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, Uncertainty & Legal Ethics

When I began to teach legal ethics forty years ago, one of the reasons that I did so was that it was not a subject with radical changes occurring almost every day. In practice, I was a tax and real estate lawyer. The first thing I did each weekday morning when I arrived at the office was to grab a coffee and a roll and a copy of the *Daily Tax Report* to read before I could begin to do client work. I did so because the outpouring of new law (cases, administrative rulings, and legislation at the federal level was enough to fill twenty to thirty pages of the Report). Legal Ethics, on the other hand, was a rather quiet field, in which the ABA *Model Code* was still the reigning source of law.

Of course, the *Model Code* was replaced in 1983 by the new *Model Rules of Professional Conduct*. One of the main purposes of the *Model Rules*' adoption was to give greater direction and more specific rules to the profession as to what lawyer activity was permissible. Indeed, over the past forty years, we have seen several major revisions of the *Rules* and a significant increase in new legislation, advisory opinions, and court cases in the subject. The nature of the Rules and the increasing new interpretations of the rules, much of it caused by the introduction of new legal technology over the past twenty years, is making it very difficult for lawyers to know precisely what behavior is acceptable and what is not.

Three factors are important.

First, the *Model Rules* are what legal scholars call "open textured." They make no attempt to be comprehensive so that every question can be answered simply by looking at them. The list of definitions in Rule 1.0 is remarkably short. Many of the words and phrases used in the Rules and comments leave quite a bit of room for interpretation. For instance, KRPC Rule 1.1, Comment 8 says that:

> 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.

(emphasis added). The problem is understanding precisely what is meant by "keeping abreast" of the "benefits and risks" of new technologies. How much should lawyers understand? Will an hour of CLE on ethics and technology each year satisfy this requirement? Surely, one hour of instruction does not make a lawyer even begin to understand the risks of complex technologies. If that is all that is required, this will not protect clients. But if it is not enough, how much is?

The second and related factor is that the "open texture" of the Rules and Comments means that lawyers must act under conditions of uncertainty, which increases the risk of error and unwitting violation of the Rules. This kind of uncertainty may cause lawyers to avoid acting in some ways that might benefit clients (and themselves). For instance, given the rapidity with which new technology like AI is being introduced into law practice, might it be better to create a safe harbor under Rule 1.1? Should ethics committees and regulatory authorities determine a number of hours that lawyers should spend in studying AI each year? Should they consider requiring mandatory AI training for lawyers to adopt the technology?

Leaving AI to the side for a moment, what about lawyers' responsibility to take protective cybersecurity measures? ABA Opinion 483 gives guidance to lawyers when a data breach occurs. The point of this opinion is that lawyers have a great deal of responsibility in the event of a cyber breach including remediation and informing clients. They are also required to be prepared with an "action plan" beforehand so as to mitigate the effects of a cyber breach. Before the computerization of law offices and the digitization of client files, concern with the potential theft of client files and the necessary precautions necessary to protect those files was far less (a sturdy door and good lock on the records room would have been considered excellent security). Even the advent of cellphones has created massive new problems for lawyers because of the requirements of Rule 1.6 and the new and heretofore unseen threats to client confidentiality created by widespread adoption of cell phones with little or no protection against interception.

The "open textured" nature of the *Model Rules*, as is equally true of the *Uniform Commercial Code*, not only allows but counts on courts and disciplinary committees to deal with new challenges. The system of advisory opinions issued by state committees and the American Bar Association also serve to update, refine, and clarify unclear portions of ethics law. A major problem with these sources is the time between the introduction of new technologies to the legal profession. Courts

and committees are justifiably cautious about moving too quickly before the full consequences of the introduction of the technology and the dangers. During the period between the introduction of a new technology and the issuance of relevant advice by courts and committees, lawyers are at risk of inadvertently violating the Rules. Moreover, the very language of Comment 8 in KRPC 1.1 (and equivalent comments in other jurisdictions) does not say what "keep abreast" means. Does it mean that lawyers must keep abreast of the changes in technology as they occur or when they are explained by courts? Indeed, this raises the interesting question of whether the multitude of explanations and guidance provided by academic legal writers is positive or negative. Law professors will also publish their opinions **before** a court of committee has issued its opinion. Will it be enough for a lawyer who acts upon the opinions of academics on interpreting ethics rules and the impact of technology upon them automatically accept this reliance as dispositive? I doubt it.

