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Can Lawyers Moonlight?

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To the Forum:

I am a recent law school graduate who was admitted to practice just a few weeks ago. I began my first job as a lawyer soon after taking the bar exam at a small family law firm in New York City that participates in a lot of pro bono work. Being that the firm takes many pro bono cases, my salary is relatively low compared to my law school peers who are working at bigger firms. I very much enjoy my work and my firm but have found it very hard to make ends meet with my first-year associate salary and the current state of the economy. I do not want to quit for a higher paying job, but I have come very close to being unable to afford the rent for my modest New York apartment and necessities like groceries.

Throughout law school, I was a server and bartender at a restaurant, which I found to be very lucrative. That job helped me pay for housing during school and all of those expensive textbooks. I decided a few weeks ago to start looking for serving and bartending jobs again for my time outside of work at night and on the weekends to help me feel a bit more comfortable financially while allowing me to continue working at my firm. However, I recently came across an article about an attorney being sanctioned for moonlighting as a document reviewer for another company and now I am worried.

My question for the forum is what are the ethical rules surrounding attorneys working multiple jobs? Are attorneys bound to one job and firm at a time or are they allowed to work second jobs so long as they are not related to the practice of law?

Warmly,

Mona Leighton

Dear Ms. Leighton:

Your question highlights a concern many lawyers quietly share. The reality of financial strain, even in a profession often associated with high incomes, sometimes necessitates a second job. While the New York Rules of Professional Conduct (RPC) do not categorically forbid additional employment, several ethical and contractual considerations must be kept in mind.

Employment Contracts and Employer Policies

As an initial matter, we suggest that you start by reviewing your firm's policies regarding outside employment, or your employment contract with your firm if you have one. Many firms prohibit outside employment and include an exclusivity clause prohibiting outside employment – even unrelated to law – in written agreements with attorneys. Breaching such provisions could result in termination. Even without a specific clause, at-will employers may dismiss employees for reasons such as secondary employment, lawful though it may be.

There are public or governmental sector jobs that prohibit lawyers from private practice, e.g., the district attorney's office,[1] attorneys employed by the Workers' Compensation Board,[2] attorneys for the New York City Corporation Counsel,[3] or clerks of the New York State Court of Claims.[4] Generally, private employers are free to restrict their employees to working only for them.[5]

Conflicts of Interest

New York's Rule 1.7 bars lawyers from representing clients if their professional judgment could be impaired by personal interests. For example, taking a second job at a restaurant owned by a party involved in litigation with one of your firm's clients could create a conflict. Even unrelated jobs may lead to conflicts if circumstances arise that connect them to your legal practice. The section most applicable to your situation is 1.7(a)(2), which states that "a lawyer shall not represent a client if a reasonable lawyer would conclude that. . . . (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." This language is broad and can be applied to myriad situations.

Example Scenarios

Consider the case of Wilma Hill-Grier, an attorney who worked as a teacher while continuing to represent private clients. She was sanctioned for representing a client in litigation against the City of New York – her employer – violating both city rules and Rule 1.7. The dual roles created divided loyalties and impaired professional judgment.

Hill-Grier was fined by the board of education for her representation of this client because the city charter and board's rules prohibited its employees from appearing against the interests of the city in "any litigation to which the city is a party."

Of course, this situation also clearly created a conflict of interest that violated Rule 1.7 because Hill-Grier was employed by the city, and also actively participating in litigation against the city. Comment [1] to Rule 1.7 states that "the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties." Put plainly, how could Hill-Grier represent her client who is suing the city in a manner that is "free of compromising influences and loyalties" when she herself worked for the city?[6]

Comment [2] to Rule 1.7 breaks down the questions lawyers should ask to analyze whether a conflict of interest exists and whether it can be resolved. The lawyer must:

1. Clearly identify the client or clients.

2. Determine whether a conflict of interest exists, i.e., whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation.
3. Decide whether representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable under 1.7(b).

In Hill-Grier's case, her judgment would likely be impaired or her loyalty divided by her conflicting interests. She might be unable to effectively advocate for her client suing the city for fear of losing her job with the city.

While unlikely in your scenario, given the nature of the second job you would like to pursue, it is always possible that a conflict may arise. Suppose, for example, that the manager at the restaurant you work at is in the middle of a divorce and custody battle with her husband and you find out that your firm is representing her husband. It would be difficult for you and your firm to continue representing the husband as your personal interests (avoiding conflict with your manager, confidentiality breaches or possible termination) conflict with those of your client. In an instance like this, Rule 1.7 would require you to determine whether your judgment as an attorney for your manager's husband may be affected or your loyalty divided. Keep in mind that even though you personally might not be representing the husband, your conflict of interest may be imputed to your entire firm.

Other Ethical Considerations

We also cannot overlook the fact that there are special conflict rules that apply to former and current government officers and employees. Rule 1.11(a) states that "a lawyer who has formerly served as a public officer or employee of the government . . . (2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." This limits jobs that government officers and employees may have concurrently or even after their employment with the government.

Other rules apply to former judges, arbitrators, mediators, or other third-party neutrals that limit their employment. Rule 1.12(a) prohibits a lawyer from "accepting private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity."

Beyond conflicts, rules like Rule 5.7 (lawyers providing nonlegal services) and Rule 8.4 (prohibiting dishonesty or conduct reflecting poorly on fitness to practice) may apply. If patrons at your restaurant seek legal advice, you must clarify that no attorney-client relationship exists. Avoid giving legal advice in such informal settings to steer clear of misunderstandings.

Rule 5.7 (a)(2) states that "a lawyer or law firm that provides nonlegal services to a person that are distinct from legal services being provided to that person by the lawyer or law firm is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship."

