



Ethics of Remote Working: *Don't just recycle bad practices*

*Oregon State Bar
Sustainable Future Section
December 16, 2020*

Holland & Knight

Copyright © 2018 Holland & Knight LLP. All Rights Reserved



Roadmap

- » Ethical responsibilities when running your law firm in crisis/remote-working environment indefinitely
- » Practical aspects of continuing firm operations while advancing client goals
- » Guidelines for supervision of and relationship with attorneys, staff, employees
- » Recycling and file management
- » Questions

6 Stages of Pandemic Grief

1. Transition
2. Settle in (let's get rid of our offices)
3. Anxiety: when will this ever end
4. Frustration: ready for this to be over (no way I'm getting rid of my offices)
5. Lean in: fine, I understand. This will never end.
6. Transition back to office*

*Unless you have to go back to step 4

Practicing in a pandemic

Competence, Knowledge and Skill

Diligence

Communications

Confidentiality/privilege



ALL OF THEM

Home office: expectations



Home office: reality



Ethical responsibilities in crisis environment

Oregon RPC 1.1: “Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

Consider

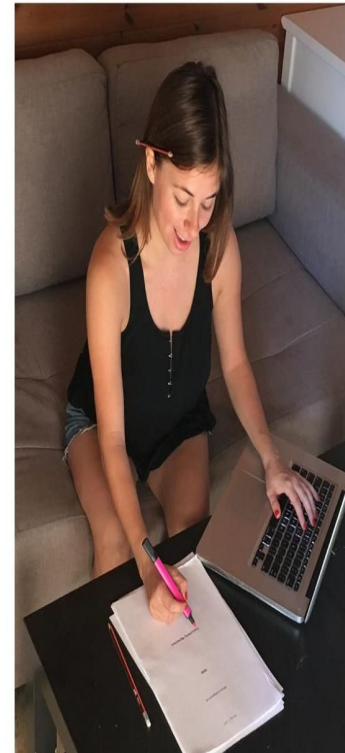
- Available workspace and needs
- The inevitable interruptions to workflows
- Securing physical material/property
- Tracking deadlines and scheduling changes
- Staying (and becoming) competent

Ethical responsibilities in crisis environment

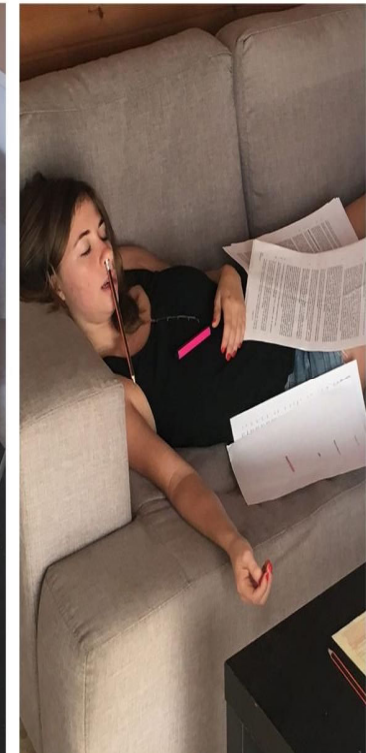
RPC 1.3: “A lawyer shall act with reasonable promptness and diligence in representing a client.”

- » Deadlines, changes, and notice
- » Preparation
- » Caseload


WORKING FROM HOME



9:00AM



9:12AM



RPC 1.16(a)(2): “lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client ***.”

- » How will health issues affect your representation?
- » What if you have to self-isolate or if you get ill?
- » Do you have a succession plan?

Ethical responsibilities in crisis environment

Communicate with clients during a crisis

RPC 1.4(a):

(a) “keep the client reasonably informed about the status of the matter...”

(b) “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”

Responsibilities include:

- Ensuring open line of communication
- Ability to contact client / POA or other if client sick
- Client’s ability to effectively communicate
- Discuss how COVID impacts case so decisions can be made
- Also – see RPC 1.14

Ethical responsibilities in crisis environment

Communicate with opposing counsel & third parties during a crisis

Consider:

- Agreements
- Extensions
- Remote proceedings
- Settlements
- Civility and professionalism

