

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-418
Issued: November 2001

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rules 1.9 and 1.10, which were amended. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: Is Lawyer A imputedly disqualified from representing a client if s/he shares office space with Lawyer B, who -- before sharing the space -- represented (or practiced in a firm that represented) a former client with an adverse interest in the same or substantially similar matter?

Answer: If the office-sharing arrangement resembles a firm, causing the lawyers to be treated as members of a firm under the Rules of Professional Conduct, then Lawyer A *is* imputedly disqualified as stated below *unless* (i) the former client consents after consultation to the representation, *or* (ii) Lawyer B is effectively screened from any participation in the matter, and timely written notice is given to the former client.

References: Kentucky Rules of Professional Conduct (S.C.R. 3.130) 1.6, 1.9, 1.10, 1.11, 1.12; KBA Opinions E-301, E-322, E-354, E-406; *Jaggers v. Shake*, 37 S.W.3d 737 (Ky. 2001); *Lovell v. Winchester*, 941 S.W.2d 466 (Ky. 1997); American Law Institute, *Restatement (Third) of the Law Governing Lawyers* § 124 (2000); ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* (4th ed. 1999), at 169-70; *ABA/BNA Manual on Professional Conduct* (1998), at 91:606-08.

OPINION

This inquiry calls upon us to examine the doctrine of imputed disqualification in the context of a lawyer office-sharing arrangement. Our analysis begins with the general rules governing former clients and imputed disqualification. Next, it considers how these rules apply in an office-sharing situation.

Former Clients and Imputed Disqualification Generally

Rule 1.9 of the Kentucky Rules of Professional Conduct (S.C.R. 3.130 [1.9]) sets forth the fundamental limitations upon a lawyer's representation of a client whose interests are

materially adverse to those of one of the lawyer's former clients. Rule 1.9 (a) provides that the lawyer may not represent such a client whose interests are materially adverse to those of a former client -- in a matter which is the same as, or substantially related to, the matter of the former representation -- unless the former client consents after consultation. Under Rule 1.9 (b) the same preclusion applies, even though the lawyer did not personally represent the former client, if the lawyer previously practiced in a law firm that represented the former client and the lawyer has information about the former client that would be protected under Rule 1.6 (confidentiality) or Rule 1.9 (c) (restriction on use or revelation of information relating to former client).

These protections of the former client are further extended by Rule 1.10. If the lawyer currently is practicing in a firm different from the lawyer's previous firm that represented the former client, Rule 1.10 (a) precludes all lawyers in the current firm from representing a client whom the lawyer him/herself would be barred from representing under Rule 1.9. Thus, if a lawyer (whom we will now call Lawyer B) moves to a new firm where Lawyer A practices, and Lawyer B has protected information relating to a former client of the old firm, then A is precluded from representing a client whose interests are materially adverse to that former client, in the same or substantially related matter.

There are two exceptions to this broad matrix of imputed disqualification. First, as noted earlier, Lawyer A could represent a client whose interests are materially adverse to those of a person formerly represented in the same or substantially related matter by colleague Lawyer B, or by B's previous firm, *if* the former client gave consent upon consultation. Second, Kentucky's present version of Rule 1.10, as amended in Supreme Court order in 1999 (effective in 2000), provides at subsection (d) that a firm is "not disqualified from representation of a client *if* the *only* basis for disqualification is representation of a former client by a lawyer presently associated with the firm, sufficient to cause that lawyer to be disqualified pursuant to Rule 1.9 *and* (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no specific part of the fee therefrom; and (2) written notice is given to the former client." (Emphasis supplied.)

Kentucky rule 1.10 (d) has no counterpart in ABA Model Rule 1.10, which does not recognize a screening exception to imputed disqualification in cases involving former clients. Nonetheless, it is consistent with many court decisions holding that imputation can be removed through screening in such cases. *See, Restatement (Third) of the Law Governing Lawyers* §124 (2000). Indeed, our Committee commented several years ago on the developing case law. *See, KBA Opinion E-354* (1993). Kentucky Rule 1.10 (d) also is consistent with the approach taken elsewhere in the Kentucky Rules and the Model Rules when a lawyer joins a firm after a period of judicial service or other government employment. In such situations, imputed disqualification of the firm can be avoided if the lawyer is effectively screened. *See Kentucky Rules and Model Rules 1.11 and 1.12; see also, KBA Opinion E-301* (1985) (screening of former judge).

Thus, in Kentucky, if Lawyer B moves from one law firm to another, Lawyer A in the new firm may represent a client whose interests are materially adverse to those of a person whom B or B's old firm previously represented in the same or substantially similar matter, even though B has protected information about the former client -- *if* the former client consents after

consultation, *or if* B is effectively screened from the matter (and is apportioned no specific part of the fee generated by the matter), and notice is given to the former client. The screening option typically is considered when the firm determines that a former client should not be asked for consent, or when the former client declines, upon consultation, to give consent. In that event, the purpose of providing notice of screening to the former client is not to give him or her a second chance to withhold consent; rather, it is to give the former client an opportunity to question the adequacy of a proposed screening arrangement or of the measures proposed to monitor for the effectiveness of the screen. *Restatement* § 124, comment *d(iii)*. Consequently, notice to the former client must be timely and descriptive.

