



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.7 and 1.10. See also ISBA Ethics Advisory Opinion 90-17. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

Opinion 85-14
May 22, 1986

Topic: Conflict of Interest

Digest: There is no per se rule against two Assistant Public Defenders who share office space but maintain separate law practices representing defendants with conflicting interests provided each fully discloses the situation to the clients and obtains the clients' consents and provided further that each can represent his client with undivided allegiance.

It is ethically improper for these two Assistant Public Defenders to involve a common secretary if they represent defendants with conflicting interests.

Ref.: People v. Robinson, 79 Ill.2d 147 (1980)
People v. Nelson, 82 Ill.2d 67 (1980)
Canons 4, 5, 9
Rules 5-101(a), 5-105, and 5-105(d)
ISBA Opinion Nos. 212, 316, 340, 482, 620, 644, 698, 701, 783, 822, 846.

FACTS

Two Assistant Public Defenders share office space and a common secretary but are not associated together in the practice of law, do not hold themselves out as practicing together, and have separate

stationery. In the county where these Assistant Public Defenders practice, there is no separate office space for public defenders. Attorneys are appointed as Assistant Public Defenders in a given case by the Circuit Judge who presides over that particular case.

QUESTIONS

1. Is it either an ethical violation or a conflict of interest for both attorneys to be involved in the same case as Assistant Public Defenders representing separate defendants with conflicting interests?
2. Is the situation different if the common secretary is not involved in any manner?

OPINION

This inquiry raises three basic questions. Does the representation by individual Assistant Public Defenders of separate defendants with conflicting interests present a per se conflict? Are attorneys in an office sharing arrangements held to the same standards of disqualification as attorneys in a law firm? Can two who have conflicting interests with undivided loyalty to their respective clients?

As to the first question, the Illinois Supreme Court has held that a public defender's office is not disqualified from representing a defendant merely because one attorney in that office has a conflict of interest. People v. Robinson, 79 Ill.2d 147 (1980). In Robinson, the Illinois Supreme Court declined to adopt a per se rule that attorneys in a public defender's office are members of an entity, all of whom must be disqualified if any one of them has a appointment of counsel with virtually no experience in the trial of criminal matters. Such a per se rule is unnecessary because the innate competitive instincts of an advocate and the integrity of the bar provide protection for society. Robinson at 158-160. Citing Robinson, the Illinois Supreme Court, in People v. Nelson, 82 Ill.2d 67 (1980) held that a question of conflict of interest requires a case-by-case inquiry to determine whether any facts peculiar to the case preclude the representation of competing interests by separate members of a public defender's office. Nelson at 73.

The Court in Robinson considered three consolidated cases. In the first, the year before the crime the law firm of the part-time public defender had represented the crime victim in the purchase of the business which had allegedly been burglarized by the defendant. In the second, three different assistant public defenders were assigned to represent three defendants with conflicting and adverse defenses. In the third case, the public defender himself represented one defendant and assigned an assistant to represent a second defendant at trial. The defendants' positions were not antagonistic. In all three cases the Illinois Supreme Court upheld convictions and rejected arguments that the public defender's office should have disqualified itself.

Even where co-defendants are jointly represented by one attorney or entity, an actual conflict of interest must be demonstrated at trial. "[I]t has been determined both by the United States Supreme Court and [the Illinois Supreme Court] that joint representation of co-defendants is not per se violative of constitutional guarantees of effective assistance of counsel." Nelson at 72 (citations omitted).

These opinions supersede former opinions of this Committee to the extent that these opinions automatically preclude individual public defenders from representing defendants with adverse interests. ISBA Opinion 698 and 620. To the extent that these opinions discuss the underlying tenets of Rule 5-105 of the Illinois Code of Professional Responsibility, they are viable. This aspect

will be discussed in connection with the third issue raised by this inquiry.

It is clear that Assistant Public Defenders within the same office can represent defendants with conflicting interest. Does the private office sharing arrangement change this ability to represent adverse interests? No. In Robinson, the Illinois Supreme Court considered "the diversity of organization of the offices of the public defenders" in this state and rejected the opinions of other courts which considered legal aid societies and other public service offices to be similar to law firms in considering whether conflicts of interest arise. Robinson at 158, 156. There are numerous office sharing arrangements among attorneys in this state. These can range from merely renting space to the sharing of some or all expenses to the sharing of business. Where, as here, the two attorneys have separate law practices and maintain their distinct professional identities as they presented themselves to the public, there is no common financial interest or associated professional reputation to protect. This committee has recognized the distinction between office sharing and a partnership. ISBA Opinion 212. It has been alert to the potential for the appearance of impropriety where conflicting interests are involved. ISBA Opinions 316, 340. The office sharing arrangement itself, however, does not preclude the representation proposed in this inquiry provided the requirements of Rules 5-101(a) and 5-105 of the Illinois Code of Professional Responsibility are not violated.

In finding that a lawyer who shares offices with a municipal prosecutor is per se disqualified from defending persons being prosecuted by that lawyer, this committee in ISBA Opinion 783 state:

The fact that a lawyer has a financial, business or property relationship with opposing counsel does not per se disqualify him. Again, it is whether or not that relationship will or reasonably may affect the lawyer's exercise of professional judgment on behalf of his client which is determinative of the disqualification question.

In opinion 783, the municipal client was unable to waive the lawyer's disqualification. ISBA Opinions 482, 846. Thus, the per se disqualification rule could not be avoided. Where two individual clients are involved as in the present case, there is no such limitation.

Office sharing alone does not preclude the attorneys here from the exercise of independent professional judgment on behalf of the client, and consent of the client after full disclosure can and should be obtained. Canon 5, Rule 5-101(a) of the Illinois Code of Professional Responsibility. Rule 5-105(c) provides:

[a] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent judgment on behalf of each.

The same requirements of full disclosure and client consents apply here where the two Assistant Public Defenders share offices. See ISBA Opinion 822.

No disclosure justifies the use in any manner of a common secretary. Such an arrangement would be ethically improper. The common secretary should not be used by either attorney in connection

with the representation of the defendants who have adverse interests because of the possibility of a disclosure of confidential information and the appearance of impropriety. Canon 9.

The third basic question is whether, as a practical matter, two assistant public defenders who share office space can represent defendants with conflicting interests with undivided loyalty to their respective clients. Each attorney must be able to preserve the confidences and secrets of his client (Canon 4) and exercise independent professional judgment on behalf of this client (Canon 5). It must be noted that Rule 5-105(d) provides:

If a lawyer is required to decline employment or to withdraw from employment under Rule 5-105, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment. (Emphasis supplied.)

There may be situations in which office sharing is in reality an "affiliation" within the intent and meaning of this rule. All that is missing is an identifying title. There may also be situations in which the friendship and close working relationship of "office sharers" precludes the representation of adverse interests. It may be too that the physical arrangement of the office makes protection of client secrets difficult. The protection of client confidences (usually involving prior clients) has been the subject of case law, which has been extensively reviewed in prior opinions 701 and 644 of this Committee.

Although these opinions involve the representation of present clients whose positions are adverse to those of former clients, they provide insight into the careful scrutiny required by attorneys considering the type of representation contemplated in this inquiry. The mere sharing of offices does not mean that there is exchange of information or the likelihood of confidential disclosures. A careful analysis of particular situations and full disclosure to clients, as discussed, is required. Limited facts have been presented to this Committee. Based upon these facts, there is no per se prohibition against the representation proposed in this particular case provided the common secretary is not used in any way in connection with the case.

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