

NEWSLETTER SUPPLEMENT

COVID-19

ETHICAL CONSIDERATIONS

FROM THE STATE BAR OF SOUTH DAKOTA
ETHICS COMMITTEE



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The South Dakota State Bar Ethics Committee has been asked to provide thoughts about ethics issues arising from the COVID-19 pandemic. This is the first in a series of brief articles about some of the Rules of Professional Conduct potentially implicated, which can be found in SDCL Chapter 16-18 at Appendix A. These articles aren't intended to impose a set of "COVID-19 Rules," but instead to provoke thought and questions.

We encourage lawyers to start with Dean Neil Fulton's article from the March 2019 SD State Bar Newsletter about preparing for and dealing with the practice of law in a disaster situation. It provides great points of discussion.¹

Rule 1.1—Competence

After the definitions in Rule 1.0, the first Rule in the "book" is Rule 1.1 regarding "competence"

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Well, that seems obvious, but what does it mean under the current circumstances? Actually, it means the same thing it has always meant, but lawyers need to guard against doing things differently just because there is a crisis or emergency.

The Comments to Rule 1.1 provide some insight. Comments [1], [2] and [4] flesh out the concept that how much "knowledge" and "skill" a lawyer must have depends on a variety of factors including the complexity of the matter and whether the lawyer has sufficient time to get "up to speed" under the circumstances. They clarify that even a "novice" lawyer can potentially be "competent" to deal with complex matters, but also remind lawyers that familiar and more experienced lawyers are a good resource the lawyer should consider recommending to a client, if needed. Comments [5] and [6] clarify that the preparation required in a matter is obviously greater when the matter is complex or the client has more at stake; and that a lawyer has to stay "up to date" on changes in the law and the practice of law.

Comment [3] is particularly relevant here. In an emergency, where client access to more experienced counsel may be limited or not practical, a lawyer lacking ordinary skill in an area can represent a client. But the lawyer should do so only on a limited "triage" basis, if possible, and must guard against "ill-considered action" by the client.

There are several excellent resources around the web and elsewhere already illuminating these comments in relation to COVID-19 in two ways: "legal competence" and "*practice* competence."

In the "legal competence" area, a great distillation of what Comment [3] means "right now" comes from www.jdsupra.com (emphasis in the original):

¹ <http://www.statebarofsouthdakota.com/p/do/sd/sid=968>

This best practice standard is even more important to follow with clients facing emergent issues with their lives and businesses. *You must resist the temptation, however, to provide quick, off-the-cuff, legal advices, let alone best guesses.* If you need to look into a legal issue or read a document more carefully (which should not be done on your phone), *tell the client you need to get back to them.*²

Great advice for all lawyers in all situations. Even (maybe especially) when things are hectic, SLOW DOWN. Don't be afraid to say "I Don't Know—Yet." Right now, clients may be calling with "emergency" questions about developments like the Paycheck Protection Program loan applications and other issues arising from the CARES Act, and several other problems. Timely and diligent responses are as important as ever (more on "diligence" under Rule 1.3 later), but providing "the" answer that will actually help a worried client is the mark of competence, not giving just "any" answer that will placate the client, even if it takes a little more time to find it.

And, as noted above, if a lawyer is familiar or practices with another lawyer who has special skill in a given area, getting that lawyer's perspective or even referring the client might be the best choice of all.

In the "practice competence" area, South Dakota (unlike some other states) hasn't added a specific "technological competence" requirement or comment to Rule 1.1.³ South Dakota's Comment [6] does say, however, that lawyers must "keep abreast of changes in the law *and its practice*" which seems to implicitly require lawyers to be up to speed on at least some technology. (We will discuss some of those issues in relation to communication and confidentiality under Rules 1.4 and 1.6). Some lawyers, depending upon their practices, may have an obligation to either learn how to use video chat and other remote officing technology⁴ and do so in a way that protects client confidentiality⁵ or have assistance from someone who can.

However, regarding COVID-19, malpractice and ethics experts have noted lawyers need not be tech-savvy to avoid major "practice competence" missteps. Instead, they need to fall back on strict compliance with existing standard procedures, particularly when a crisis might encourage them to do otherwise:

[W]ith the coronavirus forcing people around the country to break their daily routines and cancel plans, the risk that distracted lawyers and staff will overlook a court alert email or forget to put an entry into calendaring software is high.

