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

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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

Time Passing: Legal Ethics & Time

When we think of ethical rules, we rarely think about the impact of time. There are no rules solely directed to questions of time. And yet lawyers' lives are dominated by time in the form of deadlines, billing, communication, etc. This month, we are going to look at some of the basic Rules of Professional Responsibility in which time and timekeeping plays an essential role.

Diligence & Rule 1.3

Kansas Rule of Professional Conduct 1.3 reads:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 2 to KRPC Rule 1.3 reads:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

This is all about time.

A lawyer must recognize and obey all court filing and other deadlines, including being conscious of the applicable statute of limitations. In the predigital age, this meant maintaining a detailed paper calendar for each client with all relevant dates. Today, in the world of computerized law practice, there are numerous tools to prevent lawyers from missing relevant deadlines. Easily available calendar programs can take care of both memorializing and creating reminders for every necessary filing or other relevant deadlines.

Sometimes, procrastination may be caused by a lawyer's psychological

problems. Some lawyers may delay filings because they are concerned with litigation problems and falsely believe that by failing to deal with the problems they will go away. They will not. On the contrary, they will almost certainly get worse. Rule 1.3 has no exception for a lawyer's psychological issues. In such cases, a lawyer beset by procrastination must take efforts not only to avoid violating Rule 1.3, but, also, Rule 1.1 which makes psychological fitness a requirement for practice.

Time & Billing: Rule 1.5

No Rule more explicitly addresses issues of time than Rule 1.5, which requires that fees be reasonable:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Although only 1.5(a)(1) explicitly speaks of time as a factor in determining the reasonableness of a fee, a lawyer will be billing according to time spent on a

representation in many if not most cases. This means that the lawyer must consider time from a number of perspectives. First, how is the amount of time calculated and memorialized? A lawyer must determine what time segments are reasonable. Most lawyers will bill in either six minute or ten minute segments. Larger time segments may raise questions.

How is time recorded? Is it recorded contemporaneously or after the fact? The longer the period between doing the work and recording the time spent, the greater the possibility of inaccuracy. To some extent, the use of computer-based time keeping can alleviate these problems, but even computers require accurate and contemporary input.

Of course, the greatest danger involving billing by time is the temptation either to commit outright fraud by overstating time spent or by indulging in what is often referred to as "churning," actually spending more time on a matter than was necessary. It is an unspoken assumption of Rule 1.5 that spending more time on a matter and billing for that time solely for the purpose of increasing the amount billed is not reasonable. Indeed, to do so would be a violation of the lawyer-client fiduciary relationship. KRPC Rule 1.5, Comment C states:

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest…A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures…

Unfortunately, in our current environment, many clients do not necessarily trust their lawyers to bill properly. This distrust can give rise to so-called "fee audits" by third parties, fee litigation, and disciplinary complaints. The best means to avoid such problems is not only to bill accurately but, also, to provide documentation as to how bills were compiled with itemization of time and matters worked on for each bill.

Time & Diligence: Rule 1.1

Rule 1.1 requires that lawyers be competent:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

> preparation reasonably necessary for the representation.

Although Rule 1.1 does not explicitly include a reference to time considerations, the use of the term "thoroughness" should be read to include the necessity to have enough time to be thorough. Comment 5 states:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Every matter handled by a lawyer must be given sufficient time and effort to be handled competently.

This often can be a problem for solo or small firm practitioners and government lawyers, particularly public defenders where case loads can be intimidating. In March 2024, the Unofficial Blog of Vermont's Bar Counsel Ethical Grounds published a comment on this problem entitled, "A lawyer's duty to manage their caseload."[1] The blog notes that Comment [2] to Rule 1.3 of the Vermont Rules of Professional Conduct explicitly states:

> [a] lawyer's work load must be controlled so that each matter can be handled competently.

The blog goes on to say:

> What I'm saying is this: an excessive workload puts a lawyer at risk of violating several duties that the lawyer owes to clients. For instance, and as the Colorado opinion points out, the duties to provide a client with competent & diligent representation, the duty to communicate to the client sufficient information to allow the client to make informed decisions about the representation, and the duty to avoid conflicts of interest. Stated differently, it's problematic when a lawyer is too busy with Clients A, B, and C to provide Client D with competent &

1 Available at https://vtbarcounsel.wordpress.com/2024/03/06/a-lawyers-duty-to-manage-their-caseload/.

> diligent representation.
>
> . . .
>
> In sum, remember, at some point, a workload becomes so excessive as to put a lawyer at risk of violating the most basic duties owed to clients.

