



**Ethics in the Eye of the Storm: Managing Ethical Duties While
Lawyering Through a Pandemic**

(Session: Pandemic—Past & Future)

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I. INTRODUCTION

Depending upon where you live and practice, one day in March 2020, you inevitably woke up to find the courts in which you routinely appear had either shuttered or significantly limited operations. The first few weeks were, at least for most of my contacts, total chaos—very little elegance and all about triaging emergencies.

The practice of law during the pandemic has been rife with perils. We struggled (and are still struggling) with access to the courts, homes never meant for months and months of remote working, clients shuttering or unable to actively participate in their ongoing litigation, delayed discovery and trials, constantly changing emergency rules, not to mention the psychological toll of trying to live our own lives and stay safe.

But, once the initial chaos and confusion began to settle, we had to embrace the changed world we found ourselves in, and begin attacking the issues in front of us with an eye to more than just treading water as we had been, but to finding a way to keep the wheels of justice moving. It was not easy, required lawyers to trust one another (even across the aisle), and took herculean efforts from the courts to blaze a trail through the confusion.

Throughout it all, there have been opportunities to learn from this experience what it means to serve our clients, how to rise to the occasion, and how to meet our duties as counselors and advocates. This paper will walk through some common issues we faced and continue to face as a result of the pandemic, and how the Model Rules provide ethical roadmaps for surviving and thriving during these difficult and uncertain times.

II. REMOTE WORKING & MODEL RULE 5.5

For some lawyers, the initial change to remote work meant a delightful goodbye to time-wasting commutes. Home was in the suburbs, or on the other side of a gridlocked freeway from the office, but no major change of scenery was involved. However, some lawyers lived in border locations (Washington D.C./Virginia), or saw the writing on the wall sooner than others, and opted to relocate to Hawaii or Montana to wait out the initial infection waves. For those people, the implication of Model Rule 5.5 suddenly became a real concern.

Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law. Most states have adopted this Rule in some fashion. The Rule prohibits lawyers from “establish[ing] an office or other systematic and continuous presence” in a jurisdiction where they are not licensed. It also bars a lawyer from holding him/herself out or “otherwise represent[ing] that the lawyer is admitted to practice law” in that jurisdiction.

With a wave of lawyers working from their new “offices” in rented vacation homes out of state, in relatives’ homes across a state line, or by crossing national borders, the concern that one might be seen to have established an office or improper presence began to bubble to the surface. Thankfully, in December 2020, the American Bar Association (“ABA”)’s Standing Committee on Ethics and Professional Responsibility published a Formal Opinion (“Opinion 495”) that made room for the emerging work arrangements that lawyers set up because of the pandemic.

Opinion 495 confirms that under certain circumstances, lawyers may remotely practice law while they are physically located in jurisdictions in which they are not licensed.

The purpose of Model Rule 5.5 was never to stop a lawyer from the remote work arrangements that have become necessary. Instead, the Rule aims to “to protect the public from unlicensed and unqualified practitioners of law.” (Opinion 495, p. 3). That purpose is not served by prohibiting a California-licensed lawyer from practicing California law, with matters in California, while that lawyer is residing in beautiful Santa Fe, New Mexico. (*Id.*) Opinion 495 explains that such a relocated lawyer is, in essence, “invisible *as a lawyer*” to the jurisdiction he/she is waiting out the pandemic. (*Id.*)

However, lawyers should be cautioned to make sure that any work they do from their remote location does not implicate Rule 5.5, and that they are in fact staying “invisible” to their jurisdiction of residence. If that should change, the lawyer should research that state’s rules on practice and regulation of out of state attorneys.

III. COMPETENT LAWYERING IN AN EMERGENCY

I had always found the adjective “competent” insulting – it seemed to connote *just* enough, nothing noteworthy or exceptional. But when applied to practicing law in a pandemic, being competent is no small feat. Model Rule 1.1 requires that a lawyer perform with competence, defined as “the legal knowledge, skill, thoroughness and preparation reasonably necessary” for the performance of legal services. Unfortunately, there is no exception to these duties for lawyering in a pandemic, even though at times it felt like there should be.

What this means for lawyers practicing in a pandemic is that we are expected to put our clients’ interests ahead of our own and to find a way to provide competent representation regardless of the changed circumstances in which we find ourselves and our clients. This requires affirmative thought, planning and work by the lawyer to account for the known and unknown impacts of the pandemic on his/her ability to get work done, manage litigation, and meet the clients’ needs. During a pandemic, the need to be steps ahead goes from luxury to necessity if we are to meet our duty of competence.

During an emergency or crisis situation like the COVID-19 pandemic, lawyers must take a step back and reassess what it means to competently represent their clients. In such times, competence can range from traditional concerns like awareness of the area of law or proper time and attention devoted to the matter, to more logistical issues like staying on top of court closures and emergency orders or having reliable internet service to meaningfully conduct necessary remote depositions.

It is important also to note that a majority of states have either created or adopted a rule or issued an opinion (like California) related to technology competence, confirming that Rule 1.1 competence extends to matters of emerging and necessary technology issues.

Technology Competence has been spotlighted by the realities of practice during the pandemic. Some of the tools and skills we have learned are becoming essential to both pandemic and post-

pandemic practice include: Remote appearance and communication tools (Teams, WebEx, Zoom) and the security issues with all of the same; document sharing and storage applications and services; and facility with conducting remote depositions, hearings, and trials, from displaying exhibits to conducting sidebars out of the remote eyes of the jury. The ABA's Opinion 498, in the context of the Virtual Practice, speaks expressly to a lawyer's competence obligations when using several of these tools and how a lawyer must educate him/herself on these issues.