² <https://www.jdsupra.com/legalnews/attorney-ethics-considerations-in-the-10733/> (emphasis added)

³ <https://www.ktlitsmart.com/blog/what-you-don%E2%80%99t-know-will-hurt-you-technology-competence-timecovid-19>

⁴ <https://onward.justia.com/2020/03/19/legal-ethics-and-coronavirus-tech-solutions-for-health-safety-and-efficiency/>

⁵ <https://www.wyomingbar.org/practicing-ethically-age-covid-19-guidelines/>

With all the other things on their minds, lawyers should make time to double check that routine calendaring tasks and email checks are getting done on time and with the same level of attention.⁶

After “substantive errors” about the law, the ABA’s research suggests administrative errors (missing deadlines, losing documents, failing to file documents, and the like) and failing to properly address conflicts issues are two of the biggest sources of ethics and malpractice complaints.⁷

So the best and simplest things lawyers can do to provide “competent” representation in the face of COVID-19 are ones that require no special training or skill. Take the time needed to provide accurate advice to clients, even when they (and the lawyer) are in a hurry and under stress, and admit when the problem requires another lawyer’s perspective or skill. Don’t forsake consistent compliance with the procedures the lawyer or the lawyer’s firm have developed over the years to deal with the biggest sources of potential mistakes.

In short—no shortcuts. Next, Rule 1.3--Diligence

⁶ <https://www.jdsupra.com/legalnews/attorney-ethics-considerations-in-the-10733/>

⁷ https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/march/the_biggest_malpractice_claim_risks/

Rule 1.3—Diligence

Our first article was on Rule 1.1 regarding “Competence,” one of the shorter rules. Rule 1.3 is even shorter:

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

As with Rule 1.1, this rule seems to state the obvious without precisely defining what “reasonable diligence” is. (Now you know why people send questions to the Committee). But the comments to Rule 1.3 are helpful and rather blunt.

Comment [3] states “*Perhaps no professional shortcoming is more widely resented than procrastination.*” This appears to be one of the more negative statements in all of comments to the Rules. But this is because “[n]eglect of a client’s matter is one of the most common reasons for complaints to lawyer discipline agencies;” a lack of diligence can be premised on something other than missing a formal deadline—simply taking too long to attend to a matter can suffice.⁸

But how about during a pandemic or other crisis; do the rules cut lawyers any slack?

No. Comment [1] provides that a lawyer must zealously assist clients even in the face of “opposition, obstruction or personal inconvenience to the lawyer.” As one bar association has recently stated, “the fundamental ‘prime directive’ remains: thou shalt protect thy client. Your ethical obligations do not change, regardless of whether you are ill, your client is sick, or the courthouse is closed.”⁹

Relatedly, Comment [5] is particularly relevant now, requiring lawyers, especially solo practitioners, to have a succession or contingency plan in place including other lawyers willing and able to take over the lawyer’s files if the lawyer becomes incapacitated due to illness or death.

Heartless or not, the comments to Rule 1.3 reflect simple reality. Clients and client representatives dealing with their own personal and professional crises may be less efficient and productive in their own work. But they will still rightfully expect timely and diligent legal representation, and aren’t obligated to consider whether the lawyer is experiencing similar issues. This is simply part of the “deal” lawyers make when they take their oath.

However, as noted in the article on Rule 1.1 (Competence), there are uncomplicated ways that lawyers can be diligent in the face of crisis, many of which have been addressed in jurisdictions where COVID-19 spread earlier.¹⁰

⁸ ABA/BNA Lawyers’ Manual on Professional Conduct Section 31:401.

⁹ <https://www.dcbbar.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

¹⁰

<https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf><https://www.theindianalawyer.com/articles/disciplinary-commission-offers-attorneys-ethical-tips-during-covid-19-crisis><https://www.dcbbar.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the->

Lawyers can start by doing what the reader is doing i.e., staying up to date on recommendations from public health authorities, orders from the court system, and practice resources from the state bar.¹¹ For example, the CDC has provided guidance for businesses and employers about how to respond to the COVID-19 outbreak, which firms likely have an obligation to be familiar with to benefit their employees and clients.¹² More locally, the South Dakota Supreme Court and Circuit Courts have issued statewide and circuit-specific orders, which are available via links at the State Bar Website.¹³ At the same site, lawyers can find links to public health information, employment and firm-related information, information about remote officing, and American Bar Association COVID-19 resources. In short, a big part of “diligence” in a crisis is gathering, reading, and implementing information about how to deal with the crisis, much of which can be obtained from competent sources that have been through that crisis.

