

THE ETHICAL WALL

Its Application to Paralegals

INTRODUCTION

The legal system, as the law, is in a constant state of flux. This state of flux has been shaped by many innovations that have caused law service providers to grow to unprecedented sizes to meet these needs. Changes have occurred through branching, merging and expanding internally as well as contracting. Practices such as alternative dispute resolution, task-based and value-based billing, fast-track litigation, e-mail, the Internet, video depositions, and computers are only some of the activities that have changed the practice of law.

As information technology continues to expand, the impact to the legal profession will only intensify. Consider corporate legal departments that have grown to accommodate a corporation's legal needs using in-house personnel. And, compare the foregoing to law firms that have experienced a reduction in their size as a result of economic necessity, abandonment by lawyers or due to the disintegration of the relationship between the firms' partners.

Moreover, the practice of law has become increasingly focused around specific substantive areas. The legal profession has experienced a dramatic change in its composition. More women and minority counsel have joined firms. As a result of this evolution, paralegals have emerged as an integral part of the legal system.

This professional evolution has magnified the potential for both inter- and intra- firm conflicts of interest involving lawyers and paralegals. The risk of conflicts arises exponentially with the size of the firm as well as the dynamics of personnel transitions.

The plain fact is that lawyers and paralegals have become more mobile. The competition for lawyers and paralegals with superior professional credentials has caused many firms and corporations to engage individuals who were previously employed by other firms.

The foregoing considered with increasing frequency, law firms and corporations are faced with the possibility of disqualification because of conflicts of interest.

Although there are many types of conflicts of interest, the focus of this monograph is to discuss the potential conflicts of interest these law firms face when they hire paralegals from other firms, and to identify the ethical responsibilities of the paralegal, the employer and the former employer.

DEFINITIONS

For the purposes of this discussion, the following terms are defined:

PARALEGAL/LEGAL ASSISTANT

The National Federation of Paralegal Associations defines a paralegal/legal assistant as a person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work.

LEGAL ETHICS

"Usages and customs among members of the legal profession, involving their moral and professional duties toward one another, towards clients, and toward the courts. That branch of moral science which treats the duties which a member of the legal profession owes to the public, to the court, to his professional brethren, and to his clients."¹

CONFLICT OF INTEREST

"Term used in connection with the public officials and fiduciaries and their relationship to matters of private interest or gain to them. Ethical problems connected therewith are covered by statutes in most jurisdictions and by federal statutes on the federal level."²

CHINESE WALL (Hereinafter referred to as "Ethical Wall" or "Screen")

"Ethical Wall" means the screening method implemented in order to protect a client from a conflict of interest. An Ethical Wall generally includes, but is not limited to, the following elements: (1) prohibit the paralegal from having any connection with the matter; (2) ban discussions with or the transfer of documents to or from the paralegal; (3) restrict access to files; and (4) educate all members of the firm, corporation, or entity as to the separation of the paralegal (both organizationally and physically) from the pending matter.³

DISCUSSION

I. History of the Regulation of Conflicts of Interest in the Legal Profession

Regulation of conflicts of interest in the legal profession is of ancient origin and predates the paralegal profession by centuries. Indeed, as early as the thirteenth century, the London Ordinance of 1280 prohibited lawyer conflicts of interest.⁴ Seven centuries later, the 1908 ABA Canons of Professional Ethics were established as statements of expected conduct of lawyers,⁵ and addressed this concern. Specifically, Canon 6 stated that it was "unprofessional to represent conflicting interests."⁶

As the profession continued to evolve, Canon 5 of the ABA Model Code of Professional Responsibility (the "Model Code") articulated the same objective. It stated, "a lawyer should exercise independent professional judgment on behalf of a client." As a corollary, Model Code Disciplinary Rule 5-105 (A) and (B) generally prohibited the lawyer from accepting a case if the lawyer's own interests might affect the lawyer's professional judgment or it would likely involve the lawyer in representing differing interests.

In addition, Canon 9 of the Model Code provided, "a lawyer should avoid even the appearance of professional impropriety." Specifically, Ethical Consideration 9-6 was oriented toward an aspirational

¹ Black's Law Dictionary (894) (6th Edition, 1990).

² Black's Law Dictionary (299) (6th Edition, 1990).

³ NFPA Model Code of Ethics and Professional Responsibility, May 1993 (Definitions).

