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Popular Threads on Solosez

Giving Legal Advice Without Telling Firm

Hypothetically speaking, if an associate attorney works for a small firm (2 lawyers) and has friends and family who need simple wills drafted (or some other contract drafted, etc.), is it ethical for the associate attorney to do the work without the firm knowing?

Consider that there is no employment contract stating that the associate cannot "moonlight" or whatever this would be called. Also, the associate has never been verbally told that such acts are not allowed by the firm.

Disregard potential problems with family members, etc. expecting work for free, malpractice, etc. I'm just wondering if this type of conduct (working without telling the firm, when there is no employment contract in place) is allowed. I have found nothing in the state professional ethics code mentioning this situation.

Anonymous

I'd say tell the firm you are doing it. Heck, it's marketing! Make family happy and they sing your praises to their friends and neighbors. In fact, consider asking the family members to bring at least one witness to the signing so you get a chance to meet someone new. When in doubt, don't keep secrets from your firm!

Bruce L. Dorner

OMG, you're so gonna lose your license. Seriously, the only ethical problem I see might be from malpractice insurance. Presumably you don't have individual insurance so these side projects are not covered, at least not by you. Your firm's insurance might be on the hook for the work you're doing on the side and the firm might not like being exposed to liability without getting anything in return. I would think you could disclose everything and work out a steep discount for these kinds of things.

Steve O'Donnell

I try to govern my thinking on all such ethical questions by using the grandmother rule: if you told her grandmother what you were doing, would she think it was alright? I find this rule to always give a result that comports with bar ethics rules. In this case, I think your grandmother would say to tell your law firm. There's no need to keep secrets. Just because they didn't tell you you could not do it, doesn't necessarily mean that you could. Why take a chance? No doubt they will be happy to allow

you to do this.

Hugh Tedder

Um, Bruce, I think the idea is that he's taking the income directly, which is why he is not telling the firm about it. I would think they would be a trifle miffed at that, as the firm is supposed to be receiving the revenue generated by the lawyer.

I guess it's probably technically allowed, since there is no explicit employment contract, but I personally think that it is implied in any full time professional employment that the firm will receive all of the revenue generated by the employee within the scope of his employment.

Mike Koenecke

Good point, Mike. I thought it was family which generally is pro bono!

Bruce L. Dorner

I completely agree with Mike.

And even if it's technically not unethical, and even if there's no explicit contractual prohibition, the lawyer looks like a sleaze, especially by trying to scooch a few dollars from his own relatives, to the arguable detriment of his employer.

In the immortal words of Spike Lee :

"Do The Right Thing."

Charlie Abut

First, from a purely "philosophical ethics" perspective, an associate should not be taking clients independently who are paying for the same services that the firm performs. The associate is receiving the benefits of the firm - a salary, possible health and welfare benefits, probably malpractice insurance. The associate should, therefore, steer business through the firm. Frankly, if you didn't already know this at a gut level, you wouldn't be asking the question. This activity referred to here isn't even really "moonlighting." Moonlighting refers to a secondary job taken in off hours, and usually means work that is different than the primary job. From a legal ethics perspective, an associate probably owes a fiduciary duty of loyalty to the firm not to compete with the firm for business. While clients are entitled to choice of counsel, should the firm discover that associate was doing work for clients outside the firm, the firm may be entitled to sue the associate to recover fees collected by the associate for that outside work. If malpractice insurance is through the firm, and the associate is acting outside of the auspices of the firm, it is even possible that the carrier could decline coverage if the associate is accused of malpractice (depending on the details of the coverage). As an aside, this is a good example of why

law firms should NEVER have lawyers working for them that do not have a written employment agreement that details all of these considerations. I have seen a similarly-sized small firm destroyed by an associate who took work on the side and didn't tell the firm about it. In that case, several incidents of probable malpractice took place, and ultimately the associate left the firm before the outside work was discovered. But for some messy political circumstances, the departing associate SHOULD HAVE been on the hook for enough damages to lead to personal financial ruin.

Aaron Rittmaster

Don't forget the added awkwardness if something should go wrong with the work. How will the Firm feel if the first time it hears about the matter is in the context of "Houston, we have a problem"?

Stephen M. Hines

Moonlighting Lawyers May Face Discipline and Civil Liability

May 1, 2000

by Thomas L. Browne, Esq.

