LEGAL ETHICS & MALPRACTICE REPORTER

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FEATURED TOPIC
RULE 1.2(B)

In the past few weeks, the post-election litigation undertaken by President Trump and his allies has become a source of both anxiety and controversy. Although the majority of news media and other reputable sources have declared that Vice-President Biden is the president-elect, the President has refused to concede. Beyond that, he has pursued a number of law suits in both state and federal courts to challenge various aspects of the election process—all in an attempt to reverse the results as they are now generally understood to stand. While this political controversy will come to an end when states certify election results and when the Electoral College casts its votes, the political and legal legacy from this post-election season will not disappear on January 20, 2021. Part of that legacy should be to reexamine, and reemphasize, the importance of Rule 1.2(b) to the continuing health of our legal system.

KRPC 1.2(b), like Model Rule 1.2(b), reads:

> 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.

Comment 3 to Rule 1.2(b) explains:

> Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

The rule requires no specific acts of compliance by lawyers; nor does it carry any threat of sanctions. It is rarely discussed or even considered by most lawyers. But it is, in fact, one of the most important rules that governs our professional conduct, as it underlies the proper workings of the United States adversary system of justice and protects lawyers who keep that system running.

Unlike in countries where lawyers do not have a choice about whether to represent a specific client (often referred to as the "cab rank" rule), practicing lawyers in the United States lawyers are generally free to accept or reject the representation of a particular client subject to the limitations of Rule 1.16(a). But, once representation is undertaken, the attorney becomes duty bound to pursue the client's interests. As the late Irving Younger used to tell students in his New York Bar preparation lectures: "In the United States a lawyer is not like a bus, but like a piano. Unlike a bus, a lawyer does not have to take on anybody who has the price of a ticket, but, like a piano, once a lawyer has taken on a client, she has to make beautiful music."

The freedom to choose our clients comes with a cost in an adversary system such as ours because, if it is to function well and equitably, the system requires that every litigant have the possibility of obtaining legal representation. Comment 3 to Rule 1.2(b) makes this explicit when it states that "legal representation should not be denied to people…whose cause is controversial or the subject of popular disapproval." We all know of lawyers who have taken on unpopular clients or causes and suffered for doing so—in the press or among their friends and neighbors. But the fact of the matter is that taking on unpopular causes is something that lawyers must sometimes do in order to assure that our system of civil and criminal justice works properly.

Perhaps the most notable example in Kansas history is that of the late Paul Wilson. As a young Assistant Attorney General of the State of Kansas, Paul found himself tasked with representing Kansas before the United States Supreme Court in *Brown v. Board of Education*. Paul did not support segregated schools, but he understood that it was his job to represent his client to the best of his ability—even though the cause was highly unpopular and controversial. Paul was later honored by the United States Supreme Court for his courage in taking on that case. But, as he made clear in this memoir, *A Time to Lose*, his representation of Kansas in the *Brown* case had profoundly negative consequences for him both personally and professionally.

It is often difficult for the general public to separate a lawyer's personal beliefs from her representation of an unpopular client. When University of Texas Professor Michael Tigar represented Terry Nichols (one of the Oklahoma City bombers), he experienced a good deal of criticism from the general public and the press. But Professor Tigar did not take on Nichols's case because he supported Nichols's beliefs or actions. Quite the contrary. Professor Tigar accepted the case because he knew somebody had to do it, and he knew that he could do it properly. In that way, justice would be preserved and nobody could complain that Nichols had not been treated fairly. An excellent account of this trial is Professor Tigar's *A Sanctuary in the Jungle: Terry Lynn Nichols and His Oklahoma City Bombing Trial* (co-authored with James E. Coleman, Jr.).

Over the past several weeks, a number of lawyers and law firms who have represented President Trump and his presidential campaign in post-election litigation have come under fire for doing so. There has been intense public pressure for these lawyers and their firms to withdraw—with even prominent attorneys joining this call. This is potentially worrisome. An attorney is certainly permitted to voice his professional opinion that Trump's lawyers' or law firms' arguments are unpersuasive or even, as many have alleged, frivolous.[1] But, to the extent that criticism of these lawyers and law firms—and particularly any call for withdrawal—is based upon the critic's dislike for the client

[1] The merits of the cases are outside of the scope of this article. The LEMR takes no position on the merits of any of the post-election cases undertaken on behalf of President Trump and/or his campaign.

or the cause, then it is misplaced. And it is unmindful of Rule 1.2(b) and its underlying rationale.

