

## **ETHICAL CONSIDERATIONS FOR THE REMOTE PRACTICE OF LAW**

Practicing law remotely raises specific ethical concerns for attorneys relative to confidentiality, privacy and security, technical competence and supervision of less experienced lawyers. The Rules of Professional Responsibility were not drafted with a pandemic in mind. Practicing law remotely, no matter the medium, brings new challenges to attorneys relative to the manner we communicate with clients, engage in litigation and the logistics of practicing. Keeping in mind that “[t]he Rules of Professional Conduct are rules of reason”, the following offers guidance on how to maintain New Hampshire’s professional standards and stay true to our ethical principles.

### **Rule 1.1. Competence**

**(a) A lawyer shall provide competent representation to a client.**

**(b) Legal competence requires at a minimum:**

...

**(2) performance of the techniques of practice with skill;**

**(3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;**

**(4) proper preparation; and**

**(5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.**

**(c) In the performance of client service, a lawyer shall at a minimum:**

...

**(4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.**

*As applied to remote legal representation:*

- Competence is not just about the area of the law at issue, in the age of practicing using technology, competence also includes learning the medium being used by the court or administrative agency so that you can effectively communicate, present evidence and argument. “While a competent lawyer is not required to know everything about the law, they must be skilled and knowledgeable in the matter undertaken on behalf of the client. This will inevitably include skills and knowledge in the use of the tools needed to efficiently and effectively perform the tasks undertaken on behalf of the client.” *Lawyer Ethics in the Virtual Courtroom* June 3, 2020 by Gideon Christian.

- Ensure that you have the necessary technical components such as fast enough internet speed, a private area to see, hear and speak so as to not be interrupted or allow third parties access to privileged information.
- Ensure that you have the necessary technical components such as fast enough internet speed, a private area to see, hear and speak so as to not be interrupted or allow third parties access to privileged information.
- Seek assistance if you are not confident in your competence with the necessary technology.
- If available, take advantages of opportunities to practice using the technology beforehand. “Lawyers should test the platform with their clients, so they are familiar with how to enter the meeting and use the platform settings. This can help minimize the chances of technical disruptions, delays and stress from user error.” *Privacy and Confidentiality Tips for Virtual Hearings - A few considerations to keep in mind while you navigate the many logistical issues involved in remote court hearings.* By Cathy Krebs, July 01, 2020, American Bar Journal.

### **Rule 1.3. Diligence**

**A lawyer shall act with reasonable diligence and promptness in representing a client.**

*As applied to remote legal representation:*

- Diligence, like competence, requires learning what is required to effectively represent your client through the modes available.
- Make sure that you can meet your technical obligations in advance of a proceeding or event.
- Review any technical requirements that may apply to your client with your client before the relevant proceeding.

### **Rule 1.4. Client Communications**

**(a) A lawyer shall:**

...

**(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;**

...

**(b) A lawyer shall explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.**

*As applied to remote legal representation:*

- Your client should be advised of how the case will proceed, which includes the technical aspects involved.
- Explain the pros and cons of remote versus in-person attendance at events and phone versus video participation.
- Know when to demand in-person events when important to your client's representation.

### **Rule 1.6. Confidentiality of Information**

**(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) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:**

...

**(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.**

*As applied to remote legal representation:*

- Ensure that your client has a device and technical wherewithal to communicate and exchange information securely and in a manner that does not destroy the attorney-client privilege.
- Ensure that your communications take place when you are in private area to see, hear and speak so as to not be interrupted or allow third parties access to privileged information.
- Consider reviewing with your client the importance of maintaining confidentiality when using wireless devices to participate in legal consultation or proceedings.
- Use a service that your firm has verified as safe, with unique links, password protection or PINs and lock the event to avoid uninvited guests.

## **Hacker Streams Porn Into Florida Court Hearing by Infiltrating Zoom**

An intruder marred the court proceedings.

By **Raychel Lean** (<https://www.law.com/dailybusinessreview/author/profile/Raychel-Lean/>) | July 10, 2020 at 02:35 PM

[\(http://www.law.com/dailybusinessreview/author/profile/Raychel-Lean/\)](#)



Hacker. Photo: Lifestyle discover/Shutterstock.com.

It began like any other court hearing over Zoom, but this lawsuit challenging Leon County's COVID-19 mask order took an X-rated turn Friday morning. While Florida attorneys prepared to present their legal arguments, hackers infiltrated with bursts of music and a strange sort of rap involving offensive sexual language, then began streaming porn.

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- Opt to be the host. The host or moderator frequently has the most control over whether privacy settings are enabled in the platform. When you can't request basic confidentiality safeguards.
- Use private breakout rooms to allow for a private place for confidential communications.
- Limit screen sharing and the chat function. Set up a separate confidential way to communicate with client during a hearing

#### **Rule 3.4. Fairness to Opposing Party and Counsel**

**A lawyer shall not:**

**(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;**

**(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;**

**(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;**

...

**(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:**

**(1) the person is a relative or an employee or other agent of a client; and**

**(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.**

*As applied to remote legal representation:*

- The same rules of honesty and integrity still apply even when opposing counsel isn't present in person. A lawyer has a duty to be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings, including cooperating with opposing counsel at all stages of remote proceedings.
- Do not take advantage of technological mistakes by the opposing party or counsel that do not go to the merit of the case or that are not prejudicial to the rights of the client.
- Do not take advantage of the area off camera to make gestures or pass notes to your client he/she is testifying. Coaching is not permitted.
- Third persons should not be permitted in the room while client or witness is testifying unless disclosed ahead of time to other counsel.
- In the event that other parties are in the room, note that New Hampshire both parties must consent to a recording. Consent may be implied by surrounding circumstances however. *See Fischer v. Hooper*, 143 N.H. 585, 598 (1999).

#### **Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers**

**(a) Each partner in a law firm, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.**

**(b) Each lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.**

*As applied to remote legal representation:*

- Make sure all attorneys in the firm acquire the necessary education to practice ethically through technology. This includes providing the necessary tools and training.
- Consider planning ahead to make sure support personnel are available if necessary to assist attorneys with technology associated with remote advocacy.

There are a number of articles on-line that go into detail about best practices. We recommend reading some of these to make sure that you are doing your ethical best when practicing remotely. This is especially important for litigating criminal cases due to the defendant's confrontation rights and right to a jury trial and right to a speedy trial.

The Zoom boom: How videoconferencing tools are changing the legal profession By Ellen Rosen, ABAJournal (June 3, 2020), <https://www.abajournal.com/web/article/ethics-videoconferencing-tools-are-changing-the-legal-profession>.

Ethics and Litigating a Criminal Case from Afar By Joel Cohen | August 20, 2020, New York Law Journal via Law.com. <https://www.law.com/newyorklawjournal/2020/08/20/ethics-and-litigating-a-criminal-case-from-afar/?slreturn=20210101084610>.

Privacy and Confidentiality Tips for Virtual Hearings - A few considerations to keep in mind while you navigate the many logistical issues involved in remote court hearings. By Cathy Krebs, July 01, 2020, American Bar Journal. <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/privacy-and-confidentiality-tips-for-virtual-hearings/>.

Ethics Forum: Questions and Answers on Professional Responsibility - What is a Webex or Zoom hearing or trial like? By Samuel C. Stretton | August 27, 2020, New York Law Journal via Law.com. <https://www.law.com/thelegalintelligencer/2020/08/27/ethics-forum-questions-and-answers-on-professional-responsibility-137/>.

Ethics of Virtual Consultations By Megan Zavieh, Attorney at Work. <https://www.attorneyatwork.com/ethics-of-virtual-consultations/>