Legal Ethics & Malpractice Reporter

Vol. 4, No. 7

JULY 31, 2023

EDITED BY

Dr. Michael Hoeflich
Professor, The University of Kansas School of Law

PUBLISHED BY

Joseph Hollander & Craft LLC
Lawyers and Counselors

Contents

FEATURE ARTICLE

Office Sharing in Law Practice

The cost of office space is often one of the most significant expenses for many lawyers. In many markets, commercial real estate costs continue to be high, and many solo practitioners and small law firms find that office sharing with other lawyers can be a cost effective option. However, office sharing can pose a number of ethical risks, which we would do well to note and avoid. This month, the American Bar Association Standing Committee on Ethics and Professional Responsibility released Formal Opinion 507 to provide guidance to lawyers contemplating office-sharing arrangements.

Opinion 507 points out that office-sharing arrangements can take a variety of forms: "lawyers with separate law practices sharing office space, support staff, and equipment; law firms renting unused office space to unaffiliated lawyers; or even lawyers sharing an office suite, receptionist, and conference room as part of a virtual law practice or on a temporary basis." These various arrangements obviously implicate a number of the *Rules of Professional Conduct*, including the requirement that lawyers maintain client confidences under Rule 1.6, not mislead the public under Rule 7.1, and avoid conflicts of interest under Rules 1.7 through 1.10. In structuring an office-sharing relationship, it is critical that lawyers consider all of these potential ethical problems.

Rule 7.1 requires that a lawyer not make a "false or misleading communication about the lawyer or the lawyer's services." One of the dangers of office sharing is that clients and the public might believe that the lawyers in a shared space are, in fact, associated in some way other than simply sharing space. To prevent this from happening, Opinion 507 advises:

> Lawyers in an office sharing arrangement should use separate business cards, letterhead, and directory listings, as well as office signs, firm names, and advertisements that describe their distinct practices and do not suggest a close association between professionals operating within the same space It is desirable for lawyers sharing office space to have separate telephone lines, but a receptionist may answer a common telephone line with a generic salutation such as "Law Offices" to avoid implying that the lawyers are practicing together in the same firm.

Signage in shared office space can also be problematic:

> unaffiliated lawyers sharing space must take reasonable measures to ensure that clients are not confused about their associations with the other lawyers practicing in the immediate area. Office sharing lawyers must understand the need to clarify for their clients these distinct professional relationships. Any communications to the public should also signal that the law practices are not affiliated with one another, other than in their resource-sharing arrangement.

Increasingly today, lawyers who work remotely will find themselves using temporary shared office space when in-person meetings are required. The use of such spaces may well pose special problems in terms of distinctive signage, and lawyers might consider using temporary signs or other means of communicating to visitors that they are not affiliated with other professionals in the shared space.

Opinion 507 devotes considerable discussion to a risk of office-sharing of which many lawyers might not be aware—conflicts of interest among office-sharing lawyers' clients:

> Where lawyers in an office sharing arrangement properly shield the confidentiality of their respective clients and do not hold themselves out to the public as members of the same firm, it may be permissible under the Model Rules to represent clients with adverse interests—even in the same lawsuit or transaction. Although this determination will ultimately turn on specifics of the office sharing arrangement and the nature of the proposed representations, Model Rules 1.4 and 1.7 may obligate lawyers to disclose the details of the office sharing arrangement to their respective clients, including their efforts to maintain confidentiality, and to obtain each clients' informed consent, confirmed in writing.
>
> In addition, any staff shared by the lawyers should not possess or otherwise have access to information from both adverse clients.

