

ETHICS NEWS

from around the country

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SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

The National Organization of Bar Counsel (NOBC) is a professional organization dedicated to enhancing the effectiveness of lawyer discipline counsel. Formed in 1965, before most states even had professional discipline counsel or operations, NOBC includes representatives from 75 state, federal, and international jurisdictions. The Office of Lawyers Professional Responsibility has long been a member of this valuable organization, and I and another lawyer in the Office recently attended the annual NOBC conference. I thought you might be interested to learn a bit about what is happening around the country in the area of attorney ethics.

Rule changes

Many jurisdictions are considering or have passed rule changes. While rule changes are always in play across the country, the volume of changes being pursued across various jurisdictions felt notable to many attendees. For example, effective July 1, 2022, Colorado significantly modified its Rule 3.8(d), relating to obligations of a prosecutor. Colorado's Rule 3.8(d) now states:

(d) timely disclose to the defense all information known to the prosecutor, regardless of admissibility, that the prosecutor also knows or reasonably should know tends to negate the guilt of the accused or mitigate the offense, or would affect a defendant's decision about whether to accept a plea disposition, except when the prosecutor is relieved of this responsibility by statute, rule, or protective order of the tribunal. This information includes all unprivileged and unprotected mitigation information the prosecutor knows or reasonably should know could affect the sentence. A prosecutor may not condition plea negotiations on postponing disclosure of information known to

the prosecutor that negates the guilt of the accused. A prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists by making timely disclosure requests to agencies known to the

prosecutor to be involved in the case, and alerting the defense to the information if the prosecutor is unable to obtain it.¹

Florida recently expanded its emergency suspension rules to more directly address incapacity unrelated to specific misconduct, an issue Minnesota should examine closely in my view.² Like Minnesota, Georgia is looking at adopting the ABA model rules to streamline lawyer advertising, and similarly Tennessee has adopted several advertising rule changes.³ Louisiana, on the other hand, has gone in the opposite direction, expanding its lawyer advertising rules significantly, including the added requirement that lawyer advertisements, unless exempt, be approved by Louisiana's Professional Conduct Committee.⁴ Kentucky amended its rules to eliminate private reprimands, making all attorney discipline public.⁵ Missouri adopted a new requirement that lawyers convicted of any felony and certain misdemeanors have a duty to self-report their conviction to the Office of Discipline Counsel.⁶

The American Bar Association's Standing Committee on Ethics and Professional Responsibility is considering significant changes to Rule 5.5 relating to multijurisdictional practice. This review was prompted in part by a proposal from the Association of Professional Responsibility Lawyers (APRL) toward a more "national" license, and in part due to changes in the profession prompted by remote practices that cross jurisdictional borders.

The ABA is informally soliciting feedback on a working draft that would allow a lawyer licensed to practice in one state/jurisdiction to practice in any other state/jurisdiction as long as the lawyer discloses in writing to the prospective client where the lawyer is actually licensed and that the lawyer is not actively licensed to practice in the jurisdiction, and complies with any *pro hac* or other requirements of the jurisdiction. Multijurisdictional practices are often challenging because each state regulates the practice in their state, as do other "jurisdictions" (such as federal or tribal jurisdictions). As you might expect, lots of regulator concerns were expressed over a proposed draft rule that flips the licensing paradigm. This is only a small sampling of rule changes or proposed changes that were discussed, with lots of rule-making activity across the country.

COUNSEL FROM OKLAHOMA SHARED THE STARTLING STATISTIC THAT THERE ARE MORE LICENSED LAWYERS OVER 80 THAN UNDER 30 IN THE STATE!

High-profile cases and complaints

Several jurisdictions discussed the challenges arising from the volume of higher-profile cases they are seeing. Many arose from the 2020 election (matters concerning Rudy Giuliani, L. Lin Wood, and Sidney Powell, to name a few), but some of this is part of a trend that started before 2020. One legal scholar who presented at the conference calls it “The Ethics Resistance”⁷ to denote the use of legal ethics complaints to hold lawyers to account for ethics failures in their professional capacity that affect the nation or the public as a whole rather than a specific client. Examples in this category include complaints against the former Attorney General William Barr or Kellyanne Conway, a special assistant to former President Donald Trump.

High-profile cases have not been limited to election or political issues. For example, South Carolina’s legal community (and general population) has had one surprise after another due to the many criminal charges lodged against attorney Alex Murdaugh. Mr. Murdaugh’s alleged crimes run the gamut from allegedly stealing money from clients and money-laundering with a client in a painkiller scheme to a recent indictment for the 2021 murders of his wife and son.

The South Carolina Supreme Court disbarred Mr. Murdaugh on July 12, 2022, having previously suspended him in September 2021. In its order, the court noted that since September 2021, Mr. Murdaugh “has been indicted on more than eighty criminal charges arising from various ongoing investigations. Additionally, Respondent has admitted in various court proceedings and filings that he engaged in financial misconduct involving theft of money from his former law firm; that he solicited his own murder to defraud his life insurance carrier; and that he is liable for the theft of \$4,305,000 in settlement funds.”⁸ Mr. Murdaugh did not contest his disbarment.

Changing demographics and operations

Counsel from Oklahoma shared the startling statistic that there are more licensed lawyers over 80 than under 30 in the state! This is a stark example of the “aging” that has been widely discussed in recent years as fewer new lawyers

join the profession. Illinois reported that over the last several years, annual complaints have dropped by approximately 40 percent, leading to a similar reduction in regulatory personnel. Many other jurisdictions reported a return to complaint filings similar to pre-pandemic levels, but still modestly down from prior-year highs, similar to Minnesota. A common theme of the conference was staffing turnover, with many jurisdictions experiencing a lot of turnover and most experiencing the challenge of hiring and training new employees over the pandemic. And it looks like Hawaii has become the first lawyer regulation office in the country to go fully remote and fully digital.

Conclusion

As you can see, a lot is happening around the country in attorney ethics. Before accepting this job in 2016, I had no idea what an interesting and dynamic area of law professional regulation is, and it remains interesting to me how much the jurisdictions differ and yet how much the jurisdictions are the same. If you have questions regarding your ethical obligations, please call our ethics help line at 651-296-3952, or visit our website at www.lprb.mncourts.gov. ▲

NOTES

- 1 Rule 3.8(d), Colorado Rules of Professional Conduct, Amended and Adopted by the Court, En Banc, 2/24/2022, effective 7/1/2022.
- 2 Rule 3-5.2, Rules Regulating the Florida Bar (RRTFB), effective 8/1/2022.
- 3 Tennessee Supreme Court Rule 8, Rules of Professional Conduct 7.1-7.5, effective 9/1/2021.
- 4 Rules 7.1-7.10, Louisiana Rules of Professional Conduct, with amendments through 1/1/2022.
- 5 Kentucky Supreme Court Rule 3.380, effective 4/1/2022.
- 6 Missouri Supreme Court Rule 5.21(a), adopted 5/31/2022, and effective 1/1/2023.
- 7 Brian Sheppard, *The Ethics Resistance*, 32 Georgetown Journal of Legal Ethics 235 (2019).
- 8 Order of the Court dated 7/12/2022, *In the Matter of Richard Alexander Murdaugh*, Respondent, Case No. 2022-000812.