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

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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 Importunate Client

Several months ago, LEMR featured an article on the ethical and practical problems of the "tyrannical client," which garnered some interest. This month, we follow up with a piece on the "importunate client." An importunate client is one who feels compelled to be in constant contact with his or her lawyer, seeking information about his or her representation. Besides being annoying, such importunateness can be quite disruptive to the lawyer's life. How should a lawyer deal with such clients?

Lawyers are their clients' agents and fiduciaries. The essence of the lawyer-client relationship is the trust the client must have in his lawyer. The importance of trust underlies and justifies many of the ethical rules that regulate the relationship. For instance, the rules concerning the confidentiality of client information under Rule 1.6 justify strict lawyer confidentiality on the ground that a client must have total confidence that his lawyer will not damage him through information disclosure.

There are a number of aspects to consider when dealing with an importunate client. First, of course, every lawyer has an ethical duty to communicate with her client pursuant to Rule 1.4. Kansas Rule of Professional Conduct 1.4 reads:

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

b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 2 to KRPC 1.4 reads:

> Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail.

> The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

When dealing with a difficult client who demands constant attention and feedback, it is important to remember the phrase "reasonable client expectations." At a certain point, constant demands for attention and repeated information that has already been provided ceases to be reasonable. Whether caused by the client's anxiety or their need to control the representation, even if the client's actions do not constitute bullying, the behavior may exceed the threshold of reasonableness.

Indeed, at some point, an importunate client's actions may raise the lawyer's obligation under Comment 2 to "act in the client's best interests." Why? Because a lawyer is entitled to charge for her time, so long as it actually expended on the client's behalf. Constant telephone calls, for instance, require the lawyer to devote chargeable time to these calls, even if the lawyer feels it is not necessary to the client.

What does a lawyer do when confronted with such a scenario? There are a number of possibilities. First, lawyers might consider adding a few lines to the standard engagement letter used with clients that explain to a client that constant, unnecessary communications should be avoided and that all such communications will be billed to the client. Indeed, lawyers might even consider imposing a surcharge at a stated level of unnecessary, arguably harassing communications. KRPC 1.5(a)(2) states that the following should be considered in determining a fee's reasonableness:

> …the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer…

A lawyer might well argue that a client who persists in unnecessary and unreasonable time demands on a lawyer, especially once warned of this, should pay a higher fee for such use of a lawyer's time. However, this may be a somewhat controversial technique and so should be used with caution.

Beyond including a provision in an engagement letter, a lawyer confronted by a needy, importunate client should calmly explain to the client that such behavior is both expensive and counterproductive for achieving the goals of the representation. If such an explanation, verbally or in writing, does not effectuate changes in the

client's behavior, what should the lawyer do next? This question is particularly critical if a client chooses to have unnecessary contact with a lawyer outside of business hours or at her personal residence or a similarly inappropriate location. For instance, if a client insists on speaking to a lawyer in a church or synagogue, the lawyer would be quite justified in telling the client that, absent an emergency, such contact should be limited to her office during regular business hours.

When I was a very young lawyer, attending a party on a Saturday night, I was cornered by a would-be client who insisted I give him legal advice then and there. I refused and told him to call my office on the following Monday. I felt wholly justified in doing so.

In extreme cases, a lawyer may find an importunate client so difficult that she feels the necessity to withdraw from the representation entirely. Rule 1.16(a) would not require withdrawal. But KRPC 1.16(b), which lists those situations in which a lawyer may withdraw from representation, states:

> 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.

The key provision here is KRPC 1.16(b)(4), which permits withdrawal when "the representation . . . has been rendered unreasonably difficult by the client."

However, any lawyer planning to invoke KRPC 1.16(b)(4) may find herself having to convince a reviewing judge of the necessity for withdrawal from representation pursuant to KRPC 1.16(c):

> When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Thus, a lawyer seeking to terminate his or her representation of an importunate client should be prepared for the necessity of justifying and documenting why the client's actions have transcended mere annoyance and reached the level of "difficulty" if the lawyer hopes to be permitted to withdraw. Making such a request and having it turned down by the judge could make the situation worse, empowering the client to believe that his actions have been judicially approved.

