



ERICSA

The logo features the word "ERICSA" in a large, bold, white sans-serif font. Below it, the phrase "On the Road Again" is written in a white, cursive script font. The text is contained within a teal-colored sign with a white border and a slight 3D effect. The sign is supported by two teal posts. In the background, there are stylized white clouds with blue outlines against a light blue sky. Two orange triangular road signs are visible behind the main sign. The foreground shows a green grassy hill and a grey road with white dashed lines curving into the distance.

On the Road Again

**A
VIRTUAL
ROAD
TRIP**

MAY 24 - 26, 2021

I'm (virtually) a Lawyer

The more things change, the more the CODE remains the same



Thank you to our sponsor!

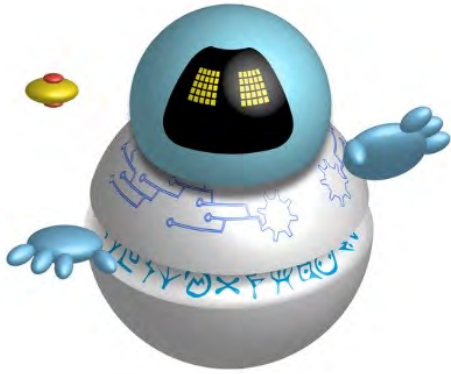
CONDUENT



The brick-and-mortar practice of law is (at least temporarily) a thing of the past. We meet clients over platforms such as Zoom, Teams or Skype. Attorneys may be working from their homes, which may be in states where they are not licensed to practice. We now exchange documents in electronic formats, saving paper but creating different storage, retrieval and confidentiality issues. Court hearings take place over the internet. The COVID outbreak has forced a notoriously tech-averse profession to dive into the modern world headfirst. But we are far from blindfolded, at least when it comes to our ethical responsibilities. Although the Rules of Professional Conduct have not been amended to account for this rapid change in the way attorneys do business, it still provides guidance to allow us to navigate in this brave new world while still fulfilling out ethical duties.



Your (Virtual) Guides



Kathleen Kitson

*Child Support Hearing Officer
Monmouth County NJ Family Division*



Kate Weaver

*Referee
Oakland County Friend of the Court*



Nicholas Palos

*Support Magistrate
Kings County Family Court*



Session objectives

- This **CLE/LEGAL ETHICS** Session will
 - ❖ Review the Rules of Professional Conduct which govern an attorney's obligations of:
 - ❖ Competence
 - ❖ Confidentiality
 - ❖ Diligence
 - ❖ Decorum
 - ❖ Supervision
 - ❖ Authorized Practice of Law
 - ❖ Discuss how the Rules of Professional Conduct should apply during the exigent circumstances presented during the current Covid pandemic
 - ❖ Provide an analytical framework for applying the Rules of Professional Conduct during a period where the profession is forced to improvise how to continue serving our clients in a manner consistent with out ethical obligations

