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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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

Loyalty & Disrection

Many lawyers will be surprised to be told that the term "loyalty" does not actually appear in the text of the Rules of Professional Conduct. It does appear in several explanatory comments, but not in the text of the actual Rules.

Loyalty is probably most commonly considered with regard to conflicts of interest. Indeed, Comment 1 to KRPC 1.7, Conflict of Interest: Current Clients, invokes the term immediately, stating:

> Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.

But conflict analysis is not the only place for loyalty in legal ethics.

The obligation of loyalty to one's client is one of the underlying principles of most of the Rules found in the Code. It dates back, in its most extreme form, to a statement by Lord Brougham during his defense in the English Parliament of the Case of *Queen Caroline* in 1820:

> …[a]n advocate, by the sacred duty of his connection with his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means-to protect that client at all hazards and costs to all others, and among others to himself-is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other; nay, separating even the duties of a patriot from those of an advocate, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client.

This statement is probably one of the most extreme positions to be taken on the duty of loyalty owed by a lawyer to her client.

In contrast to Lord Brougham's extreme position, the Rules of Professional

Conduct take a substantially softer approach. For example, Comment 1 to KRPC 1.3, Diligence, explains:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.
>
> A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. **However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2.**

(emphasis added). This requirement of diligent advocacy is worlds away from Brougham's concept of diligence, especially since it leaves a great deal of discretion to a modern lawyer as to how far to go in the representation.

This difference between Comment 1 to Rule 1.3 and Lord Brougham's ideal of total loyalty is more than a history lesson. It reflects a significant change in perspective regarding what role a lawyer is meant to occupy. It is also gaining importance as judges are speaking out against lawyers and litigants bringing litigation for political purposes or to harass others without any real expectation of winning--or to gain some advantage separate from the claims made in the case. Often, this type of litigation is brought with the knowledge that a settlement would be preferable for the defendant than a long, drawn-out expensive suit with negative publicity.

Like Federal Rule of Civil Procedure 11(b), many Rules of Professional Conduct are designed to stop such litigation. KRPC Rule 3.3 prohibits frivolous lawsuits:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

However, laws are rarely so clearly drafted that frivolity of a claim is beyond contestation. Indeed, Comment 1 to KRPC 3.1 is quite sensitive to this fact:

> The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

A good lawyer can often press a claim or defense that borders on abuse of process which, while not brought for the purpose of adjudicating a real dispute, is pursued for other external reasons—such as publicizing a cause or gaining notoriety.

Judges are rightly hesitant to declare such borderline cases frivolous or sanction lawyers in such circumstances. In essence, a lawyer being asked to bring or defend litigation that is borderline is left to her own judgement and discretion whether to take the representation on. This exercise of judgement is extremely important for the lawyer and the system of justice.

Why would a lawyer take on a questionable, borderline case?

The most obvious answer is money. Only corporations, well-funded not-for-profits, and wealthy individuals will bring an expensive lawsuit with little hope of winning. Litigation is almost always quite expensive, and if the target of the litigation lacks the resources to adequately defend, they will often simply settle to avoid the costs of defense. From the lawyer's perspective, taking on such a case will be profitable. It may also bring in a new client with a real possibility of repeat business or referrals to others; the networking and financial benefits may be great for the lawyer.

Another reason may be that the party seeking representation is a past or present client and refusal to take the dubious case might result in the loss of the client. If a client provides a major source of a firm's or lawyer's business, then the possibility of losing that client becomes quite problematic and may incline the lawyer to take on the dubious matter.

A third possibility is that the case, albeit dubious, provides the potential for publicity for the lawyer or law firm. If the case is potentially a high-profile case that will attract media attention, a lawyer may well decide that the representation is worth the exposure, even though the case may not be popular.

Still, when taking on a dubious representation, the lawyer must ensure that she honestly and independently explains the downside of the matter to the client:

> 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.

KRCP 2.1.

