

Ethical Considerations of Remote Representation



MEMORANDUM

TO: File
 FROM: NCVLI
 RE: Ethical Considerations of Remote Representation
 DATE: May 4, 2016

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The need for skilled no-cost or low-cost legal services for crime victims throughout the country is tremendous. This need is great in rural areas where poverty rates above the national average outnumber urban counties in that category at nearly a five to one ratio, and communities face a critical shortage of attorneys.¹ Representation of victims by legal services organizations in many underserved areas—rural and urban alike—present myriad challenges, including those resulting from large geographic distances that often separate the attorneys and their victim-clients and the significant technological and financial hurdles that exist in many communities such as the existence of poor public transportation, spotty cellular coverage for telephone service, and lack of high-speed Internet connections.² But attorneys' use of technologies such as e-mail, video-conferencing, and cellular phones and other mobile devices to represent clients is now common and can help overcome geographical and technical hurdles thereby improving these victims' access to justice.

Representation of clients whose geographical or technological remoteness may make face-to-face attorney-client meetings impracticable and in-person attendance at court hearings and other proceedings difficult, presents unique ethical and logistical considerations. These include the need to: (1) assess the nature and scope of representation to determine if face-to-face meetings with clients and in-person attendance at court hearings or other proceedings is necessary to ensure competent representation; (2) budget for travel and technology usage; and (3) maintain confidentiality of attorney-client communications while using various technological-based means of communication.

These considerations are necessary because lawyers in every jurisdiction are bound by ethical rules governing matters such as competency, communication and confidentiality. *See,*

¹ *See* ABA Standing Comm. on Pro Bono and Pub. Serv. and the Ctr. for Pro Bono, American Bar Association, *Rural Pro Bono Delivery: A Guide to Pro Bono Legal Services in Rural Areas* at 11-12 (2003), available at http://www.americanbar.org/content/dam/aba/migrated/legalservices/probono/aba_rural_book.authcheckdam.pdf [hereinafter *Rural Pro Bono Delivery*].

² *Id.*

e.g., Colo. Rules of Prof'l Conduct R. 1.1 (Competence) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Colo. Rules of Prof'l Conduct R. 1.4(a)(2) (Communication) ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished[.]"); Colo. Rules of Prof'l Conduct R. 1.6(a) (Confidentiality of Information) ("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)."). These professional ethical obligations apply to lawyers as well certain nonlawyers with whom lawyers work. *See* Colo. Rules of Prof'l Conduct R. 5.3 (Responsibilities Regarding Nonlawyer Assistants); *see also* Colo. Rules of Prof'l Conduct R. 1.6(c) (Confidentiality of Information) ("A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client.").³

³ Subsection (c) was added to Rule 1.6 as part of recent amendments to the Colorado Rules of Professional Conduct by Court Order 2004, effective April 6, 2016, many of which address the intersection of attorney professionalism and use of technology. Court Order 2004 also amended the Comments section of Rule 1.6 entitled "Reasonable Measures to Preserve Confidentiality"—now numbered as Comments 18 and 19—which provide guidance on what measures will be sufficient to comply with subsection (c) in maintaining client confidentiality:

[18] Paragraph (c) requires a lawyer to make reasonable efforts to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. 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). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Comments [3] and [4] to Rule 5.3.

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

When deciding whether to represent a geographically or technologically remote victim-client, it is important for attorneys to first assess the nature and scope of the representation to determine if face-to-face meetings with the client and in-person attendance at hearings or other proceedings is necessary to ensure competent representation. An example of when in-person attendance at court hearings or other proceedings may be necessary is contested matters, whether those are criminal proceedings, restraining or other protective order proceedings, or family law matters. Even if an attorney concludes that competent representation will allow for remote participation in court hearings and other proceedings, the attorney will still need to confirm that the jurisdiction allows such participation by attorneys and is equipped with the necessary technology, such as video-conferencing equipment.⁴ The analysis of whether and how competent representation can be provided remotely should also include consideration of how the attorney will obtain necessary case documents in a timely fashion, particularly if the jurisdiction's court system does not provide online access to case records and filings.

