

Recent Developments in Ethics 2023

James M. McCauley and Jennifer Bockhorst—special thanks to Emily Hedrick, Ethics Counsel, Virginia State Bar, for the use of her material at this conference.

LEO 1899 – Flat fee cases

- Existing rule: a flat fee is not earned until the representation is complete – if representation ends prematurely, the fee must be based on quantum meruit
- LEO 1812: a conversion clause is permissible as an alternative to quantum meruit in a contingent fee matter, but it must be reasonable and adequately explained to the client, and can't mislead the client that it is an application of quantum meruit
- LEO 1899: a conversion clause is also permitted in flat fee cases, with some important differences

Flat fees and benchmarks

- An alternative fee cannot exceed the original flat fee – unreasonable
- One alternative fee option already in widespread use is benchmarks
- They are valuable even if the representation is not terminated because they can allow the lawyer to earn portions of the fee as the case progresses, rather than holding the entire amount in trust until the matter concludes
- Once reasonable benchmarks are established and agreed to, they can also be used as an alternative fee with consent from the client

Rule updates

- Rule 1A:9 Legal Aid Counsel



- Paragraph 3(c) judicial class members



The ABC Board is a tribunal and there is no other authorization for representation by nonlawyers

UPL Opinion 219



LEO 1893 – Representing a child

- Despite the requirement of a next friend, the child is the real party in interest and the client to whom the lawyer's duties run
- When the next friend is a parent, there is a presumption that the parent acts in the best interests of the child and the lawyer should accept the parent's instructions
- When the lawyer believes the parent's direction is not in the child's interests, the lawyer can seek appointment of a GAL for the child or petition the court herself to approve action that the parent will not agree to, or can seek appointment of a substitute next friend

LEO 1900
Death of
client



Responding to negative reviews

1771 COMMENTS

ALL COMMENTS

I MADE THIS

QUESTIONS

Marissa

June 21, 2022 at 5:54 pm



These are greasy and mushy. I undercooked some parts and the bits undercooked were so bad I decided I would rather starve and even lost my appetite. The parts that were close to burnt were good, that's it. Will never try again. Reminded me of the Great Depression pancakes

Reply

Madhram

June 22, 2022 at 4:39 pm

It's unfortunate that you didn't get these pancakes right, Marissa.

Reply

Protecting smartphone data



- Information gained in the representation and stored on your smartphone, even contacts, may be confidential if disclosure of the information would be embarrassing or detrimental to your client
- Obligation to take reasonable steps to protect confidentiality, including knowing about risks from apps that access that information or use your contacts

Death of email?

- No, at least not yet, but communication norms are shifting and Slack and Teams are making inroads, especially among younger employees and those who are mostly or fully remote
- Email may not be the best option for file transfers, due to security and convenience concerns
- Many/most case management systems have client portal options, or use file transfer options like SharePoint

Is ChatGPT going to make lawyers obsolete?

Not any time soon! But it has already passed sections of the multistate bar exam and some law school sample exams. Its “sibling,” GPT-4, has surpassed ChatGPT, scoring in the 90th percentile on the uniform bar exam and getting a 163 on the LSAT (88th percentile).

Bots and UPL

- Can a chatbot commit UPL? When? Does it matter whether it's used by a lawyer or independently/by a nonlawyer? See DoNotPay for example, and its attempts to recruit lawyers to make arguments based on its bots.



Yes!



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Is a pro se lawyer subject to Rule 4.2?

- To say that rules that relate to the representation of a client do not apply to a lawyer representing himself would be a manifest absurdity and a distortion of the RPCs
- A lawyer who represents himself acts as both lawyer and client

Proposed changes to Rule 5.5

- APRL proposes changes to Rule 5.5 to allow a lawyer authorized to practice law in any US jurisdiction, and not disbarred or suspended in any jurisdiction, to provide legal services in any jurisdiction that adopts the rule
- Would not change courts' admission requirements
- A modified version of this proposal, with the same basic result, is being studied by the ABA
- Too soon to tell whether anything will come of this at the national level but no doubt there will be ongoing discussion and proposals about multijurisdictional practice

Recommendations by health care providers

- Can a doctor offer to include a certain lawyer on a list of referrals he offers to patients who may need representation? Can a lawyer contact a doctor to ask that he do this?
- Yes and yes, as long as there is no reciprocal referral agreement or other exchange of value for the referral by the doctor

Questions?

