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FEATURED TOPIC

SO YOU WANT TO BE A WRITER: ETHICAL ISSUES FOR LAWYERS

Over the past four decades of my life as a lawyer and law professor, I have been struck by how many lawyers dream of doing something different, either as an alternative to law practice or as a second career. Among the alternative careers that seem to be most often mentioned, three predominate: being a chef, owning a country inn, or being a professional writer. I imagine that there could be ethical issues for lawyer-chefs and innkeepers, but, to be honest, these professions are unlikely to implicate any of the *Rules of Professional Conduct*. The lawyer who dreams of being a writer, however, particularly if she wants to begin her writing career while still practicing law, does have to consider how novel writing may involve ethical risks. As attractive as the idea of being the next John Grisham may be, it is necessary to think about several of the *Rules of Professional Conduct* and be sure not to violate them as we pursue our dreams of literary fame.

One of the first things that creative writing teachers tell their students is that they should write about what they know. This is undoubtedly good advice for a novice author, but it is also dangerous advice for novice lawyer-authors. The problem is: what most lawyers know best is their clients and the matters upon which they work for their clients, but using the information they have gained from client representation raises the specter of violating Rule 1.6 on client confidentiality as well as Rules 1.7 and 1.8(d) on lawyer-client conflicts of interest.

A lawyer who decides to write about a client or a case in which she has been involved must be acutely aware of the limitations placed upon her writing by the lawyer-client confidentiality rules. KRPC Rule 1.6(a) states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

The enumerated exceptions to KRPC 1.6 are stated in KRPC 1.6(b):

> (a) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> 1) To prevent the client from committing a crime;
> 2) To secure legal advice about the lawyer's compliance with these Rules;
> 3) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
> 4) To comply with other law or a court order; or
> 5) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the

> composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.[1]

It is quite clear that none of the enumerated exceptions in KRPC 1.6(b) would authorize a lawyer's use of client confidential information in her professional writing. Further, it seems quite unlikely that a convincing argument could be made that the use of such protected information for professional writing would be "impliedly authorized to carry out the representation" of a client. Thus, the only prudent path for a lawyer-author to follow would be for her to obtain the client's "consent after consultation." This consent process, I would suggest, should involve a detailed description of the proposed writing, where it will be published, and whether it will be fiction or non-fiction at the very least.

Some lawyer-authors may believe that using client information in fiction, especially if "names are changed" will obviate the necessity to obtain client consent. Such an assumption could be very dangerous for the lawyer-author. Often, even purported fictional characters are easily identifiable. In such cases a client may well object to the use of their information, and a court or disciplinary tribunal might well agree with the aggrieved client that the lawyer-author has violated Rule 1.6.

KRPC Rule 1.8(d) deals specifically with those situations in which a lawyer wants to write about a client:

> (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.[2]

Comment 9 to KRPC Rule 1.8(d) states:

> An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

For the would-be lawyer-author, the key sentence is "measures suitable in the representation of a client **may detract from the publication value of an account of the representation.**" To understand the nature of this potential conflict, imagine a

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[1] While there are some differences between KRPC 1.6 and MRPC 4-1.6, these differences do not affect this analysis of a lawyer-author's use of client confidential information.
[2] MRPC Rule 4-1.8(d) is the same as the KRPC rule.

defense attorney who is retained to defend a celebrity client on a capital murder charge. The attorney wants to negotiate literary and media rights for himself before the trial begins. The problem with this situation is that the attorney may believe that a guilty verdict would be more sensational than either a verdict of innocence or a verdict without capital punishment. The more sensational verdict might well sell more books. Here is the conflict: the lawyer-author might be tempted to do less to avoid a capital verdict to increase future literary and media profits. Such a conflict is unacceptable. Indeed, the lawyer cannot negotiate these rights even if his client is willing to give informed consent. This conflict is so potentially dangerous that the client cannot waive it.

Rule 1.8(d) is limited to a lawyer negotiating literary and media rights before the client representation ends. It does not prevent a lawyer from negotiating such rights after the representation is concluded, although lawyers in such a position must still be concerned about violating Rule 1.6 on confidentiality during the negotiations.

