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TABLE OF CONTENTS

FEATURED TOPIC

ASSISTING OR COUNSELING CLIENT FRAUD OR CRIMINAL ACTIVITY: ABA FORMAL ETHICS OPINION 491

The American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 491 on April 29, 2020. This opinion focuses on the application of Rule 1.2(d) of the Model Rules and its state variants. Kansas Rule of Professional Conduct 1.2(d) reads like the Model Rule:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

The essence of Rule 1.2(d) is that a lawyer has a professional obligation to not knowingly use her legal knowledge and experience to further criminal or fraudulent activities. Rule 1.0(g) defines "knowingly":

> "Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

In order to comply with Rule 1.2(d), a lawyer must be able to discern what client activities may be criminal or fraudulent and whether a client is employing the lawyer to further such schemes. This, of course, raises the question: What is a lawyer's duty of inquiry into a client's actions prior to undertaking representation of the client on a matter? This has been a thorny issue for lawyers, courts, and disciplinary tribunals for decades.

Formal Opinion 491 focuses on this critical question of a lawyer's duty of inquiry into client affairs. It builds upon two earlier ABA Opinions: ABA Informal Opinion 1470 (1981), the ABA's 2010 Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, and ABA Formal Opinion 463 (May 23, 2013)—all of which address the duty of inquiry in certain circumstances. Formal Opinion 491 is the broadest of ABA statements on this duty, and it goes into great detail regarding the "knowing" requirement contained in Rule 1.2(d). It is important to recognize that Opinion 491's statements on the duty of inquiry do not apply to litigation:

> This opinion does not address the application of rules triggering a duty to inquire where a client requests legal services in connection with litigation. ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1470 (1981), discusses how a lawyer not involved in the past misconduct of a client should handle the circumstance of a proposed transaction arising from or relating to the past misconduct.

ABA Formal Opinion 491, fn. 6.

The Opinion begins with a general warning that lawyers today may be asked by existing or new clients to assist or counsel them in activities about which a lawyer may not have adequate information to make a competent judgment as to the applicability of Rule 1.2(d). Much of the problem is the increasing use of lawyers to facilitate complex transactions, like money laundering, which may be sufficiently disguised so as to leave a lawyer in the dark as to their true nature. In the years since 9/11, many commentators have called for lawyers to take on a "gatekeeping function" to actively prevent clients and prospective clients from engaging in criminal and fraudulent activities. But such a function is antithetical to many ethical duties of lawyers, such as the requirement of client confidentiality. In Formal Opinion 363, the ABA explicitly rejected such a "gatekeeping" function being imposed on lawyers:

> The underlying theory behind the "lawyer-as- gatekeeper" idea is that the lawyer has the capacity to monitor and to control, or at least to influence, the conduct of his or her clients and prospective clients in order to deter wrongdoing. Many have taken issue with this theory4 and with the word "gatekeeper." The Rules do not mandate that a lawyer perform a "gatekeeper" role in this context.5 More importantly, mandatory reporting of suspicion about a client is in conflict with Rules 1.6 and 1.18, and reporting without informing the client is in conflict with Rule 1.4(a)(5).

However, even without imposing such a gatekeeping function on lawyers, Rule 1.2(d) does put a heavy burden on lawyers to not assist or counsel clients in criminal or fraudulent activities. This necessitates that lawyers undertake some degree of inquiry into their clients' activities. One thing that Formal Opinion 491 makes absolutely clear is that a lawyer is not an ostrich who can avoid problems by willfully ignoring them. The Opinion states:

> …if facts before the lawyer indicate a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, a lawyer's conscious, deliberate failure to inquire amounts to knowing assistance of criminal or fraudulent conduct. Rule 1.0(f) refers to "actual knowledge" and provides that "[a] person's knowledge may be inferred from circumstances." Substantial authority confirms that a lawyer may not ignore the obvious.

