

Emerging Ethical Issues and Hot Topics

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Legal and technological developments have created increased **uncertainty** about lawyers' professional responsibilities and ethical duties.



While the landscape has changed, the Model Rules of Professional Conduct—with certain exceptions—have not.

The Starting Point - Model Rules of Professional Conduct

A. **Competence** – MRPC 1.1

“A lawyer shall provide competent representation to a client.”

B. **Diligence** – MRPC 1.3

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

C. **Confidentiality** – MRPC 1.6

Subject to exceptions, lawyers are prohibited from revealing “information relating to the representation of a client.”

D. **Supervision** – MRPC 5.1 AND 5.3

Partners and other managerial attorneys have a duty to reasonably supervise subordinates to avoid ethical violations.

ABA Formal Opinions

- Opinion 491 (April 29, 2020) – Obligations to Avoid Counseling or Assisting in Fraud in Non-Litigation Settings
- Opinion 498 (March 10, 2021) – Virtual Practice
- Opinion 512 (July 29, 2024) – Generative Artificial Intelligence Tools
- Opinion 513 (August 23, 2024) – Duty to Inquire Into and Assess the Facts and circumstances of Each Representation

Navigating Virtual Practice (Ethically)

A. Managing the Technology – Ensuring Confidentiality

- Practice pointer: Do not use the public hotspot at the library or the neighborhood coffee shop's Wi-Fi to conduct client business; use VPNs when using public networks.
- Do not send or receive work-related communications using personal (non-work) e-mail accounts, and do not save data on personal devices.



A. Managing the Technology (cont'd) – Ensuring Confidentiality

- **Practice pointer:** If your office network has the ability to remotely access client files via an encrypted network, be sure to use that system exclusively for accessing client's data.
- If using a third-party cloud storage vendor, be sure it offers proper security protocols to protect a client's confidential information. Pay special attention as well to the vendor's data breach notification policy so clients can be notified after the lawyer receives notice of a data breach.



A. Managing the Technology (cont'd)

- **Practice pointer:** When using Zoom or other videoconferencing services, use the platform's security settings (e.g., require a password for admission that is randomly generated; provide login credentials directly to the participants only; require the host to admit attendees, etc.)
- Take the call/meeting in a private setting to lessen the risk of others outside of the zone of privilege inadvertently overhearing conversations.



A. Managing the Technology (cont'd) – Ensuring Confidentiality

- Practice pointer: If you have access, exclusively use a secure document-sharing site to send documents to, and receive documents from, clients.
- If using outside vendors to share documents, understand the level of encryption used and security protocols for storing the documents as well as the vendor's obligations in the event of a data breach.



A. Managing the Technology (cont'd)

- Practice pointer: Turn off Alexa and other smart speaker devices in your remote work space environment.



B. Managing the People – Ensuring Adequate Supervision

- Practice pointer: Maintain open lines of communication and regular interaction with subordinates. Out-of-sight should not mean out-of-mind.
- Make sure subordinates are trained in proper data security and that your firm has a system in place to protect client information if devices are lost, stolen, or inaccessible.

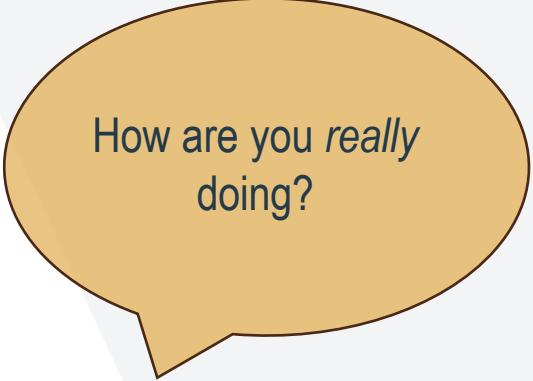


Managing the People: Best practices for effective supervisory oversight

- Schedule regular check-ins
- Have a virtual “open door” policy
- Emphasize and utilize mentoring relationships
- Where you see gaps, speak up

Managing the People: The Duty to Supervise Extends to Attorney Wellness

- Greater attention is being paid to the connection between attorney wellness, client service, and professional ethics—including the **impact of wellness on the duties of competence.**
- Cultural change is needed within most law firms. Action steps:
 - Identify stakeholders and their roles in bringing about cultural change;
 - Diminish stigma associated with seeking help for mental health disorders;
 - Emphasize that well-being is part of the duty of competence;
 - Expand educational outreach on mental health and substance use disorders, as well as issues related to well-being;
 - Change the tone to make health and well-being a top priority for everyone.



