

# *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

**T**HE *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

## If Santa Were a Lawyer

**T**HE month of December is a bit different from other months for most of us. As winter closes in upon us, the days get shorter, and the glorious colors of fall become a memory, many of us embrace the warmth and brightness of the holidays. We put up lights on our houses, we cook warming dishes, and we treat our children and grandchildren to holiday treats. Central to millions of families are the various stories we tell, and one such major story is that of Saint Nickolas or, as he is popularly known in this country, Santa Claus.

Santa has a long history. The original seems to date to the third century and a Syrian saint beloved for his charity and good works. By the Middle Ages, veneration of St. Nickolas spread across Europe. Santa apparently came to the United States with the Dutch colonization of New York and was named by Washington Irving as the patron saint of New York City. His popularity has grown ever since in art and children's tales. But Santa is not a mere human being. He brings toys to *good* children but lumps of coal to those who have misbehaved. He keeps a tally throughout the year and judges whether each of us has been naughty or nice. He has come to expect a treat when he comes down the chimney (a cookie or sweetmeat will never be disdained).

When we speak of Santa, we know what he does one day a year, the day when he delivers presents in his magical sleigh. But what of the other 364 days? We assume that he supervises his workshop at the North Pole, but the work is done by elves. It may well be that Santa has another job when not occupied in his toy making business. Perhaps, Santa is a member of the bar. And, if he is, then he must be subject to the *Rules of Professional Responsibility*. Let us imagine, as a holiday thought experiment, that Santa's Kingdom has adopted the *Kansas Rules of Professional Conduct* and that Santa is subject to those rules as a member in good standing of the North Pole Bar. What would that be like?

First, we must acknowledge that the *Rules*, while concentrating on a lawyer's professional activities, are not confined to these alone.

Most important in this respect is Rule 8.4:

It is professional misconduct for a lawyer to:

- a. Violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- b. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- c. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- d. engage in conduct that is prejudicial to the administration of justice;
- e. state or imply an ability to influence improperly a government agency or official;
- f. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- g. engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment 2 to Rule 8.4 explains:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Might Santa run afoul of Rule 8.4 on his Christmas rounds? We assume that Santa would never be guilty of any form of “moral turpitude,” given his reputation as a saint, or holy man. But would a disciplinary panel deem any of his actions an ill reflection upon his fitness as a lawyer and upon the legal profession as a whole?

Let us assume that the disciplinary panel chair is Mr. Ebenezer Scrooge, of Dickensian fame. He will be looking carefully at everything Santa does on Christmas. His first question will be whether his magic sleigh is properly licensed and whether he has paid the necessary personal property tax on it. Pursuant to Comment 2 to Rule 8.4:

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication.

Failure to license a magic sleigh certainly does not fit within the kinds of criminal offenses generally regulated by Rule 8.4. But what if Santa has not paid his personal property taxes? Comment 2 mentions income taxes but not property tax. While Mr. Scrooge may well be inclined to find a violation of Rule 8.4 here, it seems doubtful it would hold up.

There are, however, at least two other potentially serious violations of Rule 8.4. Santa is a citizen of his own kingdom at the North Pole. If he is not a United States citizen and does not have a visa to spend time in the U.S., then he is very likely in violation of U.S. immigration laws—which are strict and getting stricter. Indeed, Santa may well be an undocumented alien. As such, his presence in this country could constitute a serious crime. Would a violation of U.S. immigration laws constitute a serious crime reflecting upon Santa’s fitness to practice law? Mr. Scrooge may well have hit the jackpot on this one, and Santa may face sanctions.

The third potential violation of Rule 8.4 is also potentially serious, if not felonious. Santa does not knock on the doors of the homes he enters. Instead, he enters through the chimney secretly, when the children of the house are asleep in their beds. Does he have permission to do so, or is he housebreaking? If it is the latter, he is, again, in violation of the law, which could put him in ethical jeopardy. If an ordinary member of the bar was caught entering a stranger’s house through

the chimney, he would be arrested and prosecuted criminally, which almost always results in a disciplinary proceeding.

Finally, there is the matter of the cookies and milk. If they have been left by the hearth as a gift for Santa, there should be no problem. But what if Santa, not finding them by the fireplace, goes looking in the kitchen and takes nourishment without permission? We are back in the criminal realm! And a disciplinary charge pursuant to Rule 8.4 is soon to follow.

Perhaps there are some lessons we can learn here. First, Ebenezer Scrooge and others of his anti-Christmas inclination ought not serve on Santa's disciplinary panel. His obvious bias should at the least require recusal. Second, authorities might choose to decide that, when dealing with beloved saints and magical sleighs, the application of the *Rules* should be informed by the holiday spirit rather than the strict letter of the law and regulations so that peace, joy, and the laughter of children should prevail.

*Happy holidays.*



## NEW AUTHORITY

## North Carolina Bar Association Formal Opinion 2023-3

**O**n July 14, 2024, the North Carolina Bar Association issued Formal Ethics Opinion 2023-3, which, while rather narrow in focus, does open up interesting possibilities for law office management. The question presented dealt with a lawyer’s interest in installing a self-service vending machine in his office for the use of clients. The lawyer specialized in DUI cases, and the vending machine offered ignition locks for sale. This proposed arrangement raised four ethical questions:

1. May Lawyer permit Company to rent space in Lawyer’s law office and install the ignition lock self-service kiosk for Lawyer’s clients to use?
2. May Lawyer recommend Company to his clients for ignition lock services via the kiosk if Lawyer does not receive a rental fee from Company for the kiosk?
3. May Lawyer receive a referral fee from Company for each client that signs up for Company’s services via the kiosk in Lawyer’s office?
4. May Lawyer participate in Company’s efforts to market their product, which includes listing Lawyer’s name and contact information in the Company’s list of providers or affiliates?

