A legal note from Marshal Willick about how attorneys are violating the rules of professional ethics by mis-using paralegals who change firms

There are attorneys in this State who seek out and even hire paralegal staff for the purpose of pumping those paralegals for confidential information obtained during previous employment. The practice is odious, and unethical, and requires a whole lot more attention, condemnation from the bench, and prosecution by the Bar, than it has received to date.

I. BACKGROUND

The Nevada Supreme Court has expressed considerable sensitivity to balancing the triangle of needs and duties among clients, who have a right to expect that their information will remain confidential, non-attorney legal staff, who need reasonable employment opportunities, and law firms, which require the freedom to employ the most qualified job applicants. *See Leibowitz v. District Court*, 119 Nev. 523, 78 P.3d 515 (2003) (screening of non-attorney personnel is authorized so long as adequate provisions are made for the protection of client confidences); ***overruling in part*** *Ciaffone v. District Court*, 113 Nev. 1165, 945 P.2d 950 (1997).

Ciaffone involved a typist, hired through a "temp" agency, who performed some overflow secretarial typing relating to the case at one office (Thorndal), before leaving to be employed by attorneys on the other side of the case (Gillock).

On appeal, the Nevada Supreme Court quoted from prior SCR 160(2), starting its analysis by stating that "lawyer screening" was prohibited, and noting that former SCR 187 (now RPC 5.3) required lawyers to hold their nonlawyer employees to the same professional standards:

> 1. 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;
> 2. 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. . . .

113 Nev. at 1168.

Having established both that "lawyer screening" was not permissible, and that non-attorney staff members were held to the same standard as the lawyers, the Court went on to apply the law to the facts of that case, and found the firm that hired the employee was disqualified. The Court explained that the basis for its opinion was the need to protect the expectation on the part of clients that their information will be completely confidential.

Six years later, *Leibowitz* involved a paralegal. The Court clarified *Ciaffone* by holding that mere potential "access" to privileged information is insufficient to cause disqualification. Rather, a court must find that the employee actually ***gained*** privileged and confidential information as a result of the former employment, in which case "imputed disqualification should apply whenever the

nonlawyer accepts employment with a firm or attorney who represents a client with a materially adverse interest to the former client." 78 P.3d 520.

The Court then overruled *Ciaffone* ***in part*** – holding that screening should be permitted, under ***some*** circumstances, for nonlawyer employees, primarily to protect their employment opportunities. *Id*. However, the hiring firm is only to ***not*** be disqualified if stringent steps are immediately taken to ensure confidentiality, which the Court termed an "affirmative duty" of the hiring firm. The Court detailed an "instructive minimum"of ***requirements*** for any lawyer, seeking to avoid disqualification, who seeks to "screen" a new hire:

> 1. "The newly hired nonlawyer [employee] must be cautioned not to disclose any information relating to the representation of a client of the former employer."
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> 2. "The nonlawyer [employee] must be instructed not to work on any matter on which [he or] she worked during the prior employment, or regarding which [he or] she has information relating to the former employer's representation."
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> 3. "The new firm should take . . . reasonable steps to ensure that the nonlawyer [employee] does not work in connection with matters on which [he or] she worked during the prior employment, absent client consent [i.e., unconditional waiver] after consultation."
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> In addition, the hiring law firm must inform the adversarial party, or their counsel, regarding the hiring of the nonlawyer employee and the screening mechanisms utilized. The adversarial party may then: (1) make a conditional waiver (i.e., agree to the screening mechanisms); (2) make an unconditional waiver (eliminate the screening mechanisms); or (3) file a motion to disqualify counsel.

II. THE PROBLEM

Three time in the past six years, we have discovered opposing counsel grossly violating these procedures. In the first case, one of our paralegals was hired by opposing counsel in an on-again, off-again custody and visitation matter. They never sent the required notice, and made not even a pretense of screening the employee from access to the file. He even had the employee write letters on cases that the employee had handled while in our office. The district court found that opposing counsel was disqualified, but took no further action.

The second time, different opposing counsel in a post-divorce matter actually ***took the deposition*** of a prior paralegal from this office (who had taken notes during our client's consultation). When we found out, we immediately moved for disqualification and sanctions. Immediately before the hearing on our sanctions motion, the opposing party fired opposing counsel – and hired his former partner and good friend. The district court judge declined to issue any sanctions, pretending that the confidential information would not simply be handed over from the fired opposing counsel to his good friend, new opposing counsel.

The third case is even ***more*** egregious. A former paralegal of this office was hired by a lawyer who was going through his own personal divorce. Some weeks later, the paralegal called our receptionist and requested copies of the consultation notes taken with the paralegal's current employer's spouse. The paralegal admitted that her current employer had wanted to know everything she remembered about the case. As a bonus, the divorcing lawyer was represented by the same "good friend" of the violating attorney from

the other case discussed above.

This third matter was directly reported to the State Bar by me, to avoid any possibility that this office could be implicated in the ongoing sleaze. That was about six months ago; near as I can tell, there was not even an investigation; certainly, we were never contacted for any information on the matter.

RPC 5.3(c) states that "A lawyer shall be responsible for conduct of such a person [nonlawyer assistant] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer," if the lawyer orders it, knows about it, or ratifies it, or if the lawyer is in a position of authority but fails to prevent or mitigate the conduct.

So what to make of district court judges who do not sanction, or even report, "data mining" of paralegals from one firm by another, when it is blatantly obvious? What to make of a Bar disciplinary process that fails to investigate and punish admitted and deliberate mis-use by a lawyer of confidential information for advantage in a case, or even personal gain?

III. THE SOLUTION

District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case. *See Robbins v. Gillock*, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993); *Cronin v. District Court*, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989).

But the district courts should go further, and both directly sanction violating firms, and report the misconduct when it has been demonstrated to have occurred. The former is necessary to make the innocent parties whole for the expense of having investigated and litigated the disqualification, and the latter is necessary for the protection of the public.

The rules are rules of ***ethics***, not of convenience. They are not to be followed only when it is "not so bad" to ignore them, or when it might cost a law firm a paying client, or cost a client a lawyer with whom he/she is comfortable or thinks he/she has an "extra edge." Compliance with those ethical rules is required for anyone wishing to remain a member of the Nevada Bar. *See* RPC 1.6; RPC 1.9; ABA Model Rule 1.9, comment 6 ("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 is privy to all information about all the firm's clients"); EDCR 5.04, "Standards of Conduct," incorporating the Bounds of Advocacy; *see also* "The Lawyer's Pledge of Professional Responsibility" (Clark County Bar Association, 1994).

And, once reported, it is incumbent on the organized Bar to investigate and punish mis-use of confidential information, if we are going to assert that the sanctity of client confidences is accorded anything more than lip service. The failure to do so provides an unwarranted advantage to clients hiring ethically challenged lawyers, and puts those complying with the ethical rules at a competitive disadvantage in ongoing litigation.

If the bench will not report and sanction, and the Bar will not punish mis-use of client confidences, then perhaps the Supreme Court will have to revisit *Leibowitz* and *Ciaffone*, and conclude that the bench and Bar

just could not be trusted to protect the freedom that they had been given. It would be a shame to injure the employment prospects of non-lawyer personnel and hinder the ability of law firms to hire the best possible staff, but if the cost is open season on client confidences, the price of allowing "screening" without enforcing its requirements is just too high.

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