

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-308
Issued: September 1985

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: If a paralegal leaves a law firm (the “former firm”) and is hired by another law firm (the “hiring firm”), which is the opposing counsel in several cases, does the hiring firm have a conflict of interest?

Answer: Qualified yes.

References: SCR 3.700 Sub-Rule 4; Code of Professional Responsibility (1969), Preamble; Disciplinary Rules 1-102(A)(3), 4-101(D), 5-105(D), and 7-107(J); Ethical Considerations 4-1, 4-2 and 4-5; Philadelphia Opinion 80-77 (1980); Philadelphia Opinion 80-199 (1980); Vermont Opinion 79-28 (1979) (MARU 12841); Vermont Opinion 78-2 (1978) (MARU 12822)

OPINION

This opinion assumes that: (1) the hiring firm is opposing counsel in ongoing litigation; (2) the paralegal worked on the case while employed by the former firm; and (3) the hiring firm knows that the paralegal formerly worked on the case.

The Preliminary Statement to the Code of Professional Responsibility states:

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of a client.

This statement implies that no conflict of interest can be imputed to the hiring firm. Such conflicts are normally imputed under DR 5-105(D), which requires the partners and associates of a “lawyer” to withdraw from or decline employment if the lawyer must decline it or withdraw under DR 5-105. Since the paralegal is not subject to DR 5-105(D), he or she cannot have a conflict of interest which can be imputed to the hiring firm. *See* Vermont Opinion 78-2 (stating that conflict-of-interest rules should not apply to the hiring of paralegals because of the foregoing reason and because (i) it is difficult to distinguish paralegals from other office staff, (ii) paralegals’ job opportunities and mobility

would be limited, and (iii) there is no compelling appearance of impropriety). *But see* Vermont Opinion 79-28 (stating that there is an appearance of impropriety, but declining to state that there is a conflict of interest or that the hiring firm must withdraw).

Despite the foregoing, lawyers have duties regarding the employment of paralegals which can provide a basis for disqualification in the present case. DR 4-101(D) requires a lawyer to exercise reasonable care to prevent employees from disclosing or using confidences or secrets of a client. In addition, Kentucky Supreme Court Rule 3.700 Sub-Rule 4 states: “A lawyer shall instruct the paralegal employee to preserve the confidences and secrets of a client and shall exercise care that the paralegal does so.” Together these rules require that the former firm: (1) instruct the paralegal not to disclose the client’s confidences and secrets after leaving the firm; (2) inform the hiring firm that the paralegal has been so instructed; (3) request that the paralegal not be permitted to work on or discuss the case; (4) request that the hiring firm instruct the paralegal not to disclose confidences or secrets of the former firm’s clients; (5) request that the hiring firm inform the former firm if the paralegal discloses confidences or secrets of the former firm’s client; (6) request that the hiring firm withdraw from the case if the paralegal discloses confidences or secrets of the former firm’s clients; (7) request written assurances from the hiring firm that it will comply with the former firm’s requests; (8) advise the clients of the paralegal’s change in employment; and (9) move to disqualify the hiring firm if the client so requests.

DR 4-101(D) and Kentucky Supreme Court Rule 3.700 Sub Rule 4 do not require the hiring firm to comply with the former firm’s requests. To interpret them otherwise would impose upon lawyers a duty to preserve the confidences and secrets of other lawyers’ clients. But since there is no attorney/client relationship in such cases, there can be no such duty.

Nevertheless, under Canon 9 the hiring firm has a duty to avoid even the appearance of impropriety. When a paralegal joins the opposing firm in a case on which the paralegal formerly worked, there is a possibility of an appearance of impropriety. The hiring firm is presumed to know of the paralegal’s involvement in the case, and thus it may appear that the paralegal has been hired because of his or her involvement in the case. To mitigate this possible appearance of impropriety, the hiring firm must comply with the former firm’s requests as set forth above. If the hiring firm refuses to comply with any of these requests, then it may be disqualified upon the former firm’s motion and after a hearing to determine whether there has been or is likely to be any disclosure of confidences or secret of the former firm’s clients. *See Summit v. Mudd*, 679 S.W.2d 225 (Ky. 1984).

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.