Another issue that may arise in some cases is the use of a "pen name." Some lawyers may wish to publish not under their own name, but under a pen name.[3] Is the use of a pen name ethically problematic? In 2012 the Ethics Committee of the Arizona State Bar issued a formal opinion on precisely this subject. The question presented in Formal Opinion 12-02 was whether a lawyer's use of a pen name to write a murder mystery would violate Arizona Rule ER-7.1(a) which states:

> A lawyer shall not make or knowingly permit to be made on the lawyer's behalf a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Based on its reading of EC-7.1(a), the Arizona Bar Ethics Committee advised that the use of a pen name by a lawyer-author would not violate the Rule:

> A lawyer who engages in an activity that does not constitute the practice of law may, for the purpose of engaging in that activity, adopt any name by which the lawyer chooses to be known, so long as the lawyer has no fraudulent or improper motive for doing so. Thus, a lawyer who changes his or her name upon marriage may continue to practice law under the former name and use the married name for personal or social purposes unrelated to the practice of law. See *South Carolina Op. 07-05* (July 19, 2007). A lawyer who writes books or articles, or who otherwise engages in an activity that does not constitute the practice of law may, for purposes of engaging in that activity, adopt a pen name or pseudonym, without violating the Rules of Professional Conduct.

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[3] On reasons for using a pen name, see K. Notaras. "The Pros and Cons of Using a Pen Name," online at https://knliterary.com/using-a-pen-name/.

KRPC 7.1(a) reads the same as Arizona Rule ER-7.1. And MRPC 4-7.1(a) reads:

> A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false if it contains a material misrepresentation of fact or law.

A communication is misleading if it:

> (a) Omits a fact as a result of which the statement considered as a whole is materially misleading…

Given that KRPC 7.1 is the same as EC-7.1 and that MRPC 4-7.1 is substantially similar to EC-7.1, a Kansas or Missouri lawyer contemplating using a pen name as an author should feel she has a strong argument that such use would not violate either the Kansas or Missouri ethics rules.

In conclusion, a lawyer who decides that she wants to become a writer should not be deterred from that additional career path, but, at the same time, should recognize the *Rules of Professional Responsibility* will limit how she proceeds in that path.

NEW AUTHORITY

PROPOSED AMENDMENTS TO MODEL RULES OF PROFESSIONAL CONDUCT

On December 15, 2021, the American Bar Association published a discussion draft of possible amendments to *Model Rules of Professional Conduct*. These proposed amendments were issued in response to concerns that that the *Model Rules*, specifically *Model Rules 1.0, 1.1,* and *1.2,* as they are currently written do not adequately provide for lawyer due diligence in dealing with clients possibly engaged in money laundering or terrorist financing activities.

The proposed amendment to Rule 1.0 would add a comment, which would read:

> [11] A lawyer's knowledge may be derived from the lawyer's direct observation, credible information provided by others, reasonable factual inferences, or other circumstances. For purposes of these Rules, a lawyer who ignores or consciously avoids obvious relevant facts may be found to have knowledge of those facts.

The proposed amendment to Rules 1.1 would add the following language to Comment 5 to Rule 1.1:

> The duty of competence requires that a lawyer make a reasonable inquiry into the facts and decline or terminate the representation when the lawyer has reason to believe that the client seeks the lawyer's services in criminal or

> fraudulent activity. A lawyer may not knowingly assist in criminal or fraudulent activity and should discourage a client from engaging in such activity, but the lawyer may offer to assist in achieving the client's lawful objectives by lawful means. In some circumstances, competent representation may require verifying, or inquiring into, facts provided by the client. Ignoring or consciously avoiding obvious relevant facts, or failure to inquire when warranted, may violate the duty of competence. See Rules 1.0(f) and 1.2(d), Comment [10].

The proposed amendment to Rule 1.2 would add the following language to the Comments to Rule 1.2:

> Rule 1.2(d) prohibits a lawyer from assisting a client in conduct the lawyer knows is criminal or fraudulent. Rule 1.16(a) creates a duty to decline or withdraw from representation if the representation will result in violation of the rules of professional conduct or other law.
>
> When a lawyer has reason to believe that the client seeks the lawyer's assistance in criminal or fraudulent activity, the lawyer should conduct a reasonable inquiry to avoid assisting in that activity by the client. See Rule 1.1, Comment [5]. A lawyer's duty to undertake a reasonable inquiry may exist at the formation of, or arise during, the course of the representation.
>
> To determine whether further inquiry is warranted regarding whether a client is seeking the lawyer's assistance in criminal or fraudulent activity, including money-laundering or terrorist financing, relevant considerations include: (i) the identity of the client, (ii) the lawyer's familiarity with the client, (iii) the nature of the requested legal services, and (iv) the relevant jurisdictions involved in the representation (when a jurisdiction is classified by credible sources as high risk for criminal or fraudulent activity). For further information, see *ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*.

Since the September 11, 2001, terrorist attacks, the problem of stopping terrorist financing and money laundering has become a major priority for American law enforcement. A number of new laws have been enacted, including the Patriot Act, to give law enforcement and the intelligence community the legal ability to stop these activities. Unfortunately, terrorist sympathizers and supporters in the U.S. and abroad continue to find ways to launder money and funnel it to terrorist organizations.