But the prohibition against willful ignorance only gets us so far. Once we accept that lawyers must not pretend to be ostriches, we have to ask: How much inquiry into a client's activities must a lawyer undertake? It is here that there is some confusion between the text of Rule 1.2(d) and Comment 13 to Model Rule 1.2(d), which reads:

> If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

The problem arises because Model Rule 1.2(d) requires that lawyer "knowingly" assist the client in fraudulent or criminal activities while Comment 13 speaks of a lawyer who "reasonably should know" that a client intends to engage in fraud or a criminal act. The standard set forth by Comment 13 puts a greater burden on the lawyer by seemingly interpreting the final sentence of 1.0(g) ("A person's knowledge may be inferred from circumstances") as setting forth a "reasonably should know" standard. Not all states have adopted Comment 13 to Rule 1.2(d). Missouri, for example, has not. Nor has Kansas. The comments to KRPC 1.2 end at Comment 9.

Formal Opinion 491 deals with the seeming conflict between the text of Rule 1.2(d) and Comment 13's "lower threshold of scienter":

> The Committee acknowledges the tension between the "actual knowledge" standard of Model Rule 1.2(d), on the one hand, and those authorities applying a reasonably should know standard. This opinion concludes only that the standard of actual knowledge set out in the text of Model Rules 1.2(d) and 1.0(f) is met by appropriate evidence of willful blindness. When the Model Rules intend a lower threshold of scienter, such as "reasonably should know," the text generally makes this explicit. See, e.g., MODEL RULES R. 2.3(b), 2.4(b), 4.3.

But where in between these two extremes of willful blindness and the "reasonably should know" standard does the conservative lawyer make her stand? The Opinion gives some useful clues. For instance, it quotes the New Jersey Supreme Court's decision in In re Blatt:

> A lawyer may not follow the directions of a client without first satisfying himself that the latter is seeking a legitimate and proper goal and intends to employ legal means to attain it. . . . The propriety of any proposed course of action must be initially considered by the attorney, and it may be thereafter pursued only if the lawyer is completely satisfied that it involves no ethical compromise. . . . [The lawyer's] duty, upon being requested to draft the aforementioned agreements, was to learn all the details of the proposed transaction. Only then, upon being satisfied that he had indeed learned all the facts, and that his client's proposed course of conduct was proper, would he have been at liberty to pursue the matter further.

65 N.J. 539, 545, 324 A.2d 15 (1974).

The Opinion also cites the decision of the United States Supreme Court in Global-Tech Appliances, Inc. v. SEB USA, 563 U.S. 754, 767 (2011), a criminal law case requiring the court to determine whether the defendant acted "knowingly or willfully":

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances. . . . [The Model Penal Code defines] "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a high probability of [the fact's] existence, unless he actually believes that it does not exist." Our Court has used the Code's definition as a guide . . . [a]nd every Court of Appeals—with the possible exception of the District of Columbia Circuit—has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.

A close reading of Opinion 491 suggests that a conservative approach would be for a to lawyer to make inquiries—in a reasonable way and to a reasonable degree—if the lawyer believes that there is a "high probability" that the client's proposed activities may be fraudulent or even criminal. There is, however, no real guidance as to when such a high probability exits. Essentially, whether or not to inquire about a client's proposed activities is a judgment call, one depending upon the facts and circumstances of the case and the lawyer-client relationship. This becomes clearer in the second part of the Opinion, in which the ABA Standing Committee looks at other sections of the Rules that also may impose a duty of inquiry upon a lawyer.

The Opinion raises another significant issue. What happens if a lawyer decides that she does have an obligation to inquire into a client's activities? Clearly, the prudent method of doing so would be to first ask a client directly about the proposed activities. But what if a client refuses to answer or tells the lawyer not to make any inquiries into his affairs? What if a client agrees to provide information about his activities and then fails to do so? The Opinion states that, in these cases, lawyers must assume there is a problem:

> If the client refuses to provide information or asks the lawyer not to evaluate the legality of a transaction the lawyer should explain to the client that the lawyer cannot undertake the representation unless an appropriate inquiry is made. If the client does not agree to provide information, then the lawyer must decline the representation or withdraw.37 If the client agrees, but then temporizes and fails to provide the requested information, or provides incomplete information, the lawyer must remonstrate with the client.

