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FEATURED TOPIC
ABA FORMAL OPINION 500

The United States is becoming a more diverse nation in virtually every way, and this increasing diversity is impacting the legal profession in significant ways as well. One aspect of our nation's increasing diversity is linguistic. For more and more Americans, English is not a first language, and, in some cases, English proficiency is low. According to a new opinion issued by the ABA Committee on Ethics and Professional Responsibility:

> In 2013, approximately 61.6 million individuals, foreign and U.S. born, spoke a language other than English at home. While the majority of these individuals also spoke English with native fluency or very well, about 41 percent (25.1 million) were considered as having Limited English Proficiency (LEP), which is defined as speaking English "less than very well." Jie Zong & Jeanne Batalova, The Limited English Proficient Population in the United States in 2013, MIGRATION POLICY INSTITUTE (July 8, 2015) [hereinafter Limited English Proficient Population], https://www.migrationpolicy.org/article/limited-english-proficient-population-united-states-2013. 2019 data from the U.S. Census bureau estimates that 22% of households in the U.S. speak a language other than English in the home. U.S. CENSUS BUREAU SELECTED SOCIAL CHARACTERISTICS IN THE UNITED STATES (2019)…

Meanwhile, lawyers practicing in American courts must do so in English, and many are not multilingual. For unilingual lawyers dealing with clients and prospective clients with Limited English Proficiency, the communication barrier can be more than a practical challenge; it may have ethical implications. Now, the ABA has issued formal Opinion 500 to provide guidance to lawyers who encounter these situations.

ABA Formal Opinion 500, issued on October 6, 2021, explores the ethical requirements a lawyer must comply with when the lawyer does not share a common language with a client. The Opinion begins its analysis with an examination of Model Rules 1.1 (on competence) and 1.4 (on diligence):

> The foundational rules of competence (Rule 1.1) and communication (Rule 1.4) in the ABA Model Rules of Professional Conduct establish a baseline for a lawyer's duties when there is a barrier to communication because the lawyer and the client do not share a common language, or when a client is a person with a non-cognitive physical condition that affects how the lawyer communicates with a client, such as a hearing or speech disability. This baseline prescribes that

> when a lawyer and client cannot communicate with reasonable efficacy, the lawyer must take steps to engage the services of a qualified and impartial interpreter and/or employ an appropriate assistive or language-translation device to ensure that the client has sufficient information to intelligently participate in decisions relating to the representation and that the lawyer is procuring adequate information from the client to meet the standards of competent practice.

Model Rule 1.1 is essentially the same as KRPC 1.1 and Missouri Rule 4-1.1. This is also true of Model Rule 1.4, which reads:

> (a) A lawyer shall:
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
> (3) keep the client reasonably informed about the status of the matter;
> (4) promptly comply with reasonable requests for information; and
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

In Kansas Rule KRPC 1.4 reads:

> **(a)** A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> **(b)** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The first line of Comment 3 to KRPC 1.4 reads:

> Ordinarily, the information to be provided is that which is appropriate for a client who is a comprehending and responsible adult.

Missouri Rule 4-1.4 reads:

> **(a)** A lawyer shall:
>
> (1) keep the client reasonably informed about the status of the matter;
> (2) promptly comply with reasonable requests for information; and
> (3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.
> **(b)** A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 5 to Missouri Rule 4-1.4 states, in part:

> Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.

According to the Opinion, the "duty to communicate" imposed by Rule 1.4 does not lessen when a client has difficulties understanding a lawyer because of linguistic issues. The Opinion cites a number of state ethics opinions to support this interpretation of Rule 1.4: State Bar of Ariz. Op. 97-05 (1997) (presence of interpreters to facilitate communication between lawyers and clients who do not share a common language furthers the purposes of Rule 1.4); Utah Ethics Advisory Op. Comm., No. 96-06 (1996) ("A language barrier does not reduce the attorney's duty to communicate adequately with the client, as required by Rule 1.4."); N.Y. City Bar Formal Op. 1995-12 (1996) (Rule 1.4 obligation applies to client with whom the only means of effective communication is through a sign language interpreter).

