

Ethical Considerations Practicing Remotely in a Pandemic

Judge Roy B. Ferguson
394th Judicial District Court

Craig Haston
Houston, Texas

Vaccinating Your Tech Tools for Practice in a Pandemic

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State Bar of Texas
Computer and Technology Section

Virtual Pitfalls

- Dealing with Clients
 - Protecting Confidentiality
 - Protecting Yourself
 - Proficiency with Technology
- Dealing with the Court
 - Enforcing “the Rule”
 - Candor and Clients
 - Minimizing Risks
 - Corrective Action

Confidentiality of Information

TRE 503 Attorney-Client Privilege

Belongs to the client, so can be **waived by the client**

TDRPC 1.05. Confidentiality

(b) [a] **lawyer shall not knowingly:**

- (1) **Reveal** confidential information of a client [without client consent], or
- (2) **Use** confidential information of a client to the disadvantage of the client unless the client consents after consultation.

Potential Confidentiality Pitfalls

Waiver of Attorney-Client Privilege

- Intentional:
 - Client has others in the room off-camera.
 - Client records Zoom meeting and shares with others or comments on social media.
 - Client forwards privileged emails to third party (friend, bf/gf/fiance, parent).
- Negligent:
 - Lawyer or client participates in public place.
- Warn client of loss of attorney-client privilege if others are present in the meeting.
 - Add to Waiting Room message.

And now, avoiding the
Digital Death Penalty...

Spoliation

Dealing with Clients - Spoliation

- “[T]he intentional or negligent withholding, hiding, altering, or destroying of evidence relevant to legal proceedings.”

Black’s Law Dictionary (8th Ed. 2004).

- TDRPC 3.04 (a) deals with concealing or destroying evidence, and states a lawyer shall not:
 - (a) unlawfully obstruct another party’s access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act.

Protect Your Client and Yourself!

Rule 1 and the only Rule –

Never advise a client to delete their social media data. Ever.

- *Allied Concrete Co. vs. Lester*, 736 S.E.2nd 699 (Va. 2013)

Lawyer and Client sanctioned for “cleaning up” clients FB account on advice of counsel

- *In re Murray*, VSB Docket 11-070-088405 & 11-07-088422,

<http://www.vsb.org/docs/Murray-092513.pdf> (July 9, 2013)

Lawyer personally sanctioned \$500,000 and suspended for 5 years.

Spoliation Practical Tips

- Ask opposing witnesses in virtual hearings whether they have deleted anything.
- Ask opposing witnesses what they were told by the other side about digital evidence.
- REMEMBER: when checking social media, do not “friend,” “subscribe,” or “follow” the other side OR have anyone else do it for you.
- Follow *Weekley-Shipman* framework if anything was deleted.

540 S.W.3d 562 (Tex. 2018); 295 S.W.3d 309 (Tex. 2009).

Spoliation Practical Tips

Is it ethical to advise clients to:

- Disable location services, tagging, or social media check-ins?
- Disconnect from Alexa, Google Home, iHome devices?
- Turn-off automatic cloud storage?
- Use self-destructing messaging apps? (Snap Chat, Telegram, Wickr)

Top Fear #1: Cyber-Cheating and “The Rule”

“There’s no way to know whether a witness is watching the live stream.”

Top Fear #1: Cyber-Cheating and “The Rule”

The Rule:

“At a party’s request [or on its own], the court must **order** witnesses excluded so that they cannot hear other witnesses’ testimony.”

Texas Rule of Evidence 614.

Their Witnesses and “The Rule”

- Ask the witness at the beginning of your line of questioning:
 - “Where are you right now?”
 - “Who else is in the home/office/location with you?”
 - “Are you aware that this proceeding is being live-streamed on the Internet?”
 - “Have you watched or heard any of this hearing?”
 - “Have you communicated with anyone else involved in this hearing, or who is watching the livestream?”
- **WATCH CAREFULLY!**

Detecting Virtual Violations

- Cutting eyes away from the screen.
- Shadows.
- Muting and unmuting.
- Ventriloquism.
- Witnesses in same building.
- If attorney knows witness is violating the Rule what is the attorney's duty?