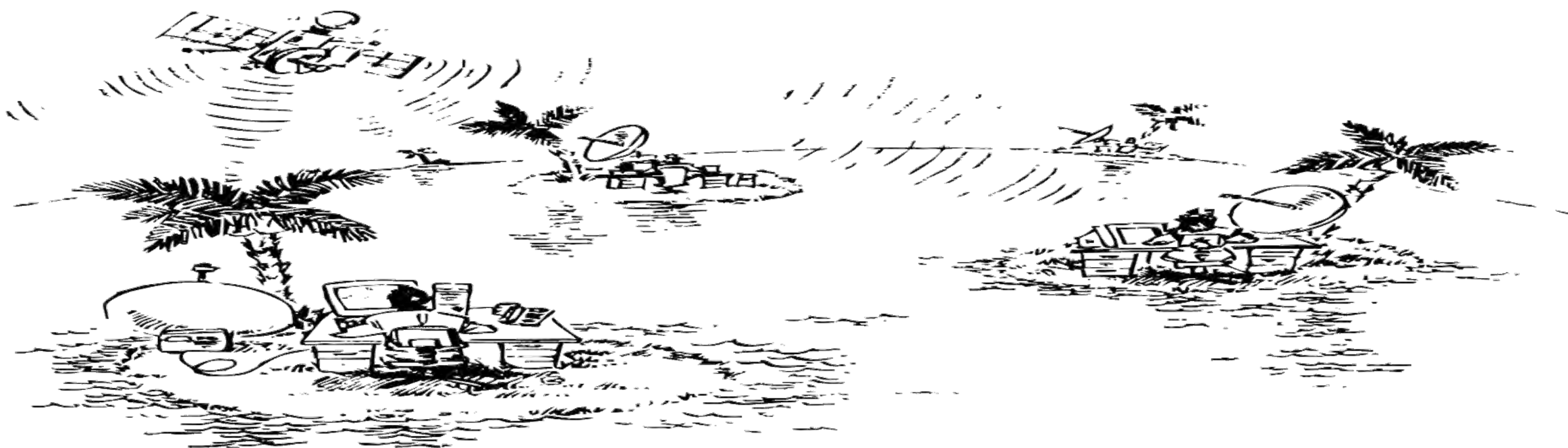


Session Methodology



- This workshop is divided into six segments. Each segment will look at a different obligation.
- Each segment will open with a short fact pattern, which will serve as the basis of the discussion.
- All ethics opinions referred to during the discussion can be accessed using the hyperlink in these materials.
- **This is meant to be an interactive session. Please join in and ask your questions. We only ask that everyone remain respectful**





A Virtual Office



For Your Consideration



A. T. Tornée works in a small office which was destroyed by an earthquake. There is no viable office space available. While waiting for the office to be reconstructed, she is forced to work from home. She has always kept her work life separate from her home life, so she has chosen to keep her home off the virtual grid. She now needs to establish a “home office” in order to continue serving her clients. She needs to get set up as quickly as possible.



What can possibly go wrong?



- Physical Office Rules
- Private Protected Space
- Technology issues
 - Data Security
 - Cloud storage
 - On site storage
 - Hard copy v electronic storage
 - Confidentiality
 - Communications
 - Information learned
 - How to Use Specific Technologies
- Professional Approach



Ethics Opinions Applicable to the Virtual Practice of Law



- Pandemic Specific Opinions
 - [ABA Formal Opinion 498 \(3/10/21\)](#)
 - [WI Formal Ethics Opinion EF-21-02 \(1/29/21\)](#)
 - [PBA Formal Opinion 2020-300 \(4/10/20\)](#)
 - [NYCLA Formal Opinion 754-2020 \(8/11/20\)](#)
- General Opinions
 - [WSBA Advisory Opinion 2016-1](#)
 - [PBA Formal Opinion 2010-200](#)
 - [OH Bd of Prof Conduct Opinion 2017-5](#)
 - [NC Formal Ethics Opinion 2005-10](#)
 - [CA Formal Opinion 2012-184](#)





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Virtual Competence

For Your Consideration



When establishing the home work environment

Home Office Necessities

- ☐ Space
- ☐ Telecommunications hardware
- ☐ Computer/Printer
- ☐ Internet Connections
- ☐ Connection to Office Network
- ☐ Teleconferencing Software

Potential Issues

- ☐ Intrusions by family members
- ☐ Use by family members
- ☐ Malware, hackers
- ☐ Not knowing the basics of the program (how to use it & how it handles its business)



MRPC 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.



MAY 24-26, 2021

MRPC 1.1 Comment 8



- 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.





“New Jersey lawyers who use technology in their practice are guided by Advisory Committee on Professional Ethics Opinion 701 (April 2006), This Opinion sets forth the standard of care that lawyers who use modern electronic technology to communicate with clients or to store or transmit client files and confidential information should exercise in order to act consistently with their ethical duties, “Gross negligence,” which would include gross negligence in the use of technology, is prohibited by Rule of Professional Conduct 1.1. The Committee does not recommend that the Rule be amended to single out technology, which is just one component of lawyers’ general duties.”

[Special Committee on Attorney Ethics and Admissions, Report May 12, 2015 p.22](#)



MAY 24-26, 2021

Duty of *Competence* and home office cybersecurity

- ❑ The technological tools used in the modern practice of law raise significant challenges to confidentiality.
- ❑ When rapidly setting up to work from a remote location (other than one's regular office) under the pressure of a pandemic or other disaster, one cannot lose sight of the potential threats to confidential information.

❖ Dedicated “work only” electronic devices

❖ Password protected device

❖ VPN

❖ Firewall

❖ Multifactor authentication

❖ Be aware of devices latent in the environment



MAY 24-26, 2021



Virtual Confidentiality



MAY 24-26, 2021

For Your Consideration

- Carol Counselor works for a small law office. Due to the pandemic, her office has directed her to begin working from home starting tomorrow. She is working on several high-profile matters which could result in major harm to her clients if information about the cases got out. Her home office currently consists of her living-room sofa, her personal laptop computer and an internet connection she establishes through her employer provided cell-phone (“personal hot spot”).



