ETHICS UPDATE

SUBPOENA FOR RECORDS FROM THIRD PARTY

The Problem

The subpoena ordered [the] custodian of records to appear at a deposition … and to produce at that time "[a]ny and all records pertaining to or concerning . . .." Attached to the subpoena was a letter from [defendant's] attorney informing [the] custodian of records that the requested documents could be mailed to her law office prior to the date of deposition to avoid appearing at the deposition.

The facts as alleged by Mrs. Fierstein's petition indicate that DePaul released Mrs. Fierstein's records in violation of the specific orders of the subpoena. The subpoena directed DePaul's custodian of records to appear at a deposition on July 15, 1994.

Fierstein V. DePaul Health Center, 949 S.W.2d 90 (Mo.App.E.D. 1997)

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 343 (Mo. Banc 1998)

Crowden raises the concern that the procedural protections at a deposition are meaningless in practice because custodians (as in this case) often mail the records to requesting counsel, instead of bringing them to the deposition as required by the subpoena.

A medical provider that reveals privileged information by mailing records in lieu of attending a deposition may be sued in tort for breach of the fiduciary duty of confidentiality.

Equally, it is professional misconduct for a requesting attorney to review or otherwise use privileged records that a provider mails contrary to a subpoena requiring production of documents at a deposition. *Rule 4-8.4(d).*

The Solution

Rule 57.09(c)

The party serving a subpoena on a non-party shall provide a copy of the subpoena to every party as if it were a pleading.

If all parties agree,

- the non-party need not appear at the deposition
- may produce the subpoenaed items to the subpoenaing party

That party shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items.

The subpoenaing party is responsible for:

- obtaining the agreement of all parties and
- advising the non-party in writing of the agreement,
- copying all attorneys of record and self-represented parties with the agreement.

Absent such an agreement, the subpoenaed items shall only be produced at the deposition.

NEW RULE 58.02 – SUBPOENA FOR PRODUCTION

Rule 58.02(a)

A party may serve a subpoena on a non-party to:

(1) Produce and permit inspection and copying of any designated documents, or

(2) Permit inspection, copying testing, or sampling of any tangible things ….

(c) Notice to Parties. The party serving a subpoena on a non-party pursuant to Rule 58.02(a) shall provide a copy of the subpoena to every party as if it were a pleading.

(d) Response. With the agreement of all parties, the non-party may be excused from appearance at the location specified for document production and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect or copy the subpoenaed items.

The party responsible for issuance and service of the subpoena is responsible for obtaining the agreement of all parties and advising the non-party in writing of the agreement, with a copy to all attorneys of record and self-represented parties. Absent such an agreement, the subpoenaed items shall only be produced at the place, date and time specified by the subpoena for all parties to inspect or copy.

REPORTING
PRO BONO SERVICE

RULE 4-6.1: VOLUNTARY PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service.

How?

Provide professional services at no or reduced fee --

-- to persons of limited means or

-- to public service or charitable groups or organizations

By service in activities for improving

- the law,
- the legal system, or
- the legal profession.

By financial support for organizations that provide legal services to persons of limited means.

The Missouri Bar asks lawyers to voluntarily report the number of hours they commit to pro bono work annually to:

- provide valuable information.
- help the Bar better recognize these efforts.
- Inspire other lawyers.

40 or more hours of pro bono work in a year will be honored on the Missouri Bar Pro Bono "Wall of Fame."

Member Benefits
Practice Resources
Committees & Sections
Ethics & Disciplinary System
Publications
Professionalism & Leadership
Advocacy
Jobs for Missouri Lawyers or Office Space/Office Sharing

Missouri Bar Pro Bono Webpage

Many lawyers feel a profound sense of responsibility to do pro bono work and most find they gain great personal satisfaction from doing so. The great majority of lawyers provide pro bono service of some nature. The need for more involvement, especially in helping those who cannot afford legal representation, is great. This page offers information and resources to help Missouri lawyers fulfil their professional obligation to render public interested legal services.

Rule 4-6.1: Voluntary Pro Bono Publico Service

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; by service in activities for improving the law, the legal system, or the legal profession; and by financial support for organizations that provide legal services to persons of limited means.

Click here to read the full text of the rule

The need is great, the responsibility profound.

Resources

- Pro Bono Opportunities Website
- ABA Standing Committee on Pro Bono page
- ABA Pro Bono Celebration
- Missouri Access to Courts
- Legal Services Office websites
- Report Your Hours

Missouri Bar Asks Lawyers to Report Pro Bono Hours Annually

Help Track Our Legal Profession's Commitment for Justice to All

Many Missouri lawyers generously help ensure that justice extends to those less fortunate by making pro bono work an integral part of their practices. However, this honorable commitment often lacks the recognition it deserves within the legal profession and is for the most part unknown to the general public.