Dealing with Dishonesty

If you believe your witness
or client is violating the Rule,
what is your duty?



Your Witnesses and “The Rule”

- Admonish your witnesses before the hearing.
 - Yes, the judge will also admonish the witness, but you should also do it.
 - They may be asked whether you did this – it’s not privileged.
 - Get client’s consent to disclose or refuse to call witnesses who violate The Rule.
- Carefully Layout the Room.
 - Turn off “virtual backgrounds.”
 - Position camera to show hands.
 - Move back from camera.
 - With spouses in the same room, keep them in view but separated while testifying.

TELLING THE TRUTH

TDRPC 3.03 and 4.01. Truthfulness in Statements

In the course of representing a client a lawyer shall not knowingly:

(a)(2) **fail to disclose a material fact** [...] when disclosure is necessary to avoid making the lawyer a party to a **criminal act** or knowingly assisting a **fraudulent act** perpetrated by a client.

(a)(5) **offer** or **use** evidence that the lawyer knows to be false

CAN YOU TATTLE?

TDRPC 1.05.

(c) A lawyer **may** reveal confidential information:

(4) When the lawyer believes it **necessary to comply with a court order**, a Disciplinary Rule of Professional Conduct, or other law.

(7) When the lawyer believes it necessary to prevent **the client** from committing “a criminal or fraudulent act.” (this means PERJURY)

(8) To rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services were used. (again – PERJURY)

MUST YOU TATTLE?

TRDPC 1.05

A lawyer **must** reveal confidential information:

(f) When required to do so by:

- 3.03(a)(2) and 4.01(b) [to avoid being a party to fraud or crime]
- 3.03(b) [to rectify false evidence previously given]

CORRECTING LIES

TDRPC 3.03

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to **persuade the client** to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take **reasonable remedial measures**, including disclosure of the true facts.

(c) The duties ... continue until remedial legal measures are no longer reasonably possible.

What if you suspect *your* witness broke the Rule?

- Ask for a breakout room and question your witness
 - Is an exception to the Rule
- Ask for Client permission to disclose
 - Always solves the problem.
- Must you disclose?
 - Rule 1.05(c)(4) to comply with court order (the Rule)
 - Rule 8.04 Dishonesty, fraud, deceit, misrepresentation
- May you disclose?
 - Rule 3.03 Candor to the Court

Top Fear #2

Cheating Witnesses

Witnesses and Wikipedia

- TRE 612: Writing Used to Refresh a Witness's Memory
 - An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

Google. Wikipedia. Mapquest. Google Earth. Texts and emails from friends?

If You Suspect a Witness is Cheating

- Ask court to question/interrogate the witness
- Ask to readjust the camera angle
- Ask to push witness back
- Ask for hands to be visible
- Ask for admonishment
- Move to strike their testimony

Top Fear #3

“I don’t know what I’m doing.”

Technological Proficiency

TDRPC Rule 1.01. Competent and Diligent Representation

Comment 8 added February 26, 2019:

Maintaining Competence

8. Because of the vital role of lawyers in the legal process, **each lawyer should strive to become and remain proficient and competent in the practice of law, *including the benefits and risks associated with relevant technology.***

Virtual Technological Proficiency - Hearings

- Always assume you are unmuted.
- Always assume camera is on.
- Don't talk until the Hearing is CLOSED!!!
- Practice with your clients and witnesses.
- Learn to Share Screen using Advanced Features.

Virtual Technological Proficiency - Meetings

- "Lock" meeting once all participants are in the meeting.
- ALWAYS RANDOMLY generate a new meeting code.
- Use a passcode for attendees.
- Enable "mute" when party enters meeting.
- DO NOT allow live streaming or recording of meeting by others.

THANK YOU FOR WATCHING!

- Join the Computer and Technology Section of the SBOT.
- Visit the Section Website.

- Enjoy the seminar!