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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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 Ethics of Change

As the year 2026 begins, it is interesting to look back a century to 1926 and to compare how the practice of law has changed and how the ethics of practice have changed as well. In 1926, one of the great debates at the Bar was whether law was a business with all that implies. Many lawyers believed that law was a gentlemanly profession rather than a business, and that was one of the most important underlying ethical bases for the law. Today, 100 years later, few lawyers would attempt to argue that the practice of law is not a business. Most would say the business must be ethically conducted, and many would acknowledge having aspirations that go beyond making a profit, but nevertheless it would be hard to find any who would not admit that the modern practice of law requires businesses practices to remain economically viable.

The law office of 1926 was a relatively simple organization. There were lawyers and secretary-typists. In many offices, there might be one or two law clerks. Often these were unpaid lawyers hoping to build a practice and earn a living from it. There was a law library either at the firm or at a law school or bar association that the lawyers could use for research. Technology consisted of typewriters, electric lighting, telephones, and fountain pens, which had by that time replaced dip pens. There were bookshelves and filing cabinets, most often made of oak so at risk of fire and water. The ethical rules that regulated practice were based on the American Bar Association Code of 1908, which itself was based upon the rules first set out by David Hoffman in 1836-46 and Judge George Sharswood in the 1850s. There were a few large firms that serviced the growing number of large corporations, especially in New York, but the average practice was small.

If a lawyer of 1926 were to visit a law office of 2026, it is quite likely that he would be reduced to a combination of shock and wonder. Use of the male pronoun is assumed because most lawyers in 1926 were still men (although that was changing slowly).

The law office of 2026 may vary from a solo practice to an international megafirm of thousands, but all are highly dependent upon technology of every type. Lawyers now depend upon human paralegals and sophisticated computer programs to do complex tasks that a hundred years ago would have been performed by

members of the Bar, if performed at all. Today, a lawyer could not practice without a cell phone, a computer, subscriptions to legal databases, and computer tools. Today, many lawyers rely on the many variations of AI algorithms, including those that do research, generate documents, analyze conflicts, follow complex financial reports, and even greet clients on the phone (and front office robots are not far behind). But technology not only changes the way tasks are done, it also changes the culture and the entire ecosystem of law practices. As we have learned over the past fifty years, basic ethical principles can be challenged and even defeated by new technology--and its misuse. Cell phones, email, and now AI all present special challenges to Rule 1.6 on confidentiality, for instance. The use of generative AI presents a significant challenge currently both to confidentiality required by Rule 1.6, competence required by Rule 1.1, and supervisory obligations under Rules 5.1 and 4.4, among others.

The modern version of Rule 1.6 in Kansas, for instance, reads:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the 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.
>
> (c) 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.

When looking at the modern Kansas version of Rule 1.6, it becomes clear that Rule 1.6(c) on the need to make "reasonable efforts" to preserve client confidentiality sets the need to develop what actions will satisfy this; which will require learning *in detail* about any new technology; how using it may threaten confidentiality; and how to lessen, mitigate, and, if possible, eliminate such threats caused by the new technology. Indeed, modern versions of the *Rules of Professional Conduct* in Kansas and other states make explicit that acquiring this knowledge of new technologies, their benefits, and the threats they present is non-negotiable:

> 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.

Rule 1.1, Comment 8 (emphasis added).

If we look at the *Code of Professional Responsibility* published by the American Bar Association in 1908, the rule on lawyer maintenance of client confidences is contained in Canon 6:

> The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

The obligation under the 1908 *Code* was more absolute than the current rule ("forbids"), with no stated exceptions. It did not mention reasonable efforts to maintain client confidences. The fact is, the threats to client confidentiality in the law office of a century ago were far less and far easier to solve. Papers had to be preserved and not casually discarded in a manner that allowed them to be seen by

others. Lawyers and staff had to understand that, as was said in a war soon thereafter "loose lips sink ships" . . . and law cases and lawyer careers.

The technology that would have been most concerning other than maintaining control of papers and copies produced by typewriters was the use of telephones to communicate confidential information. This required understanding that people could overhear confidential calls, but there was a simple answer to that: use the telephone in a specially constructed booth or only when others were neither in the room or listening at the door.

The thought that went into protecting client confidences in an early twentieth law office was far less than what is needed in the early twenty-first century. Progress in the practice law brings with it more complex ethical issues.

Indeed, we are now undergoing an onslaught of new technologies being developed, some of which are designed directly for the law office and some of which are not. But all of them have potential ethical ramifications. Another example of this is the global proliferation of law directed searchable databases. Lawyers realized that American trained lawyers (and other non-lawyers) based in foreign countries in which living costs and research fees could be dramatically less costly. This very quickly led to a stampede of American lawyers seeking out off-shore English speaking researchers who could perform sophisticated research at lower cost, thereby saving costs not only for the lawyers but for their clients. It also brought with it serious questions about legal ethics, such as the protection of client confidences and avoidance of inadvertent client conflicts when the work was being done thousands of miles away by personnel whom the lawyers had not even met. Not surprisingly, the ABA Committee issued Formal Opinion 08-451 setting out substantial and potentially costly requirements for U.S. lawyers who wanted to outsource non-legal services while avoiding confidentiality and conflicts problems.

