

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-9

Issued April 12, 1991

Withdrawn by Adv. Op. 2022-11

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 2-107, eff. Aug. 1, 1990; DR 7-107, eff. Jan. 1, 1996.]

SYLLABUS: Attorneys who maintain separate law practices within the same building are not lawyers in the "same firm" for purposes of DR 2-107 (A); therefore, these attorneys must comply with restrictions on division of fees contained within DR 2-107.

In order to preserve client confidences and secrets as required by DR 4-101, attorneys with separate law practices in the same building must maintain filing systems separate from and inaccessible to other attorneys. Computer access to client files must be limited to the client's attorney and staff in the absence of full disclosure to and consent of the client.

It is proper for attorneys who maintain separate practices to share non-lawyer personnel provided that each attorney exercise reasonable care to prevent the employees from disclosing or using confidences or secrets of a client as required by DR 4-101.

OPINION: We have before us a request for an advisory opinion on the application of various disciplinary rules to attorneys who maintain separate law practices within the same building but wish to share fees, expenses, and services. Three questions are raised:

1. Whether there are restrictions on the division of fees among attorneys who have separate law practices in the same building, but who collaborate on legal matters;
2. Whether, in order to preserve client confidences and secrets, attorneys with separate law practices in the same building must maintain separate filing and computer systems inaccessible to the other attorneys and their staffs;
3. Whether it would be proper for attorneys who maintain separate law practices to share non-lawyer staff?

DR 2-107 of the Code of Professional Responsibility (Code) regulates the division of fees among lawyers and clearly applies restrictions on the division of fees by attorneys "who are not in the same firm." It is the opinion of the Board that attorneys maintaining separate law practices within the same building are not lawyers in the "same firm" for purposes of DR 2-107 (A). Therefore, these attorneys must comply with restrictions on division of fees contained within DR 2-107. For a more complete discussion on the division of fees, see Ohio SupCt, Op. 91-5 (1991).

The Code does not specifically prohibit the sharing of office space, equipment, personnel, or expenses among lawyers. However, under DR 4-101 which governs the preservation of client confidences and secrets, the attorney has an affirmative duty not to reveal or use a confidence or secret of his client, except when permitted by the rule. DR 4-101 (A) (B) (C). The lawyer also has the affirmative duty to exercise reasonable care to prevent employees, associates, and others from disclosing or using confidences of a client. EC 4-2, DR 4-101 (D).

The purpose of the DR 4-101 restrictions is to preserve the candor between client and attorney required for proper functioning of the legal system and to maintain the fiduciary relationship between client and lawyer. EC 4-1. Also, the ethical obligation to preserve confidences and secrets of a client facilitates proper representation of clients and encourages the public to seek early legal assistance. EC 4-1.

A lawyer may disclose the affairs of his clients to partners or associates of his firm, unless the client otherwise directs. EC 4-2. However, the Code does not authorize the sharing of client confidences and secrets among attorneys with separate practices. DR 4-101. Thus, in the absence of client consent after full disclosure, a lawyer should not associate with another lawyer nor seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed. EC 4-2. Since DR 4-101 C (1) clearly requires consent and full disclosure to clients prior to revealing confidences or secrets, attorneys with separate practices who wish to co-counsel on client matters should comply with DR 4-101 (C) (1). These attorneys should also comply with DR 2-107 (A).

The Advisory Committee on Professional Ethics of the Supreme Court of New Jersey has opined that a lawyer may share word processing and other computer facilities with a lawyer in an adjacent office, but reasonable care must be taken to prevent employees and associates from disclosing or using client confidences or secrets. New Jersey SupCt, Op. 515 (1983). Similarly, the Legal Ethics Committee of the Oregon State Bar stated that lawyers who share office space can maintain a common file room but must preserve confidences and secrets by guidelines which perhaps could provide for maintaining separate, secured file systems. Oregon State Bar, Op. 486 (1983).

It is the opinion of this Board that in order to preserve client confidences and secrets as required by DR 4-101, attorneys with separate law practices in the same building must maintain filing systems separate from and inaccessible to other attorneys. Computer access to client files must be limited to the client's attorney and staff in the absence of full disclosure to and consent of the client.

A more flexible rule applies to the sharing of non-lawyer staff services. DR 4-101 (D) places a duty of reasonable care to prevent non-lawyer personnel from violating the preservation of client confidences and secrets:

A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101 (C) through an employee.

Code of Professional Responsibility DR 4-101 (D).

The Code acknowledges that the normal operation of a law office exposes confidential professional information to non-lawyer employees and that this obligates a lawyer to select and train his employees carefully in order to preserve the sanctity of client confidences and secrets. EC 4-2. DR 7-107 (J) places a related duty upon a lawyer to prevent employees from making extrajudicial statements on confidential matters.

ABA Model Rule 5.3 (a) regarding non-lawyer assistants, suggests that a partner in a firm must make reasonable efforts "to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." Under Model Rule 5.3 (b), reasonable efforts must also be made by a lawyer with supervisory authority over a non-lawyer "to ensure that the person's conduct is compatible with the professional obligations of the lawyer." The rule also deems a lawyer responsible for the conduct of the non-lawyer assistant under certain circumstances. Model Rule 5.3 (c). The Comment to Model Rule 5.3 advises that the lawyer should give instruction and supervision to assistants regarding ethical aspects of employment, particularly the obligation not to disclose information relating to representation of the client.

The Committee on Professional Ethics of the State Bar of Wisconsin has expressed the opinion that a district attorney's office and a circuit judge's office may share the services of a non-lawyer employee provided that both offices exercise reasonable care in instructing and supervising the employee regarding confidentiality of documents and communications. Op. E-86-13 (1986).

It is the opinion of this Board that it is proper for attorneys who maintain separate practices to share non-lawyer personnel provided that each attorney exercise reasonable care to prevent his employees from disclosing or using confidences or secrets of a client as required by DR 4-101. The Board suggests that in an effort to avoid potential conflicts, the lawyers disclose to their clients that non-lawyer personnel are shared by lawyers with separate law practices.

This is an informal, non-binding advisory opinion based on the facts presented and limited to questions arising under the Code of Professional Responsibility.