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

Contents

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

The Dangerous Client

The practice of law is not ordinarily considered to be a particularly dangerous or risky profession, but crime against lawyers and law firm personnel is an unfortunate reality. Furthermore, lawyers may reasonably believe that legal ethics rules prohibit them from reporting such crimes or providing sufficient information to law enforcement authorities regarding those crimes. This is an intolerable situation. Thankfully, the American Bar Association Standing Committee on Legal Ethics and Professional Responsibility issued Formal Opinion 515 on March 5, 2025, in an attempt to ameliorate this situation.

Opinion 515 recognizes that lawyers may fall victim to clients' criminal acts in multiple ways including physical violence or by financial crimes. It also recognizes that the general rule of client confidentiality of Rule 1.6 may suggest the lawyer is unable to share information pertinent to reporting, investigating, and prosecuting a client's criminal conduct. It ultimately concludes, however, that there is an implicit exception to Rule 1.6 when a lawyer is a victim of a client's crime or someone associated with the lawyer or related to the lawyer is a victim of the client's crime and the lawyer is a witness to that crime.

Model Rule of Professional Conduct 1.6(a) states that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Formal Opinion 515 considers the enumerated exceptions and analyzes whether they provide sufficient authority for a lawyer to disclose a client's crimes against her. It is important to note, however, that there is great variation amongst states and the Model Rule as to exceptions to the general rule of confidentiality. Model Rule 1.6(b) states seven exceptions:

> (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;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

KRPC Rule 1.6(b) is rather different. It permits the revelation of information relating to representation of a client to the extent a lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(4) to comply with other law or a court order; or

> **(5)** to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Missouri Rule 4-1.6(b) permits revelation under the following circumstances:

> (1) to prevent death or substantial bodily harm that is reasonably certain to occur;
>
> (2) to secure legal advice about the lawyer's compliance with these Rules;
>
> (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (4) to comply with other law or a court order; or
>
> (5) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Opinion 515 correctly notes that few of the Model Rule's exceptions will help in a situation in which a client has acted criminally against a lawyer. Model Rule 1.6(b)(1) might be useful in the case where the client's actions open the possibility of causing death or substantial bodily harm. Kansas, however, has a much different version, only permitting disclosure to prevent future crimes, a version that will most likely be even less useful in these situations.

Model Rule 1.6(b)(3) also may provide some help, but, again, in very restricted circumstances. It states, in part, "to the extent the lawyer reasonably believes necessary . . . 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." Obviously, the most serious impediment to using this exception is that it speaks of harm to others, apparently excluding client actions that would harm the lawyer. KRPC 1.6(b) has no analogue to Model Rule 1.6(b)(3) so even the limited help the Model Rule might provide would be unavailable in Kansas. Similarly, Missouri Rule 4-1.6(b) lacks a version of that Model Rule exception.

The last specific exception the opinion considers is Model Rule 1.6(b)(5):

> to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Both the KRPC and the Missouri Rules have similar exceptions, KRPC 1.6 (b)(3) and MORPC 4-1.6(b)(3). Unfortunately, all three versions of this exception are of very limited utility since they would apply only in the case of civil litigation by the lawyer, which would be too little, too late. As Opinion 515 says, "the exception would not justify initially reporting to law enforcement authorities, since a criminal investigation or prosecution is not a controversy between the lawyer and the client."

The opinion explores when, if ever, the person harming a lawyer would not be deemed to be a client or prospective client under Rule 1.18 and, therefore, not enjoy the confidentiality provided under Rule 1.6, 1.9, and 1.18:

> Whether a person is a "client" for purposes of Rule 1.6 and other professional conduct rules is governed by law outside the professional conduct rules, on which this Committee does not ordinarily opine. But we note that contract law, which ordinarily determines whether a client- lawyer relationship was formed, supports the proposition that the formation of such a relationship requires the person to have a good faith intention of seeking legal services from the lawyer.

Using similar reasoning, the opinion advises that a purported client would not be considered a client. Additionally, the opinion points out that not all information will be information "relating to the representation" and, therefore, protected by Rules 1.6, 1.9, and 1.18.

Unfortunately, even though the 1.6(b) exceptions provide some arguments

for lawyers eager to disclose a crime, it is not enough to solve the problem. As a result, the ABA Committee goes on to argue for an "implicit" exception to Rule 1.6(a) not specifically enumerated in Rule. 1.6(b):

> In considering the situation in which a lawyer is a victim of a client's crime, the Committee finds interpretive guidance in the Scope section of the Model Rules which observes: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." Lawyers might readily assume that, if a client commits a crime against them or their employees or associates, they can report the crime to law enforcement authorities and appropriate others, notwithstanding the confidentiality duty under Rule 1.6(a). **The Committee concludes that they would be correct, even though, in many situations, no express exception to the confidentiality duty will apply. That is because, in this situation, the Committee believes an implicit exception applies.**

(emphasis added).