In practice, this means a lawyer must make a determination as to whether a language barrier requires that the lawyer take steps to eliminate this barrier in order to comply with Rule 1.4 and ensure that she and her client understand each other adequately so as to ensure that she may comply with the Rules of Professional Responsibility. The burden is on the lawyer to make this determination and to take remedial steps to overcome the language barrier. Once a lawyer has made a determination that there is a language barrier, the lawyer must then determine how best to overcome that barrier. In doing so, the lawyer must consult with the client, but the lawyer cannot simply shift the burden of dealing with the language problem to the client.

The usual way to overcome a language barrier is to employ a translator and/or interpreter. Once again, though, the burden is on the lawyer to find a competent translator:

> In most situations, the verification of a prospective interpreter's or translator's level of skill and capacity to convey legal concepts is best achieved through engagement of the services of an outside professional to assist the lawyer in the delivery of legal services. Depending on the circumstances, alternative arrangements may suffice. For example, a lawyer may look to a multilingual lawyer or non-lawyer staff member within the firm to facilitate communication with a client. If a nonprofessional interpreter is contemplated, however, the lawyer should proceed cautiously in light of the reduced ability to assess the nonprofessional's level of proficiency and the concomitant increased risk of inaccuracies in interpretation or translation.
>
> In some instances, a client's friend or a family member may function as a viable interpreter or translator. But particular care must be taken when using a client's relatives or friends because of the substantial risk that an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation. In such situations, a lawyer must exercise appropriate diligence to guard against the risk that the lay-interpreter is distorting or altering communications in a way that skews the information provided to the lawyer or the advice given to the client. Lacking accountability to the lawyer or firm derived from an employment or other contractual relationship, relatives and friends of the client may also be less reliable in providing interpretation or translation services when needed.

Beyond pre-screening the translator for competency, the lawyer is obligated to supervise the translator pursuant to Model Rule 5.3. And, most importantly, the lawyer must ensure that the translator understands and complies with the Rules of Professional Responsibility, including the client confidentiality rules.

The Opinion also acknowledges the financial burdens incident to hiring a professional translator. It advises the lawyer should decline or withdraw from the representation if obtaining necessary services would place an unreasonable financial burden on the lawyer or the client. But it notes the lawyer may "associate with another lawyer or law firm that can appropriately address the language-access issue, such as a multilingual lawyer."

The Opinion also discusses the special problems of how cultural context and national origins may affect translation and comprehension, the need to be sensitive to such matters in hiring a translator, and the possibility that a translator may not understand all of these issues:

> Beyond language differences, the ability to understand, effectively communicate, gather information, and attribute meaning from behavior and expressions are all affected by cultural experiences. Competently mediating these differences to achieve the ends of the representation for the client requires: (i) identifying these differences; (ii) seeking to understand them and how they bear upon the representation; (iii) paying attention to implicit bias and other cognitive biases that can distort understanding; (iv) adapting the framing of questions to help elicit information relating to the representation in context-sensitive ways; (v) explaining the matter in multiple ways to promote better client insight and comprehension; (vi) "allow[ing] for additional time for client meetings and ask[ing] confirming questions to assure that information is being exchanged accurately and completely"; and (vii) conducting additional research or drawing upon the expertise of others when that is necessary to ensure effective communication and mutual understanding.

In a footnote, the Opinion hints that there may be technical solutions to lawyer-client language barriers that may obviate the necessity to hire a translator:

> Electronic text and voice translation software and devices, including text-to-text, text-to-speech, and speech-to-speech translators such as telecommunications relay service (TRI) (free - dial 7-1-1), video relay service (VRS) (free - subscriber based) and video remote interpreting (VRI) (fee based), have the capacity to translate from one language to another in close to real time. Brian Heater, Interpreter, Google's real-time translator, comes to mobile, TECH CRUNCH (Dec. 12, 2019, 9:00 AM), https://techcrunch.com/2019/12/12/interpreter-googles-real-time- translator-comes-to-mobile/. Depending on the circumstances, use of such technologies in lieu of or in addition to the engagement of a human interpreter or translator may be appropriate and sufficient to satisfy the ethical obligations of communication and competence. Owing to the rapid evolution of these technologies and the variability of client needs in the context of language access, an analysis of whether and when a technology will address a particular language-access quandary is beyond the scope of this opinion. The Committee notes that the availability of assistive and translation technologies is another example of the ever-increasing impact of technology on the practice of law and underscores the duty of lawyers to develop an understanding of relevant technology. MODEL RULES OF PROF'L

> CONDUCT R. 1.1 cmt. [8] ("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 . . . .").

