THE Legal Ethics & Malpractice Reporter

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

MAY 30, 2025

VOL. 6, NO. 5

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 Indifferent Client

A lawyer serves as a fiduciary agent for her client. This relationship is not one of equality. The vast majority of the obligations and responsibilities rest with the lawyer. The one-sidedness of the relationship is obvious in many of the rules and comments in the Rules of Professional Conduct. For instance, a client may dismiss a lawyer at any time for any reason and may do so without any need for justification. A lawyer, on the other hand, may not freely withdraw, but instead, must ensure that a withdrawal complies with the often-restrictive requirements of Rule 1.16. Pursuant to Rule 1.2 (a) (the so-called "means and ends rule"), a client has absolute decision-making power over critical decisions which go to the essence of the lawyer-client relationship such as settlement or pleas. Rule 1.3 requires candor to the client but not vice versa. Similarly, Rule 1.4 requires a lawyer to communicate with the client, but does not require the same of the client. Indeed, the Rules of Professional Conduct are very clearly written for the protection of clients, not of lawyers.

Over the past few months, we have discussed various types of clients and the ethical and practical problems they may present for a lawyer. Occasionally, a lawyer finds that a client takes a laissez faire attitude to a representation for some reason. They may not realize that a lawyer-client relationship is a partnership of sorts that requires both lawyer and client to work towards a common end. Others believe that as long as they pay their bills, they need not do anything else. It may be denial, or it may be simple lack of interest. Whatever it is, these attitudes may impede a lawyer's efforts. The pro-client, one-sidedness of the Rules can make dealing with a client who takes a casual or indifferent attitude to the representation particularly challenging. How can a lawyer best protect herself in such a situation?

There are scenarios when withdrawal from the representation may be necessary or appropriate.

A lawyer's first duty under the Rules of Professional Responsibility is competence. KRPC Rule 1.1:

> A lawyer shall provide competent representation to a client.

> Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Nowhere in Rule 1.1 nor the comments state that the duty of competence is suspended when a client is not helpful. When the client's indifference and failure to support the case reaches the extreme situation that the lawyer cannot continue to represent him competently then KRPC mandates that the lawyer must terminate the representation. KRPC 1.16(a)(1) states that:

> a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
>
> > (1) the representation will result in violation of the rules of professional conduct or other law…

The only exception to this mandatory termination rule is if a court orders the lawyer to continue the representation. It is certainly conceivable that a client's uncooperative behavior could make competent representation difficult or impossible. A lawyer might, for instance, need documents only available from the client or only available with the client's approval. Without these, a lawyer might be unable to meet discovery or court-ordered submission deadlines. In such an unpleasant situation, a lawyer might well believe that competent representation had become impossible and judge that she must withdraw pursuant to Rule 1.16 (a)(1).

It is also possible that a client's refusal to cooperate with his lawyer does not reach the extreme requiring a Rule 1.16(a)(1) withdrawal but might still permit the lawyer to withdraw pursuant to Rule 1.16(b). KRPC Rule 1.16(b) reads:

> …a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
>
> > (1) the client has used the lawyer's services to perpetrate a crime or fraud;
> >
> > (2) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
> >
> > (3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given

> reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
>
> (4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
>
> (5) other good cause for withdrawal exists.

Although KRPC 1.16(b)(1) and 1.16(b)(2) would probably not provide assistance to a lawyer with an uncooperative client, Rules 1.16(b)(3) and (4) may well do so in many situations.

The difficulty with going the Rule 1.16 withdrawal route, however, is that it requires admission of a lawyer's defeat by a recalcitrant client and, of course, means that the lawyer loses the representation. While a lawyer might well decide that there is no choice in the situation, forethought and action at the beginning the lawyer-client relationship might avoid this unfortunate result.

The lawyer-client relationship is a contractual relationship. By having a thoughtfully drafted engagement letter to establish the mutual rights and obligations of a representation, a lawyer can minimize situations where the client's indifference makes it difficult to continue the representation. Rather than focusing exclusively on the client's obligations to pay their fees, an engagement letter can and should include the client's obligation to provide requested documents and information to the lawyer in a timely manner and to cooperate with the lawyer in any matters that require client input. The engagement letter can also specify that failure to do so may result in termination of the representation.

Uncooperative clients are an unfortunate reality. The Rules of Professional Conduct provide some assistance in extreme cases, but lawyers should be prepared for the possibility of having an uncooperative or indifferent client and do what they can to inform all clients of their expectations in the lawyer-client relationship and create mutual obligations as appropriate.

NEW AUTHORITY

Judicial Comments

On March 11, 2025, the Judicial Ethics Committee of Maryland issued an interesting, and politically relevant, formal opinion regarding whether judges may properly offer guidance regarding Executive Orders outside the context of active litigation over which they preside.

The Maryland State Bar Association had issued a call for its members to take on the task of assisting others in understanding Executive Orders issued by President Trump at the beginning of his second term in office:

> In service of its focus on supporting and educating members, MSBA has launched a resource page for Maryland attorneys in light of the many White House Executive Orders that have far-reaching legal implications and will change how practitioners do their work and advise their clients. As part of this important effort, [the] MSBA President . . . has instructed MSBA's substantive law sections to review these Executive Orders and develop articles, webinars, roundtables, and other resources as necessary to ensure members are informed of the Executive Orders' legal impact.

