

KENTUCKY BAR ASSOCIATION

Ethics Opinion KBA E-417

Issued: July 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 Rule 1.7 and the Comments, which was 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: May a lawyer share office space with persons or organizations engaged in activities other than the practice of law?

Answer: A lawyer may *not* share office space with persons or organizations engaged in such other activities *unless* the office-sharing arrangement, in its physical layout and its functional operation, will:

- a) safeguard confidential information of the lawyer's clients, by preventing unauthorized access;
- b) preserve the lawyer's professional independence, by keeping the law practice separate and distinct from other activities and by avoiding impermissible conflicts of interest; *and*
- c) conform to rules governing information about legal services, by avoiding improper advertising and referral or solicitation of prospective clients.

Ordinarily, office sharing arrangements will satisfy these requirements if they:

- (i) provide exclusive and secure facilities for the lawyer to meet clients, communicate with them, and store information relating to their representation;
- (ii) establish the distinct identity of the law practice by furnishing clearly differentiated signage and entry to the law office and by avoiding uses of common employees or facilities in ways that suggest the practice and other activities are somehow affiliated; *and*
- (iii) allow no misleading communications on the premises regarding legal services, no communications suggesting that the law practice

is affiliated with another activity, no improper advertising or contacts by the lawyer with prospective clients, and no scheme by which the law practice and other activities give or receive anything of value in return for client referrals.

References: Kentucky Rules of Professional Conduct (S.C.R. 3.130) 1.6, 1.7(b), 5.4, 5.5, 7.10, 7.20, 7.30; KBA Opinions E-406, E-322, E-192; ABA Formal Opinion No. 328 and Informal Opinion No. 1482

OPINION

This Committee has long advised lawyers to view office-sharing arrangements with caution. In 1978 the Committee issued KBA Opinion E-192, adopting an outright prohibition against office-sharing with professionals or businesspersons engaged in activities other than the practice of law. The Committee acknowledged that its prohibitory approach contrasted with several informal opinions of the American Bar Association, which had allowed office-sharing arrangements on a case-by-case approach if they did not become “feeders” for the law practice, create indirect advertising, or entail an improper apportioning of fees or expenses. These informal ABA opinions flowed from Formal Opinion 328 (1972), in which the ABA Committee on Ethics and Professional Responsibility had eschewed broad language condemning “indirect solicitation” or “feeding the law practice.” Instead, the ABA Committee insisted, “any proscription must be based on provisions of the Code [of Professional Responsibility].”

Nonetheless, in KBA Opinion E-192 our Committee considered office-sharing to be a phenomenon deserving of separate treatment and categorical condemnation:

[T]he evils of direct or indirect solicitation on [the] part of the laymen are inevitable. Sooner or later, there will, in fact, be a feeder service for the practice of law.... With all due regard to the American Bar Association, it is our opinion that a lawyer may not share office space and expenses with a real estate broker. Furthermore, a lawyer may not share office space and expenses with a certified public accountant *or any other group or groups of people*. [Emphasis supplied.]

In 1982, the ABA issued Informal Opinion No. 1482, revisiting the issue of office-sharing in the context of the Code. The ABA Committee explained its adherence to the case-by-case approach:

The Model Code does not prohibit a lawyer from sharing office space with a private business. Nonetheless, steps must be taken by any lawyer who practices in such a setting to avoid possible misunderstanding that could be created by sharing offices. Because certain specific legal obligations and ethical protections hinge upon the existence of an attorney-client relationship, care must be taken to leave no doubt as to when that relationship exists and when it does not.

When the ABA later promulgated the Model Rules of Professional Conduct, it maintained the same approach. As explained in one authoritative commentary:

Nothing in either the ABA Model Rules or the ABA Model Code specifically proscribes the sharing of office space, personnel, equipment, or expenses. A lawyer who decides to enter into this type of arrangement, however, must consider various ethical constraints against misleading the public, revealing client confidences, or engaging in improper division of fees or solicitation. [ABA/BNA Lawyers' Manual on Professional Conduct (2000), at p. 91:601, hereinafter cited as ABA/BNA Manual.]

Recent opinions of state bar ethics committees outside Kentucky have followed the ABA's lead. *Id.* at pp. 91:610-12, and 614-15. As noted by the Michigan Standing Committee on Professional and Judicial Ethics, office-sharing is not, of itself, the ethical issue; rather, it is the factual setting in which compliance with ethical protections must be examined. These protections include the preservation of client confidences and secrets, the exercise of a lawyer's independent professional judgment in representing clients, and the accuracy and propriety of communications concerning the lawyer's services. Mich. Prof. Jud. Eth. Op. No. RI-118 (1992).

