

How Nonlawyers Can Create Conflicts For Lawyers

BY ROY SIMON

Does your law firm check for conflicts of interest when it hires secretaries and paralegals? It should, because non-lawyers can create conflicts for lawyers. This article explains how.

The basic scenario is simple. Suppose your firm hires a paralegal who has been working for the law firm of Scratch & Claw. As it happens, Scratch & Claw is defending a suit in which your firm represents the plaintiff. If the defendant moves to disqualify your firm because Scratch & Claw's former paralegal is now working for your firm, who will win the motion?

Conflicts Caused by Lateral Lawyers

If the person switching sides were an attorney instead of a paralegal – that is, if an attorney switched from the opposing firm to your firm in the middle of a case – the question would be governed by DR 5-108 and DR 5-105(D) of the New York Code of Professional Responsibility. The operation of that tandem of rules is known by most lawyers. If the lateral lawyer has either (a) personally “represented” the defendant in the case between the two firms, or (b) formally or informally “acquired information protected by DR 4-101(B) that is material to the matter,” then – absent the opposing client’s consent after full disclosure – the lateral lawyer is personally disqualified under DR 5-108(A) or (B), and your entire firm is vicariously disqualified under DR 5-105(D), which provides that “[w]hile 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” (*inter alia*) DR 5-108(A) or (B).

Moreover, if the lateral lawyer’s former firm is “a small firm” in which there was a “constant cross pollination going on” and a “cross current of discussion and ideas” among all attorneys about all matters that the firm handled, then “disqualification will be imposed as a matter of law without a hearing.” See, *Solow v. W.R. Grace & Company*, 83 N.Y.2d 303 (1994), quoting *Cardinale v. Golinello*, 43 N.Y.2d 288 (1977). Even building a timely Chinese Wall will not overcome the opposing client’s objection. See, *Kassis v. Teachers Insurance and Annuity Association*, 93 N.Y.2d 611 (1999); N.Y. State Bar Op. 720 (1999).

Conversely (except for small firms), if your firm can prove that the moving lawyer did not acquire any confidences or secrets about the matter at his former firm, then neither the moving lawyer nor your firm will be disqualified. See, *Silver Chrysler Plymouth v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1975) (denying motion to disqualify firm that hired a former associate from Kelley Drye, “one of New York’s larger law firms”).

The essential question explored in this article is whether non-lawyers should be treated like lawyers, or whether nonlawyers should be treated more leniently. In particular, should a timely and effective Chinese Wall suffice to defeat a motion to disqualify your firm when a lateral nonlawyer has created a conflict?

Sparse Law in New York

New York law on this question is sparse. I have found only two decisions -- one state and one federal -- ruling on a motion to disqualify a firm based on the presence of a nonlawyer who formerly worked at the opposing firm.

The sole New York State case addressing the question of non-lawyer conflicts is *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 514 N.Y.S.2d 440 (2d Dep't 1987). In that case, the defendants' attorneys -- the law firm of Lieb & Lieb in Center Moriches in Suffolk County -- hired a paralegal who "had previously been employed by the plaintiff's counsel and had worked on the litigation pending between the parties and had interviewed the plaintiff's manager concerning the facts of this case." Plaintiff moved to disqualify Lieb & Lieb. The Supreme Court denied the motion but the Second Department reversed and ordered disqualification. The Second Department acknowledged that the Code of Professional Responsibility does not apply to nonlawyers, but also noted that "it does place a burden on attorneys to insure that their employees conduct themselves in accordance with the code" The court then disqualified defendants' attorneys, supporting its decision by citing three cases that did not involve paralegals.

A more analytical case is *Riddell Sports, Inc. v. Brooks*, 1994 WL 67836 (S.D.N.Y. 1994) (Leisure, J.). There, defendant Brooks moved to disqualify Skadden Arps on grounds that Skadden had hired a paralegal named Alston Walker during the litigation. Walker had worked on the Riddell matter at his former firm, Ober Kaler, the law firm representing Brooks.

