HALLING & CAYO
ATTORNEYS AT LAW
320 EAST BUFFALO STREET, SUITE 700 • MILWAUKEE, WI 53202

Ethical Issues Involving Remote Work

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Ethical problems can come up even for the most diligent practitioners, across all practice areas and regardless of years of experience, and regardless of what else is going on in the world.

COVID-19 has upended every aspect of our practice, and made compliance with the Supreme Court Rules of Professional Conduct that much more challenging. Remote work, in particular, has created some new problems, but also some new opportunities. Of course, remote work existed well before the pandemic and, as Chief Justice Annette Ziegler recently indicated in her State of the Judiciary address, is here to stay in at least some forms.[1]

This presentation will discuss the ethical implications of working remotely, and will pull heavily from Wisconsin Formal Ethics Opinion EF-21-02.[2] This Opinion was released in January 2021, and while the circumstance giving rise to it was the COVID-19 pandemic, it was designed to provide guidance in non-emergency circumstances as well. Note that Opinions are not binding authority, but are useful guidance with persuasive value.

But first, some caveats. Discipline is always a lagging indicator. The pandemic that has upended the world is just starting to factor into grievances, and public discipline involving cases affected by the rapid changes and challenges COVID-19 has brought will take some time. The word "pandemic" appeared in only one case in the OLR compendium[3] as of early November, 2021, and "Zoom" three, but only with reference to the timing of the opinion or mechanism for a hearing. In our own practice, we are beginning to see issues involving the pandemic and remote work show up in complaints, how this will play out in the long term remains to be seen.

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[1] https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=28710&source=carousel

[2] Included in your materials and available at https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/EF-21-02%20Working%20Remotely.pdf

[3] https://compendium.wicourts.gov/app/search. The Compendium collects public discipline, as well as summaries of private discipline, and is searchable.

Several Supreme Court Rules are implicated here, including SCR 20:1.1 (Competence), SCR 20:1.3 (Diligence), SCR 20:1.4 (Communication), SCR 20:1.6 (Confidentiality); SCR 20:5.1 (Responsibilities of partners, managers, and supervisory lawyers); SCR 20:5.3 (Responsibilities regarding nonlawyer assistance); and SCR 20:5.5 (Unauthorized practice of law, multijurisdictional practice of law.)

As with most of the Supreme Court Rules, the sections relevant to this discussion are broad, with additional (though still limited) guidance provided by the ABA and Wisconsin Committee Comments[4] as well as the formal opinions. While it is impossible to reach every potential issue within an hourlong CLE course, this presentation will address some of the more foreseeable problems and complaints we anticipate. We invite your participation and feedback throughout this discussion.

I. Competence

SCR 20:1.1 requires lawyers to act competently:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Maintaining *substantive* competency may not be all that different now—lawyers still need to stay abreast of developments in the law; legislators still make law and appellate courts still issue opinions during the pandemic, and lawyers need to keep researching and reading.

Procedural competency is also important when working remotely—lawyers need to stay on top of court closures, revised procedures, and state and local laws governing the use of electronic signatures, remote notarization, and remote depositions. Although DocuSign and /s/ signatures are becoming more common (and, anecdotally, some state courts are allowing or are at least not commenting on unsworn declarations), some matters still require "wet" signatures. Even masking, vaccination, and social distancing orders arguably fall into this category—lawyers are obligated to be aware of the orders affecting their practices, and can be subject to discipline for disobeying them.

ABA Comment 8 to SCR 20:1.1 specifically requires *technological* competency, which has taken on newfound importance during the pandemic:

[4] The entire SCR Chapter 20, including comments from the American Bar Association and the Wisconsin Committee, is available at https://www.wicourts.gov/supreme/sc_rules.jsp.

> To maintain the requisite knowledge and skill, a lawyer should 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.

Lawyers who are used to doing everything in person or by telephone have had to add technologies such as Zoom, Skype, or other videoconferencing systems to their mix.[5] Most lawyers who litigate have had to become familiar with at least appearing on Zoom or other platforms in a hurry, but more evidentiary hearings and trials may be handled remotely even as the pandemic recedes. It may become a requirement under this Rule to become proficient in handling exhibits, screen sharing, and cross-examining witnesses remotely as well.