Lawyers also must be proactive about caseload management and engage in some self-reflection¹⁴ on that point, particularly if they are practicing remotely and experiencing a decrease in efficiency. Comment [2] to Rule 1.3 clarifies that lawyers must manage caseload to ensure maximum effectiveness. So if Lawyers or members of their household become ill, or they are otherwise inhibited from effectively representing clients, they must ask themselves, “Am I still able to provide competent representation under these circumstances?”¹⁵ And they need to have other lawyers ready to assist if the answer to the preceding question is “no.”¹⁶

Finally, as noted in the last discussion on “Competence” under Rule 1.1, Lawyers can guard against delay and lack of diligence by making sure standard procedures regarding receiving, opening, and reviewing mail, email, and other communications, calendaring matters, scheduling matters, and responding to clients are being followed strictly.¹⁷ Although it falls within the discussion about Rule 1.4 on communication, comment [4] to Rule 1.4 also speaks to diligence, stating “regular communications with clients will minimize the occasions on which a client will need to request information concerning the representation.” In other words, one of the best ways

<https://burnswite.com/coronavirus-ethics-tips-for-pennsylvania-lawyers/>
<https://www.utahbar.org/wp-content/uploads/2020/03/Utah-Bar-Coronavirus-Response-Ethics-Hotline.pdf>

<https://www.michbar.org/opinions/ethics/COVID-19>

¹¹ <https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf>

¹² <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

¹³ <http://www.statebarofsouthdakota.com/page/covid19>

¹⁴ <https://www.michbar.org/opinions/ethics/COVID-19>

¹⁵ *Id.*

¹⁶ <https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf>

<https://www.dcbbar.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

<https://burnswite.com/coronavirus-ethics-tips-for-pennsylvania-lawyers/>

¹⁷ <https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf>

to show diligence in a crisis is by simply contacting clients without prompting so they feel valued and that their lawyer is available to help.

Rule 3.2 regarding “expediting litigation” is related:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

The Comment to Rule 3.2 is also blunt, stating that unreasonable delays “bring the administration of justice into disrepute.” Lawyers can seek good-faith reasonable extensions and postponements, but must not “fail to expedite litigation solely for the convenience of the advocates.” COVID-19 can’t be an excuse for allowing a case to languish.

However, diligence and speed aren’t synonymous. As noted in the previous article on Rule 1.1, competence includes taking the time to provide the client with the right answer, not a fast answer. The same holds true with Rule 3.2. The Rule articulates a “reasonableness” standard, and the Comment provides relief: “[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.” If a lawyer has a good-faith client-approved reason for delay, the lawyer is likely being reasonable.

For example, some circuit courts are stating that hearings need to be telephonic/livestreamed or continued. And remote depositions by livestream are being encouraged. Sometimes, however, a client is best served by a live hearing (especially an evidentiary one) or in-person deposition (especially if there are many exhibits). Although lawyers have an obligation to expedite litigation, they should not do so for expediency’s sake alone if they (and their client) believe the client is better served by waiting for the opportunity to proceed in person.

Rule 3.2. is typically thought of as an “anti-delay” rule; but some bar associations have suggested that “unreasonable” conduct need not be delay, especially now:

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.¹⁸

Or as more briefly stated recently by a federal judge in Chicago:

¹⁸ <https://minnlawyer.com/2020/03/30/quandaries-and-quagmires-legal-ethics-risk-management-in-pandemic/>

If there's ever a time when emergency motions should be limited to genuine emergencies, now's the time...[a]bout half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.¹⁹

So--be diligent, but be good (or at least reasonable) to each other.

¹⁹ *Id.* (citing *Art Ask Agency v. The Individuals, Corporations, Limited Liability Companies, Partnerships, and Unincorporated Associations Identified on Schedule A Hereto*, N.D. Ill. No. 1:20-cv-01666, 3/18/20)

Rule 1.4—Communication

Rule 1.4(a) and (b) provide:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4 governing Communication is an important “glue” rule that helps make the others work, because the concept of “informed consent” is used throughout the rules.²⁰ Consequently, it appears the vast majority of ethical complaints based on Rule 1.4 also involve other ethical rules, typically regarding something the lawyer failed to tell the client.²¹ “Informed Consent” under Rule 1.0 contemplates the lawyer will communicate “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” More specifically, Comment [1] to Rule 1.4 states that attorney-client communication is essential to the relationship. Comments [2] and [3] reinforce that lawyers must consult with clients about decisions related to their matter or case, including taking affirmative steps to provide periodic updates to clients so the clients can keep making informed choices and asking informed questions. Comment [5] drives home that informed consent means providing genuine meaningful and timely details to clients about their matter.

Finally, as noted in a previous article, Comment [4] suggests the simple act of staying in touch with a client can minimize client anxiety and frustrations.