⁴ H. Drinker, in Legal Ethics cites a provision by H. Cohen in the London Ordinance of 1280 prohibiting lawyer conflicts of interest in History of the English Bar (1929).

⁵ The American Bar Association is a voluntary association whose ethics rules do not govern any particular jurisdiction. However, many states look to the ABA for guidance. While it is important to note that the ABA Rules and the Model Code specifically regulate the conduct of lawyers, not paralegals, many practicing paralegals adhere to the standards promulgated in the ABA Model Rules of Professional Conduct and its predecessor, the Code of Professional Responsibility.

⁶ C. Wolfram, Modern Legal Ethics (1960).

standard associated with Canon 9, to wit: an ethical lawyer is "to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect and trust of his clients and of the public"⁷ in the representation of a corporation, union, governmental agency or other entity (§8.3).⁸

Finally, the ABA Model Rules of Professional Conduct (the "Model Rules"), adopted in 1998, contain guidelines to the ethical practice of law. Model Rules 1.7 through 1.12 discuss various conflicts of interest. (See Appendix 1)

A cardinal tenet of the legal profession is that a lawyer has a duty of loyalty to the client, and is prohibited from undertaking matters directly adverse to that client. Thus, the lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is unrelated.

A lawyer also may not be adverse to a former client if the lawyer formerly represented the client on the "same or substantially related matter" or if the lawyer acquired material confidences from the former client that could be used to the former client's detriment. Further, a lawyer must also consider whether potential representation of the client will adversely affect his/her independent professional judgment in handling that client's case.

The paralegal profession is currently not regulated by a singular, uniformly adopted protocol. Instead, state statutes and ethics opinions govern the conduct of paralegals. Nonetheless, paralegals do adhere to standards of ethical conduct promulgated by their own professional associations.

Attorney-client confidentiality involving individuals who were not attorneys has been equally addressed in the Model Rules. Model Rule 1.6 recognizes that non-lawyer employees could be exposed to confidential professional information as a result of normal law office operation. This "confidential professional information" is more clearly defined in Model Rule 1.9 as "confidences." Confidences are "information protected by attorney client privilege under application of applicable law," and secrets as "other information gained in the professional relationship that the client has requested to be held inviolate or disclosure of which would be likely to be detrimental to the client."

The issue of whom the attorney-client privilege extends has been an issue about which much has been written. Cases have specifically addressed disclosure to non-lawyers. In von Bulow v. von Bulow,⁹ it was asserted that "a lawyer may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff -- secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants."

The existence of the attorney-client privilege with respect to a given communication is a matter of law, not ethics.¹⁰ The commonly-cited formulation of attorney-client privilege has been stated as follows: (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.¹¹

⁷ ABA Model Code of Professional Responsibility.

⁸ C. Wolfram, *Modern Legal Ethics* (1986)

⁹ *von Bulow v. von Bulow*, 811 F.2d 136 (1987)

¹⁰ R. Aronson & D. Weckstein, *Professional Responsibility in a Nutshell* (1986)

¹¹ 8 Wigmore, *Evidence*, §2292 (McNaughton re. ed. 1961).

In May 1993, The National Federation of Paralegal Associations, Inc. ("NFPA"), which represents over 17,000 members, adopted a Model Code of Ethics and Professional Responsibility ("NFPA Model Code") to establish the principles for ethical behavior to which every paralegal should aspire.

Many paralegal associations throughout the United States have endorsed the concept and content of NFPA's Model Code through adoption of their own ethical codes. In doing so, paralegals have echoed the profession's commitment to increase the quality and efficiency of legal services, as well as recognized their responsibilities to the public, the legal community, and colleagues.

Prior to the adoption of the NFPA Model Code, the creation of an ethical framework was always one of NFPA's priorities. In 1977, The Affirmation of Professional Responsibility of NFPA obligated its members to "maintain the highest standards of ethical conduct" and "preserve client confidences and privileged communications." The standard also provided that, "confidential information and privileged communications are a vital part of the attorney, paralegal and client relationship. The importance of preserving confidences as privileged information is understood to be an uncompromising obligation of every paralegal."¹²

Twenty years later, in April 1997, NFPA adopted the Model Disciplinary Rules to make possible the enforcement of the Canons and Ethical Considerations contained in the NFPA Model Code. A concurrent determination was made that the Model Code of Ethics and Professional Responsibility, formerly aspirational in nature, would be recognized as creating a mandatory set of standards for all paralegals. (See Appendix 2)

Ethical Consideration 1.6 of the NFPA Model Code requires that paralegals avoid any conflict of interest and includes a provision relating to the potential conflicts arising from previous assignments.