We agree. The modern Rules treat office-sharing as a context in which ethical issues arise, rather than as a separate problem to be addressed by categorical prohibition. When we adopted the categorical approach in KBA Opinion E-192, our concern was primarily with "feeder" operations that contravened the spirit of prohibitions against lawyer advertising and client solicitation. Although the lines of demarcation against advertising and solicitation had already begun to shift by 1978, we created a prophylactic remedy against a source of activities perceived to be broadly prohibited. Today, as court decisions have forced outright prohibitions of advertising or solicitation to be replaced by fact-sensitive regulations and limitations, the categorical approach to office-sharing has become overbroad. Office-sharing arrangements vary greatly. It would be an oversimplification to say that *no* arrangement *ever* could satisfy the ethical standards relating to confidential information, independent professional judgment, or communications about a lawyer's services. Moreover, a categorical preclusion against office-sharing may stifle some ethically responsible office-sharing arrangements that could produce salutary effects, such as enabling lawyers to control costs and to make their services more fully available to clients of moderate means.

In our view, the time has come to allow office-sharing arrangements while holding them strictly accountable under these ethical standards. Indeed, our Committee already has moved in that direction with respect to office-sharing by lawyers with other lawyers. We have stated, for example, that 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 we have allowed office-sharing if part-time government lawyers' duties are limited to special functions, and we have allowed prosecutors and defense counsel to rent space in the same building if the offices are "sufficiently separate to ameliorate the concerns raised by 'office sharing'." KBA Opinion E-322 (1987).

Accordingly, today we modify that part of KBA Opinion E-192 which categorically prohibits all office-sharing arrangements between lawyers and persons engaged in occupations or professions other than the practice of law. We reaffirm, however, the ethical mandate that any office-sharing arrangement, in its physical layout and functional operation, must safeguard confidentiality under Rule 1.6 [Kentucky S.C.R. 3.130 (1.6)], by preventing unauthorized access to client information. The arrangement also must preserve the lawyer's professional independence under Rules 5.4 and 5.5, by keeping the law practice separate and distinct from other activities. Finally, the arrangement must conform to Rules 7.10, 7.20, and 7.30; it must avoid improper communications, by the lawyer or by the office-sharing nonlawyers, of information about legal services. It is the lawyer's responsibility to assure that a contemplated office-sharing arrangement will satisfy all of these standards and will conform to any other applicable provisions of the Rules of Professional Conduct.

Experience with office-sharing in jurisdictions outside Kentucky has revealed the kinds of safeguards ordinarily needed to demonstrate compliance with these ethical requirements. Confidentiality must be protected by providing space in which lawyer-client conversations cannot be seen or overheard; by providing separate and secure computer systems and files for client-related records, including client-related billing and accounting information; and by providing separate telephone service to the lawyer's office as well as a means of safeguarding the confidentiality of any information sent or received by facsimile machine. *See generally, e.g.*, D. C. Ethics Opinion No. 303 (2001); N.Y. Cty. Law. Ass'n Comm. Prof. Ethics Opinion 692 (1993). In order further to protect confidentiality and to assure the lawyer's professional independence, any shared staff must be trained and supervised in preserving the separateness of law office work and the confidentiality of client records and communications. *See, e.g.*, Pa. Bar Ass'n Comm. Legal Ethics Prof. Resp. Informal Opinion No. 95-105 (1995); Mich. Prof. Jud. Ethics Opinion, *supra*. Common receptionists ordinarily should be avoided; if one is used, however, the lawyer's telephone line must be separate and exclusive; incoming calls must be answered in a way that identifies the lawyer or law office without reference to the other activities. Neither a shared receptionist nor any other shared staff may handle confidential client information. Moreover, if the lawyer's clients have interests adverse to the other professionals or businesspersons sharing office space on the premises, staff must not be shared at all. *Cf.* KBA Opinion E-406 (1998) (stating that lawyers representing clients with adverse interests may not share a legal secretary).

The lawyer's professional independence also must be evidenced by an office arrangement that "makes it clear to all clients and others that they are dealing with the law firm at times when in fact this is the case." ABA Informal Opinion 1482, *supra*. Door signs, the entry to the law office, telephone listings, written materials such as stationery, and receptionist contacts must express the separate and distinct character of the law practice. Mich. Prof. Jud. Eth. Opinion RI-206 (1994). A common conference room should not be used by the lawyer as a library or in any other way suggesting an affiliation of the law practice with another activity on the premises. *Id.* The names of law firms and other activities must not suggest the existence of such affiliation, and the law practice must not divide fees with the other activities. *See generally*, ABA/BNA Manual, *supra*, at p. 91:601. Moreover, the lawyer must take care to assure that relationships with other activities on the shared premises do not give rise to impermissible conflicts of interest,

such as an economic interest of the lawyer or third person adversely affecting the representation of a client within the meaning of Rule 1.7 (b).

Finally, the lawyer must take responsibility for assuring that no misleading information about his or her legal services is disseminated on the premises and that any communication about the lawyer conforms to restrictions on advertising and on direct contact with prospective clients. Communications may not suggest that the law practice is affiliated with another activity on the premises. Office-sharing may not be undertaken for the purpose of facilitating referrals or cross-referrals of clients; neither may anything of value be given or received for such referrals. *See, e.g., Arizona Ethics Opinion 84-10 (1984); Ohio Informal Ethics Opinion No. 90-2 (1990); and Wisconsin Ethics Opinion E-83-8 (1983) (each cited in ABA/BNA Manual, supra).*

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.