

COMMITTEE: Ethics Committee

DATE: April 2015

RULE 3.3-1: CONFIDENTIALITY ISSUES CONCERNING OFF-SITE WORD PROCESSING

A lawyer contemplates engaging a person who would do word processing for his firm. The person would not work at the same location as the firm and would likely work from home. He recognizes that this creates potential conflict issues and asked the advice of the Ethics Committee concerning the work arrangements. An extract from his letter of March 18, 2015 states:

At the outset, the off-site word processor (the "Word Processor") may not be concurrently employed at another law firm (although current experience would certainly be an asset) and in the result, subject to this firm's standard contractual confidentiality clauses in contracts with its legal assistant, no conflict or disclosure of confidential information should arise.

Next, the Word Processor may be concurrently employed by another law firm, however I would expect that the *possibility* of the Word Processor working for Law Firm A *for* Client 1 and then, say at night or on the weekend, working for Law Firm B *against* Client 1 to be remote.

The potential problem would arise, if at all, at least as we see it, because of a lack of knowledge on the part of Word Processor, on one hand, and the lack of knowledge, at least to some extent, on the part of Law Firm B, on the other.

Perhaps this might be addressed as follows:

- (a) if the Word Processor is already employed at Law Firm A, he or she might obtain the **consent** of Law Firm A to him or her doing off-site work subject, of course, to maintaining confidentiality in relation to any information concerning the clients and matters of Law Firm A; or,
- (b) if the Word Processor is to be doing off-site work for Law Firm B, he or she would **first** be provided with:
 - (i) the name of Law firm B's client(s) for the matter;
 - (ii) the name of the opposing lawyers (if any) and the opposing clients (if any).

In this manner, the Word Processor would be contacted, at the outset, **before** any off-site work was done in a manner similar to a "conflict search" that all firms undertake when they are approached by a new client.

Obviously, the lawyers at Law Firm B would be aware of the Word Processor. At the outset, proposed off-site work known to involve lawyers from Law Firm A would simply **not** be sent to the Word Processor.

And if, following the conflict search, if the Word Processor declines to take the work on, then Law Firm B can make alternate arrangements.

Moreover, there may be other mechanisms or procedures that achieve the same goal.

The Ethics Committee addressed the issue of off-site work in an opinion from March 1, 2001 that concluded:

It was the opinion of the Committee that a lawyer may employ a non-lawyer who also works at another law firm. However, in addition to the ordinary obligations of confidentiality, lawyers who share the services of such an employee with another firm must also exercise due diligence to ensure that the employee does not disclose the other firm's confidential information to them. In giving this opinion the Committee did not mean to suggest that it would be proper for such an employee to work on matters for clients adverse in interest to each other who have retained different law firms.

The Committee approved of American Bar Association Opinion 95-398 that specifically recognizes that law firms may use a computer maintenance company that would have access to the firm's clients' files. The Committee noted that Opinion 95-398 recognizes that law firms now use outside agencies for numerous functions such as accounting, data processing and storage, printing, photocopying, computer servicing, and paper disposal and that it is proper practice to do so. It was the Committee's view that although lawyers who use the services of outside contractors do not breach their obligations of confidentiality by doing so, they must use due diligence to ensure that the information remains confidential. The due diligence required must take account of all the circumstances but would usually include, at a minimum, giving the contractor written notice of the requirement to preserve confidentiality.

The Committee agreed with the March 2001 opinion that it would be proper for a law firm to employ a non-lawyer who works off-site and also works for another firm. However, in such circumstances the firm must exercise due diligence to ensure that both the firm and the contractor preserve client confidentiality, not only of the firm's clients' information, but information of the clients of other firms who may also be using the services of the contractor. Such due diligence would include:

- (1) requiring the contractor notify the firm of the names of any other firms for whom the contractor is working, and
- (2) obtaining the express consent of clients to make use of the contractor's services on the client's behalf or to disclose the client's name to the contractor for the purpose of permitting the contractor to conduct a conflicts check.

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