Ethical responsibilities in crisis environment

Communicate with courts during crisis

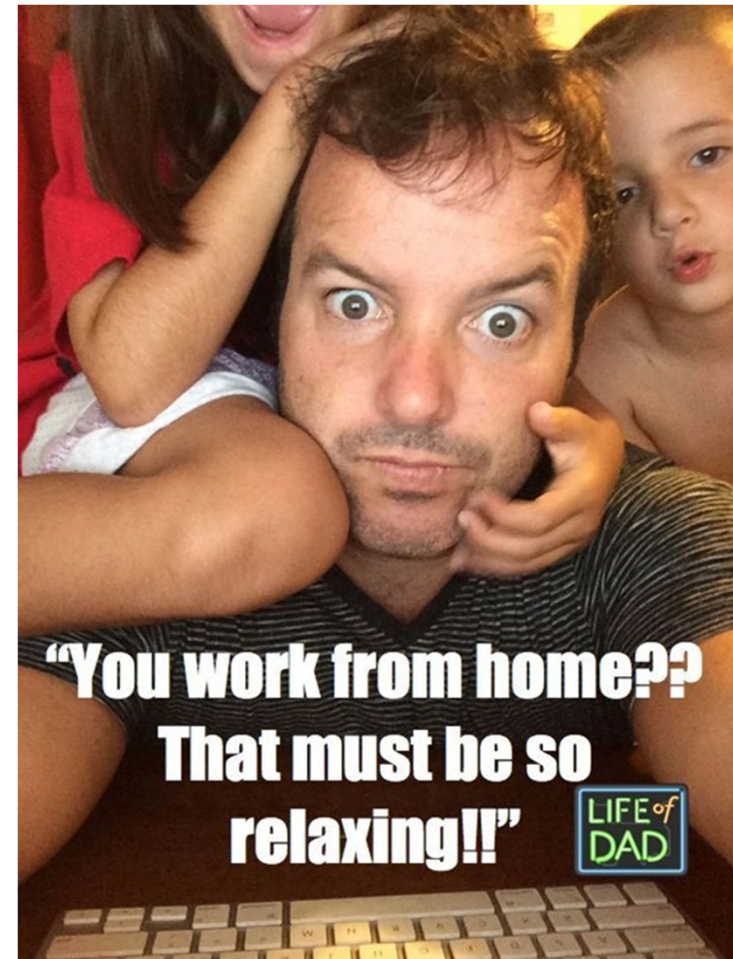
- Operational status
- Personnel requirements
- Standing orders
- *Ex parte* in proceedings

Ethical responsibilities in crisis environment

RPC 1.6(a): A lawyer shall not reveal information relating to the 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).

Attorney-client privilege:

- » Attorney
- » Client
- » Communication
- » Confidential
- » Purpose of legal advice



Privilege & Confidentiality

Traditional office

- » Designated work spaces
- » In-person meetings
- » Limited access
- » Proprietary software
- » Commercial-grade security
- » Regular staffing
- » On-site support

New remote work setup

- » Semi-designated work space
- » No in-person contact
- » 24/7 open access
- » Less secure tech
- » Not staffed by employees
- » Support is remote

Privilege & Confidentiality

RPC 1.6(c): attorneys need to act reasonably to prevent non-authorized access or inadvertent disclosure

Consider reasonable actions in different settings:

- physical office
- remote work location
- electronic material/metadata
- inadvertent/unintended recipients
- outside service providers

Privilege & Confidentiality

Communication Medium

- » Physical files
- » Email
- » Mail
- » Phones
- » Computers
- » Fax
- » Wifi
- » Cloud storage
- » Video conference applications

Practical Considerations

How do you pursue client goals during a crisis?

- » Client perspective will matter
- » Is client facing same crisis/circumstances?
- » Evaluate & reevaluate likelihood of success
- » When to take action vs. when to hold off
- » Expedite / delay litigation
- » Communicate strategy to clients
- » Do you have a succession plan?
- » How do you pursue client goals when functionality of courts/agencies is limited?

David's Favorite RPC

- » RPC 2.1: In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
- » You are counselors and advisors, not just lawyers.

Responsibilities for Supervisory Attorneys

Supervising attorneys: duty to adequately supervise and ensure compliance becomes increasingly challenging given:

Remote work settings

Delegation of duties

Decreased in-person communication

Lack of physical oversight

RPC 5.3: Supervising Nonlawyer Assistance

» Nonlawyers in the firm:

- Give appropriate instruction and supervision
- Be responsible for work product

» Nonlawyers outside the firm:


- Make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations
- Varies depending on circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information

» Technology and no lawyer assistance

NY City Bar Ethics Opinion 2020-5

- » **TOPIC:** Whether a lawyer's health concerns regarding appearing in court in person during a pandemic can create a conflict of interest requiring withdrawal from the representation
- » **DIGEST:** A lawyer who is required to return to court in person during a public health crisis may have serious health and safety concerns which could create a conflict of interest for the lawyer continuing with the representation. Whether such a conflict exists is a fact-specific inquiry and will depend on the lawyer's personal health concerns as well as the available alternatives for proceeding with the representation. If the lawyer concludes that his or her health concerns and the lack of available alternatives for appearing in court create a non-waivable conflict of interest, the lawyer must take steps to withdraw from the representation. In addition, a lawyer with supervisory responsibilities in a law firm or other organization must comply with his or her obligations to supervise subordinate lawyers and ensure that they are complying with the relevant ethics rules, including the rules relating to conflicts of interest and competence.