The Opinion's focus on how office sharing is structured is important. It is easy to create a potentially serious conflict in these situations. The use of shared secretaries or paralegals, for instance, may raise conflict issues. Even the use of common office machines, such as copiers, may cause such problems if documents are retained in digital memory.[1]

---

1 See, Opinion 507, n. 25: "The Committee does not believe it is possible for lawyers in an office sharing arrangement to maintain this kind of separation when representing

Opinion 507 also addresses a common practice among office-sharing lawyers, particularly when the lawyers are of different experience levels. One potential advantage for a young lawyer in an office-sharing situation is the presence of lawyers with more experience and expertise. There may be situations in which a younger lawyer would want to consult with a more experienced office neighbor. Indeed, Rule 1.1 on lawyer competence may mandate the less experienced lawyer to seek out a more experienced lawyer for advice. Yet, as Opinion 507 points out, such interchanges among lawyers can lead to ethical problems:

> engaging in informal consultations from time to time… does not result in the lawyers being "associated in a firm" under Model Rule 1.10(a). At the same time, lawyers who occasionally consult with other lawyers in shared office arrangements should not disclose "client information that may reveal the identity of a client or privileged information." Lawyers may instead discuss issues using hypothetical facts. As comment [4] to Model Rule 1.6 explains, "[a] lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."
>
> Consultations between office-sharing lawyers can also trigger unanticipated conflicts of interest, restricting a consulted lawyer's ability to represent a current or future client under Model Rule 1.7(a)(2). For instance, if Lawyer A and Lawyer B share office space, and Lawyer A divulges client information to Lawyer B during an informal consultation to help Lawyer A prepare a case for trial, then Lawyer B may assume a responsibility not to use or reveal the information, which could materially limit Lawyer B's ability to represent a current or future client.

ABA Formal Opinion 507 comes at a fortuitous time. The nature of legal practice has undergone many changes resulting from the COVID-19 pandemic. The uncertain economy and fluctuations in the commercial real estate market have also affected how lawyers, especially younger lawyers, practice. One can find office-sharing arrangements in virtually every city in the United States. They make good sense for many lawyers, but only if they are structured to comply with the *Rules of Professional Conduct*. Opinion 507 provides a useful guide to accomplishing this.

---

clients with adverse interests if the lawyers together share only one staff member."

NEW AUTHORITY

Romantic Relationships Between Criminal Defense Counsel and Law Enforcement Officers

NYSBA Opinion 1255

On May 26, 2023, the New York State Bar Association released Ethics Opinion 1255. This rather charming opinion deals with the ethical consequences of love in the legal profession — specifically between a criminal defense lawyer and a deputy sheriff.

The facts are, no doubt, similar to those of many others occurring around the country. The defense lawyer asking for guidance was in a "romantic relationship" with a deputy sheriff who had been "secondary or supporting officer" in two prior cases against her clients, both of which ended in negotiated noncriminal dispositions, and was "currently representing a client accused of a double homicide in a prosecution in which the deputy sheriff is again a 'supporting officer.'"

The Opinion cites New York Rule 1.7(a)(2), which states that a lawyer may not represent a client if "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own … personal interests" unless, per Rule 1.7(b), the conflicted lawyer obtains the client's informed consent, confirmed in writing.

Kansas Rule 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client;
> >
> > (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able

> to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

The Missouri Rule reads:

> (a) Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> > (1) the representation of one client will be directly adverse to another client; or
> >
> > (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> >
> > (2) the representation is not prohibited by law;
> >
> > (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> >
> > (4) each affected client gives informed consent, confirmed in writing.

Although these three Rules differ in some respects, NYSBA Ethics Opinion 1255 should provide some degree of guidance to lawyers subject to each version. On the facts as presented, Opinion 1255 sounds a note of caution:

> Here, whether such a significant risk exists will depend, among other factors, upon (i) the closeness of the relationship between the inquirer and the deputy sheriff, (ii) whether the deputy sheriff played a significant role in investigating the matter, (iii) whether the actions of the sheriff's department are an issue in the case, and (iv) whether the deputy sheriff will be a trial witness subject to cross-examination by the inquirer.
>
> Concern would arise if the deputy sheriff played a significant role in investigating the matter, or if the deputy sheriff would be subject to cross-examination, because the inquirer might be tempted to "pull her punches" in defending her client. The inquirer might also be inclined to accept a negotiated plea of guilty to resolve the matter without exposing deficiencies in the investigation or implausible testimony given by the deputy sheriff or others in the sheriff's office.