²⁰ See Rule 1.2(c) (limiting scope of representation); Rule 1.6(a) (disclosing confidential information); Rule 1.7(b)(4) (consent to concurrent conflict); Rule 1.8(a)(3) (consent to transaction where lawyer has an interest); 1.8(b) (use of client information to disadvantage of client); Rule 1.8(f)(1) (accepting compensation from third-party for representation); Rule 1.8(g) (consent to aggregate settlement of claims of 2 or more clients); Rule 1.9(a) (consent to conflict regarding past representation); Rule 1.11 (consent to conflict arising from former public service); Rule 1.11(d)(2)(i) (consent to conflict arising from past representation of client by attorney who is now government officer or employee); Rule 1.12(a) (conflict arising from past participation as judge, arbitrator, mediator, etc.); Rule 1.18(d) (conflicts arising from prospective client communications); Rule 2.3(b) (consent to providing evaluation to third party).

²¹ ABA/BNA Lawyers' Manual on Professional Conduct Section 31:504 (collecting cases).

Right now, client anxiety is likely high, but lawyers can do several things to provide reassurance.²² Lawyers and firms should let as many of their clients as possible know whether they are open, open but seeing clients by appointment only, or closed and working remotely, and about any changes in standard office hours, such as on their websites, outward-facing communications, by email blast to emailing lists, etc.²³ Likewise, as individual lawyers interact with clients, and as situations change, they should update clients on the best way to contact the lawyer, and obtain updates from the client on the same issue.²⁴ This also makes business sense, because it communicates that the lawyer or the lawyer’s firm is “on the job” despite adversity.²⁵

If lawyers, especially solo practitioners, have a succession or other contingency plan in place, as suggested by Comment [5] to Rule 1.3, they should consider telling clients what to expect if the lawyer becomes ill, including who will be stepping into the gap.²⁶

Relatedly, lawyers should also try to anticipate how to react if and when clients become ill. Clients should be encouraged to notify the lawyer if health problems arise so the lawyer can obtain extensions and continuances as needed.²⁷ Also, if a client is already ill and there is a concern about potential temporary incapacity, the lawyer should find out if the client has someone with a power of attorney or other authorization to act on the client’s behalf; and make sure that the client’s permission to work with that person is well-documented.²⁸

Remotely-operating lawyers should be proactive with their clients in explaining they are doing so; that way, clients can provide any special instructions about treatment of their confidential information, as specifically contemplated by Comment [16] to Rule 1.6. (“A client may require the lawyer to implement special security measures not required by this Rule.”)

Litigation lawyers should not assume clients will know about all of the court orders that might affect their case. Instead, they have an obligation to “initiate and maintain the consultative and decision-making process even when clients fail to do so.”²⁹ Lawyers should proactively explain to clients how court orders might affect near-term events, like hearings and depositions, and long-term plans, such as discovery deadlines and trial dates.³⁰ Even if nothing is immediately pressing, the client will appreciate knowing the case isn’t being neglected.³¹

²² <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2020/five-pointers-for-practicing-in-a-pandemic/>

²³ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

²⁴ <https://www.michbar.org/opinions/ethics/COVID-19>

²⁵ <https://www.pullcom.com/newsroom-publications-Lawyer-Obligations-During-COVID-19>

²⁶ <https://www.michbar.org/opinions/ethics/COVID-19>

²⁷ <https://www.dcbars.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

²⁸ <https://www.michbar.org/opinions/ethics/COVID-19>

²⁹ <https://www.dcbars.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

³⁰ <https://www.theindianalawyer.com/articles/disciplinary-commission-offers-attorneys-ethical-tips-during-covid-19-crisis>

³¹ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

Lawyers also should confer with clients about how societal, health, and economic issues arising from coronavirus-related circumstances may affect their litigation, estate planning, or business strategies.³² Those issues may make mediation or settlement of litigation, completing a will or other estate planning documents, or closing a contract negotiation that much more urgent.³³

Ultimately, however, these are only examples of issues lawyers should remember regarding their obligation to communication with clients. As with any of the Rules, a lawyer's best approach is to minimize client anxiety and consequences by communicating with clients at least as much, if not more, than ever before.

As a final note, many of the Rules are commands or prohibitions. Regarding communication, though, Rule 2.1 ("Advisor") blends instruction with aspiration:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment [1] stresses that candid communication often requires delivering a client bad news or unwelcome advice—but that it still has to be delivered. More aspirationally, Comment [2] indicates:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Or, as one ethics expert once noted:

Lawyers must often be more than lawyers. As they have for centuries, lawyers face clients' family problems, business problems, and life problems, which lead lawyers at times to go beyond the legal issues and counsel clients on the moral, economic, and other nonlegal factors affecting their situations. In addition, the practice of law today is becoming more competitive, complex, and intertwined with other substantive disciplines. Lawyers therefore are increasingly called upon to advise clients on issues that would not be deemed purely "legal" by traditional standards.³⁴

South Dakota remains a state where pure legal "specialists" are the exception, not the rule, and where lawyers are often still viewed as a client's trusted advisor on a variety of subjects. A

³² <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2020/five-pointers-for-practicing-in-a-pandemic/>

³³ *Id.*

³⁴ Gantt, Larry O. Natt, More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations, 18 *Geo. J. Legal Ethics* 365 (2004-2005).

client's lawyer may have drafted the client's will, set up an LLC for the client's family business, helped with the adoption of a child, reviewed or drafted virtually all of the client's business contracts over the years, and annually prepared the client's taxes. They also may have been invited to weddings, funerals, anniversaries, birthdays and other events for the client or the client's family because of the relationship between the lawyer and the client. In the process, the lawyer has become a "voice" to be trusted in challenging times.

