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## Ethics Corner: Ethical Issues In Representing Kentucky News Media Outlets

By Jon L. Fleischaker and Jeremy S. Rogers

In whatever area of law one practices, ethical questions constantly arise, and it's important to give ethics questions the consideration that they deserve. As lawyers, we look to the Rules of Professional Conduct as the starting point for analyzing ethics questions, and we often take the opportunity to mull over the rules and their commentary as well as to consult with our colleagues.

But what happens when there simply is not time to reflect? What happens when your client is a news media organization that needs advice right now because it goes on the air or goes to press in an hour? We represent a variety of media outlets, and this is sometimes the situation in which we find ourselves. News is a fast-paced business, and those who give legal advice to news media clients must keep up — both with the legal issues affecting news media and also with the legal ethics issues that govern our profession.

In addition to numerous print, broadcast and Internet companies we represent, we are also general counsel to the Kentucky Press Association and operate a “hotline” for that organization. Any of the KPA's members (virtually every newspaper in the state) can call the hotline for legal advice about any of the myriad legal issues that arise in the daily operation of a newspaper. A small representative list of the kind of questions we regularly field from our clients would include:

- ◆ Could you take a look at this news story or letter to the editor and let us know our exposure for defamation or invasion of privacy?
- ◆ What can we do about the denial of our Open Records Act request?
- ◆ A public agency wants to close its meeting to the public. What can we do?
- ◆ What are the requirements for publishing a particular legal notice advertisement?
- ◆ Our reporter has been subpoenaed to testify about a case upon which she has reported, what should we do?

ing upon the underlying factual circumstances. While each of these questions appears to deal with legal issues affecting the news outlet itself, one of the first things we have to do is to determine whether we're speaking as counsel for the news organization or as a source for a news story. While the two are not always mutually exclusive, it helps to know whether you are giving your client legal advice or whether you are formulating a quote for tonight's broadcast or tomorrow's front page.

### *Am I Your Lawyer or A News Source?*

The closest the Rules of Professional Conduct (Kentucky's Supreme Court has adopted the Kentucky Rules of Professional Conduct, which are patterned after the American Bar Association's Model Rules of Professional Conduct. *See* Ky. Sup. Ct. Rule 3.130. ) come to addressing this issue is Rule 1.2, which deals with the ‘scope of representation,’

- (a) A lawyer shall abide by a client's decision concerning the objectives of representation, ... and shall consult with the client as to the means by which they are to be pursued. ...

The bottom line is that you have to talk to your client and agree upon what the client should expect of you. Just as with any client, defining the scope of the representation is necessary before you can begin to comply with your other ethical duties.

Consider this hypothetical: A newspaper reporter calls you and says, “Our city council went into closed session last night to discuss changes to a smoking ordinance; can they do that in closed session?” After you and your client determine the scope of representation, the ultimate response to the reporter's question might vary significantly, depending in part upon the ethical implications, as shown in the following three examples.

1. After some follow-up questions, you determine that the reporter is simply calling to get a quote from a member of the bar who regularly practices Open Meetings Act cases for use in a story about the closed session. This is not about you being *the* lawyer for the newspaper; this is about you being *a* lawyer whom the reporter knows. You are the source who happens to be a lawyer. Here, the touchstone of your ethical duties is simply that of ‘truthfulness in statements to others’ under Rule 4.1.

Ethical issues can crop up in any of these questions, depend-

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Your answer to the reporter's question might be something worthy of a sound bite, perhaps a statement about which of the exceptions to the open meetings law could arguably apply.

2. What if the hypothetical reporter was excluded from the meeting and is calling to discuss whether the newspaper should pursue a complaint against the city council? This is a pure attorney-client situation, and the ethical landscape is different. Ethically, you are required to explain the matter to the extent reasonably necessary to permit the client to make an informed decision about whether to pursue the complaint. *See* Rule 1.4(b). You also need to determine whether the newspaper or the reporter is your client (almost always it's the newspaper). *See* Rule 1.13 (discussing organization as client). Also, you are bound by the rule of confidentiality (Rule 1.6) and the rules related to conflicts of interest (Rules 1.7 - 1.11). In addition, in your capacity as advisor of the client with respect to whether to pursue a complaint against the city council, you might also take certain political or economic factors into consideration (Rule 2.1). With these ethical considerations in the background, your response to the reporter's question will likely be much more complicated and involved than a simple quote for a news story.

