LEGAL ETHICS & MALPRACTICE REPORTER

Vol 2. **May 28, 2021** **No. 5**

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PUBLISHED BY:
Joseph, Hollander & Craft LLC

FEATURED TOPIC

TEACHING CLIENTS ABOUT THE *RULES OF PROFESSIONAL RESPONSIBILITY*

Having taught and written about professional responsibility for almost forty years in various law schools, I have received numerous inquiries from lawyers about specific professional responsibility issues. But I have also occasionally received inquiries from non-lawyers—journalists as well as the Average Joe—who had questions about the rules of conduct that regulate lawyers' behavior. On occasion, these were questions sparked by public events, such as the turmoil following the 2020 Presidential election. Sometimes, they were simply the result of a person's interaction with a lawyer and concern that the lawyer was acting improperly. These inquiries over the years have led me to the conclusion that the Bar needs to do more to inform the ordinary citizen and the media about the nature, form, function, and operation of the Rules.

One of the first things that I tell my students in my basic professional responsibility class is that formal rules regulating lawyer behavior are of relatively recent origin. The first rules were adopted at the state level by Alabama in 1887. The first rules promulgated by the American Bar Association as a model to be used by state bars were published in 1908.

I also tell my students that legal ethics did not receive a great deal of public attention until the Watergate scandal in 1972. Unfortunately, many of the key figures in the Watergate affair, including President Nixon himself, were lawyers. As revelations about the criminality of the acts performed by such government lawyers as John Mitchell dominated the media day after day, many ordinary Americans began to wonder about whether there was something fundamentally wrong with the American legal profession. Public surveys indicated that many Americans believed that most lawyers were venal and corrupt. This led the American Bar Association and state bar associations begin a campaign to explain to the public that lawyers did, indeed, have a code and rules by which they lived and practiced and that lawyers could be disciplined if they failed to live up to those rules. In fact, it was at this time that the ABA began to require that every law student take and pass a course in professional responsibility. In 1980, the Multistate professional Responsibility Examination began to be adopted by states as part of the bar examination process.

Since the aftermath of Watergate, the legal profession has concentrated its efforts in regard to professional responsibility on the Bar. And it has done very little, in my opinion, to educate the general public about the professional rules by which lawyers live and practice. Judging by my experience, this has been a mistake. Generally, the Bar and the courts have been very good about explaining client rights. For

instance, the Kansas Bar Association web page on attorney discipline states:

> **If a Complaint Arises About Lawyer Services:**
> **How Misconduct Complaints are Reviewed in Kansas**
>
> Although the performance of legal services only rarely generates complaints of misconduct against lawyers, the Supreme Court of Kansas has established procedures for investigating such complaints and reaching judgments on lawyer discipline. This pamphlet has been prepared for persons wanting information about those procedures. All rights and obligations are specifically detailed in Kansas Supreme Court Rules 201 through 227, Rules Relating to Discipline of Attorneys.
>
> **Discipline Rules are Strict**
>
> The license to practice law in Kansas is a continuing proclamation by the Kansas Supreme Court that the lawyer is fit to be entrusted with legal matters as an officer of the court.
>
> When lawyers enter practice in Kansas they obligate themselves to uphold the law and to abide by the Rules of Professional Conduct, an exhaustive set of rules adopted by the Kansas Supreme Court to regulate the professional conduct of lawyers. Lawyers who violate these professional and ethical obligations are subject to discipline. Lawyers in Kansas (not taxpayers) pay for the disciplinary system by contributing to a statewide fund to maintain the Office of the Disciplinary Administrator. This watchdog agency is an arm of the Kansas Supreme Court. The Office investigates all allegations of lawyer misconduct and makes recommendations to the Kansas Supreme Court for discipline when warranted.

To my mind, while it is extremely important to alert people who feel that they have been mistreated by a lawyer that there is a process by which they can make a formal complaint, this is not enough. In my experience, few non-lawyers know very much about the *Rules of Professional Conduct* or what lawyer behavior may warrant discipline.

The rules are available to the public on the Internet, but few non-lawyers consult the rules. Those who do often do not have the background and experience to understand the Rules. As a result disciplinary Administrators' offices will receive many complaints each year that do not, in fact, state a violation of the Rules by the attorney who is the subject of the complaint. More importantly, lawyers may find themselves in a dispute with clients not because they have violated the Rules or engaged in malpractice, but, instead, simply because their clients do not understand lawyers' ethical obligations and limitations. Thus, I think it is important that the Bar begin taking actions to help clients understand what their lawyers can and cannot do ethically.