Recycling and File Management




The reality of modern law practice requires disposal of a great deal of paper, some of which will contain information protected by Oregon RPC 1.6.



Benefits of Going Paperless

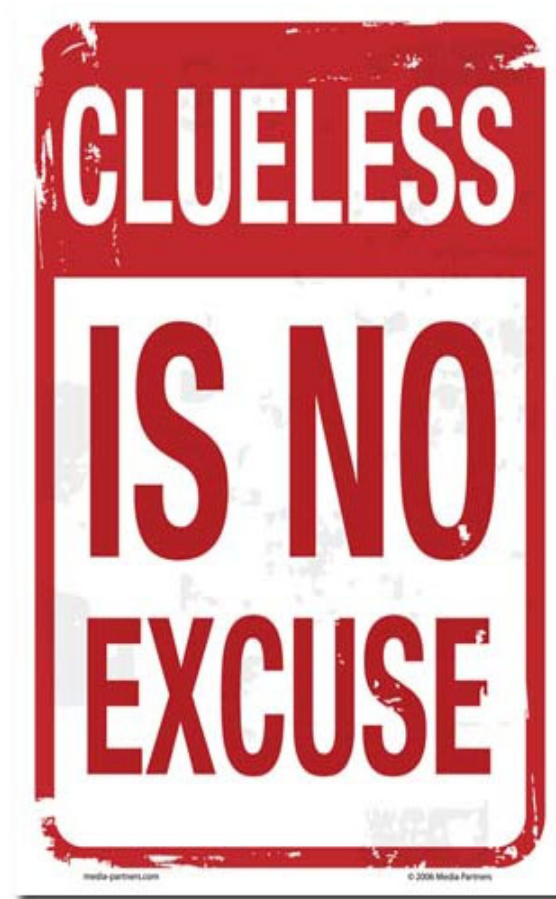
- » Reduced costs for storing/printing
- » Improved document management – from anywhere
- » Save time searching for documents/information
- » Control permission for access
- » Improved security
- » Higher level of client service
- » Easier compliance with courts, others' electronic filing requirements
- » Reduction in firm's environmental impact

- 
1. What constitutes a client file?
 2. How long do you have to keep the client file?
 3. Can you recycle client files?
 4. Can you keep an electronic only file instead?
 5. Can you put the file up in the cloud?

Yes, Competency Matters

- RPC 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- ABA Cmt [8]: Lawyer must “maintain” competence by keeping abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education.

- » What technology do you need?
- » Understand and mitigate risks of technology?
- » How do you obtain and maintain competence?



So...

What is the
client file?



Formal Opinion No. 2017-192

- » **Question presented:** What makes up the client file?
- » **Answer:** Almost everything.
- » RPC 1.16(d): upon termination, take steps to protect client interests (including surrendering papers and property to which client is entitled)
- » RPC 1.15-1(d): lawyer shall promptly deliver to the client any property the client is entitled to receive

Formal Opinion No. 2017-192

- » The secret: No RPC talks about what is or is not, or should or should not be in the client file.
 - Every email?
 - Every draft?
 - Every note?

- » Absent viable attorney lien, obligated to produce entire file to client.

- » Client file = the sum total of all documents, records, or information (either in paper or electronic form) that the lawyer maintained in the exercise of professional judgment for use in representing the client.



» This includes:

- Litigation materials, including pleadings, memos, discovery
- Correspondence
- Expert opinions, medical and business records, witness statements
- Electronic documents and records
- Emails, word documents
- Audio files, photographs
- Text messages
- Work product, lawyers' notes and internal memoranda

» You may retain a copy of the client file.



Formal Opinion 2017-192: The Exceptions

1. Documents to which the client is not entitled
2. Notes that may bear on the lawyer-client relationship rather than the merit's of the client's position
3. Internal firm communications
4. Electronic documents/metadata, or info which would otherwise be too burdensome and expensive to identify, locate, and produce in a readable or accessible format
5. Substantive reasons – court order, law, etc.

