be associated with the law firm. The Committee urged, however, that to help establish these key facts, the law firm and host organization reduce their agreement on secondment to writing, including a statement that the law firm will not be directing the professional judgment of the lawyer. The Committee added a footnote advising that the law firm should demonstrate steps taken to prevent the seconded lawyer's access to confidences and secrets in the same agreement. NYC Bar 2007-2 at n.6.

The Committee realized that the host organization might agree to pay the law firm for the seconded lawyer's services. Although it opined this would not cause the lawyer to be associated with the law firm (or lead to imputation of conflicts for the same reasons as if the law firm paid the lawyer's salary directly), the Committee flagged a different problem here. In this circumstance, the law firm and the host organization would be engaged in a business transaction together, subject to DR 5-104. Thus, in addition

to describing the transaction in a written agreement understandable to the host organization, the law firm must also recommend that the host organization consult with an independent lawyer about the agreement and obtain the host organization's con-sent in writing. Here too, the Committee acknowledged, a "written contract clearly explaining the terms of the secondment is essential." NYC Bar 2007-2.

Earlier in the opinion, the Committee, without discussion, also concluded that whether the seconded lawyer is expected to return to the law firm, the lawyer retains "class rank" at the firm, or the lawyer maintains benefits under the law firm's pension plans, are all irrelevant to whether she is associated with the law firm during secondment. These conclusions, similar to the Committee's analysis of the supervision issues, make clear that it was eager to protect the seconded lawyer too, and not create an unworkable situation under which that lawyer would have to forego hard-earned opportunities or financial interests to make the secondment viable. Although not explicitly stated in the opinion, it would undoubtedly upset the beneficial balance of secondment to pit those interests of the seconded lawyer against his law firm's interest in having the secondment take place.

Finally, as noted above, the Committee also acknowledged that the mere fact that a seconded lawyer retains access to the law firm's e-mail server, presumably through an existing e-mail account, does not itself make the lawyer "associated" with the law firm. Although the Committee did not elaborate at all on this conclusion, there is at least one potential trap to watch for here. As many law firms equip their lawyers with wireless handheld devices, and/or laptops, relevant procedures should also be in place to strip or disable those techno-logical tools to shut off any means of accessing the law firm's confidences or secrets during the secondment. For example, to the extent wireless handhelds now have the potential to allow a lawyer to access timekeeping software, or even a document-management database, the seconded lawyer could, if those tools remain active, nonetheless be said to have access to other clients' confidences and secrets, despite the presence of ethical screens and other low-tech precautions.

Additional Risks of Conflicts During and After the Secondment

The Committee also pointed out another way in which conflicts could emerge during the secondment: the seconded lawyer still owes a duty, under DR 5-108, to former clients of her law firm. Thus, the lawyer may not work on any substantially-related matter at the host organization adverse to the interests of such a former client. This creates an even broader potential for conflicts for the host organization – to the extent the seconded lawyer is now associated with the host organization's legal department, all lawyers in the department are also barred, by operation of DR 5-105(D), from working on substantially-related matters adverse to the seconded lawyer's former clients at the law firm. NYC Bar 2007-2. Two practical solutions here could be (i) for the seconded lawyer to present a list of matters and clients worked on before coming to the secondment so that the host organizations can "conflict check" (NYC Bar 2007-2 at n.8) and (ii) for any matter from which the host organization's legal department is "conflicted out," to retain separate outside counsel, not to be managed or directed by members of its own in-house legal staff, to handle the matter. One could fairly ask, however, whether in-house legal departments are properly equipped to run these conflict checks, or to keep the records required of law firms under DR 5-105(e). Cf. NYC Bar 2003-3 (discussing conflict checking record- keeping requirements under DR 5-105(e).

Not every secondment will end with the lawyer's returning to the law firm from which she came: some relationships could quickly change to a full-time in-house counsel position, should the needs and wants

of the lawyer and the host organization match. Recognizing, however, that many secondments are for just a fixed period of time, the Committee discussed two important conflicts considerations to be addressed after the secondment is over. The lawyer, having spent time in the host organization's legal department, undoubtedly will have gained broader access to its confidences and secrets than an outside lawyer normally would. If those confidences and secrets are material to a different client of the law firm (as was true in the hostile takeover example described above and at the beginning of Opinion 2007-2), the firm could not represent that other client, absent the client's informed consent. This raises an interesting question, beyond the scope of this article – whether and how a "secondment agreement" can address any such conflicts in advance.

Separately, if the host organization is no longer a current client at the time the seconded lawyer returns to the law firm, it is still protected by operation of DR 5-108. neither the seconded lawyer, nor her law firm (with which she is "re-associated") can take on substantially-related matters adverse to the host organization. For both of these reasons, as the Committee advised, it makes sense for the lawyer to keep track, to the extent possible, of the matters she works on while seconded. This will make the post-secondment conflict-clearing process much more straightforward, even if still complex.

Conclusion

Secondment is a process that bears meaningful rewards for the host organization, the law firm, and the lawyer who is seconded. These benefits, although not outweighed by them, need to be viewed against a number of complex conflicts issues that arise before, during, and after the secondment. New York City Bar Opinion 2007-2 goes a long way to outlining those concerns and creating some safe harbors and best practices for firms and clients seeking to take advantage of this type of relationship.

Jeremy R. Feinberg is the Statewide Special Counsel for Ethics for the New York State Unified Court System. *He would like to thank Paul Dutka, the former Chair of the New York City Bar Association's Professional and Judicial Ethics Committee, for his insight and suggestions that immeasurably improved this article.* *The views expressed in this article are those of the author only and are not those of the Office of Court Administration or Unified Court System.*

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