3. There is also a third, hybrid, scenario continuing under our open meetings hypothetical. What if the newspaper has decided to pursue an open meetings complaint, and the reporter needs a quote from the newspaper's attorney for the story? Here, there is an attorney-client relationship, but your audience is not your client; your audience is your client's readership. Contrary to the confidentiality provisions of Rule 1.6, you do not expect the full content of your communication with the reporter to be confidential in this scenario. At the same time, you must remember that the newspaper, not just the reporter, is your client. *See* Rule 1.13. In answering the reporter's question in this scenario, you are not likely to be wearing just your "counselor" hat but also your hat as a zealous advocate on behalf of your client. *See, e.g.,* Rule 3.1. Thus, your response to the reporter's question may be similar to the response in the first scenario, but with a bit more advocacy. Instead of giving an objective description of the open meetings law and which exceptions to open meetings could arguably apply, you might give all the reasons why the meeting should have been open and why the newspaper's position is that the city council violated the open meetings law.

***Trial Publicity***

One of the more perplexing of the Rules of Professional Conduct presents special considerations for the lawyer representing a news media client. That is the rule on trial publicity, Rule 3.6, which deals with the tension between fair trial and free press. Model Rule 3.6 provides,

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

News media clients are in the business of disseminating information by means of public communication. Just as with determining whether you are the lawyer or the news source, in the course of representing a news media client in litigation, it is important to have an idea as to when your client intends to share your advice or other statements with its readers or viewers.

Turning back to our open meeting question hypothetical, Model Rule 3.6 would only apply to the third scenario where the lawyer is publicly commenting as counsel for the newspaper on an ongoing matter involving the newspaper. This is because, as Comment 3 to Model Rule 3.6 recognizes, "the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small," as such, Model Rule 3.6 "applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates."

In Kentucky, however, the issue is further complicated by the fact that, unlike Model Rule 3.6, the scope of Kentucky's Rule 3.6 is not limited to lawyers who have participated in the investigation or litigation of a matter. Kentucky's Rule 3.6 provides:

(a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a

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substantial likelihood of materially prejudicing an adjudicative proceeding.

Kentucky's Rule 3.6 also incorporates the language from Comment 5 of the Model Rule which lists numerous kinds of statements that will ordinarily have a prejudicial effect. The list is expansive, and includes exactly the kinds of things that most reporters would want to know:

(b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

***Ky. Sup. Ct. Rule 3.130(3.6(b)).***

Unlike the Model Rule, Kentucky's Rule 3.6 might also apply to the first scenario of our open meetings hypothetical where the lawyer is commenting as a news source without actually being directly involved by representing a litigant or potential litigant in the matter.

Despite their differences in scope, Model Rule 3.6 and Kentucky's Rule 3.6 both create an essentially subjective approach to balancing the right to a fair trial and the right of free expression that can only be addressed on an *ad hoc* basis.

***Does Negative Publicity Create a Conflict of Interest?***

Aside from publicity's potential effect on an opposing litigant's interests, a lawyer representing news media clients must also consider that publicity can have significant effects on the lawyer's other clients. Does advising a news media client about a story or editorial concerning another of your clients create a conflict of interest?

The critical question to ask is whether advising the newspaper in the situation would constitute a concurrent conflict of interest, a representation "directly adverse" to the other client. Rule 1.7(a) (emphasis added). The general rule on conflicts of interest is:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client.

Rule 1.7(a). In addition, there is a concurrent conflict where representation of the client may be materially limited by the lawyer's responsibilities to another client. *Id.* This kind of determination, however, is necessarily specific to the clients and to the situation. The relationship with most clients could be adversely affected upon finding out that their lawyer helped a news media organization create negative publicity about the client. More than likely, the client is not going to consent to its lawyer doing so. At the same time, the news media client may not want the other client to know in advance that a particular story is coming out in tonight's broadcast or tomorrow's edition.

So what can you do when you are given a news story that goes to press or goes on the air in a matter of hours or less? There is no time to undertake the kind of full-scale conflict of

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interest check that most law firms do. You may not even know whether other lawyers in your firm represent the subject of a news story. Model Rule 1.7 contains 35 separate comments that attempt to illustrate the complexities of the rule against conflicts of interest, but none of them addresses this situation. Comment 10 to Kentucky's Rule 1.7 perhaps best sums up that, "Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. ... The question is often one of proximity and degree." To put it simply, in this situation you just have to do the best you can under the circumstances.

