

Legal ethics in a pandemic

by

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In the “before time” most of us were comfortable with how the ethics rules applied to our day-to-day legal practice. A short while ago the world dramatically shifted around us, requiring us to do our jobs in very different ways. In the midst of these changes, lawyers and their staffs may not have thought through the ethics questions presented by the new normal. I certainly don’t have all the answers, but I do have some guidance.

What has not changed

We have received a lot of calls on our ethics line regarding how to address particular ethics issues relating to covid-19. While the topics vary, there is a general sense that some lawyers are hoping our response will be that whatever the court or client is asking them to do, it is incompatible with their ethical obligation in times of a pandemic. Invariably we must reply that, no, all of the ethics rules remain in full force and effect. The rules, particularly those that are nondiscretionary, generally do not have exigent circumstance exceptions. Even those rules that incorporate “reasonable” refer to “a reasonably prudent and competent lawyer.” The rules do not expect you to simply do your best under the circumstances, but rather set a minimum standard of conduct for lawyers irrespective of the circumstances. As attorneys, we must embrace the challenge of ensuring that the new manner of our practice is compliant. There are two general areas I would commend to your particular attention: remote work and issues of incapacity.

Remote work

Your duty of competence requires you to maintain the requisite knowledge and skill needed to practice, “including the benefits and risks associated with relevant technology.” Remote access to networks, video conferencing, and electronic signatures thereby join email, wifi and cloud-based storage on the list of areas that lawyers are obliged to understand. All platforms have potential security issues, and compliance

with this duty does not require systems to be infallible. But your ethical duty does require you to inform yourself of how to use the technology correctly and what vulnerabilities it may have as part of a continuous vetting process. Everyone asks, can you ethically use Zoom for client calls? Yes, provided you understand and follow the security recommendations (including password-protected meetings).

The main point is to continually assess your technology platforms to ensure you are using them correctly and understand and adjust to any needed corrections. I cannot emphasize this enough. Sometimes I feel that lawyers have managed the barest of basics—such as only using secured networks and maintaining strong password protection. Other basics: Is your home network secured by a password? Does your computer have updated security patches? These are questions that we may not ask ourselves enough but certainly must be asking now. A lot is required of us to ensure technological competence in remote working environments.

Your duty of confidentiality requires you to protect client information. Much of this is encompassed under competent technology use, but old school basics are still important. Are you discussing client information around family members? Can your neighbor working in his yard hear your client call because your window is open? Do you have a secure place to maintain client files? Is Alexa listening in? Are you securely destroying client information? Are you taking pictures of your new work space and posting them to social media? A special note on that last point: Just don't. If people can see your work space, stop and think about what might be disclosed when the pictured is zoomed in. Have you discussed all of this with your staff? Do you understand your staffers' work environment, and believe they are doing what you are doing to protect client confidences? Your ethical duty of supervision requires you to make reasonable efforts to ensure that your nonlawyer staff's conduct is compatible with your ethics obligations. This is particularly important now, when many on nonlawyer staff are working remotely for the first time. Remote working agreements that detail these ethical obligations (primarily around technology use and confidentiality) are a good way to assist in meeting this obligation.

Your duty of communication is also extremely important during these times. Do you know how to get hold of your client and have you effectively communicated how to best get hold of you? Have you updated your outward-facing materials to facilitate easy contact with you? Is someone staying on top of mail, and promptly getting it to remote workers? Have you explained how covid-19 will affect the matter you are handling? Do you know to whom you can speak if your client is incapacitated and you need direction? Does your client know who will contact them if you become incapacitated?

One of the most important things we do is communicate with our clients the information they need to make informed decisions about the representation. What makes our jobs difficult is that in many respects, our evolving grasp of the substantive law implications of covid-19 will lag our obligation to provide real-time advice and counsel. The guidance that ethics provides in times like this is that you must stay informed about the changing landscape, and you must communicate what is known and unknown to the client so that the client can make informed decisions. This requires you to discuss the client's various options relating to the matter so that the client can make informed decisions about how they wish to proceed in the new circumstances, and the best practice is to document those discussions. If you do not know, you also should disclose that. If you think too much is unknown to provide competent guidance, you must raise those concerns with the client in order that objections can be raised, if that is the decision, or continuance can be sought until more guidance is available.

Your duty of diligence requires you to act with reasonable diligence and promptness in representing a client. Comment [1] to this rule requires us to pursue a matter despite "opposition, obstruction, or personal inconvenience to the lawyer." You need to stay on top of your calendar, and pay particular attention (as always) to statutes of limitations and scheduling deadlines. Because actions may take longer to accomplish remotely, you must anticipate such challenges, such as figuring out how you will perform previously routine tasks such as e-filing or gathering affidavits. Your particular health circumstances may raise an issue of whether you can diligently continue representation.

Courts and opposing parties may work with your particular circumstances, or they may not. What is the backup plan for the representation if you have to self-isolate or become ill and critical deadlines are approaching? Lawyers are good at assisting clients with contingency plans and terrible at making their own. If you are experiencing a downturn in work as clients put off legal expenses (or even if you are not), use this time to think through contingency plans for specific matters, and for your practice in general. Also take the time to make sure your active files are in good shape. One of the most daunting things about this virus is all that we do not know about how it's spread, so it's difficult to accurately gauge our individual vulnerability. Now is the time to plan for a worst-case scenario if you have not already. Such planning need not be complicated. It starts with identifying one or two people who agree to help temporarily if something happens to you, and keeping your files in good enough shape that someone can review them and understand the current status and next steps.

Conclusion

I wish I could provide more specifics or tell you not to worry because we all have enough on our plates, but I cannot. Your ethical obligations remain the same in the face of this pandemic or any other disaster. But you are well-suited to rise to this occasion if you know the basic ethics requirements and think through how they apply to new circumstances. Asking yourself the above questions will go a long way toward guiding you to compliance, and there is no substitute for just sitting down and reading the rules and thinking about the new ways in which you practice.

Remember, too, the adage that what goes around comes around. Now is not the time to forget basic kindness and civility. It is difficult to exaggerate the amount of stress that everyone is feeling. If any time called for professionalism, it is now. Also, remember we can help you with any specific ethics issues you have. The best way to contact us in these remote working times is through our website at lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx. Take care.