At the very least, lawyers should know about their computers, phones, and other devices and the software they will use; and the means by which they will keep their devices secure, private, and virus-free. This may require the use of an IT expert, which many firms already utilize.

- **A word about mistakes**

Rapid changes mean more opportunities to make mistakes. Financial stress, health stress, parenting stress, state-of-the-world stress take their toll. People who do not work well from home are doing so anyway, and may be deprived of the ability to quickly bounce ideas and strategies off of a co-worker. Conflict checks may get missed lawyers who have lost business or who are contacted in an emergency may end up "dabbling" in areas in which they are not familiar. Staff and junior attorneys may not be as well supervised as they would be if everyone were working full-time in the office. We'll discuss some of that in later sections.

Mistakes have happened. You've made them. I've made them. Again, grievances and discipline are lagging indicators; malpractice is another. Mistakes can lead to both, and insurers and professional liability attorneys are expecting an uptick in coming months/years. And, while COVID-19 may be an explanation, it will likely not be an excuse, particularly in a malpractice matter where the standard of care is not likely to change.

The Supreme Court Rules do not expressly forbid mistakes; however, mistakes can signal a competency issue in violation of SCR 20:1.1, among others. Often, discipline flows not from the mistake itself but from what happens after—specifically, whether and how you tell your client about the mistake.

[5] Confidentiality implications of this Rule are discussed later in this presentation.

While there is no bright line Supreme Court Rule as to what constitutes an error or omission requiring disclosure to the client, it is clearly not necessary for lawyers to tell their clients about every error. Generally, mistakes that do not adversely affect the case, strategic decisions that ultimately did not work but were reasonable given the circumstances, and errors that have been remedied do not need to be disclosed (though clients should not be charged for work made necessary by the attorney's error or omission). I think we can all relate to calendar errors in particular this year.

On the other hand, Wisconsin Ethics Opinion E-82-12 provides that attorneys have a duty to tell clients about omissions that are significant enough to give rise to a potential malpractice claim. The State Bar Professional Ethics Committee came to this conclusion in light of the Supreme Court Rules (as written at the time) requiring attorney competence, assistance in maintaining the integrity of the profession, and precluding the attorney from limiting his or her liability to a client for malpractice.

A later article, "What to Do After Making A Serious Error," was authored by State Bar Ethics Counsel Tim Pierce and now-retired WILMIC Vice President of Claims Sally Anderson and was published in the February 2010 *Wisconsin Lawyer.* Pierce and Anderson add to that analysis the fact that SCR 20:1.4 requires lawyers to reasonably explain matters to their client as necessary to permit the client to make informed decisions, and that SCR 20:1.7 provides that a conflict of interest exists if there is a significant risk that a lawyer's personal interest may materially limit representation of a client:

> When a lawyer commits an error giving rise to a possible malpractice claim, the client must make important decisions as to whether to pursue the possible claim against the lawyer, immediately or at a later date, and whether to continue the representation, and the lawyer must provide the client with information sufficient to ensure that the client is reasonably informed about these matters.

Even given a duty to report to the client, the lawyer should refrain from confessing malpractice liability to the client or otherwise discussing the merits[6] of filing a grievance or malpractice suit.

How to make this disclosure, beyond doing so in a manner your client can understand and use to make decisions, is going to be up to you. Email creates a "paper trail" that can be used to show you communicated the issue with reasonable diligence; phone or Zoom allows for real-time questions. A phone or video call with a follow-up email may be appropriate. If you do intend to

[6] Attorneys do have a duty to refer clients (or anyone else) to the OLR if they express a desire to file a grievance. SCR 21:1.15(3).

have a real-time conversation, rehearsing it with a colleague or into your bathroom mirror may help. Remember, your spouse or roommate is not covered by the attorney-client privilege, unless they work at your firm too, so unless you are practicing something very generic it is not appropriate to involve them in the rehearsal.

II. Communication and Diligence

The Supreme Court Rules require lawyers to act with "reasonable diligence and promptness" (SCR 20:1.3) in representing a client. The Rules also require that the lawyer communicate with the client promptly and to the extent reasonably necessary to accomplish the client's objectives, including informing the client of any matter that needs the client's informed consent. (SCR 20:1.4).

