

Covid and Beyond:  
Ethics, Wellness,  
and How Not to End  
up as Talking Lawyer  
Cat Meme



## First... A few tips

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 COVID19

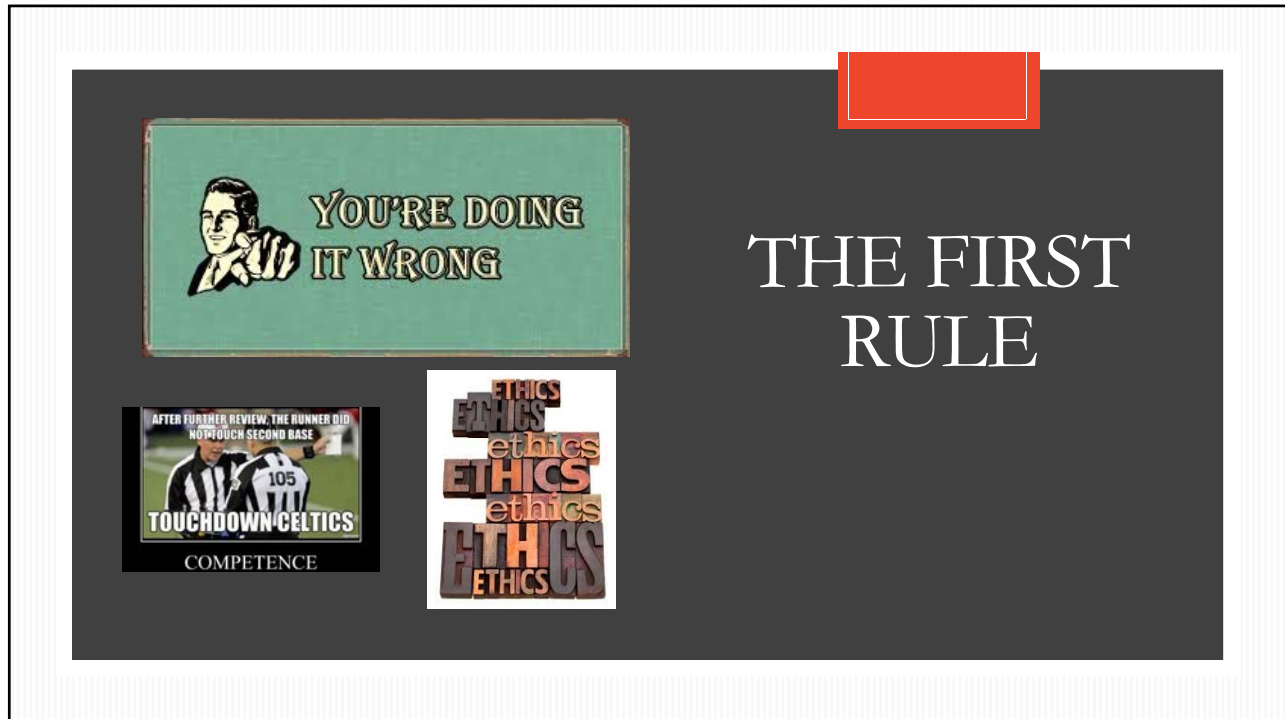
- <https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem/>

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.

Take advantage of numerous FREE ONLINE CLE OPPORTUNITIES offered to you by the WVSB <https://wvbar.org/members/mcle/free-online-cle-opportunities/>

Website - [www.wvodc.org](http://www.wvodc.org) - Rules of Professional Conduct, Rules of Lawyer Disciplinary Procedure, Legal Ethics Opinions, Supreme Court decisions, Staff contact information

Follow the @WVcourts, @EydieNash, @WVStateBar, and @WV\_ODC on Twitter for the most up to date information.



#### ■ 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.

In order to comply with Rule 1.1 (COMPETENCE) of the Rules of Professional Conduct, attorneys should both have an understanding of how social media and social networking websites function, as well as be able to advise their clients about various issues they may encounter as a result of their use of social media and social networking websites.

