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

Lawyering Ethically in a Time of Uncertainty

Lawyers are used to operating in fluid legal conditions, but adapting can be especially difficult when changes are rapid and sweeping. For example, major legislation like the One Big Beautiful Bill Act changes multiple areas of the law. In addition, a very active federal judiciary, including the U.S. Supreme Court, has changed the law in other ways recentlyIntroduction.

In dealing with change, two provisions of the *Rules of Professional Conduct* are most important: Rule 1.1, which deals with the lawyer's ethical responsibility to be competent, and Rule 2.1, which addresses the lawyer's role as a client advisor.

> Kansas Rule of Professional Conduct 1.1 states:
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment 8 to the rule explains:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Although this comment is most often discussed for its requirement of technical competence it also requires that lawyers "keep abreast of changes in the law and its practice…." Both the Model Rules and the Missouri Rules have essentially the same rule and comment (although in Missouri, it is Rule 4-1.1, Comment 6).

The problem is that there is no clear definition of what is meant by competent representation. Case law gives indicators, but finding a general rule is not easy, if possible at all. Rule 1.1 itself provides a list of factors that guide us:

- legal knowledge;
- skill;

- thoroughness; and
- preparation.

Of these four listed factors, in dealing with uncertainty and rapid change in the legal environment, legal knowledge and preparation certainly will be critical in achieving an ethical level of competence. Most experienced lawyers have dealt with massive changes in the laws and the uncertainty that affects judgment in the period in which new legislation, for instance, is uncertain. Once legislation is introduced, if not before, a lawyer must ensure that she follows its progress and advises clients of that progress and how that may affect the client's interests. It is hard to imagine that failure to do so would not put an attorney at risk of violating Rule 1.1.

Similarly, in the case of new or proposed legislation, not only must the attorney keep up with its progress, but she must all do so with a reasonable degree of thoroughness. Simply reading media accounts of new or proposed legislation would not appear to be sufficient. Kansas Rule of Professional Conduct 1.0(i) defines reasonable acts by a lawyer as: "conduct of a reasonably prudent and competent lawyer." The pairing of reasonable and competent in this definition suggests the two ideas are closely aligned. Failure to keep up with new, legal changes relevant to a client's matter would hardly seem prudent.

Another interesting potential guide to the meaning of competence is found in Kansas Supreme Court Rule 233, which lists problems for which Kansas lawyers should consult the Kansas Lawyers Assistance Program and which might affect the ability to provide competent representation:

> The Kansas Lawyers Assistance Program (KALAP) is established to fulfill the following purpose:
>
> (1) provide immediate and continuing assistance to any legal professional who is a lawyer, bar applicant, or law student and who is experiencing a physical or mental health issue such as depression, stress, grief, anxiety, alcohol or drug abuse, gambling addiction, age-related concerns, or any other circumstance that may affect the legal professional's quality of life or ability to perform the legal professional's duties;

Here we have a list of physical and psychological factors that may affect a lawyer's "ability to perform the legal professional's duty."

Why would illness be a concern in a rapidly changing legal environment? The answer, of course, is stress. When the law is changing every day or even several times in a day—as for instance in the signing of an executive order and then rapid injunctive relief granted by one or more courts—this means that lawyers must devote a substantial amount of time and resources in keeping up with all these changes. That means extra stress in many already highly stressed lives. Rapid legal changes may also make delays in a lawyer's efforts due to illness, even short delays, problematic. Kansas Rule of Professional Conduct 1.4 requires that:

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

Comment 1 adds:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer…

While this is not a rule that requires 24/7 attention by a lawyer, it does mean that, in the event of a lawyer's inability to carry on the representation for a period because of illness or voluntary absences (for a vacation, for, instance) at times of rapid change that may require an immediate response (e.g., an imminent corporate transaction in which a newly signed executive order may have an impact), a lawyer needs to ensure that a someone else can cover for her.

