

Court Disqualifies Firm For Former-Client Conflict

BY MARY C. DALY

The year 2004 starts off auspiciously for your law firm. Two existing clients and one new one express a strong interest in engaging the firm in separate new matters. While each of the new matters involves a different area of the law, they have one thing in common: the adverse party in all three matters is a different former client of your firm. Can the firm accept the representations? What factual and legal inquiries must it undertake to assure that the proposed representations do not violate The New York Lawyer's Code of Professional Responsibility (the "Code")? This article addresses these and related questions.

The Code distinguishes between the ethical duties a lawyer owes to present clients (DR 5-105) and those to former clients (DR 5-108). A substantial body of federal and state case law exists interpreting these two disciplinary rules. The outcome of a motion to disqualify will be very different from case to case - depending on how the court chooses to characterize a client's relationship with the firm. *See, generally, Strategem Development Corp. v. Heron International N.V.*, 756 F. Supp. 789, 792-93 (S.D.N.Y. 1991). Because the line separating current and former clients is sometimes murky, our hypothetical law firm must initially determine on which side of the line the relationship falls.

Assuming that the firm concludes correctly that it no longer represents any of the potentially adverse parties, it must then direct its attention to DR 5-108, which states in relevant part:

- (a) ... a lawyer who has represented a client in a matter shall not, without the consent of the former client after full disclosure: (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.
 - (2) Use any confidences or secrets of the former client except as permitted by DR 4-101 or when the confidence or secret has become generally known.

The ethical challenges that DR 5-108(a) creates were recently explored by Judge Glasser in *Arifi v. De Transport du Coucher Inc.*, N.Y.L.J., Nov. 20, 2003 at 17, col. 3 (E.D.N.Y.). [Author's Note: There is some confusion in the opinion with respect to the source of the rules that the court is applying. Judge Glasser refers to both the ABA Code of Professional Responsibility and the Code. While the law is well established that the courts in deciding motions for disqualification are not bound by the ethics codes, the local rules refer only to the Code. *See*, Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, Rules 1.3(a)(6)(f) & 1.5(b)(5). While the confusion does not affect the outcome in *Arifi*, it might have an impact in cases calling for the application of different rules.]

In the *Arifi* case, the plaintiff's decedent died in an accident involving a tractor-trailer operated by Coucher and manufactured by CRA Trailers, Inc. (Trailers). Upon learning of the accident, Coucher's insurer conducted an investigation into its possible causes. In response to a request for pre-suit

discovery, the insurer contacted Lawrence R. Green, a partner with Lester Schwab Katz & Dwyer LLP (LSKD), and retained the firm to represent Coucher. Representatives of Coucher had one conversation with Green. Following that conversation, Green advised the plaintiff's lawyer orally and in writing that LSKD would be representing Coucher.

Client Substitutes New Counsel On Short Notice

Green was subsequently out of the office for several days. When he returned, he learned that the insurer had forwarded its investigative file, but had decided shortly thereafter to retain another law firm and had requested the return of the file. Green accordingly returned the file. Approximately eleven days lapsed between the insurer's initial contact with Green and the return of the file. The substitute counsel removed the case from state to federal court.

Almost six months later, the plaintiff filed an action against Trailers in state court. This action was later removed to federal court and consolidated with the pending action against Coucher. Trailers retained two other partners in LSKD (not Green) to represent it. LSKD filed an answer and asserted a cross-claim against Coucher. When Trailers raised the conflict-of-interest issue faced by LSKD, the two partners learned for the first time of Green's prior representation of Coucher, and Green learned for the first time of his partners' current representation of Trailers.

Judge Glasser's analysis was relatively straightforward. First, he asked whether Coucher was a former client of LSKD. The firm argued that the representation had been "short-lived and limited," consisting chiefly of a single instance of oral and written communication to the plaintiff's counsel. In LSKD's view, Coucher did not therefore deserve to be treated as a full-blown client worthy of DR 5-108's complete protection. Judge

Glasser rejected this argument. To support his conclusion, he cited Green's letter to plaintiff's counsel in which Green wrote, "I will be representing the interests of Markal Insurance Company of Canada and its insureds with regard to the accident." Judge Glasser also quickly dismissed LSKD's contention that Coucher and Transport were not really adverse to one another because cross-claims are routinely filed by co-defendants against one another.

Court Finds Substantial Relationship

Second, Judge Glasser asked whether a substantial relationship existed between the subject matters of the representations of Coucher and Trailers. The answer to this question was indisputably, "Yes."

