THE Legal Ethics & Malpractice Reporter

A monthly commentary on current ethical issues in law practice for members of the Kansas and Missouri Bars

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Joseph Hollander & Craft LLC
Lawyers and Counselors

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About This Publication

The Legal Ethics & Malpractice Reporter (LEMR, for short) is a free, monthly publication covering current developments in ethics and malpractice law—generally from the perspective of the Kansas and Missouri *Rules of Professional Conduct*. Founded in 2020, this publication was envisioned by KU Law professor Dr. Mike Hoeflich, who serves as its editor in chief. In partnership with Professor Hoeflich, JHC's legal ethics and malpractice group is pleased to publish this monthly online periodical to help attorneys better understand the evolving landscape of legal ethics, professional responsibility, and malpractice.

In addition to the digital format you're presently reading, we publish LEMR as mobile-friendly blog articles on our website. We also share a digest newsletter to our LEMR email subscribers whenever a new issue is published. (You may subscribe here if you aren't already a subscriber.)

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FEATURE ARTICLE

Variations on a Theme: Ethics in Multijurisdictional Licensing and Practice

Twenty years ago, admission to practice law in multiple states generally required either taking multiple bar examinations or meeting state reciprocity rules, which often required a period of practicing law in one's home state in order to qualify for admission in the second state. It also required that the two states grant reciprocal admission privileges to bar members. The result of these requirements was that many lawyers would only be admitted to practice in one or, perhaps, two states. This has changed significantly as a result of the increased adoption of the Uniform Bar Examination.

The National Conference of Bar Examiners succinctly describes the UBE in the following terms:

> It is uniformly administered, graded, and scored and results in a portable score that can be transferred to other UBE jurisdictions.

The important point here is that a person who takes the UBE is able to transfer his bar exam score to all states that accept the UBE and, assuming the score meets the required level for admission, then the person may be admitted to as many states as she qualifies for without taking additional examinations. The UBE has now been adopted in the vast majority of states, including Kansas and Missouri. The ease of obtaining multiple bar admissions is quite striking. I have observed in recent years that recent law graduates seek admission to two, three, or even more states.

Lawyers who do become members of more than one Bar need to be aware of the ethics rules about practicing in multiple jurisdictions. These rules are set out primarily in Rule 8.5. In Kansas, KRPC Rule 8.5 reads:

> A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

The Comment to KRPC Rule 8.5 states:

> In modern practice lawyers frequently act outside the territorial

> limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the *Rules of professional conduct* in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

Missouri Rule 4-8.5 reads:

> (a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and other jurisdictions for the same conduct.
>
> (b) In any exercise of the disciplinary authority of this jurisdiction, the *rules of professional conduct* to be applied shall be as follows:
>
> > (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
> >
> > (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction.
>
> A lawyer shall not be subject to discipline if the lawyer's conduct

> conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

For lawyers who are licensed to practice in multiple jurisdictions, Rule 8.5 necessitates that they be aware that many of the *Rules of Professional Conduct* differ from jurisdiction to jurisdiction and that they must ensure that they are aware of these differences in the states in which they practice. Ethics rules vary in different jurisdictions.

One important example that lawyers will often encounter, particularly if they practice criminal law, is Rule 1.6 and its variations from jurisdiction to jurisdiction. Model Rule 1.6 (b) provides exceptions to the general rule of client confidentiality contained in Rule 1.6(a)(1):

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent reasonably certain death or substantial bodily harm;
> >
> > (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
> >
> > (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services…

On the other hand. KRPC Rule 1.6(b) states:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) To prevent the client from committing a crime…

Missouri Rule 4-1.6(b) states:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

> (1) to prevent death or substantial bodily harm that is reasonably certain to occur…

These versions of Rule 1.6(b) differ in significant aspects, and a lawyer who does not recognize these differences and follow the proper rule is at risk of violating the *Rules of Professional Conduct* in the applicable jurisdiction. This is only one of many examples. There are many other Rules that also vary significantly from jurisdiction to jurisdiction.

In addition to knowing the Rules in the jurisdictions where she is licensed or practicing, a lawyer must also know which Rules apply to particular scenarios. Here, again, Rule 8.5 varies from jurisdiction to jurisdiction. The versions from Kansas and Missouri quoted above illustrate the extent of such differences. One of the most important parts of Rule 8.5 in some versions is a "safe harbor" for lawyers who attempt to follow the Rule in good faith. MRPC Rule 4-8.5(b)(2), for example, reads:

> A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment 3(c) to this Rule explains that its purpose is "providing protection from discipline for lawyers who act reasonably in the face of uncertainty." But choice of law rules are notoriously difficult to apply. So, while states that supply detailed guidelines and safe harbor make lawyers lives a bit easier, others will be much more difficult to navigate.

The reality of multijurisdictional licensing and practice today and the likelihood that it will increase in the future coupled with the many significant variations in *Rules of Professional Conduct* to be found in different jurisdictions adds just one more ethical issue for lawyers to understand and resolve if they are to maintain compliance with their professional obligations.

NEW AUTHORITY

To CC, or Not to CC? Attorney Email Ethics

Given the preoccupation of the legal profession with cutting-edge technologies, like artificial intelligence, it is refreshing to see a state continuing to concern itself with ethical questions involving older technologies. In Nebraska Ethics Advisory Opinion for Lawyers 23-01, Nebraska considered several issues that are significant for every lawyer who uses email. The questions presented were:

1. May lawyers Carbon Copy (CC) or Blind Carbon Copy (BCC) their own client on an email to opposing counsel?

2. Does the receiving lawyer violate ethics rules by "replying all" to an email where opposing counsel has CC'd opposing counsel's own client?

