



DATE DOWNLOADED: Mon May 17 13:11:21 2021

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Citations:

Bluebook 21st ed.

Kayla Kemp, Ethical Considerations amid a Pandemic, 77 J. MO. B. 20 (2021).

ALWD 6th ed.

Kemp, K. ., Ethical considerations amid a pandemic, 77(1) J. Mo. B. 20 (2021).

APA 7th ed.

Kemp, K. (2021). Ethical considerations amid pandemic. Journal of the Missouri Bar, 77(1), 20-23.

Chicago 17th ed.

Kayla Kemp, "Ethical Considerations amid a Pandemic," Journal of the Missouri Bar 77, no. 1 (January-February 2021): 20-23

McGill Guide 9th ed.

Kayla Kemp, "Ethical Considerations amid a Pandemic" (2021) 77:1 J Mo B 20.

AGLC 4th ed.

Kayla Kemp, 'Ethical Considerations amid a Pandemic' (2021) 77(1) Journal of the Missouri Bar 20.

MLA 8th ed.

Kemp, Kayla. "Ethical Considerations amid a Pandemic." Journal of the Missouri Bar, vol. 77, no. 1, January-February 2021, p. 20-23. HeinOnline.

OSCOLA 4th ed.

Kayla Kemp, 'Ethical Considerations amid a Pandemic' (2021) 77 J Mo B 20

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ETHICAL CONSIDERATIONS AMID A PANDEMIC

KAYLA KEMP¹

THE COVID-19 PANDEMIC ALTERED NOT ONLY THE WORLD'S WORKFORCE, BUT ALSO THE PARTICULARS OF THE PRACTICE OF LAW. WHETHER A LAWYER IS ASKED TO SELF-QUARANTINE TO PREVENT FURTHER SPREAD OR IF THAT SAME LAWYER IS ADAPTING TO WORKING REMOTELY, THERE ARE ETHICAL CONSIDERATIONS WHEN ADAPTING TO AN EVER-INCREASING REMOTE WORK LIFE.

Thankfully, there are an abundance of resources and technological solutions which can be utilized to facilitate practicing during a pandemic. As lawyers, we must be mindful to ensure that as we adapt, we must continue to meet our ethical duties under the Missouri Rules of Professional Conduct ("Rules").

Planning for Incapacitation During a Pandemic

Lawyers should be prepared to adapt to a rapidly changing environment, whether that be a natural disaster, pandemic, or some other act of God. Not only do we need to be prepared for abrupt changes to the ways in which we meet with clients or appear before courts, but we also need to be prepared for incapacity, more so now than ever before. Like the general population, our profession's population is increasingly aging. According to the 2020 American Bar Association Profile of the Legal Profession, the median age of lawyers as of 2019 was 47.5 years old². Nearly one in six lawyers are 65 or older.³ This is notable because the Center for Disease Control (CDC) warns the risk for severe illness with COVID-19 increases with age. Those who are 50-64 years of age are four times more likely to be hospitalized than the comparison group, which consisted of those 18-29 years old. The risk of death was 30 times higher for those 50-64 years old compared to the comparison group.⁴ Those figures increase with each following age group. Nonetheless, every lawyer must consider the possibility of becoming incapacitated with little to no notice.

Lawyers should ensure that, in the event of incapacity, they

are comporting with ethical obligations. One way to ensure compliance is to have a succession plan in place. Rule 5.26 allows lawyers to take an important step in ensuring that representation is not disrupted by sudden incapacity. Now is a good time to consider designating a trustee pursuant to Rule 5.26, which allows a lawyer to choose someone who can take over the lawyer's legal practice upon an unexpected absence. By selecting a trustee, you can involve that same trustee in your succession plan. By actively preparing for the possibility of incapacity, a lawyer can better facilitate a smooth transition in the event the unexpected occurred. Aside from designating a trustee, a plan should be developed for any event which may keep you out of your physical office. This plan should encompass how your usual means of communication will continue to be monitored. Someone will need to go to your physical office to check mail, voicemails, or faxes. Also, be sure to include clear instructions regarding receiving and retaining client records and property. For additional resources in succession planning, visit The Missouri Bar's website, MoBar.org.⁵



