

## Referring Cases to Attorneys with Whom Office Space is Shared

### **Question:**

Attorney A and Attorney B maintain separate law practices although they share office space, telephone and other equipment, and a secretary. In one matter, Attorney B represents a defendant regarding a claim that a client of A wishes to commence. In another, Attorney A represents a client who wishes to bring an action in which A may be called as a witness. A inquires whether he may refer the case to Attorney B.

### **Opinion:**

Increasingly common among attorneys in private practice are office sharing arrangements involving two or more otherwise unaffiliated lawyers. Opinion #41, issued in 1983, addressed two potential issues that might arise in instances involving two attorneys, A and B, who maintain separate law practices but share the same office space, telephone, equipment, and secretary. In the first fact pattern, Attorney A represents a client wishing to commence an action against Attorney B's client. In the second, Attorney A represents a client who intends to bring an action that could result in Attorney A being called as a witness, and wishes to refer the client to Attorney B.

Opinion #41 analyzed the first scenario under former Maine Bar Rule 3.4(b), prohibiting employment that would compromise an attorney's judgment, and former Maine Bar Rule 3.6(h)(2) requiring attorneys to "exercise reasonable care" to prevent their employees from disclosing confidential client information. The rules created little room for the possibility that Attorneys A and B could reasonably represent opposing clients, and protect the clients' confidences and secret information, especially as the attorneys' shared staff would be privy to confidential information from both.

The principles expressed in the referenced former Bar Rules have been addressed by Maine Rules of Professional Conduct Rule 1.6 and 5.3. Rule 1.6(a) categorically prohibits the disclosure of client confidences and secrets, subject to some exceptions that are inapplicable here. MRPC 5.3 expressly imposes upon an attorney the responsibility to ensure his or her non-lawyer employees' adherence to all professional responsibility standards, including Rule 1.6(a). Attorneys A and B could not reasonably represent opposing parties in the same matter, especially in light of their shared staff's access to each side's confidential information. In short, Opinion #41 remains viable with respect to the first scenario, as the Rules of Professional Conduct prohibit attorneys who share office space and staff from representing opposing clients.

Opinion #41 analyzed the second scenario under former Maine Bar Rule 3.4(j) which stated that a lawyer shall not accept employment in contemplated or pending litigation if he knows that he or a lawyer in his firm is likely or ought to be called as a witness. As Attorneys A and B were not in the same law firm, the referral was not prohibited. Former Maine Bar Rule

3.4(a) required the disclosure to the prospective client of potential problems related to the space-sharing arrangement, including the possibility of the referring attorney being called as a witness. Opinion #41 referred to American Bar Association Formal Opinion 339 (1975), outlining the potential that the witness-attorney might be impeached as a result of his or her interest in the litigation's outcome. The Commission ultimately expressed concern that the financial relationship between Attorneys A and B were sufficiently intertwined that the referring attorney's status would be affected by the other's success or failure in resolving the client's case, but decided that the referral was not prohibited, as long as the client was fully advised of all risks.

The principles espoused in former Bar Rule 3.4(j) have been replaced by a more liberal standard set forth in Rule of Professional Responsibility 3.7(b), which states: "A lawyer may act as advocate in a tribunal in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9". Again, as Attorneys A and B are not members of the same law firm, the current rule does not apply to the contemplated in-office referral. However, the attorneys' financial and administrative ties, as described in Opinion #41, continue to require disclosure to, and consent to representation by, the affected client.

In short, the Maine Rules of Professional Conduct impose upon space-sharing attorneys the same ethical considerations as existed under the former Maine Bar Rules. The standards expressed in Opinion #41 continue to describe best practices.