The Missouri Bar hopes to change this by asking lawyers to voluntarily report the number of hours they commit to pro bono work annually. This reporting will provide valuable information about the collective and individual pro bono efforts of Missouri lawyers, help the Bar better recognize these efforts and inspire other lawyers to perform pro bono services. You will play a vital role in this effort by annually reporting your pro bono hours using this site. We have made it quick and easy to do. Just log in with your members-only bar number and pin and complete the brief form. (Report Your Hours Here)

Are You a Lawyer Who is Looking for Pro Bono Opportunities?

The Missouri Bar Pro Bono Website Can Help.

It is intended to be an easy, convenient resource for lawyers to:

Search opportunities within affiliate entities to use their skills and knowledge to provide pro bono legal assistance to Missouri citizens who cannot afford an attorney.

It is also intended be a host site for approved affiliate entities to:

List both global and specific pro bono needs and opportunities for lawyers in Missouri, categorized by substantive legal area, geographic area, time-frame, and organization.

IN HOUSE COUNSEL AND PRO BONO SERVICE

(**c**) The license issued pursuant to this Rule 8.105 only authorizes the lawyer to practice exclusively for an employer meeting the requirement of Rule 8.105(a)(1) and **to engage in pro bono work with an organization approved for this purpose by The Missouri Bar.**

CASES

DISCIPLINE

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

Violated Rule 4-1.1, Competence:

By failing to correctly calculate and deliver the amount of money owed to a client and an opposing party

By failing to provide opposing counsel with requested discovery information to avoid a default judgment against her client.

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

Violated Rule 4-1.3, Diligence:

By failing to pay money owed to a client and an opposing party in a timely fashion and

By failing to provide opposing counsel with discovery information to avoid a default judgment against her client.

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

Violated Rule 4-1.4, Communication, by failing to communicate with clients and opposing counsel.

Violated Rule 4-1.15, Safekeeping Property, by misappropriating and mishandling client funds and by failing to properly maintain a client trust account.

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

Ehler had been on probation for two years and some of the violations occurred while she was on probation.

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

Ehler failed to properly maintain her client trust account.

- Did not regularly balance her trust account.
- Lost all of her financial records because of a crashed computer hard drive.

During her probation, the consulting attorney instructed her to create a data backup system, which Ehler did not do.

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

In imposing discipline, the Court considers

- the ethical duty violated,
- the attorney's mental state,
- the extent of actual or potential injury caused by the attorney's misconduct, and
- any aggravating or mitigating factors.

In re Ehler, 319 S.W.3d 442 (Mo. banc 2010).

The sanction: Disbarment

Consistent with a progressive disciplinary scheme, which is recommended by the ABA Standards and applied by the Court previously.

In re: Byron G. Stewart, 342 S.W.3d 307 (Mo. banc 2011)

The sanction: suspended indefinitely from the practice of law with no leave to apply for reinstatement for six months

Stewart pleaded guilty to his fourth charge of driving while intoxicated, resulting in a felony conviction.

The guiding principles underlying disciplinary decisions are as follows:

The purpose of discipline is not to punish the attorney, but to protect the public and maintain the integrity of the legal profession. Those twin purposes may be achieved both directly, by removing a person from the practice of law, and indirectly, by imposing a sanction which serves to deter other members of the Bar from engaging in similar conduct.

CONFLICTS

State ex rel. Horn v. Ray, *325 S.W.3d 500 (Mo. App. E.D. 2010).*

Counsel's dual representation of both the defendant and his alleged victim in the prosecution of the defendant for allegedly assaulting the victim constitutes a concurrent conflict of interest, to which a client cannot consent.

State ex rel. Horn v. Ray, 325 S.W.3d 500 (Mo. App. E.D. 2010).

The victim's role in the case is distinctive from that of a material witness. The interests of the defendant and the victim are necessarily adverse.

CONFLICTS

Polish Roman Catholic St. Stanislaus Parish v. Hettenbach, 303 S.W.3d 591(Mo. App. E.D. 2010).

A "motion to disqualify should be made with reasonable promptness after the party becomes aware of the conflict to prevent the party from using disqualification as a strategic tool to deprive his opponent of counsel of his choice after substantial preparation has been completed."

Polish Roman Catholic St. Stanislaus Parish v. Hettenbach, 303 S.W.3d 591(Mo. App. E.D. 2010).

The timeliness of a motion to disqualify is determined by the time between when the moving party either first learned or reasonably should learned of the conflict and the time when the motion to disqualify is filed.

Polish Roman Catholic St. Stanislaus Parish v. Hettenbach, 303 S.W.3d 591(Mo. App. E.D. 2010).

A former attorney for the parish associated with current counsel opposing the parish. There is a question of whether the former counsel has a conflict.

Polish Roman Catholic St. Stanislaus Parish v. Hettenbach, 303 S.W.3d 591(Mo. App. E.D. 2010).

