

Lawyers in Crisis: Ethical Guidance for Remote Work and Dealing with COVID-19

Stacey A. L. Best, Assistant Bar Counsel

Whether a pandemic is raging, or some other crisis has arisen, lawyers are expected to solve problems, not make them worse. The COVID-19 pandemic is affecting how everyone lives and how everyone works, including lawyers. Whether a lawyer can reasonably be expected to solve a problem, the ethical rules require lawyers to take steps to avoid making problems worse. That is one thing even a pandemic cannot change.

Remote work, once the dream of many, is now a reality for most. But even for those who are accustomed to working from home, there are things lawyers should take care to do when conducting their practice remotely. Here are some tips and strategies for conducting virtual practice ethically.

Be(come) aware of risks and benefits of technology

In March 2018, Assistant Bar Counsel, Heather LaVigne wrote an article, [“From Technophobe to Technolawyer: A Lawyer’s Duties Related to Technology Competence and Prevention of Inadvertent Disclosure.”](#) The article sets out the basis in the Rules of Professional Conduct for a lawyer’s duties regarding the use of technology. Once lawyers understand the basic framework of the Rules, they can make better choices about the hardware and software that will allow them to ethically practice remotely. The at-home lawyer should spend some time thinking about the different tasks s/he performs in his/her work to determine what s/he might need.

Resources such as the Law Office Management Assistance Program of Massachusetts (LOMAP) can help lawyers figure out the equipment they need for a remote practice. LOMAP’s [website contains information](#) about the **basic technology** (hardware and software) you will need to practice law from anywhere. The Supreme Judicial Court now has a standing committee on lawyer well-being. The Committee has a Techline that you can access through its [website](#).

Be(come) informed

As a result of COVID-19, most state and local authorities have issued orders and regulations that will impact how lawyers serve their clients without face-to-face

contact. [The SJC \(https://www.mass.gov/law-library/massachusetts-supreme-judicial-court-orders\)](https://www.mass.gov/law-library/massachusetts-supreme-judicial-court-orders) and various courts are also creating rules for conducting a remote practice. Check their websites regularly, as changes are occurring frequently.

Be(come) aware of ethical considerations of remote work

Several ethical issues arise when in-person contacts are restricted and legal work is done using technology. Being familiar with the ethical rules can help lawyers think through their strategies for dealing with their practice. Some additional guidance follows below. Bar counsel's office also provides guidance to lawyers through a hotline that is staffed by assistant bar counsel Mondays, Wednesdays and Fridays between 2 p.m. and 4 p.m.

- **Competence:**

In an emergency, a lawyer may give advice or perform limited services outside of his skill set. Even so, the lawyer must exercise basic competence of a lawyer, which includes evaluating the risks and benefits of the circumstances. For example, if a potential client who is ill approaches a lawyer to prepare a will, the lawyer who does not ordinarily prepare wills may be able to assist the client. Even when a crisis like COVID-19 creates an emergency and burdens the representation, however, the lawyer is required to exercise reasonable diligence such as ensuring the identity of the client and that the client has the testamentary capacity to make a will. In a remote representation, for instance, lawyers may be able to satisfy their ethical obligations, if the client is known to them by making visual contact with the client using a video conferencing application. The lawyer also must explain circumstances to the client to the extent reasonably necessary for the client to make an informed decision concerning the representation.

- **Communication**

Lawyers have an obligation to keep their clients informed about the status of a matter, comply with reasonable requests for information and consult with the client concerning the means by which the client's objective can be accomplished. In the COVID-19 crisis, where the SJC and other tribunals have issued several orders, lawyers should understand and inform their clients as to how any court orders may impact their cases. This also naturally includes discussing with the client what can be done to accomplish the client's objectives while in-person business is restricted at court.

Lawyers have a responsibility to advise their clients how they can be reached while working remotely and an obligation to respond to client's reasonable requests for information. The lawyer should ensure that s/he attends to voicemail, email and first-class mail. This may require the lawyer to have mail and packages forwarded to their home temporarily.

- **Confidentiality**

The use of technology raises concerns of confidentiality in several ways. Some of these issues are addressed in the article by ABC LaVigne, cited above. In addition to data security, lawyers who are working using technology and perhaps sharing computers or workspace with others who are not part of their practice, should take care to maintain confidentiality.

Before reaching for the keyboard or phone to discuss client matters, lawyers should take time to consider their surroundings. This includes thinking about who might have access to read a post/chat or overhear a conversation. A 2019 disciplinary case, [*Matter of Smith*, 35 Mass. Att'y. Disc. R. ____ \(2019\)](#), provides a discussion about Mass. Prof. C. 1.6 and social media. Lawyers having discussions with clients should take steps to maintain attorney-client privilege, which includes advising clients to take similar steps to maintain the privacy.

Data security is another aspect of confidentiality requiring the lawyer's attention. In addition to the ethical rules about protecting client information and property, Massachusetts has developed data privacy laws that may be implicated by a lawyer's remote work. Documents containing sensitive information such as bank account numbers, personal identifying data should be handled with added care. There are online resources, [including some presented by LOMAP \(https://www.masslomap.org/secure-your-data-part-3-encryption-basics/\)](https://www.masslomap.org/secure-your-data-part-3-encryption-basics/), that describe how lawyers can encrypt their data.

- **Money matters**

COVID-19 is having a significant impact on the economy, which, in turn, may have a significant impact on your clients' ability to pay your legal fees. Through the years, bar counsel has offered guidance on the rules related to legal fees. Several relevant articles can be found on the BBO/OBC [website](#).

Working remotely during the crisis brought on by COVID-19 can create several unforeseen costs including a lawyer's time. However, lawyers should think carefully before passing those costs on to their clients. Overhead costs and a lawyer's education for matters that are not novel should not be passed on to the client. By extension, lawyers who find it takes them longer to complete work using technology should take care that they don't end up charging a clearly excessive fee.

- **Be well**

The COVID-19 crisis poses risks that most of us would rather not think about. But the diligent lawyer will have a disaster plan in the event s/he becomes incapacitated. There is [guidance for succession planning](https://bbopublic.blob.core.windows.net/web/f/Succession-Planning-IOLTA.pdf) on the BBO/OBC website (<https://bbopublic.blob.core.windows.net/web/f/Succession-Planning-IOLTA.pdf>). For solo practitioners and lawyers at small firms, in addition to having a plan, it is particularly important that the appropriate individuals know about the plan and have what they need to carry it out.

Crisis is stress inducing for everyone, including lawyers. The resulting mental and physical challenges can impact a lawyer's work. After receiving [a report](#) from its initial steering committee, the SJC established a standing committee on lawyer well-being demonstrating its focus on wellness in the profession. The Committee's website has links to several resources. Lawyers who find they are struggling, should not hesitate to access [resources](https://www.lclma.org/) (<https://www.lclma.org/>) for lawyers. One key to being part of the solution is your wellbeing. Be well.

For more specific guidance related to COVID-19, please visit the BBO/OBC website COVID-19 FAQs.