

The West Virginia State Bar

COVID WEBINAR 4: *Leading by Example - Maintaining Ethics in a Time of Crisis*

April 29, 2020 11:00A.M. - 12:00P.M.

Speaker: Rachael L. Fletcher Cipoletti - Chief Lawyer Disciplinary Counsel,
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Rachael L. Fletcher Cipoletti is Chief Lawyer Disciplinary Counsel for the West Virginia Office of Lawyer Disciplinary Counsel. She has been with the ODC since 2002 and became Chief Disciplinary Counsel in 2008. Rachael also serves as Special Judicial Disciplinary Counsel for the West Virginia Judicial Investigation Commission. Rachael is a frequent lecturer on ethics and professionalism for the West Virginia University College of Law, the WV State Bar, and the American Bar Association. Rachael is admitted to practice before the Supreme Court of Appeals of West Virginia, United States Southern District of West Virginia, United States Northern District of West Virginia, United States Court of Appeals for the Fourth Circuit and the Supreme Court of the United States of America. Rachael was previously an attorney with Legal Aid of West Virginia. She graduated Magna Cum Laude with a Bachelor of Arts Degree in Psychology from West Virginia University and also earned her Juris Doctorate from West Virginia University.

She currently serves on the Future of the Law Committee for the WV State Bar, is the ODC liaison to the WV Judicial and Lawyer Assistance Program, serves on the Supreme Court of Appeals of West Virginia Task Force on Lawyer Well-Being, and serves on the ABA's standing committee for the Commission on Lawyer Assistance Programs Consortium on Professionalism Initiatives. She is a lifetime member of the West Virginia University Alumni Association, a member of the American Bar Association, a member of the Center for Professional Responsibility, and a member of the National Organization of Bar Counsel.

Outside of the office she focuses a lot of her energy spending time with her 4 children, her husband, and their very large dog, Charlie.

LEADING BY EXAMPLE MAINTAINING ETHICS IN A TIME OF CRISIS

**The West Virginia State Bar
April 29, 2020**

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Desperate times do not call for desperate measures

As lawyers, we have a duty to abide by our ethical rules and we have an obligation to lead by example in times of crisis.

Key Issues

Rule 1.1 - Competence

Rule 1.3 - Diligence

Rule 1.4 - Communication

Rule 1.6 - Confidentiality of Information

Rule 5.1 - Responsibilities Regarding Nonlawyer Assistants
Standards of Professional Conduct

Rule 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.

Relevant Comments-

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation

or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[8] To maintain the requisite knowledge and skill, a lawyer must 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.

Pro tips...if you are appearing remotely

- Make eye contact through the camera lens not via the screen.
- Adjust the screen before you connect to ensure the maximum visibility of your face; always be aware of what others on the call are seeing.
- Try to do calls standing up when possible. Your voice will have more tone, depth and breadth if you are standing and moving, and gestures and body language will come to you more naturally.
- Try not to close your eyes (or pick your nose) while speaking or listening to someone else speak.
- And, please remember to get dressed.

Virtual View from the Bench - During the Covid -19 Pandemic, A letter from the Honorable Dennis Bailey

One comment that needs sharing and that is the judges would appreciate it if the lawyers and their clients keep in mind these Zoom hearings are just that: hearings. They are not casual phone conversations. It is remarkable how many ATTORNEYS appear inappropriately on camera. We've seen many lawyers in casual shirts and blouses, with no concern for ill-grooming, in bedrooms with the master bed in the background, etc. one male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers. And putting on a beach cover-up won't cover up if you're poolside in a bathing suit. So, please, if you don't mind, let's treat court hearings as court hearings, whether Zooming or not.

More bits on competence...

-Be aware of the status of orders impacting the judicial system. Our Supreme Court has issued documents to govern operations by courts throughout the State of West Virginia in order to protect the health and well-being of court employees, litigants, witnesses, jurors, attorneys, and the general public. You should check back regularly for updates and new documents.

<http://www.courtswv.gov/covid19/COVID19.html>

-WV STATE BAR COVID-19 RESPONSE PLAN & RESOURCES

<https://wvbar.org/wv-state-bar-coronavirus-plan/>

- ABA Resource Page for COVID -19

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

Rule 1.3 - Diligence

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

Relevant Comments-

[1] A lawyer should 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. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

Back to competence...