As electronic translation devices become more effective, lawyers may well want to acquire such devices if they have substantial numbers of clients with whom they do not share a common language.

The issuance of ABA Formal Opinion 500 is both timely and important. As the United States continues to become more diverse linguistically, lawyers must adapt to the ways in which this diversity will change the practice of law. Law firms should consider hiring multilingual lawyers; contracting with competent, culturally, sensitive translators; and, as the technology improves, purchasing electronic translation devices so as to accommodate these changes in compliance with the Rules of Professional Responsibility.

NEW AUTHORITY

NCSB OPINION 2, 2021: A LAWYER'S PROFESSIONAL RESPONSIBILITY IN IDENTIFYING AND AVOIDING COUNTERFEIT CHECKS

On July 16, 2021, the North Carolina State Bar issued an ethics opinion that should be of interest to lawyers in every state. It deals with the ethical responsibilities of a lawyer who receives a check from a questionable source for a client which turns out to be part of a "scam." The facts as laid out by the opinion are as follows:

> Client contacted Lawyer seeking to collect debt from a third party. Client's communication with Lawyer was unsolicited – Lawyer does not advertise for his practice, and Lawyer had not previously solicited Client's business. Client provided Lawyer with documentation supporting Client's claim. Lawyer made preliminary investigation and verified the existence and address of third party. Lawyer contracted with Client to file a lawsuit against third party for the amount owed to Client. A few days after Lawyer sent third party a letter introducing himself as Client's representative, third party contacted Lawyer stating that he wished to pay the amount owed to Client without the need for litigation, and that third party would be back in touch to make payment arrangements. Without further communication with third party, Lawyer subsequently received a cashier's check from third party drawn on an out-of-country bank. The cashier's check was dated prior to third party's earlier conversation with Lawyer, and third party did not mention the cashier's check to Lawyer.

> Third party's note also stated that he would pay the remainder of debt owed to Client within weeks. Lawyer did no further investigation of third party and did not investigate the authenticity of the foreign bank cashier's check.

Unfortunately for the lawyer, it turned out that the check from the third party was a fraud and uncollectible. Further, this "counterfeit check scam" is, according to the opinion, one that has been used against countless lawyers and law firms throughout the Unites States and one about which numerous state and federal agencies have issued warning bulletins. The opinion faults the lawyer in question for his failure to know about these scams and his failure to investigate the check he received, in spite of the "red flags" he should have noticed. The opinion states:

> Lawyer's mistaken reliance on the **counterfeit** check is unexcused. Given the breadth of notice provided to the legal profession on this common scam, Lawyer should have realized that the circumstances surrounding this purported representation required additional investigation. As noted above, Lawyer has a duty to represent his clients with competency and diligence. Rules 1.1 and 1.3. Lawyer's duty of competency includes the need to "keep abreast of changes in the law and its practice[.]" Rule 1.1. For at least ten years, lawyers have been warned about being targets of scams such as the one at issue in this inquiry. Lawyer should have been alerted to the suspicious nature of this transaction based upon the circumstances in this scenario, including the unsolicited request for the representation; the willingness of the purported defendant to quickly resolve the dispute without much effort from Lawyer; the cashier's check drawn on an out-of-country bank; and the cashier check being dated prior to Lawyer's conversation with the purported defendant Although one of these circumstances standing alone may not give cause for suspicion, the totality of the circumstances should have alerted Lawyer to the suspicious nature of the representation and the transaction. Lawyer's failure to recognize the scam given the vast notice and information directed to lawyers on the topic demonstrated his lack of competency in violation of Rule 1.1. Furthermore, given the suspicious nature of the representation and transaction, Lawyer should have diligently investigated the legitimacy of the cashier's check. Lawyer could have accomplished this by contacting the bank that issued the cashier's check to confirm authenticity, or Lawyer could have informed Client of his concerns and waited to see that the cashier's check was in fact honored and accepted by the issuing bank.
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The opinion's reliance upon Rules 1.1 (on competence} and 1.3 (on diligence), two of the most basic rules regulating lawyer conduct, makes this failure by the lawyer even worse.