Kayla Kemp

Mental Health Concerns

The physical threat COVID-19 presents is not the only health risk. On Feb. 19, 2020, the American Lawyer released the results of its year-long "Mental Health and Substance Abuse Survey," which found that 31.2% of the more than 3,800 respondents surveyed reported they were depressed. Additionally, 64% reported anxiety, 10.1% reported an alcohol problem, and 2.8% reported a drug problem.⁶ These findings predate the onset of the pandemic in the United States.

The CDC released findings noting that in June of 2020 the rates of depression and anxiety amongst adults in the United States were three to four times higher than the corresponding point in 2019.⁷ Approximately 40% of those surveyed reported struggling with mental health or substance abuse. According to the same study, rates of suicidal ideation, substance abuse, and alcohol consumption are steadily rising. Lawyers should familiarize themselves with the mental health and substance use resources available through The Missouri Bar⁸. Depression and anxiety can result in lawyers neglecting their responsibilities and, therefore, harming their clients. Just as lawyers ought to be proactive in planning for physical incapacitation, lawyers should also be proactive in caring for their mental well-being. A lawyer who is grappling with these serious health issues needs to make every effort to seek help, such as through the Missouri Lawyers' Assistance Program (MOLAP).⁹ Through MOLAP, all Missouri Bar members can

speak with a licensed clinical social worker by calling 800-688-7859. The program is free and confidential.

Competence Amidst Chaos

The first obligation set forth in the Rules is that of competence. Rule 4-1.1 – Competence – Comment [6] dictates “[t]o 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. . . .”

Keeping abreast of changes to the practice of law necessities brings an awareness of the risks associated with working remotely. Despite the challenges presented during the current pandemic, lawyers have the duty to remain competent. Comment [3] to Rule 4-1.1 provides guidance on a lawyer’s ethical obligation during such a situation as a global pandemic:

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client’s interest.

In the event of an emergency, a lawyer may give advice in a matter the lawyer does not possess the skill ordinarily needed to provide such advice. Of course, advising without the necessary skill is only acceptable where referral or consultation with another lawyer is impractical.

Lawyers must continue to educate themselves on technological innovations which can be utilized to virtually serve their clients. Also, lawyers need to stay current on any legal changes that allow them to continue to meet clients’ needs to enter into contracts, update wills, or create personal health care directives.

Remote Notarization

On April 6, 2020, Gov. Mike Parson issued Executive Order 20-08 suspending a statutory requirement that a notary public must conduct such notarization of official documents while the signer personally appears. Executive Order 20-08 was set to expire June 15, 2020; then, Executive Order 20-12 extended remote notarization to Aug. 28, 2020. Subsequently, Executive Order 20-14 and Executive Order 20-19 extended remote notarizations until March 31, 2021.

The practice of remote notarization provides a secure and safe method to execute legal documents. Notarization can occur while utilizing audio-video technology, provided certain conditions are met:

(1) If the signatory is not personally or otherwise known to the notary, the signatory must display a valid photo ID to the notary during the video conference;

(2) The signatory must affirmatively represent that they are physically situated in the State of Missouri, and the notary must be physically located in the State of Missouri and say in which county they are physically located for the jurisdiction on the notarial certificate;

(3) The video conference must be a live and interactive audio-visual communication between the signatory, notary, and any other necessary persons to allow for direct interaction at the time of signing;

(4) The notary must record in their journal the exact time and software used to perform the notarial act, along with all other required information; and

(5) The document must contain a notarial certificate, a jurat, or acknowledgement, which states that the signatory appeared remotely pursuant to Executive Order 20-14.

