

# Meeting your Ethical Responsibilities During the COVID-19 Global Pandemic

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I hope everyone reading this article and those who you are close to are safe and well and healthy and that you continue to be that way. This is an unprecedented time.

Like many of you, we have been receiving inquiries triggered by this pandemic. At the same time we are inundated with overwhelming blasts of information about the pandemic and relief or measures local, state and federal governments are implementing and changing, including updates on COVID-19, what you should or are mandated to do to prevent the spread of the disease, loans for small business and firms, economic stimulus from the federal government, health care and unemployment relief, just to give a few examples. Moreover, the information changes rapidly.

How can we as lawyers meet our professional responsibilities and advise our clients when the world is vastly different than it was just a month ago? Only last year we can recall all the CLE programs about disaster planning and the need for continuing operation plans in the event of an emergency. For sole practitioners or very small firms, having a plan for someone to cover you is critical at any point but never more critical than now.

What I want to discuss is how technology and remote work impacts our professional responsibilities. First, we and our clients are all subject to an array of orders from the government, Federal, state and local, impacting what businesses can operate, how they can operate, whether our clients can do business, and so forth. Some of these orders confounded lawyers regarding whether they could keep their practices open. Fortunately, the answer is yes, they can. See "[Lawyers Permitted to Practice Amid COVID-19 Shutdown.](#)"

To keep up with COVID-19 developments and actions the VSB, the Supreme Court and the Governor are taking, visit "[COVID-19 Updates and Safety Measures.](#)"

Because the health and safety of our colleagues and employees are our priority, many of us are being directed, for good reason, to work remotely or telework, and this presents some challenges.

Despite the rapidly changing environment, we still retain the duty to remain competent, which is one of the primary duties under the rules of professional conduct. To be competent, we not only need to be technologically capable to be able to work remotely and effectively, but we must keep track of rules, regulations and laws that are changing, not only daily, but sometimes hourly, due to the pandemic.

Large firms are collecting resources for their clients which can also prove helpful for solo and small firms to keep up with COVID-19 developments. See Hunton Andrews Kurth's "[Corona Virus COVID-19 Resources Center.](#)" McGuire Woods offers business and legal resources to address the many challenges presented by the pandemic [here](#).

By and large, the rules of professional conduct are static, but we need to abide by them even in times of unprecedented crisis or emergency. Yet, how we adapt, interpret, and apply them must be reasonable under the circumstances. The Preamble to the Rules of Professional Conduct state that they are "rules of reason."

**Competence during crises and emergencies.** Competence means that we make sure that we understand the subject matter of the representation and have the skill, experience or preparedness to perform the work. We conduct research if we don't feel up to speed on a novel issue or we consult with another lawyer that has experience or skill with the issue we are tackling. Rule 1.1, like so many of the other rules of conduct, require us to do what is reasonably necessary. The word "reasonable" or "reasonably" appears repeatedly throughout the rules. That is where our obligations are tempered or have modified based on the situation we find ourselves in now. We are currently in a situation in which all of us, regardless of age or experience, are in the same boat.

For example, I don't have any more knowledge, expertise, or information about the CARES Act or the Family First Act, or the SBA loan program, or the Payroll Protection Act. In employment law, the pandemic raises numerous new issues revolving around HIPAA, medical issues, and new law governing family/medical leave and emergency sick leave. Estate planning lawyers have expressed new concerns when children or other beneficiaries contact the parents' attorney to have their elder parents' estate plan changed. More fundamentally, how are documents to be executed and witnessed in the era of social distancing? What role, if any, can videoconferencing and E-Notaries play to ensure that legal documents are validly executed? Family lawyers are in a quandary over enforcement of child visitation orders when one parent denies visitation for fears of the coronavirus spreading. For criminal defense lawyers, concerns about the spread of the coronavirus has led them to using teleconferencing to have a virtual meeting with their incarcerated clients. But what if the lawyer is not equipped to teleconference? Must the lawyer meet in person with the client in jail or can they limit their communications to telephone?

These are not things any of us would have encountered before. We're all starting in the same place. We're being bombarded, overwhelmed by massive amounts of information coming at us that we need to deal with to be up to speed. Again, what is reasonable here may not mean the same thing that was reasonable two months ago in taking on a new matter. I don't think the rules of conduct contemplated a pandemic when Comment [3] to Rule 1.1 was written, but it certainly applies in this environment:

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

You're within your professional responsibilities and ethical obligations where it's an emergency and it's just not practical to get someone else to do it and you just must do the best you can. You may be faced with an extremely limited time or an immediate deadline within which to act or advise a client. It's very important in this pandemic to be sensitive to that. But it is also important to deal with our competence in at least a couple different ways. First and foremost, we must be up to speed on the technology that we're using and make sure that the technology we're using has the appropriate security so that we're not jeopardizing client information. In addition, we need to try our best to keep on top of all these changing laws if we're going to make sure we're complying and advising clients properly. To keep up and stay competent law firms might consider assigning a specific topic or area for each lawyer to follow and report on such as employment and leave issues, unemployment benefits, health care, state and federal court activity, small business loans, payroll paycheck protection program, etc.