A lawyer simply cannot be thorough if he has a caseload that forces him to skimp on the time he devotes to a matter.

As lawyers we lived in a bounded world. On the one hand, all of our actions as lawyers are bounded by the Rules of Professional Conduct and must comply with their strictures. Another boundary is time: time to measure fees, time to assure diligence in our representation, and time to ensure that we can competently represent our clients. The clock is ticking.

[Readers may also want to review the "New Authority" article in the May 2023 edition of the Legal Ethics and Malpractice Reporter discussing Colorado Formal Ethics Opinion 146 (2022), "A Lawyer's Duty to Maintain an Appropriate Workload."]

NEW AUTHORITY

Legal Bravery

Shakespeare famously had one of the characters in Henry II, Part 2 urge a rebellious crowd to reform England:

> DICK. The first thing we do, let's kill all the lawyers.
>
> JACK CADE. Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment, that parchment, being scribbl'd o'er, should undo a man? Some say the bee stings; but I say 'tis the bee's wax, for I did but seal once to a thing, and I was never mine own man since.

Many readers satisfy themselves by understanding this quote as anti-lawyer sentiment in the extreme. But those who read more carefully realize that the complaint against the lawyers is focused as much on the rule of law that lawyers are sworn to defend as it is on the lawyers. The notion is that if you kill all the lawyers, then you also kill the law.

In the past several weeks the Trump administration has attempted to radically change our government and legal system in ways that challenge traditional legal and political norms. The administration also took direct action against lawyers in a manner perceived by many to be an improper use of political power.

The most recent example is the White House memorandum suspending active security clearances for lawyers who have been working as defense counsel for former Special Counsel Jack Smith (the attorney who unsuccessfully prosecuted Donald Trump on behalf of the Justice Department under the Biden administration). According to CNN:

> White House aide Will Scharf said ahead of the signing, "One law firm that provided pro bono legal services to the special counsel's office under Jack Smith's leadership was Covington & Burling. As a result of those actions, we're now going to be suspending and putting under review the security clearances for the attorneys and employees at that firm who worked with Jack Smith's team."

> In response to the White House's move, a Covington spokesman said on Tuesday: "We recently agreed to represent Jack Smith when it became apparent that he would become a subject of a government investigation. Covington serves as defense counsel to Jack Smith in his personal, individual capacity."

Katelyn Polantz & Samantha Waldenberg, "White House suspending active security clearances of Covington & Burling lawyers who are working with Jack Smith," CNN, Feb. 25, 2025. [1]

Legal ethicists should be concerned for how this executive action impacts the affected lawyers' responsibilities under the Rules of Professional Conduct—and whether it may impair access to counsel for Mr. Smith and others by way of a chilling effect. The American legal system is adversarial and only functions properly when all litigants have the opportunity to have counsel. That is why the Rules of Professional Conduct include Rule 1.2(c), which states:

> 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.

Lawyers who resist efforts to limit or discourage their representation of clients with certain political, economic, social or moral views or activities should be congratulated for their bravery in upholding our system of laws.

1 Available at https://www.cnn.com/2025/02/25/politics/jack-smith-covington-burling-security-clearances-trump/index.html.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *the Current Index to Legal Periodicals*

1. Natalie A. Pierce & Stephanie L. Goutos, *Why Lawyers Must Responsibly Embrace Generative AI*, 21 Berkeley Bus. L.J. 469 (2024).

   This is an interesting piece, but we are not sure that we agree.

2. Matthew Steilen, *Genteel Culture, Legal Education, and Constitutional Controversy in Early National Virginia*, 41 Law & Hist. Rev. 709 (2023).

   While not terribly relevant to modern legal education, this article is nevertheless quite interesting from a historical perspective.

A BLAST FROM THE PAST

Trollope on the Lawyer-Client Relationship

Anthony Trollope, the great English novelist and commentator on society was much concerned with lawyers. On the lawyer-client relationship he commented:

> There is no form of belief stronger than that which the ordinary English gentleman has in the discretion and honesty of his own family lawyer. What his lawyer tells him to do, he does. What his lawyer tells him to sign, he signs. He buys and sells in obedience to the same direction and feels perfectly comfortable in the possession of a guide who is responsible and all but divine.

—Anthony Trollope, The Eustace Diamonds (Oxford Univ. Press 91 1973) (1872), as quoted by James J. Fishman, "A Random Stroll Amongst Anthony Trollope's Lawyers," 11 Br. J. Am. Leg. Studies 1, 5 (2022).

Would that all clients were so trusting today!

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