LEGAL ETHICS & MALPRACTICE REPORTER

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TABLE OF CONTENTS

FEATURED TOPIC
READING THE RULES

At the beginning of every fall semester, I teach the basic class in professional responsibility. I spend some time early in the course talking to the students about how to approach the Rules of Professional Responsibility. For the most part, the students are in their third semester of law school, having just completed the mandatory first year classes. In those classes, they are taught to read statutes and cases, but few have much experience with administrative rules.

I usually begin my discussion of how to read the Rules of Professional Responsibility by telling the students that, unlike statutes, each state's rules are crafted by advisory committees—committees often composed of lawyers and judges who specialize in legal ethics; who are learned in the literature of the subject and current with cases and advisory opinions in their own jurisdiction and other jurisdictions; and who usually have extensive experience in the actual disciplinary process. These committees will often report to a larger group of the Bar, solicit comments from the Bar when considering enacting new rules or amending existing rules, and, ultimately, present their work to the state's highest court for action. It is the state's highest court that will then decide whether to accept the committee's and the Bar's suggestions.

This, of course, is a very different process from that which results in new legislation. Legislators act as representatives of the populace and are elected to their legislative offices. The legislative process is quintessentially political. Experts may play a role at various stages in the legislative process, but not necessarily. Those involved in crafting the Rules of Professional Responsibility are all experts. And, except for elected judges or other legal officials, they are nonpolitical. Politics, generally, should not and does not play a role in the process of writing the rules.

Further, all of those who write the Rules of Professional Responsibility share one fundamental, nonpolitical mission: the protection of the public by maintaining the integrity of the legal system. They all understand that the Bar enjoys the great privilege of self-regulation (rather than governmental regulation as is the case in some countries). And this privilege will only continue as long as the Bar undertakes its mission with the utmost seriousness and maintains the rules and the disciplinary structure surrounding them as carefully as possible. Every lawyer takes an oath and is granted a license to practice premised upon the assumption that they will always conduct themselves in compliance with the Rules of Professional Conduct, with the understanding that a failure to do so will result in the imposition of penalties—up to disbarment in appropriate cases.

Unlike what law students learn in other law school courses, what they learn in professional responsibility will dictate their conduct at all times in their professional lives as well as in certain parts of their private lives (*i.e.*, it is well established that a lawyer who commits tax

fraud on his own account, wholly unconnected with his legal practice, is still liable to discipline for violating the rules of professional conduct). I explain to my students that, as lawyers subject to the Rule of Professional Responsibility, they are going to be held to a higher standard of behavior than non-lawyers in many circumstances (*e.g.*, in showing respect for the courts and judges in their public utterances).

I find that the best way to conceptualize the proper way to read the Rules of Professional Responsibility is to compare and contrast it to the way lawyers read the Internal Revenue Code. Every tax teacher I have known has always quoted Judge Learned Hand's advice that it is every taxpayers' constitutional right to do everything in their power to avoid paying more taxes than they are legally required to pay. When I began my legal career as a tax attorney, every lawyer in my department spent much of their time dissecting the most complex tax rules and regulations to find "loop holes" to help reduce our clients' taxes. The more ingenious the loophole we discovered, the happier the partners were with us. Certainly, it was never our goal to maximize the government's revenues through the tax code. Tax law students and practitioners are taught this today, as they should be.

But this is absolutely the wrong approach to take when reading the Rules of Professional Responsibility.

When I talk to my students about how a lawyer should approach the Rules of Professional Responsibility, I urge them to approach the Rules "conservatively." Practitioners should not look at the Rules to find ways to circumvent the intent of the drafters and adopters. Rather, it is of the utmost importance to approach the Rules with the understanding that compliance with the Rules is the price that lawyers pay for the privilege not only of practicing law, but also for the added privilege of self-regulation.

While no lawyer must go beyond what the Rules require, the Rules set *minimum* standards for lawyer behavior. If a lawyer complies with the Rules, that means the lawyer is doing precisely what she should be doing. Further, to understand the full meaning of the Rules, lawyers must learn more than the text of the Rules. They should study authoritative comments as well as cases and opinions interpreting the Rules.

In essence, what I tell my students is that they should approach the Rules of Professional Responsibility in good faith and make good faith efforts to comply with them. There will be times when a lawyer may fail to comply. In such cases, the lawyer should admit to the failing and learn from it—whether sanctioned or not. In the end, the obligation to comply with the Rules of Professional Responsibility is a privilege rather than a burden, and it should be seen as such.

AUTHORITY
RULE 1.0: TERMINOLOGY

Rule 1.0, the section of the Rules of Professional Responsibility that provides definitions of key terms, is probably the rule most ignored by lawyers and law students—even though its contents are absolutely critical to any interpretation of the Rules. Lawyers are accustomed to reading documents that contain a section of definitions. Such sections are included both to eliminate any confusion and dispute over the meaning of an important term used in the document and, also, because a particular term in a document may have a different meaning from its counterpart in plain speech. Rule 1.0 serves the same function for the Rules of Professional Responsibility.