Regardless whether this is true for all South Dakota lawyers, and although lawyers must certainly know their limitations, they should consider, especially now, they likely possess knowledge, skills, experience, and education on a variety of subjects, other than the law, that can help their clients.³⁵ Rule 2.1 doesn't command it, but providing advice and assurance in those areas, or referring the client to another professional who can better assist them, (see Comment [4]), may make all of the difference in the world to a client anxious about the future.

³⁵ <https://www.sdcba.org/index.cfm?pg=BusinessandCorporate201705>

Rule 1.5 – Fees

There has been little discussion or direction from state bars or the ABA regarding fee-related issues specific to the COVID-19 situation. However, the rules are worth considering, particularly now, where many clients may be (or soon will be) facing tough choices on which bills to pay and when; and where lawyers may be feeling “light” in the work they have to do.

Under Rule 1.5(a), lawyers have an ethical obligation to “not make an agreement for, charge, or collect an unreasonable amount for fees or expenses” subject to analysis under a non-exclusive list of eight factors. Comment [1] notes that Rule 1.5 “requires that lawyers charge fees that are reasonable under the circumstances.”

Under the current circumstances, lawyers and clients are living with and working during a pandemic. The news is regularly filled with stories about how COVID-19 is affecting every aspect of people's lives, not only socially but economically. Businesses are facing the possibility of failing and never reopening, and employees are being furloughed or laid off. Law firms and their clients may eventually struggle (if they aren't already doing so) with cash flow and lack of work.

This leads to at least a couple of issues regarding the reasonableness of fees, and the collection of fees, that are worth remembering.

However, before addressing those general issues, Rule 1.5(e) gives rise to a specific duty that might arise here. As noted in earlier articles, lawyers, solo practitioners especially, need to have contingency plans in place to deal with their illness and incapacity, including having lawyers, even lawyers from other firms, waiting in the wings to assist. Rule 1.5(e) provides that a lawyer may not share fees with a lawyer from another firm without ensuring (1) the fees apportioned to each lawyer are commensurate with the respective share(s) of the work the lawyers did; (2) the overall fee is reasonable; and (3) the client has agreed to the arrangement and the shares in writing. Lawyers may need to navigate this rule in working together due to one lawyer's illness.

More generally, current *circumstances* obviously warrant some *reconsideration* of what is reasonable in billing, and collecting, remembering that clients will be examining their bills at least as closely as ever if not more so (and rightfully so) to ensure they are being treated fairly and reasonably. For example:

- Lawyers will need to guard against Parkinson's law, i.e., “work expands so as to fill the time available for its completion.”³⁶ The ABA addressed hourly billing ethics some time ago, and noted that “churning” and “make work” practices are inappropriate, as is billing clients for overhead expenses.³⁷ The number of ethics complaints, ethics opinions, and

³⁶ https://en.wikipedia.org/wiki/Parkinson%27s_law; <https://www.economist.com/news/1955/11/19/parkinsons-law>.

³⁷ See Formal Ethics Opinion 93-379 and 1996 ABA Task Force on Lawyer Business Ethics

other publications discussing the impropriety of “filling up available time with the available work” are easily found, and need not be cited serially here. Suffice to say, lawyers or firms with less work now or in the future, because of COVID-related slowdowns cannot address that issue by having lawyers or associates spend longer than necessary on various tasks; and also cannot pass along the costs they may be incurring to practice law remotely.

- As noted in the previous article on Rule 1.4, lawyers will want, more than ever, to be having frank but realistic conversations with clients and determine together how fees will be paid, when fees will be paid, or perhaps develop a realistic payment plan. This will also help both the lawyer and the client have a better outlook of his/her own financial situation.
- When taking on new clients, lawyers should also deploy Rule 1.4’s commands by heeding the suggestion in Rule 1.5, Comment [2] to “furnish the client with at least a simple memorandum or copy” of his/her customary fee arrangements, setting out the basis, rate, or total amount of the fee. “A written statement concerning the terms of the engagement reduces the possibility of misunderstanding” and helps the lawyer and the client plan during current circumstances.
- During these uncertain times, when utility companies, landlords, and cities are suspending collections and evictions, lawyers will want to be particularly careful and sensitive of client expectations, given that aggressive collection of attorney fees from clients has long been a source of ethics complaints and litigation even in the best of economic times.³⁸

In short, clients are all facing uncertainty and having to make difficult economic calls. They will be expecting lawyers to be fair and reasonable in their billing practices.