Take the following hypothetical for example. A television news director calls you at four o'clock in the afternoon and asks you to review a script for a story in tonight's broadcast. The story is about a whistleblower who has come out with serious allegations of kickbacks being paid by Corporation X to the government in exchange for lucrative contracts. Your law firm represents Corporation X on various matters but not on the whistleblower case and not with respect to the government contracts.

It may be reasonable to determine under Rule 1.7(a) that the advice to the news media client simply won't be directly adverse to the existing client. With this, and the scope of representation under Rule 1.2 in mind, the best practice in this scenario may be to say to the news media client something like, "It does not appear that X is adverse to you here, but I need you to understand that my firm also represents X."

But what about indirect conflicts under Rule 1.7(a)(2)? The so-called "material limitation" conflict is much more difficult to assess. Rule 1.7(a)(2) provides that a concurrent conflict of interest also includes the situation where,

[T]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

This kind of indirect conflict is inherently subjective and depends upon the nature of the situation, the outlook of the clients involved, and upon the lawyer and law firm. Comment 8 to Rule 1.7 provides that "[t]he mere possibility of subsequent harm does not itself require disclosure and consent." Instead, Comment 8 points out that "[t]he critical questions are the likelihood that a difference in interests will eventuate and, if it

does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Thus, with our hypothetical in mind, the remote possibility that Corporation X might assert a defamation or similar claim against the television station does not necessarily create a material limitation. Rather, the lawyer is left to make a judgment as to how remote that possibility really is. This, however, resembles an exercise in circular logic because a primary job of the lawyer advising the television station in this situation is to minimize the television's exposure to any such claim.

Just as likely, the lawyer advising the television station does not also directly represent Corporation X, but another lawyer in the firm does. If you believe that there may be a direct or indirect conflict, Rule 1.7 provides that you can still undertake the representation if you believe that the representation won't affect the client relationships and each client consents, but there is no time to reach the other lawyers in your firm who represent Corporation X or for them to reach their contacts at Corporation X. Nor is there time to fully assess whether there is an indirect imputed conflict as described in Rule 1.10. In this respect, the best practice may be to contact your law partners who represent Corporation X and let them know what has happened. If necessary, your firm can erect a "Chinese wall" to segregate any pertinent information relating to the representation of Corporation X and the news media client.

***Waiving Rule 4.2***

Another unique ethical aspect of representing news media clients arises under Rule 4.2:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Ordinarily, lawyers will very rarely consent to permit opposing counsel to discuss a case with their clients. In the news media context, however, this rule is often waived or ignored

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because news media clients need to be able to speak with the adverse lawyers when reporting on the proceedings, and those lawyers want to and do communicate directly with the client.

A prime example occurred recently where our news media client was awarded a partial summary judgment in a libel case. The client's reporter, who was doing a story on the summary judgment, wanted to obtain a quote from the plaintiff's attorney. We, the lawyers, did not know about it until we got a call from a perplexed plaintiff's lawyer informing us that our client has tried to speak with him and that, under Rule 4.2, he could not do so. We promptly consented to the communication. Despite the waiver, the lawyer still told the reporter "no comment."

***Adverse News Media Clients***

News media clients do not often take positions adverse to each other, but it does happen, most often where newspaper legal notice advertisements are concerned.

The law in Kentucky requires government agencies to publish such items as Master Commissioner sales, proposed ordinances, local and state agency budgets, and a variety of other matters. Specifically, state law mandates that such legal notices be advertised in a newspaper with particular qualifications, for example, the highest *bona fide* circulation in the affected county or city. In most situations, it is obvious which newspaper is the so-called newspaper of record for a particular area, but what happens when it is not clear? For example, when two newspapers within the same county are very competitive in terms of circulation. Legal notice advertising, just like any other form of advertising, generates revenue for a newspaper. So, it's no surprise that, when a legal notice ad is placed with the newspaper on the other side of the county, disputes arise as between the newspapers.

In legal ethics terms, this is an easy one. Because we represent all of the newspapers by virtue of the KPA, we simply cannot take sides, and that is made clear in Rule 1.7.

