LEGAL ETHICS & MALPRACTICE REPORTER

Vol 2. **April 30, 2021** **No. 4**

TABLE OF CONTENTS

EDITOR:
Professor Mike Hoeflich

PUBLISHED BY:
Joseph, Hollander & Craft LLC

FEATURED TOPIC

A LAWYER'S OBLIGATION TO RENDER INDEPENDENT PROFESSIONAL JUDGMENT

A cornerstone of every lawyer's representation of a client is the obligation to "render independent professional judgment" in advising her clients. Kansas Rule of Professional Conduct 2.1 and Missouri Rule of Professional Conduct 4-2.1 state:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Although this Rule may seem simple, it is not always easy to follow. There are a number of situations in which compliance with this rule is difficult in practice.

Clients will often turn to a lawyer seeking the answers they want rather than the answers the law requires. While lawyers certainly have the duty to find ways to accomplish the ends that their clients desire, it is not always possible to do so. Rule 2.1 requires that lawyers give advice to their clients that is consistent with the lawyer's "independent professional judgment" even though this may result in giving advice that a client does not want to hear.

There is an old joke that used to circulate among accountants:

> Three candidates for a job with a large accounting firm were instructed to wait in a reception area to be called into an interview. The first candidate entered the interview room and sat down in front of three of the firms' partners. One of the partners asked, "How much is two plus two?" The candidate, somewhat surprised at the simplicity of the question, replied, "Four." The partner thanked her and told her the interview was over. On her way out she told the two remaining candidates what had happened. The second candidate was called in and asked the same question. She answered, "Five" thinking that the interviewers wanted an "out of the box" answer. Her interview then ended. She told the remaining candidate what had happened. When this last candidate entered the interview room and was asked the same question, she answered, "What would you like it to be?" She was hired immediately.

In fact, neither accountants nor lawyers may ethically always provide the answers that their clients want to hear. There are ethical limits to what lawyers may do for their clients. And, when asked difficult questions, lawyers must: (1) be honest with their clients; and (2) give

their clients advice that (a) takes these limits into account and (b) sets out the law as the lawyer understands it.

Indeed, Rule 1.2(d) addresses this specific issue when a client wants advice in contemplation of committing a criminal or fraudulent act:

> 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.

In such a situation, the lawyer may not assist or counsel his client in prohibited actions. If the client demands to know why the lawyer will not assist him, then the lawyer, pursuant to Rule 2.1, must tell the client that the proposed actions are criminal or fraudulent and may then offer to discuss the consequences of such an action.

Comment 1 to Rule 2.1 makes the lawyer's obligation to give candid, albeit unwanted, advice absolutely clear:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Another situation in which a lawyer may encounter problems when giving advice to a client may arise when a lawyer is being paid by a third party. In some cases, the third party paying the lawyer may want to influence the lawyer's advice to the client. This special situation comes within the scope of Rule 2.1 as well as Rule 1.8(f):

> A lawyer shall not accept compensation for representing a client from one other than the client unless:
>
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6.

In situations where a third party wants a lawyer to give particular advice to a client, the lawyer must comply with Rule 1.8(f), which incorporates Rule 2.1, and ensure that the advice she gives is the result of her "independent professional judgment" regardless of what the third party wants.

The difficulties lawyers may encounter when a third party wants to influence a lawyer's advice to a client is one familiar to every law school dean and clinic director. Virtually every law school in the United States operates clinical programs. Often such programs may engage in litigation of which alumni or university central administration disapproves. For instance, a law school environmental law clinic may bring litigation that is adverse to an alumnus's business and demand of the university president that the clinic be ordered to modify its pleadings. Such occurrences are not at all unusual. Third parties, especially university donors, often will feel free to put pressure upon law school administrators to instruct clinical professors to "ease up" or otherwise modify litigation to assuage their concerns. However, such actions by the law school administration or lawyers employed by law school clinics would very likely run afoul of Rule 2.1.

Rule 2.1 also addresses the ability of a lawyer to give non-legal advice to a client. Rule 2.1 permits a lawyer to do so, but there are limitations. First, the lawyer must be competent to give such advice in order to comply with Rule 1.1. Second, if a lawyer decides to give non-legal advice to a client, this may put the lawyer into the position of advising on matters that other professionals may also advise upon, and this may be a cause for some concern. Comment 4 to Rule 2.1 addresses this issue:

> Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Another issue raised by the comments to Rule 2.1 is how a lawyer should respond to a client's request that the lawyer refrain from giving anything other than "technical" advice. Comments 2 and 3 address this situation:

> [2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
>
> [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a

> client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

There are, in fact, many situations, in which a client's proposed course of action will have significant non-legal consequences.

For instance, a client may want a lawyer to draft a will that excludes one or more of the client's children. While this may be legally permissible, it may also raise the prospect of significant family conflict and possible challenges to the will that might be avoided by a different testamentary strategy. In such a case, a lawyer may well feel obliged to advise his client of these potential non-legal problems and offer advice as to how to minimize them.

Another situation may arise in the litigation context when a client wants his lawyer to put on witnesses for the sole purpose of harassing and embarrassing his opponent. Pursuant to Rule 1.2(a), the decision as to what witnesses to put on the stand belongs not to the client but to the lawyer since it is a tactical or "means" decision. The lawyer, however, is required to consult with the client, and it may well be necessary to explain the "non-technical" and non-legal reasons for refusing to do as the client asks.

Finally, Comment 5 to Rule 2.1 states the general principle that a lawyer is, generally, not obligated to give advice to a client unless asked to do so, but with important exceptions:

> In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

In situations where a client does not ask for advice, it is even more difficult for a lawyer to give a client not only unasked for, but, unwanted, advice. Nevertheless, Rule 1.4 requires:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The combination of Rule 1.4 and 2.1 may require that the lawyer give his client unwanted and unasked for advice in some situations. Giving such advice in these situations will require forethought, candor, and tact if the lawyer wishes to continue to serve her client.

