

NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 15-01

AN ATTORNEY WHO LEAVES A LAW FIRM THAT IS REPRESENTING A CLIENT IN A MATTER IS NOT PRECLUDED FROM JOINING ANOTHER LAW FIRM THAT IS REPRESENTING AN ADVERSE CLIENT IN THE SAME MATTER PROVIDED THAT THE TRANSITIONING ATTORNEY OBTAINED NO CONFIDENTIAL KNOWLEDGE OR INFORMATION CONCERNING THE MATTER OR CLIENT PRIOR TO HIS OR HER DEPARTURE. THE TRANSITIONING ATTORNEY HAS THE BURDEN OF PROOF UPON INQUIRY OR COMPLAINT AS TO THE LACK OF KNOWLEDGE OR POSSESSION OF SUCH CONFIDENTIAL INFORMATION CONCERNING THE MATTER.

QUESTIONS PRESENTED

I. Whether an attorney who transitions from a firm engaged on one side of a litigated matter (in which the attorney had no involvement) to a firm on the other side of the same matter disqualifies the attorney and firm from continuing to represent its client in such matter?

FACTS

Firm A and an attorney at Firm B have been engaged on opposite sides of a litigated matter (the “Matter”) that has been ongoing for numerous years. The attorney handling the Matter at Firm B is the only attorney at Firm B in his or her specific practice group, and therefore is the only attorney at Firm B involved in the Matter.

An attorney currently employed at Firm A and transitioning to Firm B (the “Transitioning Attorney”) has not had any involvement in the Matter and does not have any confidential knowledge pertaining to the Matter or the client. Access to information, including the Matter, at Firm A is not under lock-and-key. However, legal assistants at Firm A keep and maintain the files and each attorney’s files are segregated from every other attorney’s files. Transitioning Attorney and the attorney handling the Matter at Firm A do not share the same legal assistant. Transitioning Attorney represents that he has had no access to any confidential information related to the Matter including files, electronic documents, and any form of client information other than the name of the parties and attorney involved in the matter together with knowledge that the matter has been involved in litigation for many years.

Although Transitioning Attorney has had no involvement and has no confidential knowledge or information relating to the Matter, Firm A is assumed to not be willing to seek a conflict waiver from its client or otherwise waive any potential conflict. Prior to Transitioning Attorney’s transfer from Firm A to Firm B, Firm B will implement safeguards to restrict and/or password protect the electronic Matter files and will keep the physical files in a secure location which can only be accessed by the attorney handling the Matter at Firm B and his or her legal assistant. Note also that the legal assistant for the attorney handling

the Matter at Firm B does work exclusively for that attorney, and will not do any work for the Transitioning Attorney following his or her transfer. The Transitioning Attorney will have no involvement in the Matter following his or her transfer to Firm B.

APPLICABLE LAW

With respect to lawyer conflicts and imputed conflicts, Neb. Ct. R. of Prof. Cond. § 3-501.9, provides in pertinent part as follows:

“(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.”

The reference to Rule 1.6 contained in Rule 3-501.9(b)(1)(2) pertains to confidential information relating to the representation of a client.

The Official Comments to Rule 3-501.9 are instructive.

Comment 4 to Rule 3-501.9 provides that:

“[i]f the concept of imputation were applied with unqualified rigor, the result would be a radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.” Neb. Ct. R. of Prof. Cond. § 3-501.9 cmt 4.

Comment 5 provides that:

“[Rule 3-501.9] Paragraph (b) operates to disqualify the lawyer *only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c).*” Neb. Ct. R. of Prof. Cond. § 3-501.9 cmt 5 (Emphasis added).

Further Comment 5 states that:

“[I]f a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.”

Finally, Comment 6 to Rule 3-501.9 states as follows:

“Application of paragraph (b) depends on a situation’s particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.”

Neb. Ct. R. of Prof. Cond. § 3-501.9 cmt 6.

The history of Rule 3-501.9 was reviewed by the Nebraska Supreme Court in *Mid America Agri Products/Horizon, LLC v. Rowlands*, 286 Neb. 305, 835 NW2d 720 (2013) wherein the Court stated as follows:

“A brief history of § 3-501.9 sets the background for our resolution of this matter. Section 3-501.9 developed from a response to Nebraska case law regarding conflicts of interest that arise when lawyers move from one firm to another.