The fundamental principle embedded in the attorney-client relationship extends to every paralegal since the paralegal is considered an extension of the lawyer.

In 1991, the ABA's policy making body, the House of Delegates, adopted the Model Guidelines for the Utilization of Legal Assistant Services ("Model Guidelines") to provide guidance to lawyers in their efforts to ensure that the conduct of paralegals complies with the lawyer's ethical obligations. (See Appendix 3)

Model Guidelines in Guideline 1 provides that the lawyer should take reasonable measures to ensure that the legal assistant's conduct is consistent with the lawyer's obligations under the ABA Model Rules of Professional Conduct.

Presently, the responsibility for ascertaining the highest standard of a paralegal's ethical conduct ultimately lies with the lawyer. The lawyer must make reasonable efforts to ensure that the paralegal's conduct is consistent with the lawyer's ethical and professional obligations. In this connection, Model Rule 5.3, Responsibilities Regarding Non-lawyer Assistants, states:

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

¹² National Federation of Paralegal Associations, Inc., Affirmation of Professional Responsibility (1977, Amended 1981).

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Model Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved, or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.¹³

II. The Paralegal's Role in Legal Practice

Changes in the means for delivering legal services to the general public caused by the changes in the law firm structure due to economic necessity have moved paralegals into a profession that increased access to cost-efficient, effective and quality legal services. As a result, paralegal responsibilities have become more defined to include the delivery of substantive legal services by paralegals.

Critically, by necessity, in order to perform substantive legal services, paralegals have access to material information relating to the representation of a client that was previously reserved for attorneys. In 1933, the Supreme Court of Washington found that the work of a non-lawyer must be such that it "loses its separate identify and becomes either the product or else merged in the product, of the attorney himself."¹⁴

Interestingly, it is most likely that the court was not considering the paralegal profession at that time since it had yet to emerge. However, the indistinction between the work of a lawyer and a paralegal can be inferred from the court's opinion.

More recently, when considering the recoverability of paralegal time as a portion of attorney fees, Supreme Court Justice Brennan included the following observation in a footnote with his opinion for the Court:

It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses, assistance with depositions, interrogatories, and document production, compilation of statistical and financial data; checking legal citations; and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal.¹⁵

Within the Jenkins¹⁶ opinion itself, and not in a footnote, the Supreme Court observed that a paralegal has exposure to facts, legal analysis and attorney strategies developed which include

¹³ ABA Model Rules of Professional Conduct (1998).

¹⁴ *Ferris v. Sniveley*, 172 Wash. 167, 19 P.2d 942, 945-946 (1933).

¹⁵ *Missouri v. Jenkins*, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989), Footnote 10.

¹⁶ *Missouri v. Jenkins*, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989).

information otherwise protected by attorney-client privilege. Under the ultimate supervision of an attorney, in most cases, paralegals perform a variety of legal functions. These functions can include conducting client interviews, fact gathering, drafting pleadings, preparing tax returns, preparing and maintaining corporate documents and reports, legal research, and attendance at depositions, trial or real estate closings to assist the attorney.

The foregoing notion had been recognized in an earlier federal circuit court case, U.S. v. Cabra.¹⁷ There, the notes taken by a paralegal at trial were protected by the attorney-work product privilege.

With the decisions in Cabra and Jenkins, the use of the paralegal has been extended to other areas. Many federal and state governmental and administrative agencies authorize paralegals to represent and advise clients and prepare forms.¹⁸ Supervised legal services for the indigent have also become more accessible through utilization of paralegal or paralegal services.¹⁹

This increased use of paralegals has led to another area susceptible to conflict of interest concerns. Much like attorneys, paralegals now move to other firm's where former clients are represented. This movement creates a tension that is reflected in the ethics rules. All lawyers and paralegals have fiduciary duties to their law firm. This means that they cannot be disloyal to the firm while they are employed. However, lawyers are unique in the professional world in that they cannot have non-compete provisions. Lawyers are encouraged to move from place to place to allow clients the freedom to choose whatever lawyer they want. They are one of the only, if not the only profession that has a prohibition on non-competition. This concept is derived from the concept that the clients' interest must be protected as stated in the ABA's Legal Ethics Formal Opinion No. 99-414 issued September 8, 1999. It states:

A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients' interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him. The departing lawyer and the responsible members of her firm who remain must take reasonable measures to assure that the withdrawal is accomplished without material adverse effect on the interests of clients with active matters upon which the lawyer currently is working. The departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure that prompt notice is given to clients on whose active matters she currently is working. The departing lawyer and responsible members of the law firm who remain also have ethical obligations to protect client information, files, and other client property. The departing lawyer is prohibited by ethical rules, and may be prohibited by other law, from making in-person contact prior to her departure with clients with whom she has no family or client-lawyer relationship. After she has left the firm, she may contact any firm client by letter.

However, the desire to protect the clients' interest by allowing lawyers to move from firm to firm will not provide a defense if certain mechanisms are not in place. For instance, in SK Handtool Corporation v. Dresser Industries, Inc.,²⁰ the Chicago law firm of Winston & Strawn hired a lawyer without doing a conflicts check, and without putting in place an ethics screen. Winston & Strawn later found out that the lawyer had worked on the other side of a big case that the firm was handling. It put an ethics screen in place, but it was five weeks after the lawyer joined the firm. The court disqualified the firm, despite the lawyer filing an affidavit indicating that he had not shared any confidences with anyone at Winston & Strawn. This case had already been pending for nine years. Winston & Strawn

¹⁷ *U.S. v. Cabra*, 622 F.2d 182 (5th Cir. 1980).

¹⁸ Results of the 1984 Survey on Non Lawyer Practice Before Federal Administrative Agencies, ABA Standing Committee on Lawyer's Responsibility for Client Protection and the ABA Center for Professional Responsibility.

¹⁹ *People v. Perez*, 24 Cal. 3d 133, 594 P.2d 1 (1979).

²⁰ *SK Handtool Corporation v. Dresser Industries, Inc.*, 246 Ill.App.3d 979, 619 N.E.2d 1282

lawyers had taken 85 days of depositions and spent over 10,000 hours of time on the case before being disqualified.

Case law seems to suggest that paralegals will be held to the same standards as attorneys. In a California case, In re Complex Asbestos Litigation,²¹ the plaintiff's lawyer was disqualified from some cases as a result of his paralegal's prior employment with a firm that had represented other defendants in a case. Also, In re American Home Prods. Corp.,²² a law firm was disqualified for hiring a legal assistant from its opponent's law firm. There was no evidence of record that any Screen or Ethical Wall had been used.

Significantly, when the correct procedures are put in place, the court is more likely to rule in your favor. As shown in David Rivera, et al. v. Chicago Pneumatic Tool Company, et al.,²³ an unpublished decision, the court in its Memorandum of Decision Re: Motions to Disqualify Plaintiff's Counsel referenced the ABA Standing Committee on Ethics and Professional Responsibility's 1988 informal opinion in which the court concluded under the ABA Model Rules of Professional Conduct, a "law firm that hires a paralegal formerly employed by another firm may continue to represent clients whose interest conflict with the interest of clients of the former employer on whose matters the paralegal has worked..." in denying the Motion to Disqualify.

It found the defendants had not met their burden to show that the paralegal had disclosed confidential information to his/her new employer. Moreover, it opined the Ethical Wall erected to ensure confidences appeared sufficient and reasonable.

The Rivera court noted that plaintiff's counsel had erected an Ethical Wall which included, among other actions, having the paralegal execute an affidavit stating that s/he would have no contact with the files, nor would s/he discuss the files with anyone in plaintiff's firm or disclose any information s/he acquired in his/her former position. Further, the presiding judge noted that the plaintiff's attorney handling the case would have no direct contact with the paralegal nor would they be permitted in the vicinity of the files which were to be kept locked.

Understanding various interpretations of whether the attorney-client privilege extends to a non-lawyer is a necessity. Establishment of whether a paralegal's substantive legal work includes knowledge which would be subject to this privilege needs to be considered to discuss a conflict of interest in relation to the paralegal. Ultimately, the interpretations of the clients' interests will be at issue.

As the paralegal profession continues to be recognized, the particular tasks performed will be deemed sufficiently substantive to suggest that the "confidences and secrets" should not be used to the client's disadvantage, and should be preserved at any expense.