Clients may be often emotionally fragile, worried about their personal and financial future and that of their families. This worry is frequently accompanied by a sense of urgency that the court system is not designed to accommodate (which is made much worse this year due to closures and cancellations). Clients tend to turn to their attorneys not just for legal advice, but for a (metaphorical, these days) shoulder to cry on and a confidential place to "vent," making compliance with ethical rules (while still maintaining a law practice, balancing other client needs, and earning a living) that much more challenging. The pandemic has only magnified this issue.

Remote work makes compliance with these Rules more complex as well—for lawyers, balancing working from home, with children or elders who may be at home or quarantined, and with their own health and well-being needs, has been more of a challenge, just as clients have become needier and more demanding.

Still, the duties of communication (SCR 20:1.4) and diligence (SCR 20:1.3) (which are often interrelated) march on.

As with many of the Supreme Court Rules, SCR 20:1.3 and 1.4 are vague and broad. They simply read:

> **20:1.3 Diligence.** A lawyer shall act with reasonable diligence and promptness in representing a client.
> **20:1.4 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 SCR 20:1.0 (f), 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 by the client 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.

"Reasonably" is circularly defined in SCR 20:1.0 as denoting "the conduct of a reasonably prudent and competent lawyer." "Promptly" is not defined. These are often judgment calls.

It is useful for attorneys to inform their clients at the beginning of representation (either in, or along with, the engagement agreement) as to what to expect with regard to communication. In general, this could mean the attorney will copy the client on correspondence; send them copies of pleadings and other documents as they are received or filed; and endeavor to respond to messages from clients and third parties as soon as possible (even if simply to acknowledge receipt and define a time for a substantive response), but it does not mean informing the client of every non-substantive communication with the court or opposing counsel or responding to every message immediately.

For those of us with clients whose engagements pre-date the pandemic, any changes to your communication schedule, or to the course of the case generally, necessitated by COVID-19 should be communicated clearly, with an explanation as to why the changes are necessary. The Rules themselves don't have a "pandemic exception" but what's "reasonable" in today's world may be different from what may have been reasonable a year ago.

For instance, if you historically responded to every client communication the same day you received it and you've found that impossible given other commitments, let your client know what they can expect. Extension of time for discovery and briefing, and other enlargements of scheduling orders, have become more than routine during the pandemic; I generally recommend being as free as possible with extensions, so long as they don't truly prejudice your client, as a courtesy and as a hedge (because you will likely need an extension at some point). Again, explain why this is important and in the best interest of their case; it may be helpful to indicate your policy on extensions to your client before they're needed, so there are no surprises.

- **What if clients want to communicate in person and you don't feel safe doing so?**

Some law firms have been remote, or nearly so, since March 2020; others have more or less resumed operations, with or without disposable masks and hand sanitizer at the desk instead

of a candy dish. Whether attorneys can be required to work in-person by their firms is an HR issue outside of the scope of this presentation. Given the audience of this presentation, you are more likely than not to be working in person at least some of the time.

But what happens when your client wants you to work in-person—for a meeting, a deposition, or a trial (which may be less of a client request, and more of a court order)—and you don't feel safe doing so? What if you're at high risk or live with someone else who is?

Wisconsin has not weighed in on this issue, but the New York State Bar Association has issued an opinion[7] suggesting that an attorney may move to withdraw should continued representation endanger their health (as their Rule 1.16(b) permits attorneys to withdraw if "the lawyer's mental or physical condition renders it difficult for a lawyer to carry out the representation effectively.") Wisconsin's SCR 20:1.16(a) goes a step further and *requires* lawyers to withdraw (subject to obtaining permission from the tribunal) if their "physical or mental condition materially impairs the lawyer's ability to represent the client." However, whether fear of COVID-19 falls under this category is not clear, and is likely a judgment call based on individual circumstances.

The caution here is that a lawyer afraid of catching COVID-19 from their client may subtly undermine the effectiveness of their representation, i.e. by spending less time with a client, consenting prematurely to ending the case in a manner less favorable to the client to avoid an in-person trial, or truncating a hearing. The New York opinion was framed through an immigration court lens but the analysis seems applicable to general civil court.