-Rule 1.16(a)(2) requires us to withdraw as counsel when any physical or mental condition impairs our ability to represent our clients. While issues related to physical illness associated with COVID-19 or exposure to the COVID-19 virus is certainly a factor to consider during this pandemic, an attorney can also be afflicted and unable to work for an extended period for other reasons. If you are not able to represent a client consistent with your obligations under the Rules, you need to decline any new engagements and/or terminate existing relationships.

-Attorneys are grappling with the anxiety of the public health crisis, juggling work and family obligations at home, and adjusting to physical isolation due to the spread of COVID-19, efforts to support attorneys' mental health and wellness are paramount, according to mental health professionals.

Lawyers struggle with higher rates of mental health issues, including depression and problem drinking than the average public, studies have shown.

The current environment, which stress and anxiety are running high and many lawyers are physically isolated while working from home, stands to exacerbate the attorney mental health crisis if preventative measures are not taken.

“The pandemic and ensuing disruption to routines and stability is unquestionably taking a toll on the mental health and well-being of many in the legal profession, just as it is for individuals in all walks of life,” said Patrick Krill, founder of attorney well-being consulting firm Krill Strategies. “Fear, uncertainty, stress and worry are widespread.

Now more than ever we need to strive to maintain the same healthy regimens for our body, mind and spirit. The occupational hazards of our profession are compounded with the stress the coronavirus pandemic has placed in our economy, clients, family and ourselves.

Important note about fitness to practice...

If you are concerned about yourself or about a partner, associate, colleague, bar applicant, law student or judge, help is available.

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CDC Stress/Anxiety Page:

<https://www.cdc.gov/coronavirus/2019-ncov/prepare/managing-stress-anxiety.html>

Lawyers Depression Project:

<https://www.lawyersdepressionproject.org/>

NAMI:

<https://namimainlinepa.org/online-and-telephone-support-groups/>

CHEERS TO YOU AND YOUR NEW SUCCESSION PLAN!

-Succession Planning

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

Attorney professionalism is often equated with dedication to clients, service to others, competence in legal practice and a display of sound judgment. By formulating a succession plan, you fulfill your ethical obligations to your clients, your responsibilities to your profession, and ease your family's burden in stressful times. The proper maintenance and handling of client files is an integral part of ethically maintaining your practice within the parameters of your duties under the Rules of Professional Conduct. Client files always pose a special problem for family members when a lawyer's practice must be closed. You do not want to overburden your family by having kept more than you need over the years. For help in getting started on yours...

<http://www.wvdc.org/pdf/Establishing%20a%20succession%20plan.pdf>

And... it is no longer just a good practice tip...

STATE BAR RULE 14 SUCCESSION PLANNING

14.01 Successor designations

The duty of diligence may require that an active member of the West Virginia State Bar who is operating as a sole practitioner prepare a written succession plan specifying what steps must be taken in the event that the member is unable to continue their law practice due to death or disability. See West Virginia Rules of Professional Conduct, Rule 1.3, Comment 5. As part of any succession plan, a lawyer should arrange for one or more successor lawyers to protect the interests of the lawyer's clients in the event of death or any disability that precludes practicing law. Such designation may set out a fee-sharing arrangement with the successor lawyer or lawyers. Nothing in this rule or the lawyer's designation shall prevent a client from seeking and retaining a different lawyer or law firm. Any lawyer to be designated as a successor must consent to the designation.

14.02 Registry of successor designations

The West Virginia State Bar **shall** maintain a registry of successor designations and identify the existence of a member's succession plan as part of the Bar membership information. Active members who are operating as sole practitioners **shall** disclose to the

State Bar whether they have a designated successor and a succession plan. Such disclosure **shall** be made annually on or before **July 1** and submitted in the form required by the State Bar.

14.03 Responsibility for costs if court-appointed trustee is required

If a trustee is appointed for a deceased or disabled lawyer under Rule 3.29 of the Rules of Lawyer Disciplinary Procedure, and no successor designation is on record for that lawyer as part of the State Bar membership registry, then the lawyer, or the lawyer's estate, shall be adjudged responsible for payment of the reasonable and necessary fees and costs of the trustee that are assessed by the appointing court pursuant to Rule 3.29. To the extent that the trustee's fees, costs, and expenses are paid by the Office of Disciplinary Counsel or other third party, the lawyer or the estate shall be liable to make reimbursement for such payment or payments.

Rule 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; 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.