Lawyers, above all, should understand that our justice system can only work when we all share the understanding that an attorney's representation of a client is not an endorsement of the client's beliefs or actions. Whether a lawyer represents a client by choice or by appointment, the principle stated in Rule 1.2(b) and Comment 3 thereto applies. If we, as a profession, fail to understand this rule and honor its intent, then we endanger the very system of justice that each of us has sworn to uphold.

NEW AUTHORITY
THE ILLINOIS STATE BAR ASSOCIATION'S ADVISORY OPINION NO. 20-01

Among the many things the COVID-19 pandemic has impacted are delays to the bar examination or personal circumstances that result in some law school graduates not taking the examination immediately upon graduation. In Illinois, where the July bar examination was delayed due to coronavirus considerations, the Illinois State Bar Association issued Advisory Opinion No. 20-01, discussing the extent of legal work that can be performed by recent graduates who have not yet passed the bar exam. The opinion provides a useful guide for all law firms that employ recent graduates who are not yet licensed to practice.

The opinion states the ethical issues quite clearly:

> Law school graduates who have not yet been admitted to the bar are not licensed to practice law and therefore may not engage in the practice of law. Law school graduates are generally prohibited from representing a client in a legal proceeding or appearing in court, including in depositions. Cf., Supreme Court Rule 711. See, e.g., Pennsylvania Bar Association Ethics Opinion 86-97 (May 1987). Lawyers and law firms cannot assist law school graduates in the unauthorized practice of law. See, Rule 5.5 (a).

Having stated the limitations upon recent graduates' work, the opinion goes on to analyze what non-admitted recent graduates **may do**:

> …Comment 2 to Rule 5.5 notes that the Rule "does not prohibit a lawyer from employing the services of para-professionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work." Law school graduates would fall within the definition of para-professional.
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> Rule 5.3 also provides that lawyers may employ nonlawyer assistants in their practice. Again, law school graduates who

> are not yet licensed would fall within the category of nonlawyer assistants. Similar to the obligations of supervisory lawyers supervising subordinate lawyers pursuant to Rule 5.1, supervising lawyers of nonlawyer assistants must make reasonable efforts to ensure that the nonlawyer assistant's conduct is compatible with the professional obligations of the lawyer.

Essentially, according to the ISBA opinion, non-admitted law graduates may do many of the tasks an admitted lawyer may do so long as there is a licensed attorney supervising the non-admitted law graduate and so long as clients and others are properly informed of the recent law graduate's non-admitted status. The opinion summarizes its holding as follows:

> Accordingly, we believe law school graduates may undertake many activities, under the supervision of a licensed lawyer, that do not run afoul of the Rules of Professional Conduct. Indeed, many of the normal activities of first year associates in a law firm consist of activities that nonlawyers also routinely perform. For example, law school graduates may conduct legal and factual research, offer legal conclusions under the supervision of a lawyer, interview witnesses and clients, and prepare legal documents and pleadings for a lawyer's signature. (This is not intended as an exhaustive list of the permissible activities of a law school graduate, but any other activities must not run afoul of the prohibition against the unlawful practice of law by a non-lawyer.) Law school graduates act for the lawyer in the rendition of the legal services. The licensed supervisory lawyer must undertake adequate supervision. The licensed supervisory lawyer is responsible for the work product.

In the new world in which we now live, a world in which law graduates may not be able to sit for the bar at traditional times, law firms wishing to employ these non-admitted lawyers must understand the limits on the work that they can do. This new Illinois advisory opinion is a must read—for firm management, any attorney who will be acting in the role of supervisor, and all the new graduates we hope to formally welcome to the bar soon.

TECH TIP
PASSWORDS MATTER

by Matthew Beal, JD, MCSE, MCP, A+, SEC+

In November, Forbes released their annual top 200 list of worst passwords. Based on previously stolen user credentials, the survey found that users continue to use easily broken phrases, such as 123456, to secure their private information. A technically savvy attorney would never use any of the passwords identified by Forbes. Acting as a failsafe, however, many web sites that hold truly secure information, such as medical or financial records or email hosts such as Gmail and Outlook use two-factor authentication to strengthen access to your secured information. Two-factor authentication is the process where a web site sends a text message to a previously defined number with a digital code that needs to be entered to gain access.

In this arrangement it doesn't matter how simple your password is, the bad actor would still need access to your phone or authentication device to complete the process. This is so seemingly secure that millions of technology users access their financial, medical, and other private information on a daily basis. But is it really that secure? Not if a bad actor finds your lost cell phone that is being used as your authentication device. So, always use a strong password.