How are you *really* doing?

Vicarious Civil and Criminal Liability for the Acts of Others Is Beyond the Scope of the MRPC... BUT:

- You can be vicariously liable for another attorney's ethical violation if:
 - (1) you are a covered attorney (partner or management) who did not have reasonable measures in place, or make reasonable efforts appropriate to your role, to ensure the other attorney's compliance with the rules, and misconduct occurred;
 - (2) you order or, with knowledge of the conduct, ratify the other attorney's misconduct;or
 - (3) you are a covered attorney, you know of the misconduct at a time when consequences can be avoided or mitigated, and you fail to take reasonable remedial action.

Examples: Forgery of client affidavit
 Subordinate embezzlement

But what about UPL issues?

- Check for local opinions/rules regarding remote/virtual work while physically present in that jurisdiction
- Generally ok—so long as presence is temporary, are not “holding out” or advertising presence, and not representing clients located within the local jurisdiction
- But unique issues exist: Some jurisdictions (such as NY) place restrictions on their own licensed lawyers’ ability to practice from out of state (Judiciary Law Section 470); what about DE? (Formal Op. 2021-1 and Sup. Ct. R. 12(a))

Generative AI: Burying Your Head Is Not an Option

Lawyers have an ethical duty to keep abreast of changes in the law and its practice, including the benefits and risk associated with relevant technology.

Whether or not you plan to incorporate it into your practice, generative AI is rapidly being incorporated into practice-based technologies that you already use—or likely will use in the future.

Primary Generative AI Ethical Issues

- Competence/Diligence – Do you understand the output? Can you trust it?
- Confidentiality – Closed vs. open systems. What level of disclosure is needed in order to obtain the client’s “informed consent”? Is engagement letter boilerplate enough—see Formal Opinion 512. Are there certain confidences that should never be shared with Generative AI?
- Supervision – Do you know how your associates and staff are using Generative AI? Do you have appropriate policies and trainings?

State, Federal, and Judicial Regulation of Generative AI Use

- State Privacy Statutes – financial or tax-information privileges or privacy rights
- Federal Privacy Statutes (e.g., IRC Section 7216) – reckless disclosure of information furnished in connection with delivery of tax services/preparation
- Local Court Rules & Standing Orders

Standing Orders – Judicial Overreaction or Due Caution?

May 30, 2023 Standing Order from Judge Brantley Starr (U.S. District Court N.D. Tex):

All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.

Know-Your-Client Obligations

In recent years, there has been an increased legislative and regulatory push to require lawyers to abide by the same know-your-client (“KYC”) and anti-money laundering (“AML”) requirements that apply to other professional service providers.

- Proposed ENABLERS Act (2022)
- Anti-AML Regulations (Treasury Department)

The MRPC and KYC – A Slow Creep

- Formal Opinion 491 (April 2020): Addresses a lawyer's obligations Under Rule 1.2(d) to avoid counseling or assisting in a crime or fraud in non-litigation settings.
 - Attempts to clarify the intersection of Rules 1.2 and 1.16 where a lawyer either "knows" or strongly suspects that a client is engaged in either criminal or fraudulent activity in connection with the representation.
 - Constructive knowledge ("high probability") raises an ongoing duty to inquire further and, if necessary, withdraw.
- Amended Rule 1.16(a)(4) (2023): Rule and comments 1, 2, and 7 are amended.
 - Now imposes an affirmative duty on lawyers to investigate a client's bonafides both before and during the representation.
 - Adoption has been slow; DE has not yet adopted.
- Formal Opinion 513 (August 2024): Clarifies Amended Rule 1.16(a)'s application.
 - Before and during representation, lawyers must conduct a reasonable, risk-based inquiry to determine the risk of assisting the prospective client in a crime or fraud.
 - "Need not resolve all doubts," but must conduct a reasonable inquiry and conclude that representation is unlikely to involve assistance with or furtherance of crime or fraud.

What Does a Reasonable, Risk-Based Inquiry Look Like?

Opinion 513: Five factors a lawyer “might consider”:

- The identity of the client;
- The lawyer’s experience and familiarity with the client;
- The nature of the requested legal services;
- The relevant judications involved in the representation;
- The identities of those depositing funds into, or receiving funds from, the lawyer’s trust account, or any other accounts where client funds are held.



Thank you!