Disqualification of counsel based on the imputation of a co-counsel's conflict of interest is required when the attorney, through his or her relationship with co-counsel, was in a position to receive relevant confidences regarding the party seeking disqualification.

CRIMINAL CONTEMPT

Smith v. Pace, 313 S.W.3d 124 (Mo. banc 2010)

Where an attorney is prosecuted for indirect criminal contempt of court for making false statements, the state must prove 3 things:

1. The statements were false,

Smith v. Pace, 313 S.W.3d 124 (Mo. banc 2010)

2. The attorney knew the statements were false or acted with reckless disregard for the truth or falsity of the statements, and

3. the effect of the statements constituted an actual or imminent impediment or threat to the administration of justice.

Smith v. Pace, 313 S.W.3d 124 (Mo. banc 2010)

Not all essential elements were proven.

States may use a lesser standard than that for non-lawyers to decide whether a lawyer should be disciplined for his or her speech.

States have disciplined lawyers under state ethics rules where there is some knowledge of falsity or a reckless disregard for whether the false statement was true or false.

FEES

Vance v. Griggs, 324 S.W.3d 471 (Mo. App. W.D. 2010).

The fee-sharing agreement at issue in this case was made among lawyers of the same firm, even though the firm subsequently dissolved.

Rule 4-1.5(e) governs fee-sharing agreements among lawyers who are in different firms at and doesn't apply here.

FEES

Welman v. Parker, *328 S.W.3d 451 (Mo. App. S.D. 2010).*

Between a withdrawing partner and the former partners, who is entitled to the contingent fee from a matter that was pending at the time of the dissolution of the law firm?

Welman v. Parker, 328 S.W.3d 451 (Mo. App. S.D. 2010).

If a law firm is retained by a client on a contingent-fee basis and the client elects to hire a different law firm after the first firm dissolves and before judgment or a settlement, the dissolved law firm is only entitled to recover:

- reasonable value of the services it provided.
- not more than the original fee and
- only upon the occurrence of the contingency.

PROSECUTOR CONDUCT

State v. Terry, 304 S.W.3d 105 (Mo. banc 2010).

Defendant was charged with statutory rape.

Victim testified Defendant was father of her child because she'd had sex with no one else.

DNA after the child was born showed Defendant was not the father. Prosecution did nothing to check accuracy.

State v. Terry, 304 S.W.3d 105 (Mo. banc 2010).

The ethical norm that the state attorney's role is to see that justice is done—not necessarily to obtain or to sustain a conviction—may suggest that a different course of action may have been appropriate.

PROSECUTOR CONDUCT

State v. Greenlee, 327 S.W.3d 602 (Mo. App. E.D. 2010).

Greenlee alleges prosecutorial misconduct related to pretrial publicity.

A newspaper article was written by a reporter citing simple information regarding the case.

State v. Greenlee, 327 S.W.3d 602 (Mo. App. E.D. 2010).

The prosecutor also participated in a radio broadcast in which the prosecutor discussed basic information about the case, including the date of the trial, the nature of the charges, and the range of punishment.

Greenlee did not prove prosecutorial misconduct regarding the article or the radio show.

INEFFECTIVE ASSISTANCE OF COUNSEL

Moore v. State, 328 S.W.3d 700 (Mo. banc 2010).

Appellate counsel has no duty to represent an individual in post-conviction proceedings or inform the individual of his post-conviction rights under Rule 29.15 or the issuance of a mandate.

INEFFECTIVE ASSISTANCE OF COUNSEL

Chaney v. State, 323 S.W.3d 836 (Mo. App. E.D. 2010).

Chaney alleged his attorney was ineffective for failing to inform him that one of the counts of molestation should have been charged as a class C instead of a class B felony.

Chaney was resentenced on the count on which he was improperly charged. Post-conviction relief was denied.

INEFFECTIVE ASSISTANCE OF COUNSEL

Hill v. State, 301 S.W.3d 78 (Mo. App. S.D. 2010).

Hill's counsel was not ineffective when he relied on the information supplied by the State. The State, as well as other attorneys, are ethically bound by Rule 4-3.4 and generally there is no error in relying on information provided to a defense attorney by the State.

INEFFECTIVE ASSISTANCE OF COUNSEL

Frye v. State, 311 S.W.3d 350 (Mo. App. W.D. 2010)

Failure of defense counsel to communicate a plea offer ordinarily constitutes deficient performance" of counsel.

Trial counsel has an absolute duty to keep Defendant informed of plea communications.

INEFFECTIVE ASSISTANCE OF COUNSEL

C.V.E. v. Greene County Juvenile Office, *330 S.W.3d 560, 567 (Mo. App. S.D. 2010).*

Parents are entitled to appointed counsel in a termination of parental rights proceeding.

This statutory right implies the right to effective assistance of counsel.

Counsel followed client's instructions and was effective.