All too often, companies report a breach of their webspace and reveal that your password to that site is now likely for sale on some dark web site. Most credit providers and other companies can provide a search based on your email address or some other identifier, of the dark web for instances where your password credential are part of a data set from a data breach. The end product is a list of websites where you need to immediately change your password. If you no longer use the website in question, delete your user account information and remove your account.

At a reasonable interval you should check for such information and act accordingly.

ETHICS & MALPRACTICE RESEARCH TIP
THE SOCIAL SCIENCE RESEARCH NETWORK

When researching a particular legal ethics issue, it is often useful to have access to the most current research and writing—even before it has been published. Scientists have long had a system of publishing "preprints," the versions of papers that precede formal peer review and publication. Lawyers, too, can access many early preprints of articles through the Social Science Research Network ("SSRN"). SSRN contains research papers—both published and unpublished—addressing over fifty-five areas of scholarship, including law ("LSN")

and criminal justice ("CRJN"). The law database currently contains over 300,000 research papers by more than 140,000 authors. The vast majority of the authors represented in the LSN database are law professors, but legal researchers will find work by practicing lawyers and as non-legal scholars as well.

The Law homepage on SSRN discusses its value in this way:

> LSN is one of SSRN's original research networks and researchers have been adding to its collection for over 25 years. SSRN is a great way for researchers to practice early sharing and provides the potential for early feedback on their work. It also provides the unique ability to connect with other researchers around the world in the field of law as well as exposure for their work in other disciplines.

The SSRN database is quite easy to use. The basic search function asks for a title, abstract, keyword or author entry. Keyword searches will cull issue-specific information in published and unpublished formats. When you want to know what a particular author has in the works—including whether she is adding to a particular topic of interest, just search by name.

In addition to obtaining copies of the texts in the database, a researcher can access information regarding the number of times a particular paper or article has been downloaded from the site. This information can be quite useful in determining whether a paper, particularly one that has not yet been published, has achieved some measure of acceptance within the scholarly and legal community. This may be important in qualifying the author as an expert or arguing for the value of the research in question. It may also lead to other relevant papers.

SSRN is a subscription service. One may subscribe to all or a selection of its databases. The good news is that most major universities and law schools are subscribers to SSRN, so it is often possible to gain access to these databases through a local university or nearby law school library. The great advantage of using SSRN for legal research, including legal ethics research, is that, unlike most other commercial legal databases and search engines, it contains many papers that have not yet been published. When one is confronted with a new or complex question in legal ethics, it is always worth an SSRN search precisely because there may well be an unpublished paper by a law professor or legal ethics expert that may help in answering your research questions. In addition, if one is searching for an expert to assist in a legal ethics matter, a search of papers by a particular expert on SSRN will not only be helpful in discovering works by that expert but, also, the downloads and ranking data will give an insight into that expert's standing in the legal ethics community.

BLAST FROM THE PAST
RESOLUTIONS ON PROFESSIONAL DEPORTMENT

Printed here are some more of David Hoffman's Fifty Resolutions on Professional Deportment (1836) that we should all consider during this highly contentious time in American history:

> 2. I will espouse no man's cause out of envy, hatred, or malice toward his antagonist.
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> 5. In all intercourse with my professional brethren, I will always be courteous. No man's passion shall intimidate me from asserting fully my own or my client's rights, and no man's ignorance or folly shall induce me to take any advantage of him. I shall deal with them all as honorable men, ministering at our common altar. But an act of unequivocal meanness or dishonesty, though it shall wholly sever any personal relation that may subsist between us, shall produce no change in my deportment when brought in professional connection with them. My client's rights, and not my own feelings, are then alone to be consulted.
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> 10. Should my client be disposed to insist on captious requisitions, or frivolous and vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into an unjust compromise, or with any other motive, he shall have the option to select other counsel.
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> 11. If, after duly examining a case, I am persuaded that my client's claim or defense (as the case may be), cannot, or rather ought not to, be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise would be lending myself to a dishonorable use of legal means in order to gain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice.
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> 14. My client's conscience and my own are distinct entities; and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it; and should the principle also be wholly at variance with sound law, it would be dishonorable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

16. Whatever personal influence I may be so fortunate as to possess shall be used by me only as the most valuable of my possessions, and not be cheapened or rendered questionable by a too frequent appeal to its influence. There is nothing more fatal to weight of character than its common use; and especially that unworthy one, often indulged in by eminent counsel, of solemn assurances to eke out a sickly and doubtful cause. If the case be a good one, it needs no such appliance; and if bad, the artifice ought to be too shallow to mislead any one. Whether one or the other, such personal pledges should be very sparingly used and only on occasions which obviously demand them; for if more liberally resorted to, they beget doubts where none may have existed or strengthen those which before were only feebly felt.

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