One interesting aspect of the opinion is interpretation of Comment 8 to Rule 1.1 (Comment 8 in Kansas; Comment 6 in Missouri) and the requirement that lawyers be familiar with the risks "associated with new technologies." Often lawyers interpret this to refer to the need to have internet security programs to protect them against hacking and information breaches. In this North Carolina opinion, the notion of such risk is extended to the risk that humans (lawyers) will fall for internet scams and confidence games over the internet.

It seems quite possible that both Kansas and Missouri authorities could take a position as to violations of Rules 1.1 and 1.3 similar to that taken in North Carolina Ethics Opinion 2, 2021

Unfortunately for the lawyer involved, not only did he run afoul of Rules 1.1 and 1.3, he also violated North Carolina's version of Rule 1.15 when he deposited the cashier's check in his client trust account and immediately—i.e., before the check was sent out for collection—disbursed the amount of the check to his client. In practical terms, this meant that the lawyer had disbursed funds from the client trust account owned by other clients who had not given permission for this disbursement:

> Although Lawyer believed he was disbursing Client's funds from his trust account after depositing the purportedly valid cashier's check, Lawyer actually disbursed funds belonging to his other clients because the cashier's check was **counterfeit** and resulted in no actual deposit of funds belonging to Client into Lawyer's trust account. Lawyer's disbursement of other clients' funds to Client and to himself occurred without his other clients' permission. By disbursing his other clients' funds from his trust account without their permission and for the benefit of someone other than the client, Lawyer misappropriated entrusted client funds in violation of Rules 1.15-2(a), (k), and (n).

As the opinion points out, protection of client funds "is one of the most important professional responsibilities that a lawyer possesses." In light of this, the opinion states:

> a lawyer should never disburse against any provisionally credited funds unless he or she reasonably believes that the underlying deposited instrument is virtually certain to be honored when presented for collection. … When reasonably identifiable suspicious circumstances are present surrounding the receipt and disbursement of funds, a lawyer should not disburse on provisional credit – even if statutorily authorized to do so – until the lawyer satisfies him or herself that the

> instrument is authentic and the transaction is legitimate. Lawyer's failure to do so in this situation not only unnecessarily put other clients' funds at risk but resulted in actual harm to his clients through the misappropriation of his clients' funds.

Further, the opinion holds that the lawyer was personally obligated to replace the funds disbursed improperly and that:

> "[a] lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the Trust Account Compliance Counsel (TACC) in the North Carolina State Bar Office of Counsel." Even if Lawyer promptly replenished the funds disbursed after learning the cashier's check was counterfeit, a misappropriation of funds belonging to other clients occurred that requires reporting to the State Bar under Rule 1.15-2(p).

Kansas and Missouri Rules 1.15 differ somewhat from North Carolina Rule 1.15 (upon which this opinion rests). In Missouri, the applicable rule would be Missouri Rule 4-1.15(a)(6) which states:

> No disbursement shall be made based upon a deposit:
> (A) if the lawyer has reasonable cause to believe the funds have not actually been collected by the financial institution in which the trust account is held; and
> (B) until a reasonable period of time has passed for the funds to be actually collected by the financial institution in which the trust account is held.

