

BAR ASSOCIATION OF ERIE COUNTY
COMMITTEE ON PROFESSIONAL ETHICS

Opinion 05-07 - 4/4/05

Topic: Office sharing.

Digest: Conflict in office sharing situation: An attorney who shares office space with a part-time employee of the Public Defender's Office can not represent public defender clients who the Public Defender's Office has been disqualified from representation.

Code: EC 1-18
DR 5-105D

QUESTION

Is an attorney who shares office space with a part-time member of the Public Defender's Office, precluded from accepting court assignments of clients who were assigned because of a conflict within the Public Defender's Office?

OPINION

Background

The attorney in this matter shares space with several other attorneys. The Rental Agreement includes a sharing of office staff, telephones, copy machines and other facilities. There are two secretaries. Each of them performs work for both of the attorneys. There is a policy in place whereby secretaries are notified if there is a potential conflict and they split assignments so that the secretaries only work on one side of a matter.

The lessor of the space is the wife of an attorney-lessee who is a part-time member of the Public Defender's Office. When that office has a conflict (either because of representation of a co-defendant or a crime victim), the court will assign private counsel to represent the client who is conflicted. The attorney co-lessee accepts assignments of Public Defender clients who are referred to her because of the conflict situation.

The Public Defender's Office employee-lessee often has Public Defender files in his private office. He conducts some Public Defender work out of his private office. The attorney-lessee would also have Public Defender client files in the office. On occasion, a secretary would perform work for the Public Defender attorney lessee and the same secretary could perform work for the private attorney-lessee.

The private attorney-lessee never accepts a referral when the Public Defender attorney-lessee represents a codefendant or witness in the same matter. The opportunity for a conflict to arise is minimal because the Public Defender attorney-lessee usually represents clients charged with felonies and the private attorney-lessee usually represents clients charged with misdemeanors.

Analysis

DR 5-105D is the main provision in the Code governing "vicarious" or imputed" disqualification. It provides that if one lawyer in a firm is disqualified then every lawyer in the firm – including lawyers associated with the firm as "of counsel" would also be disqualified. This rule also extends to lawyers who share office space if they have or could have ready access to confidential information of clients of others with whom they share space.

The layout and functioning of this small office are such that a "screen," firewall," or "ethical wall" would not be a viable option because of the fact that this is a small office where the secretaries do the work of both attorneys and the attorneys share copying machines, telephones, etc.

DR 5-105(D) provides that "*while lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when anyone of them practicing alone would be prohibited from doing so under DR 5-101.*"

The New York State Bar Association Committee on professional ethics has dealt with two situations which can be analogized to the instant situation. The Committee found that an Assistant Public Defender may not share office space with a Village Justice or any member of the Public Defender's staff who appears in Justice Court. The rationale was, "The reason for prohibiting a lawyer from sharing office space with a Judge in whose court the lawyer practices is grounded on the need to promote public confidence in the administration of justice by avoiding the appearance of impropriety". The Committee goes on to say that "A public defender staff, like that of a District Attorney, is treated comparably to a partnership in private practice where purposes of applying the ethical precepts of Canons 5 and 9". (Opinion #497-11278(57-78)).

The Committee on Professional Ethics also considered whether it was improper for a lawyer who shares space with an Assistant District Attorney to practice criminal law in the County for which the Assistant District Attorney has been appointed. The Committee found that:

Clearly it would be inappropriate for the partner or the associate of the Assistant District Attorney to represent criminal defendants in the courts where the District Attorney and his assistants are representing the State. In order to avoid the appearance of impropriety it has normally been held that one sharing office space should be disqualified to the same extent as a partner or associate.

In N.Y. State 413 (1975) it was held to be improper for an Assistant District Attorney to enter into a business relationship with an attorney who defends clients prosecuted by the District Attorney's Office. The appearance of impropriety would be even greater where the Assistant District Attorney shares office space with the attorney who represents criminal defendants. (Opinion #437-7/19/76 (46-76)).

CONCLUSION

Under the circumstances described, the attorney-lessee can not accept the court appointment.