

OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY

FREQUENTLY ASKED QUESTIONS (COVID-19)

SEPTEMBER 2020

During the Covid-19 pandemic, lawyers are facing new challenges in their legal practice as a result of social distancing requirements, court closures and delays, working from home mandates, and other changes in how we live. While our legal practice may change to address Covid-19, *our professional responsibility obligations do not change and the Rules of Professional Conduct continue to apply.*

The following are some frequently asked questions concerning how Covid-19 may impact your legal practice. This list is not exhaustive and is general in nature, so you are encouraged to contact our Ethics Hotline (651-296-3952) with any questions you may have about your ethical responsibilities in a specific context.

A. Must I disclose to a client when a staff member at my firm gets a positive test and there was possible exposure to the client?

Yes, but you are not required to disclose the name of the individual who was positive. See Rule 1.4(b), Minnesota Rules of Professional Conduct (MRPC). Be sure to consult the Minnesota Department of Health guidance for their recommendations on what constitutes close contact or potential exposure.

B. May or must I disclose to a Department of Health contact tracer the names of clients who may have come into contact with a staff member at my firm who has had a positive COVID test and there was possible exposure to the client?

If required by law, you should disclose and tell the client about the disclosure. Rule 1.6(b)(9), MRPC. If not required by law, best practice is to obtain the client's informed consent to the disclosure. Rule 1.6(b)(1), MRPC. If a client will not give informed consent, you may make disclosure if you believe it is necessary to prevent reasonably certain death or substantial bodily harm. Rule 1.6(b)(6), MRPC. Again, be sure to consult the Minnesota Department of Health guidance for their recommendations on what constitutes close contact and potential exposure.

C. Because both my assistant, who maintains my IOLTA books and records, and I are working from home, I want to change how we do things to accommodate

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our social distancing. Some of our changes do not follow the Rules, but they comply substantially. Is this okay, especially during these unique times?

No. You should follow the rule as written. *See* Rule 1.15, MRPC, and Appendix 1. Close enough is not sufficient even in challenging times. For example, the rule requires IOLTA checks be personally signed by a lawyer. Quarantine may make this difficult if your assistant keeps the checkbook, but that is not a reason to fail to comply with a specific provision of the rule. You will have to modify your practices to safely conform to the situation. For example, you can have your assistant drop off the checkbook to you to manage in the interim. You can also see what options the bank will allow electronically, such as electronic checks for you to sign. Alternatively, you can have the bank send to you another set of checks; check numbers will be out of order, but you could always note the reason to reflect why.

- D. I represent clients with varying degrees of special needs. Social distancing is especially difficult when it comes to representation because of the unexpected extra costs that might be involved. For example, one client is hearing impaired, and struggles with video chat because it is difficult to read lips (lagging video feed). We have a virtual mediation scheduled but closed captioning is very expensive. What can I do?**

The Minnesota Rules of Professional Conduct do not require attorneys to cover unexpected litigation expenses, assuming the attorney has not agreed to do so as part of the attorney's retention. You do have the responsibility to effectively communicate with your client, however, and seek available accommodations on their behalf if possible. Perhaps there are alternatives available? Is a postponement possible? Do other less expensive services or tools exist? Rule 1.4(b), MRPC, requires that we explain a matter to the extent reasonably necessary to permit the client to make informed decisions, and Rule 1.4(a)(2), MRPC, requires that we consult with the client as to the means available to meet the client's objectives.

- E. I'm really worried about my technology at home, and hear a lot of horror stories about zoom and other technology. Can I use Zoom and is my home network sufficient?**

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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.” Rule 1.1, MRPC, comment [8]. Remote access to networks, video conferencing, electronic signatures and home network security now join email, Wi-Fi and cloud-based storage on the list of areas that you have an ethical duty 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 about how to use the technology correctly and what vulnerabilities it may have as part of a continuous vetting process.

For example, you can ethically use Zoom for client calls provided you understand and follow the security recommendations (including password-protected meetings). Other issues you need to consider are whether your home network is secured by a password, and whether you are keeping your computer updated with security patches. Beware of fraud, cybercrime, and phishing attacks, which are on the rise. Make sure you talk to your staff about their home technology, make sure they are using a secure home network and make sure they are as vigilant at home as they are in the office about opening attachments or clicking on links from unknown sources. Remember also that what may constitute reasonable security today may change as technology changes and advances.

