HOT TOPICS *in legal ethics*

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What is happening around the country in the world of legal ethics? "A lot" is the short answer. For this month's column, I thought you might enjoy a brief discussion of some current hot topics.

Confidentiality

Have you followed the dispute between the Securities and Exchange Commission and Covington & Burling? The SEC is seeking through an administrative subpoena the names of 298 publicly traded clients of the law firm to determine whether a 2020 cyberattack against the firm resulted in a leak of non-public information that was subsequently used in illegal trading. Eighty-three law firms filed an amicus brief opposing this disclosure under both attorney-client and confidentiality grounds. As of this writing, the parties were at an impasse, with enforcement up to a federal judge in the District of Columbia.[1] Remember, your duty of confidentiality under the ethics rules is broader than the attorney-client privilege doctrine; confidentiality covers all "information relating to the representation of a client" under Rule 1.6(a), Minnesota Rules of Professional Conduct (MRPC). A client's name and the fact of the representation falls within the scope of this rule, unless disclosure falls within an enumerated exception in Rule 1.6(b), MRPC (of which there are several).

Artificial intelligence

How various forms of artificial intelligence will impact the practice of law is obviously a hot topic. Attorneys in New York are learning the hard way that you cannot use ChatGPT to write your brief or find cases for you because the product will make up cases that do not exist but apparently look great on paper. Using ChatGPT, lawyers in the case of *Mata v. Avianca* cited six cases that were, apparently unbeknownst to them, wholly fictitious in a submission to the court. As this is written, an order to show cause why the lawyers should not be sanctioned is in process.[2] While this case is getting a lot of press, I know that this same thing happened in March in Minnesota. This should surprise me, but it does not.

Your duty of competence under Rule 1.1, MRPC, requires you to understand the benefits and risks of using technology in your practice.[3] It should also go without saying that you need to read the cases you cite to the court, and that you are responsible for having measures in place to ensure that those who assist you in creating work product also understand and comply with the ethics rules.[4]

Nonlawyers permissibly practicing law

As many of you know, Minnesota is currently conducting a pilot program that allows approved paralegals to provide broader, specifically enumerated legal services (under the supervision of a lawyer) in certain types of cases. Many states have implemented or are implementing similar programs. This effort began many years ago in Washington state—which recently sunset its program due to costs while allowing those already licensed to continue—and has grown to include Utah, Arizona, Oregon, and New Hampshire, in addition to Minnesota. Several other states have programs in process (Colorado, Connecticut, New Mexico, New York, North Carolina, and South Carolina), while some states have stopped efforts that were afoot (California and Florida). The structure of permissible programs differs depending on the jurisdiction, but they are alike in allowing trained nonlawyers to provide legal services under specific circumstances that would ordinarily be prohibited as the unauthorized practice of law.

As part of these efforts, jurisdictions are again asking how to define the practice of law, and what can and should be allowed by nonlawyers—including by non-humans, given the growing sophistication of artificial intelligence. Most people cannot afford lawyers, and many legal problems are not complex but do require specialized knowledge. Where these lines should continue to be drawn to protect the public is a particularly hot topic.

Due diligence on clients

The American Bar Association Standing Committee on Ethics and Professional Responsibility will be proposing a rule change at the ABA Annual Meeting in August to amend Model Rule 1.16 to incorporate an express ethical duty to "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation" consistent with the ethics rules.[5] This proposed rule change is the result of a years-long effort to address concerns by the Treasury Department and others that lawyers may be unwittingly facilitating money-launder-

ing or other illegal conduct through the provision of legal services. While you have never been able to ignore red flags that your legal services were being used to facilitate unlawful conduct, the purpose of this rule change is to make the duty of inquiry part of the black-letter law.

Expanding multijurisdictional practice

The ABA is also currently studying proposed changes to Model Rule 5.5 relating to multijurisdictional practice in an effort to expand the ability of lawyers to practice across state lines. Since I have been in my position (and I am sure before then), there have been efforts to push licensure that is essentially nationwide in scope (once licensed in one jurisdiction, you are free to practice in any jurisdiction, except if special requirements exist to appear in court). While certainly more convenient for counsel, no one has yet figured out how to address the issues such a proposal would cause in the absence of a national regulatory scheme—which does not exist and cannot exist in a system where each state's Supreme Court (and in some instances, legislatures) regulates the profession in their jurisdiction. It will be interesting to see where this effort leads.

Frivolous claims and advocacy

Lawyers involved in challenging the November 2020 election have been the subject of public discipline proceedings in numerous jurisdictions, including but not limited to Rudy Giuliani (New York and D.C.), Jenna Ellis (Colorado), John Eastman (California), L. Lin Wood (Georgia), and Sidney Powell (Texas). More cases are likely to follow. These cases are not particularly novel in that it has long been ethically prohibited under Rule 3.1, MRPC, to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." What is more challenging, however, is the context in which these cases arise—extreme partisan politics. One commentator at a CLE I attended suggested regulators need to take care not to politicize discipline or penalize "aggressive advice." There is no doubt that the courts and discipline authorities will continue to debate where the line should be drawn between zealous advocacy and disciplinable conduct: a hot topic indeed!

Trust account schools and other proactive programs

Many jurisdictions, whether through their discipline offices or client security funds, are expanding efforts to assist lawyers in ethically meeting their trust accounting obligations by creating and expanding trust account schools. At a regulators' roundtable I attended in early June, several jurisdictions reported increasing their trust account training, such as Mississippi, California, and Ohio, and others have similar efforts in process. I hope that Minnesota will join this growing list in the next year. Other states are expanding efforts to provide, and in some cases make mandatory, practice-essential training or ethics schools, particularly for solo practitioners. Although resource-intensive, such programs are in my opinion a good value proposition for both lawyers and the clients we serve. It is exciting to see these proactive efforts continue to gain traction in jurisdictions.

Conclusion

This is a small sampling of topics that have the attention of legal ethics professionals. Another hot topic of interest to me that I will cover in a future column is the role of the First Amendment in attorney regulation, particularly as applied to attorney social media use. For some, such topics are beyond boring—but please know that a lot of ethics nerds are thinking deeply about these and other topics so that you do not have to! ▲

NOTES

[1] *Security Exchange Commission v. Covington & Burling, LLP*, Court File No. 1:23-mc-00002-APM (D.D.C. filed 1/10/2023).

[2] *Mata v. Avianca, Inc.*, Court File No. 1:22-cv-01461-PKC.

[3] Rule 1.1, MRPC, Cmt. [8] ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.")

[4] Rules 5.1, 5.3, MRPC (requiring those with managerial and direct supervisory authority to take "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that" lawyers and non-lawyer's conduct conforms to the rules and is compatible with the professional obligation of the lawyer).

[5] ABA Resolution 100.