If, in the face of such client actions, the lawyer continues to represent the client and does not withdraw, then the Opinion warns that the lawyer's actions may be taken as evidence of the lawyer's "willful blindness" and a violation of 1.2(d).

In the event a client does comply with a lawyer's request for information and the lawyer concludes on the basis of that information that the client's proposed activities are fraudulent or criminal, then the lawyer must take additional steps. Rule 1.2(d) permits the lawyer to explain to the client that the client should not pursue the proposed activities and that, if the client persists in such activities, the lawyer is required to withdraw from the representation pursuant to Rules 1.2 and 1.16.

An even more sensitive issue may arise under Rule 1.2(d) if a lawyer concludes that she bears an obligation to inquire into a client's activities. The question is whether and to what extent a lawyer may make inquiries about a client's activities from someone other than the client. Any such activities will be substantially limited in practice by the confidentiality requirements of Rules 1.6 and Rule 1.18 (on the lawyer's responsibilities to prospective clients). In such a case, a lawyer may be required to get a client's informed consent in advance to disclose information necessary to making the inquiries. Informed consent in Kansas is defined in Rule 1.0(f):

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

In a situation where a lawyer feels obligated to make outside inquiries and seeks her client's informed consent, it is quite easy to imagine that a client might be offended by the request and refuse it. If the client refuses to grant consent, then Opinion 491 states that a lawyer must withdraw from the representation. There is also the possibility that a client will grant consent but refuse to pay the costs of the inquiry. Again, once the lawyer has decided that she has an obligation under Rule 1.2(d) to make the inquiry, the lawyer must make the inquiry in order to accept or continue the representation—even if she must absorb the costs of inquiry herself.

The process described here obviously raises the question as to whether and to what extent a lawyer may trust her client. Clearly, Opinion 491 does not permit a lawyer to always take her client's statements as true. But some degree of trust is permitted:

> Overall, as long as the lawyer conducts a reasonable inquiry, it is ordinarily proper to credit an otherwise trustworthy client where information gathered from other sources fails to resolve the issue, even if some doubt remains.44 This conclusion may be reasonable in a variety of circumstances. For example, the

> lawyer may have represented the client in many other matters. The lawyer may know the client personally, professionally, or socially. The business arrangements and other individuals or parties involved in the transaction may be familiar to the lawyer.

As a practical matter, when a lawyer decides that she must inquire into a client's activities in order to assure herself that representation of her client will not run afoul of Rule 1.2(d), the potential for friction with her client increases substantially. This will be the case particularly when the client is long standing and expects the lawyer to be loyal. Rule 1.2(d) and Opinion 491 make it absolutely clear, however, that a lawyer's sense of duty to a client does not permit her to be "willfully blind" to a client's fraudulent or criminal activities or alleviate from her the obligation to make adequate inquiry into a client's affairs when the facts warrant such inquiries.

Opinion 491 is not limited to an analysis of a lawyer's duties of inquiry pursuant to Rule 1.2(d). The Opinion also reminds lawyers that a number of the Rules other than 1.2(d) impose some level of an obligation of inquiry upon lawyers:

> Rule 1.2(d) is not the only source of a lawyer's duty to inquire. A lawyer may be obliged to inquire further in order to meet duties of competence, diligence, communication, honesty, and withdrawal under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. The kinds of facts and circumstances that would trigger a duty to inquire under these rules include, for example, (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the matter (particularly whether such matters are frequently associated with criminal or fraudulent activity), (iv) the relevant jurisdictions (especially whether any jurisdiction is classified as high risk by credible sources), (v) the likelihood and gravity of harm associated with the proposed activity, (vi) the nature and depth of the lawyer's expertise in the relevant field of practice, (vii) other facts going to the reasonableness of reposing trust in the client, and (viii) any other factors traditionally associated with providing competent representation in the field.

