

*Navigating Pandemic-Related Changes from Your Home Office***Coronavirus & Legal Ethics: Part Two**

By Nik Chourey



Bulletin File Photo

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April's issue of the *Bulletin* contained Bar Counsel's initial guidance in response to frequent questions related to the coronavirus that have been received on the Legal Ethics Helpline. This month's column continues that theme.

The regular flow of ethics calls has continued during the COVID-19 pandemic, with members raising additional questions about the practice of law from home. For that reason, this column responds to universal ethics implications resulting from pandemic-related changes to how and where we practice law.<sup>1</sup>

**Changes in How We Practice Law**

The impact of the COVID-19 pandemic appears without limitation. From courts to sports and from offices to schools, we have not been able to gather as we did before. How we practice law has changed, too.

Telecommuting policies for law firms and agencies have either already expanded, or they are in transition. That means many lawyers have the ability to continue much

of their work from the security of their homes. Still, practicing from a kitchen table presents daily and vexatious challenges. And our workspace adjustments are only compounded by the management of a caseload of vital needs.

Staying safe, keeping our families safe, keeping our clients and staff safe — all require the best we have to offer. Those of us who are parents of school-age children are now their substitute teachers, coaches and camp counselors, too. Simply put, the boundaries between work and home have melted into some new, not-yet-recognizable form.

These changes mean that our identities as lawyers are also challenged. Before, our dockets and calendars directed us to go forth and gather. We traveled to court appearances, meetings, depositions, arbitrations and conferences. Now, all of those in-person gatherings have changed, and uncertainty surrounds when, where and how we will gather in the future. Any return to pre-pandemic behavior will vary widely from solos to big firms, and from cities to smaller communities.

Despite so much uncertainty, legal ethics endures as a defining element of our identities as officers of the court. We are members of a learned profession,<sup>2</sup> united in legal practice by our role as officers of the court, our adherence to the Oregon Rules of Professional Conduct and our oaths to uphold the law.<sup>3</sup> To that score, manage your regulatory risk by learning what rules apply to common practice scenarios in this new environment. Take advantage of bar resources<sup>4</sup> to alleviate ethics concerns, and sharpen your purpose and ability to pursue your clients' objectives.

**Sustaining Legal Ethics at a Home Office***Duty of Confidentiality*

When working remotely, consider that our ethical duty of confidentiality may often

cover more information than the attorney-client privilege (OEC 503) and the work-product doctrine. Our duty of confidentiality almost always prohibits the disclosure of "information related to the representation"<sup>5</sup> of prospective, current and former clients.<sup>6</sup> The source of the information is immaterial, as long as it originates from the professional relationship; all information related to the representation is subject to your duty of confidentiality. This is always the case, barring the informed consent of your client, implied authority or other limited exception. RPC 1.6(a) and (b).

There is no friends-and-family exception to our duty of confidentiality. Working from home requires that we make reasonable efforts and act competently to prevent unauthorized access to client information or the inadvertent disclosure of that information to our own family members and housemates. RPC 1.1; RPC 1.6(c). Further, remote work may pose challenges for supervising lawyers charged with ensuring that their lawyer and non-lawyer staff abide by the rules, including the duty of confidentiality. RPC 5.1; RPC 5.3; RPC 5.5(a).

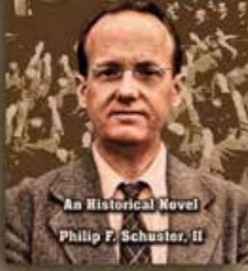
A number of members who have called the Ethics Helpline have never worked from home before, and have no dedicated space to do so. The good news is that solutions to this problem are realistic and need not be complex. Close the door, modulate your volume on calls (or consider installing a white noise machine outside your door), wear headphones, keep confidential documents out of view and be discrete. Lawyers may also consider whether to request that housemates and family members agree to keep confidential any information they may overhear inadvertently.

Doing legal work on a home internet network may also undermine client confidentiality. Lawyers have an obligation to employ "reasonable steps" to safeguard



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1949. American Rudy Chapman is planning his escape from Communist East Germany. For the past decade, he has survived the Nazi regime's brutality by teaching English in the tiny village of Grossheringen and translating at a POW camp while secretly aiding Allied POW code writers.

Rudy falls in love with Miriam, a young Jewish woman in hiding, and remains optimistic that Miriam's family is alive. At war's end, unseen forces pull the couple apart. Miriam is utterly convinced her family has vanished, yet Rudy remains a Holocaust skeptic.