Walker had worked as a paralegal at Ober Kaler for only nine months, but he had worked directly on the *Riddell* matter, drafting motions and document requests, compiling factual analyses, assembling documents, and even attending meetings with Brooks. Right after his job ended at Ober Kaler, Walker was interviewed by Skadden, which was looking for paralegals to work on breast-implant product liability litigation. Even back then, Skadden was checking for conflicts when it hired paralegals. But in his interview at Skadden, Walker did not disclose that he had worked on the Riddell case at Ober Kaler, or that he had worked against Skadden on any matter. When Skadden specifically asked Walker whether he knew of any conflicts between Skadden and clients that he had served in his prior positions, Walker responded that he could not recall the names of any clients because he had been "just a temp" at Ober Kaler and had not worked on matters for any particular client for an extended period. When Skadden asked Walker for references from an attorney at Ober Kaler, Walker stated that he didn't think any attorney at Ober Kaler would remember him because he had been "constantly shifted from work on one matter to another."

Not detecting any conflicts, Skadden hired Walker. On his first day at Skadden, Walker attended an orientation for new paralegals, during which Skadden's paralegal supervisor distributed a memorandum setting forth the firm's policy on protecting the confidences of clients in former employment. Walker signed the memorandum indicating that he understood the policy, but he did not prepare the list of former clients that Skadden asked each paralegal to prepare. Skadden assumed that Walker did not prepare the list because he could not remember the names of any former clients.

At Skadden, Walker worked only on breast-implant product liability cases. After he had been working on these cases for about six weeks, the lawyer at Ober Kaler who was representing Brooks notified Skadden that Walker had previously worked on *Riddell Sports v. Brooks*. Skadden sought Ober Kaler's assurance that Brooks would not move to disqualify Skadden based on Walker's conflict, but Ober Kaler would not give that assurance, so Skadden terminated Walker on November 19, 1993, less than two months after he arrived there.

Soon after Skadden terminated Walker, Ober Kaler moved to disqualify Skadden. Skadden mobilized its huge resources to fight the motion. Using affidavits from more than twenty different Skadden partners, associates, and nonlawyers, Skadden asserted the following facts about Walker's brief employment at Skadden: (1) Walker worked only on breast-implant product liability cases; (2) the product liability department never did any work for Riddell; (3) Walker himself swore that he never discussed anything relating to Riddell with anyone at Skadden; (4) All nine Skadden attorneys who worked with Walker swore that they never talked with Walker about his work regarding Riddell and did not even know that Walker had ever worked against Skadden on any matter; (5) None of the principal attorneys or legal assistants on the *Riddell* case received any information from Walker, or recalled having had any contact with him whatsoever; (6) Walker's office was located on the 23rd floor, and no Riddell files were kept on that floor, and no paralegals or attorneys working on Riddell matters had their offices on that floor.

The court denied the motion to disqualify Skadden. The court refused to presume that Walker had shared confidences with the lawyers at Skadden partly because he had not worked on the Riddell matter while at Skadden, and a person is "less likely to talk frequently and in detail with colleagues about a matter he worked on in the past than one on which he is currently engaged." Moreover, there was "no danger that confidences will be shared in the future since Walker is no longer employed at Skadden Arps." Even if the presumption of shared confidences had applied, however, the court found that Skadden had rebutted it. The affidavits established that the Skadden lawyers representing Riddell (a) did not work with Walker, (b) did not know that Walker had been involved in the Riddell matter in the past, and (c) did not discuss the Riddell matter with him, and – filling in one more link – (d) the Skadden lawyers who did work with Walker on the breast-implant cases did not know of his work on Riddell and did not discuss it with him. On top of all this, the court noted that Skadden was "a particularly large firm" and that Walker worked solely in the product liability department.

Brooks requested discovery so that it could delve more deeply into Walker's relationships at Skadden, but the court concluded that discovery was unnecessary. "Simply stated," the court said, "there has been an insufficient threshold showing of any impropriety, appearance of impropriety, or of shared confidences; and the effort and expense of further discovery is therefore not merited." Rather, the court concluded that Walker's employment at Skadden was "a proverbial tempest in a teapot," and was not a basis for disqualification.

Lessons from Glover and Riddell

Riddell and *Glover* hold many lessons for New York lawyers. First, if you hire a paralegal from an opposing firm, the opposing law firm will very likely move to disqualify your firm. Second, when you interview nonlawyers who have worked at law firms that your firm is currently opposing, you should check for conflicts during the interviewing process. (If Skadden had not tried to discover conflicts during the interview process, I think the court might have been much less sympathetic to Skadden's position.)