NEW AUTHORITY
NYSBA ETHICS OPINION 1220

On April 6, 2021, the New York State Bar Association issued Ethics Opinion 1220 dealing with an often overlooked provision of the *Rules of Professional Responsibility*. New York Rule 7.5(b)—like KRPC Rule 7.5(a) and MRPC Rule 4-7.5(a)—permits law firms to adopt a "trade name" so long as it does not violate Rule 7.1's prohibition on "false or misleading" communications. KRPC 7.5(a) reads:

> A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

Comment 1 to KRPC explains the Rule:

> A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable as long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

The NYSBA issued Opinion 1220 in response to a question asking whether two law firms intending to jointly create a Professional Limited Liability Corporation could ethically do so under the following conditions:

> The inquirer proposes to bring together separate law firms into a professional limited liability corporation ("PLLC"), which we shall call "ABC Law Group PLLC." The member law

> firms in ABC Law Group PLLC will sign an operating agreement that will set forth various terms and conditions of membership. Under this proposal, ABC Law Group PLLC will maintain a website describing the services provided by the group as a whole and offering a profile of each separate member firm. Each firm's profile will be linked to the member firm's own website.
>
> Visitors to the ABC Law Group PLLC website who click on a link to a member firm's website will be advised that they are leaving the ABC Law Group PLLC website. Each individual PLLC member's letterhead (and other written materials, including engagement letters) will include the words "Member Law Firm" under the name and trademark of ABC Law Group LLC. Client engagement letters will be between the client and the member law firm, not ABC Law Group PLLC. All billing will be done by the member law firms. Member firms may collaborate with each other, and each attorney in a member firm must be insured under a member law firm's malpractice policy.

The NYSBA concluded that such an arrangement would not be ethically permissible.

The adoption of the name "ABC Law Group" would not violate NYRPC 7.5(b) (the New York counterpart to KRPC Rule 7.5(a) and MRPC Rule 4-7.5(a)). But the combination of "ABC Law Group" and "PLLC" would violate this provision because the New York law regulating PLLCs requires that all members of a PLLC "must be individuals who are professionally licensed in New York and who practice their profession within the PLLC." According to the NYSBA, combining the trade name "ABC Law Group" and "PLLC" "necessarily implies that it is formed to practice law and that the members of the PLLC are associated for that purpose." Under the facts as presented, this would not be true. Therefore, the combination of the terms would violate the Rule.

While Opinion 1220 may seem rather esoteric to the average Kansas or Missouri lawyer, it should not be written off too easily. Increasingly, law firms are seeking ways to reduce costs and make use of economies of scale. The type of firm alliance discussed in NYSBA Opinion 1220 was designed to reduce expenses and increase market share for the involved firms—all while maintain the independence of the constituent firms. Such an arrangement has appeal in nearly every marketplace, including Kansas and Missouri. It is, in fact, a rather ingenious proposed business structure. Unfortunately, the NYSBA decided that such a structure would violate its rules on lawyer communications and use of trade names.

As Kansas and Missouri lawyers look to create new business structures, they should be aware of the potential ethical pitfalls. To make sure that innovative business structures do not suffer a similar fate in Kansas and Missouri, it is wise to study the legal opinions regarding similar structures in other states.

ETHICS & MALPRACTICE RESEARCH TIP
SELECTED ARTICLES FROM THE *GEORGETOWN JOURNAL OF ETHICS*

Whether you are researching a specific issue or just want to add another legal ethics journal to your regular reading, the *Georgetown Journal of Legal Ethics* is an excellent source. It has published a number of articles recently (Vol. 33, 2020) that may be of interest to Kansas and Missouri lawyers:

(1) J. Batts, "Rethinking Attorney-Client Privilege," online at https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-33-issue-1-winter-2020/.

(2) J. Bliss, "The Legal Ethics of Secret Client Recordings," online at https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-33-issue-1-winter-2020/.

(3) D. Luban, "Fiduciary Legal Ethics, Zeal, and Moral Activism," online at https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-33-issue-2-spring-2020/.

(4) L.C. Levin, "The Politics of Lawyer Regulation: The Case of Malpractice Insurance," online at https://www.law.georgetown.edu/legal-ethics-journal/in-print/volume-33-issue-4-fall-2020/.

The ABA Center for Professional Liability is also a great resource. For example, it recently published an interesting piece called, "The Fierce Debate over Alternative Business Structures," online at https://www.americanbar.org/news/abanews/publications/youraba/2021/0419/alternative-business-structures/.

BLAST FROM THE PAST
THE YOUNG LAWYER'S STRUGGLE: TAKE THE WORK OR STARVE

The following is an extract from a letter from Charles F. Mansfield, a prominent nineteenth century American educator. The letter was written by Mansfield at a time when his family and friends were urging him to study law:

> …I am sorry that I cannot comply with J's wishes and become a lawyer; but I grow more and more averse to that profession every day. The office business might be destructive to my health; but, more than this, my Creator has quite disqualified me for the profession, by making me a little too honest, and giving me too warm sympathies and too strong a love of justice. If I could become a great lawyer, so independent that I could pick my cases, could advocate just causes and no other, and have no business to do but plead and counsel, nothing would be more in accordance with my desires. But this is, of course, absurd; the young and poor lawyer has "no election;" he must take the work that comes to him, no matter how dirty it may be, …or starve…

Lucy Langdon Mansfield, *Memorial of Charles Finney Mansfield: Comprising from his diaries, letters and other papers* (Baker & Godwin 1866). Alas, this continues to be an issue for young lawyers today as well.