

THE Legal Ethics & Malpractice Reporter

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

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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

The Problem of the Tyrannical Client

THE relationship between a lawyer and her client is one of agency—a highly privileged relationship in which the lawyer becomes her client’s fiduciary. Although the notion of fiduciary duty has been defined in various terms, the predominant definition in the United States is found in Judge Cardozo’s opinion in *Meinhard v. Salmon*:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions (*Wendt v. Fischer*, 243 N. Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

249 N.Y. 458, 464, 164 N.E. 545 (1928).

Earlier, Lord Chancellor Brougham, in his defense of the Queen at her trial in the House of Lords in 1821, put it even more strongly. He stated that a lawyer was required “to save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, he destruction which he may bring upon others.”

These definitions of a lawyer’s duty to his client do not speak of any limits on this duty.

For these limits, a lawyer today can turn to the *Model Rules of Professional Conduct*. The *Rules* do not adopt the extreme view in which a lawyer must “by all means and expedients” do whatever she must for her client’s case. Instead, the rules reflect a narrower notion of fiduciary responsibility. The *Rules* are replete with guidance constraining the lawyer’s obeisance to the client’s wishes and needs.

Although Judge Cardozo's definition is considered correct by many American lawyers today, traces of the more extreme concept put forth by Lord Chancellor Brougham remain. Many lawyers are inclined to give their all for a client. Many clients—who we might dub “tyrannical clients”—expect this. Tyrannical clients do not want their lawyers to provide independent and unbiased judgment as Rule 2.1 requires. They want lawyers who will do what they want without limits.

In many ways, the *Rules of Professional Conduct* provide refuge from tyrannical clients. There are certain instances in which a lawyer cannot take on a client or continue an existing lawyer-client relationship. Rule 1.16 outlines such scenarios. KRPC Rule 1.16 (a) sets out in what circumstances a lawyer may not enter or remain in a lawyer-client relationship:

Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

1. the representation will result in violation of the rules of professional conduct or other law;
2. the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
3. the lawyer is discharged; or
4. the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent.

While some might view this rule as limiting an attorney's freedom of action much like the conflicts rules of Rules 1.7–1.10, there is another way to view it. This rule ensures that a client with naïve assumptions about a lawyer's fiduciary duty cannot force the lawyer to do his bidding.

Rule 1.16(b) confirms this by setting out those circumstances when a lawyer may withdraw from a representation permissively:

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if

1. the client has used the lawyer's services to perpetrate a crime or fraud;
2. a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
3. the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
4. the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
5. other good cause for withdrawal exists.

Rules 1.2(a) and 1.2(d) also provide shelter for a lawyer from the unreasonable demands of a tyrannical client. KRPC 1.2(a) states:

A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The critical phrase is "lawful objective." If the client demands that his lawyer undertake an unlawful objective, the lawyer need not—*and may not*—do so pursuant to Rules 1.2(a) and 1.16(b).

Likewise, Rule 1.3 requires that a lawyer exercise *diligence*, not zeal, as was formerly expected. Comment 1 to KRPC 1.3 states:

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.

When a client demands inappropriate, unwise, criminal, or unethical action from a lawyer, the lawyer is not bound by her fiduciary duty to take such action.

A lawyer may justifiably cite the *Rules of Professional Conduct* in her argument that there are limits to a client's unwise or unreasonable demands.



NEW AUTHORITY

The ABA's First Ethical Guidance on the Use of AI in Law Practice

ON July 29, 2024, the American Bar Association Standing Committee on Ethics and Professional Responsibility [issued Formal Opinion 512](#) regarding generative artificial intelligence (GAI). Given how recent the opinion is, we cannot offer a full analysis at this time. We simply want our readers to be timely aware that it has been issued, and we encourage every lawyer to read it. That said, we do not believe its contents will surprise regular *LEMR* readers, who will be familiar with the ample discussion we've devoted to this subject in recent years. For example, consistent with the majority of commentary to date, the opinion states:

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation. Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Look forward to next month's edition of the *LEMR* for more on ABA Formal Opinion 512.



ETHICS & MALPRACTICE RESEARCH TIP

New Articles from the *Current Index to Legal Periodicals*

1. Rebecca A. Delfino, The Deepfake Defense—Exploring the Limits of the Law and Ethical Norms in Protecting Legal Proceedings from Lying Lawyers, 84 Ohio St. L.J. 1067 (2024).

It is a sad comment on the state of the legal profession today that we must deal with lying lawyers.

2. Abigail L. Cahn-Gambino, Note, Under Pressure: The Effects of Dobbs on Lawyers Advising Abortion Providers, 36 Geo. J. Legal Ethics 597 (2023).

This article deals with ethical considerations for lawyers advising abortion providers.



A BLAST FROM THE PAST

James Fishman on Anthony Trollope

GENERALLY, this column consists of a quotation. This month, rather than a quotation, we provide a reference to [a splendid article](#) by James Fishman discussing how the great, nineteenth-century English novelist Anthony Trollope wrote about lawyers:

Fishman, James, A Random Stroll Amongst Anthony Trollope's Lawyers (October 19, 2020), available [at SSRN](#).



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