All things considered, the problems presented by an importunate client may exceed, in number and kind, the problems that a tyrannical client poses because there is less discussion of importunate clients in the *Rules of Professional Responsibility*. The best way to avoid such problems is to attempt to avoid taking on such difficult clients. (This applies to clients who are not disabled. Disabled lawyer-client relations require close examination of Rule 1.14.) This may be best accomplished by learning about a would-be client before agreeing to the engagement in the first place.

NEW AUTHORITY

Conflicts & Family Government

United States Presidents have the right to appoint thousands of individuals to positions in the executive branch and its agencies and departments, and the vast majority of these appointments do not require congressional advice or consent. Presidents have often appointed friends and family members to such positions. While such appointments may draw criticism from some commentators, the practice has been going on for decades.

In the case of lawyers and judges, however, the appointment of related parties may raise the possibility of conflicts of interest that violate legal and judicial codes of ethics. Bloomberg Law recently drew attention to this issue in an article discussing the appointment of Chad Mizelle as the Justice Department's chief of staff.[1]

Mizelle is not related to President-elect Trump, so the ordinary critique is not at issue. Instead, the concern arises from the fact that he is married to Judge Kathryn Mizelle of the United States District Court for the Middle District of Florida.

Because Judge Mizelle is governed by the Code of Conduct for United States Judges, she would be required to recuse herself from cases challenging any policy her husband created or in which his interests could be substantially affected by the outcome of the proceeding—among other scenarios. She would also have to avoid discussing ongoing Justice Department matters with her husband if they were pending in her courtroom.

According to Bloomberg, however, analysts believe that the likelihood of actual conflicts is low:

> Still, judicial ethics experts predicted the appointment isn't likely to spark many conflicts of interest, given that challenges to Justice Department policies aren't generally litigated in Florida.

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1 Suzanne Monyak & Ben Penn, *Mizelles Must Navigate Ethics of Dual Trump Appointed Roles*, Dec. 24, 2024, https://news.bloomberglaw.com/us-law-week/mizelles-must-navigate-ethics-of-dual-trump-appointed-roles.

> The chances that Chad Mizelle's work would require his wife to recuse from cases involving the department "are slim," said Stephen Gillers, a professor at the New York University School of Law, who studies judicial ethics.
>
> The chief of staff is unlikely to be involved in civil or criminal matters in Tampa, where the judge is based. And while Chad Mizelle will be involved in creating policies, it is "highly improbable" challenges to those policies would land in Judge Mizelle's courtroom, Gillers said. However, if they did, the judge would need to recuse, he said.
>
> Green also said that the "mere fact" that Mizelle would have a supervisory role at the department doesn't mean he's in charge of cases in the federal courts, he said.

While there is no reason to believe that the Mizelles and other professional couples in public service will not adhere strictly to the ethical responsibilities placed upon them, one can also be certain that they will face increased scrutiny in any case in which the possibility of a conflict appears possible.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *the Current Index to Legal Periodicals*

The *Hofstra Law Review* has done the profession and the public a great service by publishing a symposium on United States Supreme Court ethics in Volume 52, Issue 3 (Spring 2024). The list of articles is below.

- Theo Liebmann, *Introduction: Accountability and the Future of the Supreme Court*, 52 Hofstra L. Rev. 551 (2024).
- Jennifer Ahearn & Michael Milov-Cordoba, *The Role of Congress in Enforcing Supreme Court Ethics*, 52 Hofstra L. Rev. 557 (2024).
- James J. Sample, *The Supreme Court and the Limits of Human Impartiality*, 52 Hofstra L. Rev. 579 (2024).
- Eric J. Segall, *Recency Bias and the Supreme Court: The Problem Is the Institution, Not the People Who Sit on It*, 52 Hofstra L. Rev. 617 (2024).
- Brie Sparkman Binder & Debra Perlin, *Americans and the Court: How Public Outcry Has Influenced the Court to Address Judicial Ethics Crises*, 52 Hofstra L. Rev. 631 (2024).
- Louis J. Virelli III, *The Underappreciated Virtues of the Supreme Court's Ethics Code*, 52 Hofstra L. Rev. 657 (2024).

A BLAST FROM THE PAST

Lawyer Integrity

Never misrepresent, falsify, or deceive;

have one rule of moral life; never swerve from it,

whatever may be the acts or opinions of other men.

—J.L. Nichols, *The Business Guide: Or, Safe Methods of Business* 41 (1894).

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