THE Legal Ethics & Malpractice Reporter

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

MAY 29, 2026

VOL. 7, 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.)

EDITORIAL TEAM

Editor-in-Chief

Dr. Michael H. Hoeflich

John H. & John M. Kane Distinguished Professor of Law, The University of Kansas School of Law

Legal Editor

Carrie E. Parker

Attorney, Joseph, Hollander & Craft

Design & Publishing Editor

Luzianne Jones

Marketing & Operations Assistant, Joseph, Hollander & Craft

FEATURE ARTICLE

ABA Formal Opinion 523

On May 20, 2026, the American Bar Association Committee on Ethics and Professional Responsibility issued Formal Opinion 523. It discusses the complexities of Model Rule 1.16(b)(5) (KRPC 1.6(b)(3))—the provision of the Rules that permits lawyers to withdraw from a representation when "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."

As the Opinion notes, the provision is invoked most frequently when a client fails to meet financial obligations, but the rule but is not limited to instances when a client fails to pay as promised:

> Rule 1.16(b)(5) is most often invoked when the client fails to fulfill an obligation regarding legal fees or expenses. However, clients may assume other obligations that may be made explicit in the engagement agreement, such as the duty to cooperate with the lawyer regarding the representation nor to provide and update the client's contact information.

The first significant point of Opinion 523 is this paragraph's focus on the lawyer-client engagement agreement. The engagement agreement is the memorialization of the "deal" between the layer and client. As such, its provisions are critical. Even so, the Rules do not specify what its contents should be. While the lawyer and client cannot agree to obligations that violate the Rules, they can agree to a wide range of provisions and self-impose obligations. Opinion 523 explains:

> The lawyer's engagement agreement may specify obligations of the client that are otherwise implicit in the representation, such as the obligation to cooperate with the representation, including in a litigation context the duty to produce discoverable documents within the client's custody and control. Other such implicit obligations include the client's obligation to communicate with the lawyer, to provide information truthfully, and to provide or to execute documents that are necessary for the lawyer to conduct the representation as the law requires.

> Within ethical limits, the engagement agreement may also set forth obligations of the client that are not otherwise implicit. For example, a lawyer may include a provision in which the client agrees not to make an audio or a video recording of communications between the lawyer and the client, or not to discuss the lawyer or the representation on social media during the course of the representation.

While specifically listing mutual obligations in the engagement agreement may make subsequent withdrawal easier, an explicit mention in the agreement is not necessary. As the opinion notes:

> a lawyer may withdraw based on the client's substantial failure to cooperate with the representation, regardless of whether that obligation is made explicit in the engagement agreement or left implicit, as long as the lawyer has given the requisite "reasonable warning."

Still, memorializing issues that seem to form repeated bases for withdrawal is certainly prudent.

Opinion 523 notes that there are provisions that might seem reasonable to a lawyer, but that will not justify withdrawal even if the client agrees. For instance:

> A lawyer may not withdraw based on Rule 1.16(b)(5), however, if the client fails to comply with an obligation that is not one "regarding the lawyer's services." For example, a client's obligation to pay a prior debt to the lawyer that is unrelated to the lawyer's services is not an obligation "regarding the representation." Therefore, the client's failure to repay the prior debt would not justify the lawyer's withdrawal under Rule 1.16(b)(5).
>
> Further, a lawyer may not withdraw under Rule 1.16(b)(5) based on a client's noncompliance with a trivial obligation or based on a client's insubstantial failure to comply with an obligation set forth in the engagement agreement. For example, if the engagement agreement obligates the client to appear at scheduled office appointments on time, tardiness probably would not alone justify terminating the representation, if the client has reasonable excuses for appearing late.

These exceptions to a lawyer's general freedom to include anything in the engagement agreement (other than provisions that violate the Rules or other law) make sense.

The first is simply interpretive of the text of Rule 1.16, which specifically requires that the reason for withdrawal be "regarding the lawyer's services" to the client (i.e., the reason for withdrawal must relate to the representation). The second rule also is interpretive. The text of the Rule requires that the client's failure be "substantial." A trivial failure (e.g., being a few hours late with a payment) will not generally be a justification for withdrawal.

The Opinion concludes:

> Rule 1.16(b)(5) of the ABA Model Rules of Professional Conduct permits a lawyer to withdraw from a representation, or to seek the tribunal's permission to do so, when "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." This provision is ordinarily invoked when a client fails to fulfill an obligation regarding payment of legal fees and expenses. The engagement agreement may memorialize additional obligations of the client, both obligations that are otherwise implicit such as the client's truthful cooperation with the representation, and further obligations insofar as they are not forbidden by the Rules, other law (including court rules), or public policy. A client's persistent failure to fulfill obligations regarding the lawyer's services, including obligations unrelated to payment of fees and expenses, may constitute a basis for withdrawal if the procedural requirements of Rule 1.16(b)(5) are satisfied.
>
> Further, the lawyer's engagement agreement may put the client on notice of permissible grounds for withdrawal under Rule 1.16(a) and (b), including the clients' failure to fulfill obligations regarding the lawyer's services. However, the engagement agreement may not expand on the grounds for withdrawal set forth in Rule 1.16 or mislead the client regarding the legitimate grounds.