If remote representation of victim-clients is undertaken the attorney must—by way of example and in addition to all the considerations required when representing any client, whether geographically or technologically remote or not—ensure that they have budgeted adequately for necessary travel and technology usage, and that their policies and procedures that maintain confidentiality of attorney-client communications account for distance and technology usage. Maintaining confidentiality of attorney-client communications that are facilitated by technology may require, among other things, the use of only password-protected (non-public) wireless networks and other systems of communication offering end-to-end encryption.⁵ Additionally, in

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Colo. Rules of Prof'l Conduct R. 1.6, cmts. 18-19. Other amendments to the Rules of Professional Conduct adopted as part of Court Order 2004 include those relating to the necessity of "Maintaining Competence" under Rule 1.1, which has been renumbered as Comment 8 and now expressly includes the mandate that attorneys maintain "requisite knowledge and skill" of "changes in the law and its practice, and *changes in communications and other relevant technologies . . .*" (Emphasis added).

⁴ At least one jurisdiction is using video-conferencing to expand rural citizens' access to legal services. See *Rural Pro Bono Delivery*, *supra* note 1, at 52-53 (describing the Montana Video Experiment, as part of which the Montana Legal Services Association has collaborated with state courts and other partners to expand use of video-conferencing to place an attorney in a remote location to represent a client in a courtroom). See also Richard Zorza, *Video Conferencing for Access to Justice: An Evaluation of the Montana Experiment* at 1, 23 (June 2007), available at <https://lsntap.org/sites/all/files/TIG%2003693%20MLSA%20Final%20Video%20Conferencing%20Evaluation%20Report.pdf> (reporting results from evaluations of the Montana Video Experiment, including that "the overall conclusion is that the use of video makes a contribution to access to justice. While appearance and participation by video, whether in court, in a meeting, or in any other context is *not* identical to in-person appearance, it appears that in most cases, and subject to caveats, the overall benefits outweigh the issues that emerge from the differences[.]" and concluding that "[i]t is the responsibility of all participants to minimize the downsides and indeed to avoid circumstances in which these downsides are too great").

⁵ See Colo. Bar Ass'n Ethics Committee, Formal Op. 90 (November 1992), available at https://www.cobar.org/repository/Ethics/FormalEthicsOpion/FormalEthicsOpinion_90_2011.pdf (discussing the need for attorneys to be "mindful of their duty under Rule 1.6 of the Colorado Rules of Professional Conduct and Canon 4 of the Code of Professional Responsibility to preserve client confidences when utilizing advanced

May 4, 2016
Page 3 of 6

furtherance of attorneys' obligation under Rule 1.4 to "reasonably consult with the client about the means by which the client's objectives are to be accomplished[,]" it is critical that attorneys communicate with clients about how remote representation will be accomplished so that the client may make an informed choice about matters including the use of technology to aid communication and any inherent risks associated with its use.⁶

Although jurisdictions and practitioners nationwide are grappling with the ethical implications of representing clients remotely—particularly when such representation will require attorneys to represent clients in court hearings and other proceedings—little consensus or definitive conclusions exist regarding clear best practices, beyond widespread acknowledgement of the importance of fully informed client choice. Consequently, each legal services organization should determine what scope of services it may provide remotely, while still meeting its obligations to its clients, and create policies and procedures protective of client confidences and respecting of the myriad obligations to which professionals are bound. In jurisdictions where the bar authority has not issued a formal opinion evaluating the propriety of certain policies and procedures relating to the use of technology—such as the use of cloud computing and end-to-end encryption—it may also be worthwhile to request a formal legal opinion addressing the relevant topics.

Annotated Resource List

The following resources, in addition to those cited above, may be helpful in analyzing the ethical considerations implicated by use of technologies when remotely representing clients.