Because Wisconsin has not gone on record about fear of illness as a basis to withdraw, this may end up being a gray area going forward. If you do feel a need to withdraw not because the attorney-client relationship has broken down beyond repair but because you don't want to get sick, working with the client to help them find new counsel if they wish, complying with any procedures the tribunal requires, and transitioning the file to them in a timely fashion takes on added importance. Orderly, cordial withdrawals rarely result in grievances (regardless of the underlying reasons), where sloppy ones will.

- **And what about communication from quarantine, or in case I become incapacitated?**

This is tough stuff, we know, it is something all of us will need to confront eventually, whether because of COVID or another illness, or age. If you are ill and unable to work even remotely, or cannot make an in-person appointment due to quarantine, you need to communicate with your client and advise them that you are too ill to work (SCR 20:1.4), and to make sure that

[7] https://nysba.org/ethics-opinion-1203/

appropriate extensions or substitute personnel are notified so that deadlines are missed and their matter has a caretaker (SCR 20:1.3). You don't need to say it's COVID-19; as with any medical issue, you're entitled to privacy and don't need to share unless you want to share. (Clients will likely ask or assume, though.)

Succession planning is important, even for lawyers who are young and have no known health issues, because anything can change. Firms should decide how cases might be handled in case a lawyer could not continue working—there may be a point person who will divide up the matters and handle communication (a "general counsel" type setup) or each lawyer may have a designated backup person (the "buddy system"). Solo practitioners should reach out to other lawyers, who at the very least can communicate with clients and courts about the lawyer's convalescence and protect the clients' interests.[8]

III. Confidentiality When Working Remotely

SCR 20:1.6 governs confidentiality, and is far broader than the attorney-client privilege. While privilege is an evidentiary issue applicable in court and related proceedings, confidentiality is a 24/7 rule. The Rule forbids attorneys from revealing "information relating to the representation of a client" absent informed consent of the client, except for disclosures "impliedly authorized in order to carry out the representation," and with certain exceptions pertaining to preventing death/serious injury/financial loss; to secure legal advice about the lawyer's conduct; to establish or defend a claim on behalf of the lawyer and involving the client (including a fee dispute or collection); comply with other law or a court order; or to detect or resolve conflicts of interest.

Lawyers must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." (SCR 20:1.6(d).) This sub-part is particularly challenging when attorneys used to working at a firm with others are working from home, unless they live alone or with a spouse or partner who also works for their law firm. This challenge arises both personally and technically. From a personal standpoint, those of us who have been working from home most or all of the time may have nobody readily available with whom they are permitted to speak freely about cases and clients. In an office, we're normally able to walk down the hall and bounce an idea off of a co-worker; speaking on the phone at a reasonable volume is generally a matter of courtesy, not privacy.

Speaking technically, communication and work product done at home must remain confidential. Ideally, your workspace is a spare bedroom or home office with a door and reasonable

[8] The State Bar has some good resources on this. See, e.g., https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/article.aspx?Volume=91&Issue=11&ArticleID=26746.

sound privacy, and your Alexa and Google smart devices are banished to another side of your residence. Your computer is protected with a strong password, firewall, and anti-viral software;[9] your tablets and phones have passwords, codes, or finger/face recognition and do not display the contents of text messages on the lock screen. Consider using two-factor authentication. If you use cloud computing (as most of us do to some degree), you must understand how the technology may implicate privacy. Confidential documents should be filed out of sight from your family or roommates; a locked file cabinet may be a necessary investment if you do keep things on paper.

However, not all of us have a separate workspace with a door that locks, and short of moving we do the best we can with what we have. As remote work becomes more the norm and less a response to an emergency, we would expect that requirements for a remote workspace may evolve, and a separate, lockable, soundproof space may be seen as necessary.

Moreover is not recommended that you access work information from any device that your kids can also access for school or recreation (as you do not know whether they will set your Zoom name to "You'reAllSus," which my tween tells me is an *Among Us* thing, or something far less court-appropriate), but if you have to, make sure you set up separate profiles and that your work profile cannot be accessed by others. Rethink the use of saved passwords on shared computers, even with separate profiles.