There are several aspects of Rule 1.0 that deserve special notice. First, there are, in fact, very few defined terms in the rule. For the most part, terms that are used in the Rules, even terms that are incredibly important, are not defined in Rule 1.0. For instance, Rule 1.0 does not contain a definition of the term "client," although Rule 1.18 on prospective clients does provide some guidance as to the meaning of the term. Rule 1.0 also does not provide a definition either of fiduciary or of "lawyer-client" relationship, although these terms and the concepts they represent underlie many of the rules in Chapter 1. Rule 1.0 also does not define the term "material," although Rule 1.0(m) defines "substantial" as "when [a term] used in reference to degree or extent denotes a material matter of clear and weighty importance."

Presumably terms that are not defined in Rule 1.0 must be interpreted by lawyers according to their common usage as well as by how they are used in court decisions and advisory opinions on legal ethics. This, of course, puts an enormous burden on a lawyer attempting to understand a particular rule. It requires researching the meaning of often common terms in a large body of material to see whether the term is used in particular ways when used in the professional responsibility context. It is also potentially problematic when a particular undefined term is used in the Rules but has multiple or conflicting meanings in common usage or in various substantive areas of the law.

Rule 1.0(e) illustrates how Rule 1.0 deals with this problem in the case of the term "fraud" or "fraudulent:

> …denotes conduct that is fraudulent under the substantive law of the applicable jurisdiction and has a purpose to deceive.

This definition is actually quite interesting, but also has the potential to mislead lawyers who read it superficially. The rule refers lawyers to the term's definition in each jurisdiction but then adds something: the requirement that there be an intent to deceive. Thus, a lawyer attempting to determine whether a particular act constitutes fraud may think that simply using the definition of fraud in her jurisdiction is sufficient. Unfortunately, if that jurisdiction does not have an "intent

to deceive" requirement for fraud, she will be incorrect in that assumption.

Even when a term is defined in Rule 1.0 it is quite important to make sure that you understand the full context of the definition. This generally will require looking at the definition in Rule 1.0 and any clarifications or refinements that might appear in other rules or comments to those rules. For instance, Rule 1.0(g) defines "knowingly," "known" and "knows":

> …denotes [that a lawyer had] actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

If one looks at Rule 1.9, Comments 4, 5, and 6 provide a specific context for and illustrations of how actual knowledge may be "inferred from the circumstances" within the context of the former client conflict rule of Rule 1.9. These illustrations make the full meaning of the terms defined in Rule 1.0(g) far clearer. It is also important that the terms in Rule 1.0(g) do not include "should have known." Generations of students have missed questions on Professor Hoeflich's professional responsibility examinations because they assumed that "knows" and cognate words includes "should have known." In the definitions included in Rule 1.0 of the Rules of Professional Responsibility, they do not. When the standard is "should have known" a particular rule says so explicitly by using the defined term in Rule 1.(0)(k) "reasonably should know."

One final definition worth particular attention is Rule 1.0(o)'s definition of "writing" and "written":

> …[a writing] denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or videorecording, and electronic communications. A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

As every lawyer knows, the meaning of legal terms often differs from the plain meaning of words as used in everyday speech. Indeed, lawyers have always been quite fond of redefining terms. When I was a new law student I was quite amused to read legal documents that defined "he" as "he or she" in the document's definitions section rather than using something on the order of "he/she." The definition of "writing" and "written" in Rule 1.0(o) was expanded several years ago to encompass a vast range of new technologies. Now a lawyer must be aware of this expansive view of the terms added to Rule 1.0(0) even though the rules that use the term do not necessarily make this broad definition explicit. Failure to keep up with changes in Rule 1.0 can have disastrous results.

So, in conclusion: Read Rule 1.0. Understand how it operates. Know the definitions it contains. And check it periodically to be sure to know any changes that may have been made to it.

TECH TIP
DICEKEYS

by Matthew Beal, JD, MCSE, MCP, A+, SEC+

Over the past several months, we have discussed several different methods a lawyer may use to maintain confidentiality of client materials in accordance with the Rules of Professional Responsibility. In all instances the use of a password for each file, website, or access point has been encouraged. Passwords should never be recycled or reused in other protected locations. For many of us, this creates a long list of passwords to be remembered and maintained and makes the use of a password manager necessary. These tools are extremely useful as long as the user can remember the password to the manager.

To assist with the retention of the password manager's master password, a new tool is emerging that encrypts the master password based on a roll of a set of specialized dice that is then recorded by the password manager. This emerging technology is called DiceKeys. DiceKeys creates its encryption based on a 2^{196} key. This creates a virtually impenetrable password. It is also very inexpensive and, thereby, available to anyone who wishes to have a higher level of digital security.