Third, opposing a motion to disqualify can cost considerable time, effort and money. In *Riddell*, for example, Skadden had to round up more than twenty affidavits to rebut the presumption that Walker had shared confidences about the case with anyone at Skadden. Fourth, harsh as it may sound, your firm will improve its chances of defeating the motion to disqualify if you fire the nonlawyer in question as soon as you find out about the conflict (unless, of course, the opposing side will consent). As the court said in *Riddell*, terminating the nonlawyer will remove the possibility that the nonlawyer will share client confidences with your firm in the future. Put another way, termination is the ultimate screen.

However, neither *Riddell* nor *Glover* addressed the most burning question about paralegals: Can screening overcome a conflict? I now turn to that question.

Abundant law from other states

No New York case or ethics opinion has yet decided whether screening a nonlawyer can defeat a motion to disqualify, but many other jurisdictions have ruled on this question. In fact, the issue has been decided by the highest courts of Nevada, Kansas, Texas, Ohio, and Oklahoma, and has been decided by intermediate appellate courts in Florida and California.

A few of these decisions have held that a law firm hiring a secretary or paralegal from an opposing firm is automatically disqualified unless the opposing party consents, and the hiring firm cannot escape disqualification by building a screen. See, e.g., *Zimmerman v. Mahaska Bottling Co.*, 270 Kan. 810, 19 P.3d 784 (Kan. 2001) (“Where a motion to disqualify has been filed, based on the movement of nonlawyer personnel, the trial court must proceed in the same manner as if the person was an attorney.”); *First Miami Securities, Inc. v. Kurt Sylvia*, 780 So.2d 250 (Fla. App. 3rd Dist. 2001); *Brown v. Eighth Judicial District Court*, 116 Nev. 1200, 14 P.3d 1266 (Nev., 2000); *Koulisis v. Rivers*, 730 So.2d 289 (Fla. App. 4th Dist. 1999); *Williams v. Trans World Airlines, Inc.*, 588 F. Supp. 1037 (W. D. Mo. 1984). The courts in these cases reasoned that migratory secretaries and paralegals pose just as great a threat to confidentiality as migratory lawyers, and that screening will not cure the problem. In *Williams*, for example, the court said:

If information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney’s non-lawyer support staff left the attorney’s employment, it would have a devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by an attorney...The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these “agents” of lawyers to the same disability lawyers have when they leave legal employment with confidential information.

In *Zimmerman v. Mahaska Bottling Co.*, the Kansas Supreme Court held that a “screening wall imposed unilaterally is inappropriate to meet [the] burden under our case law” that the non-lawyer employee did not acquire material and confidential information during the course of his employment.

Other decisions involving secretaries and paralegals, however, have held that a law firm hiring a nonlawyer can escape disqualification by building a timely and effective screen around the nonlawyer. See, e.g., *Green v. Toledo Hospital*, 94 Ohio St.3d 480, 764 N.E.2d 979 (Ohio 2002); *Hayes v. Central States Orthopedic Specialists Inc.*, 51 P.3d 562 (Okla. 2002); *In re American Home Products Corp.*, (Tex. 1998); *Stewart v. Bee-Dee Neon & Signs Inc.*, 751 So.2d 196 (Fla. App. 1st Dist. 2000); *In re Complex Asbestos Litigation*, 232

Cal.App.3d 572, 283 Cal. Rptr. 732 (1st Dist.1991); *Kapco Mfg. Co. v. C & O Enterprises, Inc*, 637 F. Supp 1231 (N.D. Ill. 1985). These courts reason that screening a nonlawyer provides adequate protection for the former client and allows greater mobility for paralegals, as well as greater choice of counsel for clients.