Comment 5 to 4-1.15(a)(6) further states:

> Rule 4-1.15(a)(6) establishes that a lawyer must wait a reasonable period of time for deposited funds to be collected by the financial institution in which the trust account is located before disbursing funds on that deposit. This is often referred to as the deposit being "good funds." It is not sufficient to wait only until the deposit is "cleared" or "available" according to financial institution records. In either of those situations, the transaction may be reversed by the financial institution if a problem arises. The amount of time that is reasonable to wait may vary from one financial institution to another, depending on the financial institution's processing method. Waiting 10 days after the date the bank records the deposit is presumed to be a reasonable period, unless a lawyer has actual notice of a reason to wait longer on a specific deposit. A shorter period may be reasonable, in some circumstances. **A lawyer must also delay disbursement and take extra measures to ensure collection before disbursement if the lawyer is aware of information that causes doubt about the collection or collectability of the deposit.**

(emphasis added). Presumably, a Missouri lawyer acting in the way the North Carolina lawyer did might well have a problem with Rule 4-1.15(6) and Comment 5.

Kansas does not have a provision exactly analogous to either the North Carolina rule or the Missouri rule described. Nevertheless, KRPC 1.15(a) does require that a client's property be "appropriately safeguarded." In addition, KRPC 1.15(d)(2)(iv) requires that a lawyer "shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property." Finally, Comment 7 to Rule 1.15 states, in part:

> Rule 1.15 of the Kansas Rules of Professional Conduct requires that lawyers in the practice of law who are entrusted with the property of law clients and third persons must hold that property with the care required of a professional fiduciary.

See also KRPC 1.15, Comment 1.

Whether a Kansas court or disciplinary tribunal would find a KRPC 1.15 violation on the North Carolina opinion's facts is difficult to determine, but it is a possibility.

The takeaway from North Carolina Ethics Opinion 2, 2021 for Kansas and Missouri lawyers is that they should be cognizant of the types of scams described in the North Carolina opinion and take care that they fully investigate any checks or other financial instruments they receive—especially from foreign sources—before they make disbursements based thereon.

ETHICS & MALPRACTICE RESEARCH TIP
KANSAS LAW REVIEW SYMPOSIUM 2021: JUDICIAL CONDUCT AND MISCONDUCT

This month, rather than providing scholarly articles for review, the LEMR invites its readers to participate in what promises to be an excellent and informative program with legal ethics scholars from across the nation.

For the 2021 Kansas Law Review Symposium, the University of Kansas Law Review has put together a program titled:

Judicial Conduct & Misconduct:
A Review of Judicial Behavior from Sexting to Discrimination

The Symposium will take place *virtually* on November 15, 2021, from 12:30 to 3:30 p.m., and it will feature a panel of judicial ethics experts discussing judicial conduct and misconduct, guidelines necessary to promote ethical behavior, and reforms needed to prevent any similar conduct in the future. The current program and speakers list is:

Time	**Speaker**
12:30 – 12:45 p.m.	**Welcome** Stephen Mazza, dean and professor of law Michael Hoeflich, John H. & John M. Kane Distinguished Professor of Law Rachel Zierden, symposium editor
12:45 – 1:00 p.m.	**Ross Davies** Professor, Antonin Scalia Law School, George Mason University
1:00 – 1:15 p.m.	**Michael Ariens** Professor, St. Mary's University School of Law
1:15 – 1:30 p.m.	**Stephen Sheppard** Professor, St. Mary's University School of Law
1:30 – 1:45 p.m.	**Susan Saab Fortney** Professor, St. Mary's University School of Law
1:45 – 2:00 p.m.	**Christopher Joseph** Partner, Joseph, Hollander & Craft, LLC
2:00 – 2:15 p.m.	**Adam Hoeflich** Partner, Bartlit Beck LLP
2:15 – 2:45 p.m.	**Keynote Speaker: Hon. Caleb Stegall** Justice, Kansas Supreme Court
2:45 – 3:15 p.m.	**Question & Answer**
3:15 – 3:30 p.m.	**Closing Remarks**

The symposium will be recorded and posted on KU Law's YouTube channel following the event, but only those who attend the live program will be able to submit questions to the panelists using the Q&A function in Zoom webinar. All LEMR readers are invited to attend.

Register online at:

https://kansas.zoom.us/webinar/register/WN_hEwmZaQjShGm08KsiUOMtw

BLAST FROM THE PAST
HONEST LAWYERS.

To prove that lawyers honest are
In vain alas you try
While truth may be within their words
Their *actions* always *lie*.

From Edward R. Johnes, *Briefs by a Barrister* (1879).