IV. DILIGENCE IN A WORLD ON LOCKDOWN

The Comment to Model Rule 1.3 has always felt like a dose of "straight talk" to me – "Perhaps no professional shortcoming is more widely resented than procrastination." Lawyers did not need a pandemic to feel like they are drowning in emails and voicemails, and wondering when they will have the time to get caught up. We have all flagged an email that we just keep moving down the priority list. However, those common practice struggles have been exacerbated by the lockdowns of our offices, clients and courts, and they have highlighted that some basic access issues were not as adaptable as they need to be.

Model Rule 1.3 requires that a lawyer "act with reasonable diligence and promptness in representing a client." The Comment to Rule 1.3 makes clear that lawyers must "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." During a period where COVID related obstruction and personal inconvenience seemed to know no limits, meeting our obligations under rule 1.3 required unwavering commitment.

Lawyers were required to put our clients' interests ahead of personal issues we were facing – like juggling work from home schedules, travel limitations, lack of child care, or unreliable technology – any of which could impair our ability to represent the client. We have to be sure that our "work load [is] controlled so that each matter can be handled competently." (Comment to Rule 1.3). During the pandemic, control over that workflow and those issues, from both external and internal pressures, seemed elusive.

At times, it felt like even the smallest task or obstacle could have ripple effects on the diligent practice of law. From creating work-arounds to have access to office mail miles away during a stay at home order to securing access to client files while working outside the firm's brick-and-mortar offices, Rule 1.3 required lawyers to make sure the trains kept running, and as close to on time as possible. We had to find the best way to move cases forward, as promptly as the Courts would tolerate. And, it is fair to say that lawyers who threw their hands up in virtual appearances and exclaimed "COVID" to excuse delays in discovery, to request continuances, or to justify shortcomings, not only failed to do their duty to their clients, but suffered rebuke by their peers and the Court, all of whom were finding a way to get things done under the same grueling circumstances.

V. COMMUNICATION WITH CLIENTS

The duty to communicate with our clients is always the focus of competent and diligent practice. However, during a crisis like the pandemic, timely, clear, and productive communication was more essential than ever. Model 1.4 requires a lawyer to “keep the client reasonably informed about the status of the matter,” to explain significant developments relating to the representation, and to promptly comply with requests for information when necessary to keep the client so informed. In a period marked by communication chaos from all levels of government, industry, and personal life, communication with clients was one of the few ways to establish stability for all of us.

This obligation means that even in a time of crisis, lawyers must make sure they are regularly communicating with their clients; that they have plans in place should they be called out of the office or taken ill to keep the client informed; that they have multiple ways to reach clients and be reached by them, in the event the most common method fails; that they plan for increased client anxiety and the impact it will have on their needs in regards to updates and communications; or that they consider creative ways to meet with clients virtually to deal with issues for which email or traditional phone calls will not suffice.

VI. CONFIDENTIALITY

Lawyers are long familiar with the anecdotal stories of a lawyer speaking with a colleague in a shared elevator, and saying something about a case, without noticing opposing counsel tucked away in the corner. The anecdotal warning has become dated, and likely not a mistake the new generation of lawyers would make. However, in the time of COVID and remote work, video conferences on systems of varied security levels, and use of communication mediums by colleagues and clients not familiar with those tools, the danger of disclosure of confidential information and data was greater than ever before in wholly new and complicated ways.

Under Model Rule 1.6, lawyers have a duty of confidentiality to all clients and must “not reveal information relating to the representation of a client.” This duty requires lawyers to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

As we take calls in our kitchens, with spouses and children running wild, we have to ask ourselves if we are meeting our obligations. It may require we take sensitive calls in the car in the garage; that we invest in noise-canceling headphones for roommates; that we set calls on key case strategy for times when kids are away. The universe of challenges to keeping client information confidential has expanded as we work from homes, coffee shops, hotels, and parks – and so too must our thoughtfulness around protecting our clients' information.

To be clear, Model Rule 1.6 does not require lawyers to operate like white-hat hackers, defending every possible breach that might occur via every imaginable medium. Instead, the Comment to Rule 1.6 explains that lawyers must balance “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." That means that lawyers should always, but especially when practicing remotely during a crisis like the pandemic, employ all reasonable measures to safeguard confidential information, and take any and all reasonable precautions when transmitting that information. That means secure servers, password protected file shares, privacy screens on laptops, and engaging only in methods of communication that provide a reasonable expectation of privacy.

The more thoughtfully we consider the factors outlined by the Comment to Rule 1.6, the more likely we are to succeed in protecting our clients and ourselves.

VII. CONCLUSION

Being a lawyer, even in normal times, is demanding. There is so much to manage and do and be for your clients, your colleagues, and the courts. In part, the Model Rules help light a path for us, and help us stay focused on the most essential duties we have. While that is true every day, it has never been more true than during this pandemic. In order to make sure we are serving our clients in times of crisis, our best guides are the rules that form the bedrock of our professional obligations.

These have been dark days in many ways, but the resilience, diligence, compassion, and adaptability of my colleagues, my adversaries, my clients, and the courts, have given me hope that whatever obstacle may arise as we weather this pandemic, or whatever may come next, we have the tools to make sure the justice system perseveres.