THE Legal Ethics & Malpractice Reporter

A monthly commentary on current ethical issues in law practice for members of the Kansas and Missouri Bars

April 30, 2024

Vol. 5, No. 4

Joseph Hollander & Craft LLC
Lawyers and Counselors

Contents

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

Interviewing Prospective Clients

Last month, the ABA Committee on Ethics and Professional Responsibility published Formal Opinion 510, which supplements Formal Opinion 492. Both opinions clarify points about Rule 1.18, which provides rules for dealing with potential conflicts that may arise when interviewing prospective clients—rules that differ significantly from those that apply under Rule 1.9, governing conflicts that may arise generally with former clients.

Kansas Rule of Professional Conduct 1.18 reads:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> > (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
> >
> > (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying

> information than was reasonably necessary to determine whether to represent the prospective client; and
>
> (3) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (4) written notice is promptly given to the prospective client.

Missouri Rule of Professional Conduct 4-1.18 reads:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 4-1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to Rule 4-1.18(b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in Rule 4-1.18(d). If a lawyer is disqualified from representation under Rule 4-1.18(c), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in Rule 4-1.18(d).
>
> (d) When the lawyer has received disqualifying information as defined in Rule 4-1.18(c), representation is permissible if:
>
> > (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and the disqualified lawyer is timely screened from any participation in the matter.

Formal Opinion 492 provided guidance as to what kind of information learned from a prospective client would be considered "disqualifying information" such as "views on the potential resolution options, personal accounts of relevant events, sensitive personal information, and strategies." The central point made in Opinion 492 was that a lawyer faced with a question of whether information constituted "disqualifying information" would require a "fact-based" inquiry." Opinion 492, however, did not advise on certain other aspects of the interpretation of Rule 1.18.

Formal Opinion 510 attempts to fill those gaps. It begins by giving advice on what information a lawyer should seek to learn from a prospective client:

> The initial question is whether particular information that a lawyer elicited from a prospective client at a preliminary meeting relates to "whether to represent the prospective client." Not all information solicited from or provided by a prospective client will relate to this determination. The type of information that lawyers may obtain to determine "whether to represent the prospective client" principally falls into two categories, which may overlap: first, information may relate to the lawyer's professional responsibilities (i.e., whether the rules permit the lawyer to take on a matter), and, second, information may relate to the lawyer's more general business decisions (i.e., whether the lawyer wants to accept the matter). The former category would naturally include information that is necessary to ensure compliance with legal and ethical obligations, including those set forth in the Model Rules of Professional Conduct. This could conceivably include, among other things, sufficient information to determine whether the lawyer could handle the matter competently (Rule 1.1), whether the client or prospective client seeks to use the lawyer's services to commit or further a crime or fraud (Rules 1.2(d) and 1.16(a)(4)), whether the lawyer would be able to communicate effectively with the prospective client (Rule 1.4), whether the lawyer has a conflict of interest (Rules 1.7-1.12 and 1.18), and whether

> all of the prospective client's potential claims would be frivolous (Rule 3.1). But it is very possible that less than all information that is responsive to these factors—particularly the merits of potential claims—is reasonably necessary to determine whether to undertake the representation.

The Opinion concedes it is ordinarily necessary to "seek the identity of other relevant parties, witnesses, and counsel" to identify conflicts of interest. But it opines that "detailed information" about the matter may not necessarily relate to a lawyer's determination "whether to represent the prospective client."

The Opinion emphasizes that determining whether an attorney has disqualifying information does not turn on the lawyer's purpose in requesting information, but on the necessity of the information for deciding whether to take on the representation:

> A lawyer might permissibly undertake a very detailed inquiry into the matter before deciding whether to accept it. But such a permissible inquiry may not be the same as an inquiry that is "reasonably necessary" such that the lawyer's conflict is not imputed to the firm. In general, the rules distinguish situations where lawyers' conduct serves a legitimate or permissible purpose and those where the conduct is "necessary" to serve that purpose. It is easier to show that the lawyer's conduct was intended to serve a legitimate purpose than to show that it was necessary to serve that purpose.

The Opinion discussed various reasons why an attorney may need lots of information to decide whether to proceed, but cautions:

> Once a lawyer has sufficient information to decide whether to represent the prospective client, further inquiry may be permissible, but it will no longer be "necessary." That means once a lawyer has decided there is any basis on which the lawyer would or must decline the representation, stopping inquiry on all subjects would place the lawyer in the best position to avoid potential imputation of a conflict to other lawyers in their firm. See Comment [4] to Rule 1.18.

After the discussion as to how much information is "reasonably" necessary for a lawyer to glean from a prospective client, Opinion 510 moves on to the question of what "reasonable measures" a lawyer should take to avoid a prospective client

giving more information than is necessary. The Opinion points out that there is a range of approaches that a lawyer may take from a "free-flowing conversation" to a conversation of limited scope. The first, of course, may increase the risk of disqualification under Rule 1.18 since the lawyer would almost certainly receive "disqualifying information" as discussed in Opinion 492. However, the second may not provide the lawyer with all of the information the lawyer reasonably needs and might well violate the inquiry necessary to assure a lawyer that he does not violate Rule 1.16's prohibitions of certain representations. The ABA concludes:

> Rule 1.18(d)(2)'s "reasonable measures" standard means that lawyers must exercise discretion throughout the initial communications, while the lawyer and prospective client are considering whether to enter into a lawyer-client relationship. Lawyers must limit the information sought from prospective clients, and those who seek and obtain information without limitations fall short of that standard.

