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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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

Institutional Censorship and Judicial Clerkship

In May of 2024, a group of federal judges sent a collective letter to the president of Columbia University and the dean of Columbia Law School. The letter announced that the judges would not prospectively hire graduates of the college and law school as judicial clerks because of the university's failure to control apparent widespread antisemitism at the institution. They wrote:

> As judges who hire law clerks every year to serve in the federal judiciary, we have lost confidence in Columbia as an institution of higher education. Columbia has instead become an incubator of bigotry. As a result, Columbia has disqualified itself from educating the future leaders of our country…

This letter followed similar letters from other federal judges to other universities experiencing similar protests and accusations of antisemitic actions; but it was the letter to Columbia that created significant controversy.

Since Justice Oliver Wendell Holmes began to appoint Harvard graduates to serve as his "law secretaries," the prestige of an appointment to serve as a judicial law clerk has grown. Given their extreme competitiveness, judicial clerkship appointments can be a significant boon to graduates' careers. Those who successfully complete a judicial clerkship will often be recruited by prestigious law firms offering large starting bonuses and plum assignments. It is often a "golden ticket."

With the increasing politization of the judiciary and the bar, a clerkship with a judge of the "right" political inclination may provide an automatic professional network. Thus, when thirteen federal judges announce they will not choose clerks from a particular college or law school, that is news. Indeed, this boycott of Columbia students made national media.

Why such newspapers as the *Washington Post* were bothered by this boycott is clear. The judges who penned the letter are politically conservative (many from Texas and appointed by President Trump). The protests and antisemitic acts at Columbia and other major universities have been over the plight of those people in Gaza who have been injured and killed in the Israeli attacks in response to the Hamas

atrocity in Israel on October 7, 2023. These protests have often become antisemitic and aimed not simply at the institution but at Jewish students and faculty, intending to drive them away. Obviously, such tactics are unacceptable not only to the judges, but also to many Americans.

Opposition to the protests has emerged as something of a partisan political position. Elements of the progressive left wing of the Democratic party have embraced the Palestinian cause, and some have made anti-Israel and even antisemitic statements while supporting these protests. This has led to opposition from members of the Republican right who support Israel.

The perception that these boycotting judges had made an overtly political statement via their letter to Columbia raised a question of whether, in so doing, they had acted unethically. This led to the filing of a disciplinary complaint against them. The *Washington Post* reported:

> One federal judge familiar with the letter, who spoke on the condition of anonymity to speak freely, said the purpose of the boycott is not to make "schools more conservative or more liberal," but to "make schools more like schools," and to address what these judges see as an unwillingness to accept diverse viewpoints.
>
> "I worry that we are teaching people, including in law schools, that we should not see the law as a neutral endeavor," the judge said. "We're starting to see the world in terms of red and blue, and we're teaching law students to view it [that way]."

And:

> Stephen Gillers, a judicial ethics expert at New York University's law school, shared similar concerns.
>
> "Judges do get to choose their law clerks, but they hold that power in trust and must exercise it fairly and based on merit," Gillers said in a statement. "The judges here, however, abuse their power when they punish Columbia graduates not for what they did but for where they went to school. This is a form of collective guilt that American law has always rejected."

The critical issue to those like Professor Gillers is whether these judges' letter constituted overt political action—in violation of the *Code of Conduct for United States Judges*. One fundamental tenet of the *Code* is that judges maintain, at all times, the neutrality of the judiciary and that judicial decisions will be based on the law alone and not political bias. The proposed boycott of Columbia clerkship applicants, it was argued, violated this fundamental notion of judicial impartiality and fairness. Canon 2(B) of the *Code* specifies:

> *Outside Influence*. A judge should not allow family, social, political, financial, or other relationships to influence judicial conduct or judgment. A judge should neither lend the prestige of the judicial office to advance the private interests of the judge or others nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

On the other hand, judges are encouraged to root out discrimination among applicable organizations. The commentary to Canon 2(B) states:

> When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

The concern with neutrality and impartiality would seem to be in some conflict. Could one read these provisions to the effect that anti-discrimination efforts put a limit on the need for impartiality in some cases not directly affecting court proceedings? Although their actions did not involve an organization in which the judges were members, did they not have a right to act to end what they saw as pervasive discrimination and institutional hostility?

On August 12, 2024, the Judicial Conference of the Eleventh Judicial Circuit issued a confidential order dismissing the misconduct complaints filed against two of the signatories to the boycott letter. The order gave no reason for doing so other

than stating that the Judicial Council had considered all relevant documents and authority.

Was this the correct decision? On the law and appropriate ethical rules, it almost certainly was. The signatory judges may have violated the spirit of the *Code*, but it would take an awkward construal of the plain language of Canon 2(b) to hold their letter to be a violation.

On the other hand, one must question the prudence of this letter, carrying with it what many might perceive as a threat to the autonomy of educational institutions. Keeping in mind the enormous power judges have over the lives of young lawyers, an act such as writing a letter to an educational institution that promises to boycott students from that institution from the judicial clerkship selection process is a dramatic political act. Such an act may punish not only the institution, but also individual students uninvolved with the protests or with antisemitic actions or rhetoric. Indeed, it is likely that a number of the Columbia students who would be applying for clerkships would be Jewish and pro-Israel. To hold students to account for actions with which they were not involved and which indeed may have hurt them seems illogical and antithetical to American legal and political ideals.