F. My partner is working from home and my children are distance learning from home, so the house is pretty crowded. What do I need to do to protect client confidentiality?

Your duty of confidentiality requires you to protect client information. Rule 1.6(a), MRPC (a lawyer shall not knowingly reveal information relating to the representation of a client); *see also* LPRB Opinion 19. You should not discuss client confidential information around family members, and should make sure you have a space to work that allows you to protect client files from the eyes of others. You should discuss this with your staff as well, so they are following these same rules at their home.

Your clients are also probably around more people as well. Make sure you discuss with them that your conversations are confidential and to protect the attorney-client privilege, they should seek a private area to talk to you. Some additional things to keep in mind—make sure your calls cannot be overheard by others through open windows and doors. Make sure home electronic devices are

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not recording interactions. Make sure you and your staff are securely disposing of client information—shredding first, then recycling. Make sure if third-parties enter your home to provide service that you are protecting against disclosure, such as closing and securing files at the end of the day, and not leaving information out in ways that may be viewed by third parties.

G. My secretary and associate are both working from home, with occasional visits to the office to pick up files. I trust my staff but with less day-to-day contact I have less insight into what they are doing. Is that okay?

You are required to take reasonable measures to ensure your staff's conduct complies with your professional responsibility obligations. *See* Rule 5.1, MRPC; Rule 5.3, MRPC. Neither rule (regarding lawyer subordinates and non-lawyer subordinates) requires you to review everything your staff does every day, but both rules require you to have procedures in place to ensure the work they do is consistent with your ethical obligations. To do this, you should understand your staffs' work environments, and ensure they are doing what you are doing to protect client confidences and are otherwise following the oversight procedures you have in place in the office as modified for the new work from home environment. The most important thing you can do is have a conversation on this topic; do not assume everything is fine.

For example, conflict checks still need to be run and documented in the firm's conflicts software, including prospective clients. Staff should not be signing your name to documents, unless you have specifically authorized the signature and they note they are signing for you with permission. Do you have good calendaring systems so that deadlines are noted with enough time to be met working remotely? Are files being accurately maintained with so much happening remotely? While we originally thought this period of time might be brief, there is no doubt that many will continue to work fully or partially remotely for some time to come. Many non-lawyer staff are working remotely for the first time. Remote working agreements that detail the ethical obligations (primarily around technology use and confidentiality) are a good way to assist in meeting your ethical obligation of supervision.

H. What are unique features of my duty of communication when practicing remotely?

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You are required to communicate reasonably and adequately with your client and the pandemic does not change this requirement. Now that you and perhaps your client are working remotely, be sure you know how to get hold of your client and your client knows how to best get hold of you. Keep clients up-to-date on changes to the status of their cases as courts close and re-open. If you do not know what will happen or when it will happen, tell your client that. Update your outward-facing materials to facilitate easy contact with you. Ensure someone is staying on top of mail and promptly getting it to remote workers. Explain to clients as necessary how COVID-19 will affect the matter you are handling. Find out to whom you can speak if your client is incapacitated and you need case direction. Know who you can contact as a secondary source in case you are unable to contact your client. Be sure that your client knows who will contact them and whom they should contact if you become incapacitated.

I. What are unique features of my duty of diligence when practicing remotely?

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 or declarations. 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. So have a backup plan for the representation if you have to self-isolate or become ill and critical deadlines are approaching. 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.

J. I have underlying health concerns and I need to limit my contact with others. Can I be required to go to court or meet with clients?

This question invokes important issues regarding the obligations of other (such as the courts or employers) to make accommodations which are beyond the scope of the ethics rules. From the perspective of the ethics rules, if you have a

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physical or mental condition that impairs your ability to represent a client, then the rules require you to withdraw. *See* Rule 1.16(a)(2), MRPC. You also have a duty to discuss with your client's material information relating to their matter, including any potential limitations your personal decisions may have so they can make informed decisions regarding the representation. Hopefully accommodations are available that allow for continued representation but the ethics rules require that the requirements of the representation take precedent. Remember also that you may have to comply with Rule 1.16(c), MRPC, regarding permission of the tribunal to withdraw if applicable, and still must take steps as reasonably practicable to protect the client's interest. Rule 1.16(d), MRPC.

K. Remote hearings and the inability to speak in person with my client for a variety of reasons is really impacting my ability to effectively communicate and advise my client. What can I do?