In addition to the competency issues caused by rapid legal change, there are also issues of general legal advising in these situations that may be impacted. Kansas Rule of Professional Conduct 2.1 states:

> 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.

Model Rule 2.1 and Missouri Rule 4-2.1 are essentially the same.

Legal and political uncertainty may make the exercise of "independent professional judgment and…candid advice" more difficult. Political passions are running incredibly high at this time. The judiciary, too, is feared to be more political, and rapid orders are coming from the bench with little notice. Calculating

legal outcomes now seems to require not only legal knowledge but political savvy on the part of lawyers. Lawyers are human and many are feeling quite politically motivated these days. That political feeling may well bleed into advice to clients on issues of politics, such as the political beliefs of a particular judge or the political aspects of a new statute or case. Rule 2.1 makes it clear that lawyers may comment on non-legal matters so long as they are competent to do so, but it also states that a lawyer's advice must be independent. Lawyers' political views hold the potential of making the independence required by Rule 2.1 more difficult. Lawyers may be tempted to give political advice mixed with legal advice to clients who seek advice on potential litigation, for example, that is politically impactful. That may well pose dangers under Rule 2.1.

The final area that may be seriously impacted by rapid legal change and uncertainty is that, pursuant to the earlier competency analysis, matters may require far more time expended. Kansas Rule of Professional Conduct 1.5 requires that a lawyer's fee be "reasonable." Both the Model Rules and the Missouri Rules require that a fee not be "unreasonable." How much can a lawyer charge for all of the extra preparation and research necessary to keep up with rapidly changing law? Further, if a lawyer needs to spend the time in additional preparation and research for more than one client, then how should that extra time be charged? On the one hand, Rule 1.1 requires that the extra time be expended, but will Rule 1.5 put limits on how much charges for additional time will be deemed reasonable. These will not be simple questions to answer and will undoubtedly require fact specific analysis.[1]

We live in a period of accelerating change on many fronts, including the law. Lawyers must be aware of that change and not be caught violating ethical rules that are implicated in their responses to such change.

1 ABA Formal Ethics Opinion 97-379 which includes a discussion of billing more than one client for the same time may be helpful in this regard.

NEW AUTHORITY

North Carolina Formal Ethics Opinion 3

On January 24, 2025, the North Carolina State Bar adopted Formal Ethics Opinion 3, concerning an interesting problem that had arisen for a firm practicing estate planning. The law firm found that many of its lawyers were being required to take on collateral activities, such as giving depositions, and were, presumably, having some difficulty being paid for this work from estates. Thus, the firm wanted advice as to whether it could ethically include the following provision in its client retainer agreements:

> Client agrees that if a member of or person rendering services to Law Firm is deposed, called to testify, or required to respond to discovery in the context of legal proceedings concerning any aspect of Client's estate plan, Law Firm will be compensated for that person's services at his or her hourly rate to clients at the time of the deposition, other testimony, or other discovery. Client also agrees that Law Firm will be entitled to full reimbursement for costs incurred in connection with the production of documents in response to subpoenas and demands for the production of documents issued in any such legal proceedings. This agreement will bind not only Client but also anyone managing Client's financial affairs (before and after Client's death), Client's heirs, and the beneficiaries under Client's estate planning documents.

The North Carolina Bar answered with a qualified "no."

According to the opinion, such a broad provision would be unethical, even if the fees charged met the requirement of enforceability and legality:

> Even presuming the proposed fee provision is legal and enforceable, the proposed provision fails to comply with other requirements set out in Rule 1.5. Rule 1.5(a) provides that a lawyer shall not make an agreement for, charge, or collect "a clearly excessive fee." The proposed provision requires the client's estate to compensate any lawyer in the firm who is deposed, called to testify, or required to respond to discovery in the context of legal proceedings concerning *any aspect* of the client's estate plan. There is no exclusion in the

> provision for legal fees resulting from a firm lawyer's incompetence or negligence. Law Firm may not charge an estate planning client for future legal services necessitated by a lawyer's incompetence or negligence in drafting the client's estate plan. Such charges would be clearly excessive in violation of Rule 1.5(a).