In Kansas, the attorney discipline webpage does address this issue to some extent:

> **Before Filing a Complaint**
> Nearly all Kansas lawyers are competent and respectable persons who uphold their legal and professional obligations; however, lawyers sometimes make mistakes, and some lawyers are more competent than others. A lawyer may lose the trust and confidence of a client for various reasons. However, **just because a legal matter does not turn out the way one had hoped does not mean the lawyer violated any ethical standards.**
>
> **Disagree with a Court Decision**
> While your lawyer assists you in presenting your case in its best light, the final decision rests with the jury or judge and is not controlled by the lawyer. If you do not agree with the decision, an appeal to a higher court will probably be more advantageous to your interests than filing a complaint against your lawyer.
>
> **Recovering Funds**
> You should be aware that the purpose of the disciplinary procedures is not to recover funds from lawyers or to settle fee disputes. It is instead to determine whether an ethical violation has occurred and, if so, what discipline should be imposed upon the lawyer. The Office of the Disciplinary Administrator never becomes your lawyer or represents your personal interests. **In the disciplinary proceeding you should not expect to receive any money damages or reimbursement of loss or any individual legal advice or services.**
>
> **The Disciplinary Administrator encourages frank discussion with your lawyer which often resolves the problem.** Tell the lawyer about your dissatisfaction and ask for a full explanation of the matter. If you still believe your complaint is well founded, write the Disciplinary Administrator's Office.

While I think that this is a good start, it is not enough. Having taught professional responsibility for decades and seen the difficulties law students have in understanding the Rules, posting the Rules along with general advice to exercise caution before filing a disciplinary complaint is sufficient to create informed public. I think that the lawyers and the organized Bar need to take additional steps.

First, I think that the bar associations should consider offering free programs to the public designed to give non-lawyers a basic understanding of the Rules. In particular, such programs could explain the rules on confidentiality, candor, conflicts, and the allocation of

authority between lawyers and clients. They should also address lawyers' obligations regarding and clients' rights concerning fees and other charges.

Second, I think bar associations could prepare model language, perhaps even a small pamphlet, explaining these matters. Practicing lawyers could send this written information to prospective clients packaged with retainer letters.

Third, bar associations could take the materials created for these purposes and post them on the Internet with links to other resources.

Fourth, bar associations could recruit lawyers willing to speak to the general public about these matters and make these speakers available to social, business, and civic groups as well as to schools and colleges.

These are only some suggested ways in which lawyers and the organized Bar might help to create informed clients and, perhaps, reduce the number of groundless disciplinary complaints and improve the reputation of the Bar.

As a first step to achieve the goal of lessening frivolous complaints and improving the image and reputation of lawyers, I would suggest that state supreme courts and bar associations, including those in Kansas and Missouri, consider creating bar committees to formulate strategies to create better informed clients by making the Rules more accessible and more understandable. I think taking the steps outlined here will pay large dividends for the legal profession both in limiting disciplinary complaints and improving popular perceptions of lawyers and courts.

NEW AUTHORITY
BANNING QUOTAS IN SELECTING CLE SPEAKERS: THE FLORIDA SUPREME COURT'S CONTROVERSIAL RULING

Last month, the Florida Supreme Court shocked many members of the Florida Bar as well as lawyers across the United States when it issued an order amending its continuing education rules to prohibit the approval of any course submitted by a sponsor "that uses quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants."

The order responded to a policy that had been adopted by the Business Law Section of the Florida Bar Association, which sought to increase the diversity of among the instructors of the continuing legal education courses. Describing the initiative as a quota requirement, the Florida Supreme Court found the policy untenable:

> Subject to certain exceptions, the policy imposes quotas requiring a minimum number of "diverse" faculty, depending on the number of faculty teaching the course. The policy defines diversity in terms of membership in "groups based upon race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism." The stated goals of the policy are "eliminating bias, increasing diversity and implementing tactics aimed at recruiting and retaining diverse attorneys."
>
> The Court recognizes and is grateful for the Bar sections' important contributions to the legal profession in our state. And the Court understands the objectives underlying the policy at issue here. Nonetheless, certain means are out of bounds. Quotas based on characteristics like the ones in this policy are antithetical to basic American principles of nondiscrimination.

In re: Amendment to Rule Regulating the Florida the Bar 6-10.3, No. SC21-284, --- So.3d ---, 46 Fla. L. Weekly S73, 2021 WL 1418863 (Fla. Apr. 15, 2021).