Here, again, the Opinion emphasizes that a lawyer must, in many circumstances, make some inquiry into a client's current or proposed activities in order to undertake or continue representation of a client. The Opinion sets out a laundry list of factors that may influence whether a lawyer decides that such an inquiry is necessary. For the most part, these factors are relatively easy for a lawyer to build into her decisional process, e.g. the client's identity and the lawyer's knowledge of the client. Other factors, however, may not be so simple to consider. For instance, in complex transactions, such as those that might involve the potential for international money laundering, many lawyers will simply not know enough to be able to adequately judge whether there is a risk of fraudulent or criminal activity without expert

consultation. Similarly, if a lawyer were to be asked to undertake a matter with foreign connections in an unfamiliar country, a determination of whether "a jurisdiction is classified as high risk by credible sources" will at the very least require the expenditure of time to do research—if not employment of an expert consultant on the country's culture, government, and finance. In many cases, a lawyer will simply decide to decline or withdraw from representation in the matter simply because even the preliminary decision as to whether she bears an obligation to make an inquiry into the client's activities is too burdensome. Happily, according to Opinion 491, there are limits on how burdensome this may be. It cites the earlier Formal Opinion 463 on the special problems posed by money laundering and complex financial crimes:

> "[i]t would be prudent for lawyers to undertake Client Due Diligence ("CDD") in appropriate circumstances to avoid facilitating illegal activity or being drawn unwittingly into a criminal activity. . . . [P]ursuant to a lawyer's ethical obligation to act competently, a duty to inquire further may also arise. An appropriate assessment of the client and the client's objectives, and the means for obtaining those objectives, are essential prerequisites for accepting a new matter or continuing a representation as new facts unfold."

And:

> A lawyer's reasonable judgment under the circumstances presented, especially the information known and reasonably available to the lawyer at the time, does not violate the rules. Nor should a lawyer be subject to discipline because a course of action, objectively reasonable at the time it was chosen, turned out to be wrong with hindsight.

The final passage provides some relief for lawyers and makes the burden of inquiry not too great. Nevertheless, every lawyer must read and understand Formal Opinion 491. The burdens it does impose are quite substantial, and lawyers may unwittingly violate the Rules if they do not recognize their obligations under Rule 1.2(d) and the other Rules discussed in the Opinion.

Formal Opinion 491 concludes with concise and clear instructions for lawyers:

> Model Rule 1.2(d) prohibits a lawyer from advising or assisting a client in a transaction or other non-litigation matter the lawyer "knows" is criminal or fraudulent. That knowledge may be inferred from the circumstances, including a lawyer's willful blindness or conscious disregard of available facts. Accordingly, where there is a high probability that a client seeks to use the lawyer's services for criminal or fraudulent activity, the lawyer must inquire further to avoid advising or assisting such activity. Even if information learned in the

> course of a preliminary interview or during a representation is insufficient to establish "knowledge" under Rule 1.2(d), other rules may require further inquiry to help the client avoid crime or fraud, to advance the client's legitimate interests, and to avoid professional misconduct. These include the duties of competence, diligence, communication, and honesty under Rules 1.1, 1.3, 1.4, 1.13, 1.16, and 8.4. If the client or prospective client refuses to provide information necessary to assess the legality of the proposed transaction, the lawyer must ordinarily decline the representation or withdraw under Rule 1.16. A lawyer's reasonable evaluation after that inquiry based on information reasonably available at the time does not violate the rules.

NEW AUTHORITY
ABA FORMAL OPINION 08-451

Last month's reporter addressed the ethical considerations of using a contract or temporary lawyer as laid out in ABA Formal Ethics Opinion 88-356. This month, we build on that foundation to consider the ethical considerations of outsourcing legal work as discussed in ABA Formal Opinion 08-451.

Over the past decade, an increasing number of United States law firms have increased their use of third-party vendors to perform a wide range of legal and non-legal services. Traditionally, law firms have tended to use third party providers for non-legal tasks, such as security or printing, while relying on firm employees to perform legal tasks. This has begun to change both for efficiency and cost reasons.