Someone needs to check daily, or even the beginning and end of every day, to follow the courts in which we regularly practice making sure we know what rules are in force, whether matters are continued or

extended. For example, the Supreme Court of Virginia announced on Friday, April 3, that oral arguments in the April session, April 14-17, will be done by teleconference.

There are large institutions putting out thorough and sophisticated summaries of everything you need to know about legislation and the changing legal landscape during this pandemic. The U.S. Chamber of Commerce is doing an excellent job of providing [resources for advising business clients](#).

You may want to go to your local bar association for local things and go to the [ABA website](#) for things that are broader ranged. As mentioned earlier many of the large law firms are posting robust COVID-19 resources pages on their web sites. See also the Virginia Bar Association's COVID-19 [legal resources page](#) at and the Virginia State Bar's "[COVID-19 Resources for Lawyers](#)."

Being competent and diligent is more challenging right now. The thing to remember about diligence under these situations is that even if we're inconvenienced, or there's some obstruction, delay, some obstacle, we're still expected to act reasonably diligently and promptly. However, to some degree, what's reasonable now may not be the same as what was reasonable two months ago.

**Communication.** The rules give some leeway in emergency situations, but we need to make sure to avoid client anxiety by keeping clients reasonably informed. Rule 1.4. It's important among other things, to have a contingency plan if you are working alone or in a small firm. Communicate with clients about how recent events impact the representation and how your firm will handle their matters during the stay-at-home order or how reduced in-person staffing at your office will affect the representation. Posting status updates about the operations of your law office on your Facebook page, blog, e-newsletter and web site can help. For instance, will you need to meet with clients via teleconference instead of in-person? Will you need to continue or delay matters? Will another attorney need to help with the case?

Consider planning to have mail delivered to your home or scanned and sent to you if you are out of the office. If necessary, have one person (and a backup) designated to go into the office to process physical mail, accept packages, and check to see if everything is running.

If clients are contacting us and we can't respond to clients quickly, we need to tell them or have a method that acknowledges they contacted us, i.e., a voice mail greeting on our mobile phone, saying we will get back to you as soon as possible; and/or an auto-reply on our e-mail application. Check your voice mail messages periodically and delete old messages so that your voice mail box is not full and no longer accepting new messages. If you can't do it, someone else needs to do it so that clients are not getting frustrated and increasingly agitated. If you are closing your law office space and teleworking from home, you should post a message on your firm's web site that says so. Communication with clients in the time of this pandemic should be handled delicately. One commentator has noted that when you call your clients now, perhaps the first few minutes of any conversation should have nothing to do with the legal matter at hand. "It's time to discuss life, family, fears, and of course, health." This is also a time to be honest and transparent. "We're all going through this, no one is immune."

**Confidentiality.** Many of us are working in our homes. The concern, of course, is that you may be working in an environment where anyone can overhear what you're saying or can have access to your device or materials. I would expect for most of us that's not the case and that we have found a private spot in the home that's quiet where you can have a protected confidential conversation. The issue is that, crisis or not, we still have the same obligation for confidentiality when we're using electronic devices as when we're working with hard copied papers. Everyone needs to be diligent in making sure that no one else has access to the information. You may be thinking what's the difference if my teenage or my spouse or roommate sees it. The reality is that it does make a difference and it's critical to take the precautions to

make sure that your devices are protected, that you're securing confidential information and that you're not having confidential phone calls in the presence of others. Most recently, commentators are cautioning that the Alexa, Google Assistant and other smart devices around the home should be unplugged.

**Conflict of interest.** One important aspect of conflicts of interest is how we intake new clients. First, with respect to conflicts of interest, we owe a duty to make sure we don't take on conflicting matters and that we seek appropriate waivers when needed. That becomes harder during our current working environment. If you are a solo, small firm lawyer you may find yourself getting calls from friends, people you know from church, people you care about, asking for advice. Frequently they might be amid a crisis and they're asking for advice. We want, of course, to help everyone we can to the extent feasible because this is such a challenging time. But under the circumstances, what does that mean? If I receive a phone call or an email with someone who has a small business asking me for help, I don't know -- unless I run a conflicts check -- whether one of my colleagues, working in her home or his home, either the same part of the country or across the street or across the state, is getting a call from someone else asking for advice on the same matter from the other opposing point of view.