However, Judge William Pryor stated, in dismissing the misconduct complaint, that the threatened boycott was within the power of the judges:

> The complainant failed to present a basis for finding the judges engaged in misconduct. He said judges must consider a law clerk applicant's educational background to determine whether the individual will succeed in the job.
>
> As part of that consideration, judges are permitted to make reasonable conclusions regarding the value and quality of a school's educational program.

The decision of the Eleventh Circuit Judicial Council is likely to put an end to misconduct complaints against the federal judges who have boycotted schools in clerkship matters. The Fifth Circuit had already dismissed a similar complaint when the Eleventh Circuit acted. Some law students will simply not apply to clerk for these judges, which seems unfortunately limiting of their opportunities. And some students may choose not to attend Columbia for fear of the boycott. But, again, one wonders how many would make the choice of attendance on that basis.

The judges did make their point, although, given the Congressional hearings on charges that antisemitism is now capturing some universities, the resignation of senior administrators at some of these universities, and the widespread publicity about these problems, one really does have to ask whether the boycott letter had that much of an impact in the end.

NEW AUTHORITY

Nebraska Ethics Opinion 24-03

Nebraska Ethics Opinion 24-03 provides a useful and timely reminder for lawyers everywhere about how electronically filing an itemized statement for attorney fees may impact the requirement of client confidentiality. The question presented was:.

1. Do Nebraska statutes, Supreme Court Rules, and/or local court rules that require court-appointed counsel to electronically file motions with the lawyer's itemized billing statements (which include an itemization of the services provided to the indigent-client) for attorney compensation violate the Nebraska Rules of Professional Conduct, specifically §3-501.6, the rule of confidentiality?

2. Does a lawyer violate the Nebraska Rules of Professional Conduct, specifically §3-501.6, the rule of confidentiality, if the lawyer electronically files itemized billing statements, but redacts or otherwise makes efforts to not include confidential information?

In its answer, the Nebraska Supreme Court begins with a general discussion of the importance of lawyers maintaining confidentiality of client information. The questions arose from the shift to electronic filing in Nebraska and a local court rule that required lawyers to file itemized billing statements with the court. The lawyers'

questions arose from a seeming conflict between this rule and Nebraska ethics rule 3-501.6 (similar to the Kansas and Missouri rules).

After a discussion of Nebraska case law and specific rules on the filing of fee statements in the representation of indigent clients by court appointed counsel, the opinion looks to the intersection of ethical rules and court orders:

> … the Committee concludes that an attorney who electronically files an itemized billing statement concerning their representation of a court-appointed client does not, per se, violate the attorney's ethical duty of confidentiality, as the duty of confidentiality does allow some disclosures of information related to representation, at least to a limited extent. Ultimately, the Uniform Court Rules which set forth the procedure for compensation for an appointed attorney create a narrow exception to the duty of confidentiality.

Having said this, the opinion makes it clear that this is a very narrow exception and requires significant thought by lawyers:

> That being said, there are limits to that narrow exception, and it is critical that an attorney filing an itemized billing statement give heavy consideration to the duty of confidentiality and the client's interests. Rule §3-501.6 "permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified" and "no greater than the lawyer reasonably believes necessary to accomplish the purpose" Neb. R. Prof. Cond. §3-501.6, cmt. 3. Therefore, it is incumbent on counsel to act competently and diligently in limiting the disclosure of information, with extreme sensitivity to the protection of the client's interests.
>
> To be sure, the nature and extent of an attorney's task in determining what information is to be disclosed on an itemized billing statement in order to comply with the Rules, while also balancing the duty of confidentiality, will vary based on the facts of circumstances of each case…

The opinion goes farther and gives guidelines with commentary:

> (1) Information provided on the itemized statement should be minimal and general in nature…

> (2) Attorneys should employ competent methods and procedures to ensure itemized statements do not harm the client's interests…
>
> (3) Attorneys should take all protective measures necessary to ensure itemized statements do not harm the client's interests…
>
> (4) If an attorney receives an adverse ruling against their efforts to take protective steps, they should consider an appeal…
>
> (5) Attorneys are encouraged to keep more detailed notes about client representation and billing…

Readers should consult the commentary to each of these five guidelines because it provides further useful advice.

The opinion concludes by taking an excellent and balanced approach to the questions and the issues they raise:

> The Committee concludes that Nebraska statutes, Nebraska Supreme Court rules, and/or local court rules that require a court-appointed attorney to electronically file itemized billing statements to receive compensation do not violate an attorney's ethical duty of confidentiality. However, attorneys are cautioned to provide competent representation to their clients when filing an itemized statement – always mindful of the dangers that itemized billing statements can present, and always acting in a manner to protect the client…If information must be revealed on an itemized statement that the attorney feels is necessary to comply with the rules on compensation, but ultimately could be harmful to the client, the attorney should take all necessary steps to protect the information from disclosure, including filing the itemized statement with redactions, filing a motion to seal, and appealing adverse rulings when denied.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from the *Current Index to Legal Periodicals*

1. Sam Libby, *The Case for Proactive Bar Sanctions to Combat the Next Big Lie*, 102 Tex. L. Rev. 1331 (2024).

   This article raises important questions for all lawyers and judges.

2. Symposium, *The New AI: The Legal and Ethical Implications of ChatGPT and Other Emerging Technologies.* 92 Fordham L. Rev. 1797-1814 (2024).

   This symposium presents very important discussions by leading scholars of the interactions between AI and legal ethics. This should not be missed!

A BLAST FROM THE PAST

Mental Cowardice

"A lie is always an act of mental cowardice,

whereas intelligence is brave."

—Harold Nicholson, *Small Talk* 122 (1937).

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