From the lawyer's perspective, Rule 1.2(c) provides a "safe harbor" that taking on the representation does not reflect the lawyer's personal beliefs:

> A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

This may protect the lawyer from some degree of public criticism, but that does not mean that negative public opinion will disappear. Nor does it mean that members of the judiciary and the Bar will approve of a lawyer taking on the case in the first place. A lawyer who takes on a dubious case which pushes the boundaries of FRPC 11(b) or KRPC 3.3 and can always claim that, when the law is ambiguous, her ethical duties do not proscribe the representation. But Rule 1.2(c) is not a miracle cure for reputational damage.

When lawyers take on dubious cases, they not only must calculate the personal risk that they may cross disciplinary lines and the reputational risk that the case may alienate future potential clients, but they should also consider what risk they pose to the credibility of the legal system. When the public witnesses dubious cases and questionable courtroom tactics, many blame the system as well as the lawyers involved. This endangers the judicial system's legitimacy.

NEW AUTHORITY

New York on AI Use

As of June 1, 2026, lawyers practicing in the New York State Unified Court System are governed by a new rule regarding the use of artificial intelligence (AI). After months of deliberation and consultation, the Unified Court System adopted 22 NYCRR Part 161.

It begins with a general statement of policy:

> It is the policy of the Unified Court System that the use by attorneys and parties of artificial intelligence tools in preparing papers submitted to a court should not be prohibited, as long as such use is in accordance with the duties and responsibilities that apply to individuals who submit papers to a court. Since those duties and responsibilities already apply to all submissions, regardless of whether AI tools were used, attorneys and parties should not be required, upon submitting papers, to disclose to the court that they have used AI in the preparation of such papers.

The order also includes a model rule, which New York judges may use in whole or part:

> Every attorney or party who uses an artificial intelligence (AI) tool in preparing any paper submitted to this court is expected to understand that tool's capabilities and limitations. Attorneys and parties need to be aware that AI tools, among other risks and limitations, can generate fabricated information or fictitious citations to authority (commonly known as hallucinations). Under existing authority, by signing a paper and submitting it to this court, an attorney or party certifies that the paper does not contain any false material factual statement or any frivolous legal argument Cree, e.g, 22 NYCRR 130-1.1, 130-1.1a), and an attorney who submits any paper to this court is additionally bound by the Rules of Professional Conduct. Accordingly, any attorney or party who uses an artificial intelligence tool, as defined in 22 NYCRR 161.2(a), in preparing any paper, as defined in 22 NYCRR 161.2(b), filed in or submitted to this court or served on another party in a case before this court is required to

> carefully review the paper and independently ensure that it contains no fabricated or fictitious cases, statutes, or other material. By signing such paper, an attorney or party certifies that such a review has been conducted and that the paper contains no such fabricated or fictitious content. If this court determines that this requirement has not been satisfied, such attorney or party may be subject to sanction or other remedial action.

A number of provisions of this model rule are quite important. First, and most basic, every lawyer is expected to understand that AI is far from perfect and that hallucination are common. Therefore, every attorney practicing in New York, by submitting a document to a N.Y. court certifies that it is free of hallucinations or "fictitious citations." Second, the model rule also makes it clear that submission of a document with hallucinations to **a party before the court** will also bring sanctions. Finally, the court makes a point to say that this rule is based on "existing authority," so lawyers cannot argue that the Court is making a new rule.

While 22 NYCRR Part 161 only applies to practice in the state of New York, it undoubtedly will have a major impact on state and federal courts looking to develop appropriate regulations for AI in their own jurisdictions. It is, therefore, something every lawyer should study.

ETHICS & MALPRACTICE RESEARCH TIP

New Article on Legal Malpractice & Ethics

David A. Grenardo, "Why Civility?" 57 U. Tol. L. Rev. 421 (2026).

> In spite of efforts over the past two decades to improve civility at the Bar and reintroduce a sense of collegiality among lawyers, the issue remains difficult and unresolved. In this article, Professor of Law & Associate Director of the Holloran Center for Ethical Leadership in the Professions at University of St. Thomas School of Law David Grenardo highlights experiences that illustrate both the importance of civility and the costs of incivility.

A BLAST FROM THE PAST

From the Not so Distant Past: Preamble to the Rules of Professional Conduct

Lawyers should always remind themselves of the Preamble to the Rules of Professional Conduct. There is wisdom contained therein:

> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

Model Rules of Professional Conduct: Preamble & Scope, 7.

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