

State Bar of South Dakota

Ethics Opinion 2004-1

- **Rule: 5.3 ; 1 .10(c) and 1 .7**
- **Subject: Non-lawyer Employees**
- **Summary: Competing law firms may employ the same non-lawyer.**

FACTS

Law Firm A has employed the services of a legal secretary on a part-time basis. Law Firm B would also like to employ the legal secretary on a part-time basis, while she continues her employment with Law Firm A. Can both law firms employ the same legal secretary at the same time?

DISCUSSION

Rule 5.3 provides:

With respect to a nonlawyer 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;
- (b) a lawyer having direct supervisory authority over the nonlawyer 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 rules of professional conduct if engaged in by a lawyer it:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or 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 a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The comment to Rule 5.3 provides, "A lawyer should give assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client ... [.]"

Rule 1 .10(c) provides: "[w]hile lawyers are associating in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9[.]" Further, Rule 1.7 provides:

(a) Except as provided by paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

...

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

...

(3) the representation does not in-volve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or same matter before a tribunal[.]

Rule 5.3 does not prohibit employment of a part-time legal secretary by Law Firm B while she remains employed by Law Firm A. Compliance with Rule 5.3 requires that a lawyer with managing authority in Law Firm B make reasonable efforts to insure that the law firm is reasonably sure that the legal secretary's conduct is compatible with the lawyers' and law

firm's professional obligations under these rules. Such measures may include instructing non-lawyers about lawyer's ethical duties (especially a duty to maintain client confidences), supervising non-lawyers in a way that does not permit them to engage in the unauthorized practice of law, and, when appropriate, screening non-lawyers from involvement in particular client matters. See Annotated Model Rules of Professional Conduct, 5th Edition, Rule 5.3, page 455 (2003); See also *Stewart v. Bee-Dee Neon & Sign, Inc.*, 751 So2d 196 (Fla. Dist. Ct. App. 2000). The committee is prohibited under its guidelines from expressing any opinion on the conduct of Law Firm A.

The committee recommends that Law Firm B ascertain from Law Firm A if similar assurances have been initiated for the protection of their clients. The committee is split on whether this is a requirement of Rule 5.3 and therefore only recommends such action.

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Chair, Ethics Committee
State Bar of South Dakota