III. The "Ethical Wall" Concept

As the size and configuration of law firms change, thus change the relationships between attorneys, paralegals and clients affiliated with them. Recognizably, modern firms are affected by the mobility of attorneys and paralegals. However, clients may also move from firm to firm.

²¹ *In re Complex Asbestos Litigation*, 232 Cal.App.3d 670, 283 Cal.Rptr. 732 (1991)

²² *In re American Home Prods. Corp.*, 985 S.W.2d 68 (Tex. 1998)

²³ *David Rivera, et al. v. Chicago Pneumatic Tool Company, et al.*, No. 51-63-64 (Superior CT., Judicial District of New London, Conn., 8/5/91)

If an effective "Ethical Wall" or "Screen" is not in place, representation of some clients may lead to disqualification based on a lawyer's duty to protect a client's confidence and secrets,²⁴ to serve a client with undivided loyalty,²⁵ and to avoid even the appearance of impropriety.²⁶ Consequently, if an ethical conflict is found sufficient to disqualify an individual attorney, then, under traditional rules, the disqualification may extend to (imputed) the entire firm with which he or she is associated.²⁷

Law firms faced with the challenge of defending against a disqualification have attempted to rebut this presumption of imputed knowledge by adopting procedures designed to create an impermeable barrier to the exchange of confidential information between professionals at a firm. The defined term Ethical Wall is a procedure aimed to isolate the disqualification of an attorney to the lawyer or lawyers carrying the confidential information that is the source of the ethical problem, and thereby allowing other attorneys in the firm to carry on the representation free of any taint or misuse of confidence.

At a minimum, an Ethical Wall should prohibit discussion of sensitive matters, limit circulation of sensitive documents, and restrict access to files.²⁸ Typical segregation procedures include prohibiting the attorney or attorneys who "carry" the confidential information from having any connection with the case, banning relevant discussions with or the transfer of relevant documents to or from other counsel, restricting access to files, educating all members of the firm as to the importance of the law, and separating both organizationally and physically, groups of attorneys working on conflicting matters.²⁹

The effectiveness of an Ethical Wall depends on the development of routine internal procedures for handling confidential information. Firms must keep records of all procedural screening devices, including but not limited to limitations on access to files, restrictions on correspondence between attorneys and clients and among attorneys within the firm, and special routing of calls, etc.

A law firm must also take appropriate steps to educate every member of its firm as to the prohibition on exchange of information. A policy statement relating to the existence of specific Ethical Walls should be circulated and methods for enforcement, including sanctions, should be announced and implemented.

Although some educational meetings may seem unimportant to some office staff, they may make the difference between a successful and an unsuccessful screening effort. Awareness for the need of confidentiality is necessary to insure compliance with screening procedures and to minimize or prevent damage when those procedures are not followed.³⁰

One must assume that a paralegal collaborating closely with an attorney would have access to confidential information relating to a client and/or a case and therefore should be subject to the same restrictions as imposed on the attorney. Consequently, the Ethical Wall must extend to paralegals and other non-lawyer personnel.

²⁴ "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation." Rule 1.6.

²⁵ "A lawyer should exercise independent professional judgment in considering alternatives or foreclose courses of action." Rule 1.7.

²⁶ "A lawyer is prohibited from engaging in conduct that is prejudicial to the administration of justice." Rule 8.4

²⁷ Rule 1.10 has been relied upon by Courts in disqualification proceedings as a firm-disqualification rule. It reads: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so." See e.g. *McKenzie v. St. Croix Storage Corp.*, 961 F.Supp. 857 (D.C.Vi. 1997).

²⁸ *Kesselhaut v. United States*, 555 F.2d 791 (Ct. Cl. 1977)

²⁹ "The Chinese Wall Defense to Law Firm Disqualification: 128 U. Pa. L. Rev 677 (1980) [hereinafter cited as Note, *Chinese Wall Defense*].

³⁰ 94 Harv. L. Rev. 1244 (1981)

The Ethical Wall is designed to provide a procedural surrogate to strict confidentiality of case information by ensuring that a lawyer or paralegal will not breach his/her underlying duties. As a practical matter, the erection of an Ethical Wall can, in effect, enhance an attorney's or paralegal's mobility.