Many law firms have a policy against associates accepting unauthorized outside legal employment. But other than the threat of termination for being caught, what consequences might befall an associate who chooses to violate that policy and succumbs to the temptation of making a little money on the side?

Employers will be pleased to learn of two recent out-of-state decisions that should give any associate good cause to think twice about accepting secret, unauthorized legal employment. One involves professional discipline and the other civil liability for damages caused to the employer.

The problems inherent in secret clients are obvious to employers but not always to associates. So, for those associates who are reading this column, I will spell them out.

Contrary to popular opinion, the principal problem is not failure to share fees with the employer (although many employers resent what they perceive as a diversion of funds). Rather, employers are concerned with professional responsibility issues and civil liability.

The most obvious professional responsibility issue is the identification and avoidance of conflicts of interest. Secret clients may be adverse to existing clients, and future clients may be accepted who are adverse to secret clients.

As for civil liability, associates are likely to have apparent authority from their employer to accept legal representation of the client. Consequently, the employer is likely to be liable for any malpractice committed by the

associate, even though the employer has no knowledge of the legal representation and receives no benefit from it. To make matters worse, the employer's professional liability insurance carrier is much more apt to have policy defenses to coverage, such as late notice of claim.

Secret, unauthorized clients are a nightmare, plain and simple. That undoubtedly is why some employers are approaching breaches of policy aggressively and why some courts are backing up their need to do so.

In The Florida Bar v. Cox, 655 So.2d 1122 (1995), the Florida Supreme Court ordered a 30-day suspension from the practice of law of an associate who, contrary to firm policy, did a little "moonlighting." In particular, the associate accepted unauthorized cases, corresponded with clients on these matters, and billed clients on firm stationery. He collected and kept some of these fees. Moreover, he denied having done so until confronted with the written evidence. Significantly, the court acknowledged that the lawyer's conduct may not have caused harm to the clients or to the firm where he was employed, but it was unimpressed with this "no harm, no foul" defense. The associate's conduct involved dishonesty and misrepresentation toward his employer and his clients, and that was sufficient to warrant a 30-day suspension.

In Kramer v. Nowak, 908 F.Supp. 1281 (E.D.Pa. 1995), Kramer, a lawyer, claimed that a legal malpractice judgment against him was caused by the negligence of Nowak, another lawyer, whom he employed to assist him in the underlying matter. Kramer sued Nowak for contribution, negligence and breach of contract. The Pennsylvania District Court determined that New Jersey substantive law controlled. As to the contribution claim, the court held that defendant Nowak was entitled to summary judgment unless Kramer could prove that they operated as separate economic entities with respect to the underlying legal matter. The typical associate/employer relationship has no such characteristic, and thus the case stands for the proposition that an employer ordinarily may not seek contribution from an associate whose negligence results in a legal malpractice judgment against him.

With respect to the tort and contract claims, however, the court recognized a legal right of recovery in favor of the employer and against the subordinate attorney. The court based its decision upon the general rule of agency found in the Restatement (Second) of Agency, which provides that: "unless he has been authorized to act in the manner in which he acts, the agent who subjects the principal to liability because of a negligent or other wrongful act is subject to liability to the principal for the loss which results therefrom." The court held that Kramer had a cause of action against Nowak to recover the amount of the legal malpractice judgment against him if Nowak's conduct was not authorized, if Kramer did not ratify Nowak's conduct, and if the conduct could not have been discovered through reasonable inquiry.

The rule in Kramer did not arise out of the context of a secret, unauthorized file; but it is based upon an employee's duty to his employer as opposed to the client. I, for one, believe it is good law - associates do owe duties to their employer. The duty not to accept unauthorized outside legal employment does not conflict with the rights of the client; if

anything, it protects clients. Employers should not assume that associates understand the importance of accepting only authorized work. Therefore, they should take time to explain the professional responsibility and civil liability ramifications of breaches of firm policy.

Associates, on the other hand, should not assume that their only professional responsibility is to the client. When they undertake unauthorized work that results in a professional responsibility or civil liability problem for the employer, there may be serious personal consequences.

First preference with a law firm is that you do things with the firm's full knowledge. From a business, career, and ethical standpoint this is best approach. Generally the concern is raised because, although an associate may not be expressly forbidden, there is something going on in the firm culture or atmosphere that makes the inquirer question whether this may occur. In such, best to be upfront.

