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INTRODUCTION

By Editor Mike Hoeflich

Welcome to Volume 1, Issue Number 1 of the Legal Ethics and Malpractice Reporter, published by Joseph, Hollander & Craft LLC and edited by me, Mike Hoeflich. Its appearance marks the culmination of a number of years of aspiration, planning, and preparation. I have taught various aspects of legal ethics for nearly forty years, at the University of Illinois College of Law, Syracuse University College of Law, and the University of Kansas School of Law. Over this period, I have come to believe that most lawyers find it difficult to keep current with developments in legal ethics and malpractice law both in their own jurisdictions and nationwide. Thus, I decided several years ago that a brief monthly online reporter covering current developments in ethics and malpractice law would be a useful tool for practicing attorneys.

I intend to publish this reporter on the last day of each month throughout the year. In a few months, I will also begin a blog that will appear in between publication of the reporter. The focus of this reporter will be Kansas law, but I will also do my best to highlight developments in states surrounding Kansas, i.e. Missouri, Colorado, Oklahoma, Texas, Nebraska, and Iowa. I will also report on other national developments that may be of significance to Kansas lawyers. Each issue of the reporter will have a lead article about an important aspect of ethics or malpractice law, a short note on ethics and malpractice research, a "blast from the past" of legal ethics and malpractice law, a note on new authority in the field, and, finally, a "tech tip" focused specifically on technology, ethics, and malpractice liability for lawyers.

I hope that readers of this reporter will find the information contained herein useful. It is intended only for licensed attorneys and does not constitute legal advice.

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FEATURED TOPIC
TRIAL PUBLICITY I: KRPC 3.6

KRPC 3.6 sets the limits for lawyers who wish to engage in efforts to publicize their clients' side in litigation. The general rule of KRPC 3.6 is that:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

KRPC 3.6(a). The key concepts underlying this rule are: (1) the comments must be made in the context of litigation, (2) the comments are extrajudicial (i.e. outside the courtroom), and (3) the lawyer "knows or reasonably should know" that the comments "will have a substantial likelihood of materially prejudicing" the trial or hearing of the matter.

Of course, any limitation on lawyers' speech immediately begs the question of a lawyer's First Amendment rights. Comment 1 to KRPC 3.6 recognizes that it is necessary to balance a lawyer's speech rights with maintaining the parties' rights to a fair trial. The Rule attempts to do this by creating a "safe harbor" in part (b):

b) Notwithstanding paragraph (a) a lawyer may state:

(1) the claim or defense involved and, except when prohibited by law, the identity of the persons involved;
(2) information contained in a public record;
(3) that an investigation of the matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):
(i) the identity, residence, occupation and family status of the accused;
(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and
(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Statements that go beyond the safe harbor may well cause a lawyer to be charged with violating Rule 3.6(a):

> There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
>
> (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
> (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
> (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
> (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
> (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

KRPC 3.6, Comment 5.

For the most part, Comment 5's example of potentially prejudicial statements deal with criminal trials and are common sense. In spite of television's absurd portrayal of fictional trials, in real life responsible lawyers must avoid inflaming the public's passions against criminal defendants in order to assure that a defendant may have a fair trial. But not all of the provisions of are limited to criminal cases. Comment 5.5, in particular can pose a serious danger to overly talkative and not careful lawyers. In many cases, a lawyer will speak to the press before the trial has begun or all motions have been decided. In such a case, a lawyer may be tempted to discuss evidence she thinks might help to win the public over to her client's side. Comment 5.5 points out the danger in such a tactic. If the lawyer "knows or reasonably should know" that the evidence discussed will be ruled inadmissible at trial and would "create a substantial likelihood of prejudicing an impartial trial," then the lawyer would have violated KRPC 3.6(a). Unless a lawyer is quite confident that evidence she wished to discuss in extrajudicial statements is admissible and would not prejudice an impartial trial, she should not include such evidence in any public statements.

One additional aspect of KRPC 3.6 that is quite significant is mentioned in Comment 3. Lawyers who are not and have not been involved in the investigation of a case and their associates are not bound by Rule 3.6(a). These lawyers, pursuant to their First Amendment rights to free expression may, within the bounds of the law, say whatever they like about a case. Thus, lawyers who serve as television, radio, or social media commentators are free to remark on a case as they may wish to do.

