

Negligence Law Section

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“Risk Management Concerns in the Age of Covid”

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Every lawyer has had to revise their operations, workspace and use of technology while adjusting to practicing law during the pandemic. The modifications, at least for litigators have typically included working from home, remote attendance at hearings or depositions and the use of skeletal staff to conduct the typical operations necessary to managing a law firm. Despite these new realities a lawyer’s ethical responsibilities provided for in the Michigan Rules of Professional Conduct (“MRPC”) remain unchanged. Even though all of our practices have transformed significantly this calendar year, our ethical requirements are the same. This article will highlight some of the potential pitfalls associated with our new ways of practicing and offer risk management solutions to ensure compliance with our ethical obligations.

I. Competence

Lawyers “shall provide competent representation to a client.” MRPC 1.1 has been modified to expressly recognize that competent representation encompasses technological competence:

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter.

With that modification, effective January 1, 2020, the Supreme Court has made clear that the days are gone when an attorney can turn a blind eye to the advances now generally available to quickly and efficiently process a case. COVID-19 and the Governor’s Executive Orders limiting in-person legal work emphasize this technological imperative. Even as attorneys adjusted to advancements like word processing and “cutting and pasting” in the past, attorneys must continue to adjust to newer technologies involved in handling cases, and in communicating with clients, opposing counsel and the courts, and understand generally both the benefits and the risks of those technologies amidst the pandemic.

While it is the attorney's ethical obligation to competently represent the client, that obligation does not require every attorney to become a technology expert or a wiz in handling the newest technological tools. What it does require is for the attorney to gain those skills that are "reasonably necessary" to represent their clients competently. The first step is to familiarize ourselves with the types of technology available- something that can be accomplished through attendance at any number of seminars or other types of training offered by professional groups, for example. The second step is actually practicing using the tools we find most helpful to our specific client base so we can become proficient and comfortable. Finally, we have the obligation as legal experts to engage others who are technological experts where necessary. Just as attorneys adapted to faxes and email in the "old days," we have the ethical obligation to gain and maintain a reasonable understanding of the newer tools and technologies available.

II. Communication

Our ethical obligation to communicate effectively with the client (MCPR 1.4) requires that we keep clients "reasonably informed" and "promptly" comply with reasonable requests for information. COVID has certainly hampered attorneys who rely upon, or simply prefer, in-person client meetings as the primary means of communication. Technology offers the means to comply with our communication obligation by broadening options to include email, text, instant messaging and zoom conferences, among others. While these communication devices may allow for continued communication and increase the speed of communication, some can be improperly accessed unless intentionally protected and some may actually have unanticipated implications for communications we believe are otherwise protected by the attorney-client privilege. See for example, the recent unpublished (as of yet) Court of Appeals decision in *Stavale v Stavale*, 2020 WL 310791 which concludes that a client's communications to his attorney, sent from the client's work email, may not be protected by the privilege. In this respect, our ethical obligation to maintain confidentiality takes center stage.

III. Confidentiality

One of the foundational ethical requirements for an attorney, outlined in MRPC 1.6 is that of confidentiality. Of course, because attorneys are now spending more time working from home they are using their home wireless network to share a multitude of confidential client material. With respect to working from home:

- Do not stick with the factory's default password on your wireless router. That's easy to hack because it's the same for all routers of that type. Change the password, ensuring it is strong (long with mixed letters, numbers and characters);
- Make sure your router is using WPA3 encryption;
- Set your router to automatically update with new software, as this also updates new safety technology;

- When working from home only work using your firm's VPN. Do not just download documents to your computer and work offline as this is not nearly as secure and prevents others in the firm from having access to the latest version of all documents;
- Limit printing on home printers unless absolutely necessary. Home printers have a hard drive. If you later give that printer to someone else, or dispose of it client information may be stored on the hard drive and accessible to others;
- Be careful with Zoom and other video conference services. Never upload documents through the video platform. Only send secure documents through secure channels, such as encrypted email or a password-protected file sharing site. Do not check your email while on a conference using the same device;
- Turn off smart speakers anytime you're on a work call. Those speakers listen to everything and can store information;
- Finally, there are low-tech risks at home. Client confidences must be preserved even from family members. As a result, print as little as possible, use shredders and don't leave documents laying around where others can see them.

IV. Supervisory Obligations

Working remotely from others in your firm does not forgive the supervisory obligations of partners contained in MRPC 5.1 - 5.3. In fact, given the additional pressures brought by this pandemic on associates, assistants and subordinates it is recommended that every law firm establish regular points of contact with each employee to address issues of workload, deadlines and general well being:

- Senior attorneys must have regular, structured contact with younger attorneys and staff. Check in on them, and get reports on all matters on which they are working;
- Firms should insist that each practice group have regular, planned meetings with their groups;
- Managing deadlines can be more difficult while working remotely. Attorneys must oversee this and should have at least 2 people looking at schedules for their files;
- Plan redundancy in case of sickness. Firms should have at least 2 attorneys on all matters.

Most importantly, attorneys and staff are experiencing much higher levels of stress during this time, whether it be working from home with kids, financial trouble or general anxiety about the disease. It is very important to pay attention to your employees. Stay in contact, ask how they're doing, look/listen for signs of stress or trouble, and get people help if they need it.

V. Expediting and Diligently Processing Litigation

Attorneys have the obligation to diligently process cases (MRPC 1.3) and to expedite litigation (MRPC 3.2). These obligations implicate serious concerns if we are limited to remote hearings as COVID continues. While most attorneys have effectively learned to handle conferences with the court and other counsel, motion practice, and even depositions remotely, the State Bar has convened a workgroup that will be making recommendations on how to proceed with remote trials. While MRPC 3.2 requires attorneys to “...make reasonable efforts to expedite litigation consistent with the interests of the client,” whether that ethical obligation must include compelled remote civil jury trials is a significant question that merits serious thought. How will attorneys develop a rapport with the potential jurors through “zoom” voir dire? Will the attorney be able to see and appreciate the potential jurors’ facial reactions or body language as voir dire progresses when separated by a computer screen? Will the jurors, once selected, be able to appreciate the “humanity” of our clients when they are not in a position to really “see” our client? These and many others questions of moment must be addressed as attorneys work to satisfy their obligations to diligently and expeditiously process litigation.

As attorneys our ethical obligations do not abate simply because we are functioning in the midst of an unprecedented pandemic. While there are challenges ahead, technology will help us accomplish these obligations as we move forward.

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