The Opinion's response to these questions centers on the Nebraska version of Rule 4.2, which—like KRPC Rule 4.2—reads:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Neb. Ct. R. of Prof. Cond. § 3-504.2.

Applying this rule, Opinion 23-01 instructs that a lawyer may not CC her own client in an email to opposing counsel unless the client has given informed consent to the disclosure of the client's email address:

> Electronic communication is now a common, quick, and effective tool for lawyers either communicating with their clients or with other lawyers. Lawyers may be tempted to include their clients in communication with opposing counsel in an attempt to keep clients informed and up to date regarding the client's matter; however, lawyers who CC their clients without the client's informed consent have violated Neb. Ct. R. of Prof. Cond. § 3-501.6(a) by disclosing the client's confidential information. As detailed by the Kentucky Bar

> Association, this information includes "1) the identity of the client; 2) the client received the email including attachments, and 3) in the case of a corporate client, the individuals the lawyer believes are connected to the matters and the corporate client's decision makers." The client's email may also reveal personal information related to a client's fictitious name or employer; revealing these details could "open avenues for investigation by opposing counsel that were previously unknown …"

As to whether a lawyer may BCC her client, the Opinion reluctantly says that a lawyer may do so, but that it is not "recommended":

> Both a BCC and a CC recipient can hit "reply all" and directly respond to the original sender, the original recipient, and any CC recipients. This creates the potential for the client to inadvertently disclose confidential and privileged information to opposing counsel...
>
> Both carbon and blind copying the client creates a foreseeable risk that the client will "reply all" to the email and inadvertently disclose confidential information directly to opposing counsel. Given the instantaneous nature of email and the constant pressure the modern lawyer is under to quickly read and respond to email, it is natural to assume that Lawyer B opens an email from Lawyer A's client within moments of it being sent—potentially before Lawyer A is aware of the email being sent. If the client sent a physical letter to Lawyer B, Lawyer B has a much greater chance of realizing the sender is a represented party before reading the correspondence. The same is not true with email.

As to the other question, the Opinion states that once a lawyer has CC'd her client on an email to opposing counsel, then opposing counsel may reply to the client on the grounds that the lawyer who CC'd her client gave implied consent for opposing counsel to do so. The Opinion acknowledges that a number of states have taken the opposite position:

> Many jurisdictions addressing this issue have found that consent to a "reply all" is not implied when lawyers CC their client. These jurisdictions hold, however, that consent can be implied by a variety of additional facts and circumstances. Some of these jurisdictions, in an attempt to clarify such facts and circumstances, state that a receiving lawyer can determine the existence of implied consent by

> looking at "(1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship." Still, as concluded by the American Bar Association, this view "muddies the interpretation" of Neb. Ct. R. of Prof. Cond. § 3-504.2 and makes it "difficult for receiving counsel to discern the proper course of action . . . ."

Following this rationale, the Opinion adds a note of caution:

> However, lawyers receiving emails which include an opposing counsel's client must still act carefully. This opinion does not sanction "reply all" responses which surpass the scope of the initial communication; lawyers initiating communications do not "authorize the receiving lawyer to communicate beyond what is reasonably necessary to respond to the initial email." Additionally, lawyers initiating communications may explicitly notify opposing counsel that the inclusion of a client via CC does not grant consent to a "reply all" response; a lawyer can nullify the presumption of implied consent at any point, including at the outset of communications between the lawyers or at the specific point in time where a client is included in an initiating lawyer's email. So, while lawyers receiving an email from opposing counsel may be tempted to respond quickly, they must ensure they respond appropriately, both in scope and method, when opposing counsel includes their client…

Nebraska Opinion 23-01 is a useful reminder of some of the ethical issues that arise even with simple email communications and is well worth reading.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index to Legal Periodicals*

1. Margaret Canary, Compilation, *Recent Law Review Articles concerning the Legal Profession*, 47 J. Legal Prof. 115 (2022).

2. Natalie Henry, Compilation, Recent Ethics Opinions of Significance, 47 J. Legal Prof. 107 (2022).

   These are useful compilations of citations to articles.

3. Ford Mozingo, Note, *Balancing the Ethical Responsibilities of the State Attorneys General Using Private Counsel*, 47 J. Legal Prof. 247 (2023).

   The State Attorney General's use of private counsel has become more frequent in Kansas recently. This is an interesting student note on the subject.

4. Cameron A. Parsa, Note, *Artificial Intelligence and the Pursuit of Fair and Reasonable Fees in Legal Practice*, 47 J. Legal Prof. 277 (2023).

As the use of various AI programs becomes more common in law practice, the question of how to charge for its use in an ethical manner is heating up in the courts. We will be doing an LEMR feature on article on this soon.

A BLAST FROM THE PAST

Greatness Without Goodness

What would a finely cultivated mind, united to the best physical constitution be, without moral principle? What but mere brute force, impelled by the terrible energies of a perverted understanding and a depraved heart? How much worse than physical imbecility, is strength employed in doing evil?

—Henan Humphrey, *An Address, Delivered at the Collegiate Institution in Amherst, Ms*. 35 (Oct. 15, 1823).

josephhollander.com

KANSAS CITY	LAWRENCE	OVERLAND PARK	TOPEKA	WICHITA
926 Cherry St	5200 Bob Billings Pkwy	10104 W 105th St	1508 SW Topeka Blvd	500 N Market St
Kansas City, MO 64106	Lawrence, KS 66049	Overland Park, KS 66212	Topeka, KS 66612	Wichita, KS 67214
(816) 673-3900	(785) 856-0143	(913) 948-9490	(785) 234-3272	(316) 262-9393