The Opinion focuses on voluntary withdrawal under Rule 1.16, but it offers a lesson that is much broader in scope. It reminds lawyers of the importance of engagement letters. For younger lawyers and others just entering practice, the importance of well drafted engagement letters may not be appreciated. Opinion 523 is an important corrective to this.

AUTHORITY

ABA Formal Opinion 482

For anyone who hasn't noticed, the weather in the United Sates in the past few months has been extreme. Weather forecasters have predicted that the next few months will be filled with hurricanes, tornados, severe thunderstorms, wildfires, and flooding of Biblical proportions. While many people will convince themselves that they don't need to take precautions and prepare, lawyers must. This is the perfect time to remind lawyers that the ABA issued Formal Opinion 482 in 2018, setting forth various obligations lawyers have before, during, and after natural disasters.

This publication provided a guide to Opinion 482 in LEMR in August 2023, so we shall not repeat those issues we discussed then. But the provisions on lawyers' obligations to be prepared for natural disasters is worth highlighting again today. The Opinion begins by reminding lawyers that the ABA has a Standing Committee on Disaster Response and Preparedness and a website filled with resources:

> Much information is available to lawyers about disaster preparedness. The American Bar Association has a committee devoted solely to the topic and provides helpful resources on its website. These resources include practical advice on (i) obtaining insurance, (ii) types and methods of information retention, and (iii) steps to take immediately after a disaster to assess damage and rebuild.

The website is an incredibly valuable source for information on the ethical obligations of lawyers to protect client interests in disaster situations.

Among the most important aspects of preparing for a disaster is planning to protect client files. In 2012, many saw the frightening sight of law firm files floating down New York streets after Hurricane Sandy flooded basement and subbasement file storage areas. Opinion 482 specifically addresses this problem. First, it highlights the dangers of only having on-site file storage:

> Some lawyers located in an area affected by a disaster may have their files destroyed. Lawyers who maintain only paper files or maintain electronic files solely on a local computer or local server are at higher risk of losing those records in a disaster. A lawyer's responsibilities

> regarding these files vary depending on the nature of the stored documents and the status of the affected clients.
>
> Under the lawyer's duty to communicate, a lawyer must notify current clients of the loss of documents with intrinsic value, such as original executed wills and trusts, deeds, and negotiable instruments. Lawyers also must notify former clients of the loss of documents and other client property with intrinsic value. A lawyer's obligation to former clients is based on the lawyer's obligation to safeguard client property under Rule 1.15. Under the same Rule, lawyers must make reasonable efforts to reconstruct documents of intrinsic value for both current and former clients, or to obtain copies of the documents that come from an external source…
>
> To prevent the loss of files and other important records, including client files and trust account records, lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly. Although not required, lawyers may maintain these files solely as electronic files, except in instances where law, court order, or agreement require maintenance of paper copies, and as long as the files are readily accessible and not subject to inadvertent modification or degradation. As discussed above, lawyers may also store files "in the cloud" if ethics obligations regarding confidentiality and control of and access to information are met.

[Emphasis added].

As we approach storm season, it is good to review our record keeping methods. Two versions are always better than one. Off-site locations are always necessary in addition to onsite locations. Disaster insurance may well be. They can make the difference between financial disaster for the lawyer or and reasonable recovery.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles on Legal Malpractice & Ethics

1. Angela A. Davis, "Undermining Discretion: The Selective Attacks on Progressive Prosecutors'" 47 Cardozo L. Rev. 579 (2026).

2. Bruce A. Green & Jessica A. Roth, "Subordinate Prosecutors' Independence'" *Symposium Issue: Prosecutorial Independence*. 55 Stetson L. Rev. 237 (2025).

   The dangers, ethical and systemic, in the increasing attacks on prosecutors demands attention by the Bar.

3. Carol A. Needham, "Regulation of the Use of Generative Artificial Intelligence Tools in the Delivery of Legal Services: Verification and Accountability," 77 Wash. U. J. L. & Pol'y 184 (2025).

   Needham discusses one of the leading ethical and practical problems facing lawyers today.

A BLAST FROM THE PAST

Pumroy on the connection Between Government, and Science and Literature

> In our country, mind sits enthroned in its mightiest power. Its achievements and triumphs have been brilliant. This is the result of civil liberty. Civil liberty is natural liberty, so far restrained by human laws and no farther, as is necessary and expedient for the general advantage of the people. The law which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind. Our government leaves the citizen entire master of his own conduct, except in those points in which the public good requires some direction or restraint.

John N. Pumroy, *The Annual Address delivered before the Diagnothian and Goethean Literary Societies of Marshall College, Mercersburg, Pa., on the connection between government, and science and literature* (September 8, 1846).

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