

**ETHICS DURING THE PANDEMIC:
REMOTE WORK, REMOTE COURT
AND WELCOMING CLIENTS BACK TO
THE OFFICE**

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June 3, 2020

RULES THAT RELATE TO TODAY'S TOPICS

I.R.P.C. 1.1

I.R.P.C. 1.4

I.R.P.C. 1.6

I.R.P.C. 1.16

I.R.P.C. 5.1

I.R.P.C. 5.3

I.R.P.C. 1.1: 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.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

I.R.P.C. 1.4: Communication

(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; including a request for an accounting as required by Rule 1.5(f); 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

I.R.P.C. 1.6: Confidentiality of Information

- (a) A lawyer shall not reveal information relating to 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).
- (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.

I.R.P.C. 1.6: Confidentiality of Information (Continued)

Acting Competently to Preserve Confidentiality

[19] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. **Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).** A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

I.R.P.C. 1.6: Confidentiality of Information (Continued)

Acting Competently to Preserve Confidentiality

[20] **When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.** This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

I.R.P.C. 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

**I.R.P.C. 5.1:
Responsibilities of Partners, Managers
And Supervisory Lawyers**

- (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.

**I.R.P.C. 5.1:
Responsibilities of Partners, Managers
And Supervisory Lawyers
(Continued)**

(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.

I.R.P.C. 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, 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 the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

**I.R.P.C. 5.3:
Responsibilities Regarding Nonlawyer Assistance
(Continued)**

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the 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 person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

USEFUL LINKS

STAGES OF REOPENING

<https://rebound.idaho.gov/stages-of-reopening/>

CDC REOPENING GUIDELINES

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

IDAHO STATE AND FEDERAL COURTS PANDEMIC RELATED ORDERS

<https://isb.idaho.gov/>

<https://isc.idaho.gov/Emergency Orders>

ABA CORNOAVIRUS TASK FORCE

<https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem/>

ISSUES RELATING TO REMOTE WORK

The 3Cs, confidentiality, conflicts and cybersecurity.

CONFIDENTIALITY ISSUES

- 1) Remote computer connection (VPN type);
- 2) Telephone conversations;
- 3) Educate remote staff;
- 4) Watch Alexa and Google Assistant;
- 5) Zoom with passwords.

CONFLICTS

Additional care is required when the office is working remotely, and many lawyers may be answering emergency-type questions from potentially or conflicted clients. We need to emphasize standard conflict checks as you would do while at the office.

CYBERSECURITY ISSUES

Firms/offices/lawyers need to be aware of possibility/probability there will be attempts to hack their networks, and the safety of remote computer use must be considered.

Law firms and lawyers are targeted

because of the types of information we have:

Insider trading information, Social Security numbers, financial information, firm/lawyer identity.

MALWARE AND RANSOMWARE ATTACKS

Prevention techniques:

- 1) Think about what devices are connected and how they are connected to your network.
- 2) Segment the network so vendors and third parties that could be hacked have access to only a portion of your network.

Recommendations to minimize the risk of a cyberattack:

- 1) Do not use unsecure public Wi-Fi.
- 2) Encryption, including mobile devices.
- 3) Implement good password policies.
- 4) Apply patches.
- 5) Place appropriate limits on access to the firm network.

6) Develop, adopt an Incident Response Plan with a restoration process (some sources to consider, ABA Formal Opinion 483, ABA Cybersecurity Handbook, NIST Computer Security Incident Handling Guide).

7) Train.

Obligations after an electronic data
breach or cyberattack.

ABA Formal Opinion 483, 10/17/18

When a data breach occurs involving or having a substantial likelihood of involving material client information, lawyers have a duty to notify clients of the breach and to take steps consistent with the I.R.P.C.

ABA Formal Opinion 483, 0/17/18

Same obligation to safeguard and monitor the security of paper files and client property applies to electronically-stored information and property.

ABA Formal Opinion 483, 0/17/18

Rules impose no greater or different obligations for physical or electronic breaches of client information.

Then the Committee discussed Rule 1.16(d) and noted as a matter of best practices, lawyers are encouraged to agree with clients about how to handle the client's electronic information at the end of the relationship.

The Committee also addressed type of notice required.

Basic rule, provide sufficient information to enable the client to make informed decisions about what to do next.

Includes:

- 1) information affected;
- 2) lawyer's response plans;
- 3) material developments in lawyer's post-breach investigation, and
- 4) obligations under state or federal law.

Cloud storage and use are fine if reasonable safeguards include:

1) Assuring that the material in the cloud remains confidential; and

2) Ensuring that data is protected from breaches, data loss and other risks.

Other Remote Attorney-Client Issues:

- 1) Confirm client identify – do not rely on email only which will also help to avoid scams; and
- 2) If in-person meetings are not possible, meet virtually.

Be cognizant of **diminished capacity** issues under I.R.P.C.

1.14. Capacity is usually more difficult to evaluate via email and phone. You may need to meet with the client, but given restrictions on many, and particularly the elderly, you may need additional support, including:

- 1) Virtual client conferences;
- 2) Medical input and opinion;
- 3) Family's input and opinion; and
- 4) Nursing staff input and opinion.

What if you become ill?

Succession Plan. *See* ISB website for forms and information about succession plans;

I.R.P.C. 1.16(a)(2)

Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

Some Remote Work Common Sense Tips

1) Proofread, you may not have the same back up. If this is not your forte, send emails to your proofers.

2) Be aware of distractions and distance from them or reset after dealing with them.

Some Remote Work Common Sense Tips (Continued)

3) Remain calm especially when responding to emails, give it some time, use draft folders.

4) Follow firm policies and avoid shortcutting them, for example, conflicts;

Some Remote Work Common Sense Tips (Continued)

- 5) Confidentiality;
- 6) Assume nothing.

ISSUES RELATING TO REMOTE COURT PROCEEDINGS

Consider the same issues relating to confidentiality and cybersecurity.

Some practical tips:

- 1) Review all applicable court orders (link above) including applicable district court orders ;
- 2) Assure your technology is in order. If you need assistance, contact clerks, they have access to an informational website for court personnel only.

Some practical tips (continued):

3) Have your exhibits ready and copied into a PDF portfolio or whatever is compatible with remote connection used;

4) Assure your audio is good, practice and adjust and determine whether to use earbuds, etc.;

5) Dress appropriately.

- 6) Prepare your clients, witnesses, etc.;
- 7) Remember everyone sees you the entire time, watch your facial expressions;
- 8) If your client needs to use your office computer, be sure to establish the ground rules with the judge and opposing party, i.e. there may be instances where contact is inappropriate.

ISSUES RELATING TO RETURNING TO THE “NORMAL OFFICE”

KNOW YOUR OFFICE, KNOW YOUR CLIENTS

Know Your Office

Communicate about pandemic issues:

1) Communicate and explain your office's pandemic-related policies and experiences to clients, including:

1. Social Distancing
2. Face Masks
3. Disinfecting
4. Any Employee exposure or travel
5. Any Employee/Visitor Screening

Know Your Clients

Address your client's individual situations and concerns:

1. Immunity, Caring for at risk individuals, Recent Travel, etc.

2. If required by the office policy and the client is not inclined to not wear face mask, either explain or meet away from employees/office.

Be familiar with recent legislation to address client questions or to suggest some issues or programs the client may want to consider, including,

Cares Act

Family First Act

SBA Loan Program

Payroll Protection Act

And Employment-related issues:

- HIPAA
- Leave/sick leave
- Reasonable Accommodations, especially as affected by reopening guidelines or legislation.

Be aware of and if possible, address lawyer,
staff and client well-being issues.