

Planning Through the Pandemic

Practical and Ethical Issues During Times of Crisis and the COVID-19 Era

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Roadmap

- Ethical responsibilities when running your law firm in crisis/remote-working environment indefinitely
- Practical aspects of continuing firm operations while advancing client goals
- Guidelines for supervision of and relationship with attorneys, staff, employees

Ethical Responsibilities When Running Your Law Firm in Crisis/Remote-Working Environment Indefinitely

Competence, Knowledge and Skill

Diligence

Communications

Confidentiality/privilege

Ethical responsibilities in crisis environment

Oregon RPC 1.1: “Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

Duties involve

- Maintaining diligence and competence in the face of inevitable interruptions to workflows.
- Securing physical material/property
- Tracking deadlines and scheduling changes
- Transitioning into alternative workspaces
- Staying (and becoming) competent

Consider:

- Physical infrastructure
- Resources
- Communications
- Tech abilities and limitations
- Time constraints
- Emergency situations

Caveats

- Too many clients/complex matters
- Too much versatility/"dabbling"

Ethical responsibilities in crisis environment

RPC 1.3: “A lawyer shall act with reasonable promptness and diligence in representing a client.”

- Deadlines, changes, and notice
- Preparation
- Caseload

Ethical responsibilities in crisis environment

Communication with clients during a crisis

RPC 1.4(a): “keep the client reasonably informed about the status of the matter...”

Responsibilities include:

- Ensuring open line of communication
- Ability to contact client
- Client’s ability to effectively communicate

Ethical responsibilities in crisis environment

Communications *with opposing counsel & third parties*
during a crisis

Consider:

- Agreements
- Extensions
- Remote proceedings
- Settlements
- Civility and professionalism

Professionalism

- Example 1:
- “Plaintiff has not demonstrated that it will suffer an irreparable injury from waiting a few weeks. At worst, Defendants might sell a few more counterfeit products in the meantime. But Plaintiff makes no showing about the anticipated loss of sales. One wonders if the fake fantasy products are experiencing brisk sales at the moment. . . . If there’s ever a time when emergency motions should be limited to genuine emergencies, now’s the time.”
- “The filing calls to mind the sage words of Elihu Root:
- “About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop. . . . The world is facing a real emergency. Plaintiff is not.”

Example 2:

- Given the global COVID-19 pandemic, it is hardly surprising that Plaintiff filed [ECF No. 47] a motion to extend the mediation and discovery deadlines and all related deadlines and to reschedule the special set trial date. ***
- Rather than guess at defense counsel's motivation, the Undersigned requires defense counsel to by March 26, 2020 file a double-spaced memorandum explaining (1) whether he did, in fact, oppose the motion to reschedule the trial and enlarge trial-related deadlines and the mediation deadline, and (2) all the reasons justifying his opposition (assuming that he did actually advise Plaintiff's counsel that he opposes the motion).
- If defense counsel opposed the motion, then he is best advised to provide a comprehensive and rational explanation. Before filing this response, though, defense counsel may want to brush up on the concepts of karma, goodwill, grace, compassion, equity, charity, flexibility, respect, spirituality, selflessness, kindness, public spirit, social conscience, and empathy.

Ethical responsibilities in crisis environment

Communications with courts during crisis

- Operational status
- Personnel requirements
- Standing orders
- *Ex parte* in proceedings

Ethical responsibilities in crisis environment

RPC 1.6(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Attorney-Client privilege:

- Attorney
- Client
- Communication
- Confidential
- Purpose of legal advice

Ethical Responsibilities in Crisis Environment: Privilege & Confidentiality

Traditional office

- Designated work spaces
- In-person meetings
- Limited access
- Proprietary software
- Commercial-grade security
- Regular staffing
- On-site support

New remote work setup

- Semi-designated work space
- No in-person contact
- 24/7 open access
- Less secure tech
- Not staffed by employees
- Support is remote

Ethical Responsibilities in Crisis Environment: Privilege & Confidentiality

RPC 1.6(c): attorneys need to act reasonably to prevent non-authorized access or inadvertent disclosure

Consider reasonable actions in different settings:

- physical office
- remote work location
- electronic material/metadata
- inadvertent/unintended recipients
- outside service providers

Ethical Responsibilities in Crisis Environment: Privilege & Confidentiality

Communication Medium

- Physical files
- Email
- Mail
- Phones
- Computers
- Fax
- Wifi
- Cloud storage
- Video conference applications

Practical Considerations

How do you pursue client goals during a crisis?

- Client perspective will matter
- Is client facing same crisis/circumstances?
- Evaluate & reevaluate likelihood of success
- When to take action vs. when to hold off
- Expedite / delay litigation
- Communicate strategy to clients!
- Do you have a succession plan?
- How do you pursue client goals when functionality of courts/agencies is limited?

Final Thoughts

Responsibilities for Supervisory Attorneys

Non-lawyer assistance

Law Firm Theft

Responsibilities for Supervisory Attorneys

Supervising attorneys: duty to adequately supervise and ensure compliance becomes increasingly challenging given:

- Remote work settings
- Delegation of duties
- Decreased in-person communication
- Lack of physical oversight

RPC 5.3: Supervising Nonlawyer Assistants

- Nonlawyers in the firm:
 - Give appropriate instruction and supervision
 - Be responsible for work product
- Nonlawyers outside the firm:
 - Make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations
 - Varies depending on circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information

Law Firm Theft/Fraud

- Significant increase in theft of law firm funds during times of economic downturn/crisis
- Supervisory duties include both ethical responsibilities **and** financial responsibilities for health and success of firm
- Best practice tips:
 - Enact proper safeguards before crisis hits
 - Remain vigilant during crisis
 - Maintain practices after crisis for maximum effect
 - Watch for internal and external threats

Law Firm Theft/Fraud

Areas of theft/fraud

- Phishing, ransomware and malware
- Payroll theft
- Expenses
- Credit cards
- Vendors
- Wire fraud scams

Safeguards

- Ongoing security/privacy training
- Background checks/references
- Limited account signatories
- Random audits
- Garnishment policy
- Reporting structure
- Confirmation emails



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»David frequently counsels lawyers and other professionals on how to navigate an “electronic” practice and he has become increasingly interested in how lawyers and law firms can innovate through legal technology and the creation of new policies and firm structures to address client needs and the changing legal landscape. David is an avid speaker and tweets at @DavidElkanich.

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- » Rachel Edwards received her BA from the University of Washington in Seattle and her JD from Willamette University College of Law. She is a member of the Oregon State Bar, Oregon Women Lawyers, Multnomah Bar Association, and a founding subcommittee member of the New Lawyers Division of the Washington County Bar Association. She has served as a Classroom Law Project Mock Trial Volunteer Judge, an Oregon Department of Human Services Adoption Contract Vendor Attorney, and a volunteer for the Convocation on Equality and the St. Andrew Legal Clinic.
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