ADVISORY ETHICS OPINION 87-07

SYNOPSIS:

A law firm is not barred from continuing to represent a client in a matter in which an attorney newly hired by the firm had substantial responsibility while employed in the public sector, provided that the firm effectively insulates the attorney from any involvement in or knowledge of the firm's handling of the matter and the procedures used to insulate the attorney are approved by the public agency which formerly employed the attorney.

FACTS:

The Attorney General's Office requests an advisory opinion as to the propriety of consenting to a law firm's continued participation in a civil consumer fraud action where the firm proposes to hire an Assistant Attorney General who had direct involvement in the civil action on behalf of the State. The firm represents one of the defendants in the consumer fraud action. The Assistant Attorney General worked on the case but withdrew from the case prior to negotiating a position with the firm. Although not stated expressly in the request, we assume for purposes of our analysis that the client fully consents to the firm's continued representation should the attorney join the firm.

ANALYSIS:

As a preliminary matter we note that the requesting party in this case is not the attorney whose prospective change of employment is at issue nor the firm considering hiring the attorney but the Attorney General's office which currently employs the attorney. While we normally will not express an opinion as to the ethical propriety under the Code of actions other than those of a requesting attorney, the problem presented does raise the issue of whether the Attorney General can consent to a representation that might otherwise be barred under the Code and thus we believe it appropriate to address the issue presented. We would also note that it is our understanding that the involved attorney, upon inquiry, has joined in the request of the Attorney General.

As acknowledged in the facts presented, the Assistant Attorney General (hereafter the "attorney") had direct involvement in litigation – a consumer fraud action – brought by the state against a client of the firm that the attorney now proposes to join. Disciplinary Rule 9-101 (B) bars the attorney from representing the client. That Rule provides that

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

As we understand the facts, it is conceded that the attorney exercised substantial responsibility in the case while a public employee.

If the attorney now joins the firm representing the client DR 5-105 (D) will require all attorneys in the firm to withdraw from the litigation unless the vicarious disqualification provision of the Rule can be avoided. DR 5-105 (D) states

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

Recently, in Opinion No. 85-8, we addressed a similar problem involving firms in private practice and concluded that a law firm cannot continue to represent a defendant in a civil action after hiring a law clerk who worked on the case while employed by the law firm representing the plaintiff. We did note, however, that the client whose secrets and confidences might be compromised could waive the disqualification bar. The question which thus arises here is whether the waiver option available to private litigants should be available to former public employees where the conflict is rooted in the prohibitions of DR 9-101 (B). DR 9-109 (B) does not provide for such a waiver.[1]

The requester has suggested the creation of a "Chinese Wall", that is, the implementation of various screening precautions designed to insulate the attorney from the firm's litigation pertaining to the consumer fraud case so as to prevent any possibility of the attorney revealing secrets or confidences of his former client or influencing the litigation in any respect. Some cases have found such a procedure to be sufficient to remove a disqualification bar even in the face of an objection by a former client

[1] Interestingly, Rule 1.11 of the ABA Model Rules - the Rule comparable to DR 9-101 (B) - does provide for a waiver of the disqualification of a former public employee and also provides for continued representation by a firm, notwithstanding the disqualification of an attorney in the firm, so long as the disqualified attorney is screened from any participation in the matter and is apportioned no part of the fee therefrom.

still involved in the litigation.[2] To properly analyze the adequacy under the Code of a "Chinese Wall" approach we must examine the interrelationship between DR 4-101 (B), which bars an attorney from revealing a confidence or secret of a client, and DR 9-109 (B). The Disciplinary Rules of Canon 4 apply to public and private practitioners alike, and even though the Rule prohibits only the *knowing* revealing of a confidence or secret, in practice the Rule has been used prophylactically to disqualify an attorney from representing a party in litigation if the attorney previously represented an adverse party in a matter substantially related to the pending litigation.[3] Thus the bar to private employment set forth in DR 9-101 (B) parallels the "substantial relation" test that has been read into DR 4-101 (B) in the case of private practitioners.

The issue thus narrows to whether the disqualification bar of DR 9-101(B) should result in a more restrictive application than the bar created by DR 4-101(B) and DR 5-105(D). Given the absence of an express waiver provision in DR 9-101(B) and the broad reach of DR 5-105(D), strict application might seem to require the automatic disqualification of the firm in this case; however, court cases interpreting the Rules and an ABA opinion have found policy grounds for moderating the impact of the applicable Disciplinary Rules and for approving procedures designed to avoid the representation bar that would otherwise attach.[4] As stated in ABA Formal Opinion 342: "A realistic construction of DR 5-105(D) should recognize and give effect to the divergent policy considerations when government employment is involved." The Opinion goes on to set forth the policy considerations as including "opportunities for government recruitment and the availability of skilled and trained lawyers for litigants. . ." The Opinion concludes that the "DR 9-101(B) command of refusal of employment by an individual lawyer does not necessarily activate DR 5-105(D)'s extension of that disqualification. . . . So long as the [former public employee] is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present." The ABA Opinion makes the following observations with respect to satisfying the objectives of DR 9-101(B):