³⁸ See ABA/BNA Lawyer’s Manual on Professional Conduct at 41:2005 (citing Anthony Davis and Michael Downey, *Exercise Care when Suing for Unpaid Fees*, Paragon Int’l Ins. Brokers (March 2012).)

Rule 1.6—Confidentiality

Rule 1.6 regarding lawyers' obligations of confidentiality is one of the most cited and most important. Comments [2] and [3] note that, for an attorney to provide competent representation there must be unqualified, prompt, and candid communication with the client. These communications are protected by a statutory privilege against disclosure, which belongs to the client. In short, one of a lawyer's most important duties is preserving and protecting as private and confidential all information relating to the representation.

In the current environment, Rule 1.6(c) is particularly relevant:

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.

Of the ethical issues presented by the COVID-19 pandemic, it would be difficult to find one more critical or difficult to navigate than the challenge of preserving client confidentiality while working remotely. With an increasing number of law firms and attorneys shifting towards a “work from home” or “virtual law firm” business model it is important for attorneys to remember the importance of Rule 1.6 and, especially, subpart (c)

Long before COVID-19, ABA Formal Opinion 477 generally guided lawyers regarding the security of client communication and data in a modern practice and its principles are especially helpful now.³⁹ Important questions lawyers need to ask themselves include:

How sensitive is the information the lawyer is communicating or securing?
How is client information transmitted, stored, and accessed by the lawyer or firm?
What security measures are available to protect the client information?
What standard procedures can the lawyer follow to ensure client information is protected?
What protocols are available to treat more-sensitive information with higher diligence?
These questions lead to many more inquiries regarding (1) attorneys working remotely; and (2) non-attorney staff communicating with those attorneys or working remotely themselves.

1. Attorneys Working From Home.

Under Rule 1.6(c), lawyers working remotely must take reasonable steps to ensure that client information remains confidential. There are four general areas to keep in mind: (1) location/environment; (2) communications; (3) computers; and (4) paper files.⁴⁰

A. Workspace

Lawyers should consider how their selection of a workspace can help them keep personal and professional activities separate and distinct.⁴¹ This will in turn help the lawyer avoid blurring the

³⁹ <https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion477.pdf>

⁴⁰ <http://www.pabar.org/site/Portals/0/Ethics%20Opinions/Formal/F2020-300.pdf?ver=2020-04-13-090814-560>

⁴¹ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/4>

lines when it comes to client privacy and confidentiality, and can promote better personal balance and emotional well-being. (It also helps avoid having the lawyer's family members walking through the background of a Zoom meeting.)

As with other ethical issues, there are very basic, practical steps lawyers should consider:

- A. Have a separate, private work area away from other family members;⁴²
- B. Consider designating certain times of the day for private client calls or communications;⁴³
- C. Use a dedicated phone number and other security procedures for all work-related telephone communications;⁴⁴ and
- D. Clearly communicate to clients the lawyer is working from home and ask that they notify the lawyer of any concerns, questions, etc., regarding confidentiality and privacy of their information and the lawyer's communications with them.⁴⁵

Lawyers should also strongly consider having conversations with clients only in locations away from their Amazon Alexa or Google voice assistants.⁴⁶

B. Secure Communications

Lawyers should consider the various security measures that are available for each type of electronic communication.

For emails, is the system the lawyers use to send and receive emails just as secure as their office systems? If not, what should they do to correct this?⁴⁷ Are they especially avoiding using personal email accounts to send client information?⁴⁸

Some lawyers text with their clients, and some state bars and the ABA have either explicitly or implicitly condoned the practice.⁴⁹ This Committee hasn't ever been asked to opine about it but, assuming South Dakota lawyers will continue to do so, they should avoid communicating with clients about substantive matters via text message⁵⁰ or, at the very least, should ensure texting is more secure, such as through an end-to-end encryption application like WhatsApp and Signal.⁵¹ They should also clearly notify clients that texting is not necessarily private and, therefore, they should treat text messages the same as a public verbal conversation.⁵²

⁴² <https://harrityllp.com/5-tips-for-working-from-home-during-covid/>

⁴³ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/>

⁴⁴ <http://www.pabar.org/site/Portals/0/Ethics%20Opinions/Formal/F2020-300.pdf?ver=2020-04-13-090814-560>

⁴⁵ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/>

⁴⁶ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 8.