The Opinion suggests lawyers may avoid learning disqualifying information and imputing conflicts to other lawyers in their firms by warning the prospective client that she has not yet agreed to take on the matter and that information should be limited only to what is necessary for the lawyer and client to determine whether to move forward with an engagement. However, stating that such a warning need not have any "particular wording" is not very helpful in that it does not provide any safe harbor formula that lawyers can use. If a lawyer decides to provide Rule 1.18 warnings to prospective clients, the language used will be immensely important and may be subjected to judicial scrutiny. Thus, lawyers should choose such language with great care to ensure that it is effective and defensible before a disciplinary panel or judge.

The opinion concludes with very brief advice about screening when a lawyer does receive too much information and might be disqualified unless screening of that lawyer is instituted. More extensive guidance would have been helpful.

All in all, ABA Formal Opinion 510 provides important guidance regarding factors to consider when screening prospective clients.

NEW AUTHORITY

To Write or Stay Silent

In law practice, attorneys often encounter stories that seem perfect to make a best seller or a hit movie. Many lawyers want to become novelists in the model of John Grisham or other popular authors. However, the ethics of using client stories can be tricky—as one Wisconsin attorney recently discovered.

On April 24, 2024, the Wisconsin Supreme Court published its decision in the disciplinary case against a member of the Wisconsin Bar. The respondent in the case was an experienced lawyer. He published a book about a case he had handled more than a decade before the publication. In the book, he told the story of the prosecution of one of his former clients. He sought to gain permission from his former client to use confidential information, but the client denied his request. He sought to obtain trial records from the state and they, too, denied his request. In spite of these defeats, the respondent wrote his book and published it himself. The book was available for purchase in the city in which the respondent and his former client lived as well as online. The book was also available in the local public library. To provide details about the book,

> Attorney Merry drew from his own review of court records located at the circuit courthouse, as well as from his own recollection of events, chambers discussions or sidebars, and discussions with the prosecutor, other attorneys, experts, or private individuals—some of which might have occurred in the presence of others, but were not made in open court or in media coverage of the case at the time of the prosecution or its immediate aftermath.

In re Roger G. Merry, Case No. 2022AP35-D, — N.W.3d —, 2024 WI 162024, WL 1748846 (Wis. Apr. 24, 2024).

According to the Wisconsin Supreme Court, the book's publication put the client's case before the public more than a decade after it was tried, which caused her significant psychological and reputational damage. The Court believed that the case turned on the Wisconsin version of Rule 1.9(c):

> (c) A lawyer who has formerly represented a client in a matter or

> whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

The respondent defended his action on several grounds including that his former client had not been disadvantaged, that the information he revealed in his book was "generally known," and that the information was not subject to privilege. The Court rejected all of these arguments.

The lesson we should learn from this case is clear. Disciplinary authorities and courts take Rule 1.9(c) seriously. Any would-be attorney-author who thinks a case would make a great novel must get client permission before writing.

ETHICS & MALPRACTICE RESEARCH TIP

New Article from the *Current Index to Legal Periodicals*

It was a quiet month for new articles. Nevertheless, this Note on the intersection of ethics and law, as applied to the duties of mental health professionals, delves into a subject that every lawyer should consider.

> Alexis Hulfachor, Note, *A Comparative Analysis of Mental Health Professionals' Duty to Warn across the United States: The Need for Clearly Defined Laws in Light of Recent Mass Shootings*, 48 S. Ill. U. L.J. 123 (2023).

A BLAST FROM THE PAST

A Recipe for Success at the Bar

To obtain distinguished success at the bar, a man must possess great and varied qualification. He must not only be able in his closet to grapple with and conquer the most abstruse, fatiguing, and inexhaustible of studies, but he must also be thoroughly acquainted with the subtle mysteries of human nature; he must be able to penetrate with equal facility into the research of the dead, and the motives and actions of the living; he must able to wield at his pleasure all the splendors of rhetoric and eloquence, and to descend in a moment into minute and trifling technicalities; he must be able to adapt his feelings, language, and ideas, to the highest or the lowest level; he must be endowed by nature with a frame and constitution capable of enduring fatigue and anxiety, the most constant and enthralling; he must not only have commanding talents, but both energy to rouse and keep them constantly alive, and judgment and discretion to direct them. Having all these qualities, he must be full of honorable feeling, and be blessed by good fortune, or he will never succeed at the bar." Having said this Mr. Wadsworth assured me that he had great confidence in my own judgment, advised me to think of all he had said, and whichever path I should conclude to follow, all the assistance that he could give should be fully at my command.

—Sir James Stewart, *The Life of a Lawyer* 25-26 (London, 1830)

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