> The purposes, as embodied in DR 9-101(B), of discouraging government lawyers from handling particular assignments in such a way as to encourage their own future employment in regards to those particular matters after leaving government service, and of avoiding the appearance of impropriety, can be accomplished by holding that DR 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who has not been screened to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility . . . only allegiance to form over substance would justify blanket application of DR 5-105(D) in a manner that thwarts and distorts the policy considerations behind DR 9- 101(B).[5]

As further noted in Formal Opinion 342 the waiver provisions of DR 5-105(C) strongly support the conclusion that the disqualification provisions of DR 9-101(B) should not cause the automatic disqualification of an entire firm joined by a former public employee. The Formal Opinion states:

> It is unthinkable that the drafters of the Code of Professional Responsibility intended to permit the one afforded protection by DR 5-105(A) and (B) to waive that protection [as provided for in DR 5-105(C)] without also permitting the one protected by DR 9-101(B) to waive that less-needed protection. Accordingly, it is our opinion that whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in a particular matter and sharing in the fees attributable to it, that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D).[6]

The use of appropriate screening procedures to insulate a former public employee from on-going litigation in a matter as to which he had substantial responsibility as a public employee was approved by the Second Circuit in *Armstrong v. McAlpin, supra.* In *Armstrong,* a court appointed receiver hired the Gordon law firm to represent him in litigation against defendant McA1pin. McA1pin was a former top executive of the company in receivership and was a principal target of an SEC complaint. A supervisory attorney in the enforcement division of the SEC, Attorney Altman, who concededly had substantial responsibility for the SEC investigation of McAlpin, had earlier left the SEC and joined the Gordon firm. McAlpin moved to disqualify the Gordon firm based on Altman's association with the firm. The Gordon firm implemented screening procedures to insulate Altman from the litigation. The Court accepted the District Court's findings with respect to the screening that

[2] *Nemours Foundation v. Gilbane,* 632 F.Supp. 418 (D.Del.1986). *See also Armstrong v. McAlin*, 625 F.2d 433 (2d. Cir. 1980) (disqualification not required where screening procedures utilized even though a party to the action other than the former client objects). *But see Cheng v. GAF Corporation,* 631 F.2d 1052 (2d Cir. 1980). Here, the attorney's former client - the state - and the law firm's client have no objection to the firm continuing its representation in the case after the attorney joins the firm provided certain screening procedures are implemented. We assume for purposes of this analysis that other defendants in the action will likewise have no objections to the arrangements proposed. Should a co-defendant raise an objection - as might occur if there is a conflict between co-defendants - the analysis set forth herein may still apply but we do not address that contingency.

[3] *Silver Chrysler Plymouth. Inc. v. Chrysler Motor Corporation,* 370 F. Supp. 581 (E. D. N.Y. 1973), *affirmed* 518 F.2d 751 (2d Cir. 1975); ABA Formal Opinion 342 at pages 110-111; *see also Cheng v. GAF Corp., supra* (suggesting that the protections of DR 4-101 (B) may extend to "inadvertent" disclosures).

[4] *Armstrong v. McAlpin,* 625 F.2d 433 (2d Cir. 1980); ABA Opinion 342.

[5] ABA Formal Opinion 342 at 120-121.

[6] *Id.* at 121.

> Altman is excluded from participating in the action, has no access to relevant files, and derives no remuneration from funds obtained by the firm from prosecuting this action. No one at the firm is permitted to discuss the matter in his presence or allow him to view any documents related to the litigation, and Altman has not imparted any information concerning growth fund to the firm.

The Court concluded that Altman had been effectively screened from participation in the case and that the Gordon firm could therefore continue its representation of the receiver. The Court rejected a further argument that the Gordon firm's continued representation of the receiver raised an appearance of impropriety finding that "under the circumstances, the possible 'appearance of impropriety is simply too slender a reed on which to rest a disqualification order. . .'"[7]

Armstrong can be distinguishable from the circumstances presented here in that in *Armstrong* the SEC was on essentially the same side of the litigation as was the receiver, and in fact, as the Court noted, the SEC file had been turned over to the receiver prior to the receiver retaining the Gordon firm. Thus, the possible appearance of impropriety was significantly lessened. Nonetheless, the principle of utilizing screening procedures and safe-guards that meet the approva1 of the former public agency, sanctioned by the court in *Armstrong,* seems an appropriate way to meet the policy objectives of DR 9-101(B).

The screening arrangement proposed by the Attorney General's office is as follows:

1. The attorney will be excluded from any participation in the case.

2. The attorney will not have any access to the firm's files in the case.

3. The attorney will receive no portion of any remuneration received by the firm for its work on the case.

4. The attorney will not disclose to firm members or the firm's client any information acquired while working on the case for the state.

5. All members and employees of the firm will be informed of the screening arrangement and instructed not to discuss the case in the attorney's presence and not to disclose any case materials to hint.

We find these screening procedures to be appropriate and facially adequate and conclude that, conditioned upon the implementation of the above-described screening procedures, the attorney may join the firm without causing the firm's disqualification from the lawsuit.

[7] *Armstrong v. McAlpin,*. 625 F.2d at 445 citing *Board of Education v. Nyquist,* 590 F2d 1241 at 1247 (2d Cir. 1979).