BBA Ethics Opinion 94-A

Summary of Opinion: An associate who has had a minimal role in defending a corporation in several product liability cases at a "defense" law firm may accept employment at a "plaintiff's" law firm where (1) the corporation manufacturing the product has consented, (2) the lawyer and the plaintiff's firm have agreed the lawyer will not work on this type of product liability claim cases at her new firm, and (3) the plaintiff's firm has undertaken reasonable steps to screen the lawyer from contact with anyone at the firm concerning these cases.

Facts: The lawyer has worked for four years as an associate in a small (three partners and two associates) defense firm. The firm has defended a corporation in several product liability claims arising out of one particular product ("the product"). The associate's involvement with these cases has been minimal. The associate interviewed three or four medical experts regarding their potential participation in the cases. In addition, the associate deposed one plaintiff.

The associate was extended an offer by a plaintiff's firm contingent upon an agreement by the corporation not to raise the associate's employment as an issue in their numerous pending product liability cases dealing with the product. (The plaintiff's firm also is prosecuting many similar claims against other corporations.) The corporation has agreed to waive any issue regarding the associate's employment regarding these cases. This waiver has been done in writing by the senior litigation attorney employed as house counsel. In addition, the plaintiff's law firm has instructed its attorneys and staff that their new associate would not work on any plaintiff's cases involving the product, would not communicate with the new associate regarding these cases and would not solicit any information concerning these cases.

Discussion: D.R. 4-101(B) states that "A lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client,
(2) use a confidence or secret of his client to the disadvantage of the client, (3) use a confidence or a secret of his client for the advantage of himself or of a third person unless the client consents after full disclosure."

D.R. 5-105(D) provides in relevant part that:

"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 associated with him or his firm may accept or continue such employment .... "

Plainly, a lawyer is obligated to maintain confidences and secrets of former clients and not to use such confidences or secrets to the disadvantage of the former clients or to the advantage of a new client. Thus there can be no dispute that there would be serious problems for the associate and the plaintiff's law firm if the associate wished to work on the type of product liability claims against the former corporate client which the associate had previously been defending without consent of the corporate client. In this case, however, the former client has consented, and the inquiring lawyer and the new firm have taken steps to prevent any improper use of confidences. Furthermore, the associate will not work on any product liability claims against any corporation

which involve the product.

In Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D.N.Y. 1973), aff'd, 518 F.2d 751, 753-54 (2d Cir. 1975), the Second Circuit Court of Appeals held that difficulties can arise in making a rigid rule where a junior associate in a large law firm moves to another firm. The Second Circuit found that the presumption of confidences was rebuttable and refused to disqualify the plaintiff's law firm in the second action. The district court had pertinently stated:

"[T]he courts must be cautious not to interfere needlessly with the freedom of litigants to proceed with counsel of their choice, and ... not to unnecessarily circumscribe the career of a young professional."

370 P. Supp. 581, 583 (E.D.N.Y. 1973).

See also NFC, Inc. v. General Nutrition, Inc., 562 F. Supp. 332 (D. Mass. 1983), in which an attorney did some work on behalf of the plaintiff concerning an anti-trust claim in 1979 when he was with one firm located in Detroit and subsecp4ently left that firm to join the Detroit office of a Pittsburgh firm which was general counsel for the defendant. Suit was filed on November 15, 1982, and the attorney did not find out about the institution of the action until January 17, 1983, at which time he advised a senior partner of his involvement in a related preliminary investigation while at his prior firm. The senior partner instructed the attorney not to give him or any other person connected with the defense firm any information about the matter and alerted plaintiff's counsel, who moved to disqualify. Id. at 333. Instead of disqualification, the court entered a detailed order and supervised embargo on any communication between the lawyer and anyone else at his new firm with regard to any matter related to this litigation. Id. at 334-37. Accord Nemours Foundation v. Gilbane, Aetna, Federal Ins. Co., 632 F. Supp. 418 (D. Del. 1986), and Manning v. Waring, Cox, James Sklar and Allen, 849 F.2d 222, 225 (6th Cir. 1988).

MEA Opinion 79-4 discussed the issue of a recently appointed assistant district attorney who had previously represented a defendant who was being prosecuted by another assistant district attorney on the same subject matter the new assistant had been consulted on. The MBA Committee expressed the view that D.R. 5- 105(D) should not be construed to disqualify the office of the district attorney from prosecuting the defendant. The MBA Committee stated that such an interpretation would have the effect of depriving, as a practical matter, district attorney offices from recruiting from the criminal defense bar. In this case to construe D.R. 5-105(D) to disqualify the plaintiff's law firm would preclude associates from obtaining new employment.

In reaching the conclusion that the associate may ethically accept the proffered employment, we wish to emphasize the narrowness of the inquiry and our response. We are not dealing with a firm who decided to institute screening devices months after the new lawyer arrived. See LaSalle Nat. Bank v. County of Lake, 703 F.2d 252, 259 (7th Cir. 1983) (attorney joined firm in February, but screening arrangements were not established until disqualification motion was filed in August; Court of Appeals held that district court did not abuse discretion in disqualifying attorney and new firm even though the attorney did not work on particular agreement at issue because he did work and supervise work on similar agreements and had knowledge of opposing

party's attitude or policy toward subject matter in general), and Schiessle v. Stephens, 717 F.2d 417, 421 (7th Cir. 1982) (disqualification upheld where there were no "institutional mechanisms" insulating attorney who switched firms). We also do not deal with issues which arise when government attorney joins private law firm prosecuting claims which government attorney was defending. See In Re Asbestos Cases, 514 F. Supp. 914 (E.D. Va. 1981) (attorney and law firm disqualified). Finally, the attorney who switched firms was an associate who had little to do with the cases and not a partner, who was extensively involved. See Silver Chrysler, supra, 516 P.2d at 756 (" ... there is reason to differentiate for disqualification purposes between lawyers who become heavily involved in the facts of a particular matter and those who enter briefly on the periphery for a limited and specific purpose relating solely to legal questions.").