The opinion concluded the provision was also impermissible under Rule 1.5(b) in certain circumstances:

> In addition, the proposed fee agreement provision is too vague to comply with Rule 1.5(b). Rule 1.5(b) provides that when a lawyer has not regularly represented a client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible must be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. Comment [2] to Rule 1.5 states that the writing should state "the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation." The language in the proposed provision does not adequately provide the "basis, rate or total amount" of the future fees…

However, the opinion left open the possibility that some prospective fee agreements might be permissible:

> We similarly conclude that including a provision in a fee agreement for payment of the lawyer's fees and expenses for future testimony or discovery related to the services rendered is permissible, provided that (1) the scope of the provision is limited, (2) the fees and expenses are not clearly excessive, (3) the terms of the provision are clearly communicated to the client in a written fee agreement, and (4) the client consents to the provision.

It provided an example of a prospective probate fee arrangement that would be permissible in North Carolina:

> Client agrees or directs Client's estate to compensate Law Firm at our normal hourly rates, not to exceed 3% per annum above Law Firm's current rate as specified in this agreement, plus costs and expenses, for work done by Law Firm where (1) Law Firm is requested

> or authorized by you or your estate, or required by government regulation, subpoena, or other legal process, to produce information or our personnel as witnesses with respect to your estate plan or our work for you in the representation; (2) Law Firm is not a party to the proceeding in which the information is sought; and (3) the quality, sufficiency, or effectiveness of the Law Firm's work is not in question in the proceeding. This obligation applies even if our representation of you has ended. Any fees and expenses charged to Client or Client's estate shall not be clearly excessive, and Law Firm will make every reasonable effort to minimize time, costs, or expenses related to such a request.

For estate planning attorneys and any attorney who has considered including prospective fee provisions in an engagement agreement, North Carolina Formal Ethics Opinion 3 provides insight and guidance not available from many other sources.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from the Current Index to Legal Periodicals

1. Gregory C. Sisk, *Addressing Witness Coaching by Cross-Examination*, 15 St. Mary's Journal on Legal Ethics and Malpractice 197 (2025).

> Professor Sisk, a well-known scholar of legal ethics explores a particularly troubling problem: how far may a lawyer go in "preparing" a witness for trial without crossing the ethical line?

2. Anthony Song & Justine Rogers, *Lawfluencers: Legal Professionalism on TikTok and YouTube,* 37 Georgetown Journal of Legal Ethics 507 (2025).

> The two authors, both from Australia, examine the rise of a new type of social media star, the "lawfluencer," and the ethical issues with such a role.

A BLAST FROM THE PAST

Adventures of an Attorney

Generative AI issues may have pushed to the forefront questions regarding the adequacy of supervision and document review, but this has been a potential problem area for lawyers for many years. The following quote is from 1872:

> "Do you commonly read letters for your clerks to copy, Mr. Sharpe?"
>
> "No, Sir."
>
> "It would be rather an inconvenient practice?"
>
> "Certainly."
>
> "Did you examine this copy after he had made it?"
>
> "Not that I remember; certainly not to check its accuracy."
>
> "Then you cannot *swear* to its accuracy?"
>
> "I cannot; but I believe it to be accurate."
>
> — Samuel Warren, *Adventures of an Attorney in Search of a Practice* 246 (1872).

josephhollander.com

KANSAS CITY
926 Cherry St
Kansas City, MO 64106
(816) 673-3900

LAWRENCE
5200 Bob Billings Pkwy
Lawrence, KS 66049
(785) 856-0143

OVERLAND PARK
10104 W 105th St
Overland Park, KS 66212
(913) 948-9490

TOPEKA
1508 SW Topeka Blvd
Topeka, KS 66612
(785) 234-3272

WICHITA
500 N Market St
Wichita, KS 67214
(316) 262-9393