Bar Opinions

ABA Comm'n on Prof'l Ethics & Prof'l Responsibility, Formal Op. 11.459 (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/YourABA/11_459.authcheckdam.pdf (analyzing ethical considerations when attorneys communicate substantively with clients via e-

communications technology" and noting the increased risk of interception of communications when technologies such as cellular phones are used); *see also* Stephanie Kimbro, *Ethical Implications of Cloud Computing in Law Practice*, in *Cloud Computing for Lawyers* 35, 36-44 (Nicole Black, ed., Am. Bar Ass'n 2012) (discussing the interplay of attorneys' use of technology, including cloud computing, and compliance with ethical rules and noting that end-to-end encryption of data is a higher security standard and that "[a]lthough many state bars have ethics opinions approving of the use of unencrypted e-mail in law practice management, current technology and security industry standards tell us that unencrypted e-mail may not be the most secure method of transferring digital data").

⁶ Consulting with clients about the policies and practices designed to protect client confidences and the means by which the clients' objectives are to be accomplished should be designed to provide a sufficient level of education to the clients so that they may make an informed decision about the pros and cons of the proposed use of technology as well as other practices. *See* Jared D. Correia & Thomas L. Rowe, *Remote Control: How to Access Your Office From Anywhere*, 30 No. 4 GPSolo 56, 61 (2013) (noting with respect to attorneys who offer clients remote access to their case files that "[i]t is incumbent on lawyers granting such online access to educate their clients about the safe and secure use of these systems, including practical instructions on the use of strong passwords and the ways to secure any devices by which clients access case information").

mail, text messaging, or other electronic means, including the need to warn clients about the risks involved).

State Bar of Cal. Standing Committee on Prof'l Responsibility & Conduct, Formal Op. 2010-179, *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3D&tabid=836> (describing analysis attorneys must make to ensure compliance with their duties of confidentiality and competence before using a particular technology in representing a client, such as “the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security”).

Fla. Bar, Op. 00-4 (2000), *available at* <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+00-4?opendocument> (approving of attorneys providing legal services over the Internet on matters not requiring in-person consultation or court appearances as long as attorneys comply with all rules of professional conduct).

Law Review, Bar Journal, and Other Articles

ABA Legal Tech. Resource Ctr., *Cloud Ethics Opinions Around the U.S.*, *available at* https://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (summarizing state bar association opinions on the propriety of attorney use of cloud computing).

Jon M. Garon, *Technology Requires Reboot of Professionalism and Ethics for Practitioners*, 16 No. 4 J. of Internet L. 3 (2012) (describing updates to the Model Rules of Professional Conduct (MRPC) made in light of technological advances and global legal practice developments, including “the codification in MRPC Rule 1.6(c) of the duty of lawyers to recognize the impact of technology on law and its practice”).

Kristin J. Hazelwood, *Technology and Client Communications, Preparing Law Students and New Lawyers to Make Choices That Comply with the Ethical Duties of Confidentiality, Competence, and Communication*, 83 Miss. L. J. 245 (2014) (describing ethics opinions analyzing the use of technology for client communications, discussing changes to the Model Rules since 2000 relating to the use of technology by attorneys, and arguing that attorney instruction regarding the use of electronic communications in law practice is important).

David G. Ries, *Cyber Security for Attorneys: Understanding the Ethical Obligations*, 2012 A.B.A. Sec. L. Prac. Mgmt., *available at* http://www.americanbar.org/publications/law_practice_today_home/law_practice_today_archive/march12/cyber-security-for-attorneys-understanding-the-ethical-obligations.html (analyzing the ways in which attorneys’ use of technology presents special ethical challenges in the areas of competence and confidentiality).

Katrin Miller Rothgery, *Ethical Considerations of Cloud Computing* 41 Colo. Law. 77 (April 2012) (analyzing ethical implications of using cloud computing under the Colorado Rules of Professional Conduct).

Jeffrey L. Weeden, *Practical Considerations of Cloud Computing* 41 Colo. Law. 81 (April 2012) (describing practical questions to consider in Colorado when legal organizations are deciding whether to use cloud computing).