NEW AUTHORITY

ABA FORMAL OPINION 489: WHEN A LAWYER LEAVES A FIRM

In June 2019 the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Ethics Opinion 489 on a lawyer's notice obligations when she leaves a law firm. Increasing mobility among lawyers has made of pressing importance the question of what obligations a lawyer has to notify her clients when she leaves her law firm. The central issues dealt with by the opinion are stated at the beginning: timely notifying the law firm and clients of the departing lawyer, making arrangements for the smooth transition of clients and client files, agreeing as to post-departure matters. The fundamental principle underlying the Opinion, of course, is that clients have an absolute right to choose a lawyer, which means that a client has an absolute right to hire and fire a lawyer. Furthermore, when a lawyer leaves a firm, a lawyer continues to have an ethical duty to protect client confidential information under KRPC 1.6, and to protect client property and return such property (including client owned files) under KRPC 1.15. Further, a lawyer has a duty to inform a client of the impending departure under KRPC 1.4 on a lawyer's obligation of diligence to her client. A lawyer must inform those clients with whom she has had "significant contact." In prior Formal Opinion 09-414, which was cited in Opinion 489, the ABA Committee stated that:

> informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him.

However, Opinion 489 states clearly that there is no hard and fast rule as to the timing of such notice. In fact, the Opinion cites Rule 5.6(a) to advise that a notification period cannot be imposed on the departing lawyer if it would restrict her ability to carry on her practice after she left the firm. In addition, the Opinion makes clear that the law firm cannot act to prohibit a departing lawyer from soliciting clients of the firm since to do so would restrict the clients' right to choose their lawyer. In making this point, the Opinion cites advisory opinions from Illinois, Iowa, Texas, Washington, Michigan, and Virginia, as well as the *Restatement of the Law Third, The Law Governing Lawyers* § 9(3)(a) (2000).

The Opinion also advises that a departing lawyer and the firm she is leaving must assure that clients do not suffer during any transition period, that client files be properly transferred or returned pursuant to Rule 1.15, and that the confidentiality of client information be preserved pursuant to Rule 1.6. Indeed, the Opinion advises that firms have guidelines in place for these situations so that mistakes can be avoided and that lawyers understand the procedures they must follow if they leave the firm.

ABA Formal Opinion 489 makes it clear that, when a lawyer leaves a firm, there are ethical pitfalls that both the lawyer and the firm must be aware of and avoid if they are to comply with their professional responsibilities. Although ABA Opinion 489 is only advisory, all lawyers and law firms should familiarize themselves with its contents.

TECH TIP
MOBILE PHONE SECURITY

KRPC 1.1 requires that all lawyers in Kansas be competent to practice law. Comment 8 to Rule 1.1 states:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology,** engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

(emphasis added). There is no technology more ubiquitous in American society than the mobile phone. Virtually every lawyer uses a mobile phone and the vast majority use their phones for business purposes. Those who own "smart phones" may use their phones not only for telephone calls, but also for email and document transmission. Thus, a mobile phone is a technology about which lawyers must be knowledgeable. Further, lawyers must be knowledgeable about the ethical risks of using mobile phones, including the possibility that they might suffer data breaches or data losses due to hacking or actual loss of their phones. The American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 477R in March 2017 and Formal Opinion 483 in October 2018. These Opinions deal with a lawyer's obligation to protect against and cope with cyber attacks. The gist of the opinion is that lawyers must "reasonably safeguard" client information against data loss pursuant to Rule 1.15 and breaches of confidentiality as required by Rule 1.6. Formal Opinion 483 states:

In the context of a lawyer's post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission's thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those

technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer.

In the context of lawyer use of mobile phones for transmission or retention of confidential client information, there are several basic steps every lawyer should take. First, a lawyer should determine what type of client information is simply too sensitive to be entrusted to a mobile phone. Once that determination is made, any such information should never be on a mobile phone. Second, information which the lawyer determines can be transmitted by or retained on a mobile device, should be protected by the following:

1. A lawyer should always use password protection on a mobile phone in case the phone may be lost;

2. A lawyer should warn all clients that the use of mobile phones may put the client's information at risk. This information would be best put in writing (as in the engagement letter]) and should be consented to by the client;

3. The lawyer should consider whether to use some form of encryption for sensitive client data that is to be transmitted or retained on a mobile device.

Often lawyers do not realize that their mobile phones are business devices with which they communicate and retain protected client confidences. Failure to recognize this may lead to serious ethical consequences that can be avoided by relatively simple and cost effective precautions.

ETHICS & MALPRACTICE RESEARCH TIP
KBA ADVISORY OPINIONS

The three most important sources for research on legal ethics are the decisions of the highest court in the state, advisory opinions provided by the Office of the Disciplinary Administrator in the state, advisory opinions provided by Bar Association committees, advisory opinions issued by the American Bar Association's Standing Committee on Ethics and Professional Responsibility, and scholarly articles and books on the subject. Of course, only actual decisions by the state's highest court have legal authority. The other sources are advisory—and, therefore, not authoritative.