In *Green v. Toledo Hospital, supra*, for example, the Ohio Supreme Court stated: “[W]e hold that the presumption of shared confidences... is inappropriate for nonattorneys. Many, if not most, nonattorneys at a law firm are not regularly exposed to confidential information about clients and their cases.” Accordingly, the Ohio Supreme Court adopted the following approach to nonlawyer side-switching conflicts:

We hold that in ruling on a motion to disqualify a lawyer based on that lawyer’s employment of a nonattorney once employed by the lawyer representing an opposing party, a court must use the following analysis:

- (1) Is there a substantial relationship between the matter at issue and the matter of the nonattorney employee’s former firm’s representation?
- (2) Did the moving party present credible evidence that the nonattorney employee was exposed to confidential information in his or her former employment relating to the matter at issue?
- (3) If such evidence was presented, did the challenged attorney rebut the resulting presumption of disclosure with evidence either that (a) the employee had no contact with or knowledge of the related matter or (b) the new law firm erected and followed adequate and timely screens to rebut the evidence presented in prong (2) so as to avoid disqualification?

Ethics opinions are likewise split on the screening question. Compare ABA Informal Ethics Op. 88-1526 (1988) and NJ Advisory Op. 665 (1992) (screening can cure a nonlawyer conflict) with Imputed Disqualification of Law Firms When Nonlawyer Employees Change Firms, 63 Ala. Law. 94 (March 2002) (screening cannot overcome a nonlawyer’s conflict). But the Restatement of the Law Governing Lawyers allows timely screening to defeat a motion to disqualify based on a nonlawyer’s conflict. See §123, Comment f (“If strict imputation were applied, employers could protect themselves against unanticipated disqualification risks only by refusing to hire experienced people.”)

The Impact of DR 1-104

The split in state court decisions suggests that whether or not to allow screening to cure nonlawyer conflicts is a policy choice. But before we can weigh the competing policies, we need to determine whether we really have a choice in New York. The potential obstacle is DR 1-104(D), which provides that a lawyer “shall be responsible for... conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if” the lawyer either is a partner in the firm or has “supervisory authority” over the nonlawyer and “knows of such conduct, or... should have known” in time to take “reasonable remedial action.”

Does DR 1-104(D) mean that the same conflict of interest rules that govern lawyers must also govern nonlawyers? I don’t think so. If that’s what DR 1-104 meant, then law firms would have to check all

paralegals, secretaries, messengers, copy machine operators, filing clerks, and other nonlawyers for personal conflicts of interest under DR 5-101, and every such conflict would be imputed to the entire law firm via DR 5-105(D). That cannot be the law. I do not know of a single law firm that checks paralegals or secretaries – much less other nonlawyers – for personal conflicts (as opposed to former client conflicts). More important, a nonlawyer who has acquired material confidential information about an opposing client at a former job is not engaged in “conduct...that would be a violation of the Disciplinary Rules if engaged in by a lawyer” because the nonlawyer, unlike the lawyer, does not “represent” a client.

Most of the conflict of interest rules, including DR 5-108, restrict a lawyer’s right to “represent” a client against a former client. Because the paralegals, secretaries, and other nonlawyers do not and cannot “represent” anyone, their conduct (typing, organizing papers, and interviewing witnesses) cannot violate DR 5-108. Of course, a law firm has a duty under DR 1-104(C) and (D) to ensure that nonlawyers protect the confidences and secrets of former clients in compliance with DR 5-108(A)(2), but protecting those confidences would be the very purpose of building a Chinese Wall around a nonlawyer who came from an opposing firm. That returns us to the essential question: Should a screen be enough to cure a conflict caused because a nonlawyer acquired confidential information about an opposing party while working at her former firm?

Which rule should New York choose?

New York needs to make two basic choices regarding migratory nonlawyers. First, should the presumption that a nonlawyer learned confidences and secrets in the former firm be rebuttable? As with lawyers, that should depend on whether the nonlawyer worked on the matter at her former firm. If the paralegal or secretary did work on a particular matter against your firm while employed at her former firm, then, of course, we will presume irrebuttably that the nonlawyer learned confidences and secrets about the client during her former employment. But if the nonlawyer did not work on any case that your firm is litigating against her former firm, your firm should be permitted to rebut the presumption that the nonlawyer learned confidences and secrets about the client at the former firm. This is an easy choice to make in New York because DR 5-108(B) already makes the presumption rebuttable in the case of migratory lawyers, and we have no reason to take a stricter approach in the case of nonlawyers. If anything, nonlawyers are probably less likely than lawyers to have learned confidences and secrets about cases they did not work on.