Think about a firm with lawyers in different locations. We all have friends, relatives and people who will be asking for emergency advice. It is so easy to slip and make a mistake. You don't want that to happen because, as you know, the conflict of one lawyer is imputed to the other lawyers in the firm. Rule 1.10. No matter how urgent something is, we must still run conflict checks and avoid counseling someone who is adverse to a client another lawyer in the firm is advising.

**Declining or determining representation.** This is a very broad area, but I want to focus on Rule 1.16(a)(2), which is a lawyer's physical or mental condition and impairment and your ability to represent a client. Hopefully no one is suffering from the COVID-19 virus or has been exposed or will suffer any ailment that would affect your ability to function or put you at risk. However, a lawyer can be afflicted and unable to work for an extended period. Sometimes we feel so much pressure that we just keep pushing ourselves, even when it's not appropriate. It's very important to remember that if you are not able for whatever reason to represent the client to your appropriate ability that you need to decline a new engagement or terminate the existing relationship. What's very important is to make sure you do what's reasonably practicable to make sure the client's representation is done in a way that doesn't hurt the client. Again, this takes us back to the need for contingency plans and succession plans, especially here in a small firm. Make sure you have a backup plan, that your clients are covered, and you have someone who can fill in.

**Supervision.** Supervision is not just about law firms. The rules (Rules 5.1 and 5.3) focus heavily on law firms, but it's not just about law firms. If you are a partner in a law firm or you are the head of a practice group: in-house counsel, government, pro bono, or public type of law office, anything -- it doesn't matter what the institution is or the format in which you work-- if you have responsibilities for the work of others, then you have responsibilities to make sure that they are adhering to our professional standards of conduct. You are responsible to make sure that they are meeting their obligations, including all the requirements discussed in this paper. Well, how in the world do you do that when you are in your home in one place and your junior colleague is somewhere else? It isn't easy at all. If you're a person with supervisory responsibilities over lawyers or other professional staff, consider having a regular phone call, team call, or some way, whether you do it by Citrix, WebEx, Zoom, or something else. Microsoft Team is another product you can use to teleconference with your colleagues and staff. If you do it by Zoom you need to make sure you follow the protocols for privacy or pass protection as comments have been written in the past few days about people hacking into other people's Zoom calls. It doesn't have to be Zoom or Skype where you can see one another, you can just chat on the phone. It's just important that you have

regular calls with your team, both for the supervisor lawyer and for the junior or nonlawyer members of your team so people can talk about what they're doing and what they're worried about and what they need from you to do their jobs well.

**Civility and Professionalism.** In March 2020, a statement by the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee called for a new emphasis on lawyer civility:

In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretionary authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk. . . Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations.

In litigation, court rules, calendars, and statutes of limitation have been suspended. Commentators suggest that by halting trials, the Coronavirus may push parties to the settlement table. Now could be an opportune time for litigants to reach out to opposing parties to see if resolution is appropriate considering the circumstances.

**Lawyer Wellness.** According to a recent Law360 article, "Virus Poses Latest Test to Supporting Attorneys' Mental Health," Law360, Mar. 23, 2020:

As lawyers grapple with the anxiety of a public health crisis, juggle work and family obligations at home, and adjust to physical isolation due to the spread of COVID-19, efforts to support attorneys' mental health and wellness are paramount, according to mental health professionals.

Lawyers struggle with higher rates of mental health issues, including depression and problem drinking, than the average public, studies have shown.

The current environment, in which stress and anxiety are running high and many lawyers are physically isolated while working from home, stands to exacerbate the attorney mental health crisis if preventative measures are not taken, attorney wellness and mental health experts told Law360.

"The pandemic and ensuing disruption to routines and stability is unquestionably taking a toll on the mental health and well-being of many in the legal profession, just as it is for individuals in all walks of life," said Patrick Krill, founder of attorney well-being consulting firm Krill Strategies. "Fear, uncertainty, stress and worry are widespread."

Now more than ever we need to strive to maintain the same healthy regimens for our body, mind and spirit. The occupational hazards of our profession are compounded with the stress the coronavirus pandemic has placed on our economy, clients, family and ourselves.

The ABA Commission on Lawyer Assistance Programs has published a list of resources titled "[Mental Health Resources for the Legal Profession During COVID-19](#)." See also "[Staying on the Well Being PATH During COVID-19](#)."

The Legal Ethics Hotline is here to help you with your ethical issues. Our ethics lawyers are teleworking, but we are fully operational and ready to serve you. You can reach us at 804-775-0564 or you can submit your legal ethics question online [here](#).