In *State ex. rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), we disqualified a law firm from representing a defendant. The attorneys in a firm that had represented the plaintiff joined the defendant’s firm. We presumed an attorney leaving one firm acquired client confidences while at the firm, regardless of whether the attorney was actually privy to any confidential communications. We also presumed the attorney shared or would share those confidences with members of any firm the lawyer subsequently joined. We held that when an attorney who was intimately involved with the particular litigation, and who has obtained confidential information pertinent to that litigation, terminates the relationship and becomes associated with a firm which is representing an adverse party in the same litigation, there arises an irrebuttable presumption of shared confidences, and the entire firm must be disqualified from further representation.

Id. At 993, 458 N.W.2d at 253.

In *State ex. rel. FirstTier Bank*, 244 Neb. 36, 503 N.W.2d 838 (1993), an attorney was employed at a law firm while that firm worked on a case for a defendant. That attorney, and several other attorneys from the firm, formed a new firm with other attorneys. The

new firm represented the plaintiffs in an underlying action. The six attorneys from the first firm who were still with the second firm at the time of the proceedings in *Buckley* testified by affidavit that they received no information on the underlying action. We adopted a bright-line rule:

[A]n attorney must avoid the present representation of a cause against a client of a law firm with which he or she was formerly associated, and which cause involves a subject matter which is the same as or substantially related to **727 that handled by the former firm while the present attorney associated with that firm.

Id. at 45, 503 N.W.2d at 844.

The year after *Buckley*, this court applied the bright-line rule to a law firm in *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). We held that opposing counsel had to be disqualified after hiring a clerical worker that, unbeknownst to the firm, had worked on the same case as an attorney for an adverse party. We concluded that the hardship worked by this result was outweighed by the need to maintain the confidentiality of communications and avoid the appearance of impropriety.

Following *Hickman*, the Lawyers' Advisory Committee issued Nebraska Ethics Advisory Opinion for Lawyers No. 94-4. The opinion applied the bright-line rule to clerks, paralegals, secretaries, and other ancillary staff members who moved from one law firm to another. The opinion specifically stated that screening was insufficient to avoid disqualification. The opinion had the practical effect of preventing legal offices from hiring administrators, paralegals, laws clerks, secretaries, and other ancillary personnel who had worked for legal offices that had or would represent clients adverse to clients of the hiring office. Due to potential conflicts of interest, several law firms ceased hiring law clerks from Nebraska law schools. In response to opinion No. 94-4, the Nebraska State Bar Association petitioned this court to modify Nebraska's Code of Professional Responsibility. In September 2005, § 3-501.9 was adopted by the Supreme Court, as more particularly set forth above.

Although the court in *Mid America* dealt with the issue of whether an attorney could be disqualified as a result of retaining an expert who had been previously retained by the opposing party in the same matter, the court nonetheless reiterated the overall concept of imputed conflicts by stating "our precedents have applied an irrebuttable presumption only to persons who obtained confidential information while working as lawyers . . ." *Mid America Agri Products/Horizon, LLC v. Rowlands*, 286 Neb. at 316.

ANALYSIS

In the present case, the transitioning attorney did not obtain or have permissible access to any of Firm A's files pertaining to the Matter and has not acquired any confidential information concerning the Matter. In the absence of evidence contrary to the same, there is no conflict of interest that exists with respect to the transitioning attorney and, in fact, the transitioning attorney would not be prohibited from working on the Matter at Firm B by virtue of the fact that he obtained no confidential information relating to the Matter or the client of Firm A. Consequently, by virtue of the absence of any conflict of interest involving the transitioning attorney, the attorney handling the Matter at Firm B and Firm B would not be disqualified from continued representation in connection with the matter under the same rationale.

Our conclusion here is consistent with the Committee's findings as set forth in Advisory Opinion No. 09-06, wherein the Committee opined that a firm was not disqualified from continuing to represent a

husband in post-decree divorce proceedings, despite the fact that a former associate of a firm representing the wife had joined the husband's attorney's firm. A critical component of the Committee's conclusion was the fact that the transitioning attorney acquired no actual knowledge of the wife's case while associated with the former firm.

Because we conclude that no conflict of interest exists with respect to the Transitioning Attorney, we similarly conclude that no conflict exists that would disqualify Firm B from continuing its representation in the Matter.