Eventually escaping to West Germany, Rudy is recruited by the Allies to assist post-war displaced persons. Finally learning that the Holocaust was real, Rudy is devastated. Hoping to start a new life with Miriam, he longs to reunite with her. But will Miriam survive her daunting escape to the West?

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electronic information that is protected by Rule 1.6.<sup>7</sup> Lawyers who are not tech savvy should turn to experts to determine what protections are advisable. Many options, such as investing in virus protection and utilizing virtual private networks, are relatively simple to implement.

The bottom line is that lawyers must use secure methods of client communication and handling of client information that affords a reasonable expectation of privacy.<sup>8</sup>

### *Document Integrity & the Paperless Office*

Before COVID-19, many attorneys operated within cloud-based paperless offices, enjoying cost savings with efficiencies in both access and production. Since the advent of the pandemic, many more attorneys are transitioning to paperless offices.

Lawyers implementing new paperless practices must take reasonable steps to ensure that any third-party server entrusted with client information is in compliance and up to date with industry standards of security and confidentiality. Such steps include the use of a service agreement requiring the vendor to preserve confidentiality and security of the documents and notify you of any unauthorized breaches of the system.<sup>9</sup>

With effective cloud security, a paperless office will protect client confidentiality and safeguard client property.<sup>10</sup> Electronic document systems also help lawyers meet the requirement to promptly deliver a client file upon current and former clients' request, or to substitute counsel upon receiving the client's consent.<sup>11</sup>

Attorneys who move to a paperless practice should also consider what materials are deemed to be part of the client file. As the Legal Ethics Committee explains with more detail in OSB Legal Ethics Op 2017-192 ([osbar.org/\\_docs/ethics/2017-192.pdf](https://osbar.org/_docs/ethics/2017-192.pdf)), the term "client file" is not defined in the RPCs; in addition, information technology has changed the form and location of what now may constitute a client file.<sup>12</sup> But regardless of form or location, the client file should be considered to be the sum total of all documents, records or information (i.e., texting, Facebook messenger, DMs and email) that have been maintained in the exercise of professional judgment for use in representing the client.

### *Sustaining the Attorney-Client Relationship*

More than before, the Ethics Helpline has heard from a number of members who, despite their best efforts, have lost touch



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with their clients. It doesn't matter whether it's a criminal, estate planning, family law or personal injury matter — attorneys who can't communicate with their clients are at risk of violation of a number of rules, including RPC 1.1., 1.2, 1.3 and 1.4.

At the most basic level, this is because the allocation of authority between lawyers and their clients concerning the objectives of the representation requires communication. A communication breakdown may also affect the discharge of duties of competence, diligence and loyalty owed to clients.<sup>13</sup>

#### *What to Consider If Communication Fails*

First, RPC 1.2(a) provides that there are certain decisions about the representation that are for the client alone, including whether to settle or, in a criminal proceeding, whether to accept a plea, waive a jury or testify.<sup>14</sup> On the other hand, with few exceptions, the strategy, tactics and manner of pursuing the objectives of the representation are, ultimately, matters for the lawyer to determine, based upon the exercise of professional skill and judgment in consultation with the client.<sup>15</sup>

Adequate communication with clients is integral to this allocation of authority. To meet the duty of communication under RPC 1.4, lawyers must obtain their clients' informed consent to act on those decisions that are solely theirs to make. Similarly, the failure to communicate or inability to communicate with a client will also risk violations of the duties to provide competent (RPC 1.1) and diligent representation (RPC 1.3). If continuing the representation will result in violation of the rules, your withdrawal is mandatory. RPC 1.16(a)(1).

In seeking a tribunal's permission to withdraw as attorney of record, we must comply with applicable law and, if so ordered, continue the representation "notwithstanding good cause for terminating the representation." RPC 1.16(c); see also OSB Legal Ethics Op 2005-33 ([osbar.org/docs/ethics/2005-33.pdf](http://osbar.org/docs/ethics/2005-33.pdf)). In moving to withdraw, we must maintain our duty to protect client confidentiality. This likely requires that our pleadings disclose only that we "seek to withdraw for professional considerations."<sup>16</sup> Finally, we must be careful to abide by our other duties to the client upon withdrawal, and take all steps "reasonably practicable to protect a client's interests." RPC 1.16(d).



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