

THE Legal Ethics & Malpractice Reporter

*A monthly commentary on current ethical issues in law practice
for members of the Kansas and Missouri Bars*

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About This Publication

THE Legal Ethics & Malpractice Reporter (LEMR, for short) is a free, monthly publication covering current developments in ethics and malpractice law—generally from the perspective of the Kansas and Missouri *Rules of Professional Conduct*. Founded in 2020, this publication was envisioned by KU Law professor Dr. Mike Hoeflich, who serves as its editor in chief. In partnership with Professor Hoeflich, JHC’s legal ethics and malpractice group is pleased to publish this monthly online periodical to help attorneys better understand the evolving landscape of legal ethics, professional responsibility, and malpractice.

In addition to the digital format you’re presently reading, we publish LEMR as mobile-friendly blog articles [on our website](#). We also share a digest newsletter to our LEMR email subscribers whenever a new issue is published. (You may [subscribe here](#) if you aren’t already a subscriber.)

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Attorney, Joseph, Hollander & Craft



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FEATURE ARTICLE

ABA Opinion 509: Conflict Rules for Government Lawyers

THE ABA Committee on Ethics and Professional Responsibility Issued [Formal Opinion 509](#) this past month. The Opinion details the responsibilities of government lawyers when representing “private clients” both when they have left government service and when they remain in government service but also have private practices. It centers on the proper interpretation of Rule 1.11.

Model Rule of Professional Responsibility 1.11(c) reads:

Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

Kansas Rule of Professional Conduct 1.11(b) reads:

Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any

participation in the matter and is apportioned no part of the fee therefrom.

The Opinion begins by noting that, while the general conflict rules apply to government lawyers, they are also subject to the special rule of 1.11. Among the most important pieces of advice the Opinion gives is clarifying what information and which government employees are covered by the Rule:

Rule 1.11(c) refers to confidential government information about a person “acquired when the lawyer was a *public officer or employee*,” indicating that the rule applies irrespective of whether lawyers served in a representational capacity when they acquired the confidential government information. This furthers the Rule’s objective because there is the same need to protect the information from misuse regardless of the lawyer’s role or status in the government when the lawyer obtained the information. For instance, a lawyer who also is a police officer is a public officer for purposes of Rule 1.11(c). That lawyer is subject to Rule 1.11(c) when that lawyer possesses information, acquired when serving as a police officer, that the lawyer knows is confidential government information that could be used to the material disadvantage of a person whose interests are adverse to the lawyer’s private client in a matter. Accordingly, the Rule applies to lawyers who acquire confidential government information while serving as legislators, public executives, and other public officers who are not representing the government as legal counsel.

And:

Rule 1.11(c) does not protect all government information but only protects certain information about a person acquired by the lawyer while serving as a public officer or employee. In particular, it protects “information that has been obtained under governmental authority and which . . . the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.”

The opinion reminds lawyers that information they learn while working for the government in a “nonrepresentational” capacity is also subject to Rule 1.11.

It also defines what constitutes government confidential information:

Rule 1.11(c) limits confidential government information to information “obtained under government authority.” This includes information obtained pursuant to a grand jury subpoena, a search warrant, a regulatory subpoena, or other government power. Further, Rule 1.11(c) does not apply to all information obtained under government authority, but only to information that, at the time the Rule is applied, the government is legally prohibited from disclosing to the public or has a legal privilege not to disclose if the information is not otherwise publicly available...

According to the opinion, Model Rule 1.11(c) (KRPC 1.11(b)) applies not only to former government lawyers but also to lawyers presently working in government if:

...the lawyer (1) represents a private client outside of the lawyer’s government employment and (2) possesses information, acquired when the lawyer was a government officer or employee, that the lawyer knows is confidential government information that could be used to the material disadvantage of a person whose interests are adverse to the lawyer’s private client in a matter.

This reading of Model Rule 1.11(c) has been uncertain. Formal Opinion 510 takes several pages to justify this reading that Model Rule 1.11(c) applies to lawyers currently working for the government, concluding:

...this reading accomplishes the objective of the Rule and leads to the soundest result. There is no less need to restrict the misuse of confidential government information for private clients when the lawyer is still employed by the government or serving as an official of the government even if part-time. We do not perceive any countervailing considerations that would justify exempting current public officers and employees from a disqualification provision designed to prevent that lawyer from misusing confidential government information for a private client’s benefit.

Finally, the Opinion provides advice on how to define the phrase, “private client” for purposes of Rule 1.11:

Model Rule 1.11(c) applies to “a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee” when that lawyer represents a “private client.” This raises the question of whether a “private client” is a client whom the lawyer represents in the lawyer’s private practice (i.e., outside the scope of the lawyer’s public employment), or a client who is a private person or entity (as opposed to a government entity or public official), or both... Rule 1.11(c) applies in the very least to private persons and entities whom a lawyer represents in private practice, whether that practice follows government service or is concurrent with it.

