



PROFESSIONAL QUANDARIES AND QUAGMIRES

Lundberg Chuck

Hot issues in risk management, ethics as of September 2024

By Chuck Lundberg
Special to Minnesota Lawyer

From time to time since this “Quandaries and Quagmires” column was created in late 2015, it has spotlighted the hottest, breaking ethics and risk management issues for law firms, providing a “snapshot” of the state of the law of lawyering as of the present moment in time.

The September 2016 column explained the concept and the methodology:

The hottest law firm exposure issues

.... This column spotlights the hottest issues that are (or should be) on every firm counsel’s radar right now.

But this alert is not just for firm counsel: All practicing lawyers, whether or not actively involved in their firm’s risk-management responsibilities, should have at least a passing awareness of these breaking issues.

This, then, is a snapshot — as of September 2016 — of the hottest legal ethics and risk issues right now, gleaned from very recent and reputable sources.

This list was compiled from a review of topics addressed (and to be addressed) at a number of recent (and future) national conferences on legal ethics and malpractice (where firm counsel from across the country gather to learn about the newest law firm exposure areas); from recent postings on national ethics list serves and blogs; and from the advance sheets of specialized reporters and press that track current developments in the law of lawyering.

Then again in 2018:

Legal ethics and risk issues as of January 2018

The national legal press has been buzzing recently with breaking news in the areas of legal ethics, law firm risk issues, and the law of lawyering. In addition, a couple new developments will surface soon in Minnesota. Here is a snapshot — as of January 2018 — of the hottest legal ethics and risk issues right now.

As an aside, it is fascinating to look back on those earlier columns to see what is and is not still of concern in 2024. Some of the topics from 2016 are still on the list and have, if anything, become more important than ever (wellness, cybersecurity, lawyer mobility). Other topics on the list before have fallen off and are now arguably resolved by new rules and established



DEPOSIT PHOTOS

policies and procedures (cannabis law, #MeToo in the law firm, new advertising ethics rules). Finally, some topics are brand new and were not even a thing back then (Generative AI)

In any event, here is the list for September 2024:

The first topic — **supervision by firm counsel** generally — is front of mind right now as we are preparing for a major plenary program at the ABA Fall 2024 Legal Malpractice Conference this month in Vancouver, described as follows:

Advanced Supervisory Practices in Law Firms from Firm Counsel’s Perspective

Yes, you are your colleagues’ keeper. Ethics rules require firms to adopt effective supervisory practices for all firm lawyers and staff, and effective supervision is an essential component of law firm risk management. Firm counsel (the ethics partner or general counsel) has frontline responsibility for both areas, and falling short can result in ethics complaints and malpractice claims against firm management and supervising lawyers. Our distinguished Panel will take a deep dive into these issues from Firm Counsel’s perspective [and] will focus on breaking developments and ethical best practices in several new challenge areas for Firm Counsel: (1) firm supervision in the new post-Covid remote workplace, (2) wellness aspects of lawyers’ super-

visory responsibilities, and (3) how the explosion of Generative AI has created entirely new risks and issues for Firm Counsel.

This column also addressed the issue in April in “Navigating the Ethical Landscape: Supervisory Practices in Law Firms,” an interview with two ethics experts with extensive and recent background in the subject matter, Cassie Hanson and Sara Gross Methner.

Generative AI: This is without a doubt the hottest issue in the law of lawyering right now. GAI is a powerful new tool for automating research, drafting documents, and enhancing efficiency. It is just starting to revolutionize the practice of law like nothing since the adoption of email in the 1990s.

A few weeks ago the ABA issued a comprehensive formal opinion identifying a number of ethics issues involved in the use of GAI, *ABA Formal Ethics Opinion 512, July 29, 2024: Generative Artificial Intelligence Tools*. The 15-page opinion addresses in detail the following ethical areas in which GAI is raising serious concerns: Competence (Rule 1.1), Confidentiality (1.6), Communication (1.4), Meritorious Claims and Contentions and Candor Toward the Tribunal (3.1, 3.3, and 8.4(c)), Supervisory Responsibilities (5.1 and 5.3), and Fees (1.5).

In addition, Q and Q columnist

Cassie Hanson recently did a deep dive into one aspect of this issue in her July column, *Ethical considerations in billing for AI-assisted work*.