The American Bar Association has been and continues to be concerned that lawyers may be used by terrorists and their financial supporters to effectuate money laundering and financing schemes. The ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 463 in 2013 and Formal Opinion 491 in 2020 to clarify lawyers' "gatekeeping" role in preventing clients from using them to further illegal money laundering and terrorist financing schemes. The December 15, 2021, publication of proposed amendments to the *Model Rules* follows up on these two earlier Formal Opinions and create "an enforceable client due diligence obligation in the *Model Rules*."

It is important to notice that the committees making the proposals did not recommend amending the "black letter rules," but, rather, amending and supplementing the Comments to existing Rules:

> ABA Formal Ethics Opinions 463 and 491 concluded the Model Rules, as currently written, create an enforceable duty to inquire of a client when risk factors are present like those discussed in the Voluntary Good Practices. Based on the Opinions, the Ethics and Regulation Committees determined the black letter of the Model Rules of Professional Conduct did not need amending. Instead, the Committees focused on explaining the existing duties subject to disciplinary enforcement by proposing additional guidance in the Comments to Model Rules 1.0, 1.1, and 1.2.

The proposed amendments will undoubtedly elicit many comments from lawyers throughout the U.S. In deciding whether to support or oppose these proposals, lawyers must balance out the increased burden they place on lawyers versus the extent to which these amendments may, in fact, reduce national security threats to the United States. The full text of the proposals may be found online at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20211215-scpr-scepr-comment-draft-modrul-amendments-client-due-diligence-notice-of-public-roundtable.pdf. This text includes specific questions to be answered by lawyers who wish to comment. The deadline for comments is February 15, 2022.

ETHICS & MALPRACTICE RESEARCH TIP
NEW ARTICLES DRAWN FROM THE CURRENT INDEX OF LEGAL PERIODICALS

Peter Blanck, et al., "Diversity and Inclusion in the American Legal Profession: Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+," *Discrimination and Bias Reported by Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+.* 47 Am. J.L. & Med. 9 (2021).

During the past few years, there has been increasing attention paid to how the legal profession deals with diversity both among lawyers and clients. One major problem has been the lack of hard data about problems. This report focuses on discrimination against important subgroups of the profession. It is eye-opening.

Vito M. DeStefano, "The Limits of Permissible Judicial Campaign Speech in New York," 94 St. John's L. Rev. 67 (2020).

More and more states are seeing challenges to the ways in which judges are campaigning. Are these challenges an attempt to violate the First Amendment rights of these candidates? Here is one opinion.

Dyane O'Leary, "'Smart' Lawyering: Integrating Technology Competence into the Legal Practice Curriculum," 19 U.N.H. L. Rev. 197 (2021).

KRPC Rule 1.1, Comment 8 states:

> *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.*

The question is how to achieve this goal.

Bret Linley, "Note. *Quis Custodiet Ipsos Custodes*: How the Lack of Institutional Concern for Parties to ADR Protects and Incentivizes Lawyer Misconduct,"45 J. Legal Prof. 115 (2020).

An interesting perspective on how the standards governing alternative dispute resolution can protect unethical behavior and shield unethical lawyers from discipline.

BLAST FROM THE PAST
A SELECTION FROM THE DIARY OF JOHN QUINCY ADAMS

John Quincy Adams, lawyer, diplomat, Harvard professor, and sixth President of the United States, was a dedicated diary writer. His diaries narrate the smallest details of his fascinating life and his inner most thoughts. Like his father, Founding Father John Adams, JQA was a deeply ethical and religious man. In his diary entry on November 21, 1787, he recorded a conversation he had with his teacher and mentor, Theophilus Parsons, Sr., one of the greatest lawyers of his era:

> I this morning requested of Mr. Parsons his opinion, whether it would be most advantageous for me to pursue, the professional study in those hours, when I should not attend the office; or whether it would be best to devote those of my evenings, which I shall pass at my own lodgings, to other purposes, and a diversity of studies. He answered by observing, that I could not attend to any useful branch of Science, in which I should not find my account; he would rather advise me, to read a number of ethic writers: it was necessary for a person going into the profession of the law, to have principles strongly established; otherwise, however amiable, and however honest his disposition might be, yet the necessity he is under of defending indiscriminately, the good and the bad, the right, and the wrong would imperceptibly lead him into universal skepticism.

R.J. Taylor, et al. eds., *Diary of John Quincy Adams*, Vol. 2, p. 319 (1981).