Although the ABA Committee is willing to announce this implied exception to Rule 1.6(a), it does so with caution:

> **It bears emphasis that lawyers are not free to disregard the Rules whenever they conclude that the purposes underlying the Rules are not being served.** Rules may legitimately apply more broadly than necessary to serve their underlying purposes, for example, because the Rule drafters want lawyers to steer far clear of the lines, or because it is necessary to draw a bright line rather than employ an imprecise standard. What makes applying Rule 1.6(a) unreasonable here is that doing so serves no good purpose and would cause affirmative harm that seemingly was not contemplated by the Rule drafters, who, as far as we are aware, did not specifically consider the problem of clients' crimes against their lawyers.
>
> … The implicit exception limits what information relating to the representation may be disclosed. A lawyer may disclose information about the client's crime against the lawyer to the extent reasonably necessary to permit the relevant authorities to investigate and possibly prosecute the crime, or for the lawyer to seek other services like medical care, restitution, or another reasonably necessary

> remedy or redress. A lawyer may also disclose information for such purposes when someone associated with the lawyer or related to the lawyer is a victim of the client's crime and the lawyer is a witness to that crime. But this does not mean that the lawyer may disclose unnecessary or unrelated details of the representation.

(emphasis added).

In a final paragraph, the opinion deals with the aftermath of the case when a client has committed a crime against a lawyer and the lawyer has used the implicit exception to Rule 1.6:

> Finally, we note that a client-lawyer relationship almost certainly cannot continue after the client victimizes the lawyer or someone associated with the lawyer or related to the lawyer and the lawyer reports the client's crime pursuant to an exception to the duty of confidentiality under Rule 1.6, whether express or implied. The lawyer will ordinarily have an obligation under Rule 1.4 to inform the client that the disclosure will be, or was, made. If the client then discharges the lawyer, the lawyer must withdraw from the representation under Rule 1.16(a)(3). Likewise, the lawyer must withdraw if the crime and ensuing disclosure have created a conflict of interest that materially impairs the lawyer's ability to represent the client competently. Indeed, it is hard to imagine a scenario in which a lawyer who is actively seeking the prosecution of a client would not be materially impaired in the ability to competently represent the client. Even if withdrawal is not mandatory, the lawyer may elect to withdraw if, as is not unlikely, the client's criminal conduct has made it unreasonably difficult to continue the representation.

Formal Opinion 515 identifies and deals with an extremely important topic—one that goes to the safety and security of lawyers, their families, and their staff. Yet, while the opinion provides a reasoned analysis for creating an implied exception, it is not authoritative. Certainly, an opinion issued by the ABA Committee on Ethics and Professional Responsibility carries the weight of persuasion, but it is not binding on disciplinary authorities. Every jurisdiction should seriously consider adopting a new enumerated exception to Rule 1.6 based on Formal Opinion 515 and, thereby, assure the continued secure functioning of the legal profession.

RULES REMINDER

Inadvertent Disclosure of Confidential Information

Although it did not involve legal confidentiality, the recent unfortunate inclusion of an unwanted recipient to a distribution list stands as a stark reminder to lawyers of the possibility of inadvertent disclosure of confidential information by anyone who uses digital communications—whether email, messaging apps, or fax machines. Therefore, any digital device that includes a distribution list or "reply all" feature is a potential source of embarrassment or, in the extreme, ethical violation for an attorney.

Indeed, the inadvertent disclosure of confidential information by a lawyer has been the subject of debate among lawyers for decades, and a number of advisory opinions have been issued about it. That robust discourse eventually led to Model Rule of Professional Responsibility 4.4(b):

> A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Rule 4.4(b) has not been adopted by all jurisdictions, but both Kansas and Missouri have adopted the provision.

It is notable that Rule 4.4(b) differs significantly from rules suggested by many of the advisory opinions that preceded its creation. As it currently exists, Rule 4.4(b) reflects a compromise as to handle such inadvertent disclosures. Comment 2 to Kansas Rule of Professional Conduct 4.4 makes this clear:

> Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information

> is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Of course, any lawyer concerned with inadvertent disclosure of confidential information must also focus on Rule 1.6, the fundamental rule on client confidentiality. KRPC 1.6 states:

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment 26 addresses inadvertent disclosure directly:

> The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of

> implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

As the rules and commentary suggest, special considerations apply whenever lawyers use electronic communication channels. The potential for inadvertent disclosure of confidential information is an issue that every lawyer must consider. Let us all take a moment to double check before hitting send.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *the Current Index to Legal Periodicals*

1. Susan Fortney, *The Role of Accountability in Preserving Judicial Independence: Examining the Ethical Infrastructure of the Federal Judicial Workplace*, 87 Law & Contemp. Probs. 119 (2024).

   Professor Fortney is one of the leading American scholars on judicial ethics and of how judges' chambers function ethically.

2. Jonah E. Perlin, *Client Confidentiality as Data Security,* 99 Wash. L. Rev. 781 (2024).

   Increasingly, the focus of privacy concerns and client confidentiality are becoming questions of technology. This is a worthwhile article to read.

A BLAST FROM THE PAST

The Importance of the Lawyer's Oath

> …the practice of law…is not simply a business, to be followed solely for personal gain….[The lawyer's] public duties, indeed, are first enumerated in the oaths taken by the candidate. He swears to support the Constitutions of the United States and the State, and to conduct himself "with all good fidelity, as well as to the courts," as to his clients

— *Harper's Weekly*, July 28, 1906, p. 1052

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