There are many more instances where the introduction of new technologies have created ethical issues for lawyers that either had not existed before or were not realized at the time of adoption. Many of these unexpected problems—like confidentiality in the use of email or cell phones—persist decades after the introduction of the new technology.

Technology often is a blessing improving law practice and the lives of lawyers. But there are few new technologies that come without serious risks as well. This has

been true for more than fifty years and as law practice becomes more dependent on technology, the need to thoroughly explore and use these technologies in the light of ethical responsibilities becomes more pressing than ever.

NEW AUTHORITY

NYSBA Opinion 1286

On September 29, 2025, the New York State Bar Association (NYSBA) issued Opinion 1286, which may be of interest to many lawyers.

It began with an inquiry from a lawyer who had been working as an associate in a firm, then decided to go out on his own and open a solo practice specializing in immigration law. Setting up a new solo practice can be a difficult situation for an ex-associate, and the need to find clients is pressing under the circumstances. The lawyer decided to ask his former immigration clients whether they would be willing to write a review of his abilities on Google in the belief that this could generate new business. In addition, he decided he "would like to give a small gift (such as a gift card) to each former client who writes a Google review."

The NYSBA advised that the lawyer's proposal did not violate the *Rules of Professional Responsibility* as adopted in New York. The advice leaned upon an earlier NYSBA Opinion:

> In N.Y. State 1052 (2015), the Committee concluded that a lawyer could ask current clients to rate his services on Avvo and could offer a $50 credit on their legal bills, provided that the "credit is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not the lawyer." N.Y. State 1052, ¶14.

Furthermore, the NYSBA decided that requesting a Google review from an *existing* client did not violate the advertising rules:

> In N.Y. State 1221 (2021), we concluded that a communication with an existing client for the purpose of offering legal services does not constitute either advertising or solicitation. The term "advertisement" is defined in Rule 1.0(a) as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers…Rule 7.3(a) itself expressly excludes former clients from the ban on in-person solicitation,

> stating: "A lawyer shall not engage in solicitation: (1) by in-person or telephone contact, or by real time or interactive computer-accessed communication unless the recipient is a close friend, relative, *former client* or existing client." (Emphasis added.) The Committee wrote that Rule 1.0(a) has been interpreted to exclude communications to former clients. N.Y. State 1221, ¶ 8, *quoting* Rule 7.1, Cmt. [7] ("Communications to former clients that are germane to the earlier representation are not considered to be advertising").

Accordingly, the NYSBA gave the inquiring attorney the green light to proceed with his plan.

> However, the opinion did put important limitations on its advice:
>
> …a lawyer may ask a former immigration client to write a Google review without running afoul of the advertising or solicitation rules, provided the lawyer does not draft the Google review for the client or condition the gift on the content of the review.

The Opinion also devoted several paragraphs to potential confidentiality problems under Rule 1.6 and 1.9 which might arise, especially, given the possibility that the review might inadvertently reveal information dangerous for the former client.

Opinion 1286 is a good illustration of both the benefits and risks involved with the adoption of new technology for law practice. In this case, the lawyer did things right. Instead of simply going forward with his plan, he realized that it implicated several ethical issues and, therefore, made a request to the State Bar for advice which he duly received. Bravo!

ETHICS & MALPRACTICE RESEARCH TIP

An Important Article on Legal Ethics from St. Mary's Journal of Legal Ethics & Malpractice

Margaret Raymond, *Our AI, Ourselves: Illuminating the Human Fears Animating Early Regulatory Responses to the Use of Generative AI in the Practice of Law*, 15 St. Mary's J. on Legal Malpractice & Ethics 221 (2025).

Available at: https://commons.stmarytx.edu/lmej/vol15/iss2/2

There is a great divide developing between those lawyers readily accepting the assistance of AI and those who totally reject using AI in law practice. This insightful article examines the role fear has played on one side of this professional divide. She writes:

> "these early reactions will not be much use as a means of predicting what generative AI will look like in the legal sphere in the near and distant future. But they have much to tell us about the speakers, regulators, criticizers, and commentators *themselves*. They provide valuable insights into how the human element of the legal system actually works, and the fears that generative AI will alter that legal landscape, with profound effects on judges, lawyers, and clients."

A BLAST FROM THE PAST

Ill-Feeling and Personalities Between Advocates

Canon 17. Ill-Feeling and Personalities Between Advocates. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the cause. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

— American Bar Association, *Code of Professional Ethics* (Adopted August 27, 1908).

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