To the first question, as to whether the lawyer could be paid a rental fee by the vending machine company, North Carolina replied that a lawyer could not because such a fee would provide a financial “windfall” to the lawyer—thereby giving the lawyer an incentive to recommend the machine’s product to his clients. That would create a non-consentable conflict of interest pursuant to Rules 1.7(a)(2) and 1.7(b). The Opinion later quotes an earlier North Carolina opinion about whether a lawyer may refer clients to an investment advisor:

A lawyer must exercise independent professional judgment on behalf of a client when referring a client to a third party for services related to the subject matter of the legal representation. See Rule 1.7(b).

If a lawyer will receive a referral fee from the third party, the lawyer's professional judgment in making the referral is or may be impaired. Written disclosure to the client will not neutralize the potential for the lawyer's self-interest to impair his or her judgment. Other ethics opinions are consistent with this holding. CPR 241 rules that a lawyer who sells insurance should not sell insurance to clients for whom he has done estate planning. Similarly, RPC 238 permits a law firm to provide financial planning services provided no commission is earned by anyone affiliated with the firm...

Lawyer must not allow his personal financial interest in receiving referral fees to interfere with his professional judgment. Rule 1.7(a)(2); see also Opinion #1. Here, the referral fees are tied to performance by Lawyer. If Lawyer does not refer enough clients to Company, Company will likely remove the kiosk from Lawyer's office and Lawyer will lose that additional source of income. Lawyer is, therefore, more likely to refer every DWI client to Company for ignition lock services even if the referral is not in the client's best interest. Because accepting a referral fee may impair Lawyer's professional judgment, it is a nonconsentable conflict of interest to accept a referral fee from Company...

What this prohibition on receiving rent for the machine means in practice is that a lawyer would be giving up space in his office that he pays for without any form of compensation. This might well, on its own, dissuade lawyers from permitting the machine to be installed.

The second question as to whether the lawyer may recommend the services provided so long as he does not receive compensation for doing so is "yes"—so long as, in the lawyer's independent judgement, it is in the client's best interest.

The answer to the third question as to whether the lawyer may receive a referral fee when a client signs up for an ignition lock is a resounding "no" because it is a non-consentable conflict under Rule 1.7 for the same reasons given in prohibiting the lawyer to take a rental fee for the self-serve kiosk.

The Ethics Committee's answer to the final question, as to whether a lawyer may assist the company to advertise its services, is consistent with its answers to the earlier queries. The Committee concluded that a lawyer may assist the company

in advertising and may have their name and contact information included in the advertising if the lawyer complies with North Carolina Rule 7.4, which requires:

Intermediary organizations are organizations that engage in “referring consumers of legal services to lawyers or facilitating the creation of lawyer-client relationships between consumers of legal services and lawyers willing to provide assistance.” Rule 7.4(a). When participating in an intermediary organization, a lawyer must make reasonable efforts to ensure that the intermediary organization’s efforts comply with the professional obligations of the lawyer, including the following:

- (1) The intermediary organization does not direct or regulate the lawyer’s professional judgment in rendering legal services to the client;
- (2) The intermediary organization, including its agents and employees, does not engage in improper solicitation pursuant to Rule 7.3;
- (3) The intermediary organization makes the criteria for inclusion available to prospective clients, including any payment made or arranged by the lawyer(s) participating in the service and any fee charged to the client for use of the service, at the outset of the client’s interaction with the intermediary organization;
- (4) The function of the referral arrangement between lawyer and intermediary organization is fully disclosed to the client at the outset of the client’s interaction with the lawyer;
- (5) The intermediary organization does not require the lawyer to pay more than a reasonable sum representing a proportional share of the organization’s administrative and advertising costs, including sums paid in accordance with Rule 5.4(a)(6); and
- (6) The intermediary organization is not owned or directed by the lawyer, a law firm with which the lawyer is associated, or a lawyer with whom the lawyer is associated in a firm.

**It is important to note that North Carolina Rule 7.4 has not been adopted in either Kansas or Missouri.**

North Carolina Formal Ethics Opinion 23-3 opens up interesting possibilities for the use of surplus space in lawyer offices. It does not permit using such space to provide new “profit centers” for lawyers, but it does hold out the possibility of providing additional, non-legal services to clients.



## ETHICS & MALPRACTICE RESEARCH TIP

### New Articles from *the Current* *Index to Legal Periodicals*

Beth Parker, *Legal Technology in the Real World: Why the ABA Section on Legal Education Should Create Minimum Standards for Legal Technology Competency*, 20 U. St. Thomas L.J. 230 (2024).

As technical competence becomes more and more important to lawyers, the profession needs to consider the extent to which law schools must assure that every graduating student meets minimum standards of knowledge. This will necessitate both an overhaul in the law school curriculum as well as action by the ABA in its accreditation standards.

The symposium in which this article appears is full of fascinating and important readings.

## A BLAST FROM THE PAST

### The Nature of Greatness

Not all great lawyers work in expensive offices, wear tailor-made clothing, and carry leather briefcases. Greatness in a lawyer is something far different and not to be judged by external appearances. Henry Whitney, a colleague of Abraham Lincoln who rode the circuit with him in Central Illinois in the 1830s, described him thus:

He was astride a small pony, borrowed that morning from Bowling Green; his long legs nearly touched the ground, the saddle was substantially worn-out, and all that he possessed on earth was about seven dollars in cash in his pocket; in his saddle bags a copy of Blackstone, a copy of the compiled laws of Illinois for 1833, three volumes of session laws, two small volumes of miscellaneous books and a few articles of underwear, in harmony with his ungainly suit which protected and absorbed his ungainly person.

Henry Whitney, *Life on the Circuit with Lincoln* 15 (Boston 1892)



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