Even if your space is shared, you really do need somewhere to hold client conversations. It is untested as to whether having your pre-verbal baby on your lap while you work is going to implicate privilege; it is clear that having your spouse on the couch while you Zoom with a client at the desk 8 feet away will. Private conversations should always happen in a private space; if that means shooing your spouse out of your bedroom, so be it. Using a headset for calls and videoconferencing may help keep your noise contained.

IV. Supervision of junior lawyers and non-lawyer assistants

SCR 20:5.1 and 5.3 concern the responsibilities of senior lawyers to supervise those

[9] Lawyers are obligated to use reasonable efforts, not exhaust all possible efforts, to make sure that they mitigate risks of inadvertent disclosure. What constitutes "reasonable efforts" varies based on the facts of a particular situation—the type of client and matter, the sensitivity of the information involved, etc. If you work for a large firm handling international intellectual property for Fortune 500 clients, you need sophisticated security and chances are your firm has already handled that; if you are a small firm general practitioner, you may not need anything other than commercially available software and a strong password. State Bar Formal Opinion EF-15-01 discusses risk evaluation in a cloud computing context, but the general caveats are more broadly applicable. The opinion is available at https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/EF-15-01%20Cloud%20Computing%20Amended.pdf.

working under them and to ensure that all lawyers in the firm conform to the Rules and that the conduct of nonlawyer assistants and vendors is compatible with the Rules. Doing so is more challenging when the junior lawyers and assistants you're supervising are scattered across the metro area (or perhaps across the world, see next section), but the responsibility remains.

The Wisconsin formal opinion suggests the following:

> Developing a structure to adhere to a schedule, facilitate collaboration, communication, and conduct regular meetings by videoconference can help achieve the level of supervision envisioned by the rules. Regular mandatory training, review of the circumstances of a remotely-working lawyer, the assignment of experienced mentors to new lawyers, and the creation of teams are also strategies that can facilitate efficiency in the context of remote work.

Exactly how to implement these suggestions will vary greatly based on the individual firm and experience level of those under supervision.

V. Unauthorized and multijurisdictional practice of law

From March 2020 until, for some people, September 2021 or even now, they quite literally did not need to be anywhere. They worked remotely, attended court remotely, and their kids attended school remotely. Some people are still living this dream/nightmare (depending where you fall on that spectrum). However, for lawyers who are licensed in a limited number of jurisdictions (at most), questions arose as to exactly from where they could practice law.[10] If, say, they were licensed in Florida but decided to ride out the pandemic summer in Wisconsin, could they provide services to Florida clients without obtaining Wisconsin licensure?

The Wisconsin Formal Ethics Opinion concluded that SCR 20:5.5 was not designed to prohibit such conduct; it cited, with approval, a Utah opinion (19-03(2019)) on the same topic which asked, "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah?" The Utah committee concluded that it had no interest. Wisconsin agreed.

So, as long as the Florida lawyer is not holding themselves out as a Wisconsin lawyer, and has not established a public office or solicited Wisconsin business (except as otherwise permitted, such as federal or Tribal practice they are otherwise licensed or authorized to do), they can work from their summer cabin, kid's house, or hotel room in Wisconsin.

[10] Some ethics practitioners refer to this as a "butt in seat" rule—does it matter where you're licensed and what you're doing, or where your chair is?

What about the other way—can a Wisconsin attorney practice Wisconsin law from another state? Every state establishes its own rules, and you'll need to be mindful if you decide to take this route. But, assuming the other state allows out-of-state lawyers to invisibly practice there, it will not violate Wisconsin Rules to do so.

CONCLUSION

This outline is not intended to be exhaustive, but provides a brief overview of several ethical issues of particular interest to working remotely.

In many cases, reasonable and ethical practitioners will have different interpretations and different answers to the questions posed (even given the recent Wisconsin ethics opinion); it is important to remember that such issues should be resolved "through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules." (Preamble to SCR Chapter 20, ¶ 9.)

Stacie H. Rosenzweig
shr@hallingcayo.com