It is important to note that ethics rules take an entirely different approach when a lawyer or paralegal moves from one private law firm to another and when they move from the government to a private firm. When a lawyer or paralegal moving from one firm to another firm is involved, the law firm must obtain its adversary's consent or it will risk having the law firm disqualified (unless the move occurs in one of the handful of states allowing "self-help" Ethical Walls for private firm transfers.) In this case, the law firm under the Model Rules would not be able to engage in "self-help" by setting up an "ethics screen" before bringing the new lawyer or paralegal on board. The law firm must get the adversary's consent before the new lawyer or paralegal begins working at the firm. In this instance, the "ethics screen" may only be used as an inducement to obtain the necessary consent from the old firm.

On the other hand, if the lawyer or paralegal moves from the government to a private firm, in most states the law firm will not risk being disqualified as long as a proper "ethics screen" has been put in place.³¹ The government's consent is not required. Presumably this variation is based on the different way in which government lawyers practice law and on society's interest in encouraging lawyers to enter government service -- by making it easier for them to leave government service and rejoin the private work force.

IV. Application of the Model Rules to the Paralegal

For the purpose of discussion, assume that every conflict of interest found for an attorney is applicable to a paralegal. The purpose of this discussion is for those attorneys or paralegals who "switch sides" or change employers.

If, as New Jersey Advisory Committee on Professional Ethics Opinion 546 concludes, there is an irrefutable presumption that a conflict of interest exists when a paralegal switches sides, and there also exists a duty to avoid the appearance of impropriety, an attorney's moral obligations to his client requires disqualification. Model Rule 8.4 provides that it would be a violation of the Code provisions to permit, assist or encourage a non-lawyer to engage in conduct which, if committed by the lawyer, would be immoral, unethical and violate the Model Rules.

A less dramatic interpretation of the Model Rules considers protecting the client's interests at the same time as enabling a firm to continue representation by screening and isolation of paralegal employees. A departing paralegal must protect the confidences and secrets of the former firm's clients. Prudence would dictate that departing paralegals be reminded of their obligation to the confidentiality of firm matters in which s/he participated.

Critical to this discussion Model Rule 1.9 requires both the former and the hiring firm to exercise reasonable care to prevent a paralegal from disclosing or using a client's confidences and secrets. Moreover, Model Rule 5.3 prevents misuse of the information by a paralegal employee. The hiring firm is also obliged to effectively and routinely screen new employees from any participation in any cases that the opposing firms have in common.

³¹ See Model Rule 1.11.

Various precedents provided guidance in this discussion. In Kapco Mfg. Co. v. C & O Enter.,³² a law office manager/secretary who gained substantial confidential information at one firm did not participate or discuss the mutual case upon employment at the opposing firm. While plaintiff's attorney met the burden of proof that a prima facie case for disqualification existed by showing exposure to confidential information because it was not shown the non-lawyer had further involvement in the matter or had discussed it, the defense prevailed and disqualification was denied.

Likewise, in Herron v. Jones,³³ disqualification was denied when it was found that no disclosure had occurred. However, when disclosure of confidential information was revealed, disqualification was granted. Williams v. TWA.³⁴

On point is the case of Quinn v. Lum.³⁵ In the foregoing lawsuit, the defendant worked as a secretary for a firm specializing in the defense of doctors and health care providers. Upon receiving her paralegal certificate, she accepted a position in a firm devoted to plaintiffs' oriented health care issues.

The paralegal's former employer sought an injunction against her new employer in spite of attempts to establish an Ethical Wall and assurances that defendant, by her new employer, would preserve confidences. Because the judge believed the defendant understood her professional responsibilities to her former firm's clients, he saw no reason not to respect the wall which she and her new employer erected, and denied the relief sought.³⁶

The Model Rules only provide for the legal service provider when they have not had any access to the information from their previous employer. Specifically, Model Rule 1.10 provides that "if the new attorney employee did not work on a matter, nor was he privy to its confidential information while at the previous employ, it is acceptable that he work on the matter at the new firm." This would also apply to paralegals who did not work on a matter nor were exposed to confidential information pertaining to the matter.

Another important factor in a conflict of interest situation is the responsibility of all parties involved to notify the affected client. Model Rule 1.4(b) directs that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The burden of notice is on the lawyer to initiate the question of consent. And, Model Rule 1.7 delineates specific elements that must be present for a viable consent to exist.