Comment [2] to this rule poses the scenario of nonlegal services being "provided through an entity with which a lawyer is affiliated, for example, as owner, controlling party or agent." In this scenario, the lawyer must adhere to the RPC even if acting as a nonlawyer, because there is "a risk that the recipient of the nonlegal services might reasonably believe that the recipient is receiving the protection of a client-lawyer relationship." This must be abided by "unless the person understands that the nonlegal services are not the subject of a client-lawyer relationship."[7]

This is unlikely to be an issue in your situation. However, say you are bartending, and you have a customer who knows you are a lawyer and begins asking you legal questions or for legal advice for his particular circumstance. The lines may get blurry there. In such a scenario, it doesn't hurt to ensure that the customer understands that your conversation while you offer "nonlegal services" does not constitute a protected client-lawyer relationship. Generally, you should avoid providing any legal advice at all in a situation like this.

Moonlighting as a Lawyer

Greater scrutiny applies to lawyers who maintain side law practices. For example, a partner at a New York firm was suspended for improperly running a private practice, misrepresenting earnings, and breaching firm policies. These violations, rooted in dishonesty, clearly violated ethical rules. By contrast, honest and transparent supplemental employment unrelated to law, such as bartending, is less likely to raise ethical concerns.

Earlier this year, the First Department of the New York Appellate Division suspended an attorney from practicing in New York State for six months because he "improperly maintained his own personal practice" while working as a partner at the law firm Crowell and Moring and underreported his earnings from his side practice in violation of Rule 8.4.[8]

The court found that the lawyer violated the RPC because "he engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation" by "(1) failing to deliver to the law firm the earnings he received for his professional activities on behalf of his clients while employed as a

partner by the law firm; (2) utilizing a parallel invoice system and creating 12 personal invoices directing clients to make payments to his personal account in violation of the partnership agreement; and (3) using law firm letterhead for personal invoices." The court also found that the lawyer's conduct violated RPC 8.4 (h)[9] because it adversely reflected on his fitness as a lawyer.

Your case certainly is not as severe as this lawyer's was. It's hard to say that waiting tables or bartending at a restaurant would adversely reflect on your fitness as a lawyer. The lawyer there not only took on non-law firm clients privately, he also personally billed clients of the firm for work he solely did, avoiding use of the firm's billing practices. As a partner and employee of the firm advising firm clients, these funds belonged in part to the firm and the lawyer kept them for himself. The deceit and theft that this lawyer participated in while moonlighting was a clear ethical violation.

Best Practices

There are no specific rules that *prohibit* lawyers from moonlighting to supplement their incomes. However, there are certainly conflict-of-interest and other ethical rules to keep in mind before doing so. Additionally, even if there is no employment contract with your firm containing a provision prohibiting a second job or there is no conflict of interest, it is always best practice to check with your employer before beginning any sort of additional employment. Before pursuing a second job, consult your employer and disclose your plans to avoid misunderstandings. Transparency helps mitigate concerns about potential conflicts or policy violations. While moonlighting isn't inherently unethical, the specifics of your employment, your firm's policies, and potential conflicts must guide your decision.

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QUESTION FOR THE NEXT FORUM

To the Forum:

I have been an attorney with a prominent New York law firm for the past several years. During my tenure, I have gained a vast client base and a lot of experience, for which I am grateful. However, I feel that I am ready to move on and open my own private practice, and thought the partners that have mentored me would be happy for me. However, that was not the case when I told them the news and put in my two-weeks' notice. Instead, they were less than impressed and warned that my leaving is a breach of my employment agreement, which I signed before I was even admitted as an attorney, when I first received the job upon graduation. The partners threatened to hold me accountable for my breach of contract when I leave.

After my meeting with the partners, I took another look at the employment agreement. It contains several clauses that seem to me now – as an experienced attorney – to be completely unfair and make leaving the firm impossible without some sort of consequence. The employment agreement included restrictions and penalties that the firm would impose if lawyers leave the firm without "good reason." This phrase was undefined and completely up to the partners' discretion to decide what constitutes "good reason" for leaving. There were also restrictions placed on contacting clients to let them know of lawyers leaving firms, working with other lawyers and employees who have left the firm and participating in any sort of investigations against the firm.

Clearly, there is a contract issue and many of these terms can't possibly be enforced; however, my question for the forum is whether the firm's conduct violates any ethical rules?

Sincerely,

Owen Schingel

Endnotes

1. *See In re McDonald*, 174 A.D.2d 942 (3d Dep't 1991).
2. *See Lazarus v. Steingut*, 129 Misc. 2d 982 (Sup. Ct., N.Y. Co. 1985).
3. *See Civil Serv. Bar Assn. v. Schwartz*, 114 Misc. 2d 849 (Sup. Ct., N.Y. Co. 1982).
4. *See Klingaman v. Bartlett*, 92 Misc. 2d 271 (Sup. Ct., Albany Co. 1978).
5. *In Warren v. Meyers*, 187 Misc. 2d 668 (2001), the court found that it is "well recognized that restrictions on em-ployment by governmental or quasi-governmental agencies are enforceable."
6. *See* Rule 1.7, Comment [1].
7. *See* Rule 5.7, Comment [2].
8. David Thomas, *NY Suspends Moonlighting Ex-Partner at Law Firm Crowell & Moring*, Reuters, Jan. 5, 2024, https://www.reuters.com/legal/legalindustry/ny-suspends-moonlighting-ex-partner-law-firm-crowell-moring-2024-01-05/.
9. Rule 8.4(h) prohibits a lawyer from engaging in "any other conduct that adversely reflects on the lawyer's fitness as a lawyer."