

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

Time, Rules and Reform

THE last major reform of the *Rules of Professional Conduct* occurred more than a quarter of a century ago. Much in the world of law has changed radically since then. Law firms are undergoing massive changes financially, technologically, and even structurally, with greater lawyer mobility and, in some cases, huge earnings. A few law firms have become larger than many of their clients. Twenty-five years ago, so-called “baby boomers” were leading law firms. Some continue to do so, but younger generations, with very different ideals and values, have replaced them in many firms. This makes one wonder whether it is time for the Bar to enter a period of self-reflection and evaluation and undertake a thorough reexamination of the Rules to see if and how they need reform and updating.

The LEMR contributors would recommend attention to a few specific areas.

Lawyer Competence & Training

Over the past few years, lawyers have learned that use of AI is not a simple matter and that lawyers must acquire skills such as prompt writing and result verification. But most states’ rules of professional conduct are relatively vague about mandatory CLE and technology training. Similarly, while law schools are attempting to provide adequate training in AI skills to law students, not all law schools have the qualified teachers necessary to impart AI expertise. Much of what law students and lawyers know about AI usage is based on CLE programs, which vary in quality as well. More importantly, this situation does not seem to be changing quickly enough.

The foundation for requiring AI competence is Rule 1.1. Kansas Comment 8 to KRPC 1.1 discusses technological understanding:

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.

But this gives very little guidance to what technical competence in AI means.

In practice, what that means is that guidance for lawyers using AI comes primarily from judicial decisions and advisory opinions. However, judicial opinions have so far focused primarily on what lawyers should not do with AI, especially hallucinations rather than what lawyers must do and how to do it. Judicial opinions are also often slow to emerge and vary from court to court. Advisory opinions may be sought and received more quickly, but they are not authoritative. The same is true for private experts' opinions.

One possible solution to this problem is for state supreme courts to issue detailed guidelines about Lawyer use of AI and, after feedback from the Bar, add provisions to the *Rules of Professional Conduct* that include detailed guidance as to what adequate technology training is necessary to achieve technical competence under Rule 1.1.

A related issue to supplementation of Rule 1.1 is the current inadequacy of Rule 5.1 to deal with supervision. This rule explicitly states that lawyers supervising other lawyers have a responsibility to “supervise” the work of other lawyers to ensure that the supervised lawyers are complying with the rules of professional responsibility:

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Under current Rules, it is unclear what is necessary to trigger supervisors' obligations over the supervision of writing AI prompts or verifying AI produced documents. Here again a clear standard would be instructive.

Fees in the Twenty-First Century

The current rules about fees have changed little in the past several decades. The current model focuses on hourly based fees, contingent fees, in limited circumstances, and on transactional fees. The focus for most litigation and many non-litigation cases is on hourly billing. In most cases lawyers prefer hourly billing because the risk of failure is upon the clients since they will be paid whether or not the case is successful. In addition, hourly billing is easier for all involved and simple to understand. But the entire financial structure of firms who use hourly billing depends on this the notion that the more they work and can bill for that work, the more income they can earn.

AI has raised all sorts of difficulties for this model because AI can work (albeit not always well) in a fraction of the time it takes a human to do the same work. If firms can simply bill for the time the AI is used, then income may drop precipitously. The simplest answer, to raise the cost of AI use by turning it into a “profit center” runs counter to the prohibition against profiting from external services set forth in ABA Formal Opinion 93-379. Although this opinion, like all ABA ethics opinions is advisory rather than authoritative, adopting a fee structure not in compliance with the opinion is risky.

Alternatives to traditional hourly billing, often referred to as “value billing” are now being attempted by many law firms throughout the U.S. Commentators have mixed views on the ethical dangers of such fees. Certainly, given the age of current Rule 1.5, a concerted effort to revise the rule is called for to give lawyers greater clarity on billing in the “age of AI.”

Civility

Periodically lawyers become concerned that civility at the Bar has declined sufficiently to reassess whether specific lawyer conduct that does not rise to being sanctionable under the *Rules of Professional Conduct* should be. Some states (including Kansas) have enacted civility rules but not included them in sanctionable professional conduct rules. But virtually every state Bar has recognized the need for civility. Shelly Dryer, former president of the Missouri Bar Association, has said:

Incivility can foster a culture that decreases job satisfaction and declines the overall quality of life. I think most of us can remember

when a colleague treated us with rude, hateful, or aggressive behavior, and how it made us feel. I certainly can think of times when I received a contentious comment, email, or letter and found myself being angry or upset. And if we are honest, many of us, myself included, can recall a time when we were rude, abrasive, or curt to another lawyer. It may not have even been about the case or the other lawyer but instead about something completely unrelated, like maybe receiving bad news that morning. Each of us is doing the best we can, albeit each day our best may look different.¹

Unfortunately. The problem of incivility of lawyers to other lawyers, to judges and court personnel, and to media and the public does not seem to be improving. Given that non-sanctionable civility codes do not appear to work, perhaps the Bar and the judiciary might reconsider whether certain behavior needs to be prohibited such that a violation of those standards could be punished.

We do not call for broad incivility rules to be included in a revised *Rules of Professional Conduct*, but, rather, specific narrowly targeted rules to make sure that all lawyers and judges realize certain forms of incivility are simply not acceptable.