There are some legal tasks that can be performed less expensively by third parties than by law firm employees. The classic example of such a legal task is research. Using young lawyers to do basic legal research at their normal hourly rate can significantly contribute to client costs. If a law firm can engage a non-employee, licensed attorney to do such work at a lower cost, this saves the client money. One alternative discussed last month is to use a contract attorney. A second possibility is to "outsource" the work—either to an independent contractor attorney (often located in a different jurisdiction in which hourly rates are lower) or to a law firm in a foreign jurisdiction that, in effect, serves as a subcontractor to do specific tasks outsourced to it. A number of law firms in India, for instance, are willing to do legal research and writing for American law firms and charge a fraction of what it would cost if the American firm did the work itself. Such arrangements not only lower the client's cost, but also permit the outsourcing law firm to limit the number of lawyers and support staff it must keep on payroll. As potentially beneficial as such outsourcing arrangements can be, they also open up the potential for ethical problems for the outsourcing law firm. Hence, the ABA issued Formal Opinion 08-451 to provide ethical guidance to law firms who outsource.

The Opinion starts with the basic observation that a lawyer who represents a client must do so competently whether she does the work herself or outsources it to another lawyer:

> There is nothing unethical about a lawyer outsourcing legal and non-legal services, provided the outsourcing lawyer renders legal services to the client with the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as required by Rule 1.1.

In addition, a lawyer who outsources work to another is responsible under Rules 5.1 and 5.3 for assuring that the person doing the work is following the Rules of Professional Responsibility. The Opinion states that Rules 5.1 and 5.3 "apply regardless of whether the other lawyer or non-lawyer is directly affiliated with the supervising lawyer's firm." The combination of these three rules puts a burden on the outsourcing lawyer to assure that the person or firm to whom the work is being outsourced is competent to do the work and will comply with all applicable Rules of Professional Responsibility. The Opinion goes into some detail as to the extent to which an outsourcing lawyer must go to insure compliance with the relevant Rules:

> At a minimum, a lawyer outsourcing services for ultimate provision to a client should consider conducting reference checks and investigating the background of the lawyer or non-lawyer providing the services as well as any non-lawyer intermediary involved, such as a placement agency or service provider. The lawyer also might consider interviewing the principal lawyers, if any, involved in the project, among other things assessing their educational background. When dealing with an intermediary, the lawyer may wish to inquire into its hiring practices to evaluate the quality and character of the employees likely to have access to client information. Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and non-lawyers it is procuring.
>
> When engaging lawyers trained in a foreign country, the outsourcing lawyer first should assess whether the system of legal education under which the lawyers were trained is comparable to that in the United States. In some nations, people can call themselves "lawyers" with only a minimal level of training. Also, the professional regulatory system should be evaluated to determine whether members of the nation's legal profession have been inculcated with core ethical principles similar to those in the United States, and whether the nation's disciplinary enforcement system is effective in policing its lawyers. The lack of rigorous training or effective lawyer

> discipline does not mean that individuals from that nation cannot be engaged to work on a particular project. What it does mean is that, in such circumstances, it will be more important than ever for the outsourcing lawyer to scrutinize the work done by the foreign lawyers – perhaps viewing them as non-lawyers – before relying upon their work in rendering legal services to the client.

The practical difficulties of doing all of the things suggested by the Opinion are not minor. It may be quite difficult for a lawyer located in Topeka to do the kind of detailed investigation suggested when outsourcing work to a lawyer located in Mumbai.

Formal Opinion 08-451 also raises the issue of whether a lawyer who outsources client work must disclose this fact to a client and obtain consent to the arrangement. The Opinion notes that in Formal Opinion 88-356, the ABA Standing Committee concluded that it was often not necessary to inform a client about the use of a temporary lawyer. In Opinion 08-451, the Standing Committee distinguishes the use of a temporary lawyer from outsourcing:

> We recognize that Formal Opinion 88-356 held that the client ordinarily is not entitled to notice that its legal work is being performed by a temporary lawyer. We stated that "[c]lient consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm." However, that statement was predicated on the assumption that the relationship between the firm and the temporary lawyer involved a high degree of supervision and control, so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct. That ordinarily will not be the case in an outsourcing relationship, particularly in a relationship involving outsourcing through an intermediary that itself has the employment relationship with the lawyers or non-lawyers in question.

