WRITING EFFECTIVELY WHILE AVOIDING ETHICAL CONFLICTS

The ethical conduct of attorneys in Kentucky is governed by the Rules of Professional Conduct, ("RPC"). The Rules may be found in the Kentucky Rules of Court publication from West Publishing as part of the Rules of the Supreme Court.

A. Facts and Inferences.

As we all know, Civil Rule 11 reads, in part:

> "The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."

Similarly, the Rules of Professional Conduct contain a similar provision in RPC 3.1 which reads, in relevant part:

> "A lawyer shall not knowingly bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

As a result, it would be unethical for an attorney to take a position in a lawsuit if the position was deemed "frivolous."

An attorney has similar, but expanded, ethical duties under RPC 3.3 entitled, "Candor Toward the Tribunal." That Rule generally states that a lawyer "shall not knowingly":

1. Make a false statement of material fact or law to a tribunal; or

2. Fail to disclose a material fact to the tribunal when disclosure is necessary to avoid a fraud being perpetrated upon the tribunal.

The scope of these duties is set out in RPC 3.3(b). That Rule states that these duties continue up to the conclusion of the particular legal proceeding, and apply even if compliance "requires disclosure of information protected by Rule 1.6." Rule of Professional Conduct 1.6 concerns confidential information.

As set out above, if the lawyer knows that false information has or is about to be presented, the attorney is not to participate in that process. There is no discretion regarding what an attorney should do if the attorney knows that the information is false. However, RPC 3.3 further provides that if the lawyer's level of knowledge is only reasonable belief, then the attorney "may refuse" to offer the evidence which the attorney reasonably believes is false. This distinction, between "knowing" and "reasonable belief" is important. The lawyer's job is to advocate the position of his client. His job is not to be the trier of fact. That job is for the Judge or jury, as the case may be. As a result, the lawyer has the option of deciding whether to present the evidence.

The Commentary to RPC 3.3 addresses the issue of a lawyer making a false representation of the law to the Court. As the Commentary states:

> "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities."

Rule of Professional Conduct 3.1 and RPC 3.3 generally concern litigation behavior. A misrepresentation made by an attorney which is deemed to be in violation of

RPC 3.3, if the infraction is deemed serious enough by the KBA, may also constitute a violation of RPC 8.3(c). That Rule generally prohibits an attorney from engaging in conduct involving "dishonesty, fraud, deceit or misrepresentation."

Attorneys are advocates and our duty is to persuade the Court concerning the legal and factual position of our client. However, that duty of advocacy must be tempered by our duty to maintain objectivity in the process. Also, an attorney who has developed a poor reputation for being candid with the law and facts in a given case, will eventually find himself or herself at a distinct disadvantage before the Court in any subsequent cases. While it is hard to get a good reputation, it is very easy to get a bad one.

B. Protecting Confidentiality.

A lawyer's duty of confidentiality is set out in RPC 1.6.

Rule of Professional Conduct 1.6(a) generally states that an attorney cannot reveal information relating to the representation unless the client consults to the disclosure. Obviously, a lawyer could not represent a client if every time the lawyer said something, the lawyer had to get the client's permission. As a result, RPC 1.6(a) concludes by stating that a lawyer may review information which is authorized, by implication, "in order to carry out the representation."

As a result, an attorney is not going to run afoul of RPC 1.6 if the attorney reveals confidential information in pleadings, Motions and other documents filed in Court. Of course, some matters may be inherently confidential and the attorney should confer with the client before revealing such information. For example, if the attorney represents a client in a divorce proceeding, and the client had an extramarital affair or there was a suggestion of a sexually transmitted disease, the lawyer would want to confer with the client before including that information in a public filing.

Remember, with little exception, when you file a pleading, Brief, Memorandum, etc., in a Court file, you have placed that document in the public record,

which any person may see. To address this concern, since it is difficult, if not impossible, to "un-ring the bell," when a public filing is made, I will typically have my client review a document, especially if it contains possible sensitive information, before the document is actually put to public record.

A standard exception to the confidentiality under RPC 1.6 is if the attorney is called upon to defend his or her conduct in a civil, criminal or attorney disciplinary proceeding. In that case, the attorney may breach confidentiality in order to respond to such allegations. However, as set forth in the Commentary to that Rule, the "door" of confidentiality is only opened up as much as is needed to merely address the allegation raised against the attorney. If the attorney, in responding to the client's allegations, goes beyond information needed to respond to the particular allegation, the attorney will not have the protection of RPC 1.6.

C. The Role of Attorney-Client Privilege.

Strictly speaking, the attorney/client privilege is a matter of evidence law and is found in Kentucky Rule of Evidence 503. Confidentiality of information acquired by the attorney during representation is the subject of RPC 1.6. Such confidentiality survives the termination of the attorney/client relationship and even survives the death of the client. On the other hand, the attorney/client privilege is a matter of evidence law. Pursuant to the attorney/client privilege, a client may assert the privilege and not be required to reveal communications with their lawyer. Similarly, a lawyer may not reveal privileged information without client consent. As with virtually all Rules, there are exceptions such as the so-called "crime/fraud" exception or if the client is alleging a breach of duty by the lawyer.