The client's consent is necessary to avoid disqualification.³⁷ There is much controversy regarding client consent, even when the conflict involves an attorney. It is assumed that similar standards would apply to paralegals, and perhaps be more complicated when articulating the paralegal's role and exposure to confidential information.

No precedent exists as to the application of the doctrines of waiver, estoppel and laches as applied to consent of conflict of interest regarding paralegals. If all other doctrines regarding conflict of interest situations are accepted, so too should the doctrines of waiver, estoppel and laches apply. Once disclosure of the apparent conflict is accomplished, time will not cure a failure to object in a timely fashion.

³² *Kapco Mfg. Co. v. C & O Enter.*, 637 F. Supp. 1231 (N.D. Ill 1985).

³³ *Herron v. Jones*, 276 Ark. 493, 637 S.W.2d 569 (1982).

³⁴ *Williams v. TWA*, 588 F. Supp. 1037 (WD MO 1984).

³⁵ *Quinn v. Lum*, Civ No. 81284 (HI 1984).

³⁶ Orlik, "Ethics: The Chinese Wall; Fact or Fiction," *Legal Assistant Today*, Sept./Oct. 1988 at 48.

³⁷ See Model Rule 1.8.

V. Creating an Ethical Wall

To create an Ethical Wall and prevent the appearance of impropriety involves establishing internal procedures for the screening of lawyers, paralegals and staff. The screening procedures should be firm wide in order to prevent the inadvertent flow of confidential communications and should be developed with the expectation that they will be subjected to judicial scrutiny upon a motion for disqualification.³⁸

While there is no clearly defined set of procedures on the construction of an Ethical Wall, case law suggests, and some courts approve following components set forth below:

1. All employees of the law firm must be informed of the importance of not sharing information. A strong policy statement from management against passing information to other departments, accompanied by an educational program for employees, is considered essential if an ethical wall is to be minimally effective.³⁹
2. A firm must prevent those with confidential information from discussing the case or client with others in the firm. Have a firm meeting to discuss the importance of confidentiality and why, exactly, an Ethical Wall is built. The firm must take appropriate educational steps to make every member of the firm aware of the ban on exchanges of information.
3. Files must be administered to restrict access. The files must be marked so they can be easily identified. If possible, all files should be maintained under the Ethical Wall separated or under lock and key from those in the general file areas. Interoffice memos should be distributed containing instructions on the "do's and do not's" relating to these files. The memo should contain information stating the reasons for the segregation of certain files, and if there is any question as to who is not allowed to review certain files, there should be a contact person identified in the memo.
4. Clients' should be notified of potential conflicts of interest and their consent obtained to avoid disqualification.⁴⁰
5. Upon departure from the firm, paralegals should be "debriefed" and advised of the need for maintaining confidences and execute and advice that restates the proposition.

Courts often look at other factors, such as the substantiality of the relationship and time lapse between matters, size of the firm, number of disqualified lawyers, nature of disqualified lawyers' involvement and timing of the wall.⁴¹

Various judicial decisions will invariably involve situations where the opposing side of a conflict becomes aware of the conflict and moves to have the conflicted law firm disqualified. Accordingly, consideration should be given to notifying opposing counsel as soon after the conflict has been discovered and work out an amicable solution. The foregoing action satisfies the ethical obligation to a court not to intentionally deceive the judicial system.

Moreover, if a motion for disqualification is filed, a court can be presented with information to support the defense that as soon as the conflict became known, an Ethical Wall was erected to prevent the conflicted employee from the particular case(s) and the opposition was notified.⁴²

³⁸ *Chinese Wall Defense*, supra Note 17 at 711-13 Orlik, "Ethics: The Chinese Wall; Fact or Fiction," *Legal Assistant Today*, Sept./Oct. 1988 at 48.

³⁹ Herzel & Calling, *The Chinese Wall and Conflicts of Interest in Banks*, 34 Bus. Law 73 (1978).

⁴⁰ See Model Rule 1.8.

⁴¹ Note, *Chinese Wall Defense*, supra Note 16 at 711-13.

When a paralegal changes employers, there is always potential for a conflict of interest, especially if the paralegal is employed in a small state or practicing in a particular legal specialty. The current and the future employer have a responsibility to take measures to insure that any potential conflict is recognized.