Comment 8 to Rule 1.1 provides that “[t]o 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.”

West Virginia has adopted the ABA technology amendments to the RPC that require competence in technology.

The Florida Bar increased the CLE requirements to include 3 type specific credit hours in technology.

The Rules do recognize a duty to remain competent and that may include a duty to understand technology, how to use technology to investigate a case, and how to effectively represent your client in a digital age. The internet provides a window into the daily thoughts, musings and activities of a massive amount of people. WITHOUT A DOUBT social media has impacted the practice of law.

Update and use strong passwords.

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.

VPNs are GREAT (it is okay go google VPN I can't see you).

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

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

## Communication

- ▶ Telephone.
- ▶ Incarcerated clients. <https://dhhr.wv.gov/COVID-19/Pages/Correctional-Facilities.aspx>
- ▶ Email – if no email and you have an active matter, use US Mail.
- ▶ Video conferencing. Skype, Zoom, Teams and WebEx.
  - Check the Version and update as patches for problems are frequent.
  - Understand and utilize settings.
  - Duty of Competence May Require Consultation with IT professionals.
- ▶ 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 while using a mobile device like an iPad or smartphone.
- ▶ Have a central location to communicate updates.

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

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

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.

Attorneys may require storage of such documents in locked filing cabinets or in a locked home office.

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

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.

Be sure you know what platform you will be using (ZOOM, TEAMS, WEBEX) and be sure to have the most updated version.

### Supervision

Rules 5.1 and 5.3 work together to make law firm management responsible for the conduct of everyone in the firm. Rule 5.1 requires managing attorneys to "make reasonable efforts" and put in place "measures" designed to ensure that attorneys in the firm comply with their ethical obligations. Rule 5.3 makes firm managers responsible for any ethical transgressions committed by nonlawyer support personnel.

During the COVID-19 pandemic, this ethical obligation requires supervising attorneys to:

- Ensure that all firm personnel have an appropriate remote work environment and access to technology capable of protecting client confidential information.
- Train all lawyers and nonlawyer personnel in the effective use of remote networking technologies.
- Distribute and have in place a means to enforce the firm's COVID-19 preparedness plan, if one exists.
- Maintain a database of contact information for all office personnel.



At a routine civil forfeiture case hearing in Texas' 394th Judicial District Court, Presidio County attorney Rod Ponton accidentally signed on with the cat filter, making the flummoxed attorney look like an adorable kitten. And, then the 34-second clip of Ponton's brief appearance as a cat immediately went VIRAL.

Mr. Ponton, I believe you have a filter turned on in the video settings," Ferguson said.

Ponton interrupted the judge with an exacerbated guttural noise.  
"Aaughh," he exclaimed. "we're trying to — can you hear me judge?"

[The video's sound was fine.]

"I can hear you," Ferguson told the cat lawyer. "I think it's a filter."

"It is," Ponton said, the kitten's head bobbing up and down.

"I don't know how to remove it. I got my assistant here trying to ..." Ponton added.

"I'm prepared to go forward with it," Ponton said. "I'm here live."

"I'm not a cat," Ponton promised as the cat mouthed what he was saying.

"I can see that," Ferguson said after a pause.

The software that does this is augmented reality, or AR, technology. There are several different ways to get filters on a Windows PC or Mac computer.

Turn it on: In the Zoom app for Macs and PCs, find your way to "Preferences." This pulls up a settings menu, where you can click on an entry for "Background & Filters." Then tap on "Video Filters." There you'll see a whole bunch of filters and virtual stickers to try out, including ones that apply cartoons on top of your facial features.

**Turn it off:** Zoom says that once a meeting ends, any Zoom-made filters and stickers you used will disappear. They will not be deployed in future meetings. (Note, however, this rule does *not* apply to virtual backgrounds you may have chosen — they stick around.) And if you were trying the "Studio Effects," it does have a check-box for "Apply to all future meetings." Make sure that's off, or else your virtual makeup will follow you around.