DiceKeys are used to create the encryption code for your password manager. This is then stored by the end user. The user creates this key by rolling a set of dice that are encoded with characters and numbers and creates a check sum to authenticate the saved password. As long as the DiceKey is physically available, access to the password manager, or any file or website that is secured by the key is accessible to that user. In this manner, the user creates a password that can be utilized for years, if not decades, to maintain the password. At this time, Android and IOS versions are in development that encourage the adoption of a stronger personal online security position. The software that reads the code runs on the device that is encrypted. Future implementations will be able to run on web pages and other web-based programs allowing for secure access to web-stored information with an encryption key that runs on the user's device.

The strength of DiceKeys is multifaceted. The high bit count security makes the password virtually unbreakable, the DiceKey created password does not expire, and it can be changed. DiceKeys run local to the device so data is not able to be intercepted.

ETHICS & MALPRACTICE RESEARCH TIP
THE RULES CHANGE: DO YOUR RESEARCH

The Rules of Professional Responsibility are not static. The Rules change, often quite drastically. Thus, when researching the propriety of a lawyer's past conduct, it is important to apply the rules in effect at the time of the conduct. Failure to do so may lead to a materially incorrect analysis of the consequences of the actions under discussion.

Both the printed and online versions of the Rules (including the KRPC) contain references to when each particular rule was last amended and the history of its adoption. For instance, the online version of KRPC 1.2 appears as follows online:

> (a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
>
> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
>
> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.
>
> (d) 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.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.
>
> [History: Am. effective July 1, 2007; Am. (c) effective January 11, 2011.]

That last line tells the reader that the rule as it exists today was last amended "effective January 11, 2011." Thus, the version of the Rule that appears online is *not* the version that applied to actions that occurred *before* January 11, 2011. Proper analysis requires finding the

version of the rule that was effective between July 1, 2007, and January 10, 2011.

Unfortunately, finding older versions of the Rules of Professional Conduct is not terribly easy. In Kansas, the superb law librarians at the University of Kansas School of Law, Washburn University School of Law, the Kansas Supreme Court Library, or local county law libraries are wonderfully helpful. Pam Crawford with the KU Law Library, Marcia Hannon and Clare King with the Supreme Court Law Library assisted with this article.

Their go-to source for older versions of KRPC is the books. The first edition of the Rules Enacted by the Supreme Court of the State of Kansas (paperback blue book) was in 1987. Prior to that, the rules were printed in their entirety in bound volumes of the Kansas Reports. The word Rules is imprinted on the spines of those volumes. The earliest version available at the Kansas Supreme Court Law Library is in Vol. 205 Kansas Reports (pg. lxxvii-) (1970) and was Rule 501, Code of Professional Responsibility. The first version of Rule 225, Code of Professional Responsibility, is in Vol. 224 (pg. xciii-) (1978). (While the historical note says there was a previous Rule No. 231, it was not found in any Kansas Reports volume.) Versions of Rule 225 between 1978 and 1987 would be found in various volumes of the Kansas Reports. And versions of Rule 225 and the current Rule 226, Kansas Rules of Professional Conduct, can be found in the annual blue books starting in 1987.

And so, if you find that you need more information than is available in the online or printed versions of the current KRPC, it might be time to hit the stacks at your local law library.

BLAST FROM THE PAST
P.W. GRAYSON: ACT IN THE BEST INTERESTS OF THOSE YOU SERVE

Although Peter Wagener Grayson wrote the text quoted below two hundred years ago, it remains as relevant today as ever—a reminder of the dangers of legislators forgetting that they have been elected by the people to serve the people and to act in the best interests of those they serve:

> But we should not here forget, that the legislator, too, thinks his calling of paramount importance to all others in the world. For this reason we find he is never at rest. He would hold himself forth continually as one among the great conjurers of human happiness; and, revolting at the idea of losing his prominence and falling into obscurity, he is ever engaged in sending out among men the most abstruse specimens of his craft and his wisdom. Even if the creature should happen to be honest and benevolent, there is still no little danger that he will greatly over perform his duty. But, on the other hand,

> (and this is the hand we should have to be very commonly looking upon) if he should chance to be a KNAVE, how difficult would it be to set bounds to the mischief of his labors!

From P.W. Grayson, *Vice Unmasked, An Essay Being a Consideration of the Influence Of the Law Upon the Moral Essence of Man, with Other Reflections* (New York, 1830), pp. 25-26. Although Grayson's message was political, the lesson of his words extends well beyond politics. For the thoughtful attorney readers of this newsletter, it is a reminder that the paramount duty of a lawyer is to act for and in the best interests of her client.

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