

The Ethics of Absence: Illness, Vacations, and Sabbaticals

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A CLE Seminar
presented by

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Overview

I. Planned, Temporary Absence

- Rule 1.3
- Rule 1.4
- Rule 3.2

II. Unplanned Temporary or Permanent Absence

- Kansas Rule 234 and Missouri Rule 5.23
- Rule 235 and Missouri Rule 5.26
- Rule 5.1(b) & (c)

III. Planned Retirement

- Succession Planning Guide
- Practitioner Checklist

Introduction

Introduction

When a lawyer takes time away from her practice, there are a number of ethical rules that may be implicated. To start with, a lawyer should, in fact, take time off. Rule 1.1 requires that a lawyer be competent and competence involves both maintaining physical and mental health. Increasingly, lawyers and law firms are concerned about wellness and one of the most effective wellness techniques is taking time away from the stresses and demands of law practice.

Absence Chart

	Temporary	Permanent
Planned	Vacation / Sabbatical	Retirement
Unplanned	Illness / Injury	Abandonment, Incapacity or Death

I. Planned, Temporary Absence

- RULE 1.3
- RULE 1.4
- RULE 3.2

Relevant Rules of Professional Conduct

Rule 1.3

A Lawyer shall act with reasonable diligence and promptness in representing a client.

Comment:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction **or personal inconvenience to the lawyer**, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. **A lawyer's workload should be controlled so that each matter can be handled adequately.**

**Missouri Supreme Court Rule 4-1.3 Cmts. [1] and [2].*

Relevant Rules of Professional Conduct

Rule 1.3

Comment:

[2] Perhaps no professional shortcoming is more widely resented than procrastination. **A client's interests often can be adversely affected by the passage of time or the change of conditions;** in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

**Missouri Supreme Court Rule 4-1.3 Cmt. [3].*

Relevant Rules of Professional Conduct

Rule 1.3

Comment:

[3] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. **If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.** Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

**Missouri Supreme Court Rule 4-1.3 Cmt. [4].*

Relevant Rules of Professional Conduct

Rule 1.3

Not related to absences from practice, but poignant example of putting client's interests above personal interests:

Lawyer abandons Ferrari to make court date

by [South Bayview Bulldog Admin](#) • July 10, 2013

One of the most commented on tweet-pictures out of Monday's storm is the shot of lawyer Howard A. Levitt's \$192,000 Ferrari sitting above the axles in water under the Simcoe Street underpass. People found it titillating and downright unbelievable but Mr. Levitt did get it right. If the rule of successful people is that they put first things first, Mr. Levitt figured it out. He decided that his obligation to appear in court at an important hearing in Ottawa trumped his fancy car. A lawyer telling a judge he missed court because his car got stuck in water is like a kid telling a teacher that the dog ate his homework. Mr. Levitt left the Ferrari and took a cab to the Island Airport crossing.



Relevant Rules of Professional Conduct

Rule 1.4 Communication

Rule 1.4 states:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Missouri Supreme Court Rule 4-1.4(a)

A lawyer shall: ... (2) promptly comply with reasonable requests for information....

Relevant Rules of Professional Conduct

Rule 1.4

Comment:

[4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. **A lawyer may not withhold information to serve the lawyer's own interest or convenience.** Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

**Missouri Supreme Court Rule 4-1.4 Cmt. [6].*

Relevant Rules of Professional Conduct

Rule 1.4

Comment:

[5] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. A lawyer should promptly respond to or acknowledge client communications.

*Missouri Supreme Court Rule 4-1.4

Cmt. [4] ...Rule 4-1.4(a)(2) requires prompt compliance with the request or, if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected....

Implementing Rule 1.4 Communication

Tips for Planned Absences:

- Notify opposing counsel as appropriate
- Out of office email notifying of delayed response for the time period of the absence
- Similar message on voice mail to notify callers
- Identify who the caller can contact in your absence
- Ensuring scheduled court matters, meetings, and other appointments are appropriately addressed
- Establishing in advance the practice of copying your legal assistant on email communications can help provide continuity on a case and communication avenue in your absence

Relevant Rules of Professional Conduct

Rule 3.2

Rule 3.2 states:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Kansas Comment:

[1] Dilatory practices bring the administration of justice into disrepute. **Delay should not be indulged merely for the convenience of the advocates**, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Missouri Comment:

[1] Dilatory practices bring the administration of justice into disrepute. **Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates.**

II. Unplanned Temporary or Permanent Absence

- ABA FORMAL OPINION 482 (SEPTEMBER 19, 2018)
- KANSAS RULE 234 AND MISSOURI RULE 5.23
- RULE 235 AND MISSOURI RULE 5.26
- RULE 5.1(B) & (C)

ABA Formal Opinion 482

This opinion discusses contingency planning for disasters, but it also provides helpful guidance and framework for contingency planning for unplanned absences from practice:

“By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster.”

Contingency Planning

Practical Tips:

- Office Procedure / Continuity Manual
- Centralized list of passwords, accounts, and other important documents
- Affiliation with another Lawyer to Manage / Wind Down Practice
- Perform a dry run to identify and close gaps of information *before* the unplanned event

Rule 234 – Disabled Status

Rule 234: Disabled Status

“Disabled” is defined as “unable to continue the practice of law due to a mental or physical limitation.” In some instances the disability is permanent. In other instances, the disability is later removed allowing the attorney to return to practice.

The ODA may file a motion with the Supreme Court seeking an order to compel a mental health or physical evaluation of the attorney to determine if the attorney is disabled.

When evidence supports, the attorney may be transferred to disabled status.

**See Missouri Supreme Court Rule 5.23.*

Rule 235 – Appointment of Counsel to Protect Clients’ Interests

Rule 235: Appointment of Counsel to protect Clients’ Interest

(a) **Appointment of Counsel.**

- (1) **Circumstances.** The chief judge of a judicial district may appoint counsel to protect the interests of an attorney’s clients under the following circumstances:
- (A) the Supreme Court has transferred the attorney to disabled status under Rule 234;
 - (B) the attorney has disappeared or died;
 - (C) the Supreme Court has suspended or disbarred the attorney and the attorney has not complied with Rule 231; or
 - (D) the attorney has neglected client affairs.

**See Missouri Supreme Court Rule 5.26.*

Relevant Rules of Professional Conduct

Rule 5.1(b) & (c)

Rule 5.1 states:

(b) A lawyer having **direct supervisory authority over another lawyer** shall **make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.**

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if: **(1)** the lawyer **orders** or, **with knowledge of** the specific conduct, **ratifies** the conduct involved; or **(2)** the lawyer is a partner or has comparable **managerial authority in the law firm** in which the other lawyer practices, or has **direct supervisory authority over the other lawyer**, and **knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.**

**Missouri Supreme Court Rule 4-5.1(a)-(c)(1).*

III. Planned Retirement

Planned Retirement

Contingency and Succession Planning Guide published by the Kansas Office of the Disciplinary Administrator:

<https://josephhollander.com/wp-content/uploads/2024/06/Succession-Planning-Guide-Sept-2023.pdf>

California Lawyers Association published this helpful checklist:

<https://calawyers.org/section/trusts-and-estates/publications/practitioner-checklist/>

Knowing when the time is right – to quote the Office of the Disciplinary Administrator’s guidance:

“The law wants you to retire – if you have lost interest in the law or if the law has lost interest in you, it is time to retire.”

Thanks for Attending!

QUESTIONS?