⁴⁷ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

⁴⁸ <https://www.heplerbroom.com/blog/maintaining-legal-ethics-global-pandemic/>

⁴⁹ <https://abovethelaw.com/2019/02/to-text-or-not-to-text-clients-an-ethical-question-for-a-technological-time/>

⁴⁹ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/4>

⁵⁰ <https://abovethelaw.com/2019/02/to-text-or-not-to-text-clients-an-ethical-question-for-a-technological-time/>

⁵¹ *Id.*

⁵² <https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/5-tips-for-using-text-messaging-for-client-communications/>

Using video conferencing has become ubiquitous and necessary. But with that extensive usage, security concerns surrounding even the most widely used video conference applications have been discovered. Providers of conferencing applications likely meet the definition of “vendors” providing “nonlegal services” discussed in ABA Opinion 477.⁵³ Under that Opinion, lawyers should conduct due diligence on the service provider, determine and vet the provider’s security policies and protocols, and determine whether the service provides a legal forum for relief if the vendor breaches its agreement. Lawyers working on especially sensitive matters where confidentiality is vital should consider software programs that provide a heightened guarantee of security and privacy, as opposed to a “free” version of an application that may be less robust. They also should consider (1) requiring a password to access the meeting; (2) sharing links only by direct secure communications with invitees; and (3) enabling “host only” control of screen sharing, if available.⁵⁴

C. Computer and system security.

As noted in earlier articles, Rule 1.1 requires lawyers working from home to possess a minimal level of competence to safely and effectively use computer technology in their practice without compromising client confidentiality. This includes knowing how to safely and securely communicate with clients via e-mail, process and save electronically-transmitted documents, record time, and schedule appointments.

However, there are several other questions beyond these basic issues lawyers should ask themselves. Do the lawyer’s home computer, Wi-Fi or other network, and other remote-enabling systems all have the latest security patches?⁵⁵ Does the lawyer have firewall, anti-virus and anti-malware software installed on the home systems?⁵⁶ Are the systems password protected?⁵⁷ If they are, is “two factor” or “multi factor” protection available?⁵⁸ Is the computer restricted solely to work purposes?⁵⁹ If the lawyer is connecting remotely with the office’s or firm’s server, is that remote connection a secure one, such as a VPN network that creates an additional secured and encrypted connection, and shields online activity from hackers?⁶⁰ Is the lawyer able to backup work at home or, better still, back it up to the office’s or firm’s server?⁶¹ As noted in the links below, the Pennsylvania State Bar has issued a fairly comprehensive discussion on these

⁵³ <https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion477.pdf> at 9-10.

⁵⁴ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 12.

⁵⁵ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

⁵⁶ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 13.

⁵⁷ *Id.* at 11-12.

⁵⁸ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 11.

⁵⁹ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

⁶⁰ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 11.

⁶¹ *Id.* at 12.

topics.⁶² The Texas State Bar has provided a similar discussion from more of a “how-to” standpoint with specific software and other system recommendations.⁶³

D. Paper Files

Paper files are unavoidable and, for many lawyers, strongly preferred to the more sterile, less fungible, electronic version of a document. There are also cases where large document collections are simply easier to review in hard copy such as in notebooks. Regardless whether a pandemic is occurring, lawyers must always exercise caution in taking any paper materials or files outside of the office.

There appears to be little specific guidance from bar associations about taking paper files home. However, there is a wealth of useful legal guidance lawyers are providing to companies possessing trade secrets and other confidential information in paper files that might prompt lawyers to consider similar solutions.⁶⁴ Lawyers should consider whether they can avoid taking documents home at all. They should consider avoiding printing out hardcopies of documents while working from home⁶⁵ or adhering to a strict shredding protocol if they do⁶⁶ and, in any event, should ensure that clients have approved the lawyers’ doing so. Lawyers should also consider keeping a written record or “check out” system for each file identifying the materials taken home, when they were removed, and where they are located.⁶⁷ These steps help to ensure that no client papers, documents, or files end up missing or lost. Finally, all client papers should be kept in a secure and inaccessible location within the home, preferably a locked file cabinet or storage closet.⁶⁸

2. Non-Attorney Support Staff Working from Home.

A future article will address the general supervisory duties and responsibilities for overseeing the actions of subordinate lawyers and non-attorney support staff under Rules 5.1 through 5.3. Virtually all of the available guidance regarding lawyer support staff has assumed staff can work remotely as well with no separate ethical analysis, and the Ethics Committee is certainly not weighing in to the contrary here.