An adequate screen usually is understood to include safeguards that the disqualified lawyer:

- (i) will not participate in the matter;
- (ii) will not talk to any other member of the firm about the matter or share documents relating to it;
- (iii) will not impart (and prior to screening has not imparted) any confidential information to the firm;
- (iv) will not have access to any files or documents relating to the matter; or
- (v) will not receive a direct and specific apportionment of fees or other financial benefit generated in the matter.

See, American Bar Association, Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct* (4th ed. 1999), commentary at 169-70, *and*, *Restatement* §124, comment *d(ii)*; *cf.* Comment 5 to Rule 1.11 (treatment of fees in other screening situations). In a matter where disqualification has become an issue before a court, if such safeguards are incorporated into a screening arrangement, but the arrangement later is breached, the firm may be disqualified and also may be subjected to contempt proceedings. *Id.* Conversely, if timely notice has been given of such a screening arrangement, and if the safeguards are found to be adequate and effective, disqualification can be avoided. *E.g.*, Cromley v. Board of Education, 17 F.3d 1059 (7th Cir.), *cert. denied*, 513 U.S. 816 (1994).

In some circumstances, a former client might assert that disqualification is required in order to prevent an “appearance of impropriety.” The “appearance of impropriety” standard has been rejected as to imputed disqualification in Comment 9 to Kentucky Rule 1.10. Concededly, our Supreme Court has stated that “appearance of impropriety” can be an independent basis for assessing whether a lawyer’s duty of loyalty and confidentiality to a former client would be compromised by representation of another client. Lovell v. Winchester, 941 S.W.2d 466 (Ky. 1997). The Court has not employed the “appearance of impropriety” rubric, however, to mandate disqualification where it would not arguably be required also under the Rules of Professional Conduct. *See, e.g.*, Jaggers v. Shake, 37 S.W.3d 737 (Ky. 2001) (declining to apply

“appearance of impropriety analysis where interests of former and present clients were not directly adverse, and clients evidently had waived any conflict). In any event, if timely notice of a screening arrangement is given, and if adequate and effective safeguards are adopted, it is likely that both Rule 1.10 and the “appearance” standard would be satisfied.

Application of General Principles to Office-Sharing Situations

This Committee recently stated, in KBA Opinion E-406 (1998), that it may be possible to structure an office-sharing arrangement so that it does not trigger concerns such as confidentiality of information, each lawyer’s loyalty to clients, and each lawyer’s exercise of independent professional judgment. In analyzing any such arrangement, however, the Committee noted that attention must be given to work assignments, utilization of common staff (if any), and access of lawyers and common staff to confidential information in client files and communications. *See also* Mich. Prof. Jud. Eth. Op. No. RI-118 (1992) (application of ethical rules to office-sharing arrangements generally turns on the preservation of client confidences and secrets, the exercise a lawyer’s independent professional judgment in representing clients, and the accuracy and propriety of communications concerning the lawyer’s services).

If the lawyer relationships and client information systems found in an office-sharing arrangement resemble those found in firms, the lawyers will be deemed members of a firm for the purpose of applying the Rules of Professional Conduct. KBA Opinion E-406. *Compare* KBA Opinion E-322 (1987) (prosecutors and defense counsel may not share offices because of the obvious risks to confidentiality of client information and to each lawyer’s professional independence; but office-sharing allowed if part-time government lawyers’ duties are limited to special functions, and prosecutors and defense counsel allowed to rent space in the same building if the offices are “sufficiently separate to ameliorate the concerns raised by ‘office sharing’”). *See generally*, comment 1 to Rule 1.10, *and* American Bar Association/Bureau of National Affairs, *Lawyers’ Manual on Professional Conduct* (1998, and supplements), at 91:601 *et seq.*

Conversely, where an office-sharing arrangement rigorously shields each lawyer from confidential information of the other lawyers’ clients, recognizes each lawyer’s individual loyalty to his or her clients, protects each lawyer’s exercise of independent professional judgment, and avoids improper communications about each lawyer’s identity and services, the arrangement will not be treated as a firm. Accordingly, the rules (discussed above) relating to imputed disqualification of firms – Rules 1.09 (b) and 1.10 -- would not apply to the office-sharing lawyers. If the arrangement resembles a firm, however, then the rules would apply. Thus, if Lawyer B or B’s firm represents a client and B acquires protected information about the client, and if, after that representation is terminated, B moves into an office-sharing arrangement with a firm where Lawyer A practices, then neither Lawyer A nor the other lawyers in A’s firm may represent another client whose interests are materially adverse to the former client of B or B’s firm on the same or substantially related subject matter – *unless* the former client consents upon consultation, *or unless* safeguards are built into the office-sharing arrangement to meet the “screening” standards described above *and* timely notice is given to the former client.

Of course, such screening will avoid disqualification of Lawyer A or A's firm only if the *sole* basis for disqualification is imputation stemming from the representation of the former client by B or B's firm. If another conflict of interest exists with respect to Lawyer A or A's firm, it will require separate examination. Nothing in this opinion diminishes any lawyer's duty to avoid actual conflicts of interest, whether as a member of a firm or as a practitioner in an office-sharing arrangement.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.