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

After the Deluge: Law Practice & Legal Ethics in the New Administration

President Trump has been in office for two weeks and has already effectuated immense changes in the structure of the federal government. In the coming weeks and months, there will be many more. Commentary so far, both positive and negative, has focused on the political and administrative aspects of these changes and proposed changes. There has also been much discussion in the media about the changes we will see so far as constitutional law and policies. On the other hand, there has been very little discussion in the press about what impacts these new changes will have on the practice of law. But we can be certain that all the legal changes that are taking place will have both direct and indirect effects on law practice. And, with these changes, there will also come ethical challenges for lawyers. This month, we are going to explore a few of these changes and how we, as a profession, can deal with them.

1. Increased Litigation

Many of the new administration's actions to modify or eliminate existing law and policies will be controversial. Many will give rise to new legal challenges, which will impact on both national issues and individual concerns. One of the first things that the new administration has done is attempt to eliminate "birthright citizenship," a right embedded in the Fourteenth Amendment. Many lawyers, experts in constitutional law, will fight these changes, and they may or may not survive. But at the level of the daily life of ordinary individuals, these changes cause anxiety and fear among millions. Lawyers who are not constitutional experts may well find that they have clients who want their advice on what risks they face if birthright citizenship is eliminated. If they are to give such advice, lawyers are required pursuant to Rule of Professional Conduct 1.1 to do so competently. How will the average practicing lawyer achieve competence on complex questions they have not handled before? Comment 2 to Rule 1.1 states:

> 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.

It seems unlikely that lawyers will call in constitutional experts to help them advise ordinary clients, although it may be wise to refer a client to an attorney with such expertise. The alternative is that they must take time and make the effort to keep up on these changes and study the issues in some depth. Regarding the birthright citizenship issue, for instance, studying media articles will not be enough. A lawyer should have enough knowledge of an issue so that she can not only answer a general question but be able to give informed advice on the issue to an inquiring client.

The problem here is that there are so many legal and legislative changes every day that lawyers face a rather large burden that requires a substantial, non-billable time. As a profession, we cannot abandon Rule 1.1 or make an exception for periods of rapid and massive legal change. But many lawyers will now face months of new laws and new policies on a daily basis.

2. Hiring

Periods of change not only present problems, they also present opportunities. Based upon the President's intended large scale personnel changes in the federal government and, especially agencies like the Department of Justice and the FBI, many highly trained and experienced lawyers will be leaving their federal government positions voluntarily or involuntarily. This may create a large pool of available legal talent, which will permit law firms around the nation to hire first class lawyers. That is also going to bring Rule 1.11 to lawyers' attention. This Rule deals with the ethical implications of hiring former government lawyers:

> (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer

or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and
>
> (2) any other matter covered by the conflict of interest rules of the appropriate government agency.
>
> (e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Rule 1.11 is a specialized conflicts rule designed to protect clients and opponents from being disadvantaged by a firm hiring a government lawyer possessing confidential knowledge obtained during government service and using it to the disadvantage of opponents or others when transferring to private practice. Large firms in major political centers will already be familiar with Rule 1.11, but other firms may not be as knowledgeable, and the large pool of lawyers who may soon become available may tempt firms that do not regularly hire former government lawyers to do so now. Those firms need to study Rule 1.1.

Beyond the need to familiarize themselves with Rule 1.1, law firms contemplating hiring former government lawyers must also understand the substantive burden that the Rule places upon them in terms of limits on the transitioning lawyer and the firm as a whole. This may be especially great when dealing with highly experienced government lawyers with literally decades of knowledge and information about individuals and corporations. As with all conflicts checks, this is not a simple or easy matter. It will require significant investigation for fear of losing existing clients as well as prohibiting retention by future potential clients.

3. Angry Lawyers

Political passions in the United States are running quite high, perhaps as high as they have ever been in our nation's history. Lawyers are not immune. Many lawyers may well be tempted to initiate or join litigation challenging some of the changes

being introduced by the new administration. In effect, some may well become "cause lawyers," with strong feelings about the litigation in which they are involved. The temptation to let one's own feelings influence one's professional obligations and judgement can be overwhelming. This can be ethically challenging, and there are a number of pertinent ethical rules. First, Kansas Rule of Professional Conduct 1.2(a), the so-called "means and ends test" empowers lawyers by making them ethically responsible for determining litigation strategies so long as they consult with their clients:

> 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.

Anger often leads to irrationality, and a passionate and personally involved lawyer could convince a client to undertake something that is imprudent. Impassioned lawyers should take Rule 1.2(a) to heart and commit to meaningful consultations with their clients.

KRPC 2.1 requires that a lawyer render "independent professional judgement" and give "candid advice" to her client:

> 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.

I would suggest that a lawyer for whom an issue is of great personal significance will need to be especially careful to be able to provide such judgement and advice. This is especially important because Rule 2.1 explicitly permits a lawyer to comment on matters that are not strictly legal. However, this non-legal advice must still be a result of "independent judgment" and the lawyer must be competent to give it pursuant to Rule 1.1.

