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What It Takes to Market Yourself and Your Practice

by David C. Wilkes

Also in this Issue

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BY DAVID C. WILKES

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DEPARTMENTS

ATTORNEY PROFESSIONALISM FORUM

To the Forum:

I have been practicing law for 20 years. I am admitted to practice in New York, two other states, several United States Federal District Courts, and the United States Supreme Court. I started my career as a federal prosecutor and later worked for two other state governmental agencies. I now work in a private firm and have several cases pending before governmental agencies. I am not on the management committee, but recently I heard rumblings about cutbacks and even the possible dissolution of my firm because of the effects of the current economy. I have a family to support, and naturally I'm concerned.

I am thinking about applying for a job with the government, and would like to know if any problems might arise regarding pending cases on which I am presently working. Can you give me some guidance? Is there anything that my prospective governmental employers and I should be aware of before I interview?

Signed,

In Need of Job Security

Dear In Need of Job Security:

It is no secret that we are in the midst of tough economic times, and that many law firms have had to downsize by letting attorneys go or by furloughing their newly hired attorneys. However, no matter what the economic climate may be, lawyers looking for new jobs must remain mindful of their ethical obligations to their clients, their employers and even their prospective employers.

At the outset, the most important factor to consider is your obligation to maintain confidential information learned during the representation of a client. Any attorney will surely agree that this is paramount among our duties, but if that attorney is also searching for a new job there is a temptation to permit concern for his or her own future to become a factor in current professional decision-making. It therefore is possible that under these circumstances a tension may arise between the client's interests and the lawyer's, but a lawyer always is bound not to allow personal concerns to affect the exercise of professional judgment. If a lawyer were to permit personal interests to lead him or her to reveal confidential information, a conflict of interest would arise.

Although there are some exceptions regarding the disclosure of client confidences, a lawyer's search for new employment does not fall within those exceptions. You are quite right to be concerned about the cases that you have pending before governmental agencies if you choose to seek employment with those agencies. You are obligated to maintain confidential information during an interview and thereafter, if you are hired. Likewise, the governmental agencies must be mindful of maintaining the confidences and secrets of their clients, but also must be respectful of your obligations to your clients. Thus, you should be aware of such obligations and tread lightly through the interview process.

As you may know, New York adopted the New York Rules of Professional Conduct, effective April 1, 2009 (the "Rules") and prior to that date we were governed by the New York Code of Professional Responsibility (the "Code"). However, the relevant portions of both the Rules and the Code are substantially similar in defining client confidences. 22 N.Y.C.R.R. Part 1200 Rule 1.6 of the Rules provides as follows:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
>
> (1) the client gives informed consent, as defined in Rule 1.0(j);
>
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
>
> (3) the disclosure is permitted by paragraph (b).
>
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
>
> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime;

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee.

In addition, Rule 1.0(j) cited above states:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

Moreover, Rule 1.9(c) specifies:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

See also the Code at 22 N.Y.C.R.R. § 1200.19 [DR 4-101] (Preservation of Confidences and Secrets of a Client) and § 1200.27 [DR 5-108] (Conflict of Interest – Former Client).

In light of the foregoing, any time a lawyer interviews for or obtains a new position, he or she must maintain confidential information unless the client waives confidentiality by giving informed consent. As a result, the lawyer and the potential employer must decide the appropriate time to disclose to their respective clients that the lawyer is contemplating such new employment. At the initial interview, the lawyer may discuss the work being done without revealing client confidences by describing only the legal issues involved, or by talking about cases in a hypothetical manner so that the client cannot be identified. Accordingly, it would appear that any actual disclosure would be premature and unnecessary at the initial stages of the interview process, because the lawyer may not be offered the job, and so there would be no need for the potential employer to know the names of cases and / or clients.

The real issue is the timing of such disclosure to obtain informed consent. Should the lawyer obtain informed consent from the client when the offer of employment is made, or when it is accepted? All lawyers and law firms are required to do conflicts checks. 22 N.Y.C.R.R. Part 1200 Rule 1.10 states in pertinent part:

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;

(2) the firm agrees to represent an existing client in a new matter;

(3) the firm hires or associates with another lawyer; or

(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless or whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

Thus, unless and until the client provides a waiver after receiving

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informed consent, it would appear that the lawyer and law firm should have an understanding that the offer is contingent upon the conflicts check. It would appear that the new Rules prohibit a lawyer from accepting employment unless such waiver is provided, and thereby limit the lawyer's ability to switch jobs.

While the Rules do not permit screening where a lawyer has a conflict in moving to a new firm from a prior firm, the Rules do allow for screening when it comes to governmental employment. Specifically, 22 N.Y.C.R.R. Part 1200 Rule 1.11 states:

> (a) Except as law may otherwise expressly provide, a lawyer who has formerly served as a public officer or employee of the government:
>
> (1) shall comply with Rule 1.9(c); and
>
> (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).
>
> (b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the firm acts promptly and reasonably to:
>
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
>
> (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
>
> (iii) ensure that the disqualified lawyer is apportioned no part of the fee there from; and
>
> (iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and
>
> (2) there are no other circumstances in the particular representation that create an appearance of impropriety.
>
> (c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).
>
> (d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:
>
> (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter…

See also the Code at 22 N.Y.C.R.R. § 1200.45(B) [DR 9-101(B)] (Avoiding the Appearance of Impropriety).

Accordingly, lawyers can switch from private to public employment as long as they remain cognizant of their obligations to maintain confidential client information.

Simply stated, during the interviewing process, and thereafter in the event that you are hired, there is some confidential information that you may have to maintain and not disclose forever.

Good luck with the job hunt.

The Forum, by
Deborah A. Scalise
Scarsdale, N.Y.

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

As I write this the hour is late and it has been a long day. Just before shutting down my computer I took one last look at my e-mails and I saw an odd one from an adversary's law firm. The message was "fyi" and below was an attachment symbol. The message was "from" a paralegal in my adversary's office whom I had met and remembered. I double-clicked to check the "to" list and it was composed entirely of members of my adversary's law firm, individuals, including experts associated with my adversary's case and my adversary's client. I was on the list but I just did not seem to belong on it. Nevertheless I clicked on the attachment and saw the title of the attached "Confidential-Case Plan Report Analysis of Case Including Problems and Recommendations." At this point it became obvious that this was an internal memo sent to the law firm, associated support individuals and the client. It was not meant for me. My cursor is now at the bottom of the e-mail on the box with an arrow pointing down and the question is "Do I press down?" And further if I do press down and read, what do I do then? As I say it has been a long day, it is late at night, and I sure as hell could use some cheering up.

Sincerely,
Poised on the Edge