This is perhaps the most challenging issue we face during these times. Our ability to communicate effectively with our clients is fundamental to our ethics obligation, and requires us to consult with our client to understand their objectives, to keep the client reasonably informed about the status of the matter, to promptly reply to requests for information, to consult with the client about limitations on the lawyer's conduct if the client wants us to do things we ethically cannot, and to explain matters to the extent reasonably necessary to permit the client to make informed decisions. *See* Rule 1.4, MRPC. To effectively discharge this obligation in changing circumstances requires us to keep the specifics of the communication obligation in mind—listed above—and think creatively about how we can effectively meet that obligation. If you cannot do the above, you should be discussing with your client available options, such as the need to create a record, to continue matters until limitations can be addressed, if possible, or to seek such other relief as may be available depending on the client's objectives for the representation. The best advice we can give is to stay focused on what the rule specifically requires in terms of communication.

L. What if I take ill?

Before that happens, have in place a succession plan that addresses who will close or temporarily manage your practice if you become incapacitated, disabled or die. This means having someone available who can review files, notify each

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client that the lawyer is no longer (or temporarily is not) engaged in the practice of law, and determining whether immediate action to protect the client's interests is needed. Do you know who will do this for you if something happens? Have you talked to them about how you keep and store client information so they can do this task? All lawyers have an ethical obligation to have a plan if something happens. This is always true but is especially true in these times.

- M. I'm a solo practitioner and I know I need to have a plan but don't. Worst case scenario, is there someone my family or friends can contact to help them if something happens to me?**

Please have a plan but if you do not, family members or friends or your staff can contact our ethics hotline (651-296-3952) and we can walk them through the things that need to happen if you become incapacitated or die.

- N. I am sheltering in place in another jurisdiction but my law license is in Minnesota, will I be viewed as engaging in the unauthorized practice of law?**

If you are sheltering in place in another jurisdiction or are otherwise sitting in another jurisdiction, even briefly, when engaging in your practice, that state may view you as practicing in that jurisdiction. This is true even if you are representing a Minnesota client in a Minnesota matter involving only Minnesota parties and Minnesota property. If you are not licensed there, you may run afoul of that jurisdiction's laws or rules against the unauthorized practice of law. If you are in another state, you should contact that state's lawyer discipline agency for guidance about any potential UPL (unauthorized practice of law) issues. If you are not licensed to practice in Minnesota but are sheltering in place here and performing only work relating to your practice in the jurisdiction in which you are licensed, you will not violate Minnesota's unauthorized practice rules. See Rule 5.5(d), MRPC. Note, you must provide a notice to clients that you are not licensed to practice in Minnesota.

- O. What can I do about the incivility and lack of professional courtesies I am seeing? The stress is really getting to some people, but I also see a lot of people who just have no empathy for others who might be struggling, such as denying reasonable requests for extensions of time. Don't lawyers have an ethical duty to treat others better than this?**

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The practice of law can be stressful in the best of times. There is no specific ethics rule, however, that requires a lawyer to be courteous and gracious, though the oath we took when we were admitted requires that as well as the Professionalism Aspirations the Minnesota Supreme Court endorsed in 2001. Rather, the rules are written to check when such conduct reaches an extreme, such as when a lawyer has no substantial purpose for the means used. There is no question, however, that now is the time to be kind and considerate with each other. Now is the time to demonstrate your professionalism. I'm sorry that others do not always remember this fact.

P. This general information is helpful but I have a specific ethics question caused by COVID-19? What should I do? How can I learn more?

The OLPR provides an ethics hotline called our advisory opinion service that is available all day, every business day, to assist you to address specific ethics issues. You can call our Office at 651-296-3952 or submit an email request through our website at www.lprb.mncourts.gov. This service is free and confidential. While it is not meant to bind third parties, it demonstrates a good faith effort to follow the rules and has successfully helped countless attorneys navigate difficult situations.

You should also stay up-to-date on the changing situations with the courts. Both the Minnesota state courts and federal courts have detailed information about the workings of the court and how it continues to change on their perspective websites, prominently displayed. www.mncourts.gov ; www.mnd.uscourts.gov.

Finally, Lawyers Concerned for Lawyers (LCL) is a tremendous resource on all issues surrounding lawyer well-being including these particularly challenging times for the profession. Their website contains a wealth of information, including a handout on resources to assist with COVID-related challenges. www.mnlcl.org.