So...

Can we
recycle the
client file?





Holland & Knight

Formal Opinion No. 2005-141

- » **Question presented:** May Law Firm recycle client documents using a recycling service?

- » **Conclusion:** Yes.

- » 1. Oregon RPC 1.6(c): take reasonable efforts to ensure recycling company's conduct is compatible with the Law Firm's obligation to protect client information.

- » 2. Reasonable efforts include, **at least**, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately.

Expectation of Privacy?

- » Reasonable efforts does not include special measures if method afforded reasonable expectation of privacy.
- » Cmt [19]: Reasonableness of lawyer's expectation of confidentiality:
 - The sensitivity of the information
 - The extent to which the privacy of the communication is protected by law or by a confidentiality agreement.
- » Client may require special security measures
- » Client may consent to lesser means as well.
- » See RPC 5.3: supervision of nonlawyer assistance

Formal Opinion No. 2016-191

- » **Question Presented:** May Lawyer maintain electronic-only files and convert existing paper files to electronic form?
- » **Conclusion:** Yes, qualified.
- » With limited exceptions, there is no ethical prohibition against maintaining the “client file” solely in electronic or paperless form.
- » **Exceptions:** documents that are intrinsically significant or are valuable original paper documents, such as securities, negotiable instruments, deeds, and wills

Formal Opinion No. 2016-191

- » Lawyers who maintain electronic-only client files should take **reasonable steps** to ensure the security and availability of electronic file documents during appropriate time periods, including following the completion of the matter or termination of the representation.

- » Remember:
 - You may enter into agreements with a client re file retention.
 - Make sure the conversion to an electronic file does not violate retention agreement.
 - Does the conversion to client file present potential client hardship?
 - Convert original client documents with consent.

Document Retention & Destruction Policy

- » Elements: retention period, retention and destruction guidelines
- » Fee agreement: notify client that firm has right to maintain file, convert it, and store for reasonable time period
- » At file closing: establish destruction date and calendar date
 - Return original documents
 - Notify client of conversion to electronic format
- » Review the firm's electronic records for client related material
- » Final review of file before destruction

How Long to Keep the Client File?

- » In general: PLF recommends **10 years**
- » Some more than 10 years:
 - Case with minor, at least until age of majority, maybe longer
 - Criminal law, at least until 2 years after client released or exonerated
 - Family law –children minors, or support obligations continue
 - Corporate books/records
 - Adoption files
 - IP files
 - Estate plans
 - Contracts/agreements still being paid off at end of 10 years
 - Problem clients

Scanning Mechanics – See PLF Checklist

1. Scanned docs – but don't forget electronic documents
2. Use OCR Software and capability so searchable
3. Privileged documents need to be clearly marked
4. How are the electronic files backed-up
5. Consider password protection, as necessary
6. Consider storage/size/labor issues

Just a sampling of concerns with scanning

But...

What about
the cloud?



Formal Opinion No. 2011-188

- » **Question presented:** May Law Firm contract with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.

- » **Answer:** Yes, qualified.
 - » 1. The lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential.
 - » 2. Under certain circumstances, this may be satisfied through a third-party vendor's compliance with industry standards relating to confidentiality and security.

Formal Opinion No. 2011-188

- » Reasonable steps may require:
 - Ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials.
 - Requiring vendor to notify lawyer of any unauthorized third-party access to the materials.
 - Investigating how the vendor backs-up and stores its data and metadata to ensure compliance with the lawyer's duties.

