Legal Ethics & Malpractice Reporter

Vol. 3, No. 11

NOVEMBER 30, 2022

EDITED BY

Dr. Michael Hoeflich
Professor, University of Kansas School of Law

PUBLISHED BY

Joseph Hollander & Craft LLC
Lawyers and Counselors

Contents

FEATURE ARTICLE

The Dangers of Arrogance (and Benefits of Humility) in Law Practice 3

NEW AUTHORITY

ABA Formal Opinion 503: The Ethics of "Reply-all" Emails. 7

ETHICS & MALPRACTICE RESEARCH TIP

New, Must-Read Release: *The Lawyer's Conscience: A History of American Lawyer Ethics* 9

A BLAST FROM THE PAST

David Hoffman on Maintaining a Just Cause for Law Practice. 10

FEATURE ARTICLE

The Dangers of Arrogance (and Benefits of Humility) in Law Practice

The *Rules of Professional Conduct* do not discuss the dangers of lawyer arrogance or the benefits of lawyer humility. Something, or someone, must—because arrogance and humility have an immense impact on how lawyers behave and how they comply with disciplinary rules.

Susan Liautaud on the *Ethics Incubator* blog writes:

> Arrogance is one of the most dangerous drivers of unethical behavior. It is almost always present in one form or another when scandal erupts. Think of Sepp Blatter continuing to draw his president's salary during an eight-year ban from soccer (and declaring himself the "godfather" of women's soccer). Think of investment banks justifying conflicts of interest as a business model. Think of allegedly fraudulent anti-human-trafficking advocate Somaly Mam's high-fashion ego duping even the meticulous and compassionate Pulitzer prize-winning journalist Nicholas Kristof and other high-profile leaders. (I cite Nicholas Kristof precisely because he is not arrogant as far as I can tell and because his wisdom on how easy it is to fall prey to arrogance deployed for charity taught us all a good lesson.)[1]

Every lawyer has had the unpleasant experience of trying to work with another lawyer whose arrogance was a disservice to his client. A number of years ago, I was involved with a lawyer who was so convinced that he was right on point of law that he refused to actually research the issue. Insisting that he "knew" he was right, he would not change the wording of the document at issue. Unfortunately, the point of law he was so certain about was dependent upon a statute that had been recently amended. For over a month, he refused to agree to a change in the document to conform to the new law. His refusal, based on nothing but arrogance, delayed consummation of the deal and cost both parties unnecessary time and expense.

In looking at this example of arrogant behavior, we can all agree that the lawyer was, to put it bluntly, a "jerk." Moreover, his arrogance caused him to violate several of the *Rules of Professional Conduct*. First, he violated Rule 1.1 on competence in several ways. He did not know the law and refused to do the research necessary to learn it. Second, he violated Rule 1.3, which requires a lawyer to act diligently

1 http://ethicsincubator.net/unrecognizedethicsrisk.

on behalf of his client. His arrogant insistence that he knew the law, despite having been told that he was wrong, delayed completion of the transaction. Undoubtedly, the effects of his arrogance caused him to violate other ethical rules as well.

Lawyers need to be self-confident in order to represent their clients competently. However, there is a difference between arrogance and confidence.

Arrogance can also significantly damage the lawyer-client relationship. MRPC Rule 1.2(a) reads:

> Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. 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.

Lawyer-client dynamics are always a potential concern. Often, the client is in a vulnerable state—psychologically, financially, and even physically. An arrogant lawyer can easily take advantage of a vulnerable client, and this can lead to a disciplinary violation. Pursuant to Rule 1.2(a) (the "means-ends" test), a lawyer has the right, upon consultation with the client to determine the means by which to conduct a representation; but the client has the right to determine the ultimate objective of the representation, such as whether to settle a civil matter or to accept a plea bargain in a criminal matter. Arrogance can often lead to overbearing behavior, which can lead to client bullying. A bullying lawyer may well push a client to make a decision that the client doesn't actually want. This would almost certainly result in a violation of Rule 1.2 and damage to the client's interests.

Similarly, Rule 1.4 states that:

> (a) A lawyer shall:
>
> > (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> >
> > (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> >
> > (3) keep the client reasonably informed about the status of the matter;

> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the *Rules of Professional Conduct* or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

An arrogant lawyer may well violate Rule 1.4 precisely because arrogance often impedes the ability to listen to others. If you cannot listen to your client, you cannot adequately communicate with your client.

As much as lawyer arrogance is a negative characteristic and may lead to violations of the *Rules of Professional Conduct*, humility in dealing with others is a strongly positive characteristic for lawyers. Although lawyers in the United States operate within an adversarial system, a reasonable dose of humility can still be a very good thing. For instance, humility about one's own accomplishments might play a role in complying with Rule 1.1 on competence.

Comments 1 and 2 to Rule 1.1 require a fair degree of self-knowledge and the ability to evaluate one's skills and experience:

> [1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
>
> [2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends

> any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

Making the kind of judgments about oneself, one's knowledge, and one's skills required by Rule 1.1 is not easy. An arrogant individual may decide that he is capable of taking on tasks for which he is incompetent. A humble individual may engage in self-questioning and even seek the advice of a more experienced lawyer (within the bounds of Rule 1.6). Taking a more conservative view of one's abilities may well better serve a client and avoid rule violations and even malpractice actions later.