Another very rare conflict arises in the case of plagiarism. With today's electronic access to most newspapers' and other media outlets' content, plagiarism of news content is almost certain to be exposed. But what about this hypothetical, which is based upon an actual situation?

Newspaper A's intern reporter from the local community college covers a city council meeting. She copies and pastes

some content about the prior council meeting from Newspaper B's website and inserts it for background information into her own story, either not realizing that she wasn't supposed to do that or not remembering to take it out before going to press. Newspaper B's editor finds out about the plagiarism and alerts the editor of Newspaper A. Both newspapers are KPA members. The editor from Newspaper B calls us to inquire about the newspaper's legal options. What can we say? Not much. This is a clear Rule 1.7 conflict that most likely cannot be waived.

Is it a different situation if Newspaper A's editor calls and asks us to speak with Newspaper B — let them know that it was an intern's mistake, that it won't happen again, that Newspaper A is sorry and wants to make it up somehow? After all, wouldn't that benefit Newspaper B too? This kind of intermediary role among clients is governed by Kentucky's Rule 2.2 (Model Rule 2.2 has been deleted), which provides;

(a) A lawyer may only act as intermediary between clients if:

(1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;

(2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

The reality is that Newspaper B is not likely to file suit against Newspaper A for copyright infringement or the like. It almost certainly wouldn't make business sense. Couldn't it be the job of the lawyer who represents both newspapers to set things straight? Maybe. This may be a close call, and ultimately it can be the clients' call. Consider, for example, Comment 4 to Kentucky's Rule 2.2, which cautions,

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In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The stakes can be high if the intermediation fails, and the intermediary lawyer will have to withdraw as to both parties. Thankfully, this situation is exceedingly rare.

On the other hand, a very common ethical consideration arises in the area of "scooping." Every reporter wants to break the story, to scoop the other news outlet. This presents a much more nuanced set of ethical issues.

Consider this hypothetical. Newspaper A is preparing a story alleging suspicious dealings between some in the local city government and a local building contractor. Newspaper A wants its lawyer to review the story and to assess the story's legal exposure. We review the story and determine that there are too many holes to go to press and some more fact checking must be undertaken. Meanwhile, the local competition, Newspaper B, has a similar story for review. Unlike Newspaper A, Newspaper B has corroborated all the necessary information and is ready to go to press. What can we tell Newspaper A?

This situation does not appear to be a conflict of interest in the Rule 1.7 sense because Newspaper A and Newspaper B do not have legal positions adverse to each other; their legal positions are more appropriately viewed as adverse to the city government and the local building contractor whose kickback scheme they are exposing. The newspapers in this hypothetical are more accurately considered "competing economic enterprises" as set out in Comment 6 to Rule 1.7,

On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a

conflict of interest and thus may not require consent of the respective clients.

*See also* Comment 2 to Kentucky's Rule 1.7.

Thus, it is not necessarily a conflict of interest to advise both Newspaper A and Newspaper B about their similar stories. However, pursuant to Rule 1.6, the lawyer must still keep the confidentiality of information relating to the representation of the two. Therefore, it would likely be inappropriate to call Newspaper A to let them know that Newspaper B has already confirmed the information or even to disclose to the newspapers that they are working on the same story. But can you call Newspaper A back and just let them know, for unspecified reasons, that it is now OK to proceed with publishing the story?

What if the hypothetical situation were inverted and we learn from advising Newspaper A that the story Newspaper B is proposing to publish contains false information? Can we, or must we, tell Newspaper B? Must we obtain Newspaper A's consent before letting Newspaper B know that the story is false? This is much more difficult question. While Rule 1.6 safeguards the confidentiality of information related to the representation of a client, it does not necessarily prohibit sharing information about others that may be unrelated to the representation. Similarly, Rule 1.8(b) prohibits a lawyer from using information relating to representation of a client to the disadvantage of the client. The best practice in this situation may be to call Newspaper A and, without disclosing that Newspaper B is publishing a similar story or otherwise sharing how you obtained the information, let Newspaper A know that you have learned the information is false.

While differences in industry, factual circumstances, and the scope of representation often vary the nuances involved in ethical questions, ethical issues will constantly arise no matter in what area of the law one practices. Representing news media clients can make the issues more difficult, unique and interesting. This is especially true where deadlines are at play. But when deadlines loom and there is little time to reflect on ethical dilemmas, the simple ethical hallmark may be to do the best you can under the circumstances.

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