In a concurring opinion, Justice Lawson wrote that there was a "well-intended motivation underlying the decision of The Florida Bar's Business Law Section to adopt a policy aimed at meaningfully broadening participation in the instructor pool for its educational offerings." In spite of this, he concurred in the result—a result that means that policies such as the one adopted by the Business Law Section are no longer permitted in Florida.

The sole dissent noted only that rule amendment was unnecessary because "a simple letter directed to the Business Law Section" would have sufficed. But that letter would have communicated that the policy "may be in violation of United States Supreme Court precedent."

Not surprisingly, this order has become the focus of intense discussion and debate among lawyers, judges, and law professors throughout the United States. Diversity, equity, and inclusion have become a major goal of professional associations as well as of universities, corporations, and governments over the past decade. There is real fear that the Florida Supreme Court's April order may hinder these goals. The American Bar Association's online journal reported:

> In March 2017, the ABA implemented its Diversity & Inclusion CLE Policy, which requires all its sponsored or co-sponsored CLE programs with three or more panelists, including the moderator, to have at least one member from a diverse group. It also requires that programs with five to eight panelists have at least two diverse members and programs with nine or more panelists have at least three diverse members.

> "The ABA will not sponsor, co-sponsor or seek CLE accreditation for any program failing to comply with this policy unless an exception or appeal is granted," according to the policy.
>
> ABA President Patricia Lee Refo said Friday the ABA has long worked to support Goal III, which is to eliminate bias and enhance diversity, by expanding diversity and inclusion in the legal profession.
>
> "Our CLE programming presents speakers and panelists who are experts in their disciplines and who represent the diversity of our great nation," Refo said. "We are reviewing our CLE requirements in light of the Florida Supreme Court opinion while maintaining our unwavering commitment to diversity and inclusion in the legal profession."

On its face, the ABA policy as reported in the extract above may well be in conflict with the Florida Supreme Court's April order.

Melba Pearson, a lawyer in Miami, Florida, expressed outrage about the April order on the website, Law.com:

> Last month, without any prompting from a pending case or matter, the Florida Supreme Court sua sponte ruled that the Florida Bar can no longer issue continuing legal education credits to any entity that requires diversity in selecting speakers.
>
> At a time when our country is at a crossroads on racial issues—enduring the long painful trial of Derek Chauvin for the brutal murder of George Floyd, a summer of unrest due to his and the deaths of Breonna Taylor as well as Ahmaud Arbery, a huge rise in AAPI hate attacks, anti-Semitic attacks increasing by 40% in our state, and Charlottesville not far in our rearview mirror —it is incredibly irresponsible and concerning to take this approach.

On the other side, E. Whelan, a Senior Fellow at the Ethics and Public Policy Center in Washington, D.C., wrote on the National Review website:

> Two months ago, I highlighted the disturbing news that the Florida Bar's Business Law Section had established diversity quotas for its Continuing Legal Education programs. As I noted, that meant that Florida lawyers, as a condition of practicing law in the state, are required to be members of an organization that has an overt policy of discrimination on the basis of race, gender, and other diverse categories—not including, of course, intellectual or ideological diversity.
>
> I'm very pleased to see that the Florida supreme court has today issued an order that prohibits approval of any CLE course "submitted by a sponsor, including a section of The

> Florida Bar, that uses quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants."

If one takes the Florida Supreme Court—and especially Justice Lawson's comments—at face value, the concern is over how to achieve diversity in the profession rather than if diversity should be a goal. Having said that, however, the Florida court's April order does present significant problems for organizations like the American Bar Association, whose policies closely resemble that rejected in the April order. It may also have the practical effect of slowing efforts to increase diversity in the profession.

The controversy over the Florida court's April order has already spilled over to other states and to the country as a whole. There can be little doubt that the debate the order has engendered will cause a reexamination of diversity policies in every state and in many professions and associations. Will we see other courts take action on the lines of the Florida Supreme Court? Will we see increasing legal challenges to such policies—not only in regard to professional continuing education, but hiring or school admissions? What impacts the Florida Supreme Court's ruling will have in Kansas and Missouri still remains to be seen. What is certain is that the debate is far from over.

ETHICS & MALPRACTICE RESEARCH TIP
SELECTED ARTICLES FROM THE *INDEX TO LEGAL PERIODICALS*

The following are articles of interest on legal ethics and malpractice drawn from recent issues of the *Index to Legal Periodicals* for April-May 2021:

1. Cicchini, Michael D. Combating Judicial Misconduct: A Stoic Approach. 67 Buff. L. Rev. 1259-1328 (2019).

2. Cole, Lance. Perjury Traps, Prosecutorial Misconduct, and the Penn State Three Case: A Cautionary Tale for Prosecutors and Defense Counsel. 30 Geo. Mason U. C.R. L.J. 235-268 (2020).