In addition to these concerns, Opinion 1255 also explores the dangers to client confidentiality. Although the parties are not both lawyers, the Opinion states a concern that the existence of an intimate relationship between a defense lawyer and a law enforcement officer might cause a breach of confidentiality and require, at the very least, informing the client of the relationship.

Further, the Opinion discusses whether such a conflict arising from an intimate relationship would be consentable by the client. Again, the Opinion expresses a note of caution, quoting from Comment [15] to New York Rule 1.7(b):

> Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), notwithstanding client consent, representation is prohibited if, in the circumstances, the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

The Opinion also quotes language from NYSBA Opinion 660, a 1994 case decided under the predecessor to New York's current *Rules of Professional Conduct* where it noted that a "scintilla of partiality, which might be waivable by private parties in other contexts, is intolerably suspect and prejudicial to the public's regard for the

criminal justice system":

> Irrespective of the subjective intent of the prosecutor and defense counsel, and regardless of howsoever scrupulous they may be in the conduct of their professional obligations, the appearance of partiality in the administration of justice is so strong that a couple who date frequently should not be permitted to appear opposite one another in criminal cases.
>
> We leave for another day the issue of how to determine when friendship and warm regard become so fraught with emotion as to provide a basis for disqualification under DR 5-101(A). Whatever hereafter may be said of friendships in varying degrees, we believe that a frequent dating relationship is clearly over the line that separates ethically cognizable conflicting interests from those which are not. A dating relationship between adversaries is inconsistent with the degree of professional judgment required by DR 5-101(A).

The message here is quite clear. Intimate relationships in cases such as between lawyer and law enforcement officer are not simple from an ethical standpoint and will require serious scrutiny.

The Opinion concludes with an analysis of whether conflicts in this case would be imputable to other lawyers in a firm. Because New York has complex rules on imputability that are different from the *Model Rules*, we will not go into that discussion here; but readers may wish to look at this.

ETHICS & MALPRACTICE RESEARCH TIP

Fordham Law Review
Colloquium: Deborah L. Rhode in Memoriam

Most lawyers who become law professors do so because they want to make a positive difference in the world, their country, and the lives of their students and colleagues. They can do so through teaching, scholarship, and service. Few law professors manage to make a "big" difference, although we often pretend to ourselves that we do. Nevertheless, it is important to try. As Bell Hooks said, change comes with small steps.

That said, occasionally there comes along an individual of such great intellectual and personal gifts that she can change the world through her actions. Deborah Rhode, a professor at Stanford University, was one of our nation's most prolific advocates for legal ethics, the role of women in the legal profession, and the importance of fairness and equity in the legal system. She was one of those rare individuals who changed the world through her teaching, scholarship, and unrelenting activism in the pursuit of justice. She died far too soon in 2021.

In March 2023, the *Fordham Law Review* published a colloquium of articles in honor of Professor Rhode, including:

- The Shape of Life: Deborah L. Rhode in Memoriam
- Rhode Was Right (About Character and Fitness)
- Mentored: On Leaders, Legacies, and Legal Ethics
- Why State Courts Should Authorize Nonlawyers to Practice Law
- Chicken or Egg: Diversity and Innovation in the Corporate Legal Marketplace
- An Ode to Rhode: In Principle and in Practice
- Why the 30 Percent Mansfield Rule Can't Work: A Supply-Demand Empirical Analysis of Leadership in the Legal Profession
- Deborah L. Rhode in Memoriam: Three Stories and Ten Life Lessons
- Law School as Straight Space

Every law practitioner, student, and professor should read these articles dedicated to the life and work of this giant in the field of legal ethics.

A BLAST FROM THE PAST

Civility at the Bar

When litigation has become inevitable, be as firm and astute as you can possibly be; but be also courteous, liberal, and conciliating in your demeanor. Fight in good temper, in cool blood; and the dignity derivable from a consciousness that you are really striving to obtain justice, and that by fair and honorable means.

—Samuel Warren, *The Moral, Social and Professional Duties of Attorneys and Solicitors*, 166 (1855).

josephhollander.com