As important as it is for lawyers to avoid arrogance and embrace humility, we cannot incorporate these ideas into the *Rules of Professional Conduct*. The *Rules* are designed to regulate lawyer behavior and, in many cases, provide sanctions for violations. It would be both dangerous and unworkable to attempt to sanction lawyers because they are arrogant or reward them in some way for showing humility. These are character traits beyond regulation. However, even if we do not regulate lawyer arrogance and humility, we must talk about how these character traits impact the perception of lawyers, the legal profession, and the *Rules of Professional Conduct*.

NEW AUTHORITY

ABA Formal Opinion 503: The Ethics of "Reply-all" Emails

Advisory opinions relating to technology continue to be issued at a furious pace. As law office technology continues to develop, ethical problems also arise. Yet even fairly well established technologies continue to generate new advisory opinions.

On November 2, 2022, the American Bar Association Committee on Ethics and Professional Responsibility published Formal Opinion 503, which explains the ethical dangers in using the "reply all" button in common email programs. The problem arises from Rule 4.2 and its prohibition against lawyers directly contacting represented persons without the consent of the represented persons' counsel:

> Under Rule 4.2 of the ABA Model *Rules of Professional Conduct*, in representing a client, a lawyer may not "communicate" about the subject of the representation with a represented person absent the consent of that person's lawyer, unless the law or court order authorizes the communication.
>
> When a lawyer ("sending lawyer") copies the lawyer's client on an electronic communication to counsel representing another person in the matter ("receiving counsel"), the sending lawyer creates a group communication…This group communication raises questions under the "no contact" rule because of the possibility that the receiving counsel will reply all, which of course will be delivered to the sending lawyer's client. This opinion addresses the question of whether sending lawyers, by copying their clients on electronic communications to receiving counsel, *impliedly* consent to the receiving counsel's "reply all" response.

This question has been presented to state ethics committees over the past several years, a number of which have said that this scenario does not give such implied consent under Rule 4.2. In Opinion 403, the ABA takes a contrary position.[2]

---

2 "Several states have answered this question in the negative, concluding that sending lawyers have not impliedly consented to the reply all communication with their clients. Although these states conclude that consent may not be implied solely because the sending lawyer copied the client on the email to receiving counsel, they also generally concede that consent may be implied from a variety of circumstances

In justifying its position, the Opinion states:

> This conclusion also flows from the inclusive nature and norms of the group electronic communications at issue. It has become quite common to reply all to emails. In fact, "reply all" is the default setting in certain email platforms. The sending lawyer should be aware of this context…and if the sending lawyer nonetheless chooses to copy the client, the sending lawyer is essentially inviting a reply all response…
>
> Second, we think that placing the burden on the initiator – the sending lawyer – is the fairest and most efficient allocation of any burdens. The sending lawyer should be responsible for the decision to include the sending lawyer's client in the electronic communication, rather than placing the onus on the receiving counsel to determine whether the sending lawyer has consented to a communication with the sending lawyer's client. Moreover, in a group email or text with an extensive list of recipients, the receiving counsel may not realize that one of the recipients is the sending lawyer's client… We see no reason to shift the burden to the receiving counsel, when the sending lawyer decided to include the client on the group communication in the first instance.

The Opinion goes on to specify situations in which the assumption of implied consent will not apply, despite its conclusion that implied consent is the default rule.

With competing opinions and exceptions to every rule, the moral of the story is that lawyers communicating with both counsel and clients by email must be very mindful of when they click "reply all." Failure to be careful may well result in an inadvertent violation of Rule 4.2.

---

beyond simply having copied the client on a particular email. This variety of circumstances, however, muddies the interpretation of the Rule, making it difficult for receiving counsel to discern the proper course of action or leaving room for disputes."

ETHICS & MALPRACTICE RESEARCH TIP

New, Must-read Release: *The Lawyer's Conscience: A History of American Lawyer Ethics*

A number of months ago, we announced that the University Press of Kansas would be publishing what promised to be one of the most important new books on the development of legal ethics in the United States. That new book was published on November 9, 2022:

> Michel S. Ariens, *The Lawyer's Conscience: A History of American Lawyer Ethics* (University Press of Kansas 2022).

The table of contents revels the breathtaking scope of its coverage:

Preface and Acknowledgments

Introduction

1. Origins, 1760–1830
2. Honor and Conscience, 1830–1860
3. Clients, Zeal, and Conscience, 1868–1905
4. Legal Ethics, Legal Elites, and the Business of Law, 1905–1945
5. Prosperity, Professionalism, and Prejudice, 1945–1969
6. Beginning and Ending, 1970–1983
7. The Professionalism Crisis and Legal Ethics in a Time of Rapid Change, 1983–2015

Conclusion

Notes

Index

Every lawyer should read this book to understand the background and development of the regulation of lawyers and judges in the United States yesterday and today.

A BLAST FROM THE PAST

David Hoffman on Maintaining a Just Cause for Law Practice

The following quote is from a favorite text on legal ethics, David Hoffman's Resolutions in Regard to Professional Deportment[3]:

> I will espouse no man's cause out of envy, hatred, or malice toward his antagonist.

In our present era in which the courts are being used not simply to litigate normal disputes, but also to promote political and social ideas that are better decided in the political forum, Hoffman's words are well worth considering.

3 David Hoffman, *A Course of Legal Study* (Joseph Neal 1836) (1817).

josephhollander.com