Third, he asked if LSKD had, or was likely to have had, access to confidential information during the representation of Coucher. The answer to the second question determined the answer to the third question. Once a court finds a substantial relationship, a rebuttable presumption arises that the former client imparted relevant confidential information to its lawyer. Green had the required access in his phone call with the insurer and his physical possession of the investigative file. Without doubting Green's assertion that he did not remember any confidential information and had not examined the file, Judge Glasser nonetheless concluded that Green was disqualified.

Green's disqualification did not end the court's inquiry, however. Judge Glasser still had to determine if his disqualification should be imputed to LSKD as a firm. In concluding that it should, Judge Glasser

noted the absence of "a Chinese Wall between Green and the rest of the firm," and that Green was a member of a relatively small firm.

Lessons To Be Learned

Judge Glasser's opinion in *Arifi* has three important lessons for the law firm in our hypothetical and for all law firms. DR 5-105(d) requires a law firm "to keep records of prior engagements, which records shall be made at or near the time of such engagements and [to] have a policy implementing a system by which proposed engagements are checked against current and previous engagements"

Given the facts in *Arifi*, it is perhaps understandable that Green might not have entered a record of the Coucher engagement before he left the office for several days and then saw no need to enter it when he returned and found that Coucher had subsequently selected other counsel. If he had entered it, however, the two LSKD partners would have found a record of the representation when they did a conflicts check before accepting the Transport engagement. This information would have alerted them to the possibility of a conflict, allowed them to discuss the possibility with Transport, build a Chinese wall around Green, and seek Coucher's consent to the law firm's representation of Transport. Thus, the first lesson for our hypothetical law firm is that it should be scrupulous in promptly entering information in its conflicts checking system. The Committee on Professional Responsibility and Judicial Ethics of the Association of the Bar of the City of New York has recently issued Formal Opinion 2003-03, containing a comprehensive analysis of DR 5-105(e). Our law firm would be well advised to consult it. (See, Lazar Emanuel, *City Bar Lists Data To Keep to Avoid Client Conflicts*, NYPRR, November & December 2003.)

The second lesson that *Arifi* teaches is the importance that the courts place on protecting confidential information. Judge Glasser did not put Coucher to the Hobson's choice of either revealing the confidential information it allegedly communicated to LSKD or foregoing a successful disqualification motion. Adhering to a solidly established line of jurisprudence, he concluded that a comparison of the issues in the two cases lead to the creation of a rebuttable presumption that confidential information had passed between the law firm and Coucher. Our hypothetical law firm should carefully compare the issues in the former representations with those in the proposed new ones. See e.g., *Crawford v. Antonacci*, 746 N.Y.S.2d 94 (3d Dep't 2002) (refusing in a personal injury action to disqualify the defendant's attorney who had previously represented the plaintiff in a worker's compensation matter).

Even if the issues in the three new matters are different, our firm is not home free. It should also examine the facts in each matter. The greater the factual similarity between the former and proposed representations, the harder it may be for the firm to demonstrate that it was not privy to confidential information. See e.g., *Clairmont v. Kessler*, 703 N.Y.S.2d 25, 26 (1st Dep't 2000) (affirming the disqualification of the plaintiff's lawyer in a medical malpractice action because the lawyer had previously represented the defendant physician and had likely acquired confidential information "including defendant's surgical experience and techniques and methods of handling patients ...").

The third lesson warns the law firm that size does matter. Both the state and federal courts in New York are less than enthusiastic about the use of Chinese Walls in general. They are highly suspicious of the proposition that small firms can successfully build and maintain Chinese Walls. E.g., *Mitchell v. Metropolitan Life Ins. Co. Inc.*, 2002 WL 441194 (S.D.N.Y. Mar. 21, 2002); *Kassis Teacher's Ins. & Annuity Ass'n*, 695 N.Y.S.2d 515 (1999).

In short, whether the year 2004 is really starting off well for our hypothetical law firm will depend on the firm's scrupulous attention to DR 5-105(e) and careful application of DR 5-108. Protection of confidential information drives the courts' decisions interpreting this disciplinary rule along with a strong dose of skepticism about the utility of Chinese Walls, especially in small law firms.

Mary C. Daly is James H. Quinn Professor of Legal Ethics at Fordham Law and past Chair, Committee of Professional and Judicial Ethics, Association of the Bar of the City of New York.