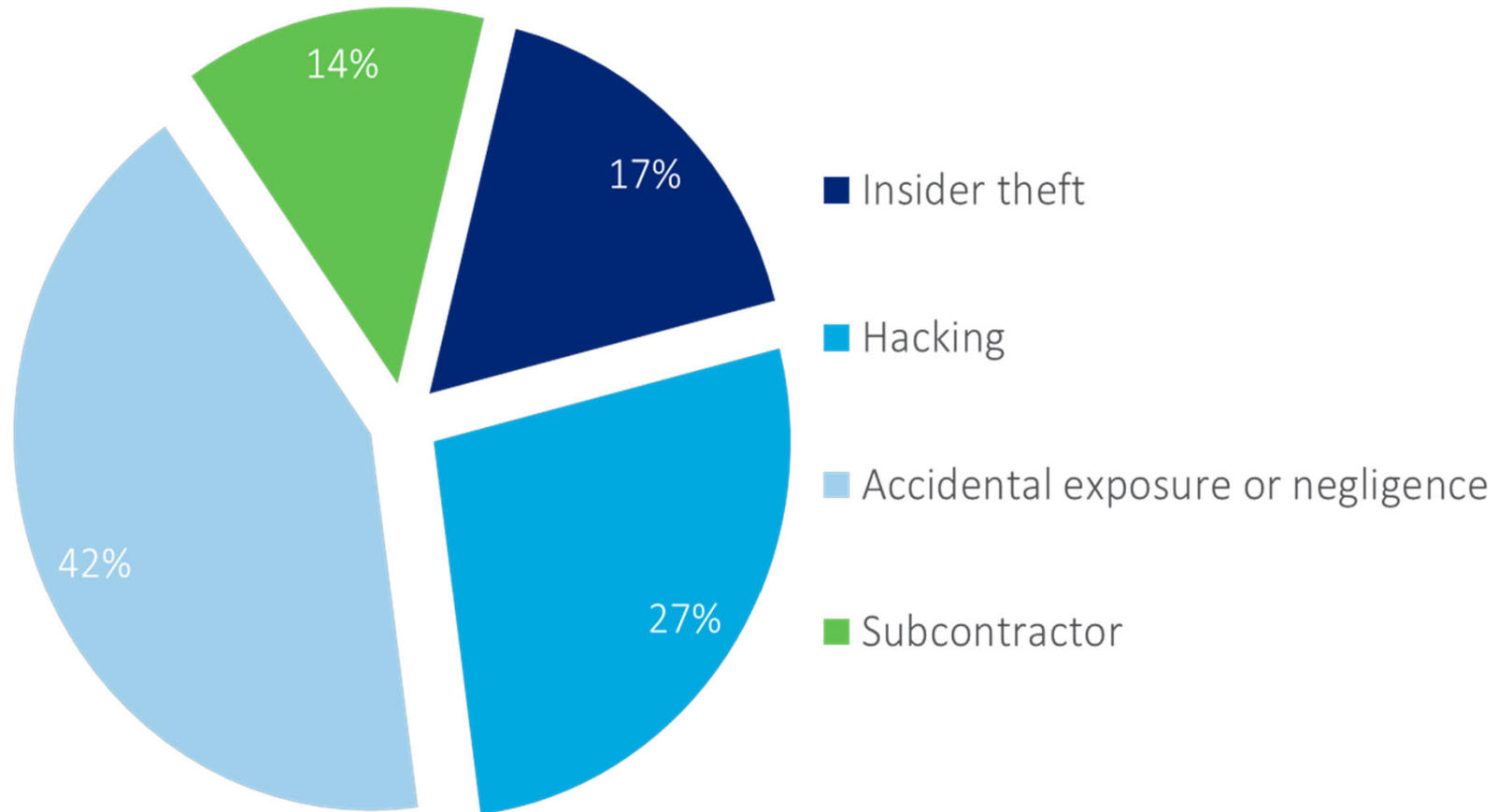
- » Technology changes = reasonableness may change as well, causing technology to become obsolete or less secure

- » Lawyers may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials

Cloud Computing Summary Considerations

- » Financial security
- » Limits on staff access
- » Protection from 3d parties
- » Reasonable amount of assurance
- » Comparable technology
- » Server locations

Quick Word re Data Security



You Play an Important Role

- » Systems assessment
- » Be part of a crisis/document response team
- » Participate in creation of policies and help conduct training – and Test!
- » Help evaluate third-party vendors
- » Compare cyber-insurance and compare to LPL



finally.

Recycling Electronic Devices

- » What to do about the data?
 - Can't just delete – remain there until written over.

- » Hard drive
 - Remove hard drive, label and store
 - Shred; get a certificate of deletion
 - Call an expert
 - Wiping programs / rewrite hard drive

DON'T FORGET ABOUT:



Holland & Knight



David Elkanich is a partner in Holland & Knight's Portland office, where he focuses his practice on litigation, with an emphasis on legal ethics and risk management. David advises both lawyers and law firms in a wide range of professional responsibility matters. He has extensive experience defending lawyers in attorney discipline matters, and in related litigation, such as sanction, withdrawal and disqualification motions, and fee disputes.

503-517-2928
David.Elkanich@hklaw.com
[@DavidElkanich](https://twitter.com/DavidElkanich)

David enjoys speaking and writing on ethics issues and is an adjunct professor at Lewis & Clark Law School, where he has taught ethics since 2012. You can read his (occasional) musings on Twitter [@DavidElkanich](https://twitter.com/DavidElkanich).