The ABA Committee on Ethics and Professional Responsibility in its Opinion No. 88-1526 (6/22/88) has recommended that the legal assistant must be warned: (1) not to divulge any information relative to the representation of a client of the former employer; and (2) not to be involved in any way in any case in which the legal assistant worked in prior employment. Upon receipt of the legal assistant's resignation, the employer should advise the legal assistant that she/he should not disclose any information obtained during his/her employment.

The new legal employer also has a responsibility to insure that the paralegal has not worked on a matter with a former employer that could constitute a conflict of interest. This can be accomplished in a conflict of interest interview in smaller firms.

The application of a more formal screening mechanism may be more useful in larger, multi-office firms. For example, a conflict of interest questionnaire could be presented to the new paralegal during the initial day of employment. This should include questions relating to names in cases the paralegal worked on at other firms, being careful to not divulge confidential information obtained while working at a prior law firm.

Further in the large firm, a completed questionnaire would be subsequently sent to the firm's conflict staff person to review for any potential conflicts. If it is determined there is a potential conflict, an Ethical Wall must be created around that employee.

To create an Ethical Wall, the firm could ask the paralegal to execute an affidavit stating that s/he will have no contact with the files, have no discussions with anyone in the firm or disclose any information acquired while working with a former employer. The attorney(s) for the case should have no contact with the paralegal. If possible, file drawers should be segregated and secured to avoid any inadvertent exposure to information contained in them.

In sum, law firms should have written procedures on constructing an Ethical Wall detailing the screening process and actions to be taken in the event a conflict is determined. The better the documentation and comprehensive these screening procedures, the better prepared any firm will be if put to the test to involving possible disqualification.

CONCLUSION

The expanded role of the paralegal has caused many to look at the conflict of interest doctrine and its relationship to paralegals. Paralegals are performing more and more substantive legal work and have become an integral part of the delivery of legal services to the public.

With access to material information received in the lawyer's representation of a client, it is necessary to determine whether a paralegal has any conflicts relating to cases being handled by a particular lawyer and/or law firm. For example, a paralegal may have been involved in one side of a case while working with one employer and now working for another employer who is also representing a different party in the same case.

⁴² Orlik, "Ethics: The Chinese Wall; Fact or Fiction," *Legal Assistant Today*, Sept./Oct. 1988 at 48.

Paralegals are not legally bound by the ABA Model Rules of Professional Conduct (its predecessor, the Code of Professional Responsibility) or the NFPA Model Code of Ethics. However, every paralegal should be knowledgeable with these standards and adhere to them. Presently, it is the responsibility of the lawyer to supervise the conduct of a paralegal and ensure that it is within those Model Rules.

During the course of employment, paralegals are exposed to facts, strategies, analysis and conclusions protected by attorney-client privilege and work-product privilege. The preservation of a client's confidences and secrets must be of the utmost concern by all individuals associated with the extension of legal services. When a substantial risk of conflict exists, providers of legal services have an ethical and moral obligation to remove all doubts against the impropriety of the representation.

A critical element when determining the impropriety of potential representation is to determine the paralegal's prior exposure to a matter. It must be determined if the paralegal was exposed to confidential information, and, if so, the result must be the erection of an appropriate Ethical Wall that will segregate the information from them.

In the alternative, previous exposure to client confidences can be avoided by an effective screening process. If a conflict is identified, full disclosure is necessary. After the client has received full disclosure of the paralegal's prior involvement, a voluntary consent of the client may be extended and disqualification is not necessary.

The paralegal profession has evolved to increase access to cost-efficient, effective and quality legal services. It is important for paralegals to have mobility in employment opportunities, but paramount is the obligation to protect clients' interests.

Any undue limitation of the ability of the paralegal to participate in the delivery of legal services neither serves the client or the legal profession. In the last analysis, the proper use of an Ethical Wall or Screen is not intended to create any limitation of employment opportunities for paralegals, but to protect the present and/or former employer from disqualification, to protect the client, and above all, maintain the stature of the profession.

APPENDICES

APPENDIX 1 ABA Model Rules of Professional Conduct, 2009 Edition, Rules 1.7-1.12, Conflicts of Interest

http://www.abanet.org/cpr/mrpc/mrpc_toc.html

APPENDIX 2 National Federation of Paralegal Associations, Inc. Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement

http://www.paralegals.org/associations/2270/files/Model_Code_of_Ethics_09_06.pdf

APPENDIX 3 ABA Model Guidelines for the Utilization of Paralegal Services