

Pandemic legal ethics, part 2

by

Susan M. Humiston

Office of Lawyers Professional Responsibility

Reprinted from *Bench & Bar of Minnesota* – September 2021

In the May/June 2020 issue of this publication, I wrote about legal ethics in a pandemic.* More than a year later, we remain in a pandemic that not only presents continuing personal safety and well-being challenges; professional challenges also remain. Lots of guidance has been issued from various sources and I want to make sure you have information to help you continue to navigate these issues in our new normal.

First, remember: All 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 the word “reasonable” refer to “a reasonably prudent and competent lawyer.” The rules do not expect you to simply do your best under difficult and challenging circumstances, but rather set minimum standards of conduct for lawyers irrespective of the circumstances. As attorneys, we must embrace the challenge of ensuring that our legal practice remains ethically compliant—notwithstanding the changes to our practice made necessary by the seemingly never-ending spread of covid-19. The good news is that the rules provide a framework to help you navigate changing circumstances and the application of those rules to your practice can help you competently handle many pandemic-related situations. As an example, let’s consider the issue of vaccinations.

Implications of vaccination status

Vaccination status has become a contentious and emotional subject. A client’s vaccination status can have implications for how you approach a representation. For example, how comfortable are you meeting with a client in person? Can you refuse to meet in person with an unvaccinated client? What about hearings? Say your unvaccinated client wants an in-person hearing but you think the remote hearing option the court is also offering is better since you don’t want to sit next to your unvaccinated client even with required masks. The ethics rules of course do not mention vaccination status, but they can help you answer such questions ethically.

You may or may not know if your client is vaccinated. Can you ethically ask? Sure. Can they decline to tell you? Sure. What you do with the answer or lack thereof

is then up to you. Lawyers make determinations all the time regarding whether they are comfortable or available to meet in person with a client or prospective client, whether it's a question of physical safety, cost savings, competing schedules, or something else. Vaccination status is no different. Can you competently represent the client using available alternatives, such as the many secure communication technology options we have been required to learn? Most likely the answer is yes. Of course this can be complicated, because not all clients have access to a lot of technology. This just means we must think about how to communicate effectively with clients or prospective clients given the particulars of their circumstances and what we need to know to represent them.

The ethics rules do not tell you specifically how to do this, but again provide the framework. Can you competently represent the client with the information you have under Rule 1.1, Minnesota Rules of Professional Conduct (MRPC)? Can you keep the client reasonably informed about the status of the matter under Rule 1.4(a)(3), MRPC? Can you promptly comply with reasonable requests for information under Rule 1.4(a)(4), MRPC? Can you explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation under Rule 1.4(b), MRPC? Chances are pretty good that no matter what type of law you practice, you can find a way to do most if not all of these things (short of a criminal jury trial) without physically being in the same room with your client if you are comfortable with technology—an essential requirement of modern practice.

Similarly, regarding the question of in-person versus remote hearings, remember as a starting point that the rules address allocation of authority between client and lawyer. Rule 1.2(a), MRPC, provides “a lawyer shall abide by a client’s decisions concerning the objectives of the representation and, as required by Rule 1.4, shall consult with the client as to the means by which they [the objectives] are to be pursued.” What is the purpose of the hearing that you want to attend remotely? Have you discussed with your client the available options as they relate to your client’s objectives? Is the court offering a remote option and can you effectively present your case through that means? Through consultation, can you find a mutually available resolution if there is a disagreement between you and your client? If not, is withdrawal warranted and can you do so ethically under Rule 1.16, MRPC?

Lawyers call our hotline hoping the ethics rules will afford them specific and unambiguous answers to the problem at hand. While the rules provide several prohibitions—for example, don’t lie—what I find most rewarding about working with the ethics rules is they give you the tools to address a lot of challenging and dynamic situations. They are logical and client-centered, and through their interplay, help you

effectively and ethically navigate all kinds of difficult and unprecedented situations. As usual, this statement comes with the caution that there may be other substantive laws or court rules that also bear on a particular topic, so do not forget those considerations.

Resources

As lawyers, we know the answer is often “it depends.” But we also know that knowledge is power. And that asking the right questions often provides the necessary clarity to navigate difficult times. In addition to my prior article, we have prepared a list of frequently asked questions related to covid. That list can be found on our website, www.lprb.mncourts.gov. The American Bar Association has also published two opinions you might find relevant: ABA Formal Opinion 495, “Lawyers Working Remotely” (December 2020) and Formal Opinion 498, “Virtual Practice” (March 2021). The first looks at working remotely through the lens of the unauthorized practice of law; the second examines ethics rules typically implicated by remote or virtual practice. Even if you are not a member of the American Bar Association, the ABA makes its copyrighted ethics opinions available free of charge for one year following issuance, so download them now if this is a topic of interest to you.

Conclusion

I’m pleased to report that we have not seen a spike in discipline due to pandemic-related ethics mistakes. The complaints we see now are the same ones we have always seen, although it’s fair to say that the pandemic has exacerbated already challenging situations for some lawyers, especially those related to substance use and mental health issues. The pandemic has also taken its toll on civility, from anecdotal reports I have received. The practice of law has always been challenging, and the profession continues to be challenged by this pandemic. Taking time to review your practices against the ethics rules is always time well spent, and that remains true as we continue to navigate day-to-day changes in the world necessitated by the pandemic. Please call our ethics hotline (651-296-3952) if you have a question about how to ethically handle a particular client situation or let us know if there is something else the Office can do to help you in the ethical practice of law. Take care.

* Susan Humiston, *Legal Ethics in a Pandemic*, Bench & Bar (May/June 2020).
<https://www.mnbar.org/resources/publications/bench-bar/columns/2020/05/27/legal-ethics-in-a-pandemic>