Firms will generally have to tell their clients that they wish to outsource some work, and, because this my well involve disclosing client confidential material, they will need to obtain the client's informed consent to do so.

Formal Opinion 08-451 concludes with a discussion of the ethics of billing for outsourced services, drawing attention to Formal Opinions 00-420 and 97-379 and the importance of whether a firm is billing the outsourced services as it would for the services of an in-house lawyer or as a disbursement. Any law firm contemplating outsourcing services must study these two Opinions and scrutinize their billing practices to assure compliance. There is also a brief reminder to lawyers that, pursuant to Rule 5.5(a), they must not "assist others" in the unlawful practice of law.

TECH TIP
UNINTENDED CONSEQUENCES OF MOVING YOUR LAW PRACTICE ONLINE

As a result of the Covid-19 pandemic and the need to limit personal interactions, businesses are increasingly reliant on remote work. With the assistance of online platforms such as Zoom, many law firms have come to discover that lawyers can do much of their work remotely with very little need to come into an office. This immediately raises questions of information security and compliance with Rule 1.6. But technology exists to make remote work secure if a law firm is willing to invest the time and effort into acquiring and implementing adequate safeguards.

Now law firms are beginning to look beyond the pandemic and rethink how they will conduct business in a post-Covid world—what has come to be called the "new normal." Having lawyers and staff work remotely can be a financially attractive proposition. Office space is often expensive. When lawyers and staff work remotely, law firms can carry on a practice with less space and, thereby, save scarce resources. Remote work can also help attract lawyers and staff who have family or other obligations that make it difficult for them to work every day in an office, but who are able to work remotely. Indeed, there has been speculation that productivity increases for many lawyers when they work remotely. Before firms move to expanded remote work models, however, it is important to recognize that remote work presents practice and ethical issues beyond information security.

Law firms are often multigenerational and diverse human institutions. Lawyers and staff will range in age and experience from young, beginning lawyers to older, senior lawyers with decades of experience, for instance. Having such a wide range of legal talent is important to a law firm. Young lawyers represent the future of the firm. Older, more senior lawyers represent an important resource: experience at the Bar and with clients. One of the very important functions of having this diverse mix of age, experience, and talent in a law firm is that lawyers learn from each other. Young lawyers learn about real practice from older lawyers; older lawyers learn about new technologies and new developments from younger lawyers. Lawyers in a firm learn from each other both in formal settings, such as meetings or conferences and in informal, unplanned encounters. These informal encounters often provide opportunities for younger, more inexperienced lawyers in a firm to come to know the more senior members and, thereby, feel more comfortable about seeking their advice on difficult issues, particularly issues involving legal ethics. While Zoom meetings may effectively replace formal in-person meetings, they will not replace informal encounters in a hallway or a lunchroom. They will not encourage a senior lawyer to invite a junior lawyer to lunch just to chat

about law and life. There is a danger that, by moving to increased remote work, law firms will lose much of this informal contact between senior and junior lawyers that takes place when lawyers work together in an office environment and, as a result, lose the advising and educational aspects of those encounters.

Expanded remote work by lawyers may also make supervision of work product more difficult and, thereby, make compliance with Rules 5.1 and 5.3 more difficult as well. These rules were formulated in the context of lawyers working together in a physical workspace where supervision may mean only that a senior lawyer drops in on a junior lawyer's office unannounced to see how the junior lawyer is doing and to ask if the junior needs any advice or assistance. Surely there is technology that can allow the virtual equivalent of such an unannounced visit, but how many firms will think to adopt such technology? A practice in which multiple lawyers are physically distanced from each other in a virtual environment will make traditional forms of supervision much more difficult.