Angry Lawyers & Overzealous Actions

Every lawyer must always be mindful of her obligations to the courts and justice system. KRPC 3.1 states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

KRPC Rule 3.3(a) states:

> A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The legal profession and the public have seen far too many instances of overzealous lawyers in the courts and the media in the past decade, often pushing the boundaries of these Rules. Lawyers must take the requirement to be truthful and to respect the court by not filing frivolous claims. Several have already been disciplined. Lawyers are different from non-lawyers so far as truth telling is concerned. Telling lies is simply not permitted.

We have touched on only a few of the ways in which the current change in

administrations and the often radical shifts may affect law practice and concomitant relevant ethical rules. Other changes may also affect critical aspects of law practice, and we will consider those in another article later in the year.

NEW AUTHORITY

Nassau County, New York Bar Opinion 2015-2: The Ethics of Modifying Preprinted Real Estate Contracts

We do not usually feature Nassau County, New York Bar Association ethics opinions. It is not because they are uninteresting, but only because they are a long way from Kansas and Missouri. However, the Nassau County Bar is a large one, and many of the ethics issues that arise there also arise in jurisdictions closer to us.

In this column we want to highlight an older opinion, from 2015, which is still relevant. In Opinion 2015-2, the Nassau County Committee on Professional Ethics considered whether a lawyer could secretly alter a preprinted form. The question was, "whether there is an ethical prohibition to change a preprinted form of a real estate contract and send it to another attorney without drawing one's attention to it."

The use of preprinted—and, most recently, digitally pre-drafted—forms is common in many law practices. It saves time and expenses. I suspect that many lawyers think it is ethical not only to fill in the blank spaces, but also to make alterations to the preprinted language.

The problem is, if a lawyer makes alterations that are neither obvious from the type and format of the document nor disclosed, then the lawyer doing so risks being accused of misrepresentation or lying. This is especially true if the form

carries a heading indicating that it is a standard form. This clearly was a concern to the Committee in Nassau County:

> The Inquirer is a real estate practitioner who uses form documents (e.g., contract of sale) along with documents custom to each transaction. Under such circumstances, attorneys have a duty to act diligently on behalf of their clients, and to read all contractual provisions. This affirmative duty on the party receiving "form" documents to be diligent in reviewing documents received does not, however, mean that the transmitting attorney may insert language into "form" documents surreptitiously.

Long gone are the days of type setting and language set in proverbial stone. Rather, the nature and length of such "form" documents, and the technological sophistication of computer software to render changes to "standard documents" nearly indiscernible—often favorable to one party over the other—makes such alterations rather rudimentary. Hence, it would be nigh impossible to discern the change in language unless one were to review the document at issue, word-for-word, and compare it to the "standard" "form" document so often utilized by such practitioners.

Accordingly, any such change (and the absence of notice of such change) in some form would open the door for some unscrupulous practitioners to gain an unfair advantage by burying a material change in prolific boilerplate language. This would, in the Committee's opinion, open the door to a "war of the forms" wherein each practitioner would race to insert more and more material, yet lesser noticeable alterations into so-called boilerplate "forms."

The opinion notes that this kind of guerilla, "gotcha" legal practice runs afoul of attorneys' fundamental duties, pursuant to Rule of Professional Conduct 8.4(c), which prohibits attorneys from engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." The consequences for the profession, as well as for our clients, would be rather severe—rewarding one's ability to furtively insert language into contracts, eroding the concepts of equity and "meeting of the minds," and rewarding stealthy boilerplate landmines.

Every lawyer using pre-drafted forms should consider this advice from New York.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *the Current Index to Legal Periodicals*

1. Julius A. Hammond, Note, *Attorneys and Their Obligation to Challenge Unethical Laws*, 48 J. Legal Prof. 111 (2023).

This is a fascinating article well worth reading.

2. Alex Sandlin, Note, *Private Advising, Public Consequences: The Role of Private Attorneys Advising Public Officials*, 48 J. Legal Prof. 127 (2023).

In these days of extreme partisanship this is a most timely discussion.

3. David A. Grenardo, *Civility Rules: Debunking the Major Myths Surrounding Mandatory Civility for Lawyers and Five Mandatory Civility Rules That Will Work,* 37 Geo. J. Legal Ethics 167 (2024).

Can we as a profession be civil? Should civility rules be mandatory and carry sanctions? These are questions with which we, as lawyers, must continue to grapple.

A BLAST FROM THE PAST

The Meaning of Our Constitution

> The work of 55 men at Philadelphia in 1787 marked the beginning of the end of the concept of the divine right of kings. In place of the absolutism of monarchy, the freedoms flowing from this document created a land of opportunities. Ever since then discouraged and oppressed people from every part of the world have made a beaten path to our shores. This is the meaning of our Constitution.

—Warren E. Burger, Forword to *The Constitution of the United States* (Commission on the Bicentennial of The United States Constitution 1986).

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