3. Feldman, Yuval; Libson, Adi; Parchomovsky, Gideon. Corporate Law for Good People. 115 Nw. U. L. Rev. 1125- 1184 (2021).

4. Johnson, Benjamin B.; Parton, John Newby. Judges Breaking the Law: An Empirical Study of Financially Interested Judges Deciding Cases. 99 N.C. L. Rev. 1-48 (2020).

In the current environment, where judicial discipline cases appear to be attracting more attention, this is an important and interesting study.

The use of empirical data is especially significant. It is well worth reading.

5. Latham, Joseph R. Note. The Real McCoy: Model Rule of Professional Conduct 1.2 as a Window to the Future of Sixth Amendment Rights. 11 Ala. C.R. & C.L. L. Rev. 335-355 (2020).

6. Kastenberg, Joshua. National Security and Judicial Ethics: The Exception to the Rule of Keeping Judicial Conduct Judicial and the Politicization of the Judiciary. *Celebrating 150 Years of Nine Justices While Wondering About the Supreme Court in Contemporary America.* 12 Elon L. Rev. 282-316 (2020).

As our nation faces increasing polarization throughout society, this is a fascinating study. Professor Kastenberg teaches at the University of New Mexico. According to his biography posted on the UNM website: "Prior to joining the UNM Law School faculty this September, Professor Joshua Kastenberg had a 20-year career as a lawyer and judge in the U.S. Air Force. He served as an advisor to the Department of Defense on cyber security and cyber warfare matters, twice deployed to Iraq and oversaw the military's compliance with international law. Professor Kastenberg served as a prosecutor and defense counsel in over 200 trials and as a judge in over 200 trials. He has been cited by the Washington Post and appeared on Fox News, and written over a dozen law review articles as well as four books. Prior to joining the faculty he taught graduate and undergraduate level courses in national security law and systems as well as legal history. Professor Kastenberg's interests are in the field of criminal law and procedure, evidence, legal history, and judicial ethics."

7. Krause, Cheryl Ann; Chong, Jane. Lawyer Wellbeing as a Crisis of the Profession. 71 S. C. L. Rev. 203-246 (2019).

8. Lee, Stephen. Training Undocumented Lawyers. *Tenth Anniversary Special Edition.* 10 UC Irvine L. Rev. 453-468 (2020).

9. Libgober, Brian. Getting a Lawyer While Black: A Field Experiment. 24 Lewis & Clark L. Rev. 53-108 (2020).

10. Potratz, Kathryn. Sexual Harassment and Wisconsin's Professional Rules of Responsibility. 35 Wis. J. L. Gender, & Soc'y 91-114 (2020).

11. Sukhatme, Neel U.; Jenkins, Jay. Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel. 70 Duke L.J. 775-846 (2021).

12. Reese Croy, Skylar. "Leave Me My Name!": Why Competitive Keyword Advertising Is an Ethical Landmine for Attorneys. 103 Marq. L. Rev. 627-680 (2019).

Any lawyer with a webpage and an interest in using online strategies to increase webpage traffic should read this article.

BLAST FROM THE PAST
EMORY WASHBURN: RESPONSIBILITIES OF LAWYERS, BEYOND LAW

Emory Washburn on the responsibilities of lawyers to their communities as role models and leaders not just in law, but in other matters:

> Few men in our country are more favorably suited to exert such an influence than a lawyer in general practice. It is part of his profession to form and maintain judgments and opinions for the guidance of others; and at the same time, it is the habit of others to accept these as a rule of conduct and action, without criticism or questions. Nor do they always discriminate between professional and other opinions in the degree of respect that is due to each; so that a lawyer often unconsciously becomes a kind of oracle to the circle of his clients and associates; and, taken collectively, a Bar thus exerts power in a community which reaches further than can be easily measured, and further than the individual himself is aware. To meet the responsibility which is thus implied, demands on the part of every lawyer, a preparation of a broad and varied character, by general reading and keeping up with the progress of discovery in science, and the advance of philosophic thought. This is aside from the range of technical and specific knowledge which is more immediately connected with the business of his profession.

Lectures on the Study and Practice of the Law, delivered in the law school of Harvard University (Little, Brown and Co. 1871).