

The Contract Lawyer And Client Confidences

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This is our third article on the temporary or contract lawyer. In the two previous articles, we dealt with Conflicts of Interest and Imputed Disqualification. In this article, we cover the subject of client confidences and secrets as it relates to the Contract Lawyer.

The New York lawyer's duty of confidentiality is defined in DR4-101 of the Code.

The Rule provides that a lawyer shall not knowingly reveal a confidence or a secret of the client or use a confidence or secret to the disadvantage of the client. However, a lawyer may reveal both confidences and secrets "with the consent of the client..." but only after full disclosure to the client.

A confidence is any information protected by the attorney-client privilege under applicable law. A secret is any information gained in the lawyer-client relationship that the client has asked to be kept inviolate or that would be embarrassing or detrimental to the client if disclosed. DR 4-101(A).

Confidences and the Attorney-Client Privilege

The attorney-client privilege is the flip side of the rule controlling confidences and secrets. The privilege prevents the attorney from disclosing any confidential communication between him and the client, unless the client consents to the disclosure or waives the privilege. The privilege is an evidentiary privilege which belongs to the client. In New York, the attorney-client privilege is codified in CPLR §4503 and applies to "any action, disciplinary trial or hearing, or administrative action, proceeding or hearing..."

Any firm hiring a Contract Lawyer to work on one or more matters should consider the problems inherent in protecting client confidences. Among these are the following.

Do you need the consent of the client whose matter the temporary will be assigned to? We will consider this question in detail in our next issue. For the moment, it's sufficient to state that the answer in New York appears to be "yes". You should advise the client that you intend to use a temporary on his matter and obtain the client's consent in advance of the employment. The client is entitled to know that a lawyer who does not necessarily owe the same fealty to him or the same allegiance to your firm will be working on his matter and may be exposed to his secrets.

What confidences or secrets does he bring with him? Many contract lawyers will have worked for other firms or be working for another firm at the time of employment. They may bring to your firm the confidences and secrets of former or present clients of these other firms with interests adverse or inimical to those of your own clients. While you may not inquire into the confidences or secrets themselves, you are certainly entitled to know the identity of those clients. Identifying the client may be enough to tell you that the employment of that lawyer is imprudent and fraught with potential problems.

Controlling the Work Assignment

What client(s) will the contract lawyer be assigned to? Do you want the confidences and secrets of your clients to be exposed to a lawyer who has only a temporary relationship with your firm? Remember that in a subsequent litigation, that lawyer may become the instrument for testing the lawyer-client privilege as it relates to your client. A court may even decide that the lawyer-client privilege did not attach to the temporary because he was not a member of your firm, thereby exposing the client's confidences to inquiry and examination through the temporary in subsequent litigation.

If you decide that you don't want the Contract Lawyer to acquire the confidences or secrets of the client whose files he's working on, you have to take steps to limit his access to the precise information necessary for his work and to assign him only to research and other non-contact projects.

Is your office organized to prevent access to the files of clients? To confine the contract lawyer only to those files he must see in order to complete his assignment, you should take steps to confine him also to a designated work area. This area should be in a specific room monitored by and under the control of a supervising attorney who is familiar with the work assigned. No files should be permitted in that room except the files needed to complete the temporary's -assignment. All other files should be kept in other areas to which the temporary has no access.

Your staff should be educated to avoid the risks involved in exposing the temporary to any files he doesn't need to see. They should avoid conversations about files or clients within his hearing. They should be careful to prevent access to computer screens or to material consigned to wastebaskets or recycling bins.

The Kassis Guidelines

A helpful guide to the steps to be taken to screen a temporary is provided by the case of *Kassis v. Teachers Insurance and Annuity Association*, 24 A.D.2d 191, 678 N.Y.S.2d 32 (1st Dept. 1998). The *Kassis* case involved a first year associate who had previously worked for another firm, but the reasoning would apply equally to a Contract Lawyer. In construing steps taken by a 26-member law firm, the *Kassis* court found that an adequate screen against improper disclosure was provided by removing forbidden files from access by the associate, instructing the associate not to touch the files, and instructing firm members not to discuss with the associate any files or information which contained the potential for exposure of clients' confidences.

Though the *Kassis* case has been criticized by some commentators (Roy D. Simon, *Chinese Wall Fends Off Disqualification in First Department*, NYPRR, September 1998), it does serve as a guide to supervising partners who wish to avoid the risk of a disqualification motion.

Law firms are turning increasingly to the employment of temporaries. A recent survey of the top 250 firms by the National Law Journal showed that temporary lawyers were more than 5% of the lawyers employed at several firms. The trend to hire temporaries was more pronounced at small firms. It's important to recognize the risks involved in hiring temporaries and to guard against them.

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