MRPC 1.6



- MRPC 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)

- MRPC 1.6(c)

A lawyer shall make *reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information* relating to the representation of a client.



MAY 24 - 26, 2021

MRPC 1.6



- NJ ACPE Opinion 701
 - Attorney is permitted to store and access client information in an electronic format
 - Must be make reasonable efforts to avoid disclosure of client information
 - Obligation to act affirmatively
 - Reasonable efforts under RPC 1.6 should be informed by technology available **at the time**
 - *Guard against reasonably foreseeable attempts to infiltrate data*



MRPC 1.6: Ethics Opinion



- [NJ ACPE Opinion 701](#)
 - Use of technology in the practice of law may enhance an attorney's ability to competently represent their client

The paramount consideration is the ability to represent the client competently, and given the advances of technology, a lawyer's ability to discharge those duties may very well be enhanced



A word from the wise



The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

Comment 18, MRPC 1.6





REMOTE MONITORING AND MANAGEMENT!

Virtual Supervision



For Your Consideration



- Larry Lawboss is in charge of a team of five attorneys and three support staff. Because of the current pandemic, the office has been temporarily closed and everyone is working remotely. Larry is worried, because he no longer is able to walk into his staff's workspace in order to be sure that they are following the office policies. He hears one of his attorneys has been accessing information from her private Facebook postings of an adverse party's witness, looking for information to assist their client when the person testifies.



MRPC 5.1



- MRPC 5.1(a)

A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make *reasonable efforts* to ensure that the firm has in effect measures giving *reasonable assurance that all lawyers in the firm conform* to the Rules of Professional Conduct

- MRPC 5.1(b)

A lawyer having direct supervisory authority over another lawyer shall make *reasonable efforts to ensure that the other lawyer conforms* to the Rules of Professional Conduct



MAY 24-26, 2021

MRPC 5.1



- MRPC 5.1(c)
- A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
 - (1) the lawyer **orders or**, with knowledge of the specific conduct, **ratifies the conduct** involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but **fails to take reasonable remedial action**.



MAY 24-26, 2021

MRPC 5.3



With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make **reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance** that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make **reasonable efforts to ensure that the person's conduct is compatible with the professional obligations** of the lawyer;



MAY 24-26, 2021

MRPC 5.3



(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.



MEMBERS ONLY

Unauthorized (Virtual) Practice of Law



MAY 24-26, 2021

For Your Consideration



Connie Commuter works for a mid-size law firm in New Jersey, serving New Jersey based clients. Every morning, she would leave her home in Delaware and travel to her office. Her office is now on a pandemic lockdown, and she is working from her home. By the way, she is not admitted to practice in Delaware.



MRPC 5.5



(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rule or other law, **establish an office or other systematic and continuous presence in this jurisdiction for the practice of law;**



Applicable Ethics Opinions



- ABA Formal Opinion 495
(12/16/20)

- Absent a determination to the contrary by a local jurisdiction, practicing the law of the state where one is licensed from a state where one is not licensed is not the unauthorized practice of law under MRPC 5.5.
 - May practice from home (or other remote location) whatever law(s) the licensing jurisdiction authorizes as if they were in their office in the licensing jurisdiction



MAY 24-26, 2021

Applicable Ethics Opinions



- [DC CUPL Opinion 24-20 \(3/23/20\)](#)
(made use of “incidental and temporary practice” exception)
- [Utah Ethics Opinion 19-03](#)
what interest does the Utah 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? And the answer is . . . none.
- [FL FAO 2019-4 \(proposed\) \(8/17/20\)](#)

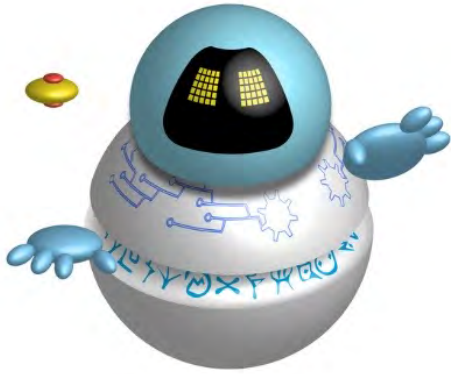
QUESTIONS?



Comments?



Contact Your (Virtual) Guides



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Please Remember to . . .

- Complete the evaluations
- Sign out
- Write your CLE codes in the spaces on the form



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