Second, should the presumption of shared confidences in the new firm be rebuttable? In other words, should your firm be permitted to defeat a motion to disqualify by demonstrating that it has built a solid Chinese Wall around a nonlawyer who formerly worked for the opposing law firm? This is a much harder question because it depends on at least six factors – (1) predictions about whether nonlawyers are more likely than lawyers to abide by a screen; (2) predictions about whether clients will be reluctant to communicate confidential information to their lawyers if a nonlawyer employee will be permitted to switch sides if properly screened; (3) the right of the hiring firm’s client to choice of counsel, (4) the effect on the mobility of nonlawyers if screens cannot cure conflicts; (5) the effect on law firms if screens cannot cure nonlawyer conflicts; and (6) the overall appearance of impropriety if nonlawyers are permitted to switch sides when properly screened. These factors cannot be quantified and are subject to debate and speculation. As indicated by the 3-2 split among state supreme courts that have addressed the question, there are strong arguments on both sides of the debate. Accordingly, I cannot confidently predict how a

particular New York court will decide a motion to disqualify in a particular case. But I can provide some advice for coping with the uncertainty.

Conclusion: Proceed with Caution

Until New York courts reach a consensus on whether screens can cure nonlawyer conflicts, here are five steps that a prudent law firm can take.

1. Your firm should check nonlawyers (especially paralegals and secretaries) for conflicts with former clients. Your check should be as thorough as it would be for a lateral lawyer. (Remember to check with all of the nonlawyer's past law firms, not just the most recent one.) Double check your results by culling your own database to look for matters currently pending between your firm and the law firms or corporations where the nonlawyer worked in the past.
2. If you discover a conflict before you hire a nonlawyer, get the nonlawyer's permission to contact the former employer to explain the situation and seek consent to the conflict. If the former employer is willing to consent, it will probably insist that your firm build a Chinese Wall to prevent the nonlawyer from disclosing any confidential information to your firm. You should agree to that condition. Get the consent in writing (or at least confirm it in writing), together with a pledge not to move to disqualify your firm based on the conflict.
3. If the nonlawyer's former employer won't consent to the conflict despite your firm's willingness to build a Chinese Wall, then your firm has a hard choice. Either you can hire and screen the nonlawyer and risk disqualification, or you can look for a different nonlawyer. The larger and more departmentalized your law firm is, the more likely a screen is to work (i.e., the less likely your firm is to be disqualified). But if the matter in which your firm faces disqualification is an important one to your firm or your client, the odds are you should not take the risk of hiring the conflicted nonlawyer.
4. If an adverse party moves to disqualify your firm based on a nonlawyer conflict that your firm did not detect, your firm faces an even harder choice. The safest course is to do what Skadden did in the *Riddell* case – terminate the nonlawyer at once. But if the nonlawyer is valuable to your firm, or if your firm is reluctant to upset morale at the firm among other nonlawyers, or if your firm is unwilling to terminate the nonlawyer for any other reason, then your firm should *immediately* build a solid Chinese Wall around the nonlawyer. In addition, build a wall between (a) the lawyers and nonlawyers who are working with (or have worked with) the nonlawyer and (b) the people working on the case in which the motion to disqualify has been filed. If the conflicted nonlawyer has already revealed any confidences or secrets to the people she works with, at least you can try to assure the court that the protected information won't travel any further within your firm. (This is probably a losing effort, but it may work occasionally, especially if the motion to disqualify has been filed on the eve of trial or if the other side delayed filing the motion for an unreasonable length of time.)
5. If the nonlawyer is working on the very same case that has generated the motion to disqualify, fire the nonlawyer forthwith for failing to alert your firm to the conflict, and round up affidavits to persuade the court that the nonlawyer never disclosed any confidences or secrets to anyone at your firm. But the odds are high that your firm will be disqualified no matter what you say or do in this situation, so tidy up any loose ends on the case and prepare to transfer the file to another firm of the client's choosing.

In short, proceed with caution when hiring nonlawyers, and check for former client conflicts in the same manner that you would check lateral lawyers for those conflicts. Checking every nonlawyer for former client conflicts will be expensive and time-consuming, but if it saves your firm from disqualification in even a single case, your firm is likely to be repaid many times over.

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