Kansas lawyers are particularly fortunate that the Kansas Bar Association has a Professional Ethics Advisory Committee comprised of experienced lawyers expert in the field of legal ethics who will provide advisory opinions to members of the Kansas bar. In order to obtain an opinion from the KBA advisory committee, a KBA member must send the committee a letter stating:

> …the facts upon which you want an opinion and self-certify that:

1. you are a KBA member and are seeking the opinion for yourself and no one else,
2. that it is not for use in litigation or disciplinary matters, and
3. that you want the information for guidance on future conduct.

https://www.ksbar.org/members/group.aspx?id=111707. Note that "Opinions are also not issued with regard to questions of law, such as interpretations of rules, statutes or cases." *Id.*

The Advisory Committee has the option of issuing either a "formal" or "informal" advisory opinion:

Informal opinions are spontaneous discussions with the KBA Law Practice Management Attorney or with members of the KBA Professional Ethics Advisory Committee, to which the caller is referred by the Law Practice Counsel. Little research is spent on informal opinions."

Formal opinions take longer, generally three to six weeks, but are well researched. Once again, both informal and formal opinions are not binding and should not be used as a substitute for advice given by the Office of the Disciplinary Administrator. The Office of the Disciplinary Administrator will frequently discuss ethical situations with attorneys and may be where an attorney should make his or her first inquiry, especially in situations where an expedited response is necessary.

Id. This distinction is quite important since the KBA Ethics Advisory Committee only issues advisory opinions to lawyers about possible *future actions*. If a lawyer has an ethics question about an action she intends to take in the very near future, obtaining a formal opinion may not be feasible because of the time required for its issuance. In such a case, a lawyer should contemplate obtaining an informal opinion. She might seriously consider also discussing the issue with the Disciplinary Administrator or one of his staff attorneys.

All opinions issued by the KBA Professional Ethics Advisory Committee are kept confidential. If they are published by the KBA, all identifying details of the requesting attorney are kept confidential.

The KBA does publish ethics advisory opinions for the use of member attorneys. All published decisions may be found in Casemaker, available to members of the KBA on its website. Casemaker lists all KBA advisory opinions issued since 1988. For opinions issued prior to 1988, a lawyer may contact the Legal Services Director of the KBA, who may be able to search the KBA archives for such pre-1988 opinions. Since a lawyer's issue may have been the subject of an existing published advisory opinion, every lawyer should consult Casemaker's contents at the very beginning of her research.

BLAST FROM THE PAST
DEPORTMENT

In the nineteenth century, before the publication of formal codes of professional conduct for lawyers, the concept of legal ethics was far broader. Ethical rules were, for the most part, customary and taught to law students and young lawyers by older members of the bench and bar. Generally, these "rules" of conduct were not the subject of formal process. They did not carry official sanctions. Instead, the rules were enforced through group dynamics and informal processes: a lawyer who violated established norms of the Bar tended to be shunned by his peers or to be publically criticized for his wayward activities.

An early example of such "rules" reduced to writing it David Hoffman's "Fifty Rules of Professional Deportment." It was first published as an appendix to the 1836 edition of Hoffman's *Course of Legal Study*, and authors on legal ethics included advice not only on what we would today consider rules of professional conduct, but also on such matters as how a lawyer should dress, conduct himself in social situations, etc. This wider conception of professional "regulation" was often referred to as rules of deportment rather than rules of ethics (the phrase "legal ethics" was first popularized by Pennsylvania judge and law professor George Sharswood).

In 1896, a young New York lawyer, Samuel Wandell, published a short introduction to proper deportment for new lawyers. The book is titled, *You Should Not*, and the first section provides advice on proper lawyer dress:

> *You should not* be careless or negligent about your personal appearance. A soiled shirt bosom, dirty collar, and greasy or frayed garments that bespeak a mind that has grown rusty, and habits which need reforming. Dress neatly and keep yourself looking respectable. You can do this without being a dude. The seedy looking attorney can usually be counted upon to be a "briefless barrister."

Obviously, Mr. Wandell was somewhat behind the times since this advice to have been aimed at male attorneys alone. Either he assumed that woman attorneys would dress well and needed no advice on the topic, or, more likely, had not yet adjusted his mind to the idea that there were growing numbers of women lawyers. (The National Association of Women Lawyers, originally called the Women Lawyers' Club, was founded in 1899, only three years after *You Should Not* was published.)

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