However, the short version is that non-attorney support staff who work from home are subject to all of the considerations discussed above regarding workspace location, adequacy of computer and other system resources and connections, communications, and treatment of physical files. And the lawyers and firms who employ them are the ones who are “on the hook” for their

⁶² <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf>

⁶³ <https://blog.texasbar.com/2020/03/articles/law-firms-and-legal-departments/law-firms-working-remotely-during-the-coronavirus-shutdown/>

⁶⁴ <https://www.huntonak.com/en/insights/keeping-your-trade-secrets-secret-during-a-time-of-increased-remote-work-due-to-covid-19.html>

⁶⁵ <https://www.laboremploymentlawblog.com/2020/03/articles/coronavirus/covid-19-wfh/>

⁶⁶ *Id.*

⁶⁷ <http://www.mondaq.com/unitedstates/trade-secrets/913474/covid-19-and-trade-secrets-is-your-business-prepared-to-protect-its-trade-secrets-while-your-employees-work-from-home>

⁶⁸ *Id.*

compliance with the rules. This means lawyers must consider being perhaps even more diligent with confidentiality where their employees are concerned. Here, again, the Pennsylvania State Bar has provided an excellent “checklist” of procedures that, although not being a “required” set of steps, are offered up as being good ways to discharge supervisory responsibility, including providing a written policy for remote employees; limiting the information staff can handle remotely to only essential data; verifying the identity of staff accessing data from remote locations; requiring the use of a Virtual Private Network or similar encrypted connection; verifying the security of employee Wi-Fi and other systems; use of multi-factor authentication; supplying or requiring employees to use work-exclusive and secure computers; saving data only on the office network not home devices; obtaining written agreements from employees that they will adhere to firm policy; and other reasonable measures.⁶⁹

It might be easy when working in a “civilian” environment, instead of at the office, to relax standards, particularly where confidentiality is concerned. Adhering to ethical and professional standards while working from home is complex, and also potentially increases operational expenses in having to obtain additional computers and the specialized software programs needed to comply with ethical rules. But the clients are entitled to the effort and compliance.

⁶⁹ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 7-8

Rules 5.1, 5.2, and 5.3 – Supervision

This is the last in the Committee’s series of COVID-19 articles, and it is the shortest, because it mostly contemplates review of the other rules discussed. Rules 5.1, 5.2 and 5.3 are more about apportionment of responsibility for compliance with the rules than separate rules in their own right. Rule 5.1 primarily governs managing and supervising lawyers in a law firm:

- (a) A partner in a law firm, and a 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) A 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.
- (c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 is nearly identical, except that it provides the same edicts regarding lawyers supervising nonlawyers, and therefore, applies not only to law firms, but to any lawyer who employs or retains services of non-lawyers. And Rule 5.2 clarifies that lawyers are “bound by the rules” even when they act at a supervising lawyer’s direction, although subordinate lawyers don’t violate the rules if they act “in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty” such as when a subordinate lawyer seeks an ethics opinion from a firm’s ethics committee as contemplated by Rule 5.1’s Comment [3].

As discussed briefly in earlier articles, lawyers (and supervising or managing lawyers in firms) have an obligation to ensure subordinate lawyers and staff are complying with the rules, including, as needed, establishing and communicating policies and procedures to help them do so.⁷⁰ This applies, even when the subordinates and staff are working remotely, and may be more difficult to monitor.⁷¹ And with nonlawyer staff, discussed in Rule 5.3 Comment [1], lawyers must account for the fact that these employees “do not have legal training and are not subject to professional discipline.”

⁷⁰ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>.

⁷¹ <https://www.michbar.org/opinions/ethics/COVID-19>

Although this can seem daunting, the same tools available to help connect with clients are there for lawyers to utilize with subordinate attorneys and staff.⁷² Senior attorneys can call firm-wide video or teleconferences to keep everyone connected and up to date on compliance.⁷³

Consequently, all of the information that's been provided in earlier articles applies with full force to subordinate attorneys and staff. Senior lawyers need to make sure these lawyers and staff are still communicating appropriately with clients, and observing firm policies and procedures designed to prevent common pitfalls. Indeed, Comment [2] to Rule 5.1 specifically provides that lawyers with "managerial authority in a firm must:

make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

In addition to subordinates and staff, because Comment [1] to Rule 5.3 discusses nonlawyer "independent contractors," lawyers must consider that they are potentially responsible for vetting all of their vendors and any other entity to which they have outsourced tasks or from whom they've acquired nonlegal assistance (i.e., IT companies, providers of remote access applications; document processing and management companies; delivery services; investigators etc.)⁷⁴ So if a lawyer or firm decides to start using new applications to make remote access easier, such as videoconferencing, encryption technology, and the like, the lawyers have to make sure those applications are safe, secure, and protect the client's information.

Lawyers, particularly senior lawyers in a firm environment, have a unique obligation to make sure the things discussed in earlier articles are at least considered by all lawyers and staff. They also can lead by example, and set the tone for everyone else.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ <https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion477.pdf>