So if you're going to play with filters, remember to always check before turning on your camera.

You do yourself and your clients a disservice if you don't take the time to set up for a professional appearance – it takes time and effort.

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.

Consider a motion to request the Court to order the same virtual background for everyone participating in the hearing. Eliminates issues about "seeing" into clients' or witnesses' homes.

Be sure to address any digital divide for your clients or witnesses in advance.

Try to address issues (like objections) in advance to aid the Court in hearing the matter remotely.



Speaking of hearings and depositions...

Virtual or in person?

Do you need witnesses? Exhibits?

How do you get documents to witnesses? Opposing counsel?

Paper vs. Electronic?

Can you use a file sharing service? Drop Box, We Share and Share point... particularly important if the document is too large to share via email.

Can you use the file sharing features on Zoom, Teams, etc?

Do you need to consider sending paper copies instead of or in addition to electronic?

Be mindful of your duties under Rule 1.1 [Competence] and Rule 1.6 [Confidentiality] redact sensitive data and/or use encryption tools

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 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.



Attorneys are grappling with the anxiety of a 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, in 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 on our economy, clients, family and ourselves.

"Virus Poses  
Latest Test to  
Supporting  
Attorneys'  
Mental  
Health,"  
[Law360, Mar.  
23, 2020]

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.

Supreme Court Announces Addition of Civility Pledge to Lawyer's Oath  
May 17, 2021

CHARLESTON, W.Va. – Chief Justice Evan Jenkins signed an order provisionally adopting and releasing for public comment the addition of a civility pledge to the oath lawyers take when they are admitted to the practice of law.

The oath with the new language is as follows:

"I do solemnly swear or affirm that: I will support the Constitution of the United States and the Constitution of the State of West Virginia; that I will honestly demean myself in the practice of law; that I will conduct myself with integrity, dignity and civility and show respect toward judges, court staff, clients, fellow professionals and all other persons; and to the best of my ability, execute my office of attorney-at-law; so help me God."

COVID-19 fatigue is real. The typical work day is long, the work is hard, and the end is nowhere in sight across much of the country. After months of "working from home," we are tired of being cooped up, tired of being careful, tired of social distancing regimens, tired of teaching 4<sup>th</sup> grade math, all while hoping the dog doesn't start barking during a Teams hearing.

It seemed that earlier this summer the end was in sight, now it feels like the goal posts have moved again.

- 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.

#### 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/>



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

Renee N. Frymyer is a Lawyer Disciplinary Counsel for the West Virginia Office of Lawyer Disciplinary Counsel. The Office of Lawyer Disciplinary Counsel is primarily tasked with screening and investigating complaints made against lawyers who practice law in West Virginia. The ODC is also responsible for prosecuting those lawyers who have either committed ethical misconduct or are suffering from a physical or mental condition which adversely affects their ability to serve the public. Prior to joining the ODC in 2008, she was an Assistant Prosecuting Attorney for Marion County, West Virginia, worked in civil litigation in Pittsburgh, Pennsylvania, and was law clerk for the Honorable Jennifer Bailey, Circuit Court Judge for Kanawha County. Renee earned her JD from the West Virginia University College of Law in 2002.

## **Biography for CLE**

Andrea J. Hinerman has served as Lawyer Disciplinary Counsel for the Office of Lawyer Disciplinary Counsel beginning January 26, 2004, and as Senior Lawyer Disciplinary Counsel since 2008. Prior to joining ODC, she served as a law clerk for the Honorable Irene C. Burger, when she was a Circuit Judge for Kanawha County from 1998 until 2000, and for the late Honorable Robert E. Maxwell, Senior District Court Judge for the United States District Court for the Northern District of West Virginia, from 2000 until 2002. From 2002 until 2004, she was in private practice. She earned her J.D. degree from the West Virginia University College of Law in 1998.

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.