This, of course, leads us to the question of the introduction of AI into the legal world and the increasing number of ethics issues it raises and the perils of so many lawyers who find that they have crossed the ethical line.

Nick Badgerow, Kansas's preeminent legal ethics scholar has an article in the most recent *Kansas Bar Journal* about this problem of dealing with AI and the massive ethics uncertainty surrounding its use: "CAVEAT ADVOCATUS: Use of Artificial Intelligence for Legal Drafting." The bottom line is that lawyers cannot simply rush into adopting AI or any new legal technology with carefully learning about it and assuring that any new technology that they use is used ethically, understanding that they are of under uncertainty and that brings risk and may affect their judgment whether to and how to use the new technology.

There are significant ethical risks for those lawyers who want to be "first adopters." Perhaps, it would be better to seek guidance before adopting. Bring first may not always be the best path.

NEW AUTHORITY

District of Kansas Show Cause Order Demonstrates Dangers of AI

A show cause order filed on December 15, 2025, by senior federal Judge Julie Robinson in the case of *Lexos Media IP, LLC. v. Overstock.Com. Inc.*, Case No. 22-cv-2324-JAR, demonstrates the dangers of using AI in litigation and may create serious concerns beyond what the lawyers had heretofore expected.

The problem in *Lexos* was that lawyers submitted imperfect documents in a patent case. According to the court:

> … Plaintiff's response briefs to Defendant's motion to exclude Dr. Russ and its motion for summary judgment contain defective legal citations that were created through the use of generative artificial intelligence ("AI"), which were not checked and confirmed before filing. These defects include: (1) nonexistent quotations; (2) nonexistent and incorrect citations and (3) misrepresentations about cited authority.

Although there were six attorneys involved in the case for *Lexos*, only one filed a declaration with the court as to how and why this had happened. Judge Robinson ordered each attorney on the signature blocks of specified documents to show cause, in writing and under penalty of perjury, why they should not be sanctioned under Rule 11 and referred to the disciplinary panel of the court and to disciplinary administrators in the jurisdictions where they are licensed.

Most importantly, Judge Robinson included local counsel in her order. This took a number of Kansas attorneys by surprise, as, under Judge Robinson's opinion, local counsel would have to "check and confirm" all citations in all documents drafted by co-counsel to ensure the citations were accurate and not AI hallucinations or misrepresentation. While Judge Robinson relied on the district's *pro hac vice* rule in her order, attorneys have expressed that this requirement may prove a significant burden for local counsel—and result in substantial additional expenses for clients.

We will discuss the extent of lawyer responsibility for AI generated errors in a future article. For now, practitioners should be mindful that responsibility may extend beyond material they personally craft.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles on Legal Malpractice & Ethics

1. Christina D. Lockwood, *Rhetoric over Reality: Examining Ethical Obligations of Confidentiality When Information Is Publicly Available*, 59 Ind. L. Rev. 97 (2025)

   One of the issues that often confuses law students is the extent to which Rule 1.6 covers information easily available in public sources.

2. Michael D. Murray, *Visual Legal Rhetoric in the Age of Generative AI and Deepfakes: Renaissance or Dark Ages?*, 28 SMU Sci. & Tech. L. Rev. 199 (2025-2026).

   The ethics of visual materials is one more fascinating issue for lawyers using generative AI.

A BLAST FROM THE PAST

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We are bound by the law so that we may be free.

— Marcus Tullius Cicero, *Pro Cluentio*

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