

**Nebraska Ethics Advisory Opinion for Lawyers
No. 02-2**

DOES THE CODE OF PROFESSIONAL RESPONSIBILITY PERMIT AN ATTORNEY WHO SHARES OFFICE SPACE WITH A PUBLIC DEFENDER TO ACCEPT APPOINTMENTS AS DEFENSE COUNSEL IN CRIMINAL MATTERS WHERE THE PRESENT PUBLIC DEFENDER HAS A CONFLICT OF INTEREST? IN RESPONSE TO THE REQUEST FOR AN OPINION FROM THIS COMMITTEE, WE FURNISH THE FOLLOWING.

RESTATEMENT OF FACTS

You share office space with the newly elected County Public Defender. Your practices are generally operated independently in that each of you has his own staff, phone lines and computer system, although there is some expense sharing. In the past, you have been appointed as defense counsel in criminal matters where the present Public Defender has a conflict of interest. You would prefer to continue to accept these appointments after the newly elected Public Defender takes office.

STATEMENT OF APPLICABLE CANONS AND DISCIPLINARY RULES

EC 1-1. A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

Canon 2: A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

EC 2-25. Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

EC 2-26. A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become the lawyer's client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his or her share of tendered employment which may be unattractive both to him or her and the bar generally.

EC 2-29. When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he or she should not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

Canon 4: A lawyer should preserve the confidences and secrets of a client.

EC 4-1. Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has

employed or sought to employ him or her. A client must feel free to discuss whatever the client wishes with his or her lawyer and a lawyer must be equally free to obtain information beyond that volunteered by the client. A lawyer should be fully informed of all the facts of the matter the lawyer is handling in order for his or her client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of the lawyer's independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of a client not only facilitates the full development of facts essential to proper representation of the client but also encourages laypersons to seek early legal assistance.

EC 4-4. The lawyer-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his or her client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the lawyer-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5. A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of the lawyer's client after full disclosure, such information for his or her own purposes. Likewise, a lawyer should be diligent in his or her efforts to prevent the misuse of such information by the lawyer's employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another and no employment should be accepted that might require such disclosure.

Canon 5: A lawyer should exercise independent professional judgment on behalf of a client.

EC 5-1. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the lawyer's client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to his or her client.

EC 5-15. If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, the lawyer must weigh carefully the possibility that his or her judgment may be impaired or his or her loyalty divided if he or she accepts or continues the employment. The lawyer should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he or she would have to withdraw from employment with likelihood of resulting hardship on the clients; for this reason, it is preferable that the lawyer refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that the lawyer can retain his or her independent judgment on behalf of each client; if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his or her clients.

EC 5-16. In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his or her need for representation free of any potential conflict and to obtain other counsel if he or she so desires. Thus before a lawyer may represent multiple clients, the lawyer should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he or she should also advise all of the clients of those circumstances.

EC 5-17. Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent codefendants in a criminal case, co-plaintiffs in a personal injury case, an insured and

his or her insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse affect upon the lawyer's judgment is not unlikely.

Canon 9: A lawyer should avoid even the appearance of professional impropriety.

DISCUSSION

The general concept of conflicts of interest in an office sharing arrangement has previously been addressed by this Committee in Formal Opinion 89-2 (modifying prior Formal Opinion 75-13). There, the following conclusion was reached:

Lawyers who maintain separate and independent practices but share certain office facilities, including reception area, conference rooms, library, computer systems, and receptionist and secretarial personnel, may represent adverse parties so long as the following precautions are met:

1. There shall be no common access to the case files;
2. There shall be no common access to any computerized data relating to the case;
3. No secretary shall be allowed to work on the case for both parties;
4. All common employees shall be informed of the adverse representation and the extreme sensitivity to the maintenance of confidentiality; and
5. Each client shall give his/her consent to the adverse representation after full disclosure of all facts relating to the common practice area.

This topic was addressed more recently by the Nebraska Supreme Court in *State v. Fletcher*, 253 Neb. 1029; 573 N.W.2d 752 (1998). In that case, defense counsel rented space from a member of the public defender's firm (who represented a codefendant). The defense counsel testified in the hearing for post-conviction relief that he was an independent practitioner and that he did not recall sharing any information with the Public Defender which could not have been found in police reports or in other sources. Further, the defendant did not introduce any evidence to support his claim that he was prejudiced by the agreement between the attorneys, and testified that he could not prove any confidential communications he had with his attorney were made known to the Public Defender. The Court ruled:

Although we conclude there is not a conflict in this case, we point out that both the trial court and the practicing bar should be cognizant of the mischief that can be created in the appointment of defense counsel who has an office-sharing arrangement with counsel for a codefendant.

It would seem from this case and our prior opinion that it would be inappropriate for this Committee to determine that there is an automatic conflict where attorneys share office space. However, it would seem appropriate to review the precautions that should be applied to this situation.

This view seems to be consistent with the views of many states as discussed in an article beginning at page 91:605 of the ABA/BNA Lawyer's Manual on Professional Conduct. That article emphasizes the necessity of physically organizing the office in a way that puts client confidences at risk. The specific items discussed are:

Access to Files: The office-sharing lawyers cannot have access to each other's files.

Personnel: Although a common receptionist is permissible, the lawyers should not share secretaries or other support personnel who have access to sensitive or privileged materials.

Computers: The lawyers must avoid sharing computers and any sensitive information often located in the computer system.

Fax Machines: At the very least, access to fax machines should be restricted or it should be made clear to potential users that fax communications are not private.

Copy Machines: The lawyers must either restrict access to copiers or take care not to leave sensitive materials in the machine.

Telephones: Although the office-sharers may share a receptionist, they must ensure that the employees of one lawyer cannot access telephone conversations of the other.

Formal Opinion 89-2 addresses the first three of the above concerns, but we now clarify the first two of those concerns by restating them as follows:

1. The attorney shall keep a secure file system, only accessible to the attorney and the attorney's staff.
2. The attorney shall keep a secure computer system, only accessible to the attorney and the attorney's staff.

In order to cover the last three items, we add the following additional precaution:

The attorney shall insure that faxes are only available to the attorney and the attorney's staff or it should be made clear to clients where conflicts exist that fax communications to a shared fax machine are not private. In addition, sensitive materials shall not be left in shared copy machines, and the phone system shall be set up so that employees of one lawyer cannot access or listen in on telephone conversations of the other.

With respect to the specific concerns raised in your request for an opinion, it is recommended that all files for cases where conflicts exist be kept in a locked cabinet or office where there is limited chance for access, either accidentally or intentionally. With respect to the consent concern, it is suggested that either consent be obtained immediately following the appointment, or perhaps the judges involved could be requested to explain the conflict at the time of the appointment.

CONCLUSION

It is our opinion that lawyers who maintain separate and independent practices but share office facilities, including an attorney who shares office space with a Public Defender, may represent adverse parties so long as the following precautions are met:

1. The attorney shall keep a secure file system, only accessible to the attorney and the attorney's staff.
2. The attorney shall keep a secure computer system, only accessible to the attorney and the attorney's staff
3. No secretary shall be allowed to work on the case for both parties;
4. All common employees shall be informed of the adverse representation and the extreme sensitivity to the maintenance of confidentiality;
5. Each client shall give his/her consent to the adverse representation after full disclosure of all facts relating to the common practice area; and
6. The attorney shall insure that faxes are only available to the attorney and the attorney's staff or it

should be made clear to clients where conflicts exist that fax communications to a shared fax machine are not private. In addition, sensitive materials shall not be left in shared copy machines, and the phone system shall be set up so that employees of one lawyer cannot access or listen in on telephone conversations of the other.

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