A Maryland judge active in the MSBA requested an opinion as to whether he might answer the call and provide this type of help. As summarized by the Committee:

> Requestor inquires whether it is permissible for Requestor to attend section council sessions focused on these "White House Executive Actions," during which Requestor's section will review and discuss the many presidential Executive Orders that have been signed since January 20, 2025. The stated purpose of the meetings is to "provide [MSBA] members with practical information and legal analysis of the [presidential orders] so they can be informed, adjust their work, and properly advise their clients in light of these actions."

The Judicial Ethics Committee looked at a number of the provisions of the Maryland Code of Judicial Conduct and all the possible provisions that might apply to a judge doing such work for the bar association.

It expressed deep concern that providing the advice requested by the MSBA would constitute the "practice of law" in Maryland and thus be a prohibited activity under the Code:

> Here, as already mentioned, the purpose of the MSBA effort is to assist members by providing legal analysis vis-à-vis the White House Executive Orders so that the members "can be informed, adjust their work, and properly advise their clients." These are complex matters that require legal knowledge and skill. Although judges appropriately participate in general educational activities through the MSBA and other bar organizations, in our view, for the current and recalled/senior judges who serve on these MSBA committees, the evaluation and analysis of White House Executive Orders is so specific that it would constitute the practice of law and, moreover, can be seen as indirectly advising the members' clients themselves. This type of activity would run afoul of Rule 18-103.10.

It is far from certain that other states would follow the Maryland opinion in this respect. The characterization of the proposed activity as "indirectly advising members' clients themselves" seems arguable.

The opinion also expresses deep concern as to whether judges should provide analysis of White House executive orders because doing so might constitute engaging in "partisan political activities":

> In addition, given the nature of the task – to provide legal analysis regarding White House Executive Orders – participation could be seen as engaging in "partisan political activity," which is prohibited by Rule 18-104.2(a). We are not suggesting that any MSBA member judges would engage in "partisan political activity." The concern is that their participation in the anticipated meetings might reasonably raise a question of impropriety, contrary to Rule 18-101.2. Certainly, the Committee acknowledges that, on occasion, judges are called upon to attend events such as the state of the State address, which will include political speech. The distinction, of course, is that the judges attending those types of functions are not engaged in the discourse. To the contrary, the MSBA objective regarding evaluation of White House Executive Actions envisions an engaged, participating work group as opposed to simple attendance.

Lastly, the opinion noted that a judge's participation in the MSBA's Executive Order interpretation efforts might cause subsequent judicial disqualification:

> We also note that the White House Executive Orders have spawned significant litigation throughout the country. At this point, most of that litigation has been initiated in the federal courts. Similar lawsuits, however, could be filed in Maryland courts, rendering particularly relevant Rules 18-102.10 and 18-102.11 (dealing with disqualification).

The Judicial Ethics Committee ultimately concluded that a judge could not properly give such advice or attend meetings designed to produce such advice and analysis:

> Based on all of the above, participation in these meetings could reasonably call into question the judge's independence, integrity, and impartiality.
>
> Given the information provided by Requestor and the directive from the MSBA president, the Committee concludes that judges and recalled/senior judges serving on MSBA committees may not participate and should not attend meetings where White House Executive Orders are evaluated and analyzed.

Once, again, other states may not follow Maryland's reasoning or endorse the entirety of its conclusion (for example, prohibiting a judge's attendance at meeting regarding the Executive Orders in addition to prohibiting the judge from endorsing an ultimate conclusion).

The current use of executive orders appears to be a significant legal innovation and presents a number of important constitutional issues. In Kansas and Missouri, our judges are not only judicial officers; they are intellectual leaders of the Bar. To deprive members of the Bar—and the general public—of their considered discussions of important legal developments may be a loss. To preserve the legitimacy of the judiciary, however, it is necessary to prevent them from giving extrajudicial opinions. Certainly, it's worth pondering where the line is properly drawn.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *the Current Index to Legal Periodicals*

1. Andrew M. Perlman, *The Legal Ethics of Generative AI*, 57 Suffolk U. L. Rev. 345 (2024).

Perlman, Dean & Professor of Law at Suffolk University Law School, offers his perspective regarding how lawyers can use generative AI ethically.

2. Timothy J. Simeone, *A Privilege to Lie, Cheat, and Steal? Recent Applications of the Litigation Privilege to Attorney Fraud*, 91 Tenn. L. Rev. 921 (2024).

Rejecting a Massachusetts case barring suit against an attorney who orchestrated a scheme to defraud creditors out of any recourse against a debtor, Simeone declares that "the litigation privilege can coexist with suits against attorneys for fraud in litigation, and the arguments of courts claiming that the privilege must be extended to fraud should be rejected in favor of a more nuanced analysis."

A BLAST FROM THE PAST

Practical Insight

> Lawyers know life practically. A bookish man should always have them to converse with.

—James Boswell, *The Life of Samuel Johnson* (Routledge, Warne, and Routledge 1866)

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