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SPACE-SHARERS, BEWARE!

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As a result of recent amendments to a comment in the Massachusetts Rules of Professional Conduct, attorneys in group practices who share space and common expenses but are otherwise solo practitioners may have to re-think their letterhead and office name. Many such offices are known as, for example, "Rodgers & Hammerstein, a Professional Association" or "W. W. Rainmaker and Associates." Such names are no longer permitted for space-sharers "in the absence of an effective disclaimer of joint responsibility."

Rule 7.5(d) of the Massachusetts Rules of Professional Conduct states that "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact." The rule, which applies to firm names and letterheads, was adopted on January 1, 1998. As of October 1, 1999, the Supreme Judicial Court amended Comment 2 to Rule 7.5 to state as follows:

> With regard to paragraph (d), lawyers who are not in fact partners, such as those who are only sharing office facilities, may not denominate themselves as, for example, "Smith and Jones," or "Smith and Jones, A Professional Association", for those titles, in the absence of an effective disclaimer of joint responsibility, suggest partnership in the practice of law. Likewise, the use of the term "associates" by a group of lawyers implies practice in either a partnership or sole proprietorship form and may not be used by a group in which the individual members disclaim the joint or vicarious responsibility inherent in such forms of business in the absence of an effective disclaimer of such responsibility.

The new comment puts teeth into the rule by explicitly clarifying that firm names such as "Lennon & McCartney, a Professional Association" and "Don Corleone & Associates" suggest a partnership. Although lawyers are generally aware that such names may signal space-sharers and not a partnership, the point of the comment is that the names may suggest something else to the public and potential clients. Space-sharers risk running afoul of the rule if they use an office name that suggests that the office is <u>any</u> business entity other than a group of space-sharers.

In its report to the Supreme Judicial Court recommending changes to the comment to Rule 7.5(d), the Court's Advisory Committee on Lawyer Advertising noted that the purposes of the revised comment are "to prevent consumers from being misled and to alert lawyers to the risks of incurring unintended liability." Both purposes need to be considered by attorneys in group practices in order to effectively respond to the change.

What can space-sharers do to comply with Rule 7.5(d)? One solution would be to abandon the group name and joint letterhead. Each attorney would have individual letterhead and a separate phone. The nameplates on the door would list the attorneys individually, such as "Law Office of Ginger Rogers", "Law Office of Fred Astaire", with no group name at the top.

The problem with this solution is that it may not be the best solution for Ginger and Fred. As the MBA's Committee on Professional Ethics acknowledged in 1985 (Opinion 85-2), the use of the term "Professional Association" is widespread in Massachusetts. The MBA's 1997 law practice survey showed that 10% of MBA members are solo practitioners in group practice. Group practices provide benefits of collegiality and practice support, and there are business, tax and personal reasons why attorneys may not want to practice in a more formal organization, such as a partnership or professional corporation. It would not be beneficial to attorneys or the public to force solo practitioners into isolation.

Effective disclaimers So what can space-sharers who want to use a joint letterhead do to comply with Rule 7.5(d)? The comment to Rule 7.5(d) states that space-sharers should not use a joint letterhead "in the absence of an effective disclaimer of joint responsibility." While the Board of Bar Overseers and the Supreme Judicial Court ultimately have the authority to decide on the efficacy of any particular disclaimer, some parameters can initially be set.

There are many short phrases that have been proposed as disclaimers: "not a partnership"; "individual" or "independent practitioners"; "an association of independently practicing attorneys"; "professional association of independent attorneys"; "network of cooperating lawyers." The problem with such brevity is that each phrase begs as many questions as it answers—If "not a partnership", then what? "Independent" from what? "Cooperating" with whom? None of the above phrases would be considered effective, and it is unlikely that any similar short phrase could pass muster.

In order for a disclaimer to be effective, a more detailed statement about the relationship among the attorneys in the group practice is necessary, such as: "Each attorney in this office is an independent practitioner who is not responsible for the practice or the liability of any other attorney in the office." This type of detailed disclaimer must appear on the letterhead, web site, advertising, and any other medium in which the name of the office appears, and not just the name of the individual attorney. It would also make sense to include the disclaimer in a written fee agreement, the use of which is encouraged by both the MBA and the Massachusetts Rules of Professional Conduct. (Rule 1.5(b)). Provided each potential client receives clear information about the lack of joint liability among space-sharers before retaining an attorney, attorneys may present themselves other than just as individuals under Rule 7.5(d).

Professional liability insurance The main point of the new comment to Rule 7.5(d) is to guard against misleading potential clients about the existence of joint responsibility to the client. Can a group professional liability policy provide the responsibility that the rule encourages? Malpractice insurance coverage is generally available to group practices to the same extent that it is available to partnerships. In fact, many insurers will *not* insure individual solo practitioners in a group practice, but will only insure the group and all attorneys in the group on one policy. In effect, a solo practitioner in a group practice can have the same malpractice insurance as a partner in a partnership. So long as that coverage is adequate, it would effectively provide clients with the same recourse to financial responsibility enjoyed by clients of other entities.

Although attorneys should always maintain professional liability insurance, the problem with space-sharers attempting to comply with Rule 7.5(d) by maintaining it is that the new comment simply does not allow for such an approach. As drafted, the comment requires that a group of space-sharers either accept joint liability or make an effective disclaimer. The insurance alternative would raise questions of minimum required levels of coverage and

whether vicarious liability above the coverage can be disclaimed. The question of whether a group of space-sharers could adopt the same approach to vicarious liability that is permitted for limited liability entities by S.J.C. Rule 3:06 should perhaps be the subject of further amendments to the rules. For now, however, space-sharers need to respond to Rule 7.5(d) and its comment as drafted.

Space-sharers—beware! One of the purposes behind the amended comment to Rule 7.5(d) is to alert space-sharers to the risk of incurring vicarious liability for other attorneys in the group through the theory of partnership by estoppel. Section 16 of MGL Chapter 108A, the Uniform Partnership Act, essentially says that a person can be held vicariously liable as a partner if he or she consents to being held out as a partner and a third party relies on the partnership to his or her detriment. What the comment to Rule 7.5(d) says is that space-sharers practicing under a joint name without a disclaimer of joint liability are holding themselves out as partners. The case of Atlas Tack Corp. v. DiMasi, 37 Mass. App. Ct. 66 (1994) is to the same effect. The new comment to Rule 7.5(d) probably will make it easier to prove a partnership by estoppel claim against space-sharers who do not use effective disclaimers of joint liability.

The potential liability involved in partnership by estoppel is not limited to negligence or malpractice of another attorney. Vicarious liability can be incurred for any liability of an office mate, including malpractice, breach of fiduciary duty, theft of clients' funds, or the lease of that new BMW. As a practical matter, an adequate professional liability policy will provide protection against vicarious liability for many situations. Insurance will not cover all of the potential liabilities involved, like the new BMW or the client's fund theft (unless it is carefully pled as a breach of fiduciary duty). Rule 7.5(d) and its new comment requires that thought be given to these factors as well, lest you become "Down & Out, a Former Professional Association."

At first blush, Rule 7.5(d) and the comment as amended this fall appeared to spell the demise of the professional association as we have known it—a group of solo practitioners sharing space and some common expenses. Upon reflection, however, the changes can better be viewed as a wake-up call and as an impetus to space-sharers to think through their arrangements and to make whatever changes are necessary to protect their clients and themselves. Rule 7.5(d) need not force solo practitioners into isolation. However, those who do not consider the implications of the rule and make appropriate adjustments are likely to encounter difficulty.

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