1 <https://news.mobar.org/help-through-civility>

NEW AUTHORITY

Attacking Judges & Recusal

In our increasingly litigious and angry society, judges have been coming under recent attacks both by lawyers and the public. One of the ways in which these attacks manifest themselves is demands that judges recuse themselves from cases. The Maryland Judicial Ethics Committee issued two formal opinions during August and September 2026, which both illustrate the problems judges face and one state's way of dealing with them. The facts in both cases present familiar problems.

In Published Opinion 2026-22 the Opinion outlines the factual basis for its analysis as follows:

The Requester is a circuit court judge. The Requester has presided in custody and protective order proceedings involving a self-represented litigant. The litigant has now moved to disqualify the Requester and every other active judge and magistrate in the Requester's jurisdiction. In the motion, the litigant describes the "entire bench" as "future DEFENDANT [*sic*] in Federal Court" and refers to what appears to be a case number in in the United States District Court for the District of Maryland. The litigant also attaches to the motion electronic mail messages that purport to confirm the litigant's filing of complaints against the Requester and other judges with the Maryland Commission on Judicial Disabilities. The Requester asks specifically whether recusal is required based on the litigant's disclosure that the litigant has filed an action in federal court or a judicial disabilities complaint against the Requester.

In Published Opinion 2026-28, the Committee discusses another scenario involving a request for a broad requirement for recusal:

The Requester relates that an attorney appeared before the Requester for the first time since the Requester's appointment to the bench and orally moved that the Requester recuse from the attorney's case that day and from all future cases in which the attorney appears. The attorney stated that the attorney had actively opposed the Requester's appointment and had openly contacted members of the judicial nominating commission and anyone else who would

listen regarding the attorney's opposition to the judge's appointment. The attorney also described what the attorney characterized as a contentious professional relationship with the Requester over the years and identified criticisms and allegations the attorney had previously expressed concerning the Requester's work ethic, ethics, honesty, candor, and professional conduct when the Requester was an attorney.

Prior to the hearing, the Requester knew the attorney had contacted at least one member of the judicial nominating commission, but the Requester was not advised of the substance of the attorney's communications, other than that they were unfavorable. The Requester was not previously aware of the full extent or nature of the attorney's opposition as the attorney described at the hearing, did not share the belief that they had a contentious professional relationship, and categorically denied the allegations of professional impropriety.

Following a recess, the Requester stated on the record that the Requester believed the Requester could be fair and impartial and did not have personal knowledge of all the matters the attorney had described. The Requester further stated that, even after hearing the attorney's allegations and criticisms, the Requester believed the Requester could preside fairly and impartially over matters involving the attorney. Nevertheless, out of an abundance of caution, the Requester advised the parties that another member of the court would resolve the matter scheduled for that day and that the Requester would seek an ethics opinion on whether future recusal is appropriate or required. The Requester submitted an audio recording of the proceeding.

In both situations, the alleged grounds for recusal rely on the actions of the litigants over which the judges had no control.

The Maryland Judicial Ethics Committee took the opportunity presented by these scenarios to explain the basis for recusing a judge with reference to the following provisions in the Maryland Code of Judicial Conduct:

Maryland Rule 18-101.2 provides in part:

(a) Promoting Public Confidence. A judge shall act at all times in a manner that promotes public confidence in the independence,

integrity, and impartiality of the judiciary.

(b) **Avoiding Perception of Impropriety.** A judge shall avoid conduct that would create in reasonable minds a perception of impropriety.

Maryland Rule 18-102.2(a) makes clear that “[a] judge shall uphold and apply the law and shall perform all duties of judicial office impartially and fairly.”

Maryland Rule 18-102.7 requires that “[a] judge shall hear and decide matters assigned to the judge unless recusal is appropriate.”

Maryland Rule 18-102.11(a) addresses disqualification and provides in part:

(a) A judge shall recuse in any proceeding in which the judge’s impartiality might reasonably be questioned, including the following circumstances:

(1) The judge has a personal bias or prejudice concerning ...
a party’s attorney...

The Committee explained that these rules create two tests to see whether recusal is warranted: an objective test and a subjective test. The subjective test requires that the judge to examine her own feelings and beliefs and determine whether recusal is necessary. The objective test looks to the principle that a judge’s actions avoid the “appearance of impropriety,” normally involving the judge’s prior actions or interactions or the judge’s family or business or social connections that might give rise to doubt of her impartiality. It is a sensible approach, and it is consistent with the rules in most states.

Both Maryland opinions are excellent guides for judges and lawyers confronted with recusal issues.

ETHICS & MALPRACTICE RESEARCH TIP

New Article on Legal Malpractice & Ethics

Symposium, *Upholding the Rule of Law in a Backsliding Democracy: Taking Stands, Pushing Back, and the Role of the Public*, 54 Hofstra L. Rev. 233 (2026).

Since the days of Monroe Freedman, Hofstra Law School has been a leader in teaching legal ethics. This symposium of leading scholars of legal ethics is timely.

A BLAST FROM THE PAST

Annals of Incivility

Sir John Fortescue-Aland was disfigured by a nose which was purple, and hideously misshapen by morbid growth. Having checked a ready counsel with the needlessly harsh observation, “Brother, brother, you are handling the case in a very lame manner,” the angry advocate gave vent to his annoyance by saying, with a perfect appearance of sang-froid, “Parden me, my lord; have patience with me, and I will do my best to make the case as plain as—as—the nose on your lordship’s face.” In this case the personality was uttered in hot blood, by a man who deemed himself to be striking the enemy of his professional reputation.

- John Cordy Jeaffreson, A Book about Lawyers 25 (1867).

Incivility in the legal profession obviously is not a new phenomenon.



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