Cybersecurity: This one isn’t exactly a new issue but it arguably has become more dangerous. A new playbook describes the problem:

The past few years have witnessed a surge in cyberattacks targeting law firms, employing sophisticated tactics like ransomware, phishing scams, and social engineering. These attacks can have devastating consequences, leading to data breaches, financial losses, reputational damage, and even legal repercussions.

The 16-page playbook, available online, describes the essential components of cybersecurity policies and procedures for law firms. *Cybersecurity Playbook for Law Firm CIOs & CISOs*.

Attorney wellness: Four years ago, at the outset of the COVID pandemic, I addressed the wellness issue at length and in detail in *Legal Ethics and Risk Management in the Time of Pandemic, Bench & Bar of Minn., May/June 2020:*

Until about three years ago, “attorney wellness” as a law firm risk management issue wasn’t even a thing. It is now one of the top five concerns in the ethics and risk management arena. And without question it has become a much bigger issue in the time of pandemic.... By now we are all acquainted with the

Court orders new hearing in ‘Serial’ murder case

By Brian Witte and Lea Skene
Associated Press

ANNAPOLIS, Md. — Adnan Syed’s murder conviction still stands after Maryland’s highest court Friday ordered a redo of the hearing that freed him. The court ruled that the earlier proceeding violated the legal rights of the victim’s family, marking the latest development in a legal saga of global interest because of the hit podcast “Serial.”

The 4-3 ruling upheld an appellate court’s decision to reinstate Syed’s conviction. It comes about 11 months after the court heard arguments last October in a case that has been fraught with legal twists and divided court rulings since Syed was convicted in 2000 of killing his high school ex-girlfriend Hae Min Lee.

The justices said that Syed, who was released from prison in 2022, can remain free as the case heads to a new lower court judge to determine whether Syed’s conviction should be tossed. Baltimore State’s Attorney Ivan Bates on Friday said his office is reviewing the ruling and declined to comment further.

The court concluded that in an effort

to remedy what was perceived to be an injustice to Syed, prosecutors and a lower court “worked an injustice” against Lee’s brother, Young Lee. The court ruled that Lee was not treated with “dignity, respect, and sensitivity,” because he was not given reasonable notice of the hearing that resulted in Syed being freed.

The court also said Lee would be afforded reasonable notice of the new hearing, “sufficient to provide Mr. Lee with a reasonable opportunity to attend such a hearing in person,” and for him or his counsel to be heard.

In a dissenting opinion, Justice Michele Hotten argued the issue was moot because the conviction had already been vacated.

“This case exists as a procedural zombie,” Hotten wrote. “It has been re-animated, despite its expiration. The doctrine of mootness was designed to prevent such judicial necromancy.”

The latest issue in the case pitted recent criminal justice reform efforts against the legal rights of crime victims and their families, whose voices are often at odds with a growing movement to acknowledge and correct systemic issues,

including historic racism, police misconduct and prosecutorial missteps.

David Sanford, an attorney who represents the victim’s family, said the ruling “acknowledges what Hae Min Lee’s family has argued: crime victims have a right to be heard in court.”

“If there is compelling evidence to support vacating the conviction of Adnan Syed, we will be the first to agree,” Sanford said. “To date, the public has not seen evidence which would warrant overturning a murder conviction that has withstood appeals for over two decades.”

The panel of seven judges weighed the extent to which crime victims have a right to participate in hearings where a conviction could be vacated. To that end, the court considered whether to uphold a lower appellate court ruling in 2023 in favor of the Lee family. It reinstated Syed’s murder conviction a year after a judge granted a request from Baltimore prosecutors to vacate it because of flawed evidence.

Syed, 43, has maintained his innocence and has often expressed concern for Lee’s surviving relatives. The teenage girl was found strangled to death and buried in

an unmarked grave in 1999. Syed was sentenced to life in prison, plus 30 years.

Syed was released from prison in September 2022, when a Baltimore judge overturned his conviction after city prosecutors found flaws in the evidence.

However, in March 2023, the Appellate Court of Maryland, the state’s intermediate appellate court, ordered a redo of the hearing that won Syed his freedom and reinstated his conviction. The court said the victim’s family didn’t receive adequate notice to attend the hearing in person, violating their right under state law to be “treated with dignity and respect.”