Finally, there is the issue of distraction. Over the last few months the news has been full of reports of how working from home often means that interruptions increase for those who do so; children, pets, and other household activities may well interfere with work. Not all lawyers have homes that permit a separate, dedicated workspace. Thus, lawyers who work remotely may find themselves subject to frequent distraction while doing work. Such distractions may affect the quality of the work produced, thereby raising Rule 1.1 competency issues, and it may also increase the time required to produce work. If that distraction time is recorded as work time, this may raise questions about compliance with Rule 1.5, which requires that lawyers only bill for the time they actually work on client matters and that such billing be reasonable. If a lawyer working in a workplace is able to produce work in less time than a lawyer working at home, this is a problem.

This is not to say that law firms should be inflexible with work policies or discourage remote work. The advantages in terms of cost and lawyer flexibility are too great to oppose the adaptations new technologies allow. But firms must fully comprehend all of the disadvantages and risks that may come with remote work and take steps to deal with them before making these changes permanent.

ETHICS & MALPRACTICE RESEARCH TIP
WHERE TO START WHEN EVALUATING A POTENTIAL CONFLICT OF INTEREST

I remember having lunch with the late, lamented former Disciplinary Administrator, Mark Anderson, and asking him what he thought were the most difficult ethical problems for Kansas lawyers to research and understand. He quickly responded that Kansas Rules of Professional Conduct 1.7-1.10 (pertaining to conflicts of interests) were, in his opinion, the most difficult provisions in the KRPC. He also believed they were the rules that most often puzzled lawyers trying to avoid disciplinary violations. I have always remembered that statement and have since devoted extra time to addressing conflict issues in my professional responsibility classes. I always explain that difficulty is not an excuse. All lawyers must understand and comply with the Rules of Professional Responsibility in the jurisdictions within which they are licensed.

Fortunately, there are several excellent sources to begin research into the conflict rules contained in the Kansas Rules of Professional Responsibility. The first stop for any Kansas lawyer on any ethics issue should be the Kansas Bar Association's Kansas Ethics Handbook, 3rd edition. The chapter on conflicts is very helpful. A second source for ethical rules on conflicts is both online and free. It is Freivogel on Conflicts, http://www.freivogelonconflicts.com/home.html. I always turn to this online source when researching a conflict question.

William Freivogel, the author of Freivogel on Conflicts, is a lawyer and legal ethicist with decades of experience. He has been a practicing lawyer as well as an executive with the Attorney's Liability Assurance Society and Aon Risk Services. Most importantly for our purpose, he writes and updates his online treatise, Freivogel on Conflicts. Like all good treatises on a specialized subject, Freivogel on Conflicts provides clear and comprehensible explanations of complex issues and problems and supplements these explanations with citations to important cases in jurisdictions throughout the United States. I suggest that all lawyers bookmark this important and free source for conflicts jurisprudence.

BLAST FROM THE PAST
EMORY WASHBURN: LECTURES ON THE STUDY AND PRACTICE OF THE LAW

Emory Washburn was one of the great political and legal figures of the nineteenth century. He practiced as a lawyer, served as Governor of Massachusetts, and was a professor at the Harvard Law School for two decades. He published a number of books and articles including his treatise on The American Law of Real Property. Today, his best-known work is his Lectures on the Study and Practice of the Law, first published in 1871. The following extract comes from that volume:

> There is no profession or calling wherein success depends more directly and immediately upon a reputation for honesty and fidelity than that of a lawyer. Nor can one sufficiently admire the consistency of a gentleman who left the profession on the score of conscientious scruples, to become a broker in Wall Street! The confidence which the public have in a lawyer's honesty, as well as capacity, is the capital on which he trades, and without which he would starve in the midst of plenty. Nor can he wisely or safely disregard even what some might call the prejudices of his fellow-citizens, if they take the form of sentiment and conviction

This advice is as valuable today as it was a century and a half ago.

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