Formal Opinion 509 is critical not only for former government lawyers but, also, for lawyers who work for the government while maintaining a private practice. This is quite common in many instances. Clarifying the coverage of Model Rule 1.11(c) and its state versions is a major step forward in helping lawyers comply with the disciplinary rules.



A BIT OF FUN

Test Your Legal Ethics Aptitude!

This month, instead of the column on new authority, the LEMR offers [a few questions](#) from the midterm examination taken by Professor Hoeflich's Professional Responsibility class at The University of Kansas School of Law. [See how well you can do.](#) We will provide the answers in next month's LEMR.

1. In Kansas, a court in a disciplinary proceeding must follow ABA Formal Ethics Advisory opinions, but not advisory opinions from other states.
 - a. True
 - b. False
2. The following are all concerns that a lawyer must have in order to protect client privacy under KRPC 1.6. Mark all choices that are true.
 - a. A lawyer must always use encrypted email when communicating with a client.
 - b. A lawyer may only use a fax machine to communicate non-sensitive client data.
 - c. Lawyers who want to discuss client data at a restaurant may do so long as they speak quietly.
 - d. Lawyers may release client confidential data to a court when the court orders such a release.
 - e. A lawyer may discuss client confidential data with a spouse so long as the spouse agrees to keep it confidential.
3. A lawyer is contacted by a celebrity to represent her in a criminal case in which she is a defendant. She explains to the lawyer that she cannot pay the lawyer her regular fee, but is willing to pay the lawyer a percentage of the fee she will receive from a movie production company that is going to make a documentary of the trial. She also mentions that the production company will want to advise the lawyer on "trial tactics" to ensure that the film succeeds. Can the lawyer accept this fee?
 - a. Yes
 - b. No

ETHICS & MALPRACTICE RESEARCH TIP

New Article from *St. Mary's Journal on Legal Malpractice and Ethics*

THIS month, we highlight only one new article because of its excellence. It was written by Nick Badgerow, the “dean” of Kansas and Missouri legal ethicists. Nick has devoted his professional life to the study and implementation of legal ethics rules and is a regular presenter in Joseph, Hollander & Craft’s ethics CLEs. He has now published a new article in the *St. Mary’s Journal on Legal Malpractice and Ethics* that provides a brilliant overview of the subject that every lawyer should read:

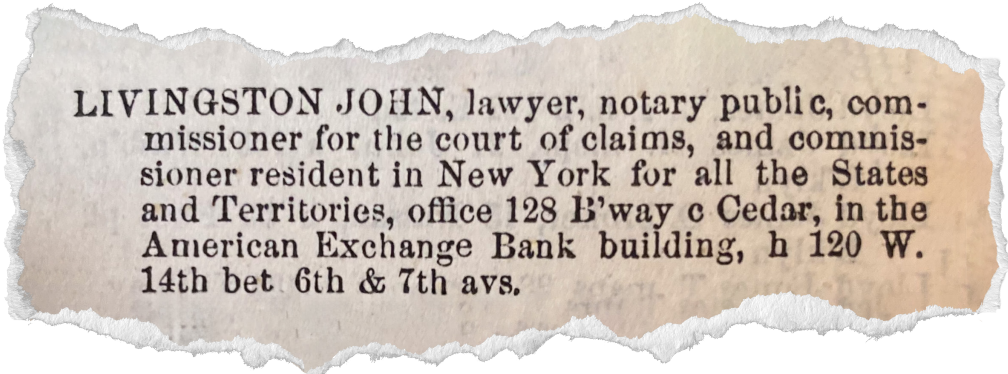
Nick Badgerow, *The Ethical Lawyer: Beyond the Rules*, 14 *St. Mary’s J. on Legal Malpractice & Ethics* 2 (2024), available online at <https://commons.stmarytx.edu/lmej/vol14/iss1/1>.



A BLAST FROM THE PAST

19th Century Lawyer Advertisement

The following advertisement for prominent New York lawyer, John Livingston, illustrates the common form of advertising in newspapers and legal directories in the mid-nineteenth century.

A piece of aged, yellowish-brown paper with irregular, torn edges. The text is printed in a black, serif font, centered on the paper.

LIVINGSTON JOHN, lawyer, notary public, commissioner for the court of claims, and commissioner resident in New York for all the States and Territories, office 128 B'way c Cedar, in the American Exchange Bank building, h 120 W. 14th bet 6th & 7th avs.

—*Trow's New York City Directory* 581 (H. Wilson ed., 1866)



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926 Cherry St
Kansas City, MO 64106
(816) 673-3900

LAWRENCE

5200 Bob Billings Pkwy
Lawrence, KS 66049
(785) 856-0143

OVERLAND PARK

10104 W 105th St
Overland Park, KS 66212
(913) 948-9490

TOPEKA

1508 SW Topeka Blvd
Topeka, KS 66612
(785) 234-3272

WICHITA

500 N Market St
Wichita, KS 67214
(316) 262-9393