Syed’s lawyer Erica Suter has argued that the state did meet its obligation by allowing Young Lee to participate in the hearing via video conference.

Syed appealed his conviction’s reinstatement, and the Lee family also appealed to the state’s highest court, contending that crime victims should be given a larger role in the process of vacating a conviction.

Syed has remained free as the latest set of appeals wind their way through the state court system.

Quandaries

Continued from page 2

dire findings of “The Path to Lawyer Well-Being,” the milestone 2017 ABA report that chronicled the high incidence of stress, depression, and unhealthy substance use in the profession [T]he current pandemic and the many dislocations it’s causing are rife with challenges to mental and emotional stability.

The article stressed that — especially with the then new remote working paradigm — law firms must maintain regular communication with their lawyers and staff members, so that they notice if someone drops off the radar and that practice group leaders should keep track of who attends weekly conference calls and check in personally with anyone who is missing.

Monitoring time records is another way to track engagement. If someone has not entered their time for several days, it is a good idea to check in with them to see how they are doing.

Well, as we all now know, remote work did not simply fade away once the pandemic was over. On the contrary, it is all too often a permanent condition of the practice. And if wellness was one of the top five concerns in the ethics and risk management arena back then, it may now be one of the top three.

Rule 5.5, multi-jurisdictional practice: This is not a breaking issue; it has been discussed for years. What is new is that a radical change may well be proposed in the rules governing multi-jurisdictional practice. The ABA is involved in a several-year project described most recently in a white paper by its working group on this

issue. Concluding with a proposal for a driver’s license model for practice in other jurisdictions — if adopted, your Minnesota license to practice law could be used in every other state. See ABA Working Group on ABA Model Rule 5.5 *Issues Paper For Comment* (Jan. 2024)

Money quote: “The proposed revised Model Rule 5.5 offers up a regulatory model that would be similar, though not identical to the way that driver’s licensing works in our nation. Although each jurisdiction implements its own scheme for granting drivers’ licenses, those licenses are, of necessity, recognized in every U.S. jurisdiction. Drivers are expected to inform themselves of the laws in jurisdictions to which they travel.

Finally, space does not allow detailed treatment of several additional hot is-

sues, but they would certainly include the perennial topic of lawyer mobility; what seems to be a rapidly growing interest in disqualification of counsel motions; and a new proposal to revise Rule 5.4 (fee sharing) now being actively worked on by the Association of Professional Responsibility Lawyers (the source of the prior successful proposal to amend the advertising rules and the pending proposal regarding multi-jurisdictional practice).

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics. (www.lundberglegalethics.com).

ARBITRATOR & MEDIATOR DIRECTORY

TO PLACE YOUR LISTING | Libbie Hein | 612.584.1563 | publicnotice@legal-ledger.com

MEDIATION (cont.)



Kevin J. Dunlevy

Dunlevy Law, P.A.
120 South Sixth Street, Suite 1515
Minneapolis, MN 55402
612-963-9046
Kevin@Dunlaw.net
MSBA Certified Real Property Law Specialist
Licensed in MN, ND and WI



James H. Gilbert

Gilbert Mediation Center, Ltd.
12700 Anderson Lakes Parkway
Eden Prairie, MN 55344
952-767-0617
JHGilbert@lawgilbert.com
www.GilbertMediation.com

MEDIATION (cont.)



Gerald T. Laurie

Laurie Law & ADR
5901 Cedar Lake Road S
St. Louis Park, MN 55416
T: 952-738-9120 • F: 612-253-6986
jerry@laurielawfirm.com
MSBA Certified as a Civil Trial Specialist and a
Labor and Employment Law Specialist 2018; Leonard
Lindquist Distinguished Practice Award
Call or email for CV

MEDIATION (cont.)



Mary E. Pawlenty

Gilbert Mediation Center, Ltd.
12700 Anderson Lakes Parkway
Eden Prairie, MN 55344
952-767-0167 • Fax: 952-767-0171
MEPawlenty@LawGilbert.com
www.GilbertMediation.com

Find out how Minnesota Lawyer’s Lawyer to Lawyer and Arbitrator & Mediator Directories can work for you!

Contact Libbie Hein at 612.584.1563 or publicnotice-legal-ledger.com

Every Monday in Minnesota Lawyer