

Putting Screens Around The Lateral Hire

BY BARBARA GILLERS

The recent amendments to DR 5-108 modernize New York's rule governing the imputation of conflicts when a lawyer changes firms. The New York rule now conforms to ABA Model Rule 1.9(b), promulgated in 1983, and to federal and state caselaw. The amendments must be read in conjunction with *Kassis v. Teacher's Insurance and Annuity Association*, 1999 WL 444339 (1999), announced the same week as the Rules. In *Kassis* the New York Court of Appeals for the first time recognized screening for a limited group of lateral hires. *Kassis* and the DR 5-108 amendments should have a significant influence on lateral hiring in New York.

Absent full disclosure and consent, DR 5-108 prohibits a lawyer from acting adversely to a former client in a substantially related matter. DR 5-105(D) then imputes a lawyer's personal disqualification throughout her entire firm. Before the amendments, the language of DR 5-108 could be read to say that a migratory lawyer's conflict continued after leaving a former firm and "infected" her new firm. Federal and state courts rejected so broad a rule.

In *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751 (2d Cir. 1974), the Second Circuit concluded that even when a lawyer moves to a firm representing an adverse party, the new firm (and the lawyer) could avoid disqualification by showing that the migratory lawyer did not actually receive relevant confidential information at the prior firm. Since the lateral acquired *no* confidential information while at the prior firm, disqualification was not required. The New York Court of Appeals accepted *Silver Chrysler* at least for lawyers leaving larger firms, in *Solow v. W. R. Grace & Co.*, 83 N.Y.2d 303 (1994).

"Materiality" Required

The amendments allow the new firm to avoid disqualification so long as the migratory lawyer can show that she did not acquire confidential information "material" to the matter. ABA Model Rule 1.9(b) sets the same standard. The amendments thus make DR 5-108 consistent with Model Rule 1.9(b) and state and federal decisions.

The addition of DR 5-108(C) also modernizes the rule in conformity with *Solow*. Under DR 5-108(C), when a lawyer leaves a firm, the firm is not thereafter prohibited from representing a person with interests that are materially adverse to those of a client represented by the departing lawyer (and no longer represented by the firm) unless the law firm or any lawyer remaining in the firm has confidential information that is material to the matter. This situation is the converse of *Silver Chrysler Plymouth*.

Even after the amendments, DR 5-108 does not recognize screening when a personally disqualified lawyer moves from one private firm to another. By contrast, DR 9-101(B)(1) and (2) have long recognized screening when a government lawyer moves to private practice. *Compare* DR 5-108 with DR 9-101(B)(1) and (2). *Kassis*, however, now permits screening when confidences acquired by the migratory lawyer at the prior firm are not “significant” or “material.” Under these circumstances, a firm can avoid disqualification by establishing timely “adequate screening measures to separate the disqualified lawyer and eliminate any involvement by that lawyer in the representation.” 1999 WL 444339 at 3.

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