Relevant Comments –

[1] Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

[2] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the **exigency** of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf.

COMMUNICATING WITH CLIENTS REMOTELY BE PROACTIVE

- Telephone
- Email – if no email and you have an active matter, US Mail
- Video conferencing
- Texting

-If you do not need an original signature you can collect them via a variety of e-signature tools. Or, if you feel more comfortable seeing the client or parties sign, you can have the user sign a document with a stylus using a mobile device like an iPad or smartphone

-In response to COVID-19 public health risks, the Governor issued Executive Order 11-20, which suspends the “personal appearance” requirements for a document to be notarized under W. Va. Code § 39-4-6. The Emergency Rule is modeled after national standards for remote notary processes, which have been adopted during this national crisis. The purpose of the remote notary option is to protect the safety of WV notaries and individuals and the validity of notarized documents executed during the State of Emergency. The Emergency Rule, which can be found at Code of State Rules § 153-45, sets forth procedures for notaries to witness the signing of a document remotely using an electronic device, technology, process or a combination of those electronic option

-Have a central location for communication updates

Rule 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)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

4. to secure legal advice, or informal ethics advice from the Office of Disciplinary Counsel, about the lawyer’s compliance with these Rules;

5. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

6. to comply with other law or a court order; or

7. to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(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.

-Confidentiality in the time of crisis...

An attorney working from home or another remote location is under the same obligations to maintain client confidentiality.

Attorney must safeguard electronic communications, such as email, and may need to take additional measures to prevent information from being accessed by unauthorized persons. This duty *may* require an attorney to use encrypted email or require the use of passwords to open attachments, or to take other **reasonable** precautions to assure that the contents and attachments are protected.

Attorneys working remotely may also be required to bring documents, files, and other confidential materials into their homes or other remote locations. Attorneys should make reasonable efforts to ensure that household residents or visitors who are not associated with the attorney's law practice do not have access to confidential materials.

The duty to maintain confidentiality requirement applies to **all** forms of communications, including phone calls, email, chats, online conferencing and text messages.

-Confidentiality in the time of crisis...

1. Public Internet/Free Wi-Fi

Attorneys should avoid using unsecured free Internet/Wi-Fi hotspots.

2. Video Conferences should be secure

On March 30, 2020 -- the FBI issued a warning about teleconference hijacking during the COVID-19 pandemic and recommended that users take the following precautions:

Do not make meetings public;

Require a meeting password or use other features that control the admittance of guests;

Do not share a link to a teleconference on an unrestricted publicly available social media post;

Provide the meeting link directly to specific people;

Have the host of the meeting manage screensharing options; and

Ensure users are using the updated version of remote access/meeting applications.

3. Update and use strong passwords

4. VPNs

5. <http://www.wvdc.org/pdf/leo2012.pdf> Use of Electronic Media for File Storage

6. Alexa, Google Assistant and other smart devices around the home should be unplugged

-Rule 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.

(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.

Comments:

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in the firm.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

-Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comments:

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules.

-Rule 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

(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.

Attorneys and staff must make reasonable efforts to assure that work product and confidential client information are confidential, regardless of where or how they are created.

Establish remote work expectations and procedures for staff.

All staff working remotely should be educated about and have the resources to make their work compliant with the Rules of Professional Conduct.

Use antivirus software and keep it current.

Use anti-malware software and keep it current.

Do not open suspicious attachments or click unusual links in messages and emails.

Check out the CYBER THREATS page <https://wvbar.org/members/cyber-threats/> which provides information about reported fraudulent cyber activities potentially related to the practice of law in West Virginia.

If you won't have anyone in your physical office space make sure to lock the doors, check the windows, and lock the file cabinets.

Our Supreme Court has made clear in its COVID-19 policies that “individuals that fraudulently use public health efforts to impact court proceedings for personal gain or to avoid a legal obligation may be subject to civil or criminal contempt proceedings and/or sanctions. Attorneys violating the West Virginia Rules of Professional Conduct may be subject to referral to the West Virginia Office of Disciplinary Counsel.”

STANDARDS OF PROFESSIONAL CONDUCT

In March 2020, a statement by the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee called for a new emphasis on lawyer civility:

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.

And, when you have questions about your conduct....

Informal Ethics Advice

- a. Inquiries may be made by calling, writing, faxing, or emailing the ODC
- b. Rule 2.15 of the Rules of Lawyer Disciplinary Procedure