

Nebraska Ethics Advisory Opinion for Lawyers
No. 88-1

A "CHINESE WALL" MAY NOT BE USED TO AVOID CONFLICTS OF INTEREST IN APPELLATE AND POST-CONVICTION CASES IN WHICH THE COMPETENCY OF PRIOR PUBLIC DEFENDER IS CHALLENGED BY A CRIMINAL DEFENDANT NOW REPRESENTED BY A PUBLIC DEFENDER FROM THE SAME OFFICE.

FACTS

On occasion one member of the county public defender staff may be requested to challenge the competency of another attorney in the same office in a criminal appeal or post-conviction action. A member inquires under what circumstances the above may be permissible and whether a "Chinese Wall" could be constructed to avoid the appointment of outside counsel.

QUESTION PRESENTED

May a "Chinese Wall" be used to avoid conflicts of interest in appellate and post-conviction cases in which the competency of a prior public defender is challenged by a criminal defendant now represented by a public defender from the same office.

DISCUSSION

It is clear that an attorney should not challenge his own competency in an appellate or post-conviction action. DR 5-101(A). The rule of imputed disqualification, as set forth in DR 5-105(D), extends this conflict to any partner or associate or any other lawyer affiliated with the attorney or his firm.

Certain authorities have not extended the imputed disqualification rule to public defender and legal service organizations. *People v. Wilkins*, 28 N.Y.2d 53, 268 N.E.2d 756 (1971); ABA Informal Opinion 1309 (1975); Michigan Informal Opinion CI-506 (5-15-80). These

exceptions appear to be based upon the structure of the respective office and have limited application to relatively small public defender offices headed by an elected public official with central administrative and supervisory functions.

Case law is somewhat divided as to whether it is proper for a public defender to challenge the competency of a member of his own office. 18 A.L.R.4th 395. The Committee is of the opinion that the imputed disqualification rule should be extended to attorneys in a public defender office. As stated in New York State Bar Association Opinion 533, Lawyers' Manual on Professional Conduct, 801:6104:

"A public defender may not represent a client in an appeal based upon ineffective assistance of trial counsel, where the trial was conducted by another lawyer in the public defender's office who has since left the office. It is a lawyer's duty to exercise professional judgment independently and zealously within the bounds of the law, solely for the client's benefit, and free of compromising influences and loyalties. Where a lawyer must attack his own competence as trial counsel, there is a personal interest that is at odds with the client's right to impartial and zealous representation, and public confidence in our justice system must suffer. If it is improper for one staff member to represent a claim in a particular matter, all are subject to the same prohibition. DRs 5-101, 5-105(D); ECs 5-1, 7-1, 9-2. (6/8/81)"

The rule of imputed disqualification may be avoided in some circumstances by isolating or screening those with a conflict from the other members of the firm or office. This process is described in the following manner at 51:2004 of the Lawyers' Manual on Professional Conduct:

Screening is the process through which a

disqualified lawyer is isolated from other lawyers in a firm so that the firm can try to avoid disqualification. Some courts have modified the imputed disqualification rule by holding that in some instances the presumption of shared confidences may be rebutted by use of an effective screening mechanism to cordon off the disqualified lawyer, thereby preventing that lawyer from tainting the other members of the law firm. The screening procedure is commonly known as a "Chinese Wall." *Cheng v. GAF Corporation*, 631 F2d 1052, 1057 (CA2 1980), vacated on jurisdictional grounds, 450 U.S. 903 (1981). See also *Nemours Foundation v. Gilbane*, 632 FSupp 418, 2 Law.Man.Prof.Conduct 123 (DDel 1986) ("cone of silence" better describes responsibility of individual attorney to guard secrets of former client).

Assuming that the county public defender office is structured so that there is central responsibility for the administrative and supervisory functions, the Committee is of the opinion that a "Chinese Wall" would not shield the office from the imputed disqualification rule. It would be improper for one attorney to challenge the competency of another attorney in the same office when salaries, promotions and job assignments for both attorneys are determined by the same elected official. This is especially true if the elected official is the target of the competency challenge. Even if the second attorney would be screened from the files, confidences, office discussions and personal relationships of the other attorneys, the fact that both attorneys are under the control and supervision of the same authority creates the appearance of impropriety.

CONCLUSION

A "Chinese Wall" may not be used to avoid conflicts of interest in appellate and post-conviction cases in which the competency of a prior public defender is challenged by a criminal defendant now represented by a public

defender from the same office.

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