Ethics Check: Negotiating For A Job With Opposing Counsel?

Law360, New York (October 15, 2015, 11:43 AM ET) When you start planning to leave your firm for greener pastures, lots of ethics issues can crop up. One of the most acute issues is if you get an offer to join a firm that is on the opposite side of a matter you are already handling. That was the situation in a recent District of Wyoming bankruptcy case, *In re US Bentonite Inc.,* and it led the court to order the firm representing a Chapter 11 debtor-in-possession to disgorge several months' worth of fees. The firm avoided disqualification, however, in part because the lawyer's new firm had screened him.

Bankruptcy Rules of Play

In *Bentonite*, a firm represented the debtor-in-possession through a firm associate. Two secured creditors had claims to virtually all the debtor's assets. The firm representing one of the creditors offered the associate a job, which the associate accepted on March 11, 2015. But the associate failed to disclose the accepted offer to his supervising attorney for six weeks. And even after tardily informing his firm, the associate kept signing and filing pleadings on behalf of the debtor until almost three months after accepting the job offer.

During this time, the debtor and creditors arrived at a settlement in which they divided the debtor's previously liquidated assets among the secured creditors and stipulated to dismissal of the bankruptcy case. Then, on June 5, the associate moved to withdraw — but without disclosing the conflict. It was not until June 15 that the supervising attorney disclosed to the court in a supplement to the firm's application for employment of attorneys that the associate had accepted a job with the firm representing the creditor. The U.S. trustee moved to disqualify the firm representing the debtor and to deny all compensation to it.

The Bankruptcy Code and Rules require that lawyers representing debtors and their estates be "disinterested," and impose a continuing duty to disclose all connections with debtors, creditors other parties in interest and "their respective attorneys and accountants."

Although the court's opinion is lengthy, it was a no-brainer for it to conclude that "accepting a position at a law firm representing one of the largest creditors in a case where one represents the debtor must be disclosed, [and] ... the connections between the firms and the parties at a minimum created the appearance of impropriety."

DQ Avoided, But Disgorgement Ordered

The result: Although avoiding disqualification and disgorgement of *all* fees, the firm representing the

debtor had to disgorge fees from the date the associate accepted the job offer — even though the firm hadn't known about the situation for the first month.

The court said and/or implied that disqualification was not warranted for several practical reasons: (1) the lawyer creating the conflict had left the firm representing the debtor; (2) the case was nearly concluded, and the cost and delay involved in having the debtor retain new lawyers at that point would be "of no benefit," particularly in a case where there was insufficient money to satisfy all claims; (3) the settlement agreement itself was not deemed to be tainted where the evidence established it was reached among four different parties, at arms' length; and (4) the court obliquely acknowledged that the migrating lawyer had been screened from participation in the case after he arrived at his new firm.

Not Just for Bankruptcy Lawyers …

The scenario that the court dealt with in *Bentonite*. — negotiating for a job with counsel representing the opposing party — is not unique to the bankruptcy context.

In 1996, the American Bar Association ethics committee considered it in Formal Op. 96-400, concluding that "a lawyer's pursuit of employment with a firm or party that [the lawyer] is opposing in a matter may materially limit [the lawyer's] representation of [the] client, in violation of Model Rule 1.7(b). Therefore, the lawyer must consult with [the] client and obtain the client's consent before that point in the discussions when such discussions are reasonably likely to materially interfere with the lawyer's professional judgment." The more involved the lawyer is in the client's matter, the more likely it is that a material-limitation conflict will arise.

Comment [10] to Rule 1.7 echoes the ABA committee's advice: "When a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client." *See also* ABA Formal Op. 09-455 (Oct. 8, 2009), "Disclosure of Conflicts Information When Lawyers Move Between Law Firms."

Role of Ethical Screens

In *Bentonite*, the debtor's firm avoided disqualification based at least partly on the fact that the migrating associate's new firm apparently screened him when he arrived. (The court's order says that the new firm "shall continue to screen" the lawyer from the case.)

If your jurisdiction has adopted a version of Model Rule 1.10 and accepts screening as a way to avoid disqualification of a law firm in this situation, it can help ease lawyer migration quandaries under some circumstances. As comment [7] warns, however, "even where screening mechanisms have been adopted, tribunals may consider additional factors in

ruling upon motions to disqualify a lawyer from pending litigation."

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