Electronic Notarization

While Missouri already permits electronic notarization, which is the use of electronic signatures and seals, Executive Order 20-14 allows for remote and electronic notarization to occur together when:

(1) The notary public is registered as an electronic notary public with the Missouri Secretary of State;



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(2) The document must be electronically signed with a software approved by the Missouri Secretary of State; and

(3) The notary must affix the electronic notary seal to the electronic document.

Lawyers should do their due diligence and check with the Missouri Secretary of State to confirm they are using a registered remote notary¹⁰ and the software used to electronically sign the document¹¹ is approved.

Cyber Security

While there are many benefits to utilizing technology to facilitate legal services, there are also risks. For example, Zoom – a platform used to facilitate virtual audio and visual meetings – has had security breaches. In July 2019, a vulnerability in Zoom’s Macintosh desktop client was found which let malicious websites turn on a Macintosh user’s webcam without that user’s knowledge.¹² Then, in January 2020, another vulnerability was discovered. Unauthorized users could enter Zoom meetings that were not password protected and did not have Zoom’s Waiting Room feature – which allows for manual admission into Zoom meetings – enabled. Security flaws such as these are not unique to Zoom. Consequently, when utilizing third-party platforms, lawyers ought to take precautions such as using updated software and taking reasonable security measures.

Rule 4-1.6(c) specifies “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information of the client.” Comment [15] details the factors to be considered in determining whether a lawyer acted completely by undertaking reasonable efforts to prevent inadvertent or unauthorized disclosure of information related to client representation. The ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 477R, “Securing Communication of Protected Client Information,” which provides guidance as to security measures that should be employed given the ever-increasing cybersecurity threats that exist when transmitting information over the internet:¹³

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications.¹⁴

While cyber security was a matter of grave concern in 2017, the threat of harm has only increased.¹⁵ In 2019, there were more than 5,000 data breaches reported.¹⁶ These breaches amounted to approximately 8 billion exposed records. Educating yourself on the various types of cyberattacks which can leave your client-confidential information vulnerable is the first step.¹⁷

Third-party Service Providers

For those lawyers whose devices are managed by a third party, include explicit terms in your contracts detailing which security practices are to be followed. These security features

can include audits that report security status and the health of your devices. The National Institute for Standards and Technology and the Institute for Standards Organization provide best practices for guidance on how to strengthen your network’s defenses. Lawyers should consider including clauses in their contracts which detail how third parties will secure remote access. Methods to help secure remote access to your network include VPNs, multi-factor authentication, and rotating strong passwords. After all, Comment [1] to Rule 4-5.3 – Responsibilities Regarding Nonlawyer Assistants requires lawyers with managerial authority make reasonable assurances that the nonlawyers in the firm and those who work outside the firm act in a way compatible with the ethical obligations of the lawyer.

As technology evolves, so does our obligation to act reasonably under the Rules of Professional Conduct. And as we adapt, we must consider what further efforts we can take to meet our ethical duties. The current global pandemic has shifted our way of life, both at work and at home. It is important for every lawyer to understand the resources available to help alleviate the burden they may feel. 🧠

Endnotes

1 Kayla Kemp is staff counsel at the Office of Chief Disciplinary Counsel. Special thanks to Melinda J. Bentley, legal ethics counsel, whose presentation, “Ethical Considerations for Missouri Lawyers Practicing During the COVID-19 Pandemic: A Conversation with the Chief Disciplinary Counsel & Ethics Counsel,” was invaluable.

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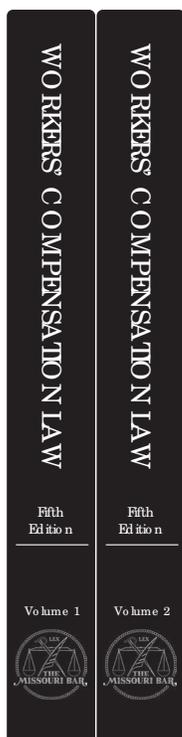
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