

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-406
Issued: November 20, 1998

The Rules of Professional Conduct are amended periodically. 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 1: May two law firms that often represent clients with adverse interests employ the same legal secretary?

Answer: Qualified No.

Question 2: May two or more lawyers who share office space and often represent clients with adverse interests, share a legal secretary?

Answer: Qualified No.

Question 3: May two law firms or lawyers sharing office space share a legal secretary when the law firms or office-sharing lawyer do not represent clients with adverse interests?

Answer: Qualified Yes.

References:: KRPC 1.6; 1.7; 1.8;1.9; 1.10; 5.3; Oliver v. KBA, 779 S.W.2d 212 (KY 1989); Ciaffone v. Eighth Judicial Dist. Ct., 945 P.2d 950 (Nev. 1997); ABA Formal Op. 88-356 (1988); ABA Informal Op. 88-1526 (1988); KBA E-308 (1985); Utah Op. 125 (1994); Oregon Ethics Op. 1991-50 (1991); ABA/BNA LMPC 91:606.

OPINION

These inquiries ask whether it is ethical for two or more unrelated lawyers or firms to employ the same legal secretary. While the Kentucky Rules of Professional Conduct do not apply directly to nonlawyers, Rule 5.3 requires partners and supervising lawyers to take reasonable steps to ensure that nonlawyer “conduct is compatible with the professional obligations of the lawyer.” KRPC 5.3.

Two separate but related obligations are implicated by these inquiries. The first is the duty to preserve client confidences. Rule 1.6 provides, in part, “[a] lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation....” KRPC 1.6.

While Rule 1.6 clearly authorizes disclosure of confidential information to a legal secretary in furtherance of the representation, Rule 5.3 obligates the lawyer to take appropriate action to protect against improper disclosure by the secretary or other nonlawyer assistant. *See* KRPC 5.3, Comment.

Closely related to the duty to protect against disclosure of client confidences is the duty of loyalty, which is codified in the conflict of interest rules. KRPC 1.7 - 1.12. The duty of loyalty is often expressed in terms of the lawyer's duty to exercise independent professional judgment in the representation of the client. In this regard, the conflict rules have no direct consequence for the legal secretary or other nonlawyer employees. But the concept of loyalty has a much broader meaning, which is reflected in the rules prohibiting a lawyer from using "information relating to the representation of a client [or former client] to the disadvantage of the client...." KRPC 1.8(b) and 1.9(b). The lawyer's duty to protect against improper use of client information does have consequences for the legal secretary.

Thus, analysis of these inquiries begins with the premise that Rule 5.3 obligates the lawyer to protect against both improper disclosure and improper use of confidential information. The threshold question is how does the lawyer go about satisfying his or her obligations under Rule 5.3? The Comment to Rule 5.3 starts by restating the obvious: "[a] lawyer should give ... assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client...." It is clear that the lawyer must do more than merely "instruct" the legal secretary about his or her ethical obligations. Legal secretaries and other nonlawyer employees are not trained as lawyers and are not subject to discipline. The burden falls upon all of the lawyers, whether they are lawyers in formal law firms or office-sharers, to evaluate their respective practices and the nature of the work to be assigned to the legal secretary to determine if it is possible to develop policies and procedures that will adequately protect client interests. In analyzing these questions, special attention must be given to both the assignment of work and access to client files.

Question 1 deals with the firms that often represent adverse interests. In order to protect client confidences, the two firms would have to work together to develop policies that ensure that legal secretary would not be assigned work involving conflicting interests. The Committee has serious doubts as to whether it is practical, or even possible, to monitor conflicts between two unaffiliated firms on a continuing basis. This is not to say that a legal secretary can never work for two firms at the same time. There may be situations where the nature of the work done by each is so distinct that conflicts would never arise, but that is not the case presented by Question 1.

Protecting client confidences requires more than coordinating and monitoring work assignments. As Comment 11 to Rule 1.10 correctly notes, "[p]reserving confidentiality is a question of *access* to information" (emphasis added). Both firms would have to take special precautions to prevent access to and the sharing of confidential information about clients who have conflicting interests. *See generally*, ABA Inf. Op. 88-1526 (1988); ABA Formal Op. 88-356; KBA E-308; Oliver v. KBA, Ky., 779 S.W.2d 212 (1989). While recognizing that screening has been employed to avoid disqualification when a secretary moves from one firm to

another, the practicality of screening when the secretary has a continuing relationship with two firms is doubtful. Just as with work assignments, both firms would have to evaluate their client base on a daily basis to identify those files from which the legal secretary should be screened. We believe this is unrealistic in most, if not all, situations. Finally, the law firms must consider also the threat of law firm disqualification by a court of law as a result of simultaneous employment of the legal secretary, though court disqualification is not a matter of ethics. *See, e.g., Ciaffone v. Eight Judicial Dist. Ct.*, 945 P.2d 950 (Nev. 1997).

Question 2 asks whether office-sharing lawyers can share a legal secretary if the office-sharers often represent adverse interests. Whether such an arrangement is permissible will depend on the particular facts of each individual situation. The problems presented by office-sharers who represent conflicting interests are similar to those described above and the duty to protect against improper disclosure and use is the same. Thus, it is not surprising that most ethics committees that have considered this issue strongly advise against sharing legal secretaries and other nonlawyer employees who have access to sensitive material. *See generally*, ABA/BNA LMPC sec 91:601, 606; Utah Ethics Op 93-99 (1994); Oregon Ethics Op. 1991-50 (1991). The Committee notes that if the office-sharers conduct their practice as a firm, they will be treated as a firm for conflict of interest purposes. KRPC 1.10, Comment 1. Shared use of a secretary, along with access to client files, are two factors that would weigh heavily in favor of treating office-sharers as a firm.

Question 3 deals with the sharing of a legal secretary by office-sharing attorneys and law firms when the firms or office-sharers do not represent adverse interests. The Committee notes that the interests and concerns discussed above are equally relevant in any evaluation of sharing a legal secretary. There may be situations in which the nature of the work done by each law firm is so distinct that conflicts rarely, if ever, arise and thus can be detected and dealt with in accord with the above discussion. Likewise, the Committee recognizes that it may be possible to structure office-sharing arrangements so that the office-sharers do not represent conflicting interests. This opinion should not be read to suggest that law firms or office-sharers can never share secretaries.

The issues to which this opinion is addressed involve a legal secretary. The same principles would apply to other nonlawyer employees of attorneys.

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.