With regard to doing the work "on the side" or moonlighting, firm may elect to dismiss or otherwise address this when it comes to light. Therefore, you are better off disclosing and discussing in advance. If you choose to do otherwise, then do not expect less than dismissal when it comes to light -- you may be surprised but prepare for the most radical. If you do not trust the law firm, do not expect the law firm to trust you.

Darrell G. Stewart

If it is pro bono, then tell the firm and it will probably be OK. I had a couple matters -- one for me and my husband, one for a friend -- while at both a large firm and a small firm and both said it was not a problem.

At the large firm the managing partner told me "Sure -- use our letterhead if it helps you get the bastards and I am sure any of the boys down the hall would be glad to offer advice when they have a free minute" (His heart was in the right place even if he forgot we had a lot of female attorneys, hehe). At my other firm I used their address but not firm name.

If you are trying to make money on the side, well, just consider how you would do if you were partner and had an associate doing this? I think it would mostly matter if the matter was in your firm's area of expertise. If you are at an insurance defense firm, they may not care if you do some side wills as long as you make it clear you are not doing it under the auspices of the firm (different letterhead, caption with home address or something...).

-- Amy Kleinpeter

Yep: if 'twere pro bono, I don't think there's a problem. Since the fellow noted the "potential problem" with "expecting work for free," I assumed he was talking about paying work.

Mike Koenecke

An additional problem is that you are setting yourself and the firm up for problems with conflicts of interest searches. If you are doing work for Sister Sue, and Sister Sue happens to own Sue's Stained Glass, and Firm takes on a litigation case to represent Paul Plaintiff against Sue's Stained Glass but didn't know you represented Sister Sue last week on a will/trust issue -- isn't that a conflict of interest or a potential conflict of interest for you that the firm should be aware of and (maybe) need to get a waiver on?

Michelle J. Rozovics

Wouldn't 'Sister' Sue present a problem simply because she's a sister, regardless of getting her free will?

Steve O'Donnell

I think you potentially could get into some problematic conflict of interest issues down the road if, as an associate of the firm, you represent someone and don't tell your firm. Assume, for example, you draft John Smith's will but don't tell the firm. John Smith dies. John Smith's illegitimate son, intentionally omitted from the will, hires your firm to contest the will. What do you say when your boss gives you the file and asks you to draft the complaint to contest the will that you drafted? Putting aside the potential conflicts, if your roles were reversed and you were the employer, how would you want your employee to handle it? Would your answer change depending on whether the work involves the use of firm resources (your time at work, library, computers, secretarial time, firm letterhead (including both the paper and the name), etc.)? Not to mention, once you get into it, issues may arise that you would like to bounce off one of your employers.

If you intend to give your family/friends a break on the fees, maybe say to your boss something like -- I've got some potential clients who want me to do some work for them. The amount of work is not voluminous, and I do not expect it to interfere with my other work. These potential clients happen to be family/friends, and I'd like to help them out while also learning something in the process for my own professional development. I was wondering if we could give them a reduced rate to essentially cover the firm's cost?

If on the other hand, you intend to charge full rate for the work for these clients, maybe say to your boss something like -- I've got some clients and I would like to discuss the possibility of my getting some enhanced compensation with respect to this work that I have originated. Could we schedule a time in the next few days to talk about that?

If your plan is to keep all the fees for yourself, I think, at a minimum, you probably are looking at having to do the work under your own name, on your own time, with your own resources, and without benefit of firm's E&O. If you go that route (not to say that you should), check your local bar rules for provisions addressing a lawyer working for more than one firm (i.e., yourself as a firm of 1 and your small firm employer). In any

event, you still have the potential conflict of interest issue, which doesn't necessarily preclude you from doing the work now, but could cause very uncomfortable situations down the road when you explain to your boss why your firm cannot take on, or must withdraw, from a conflict situation. And, regardless of ethical rules, your reputation lies in the perception of others. Is it worth the risk that your employer will not favorably view the undisclosed moonlighting?

Since you spotted the issue and asked the question, my guess is you already know the answer. Consider disclosure as a starting point and consider what options, if any, you may have from there regarding the fees to the client and your compensation.

If it is work you want to do and if your employer does not look favorably on your disclosure and request, consider whether it is time to look for a different career situation. The flip side of that coin is, if you do not really want to do the work, the complexities of being part of a firm could be a convenient excuse to avoid the work.

Good luck,

Chris Dunagan

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