
INTEGRITY
TRUTH
COMMITMENT

# 2020 and LAWYER ETHICS

BY JONATHAN FRIEDLER AND MARK DUBOIS

The past year brought significant changes to society—some short-term, some permanent. Unsurprisingly, there were important developments in the field of legal ethics, some driven by the pandemic and politics, some by shifts in tone and approach, which may be best understood as generational. While our analysis of the effects of 2020 on the field of ethics norms and rules is not exhaustive, and some of the changes we have identified may only be the first inkling of a process that will continue for years to come, we believe it safe to say that this year will be remembered long after we're allowed to take our masks off in public.

Image credit: DrAfter123/DigitalVision Vectors

## Pandemic to Politics: COVID-19 Changes Everything

Any discussion of 2020 has to start with the pandemic, which resulted in sweeping changes across industries globally, including the practice of law. COVID-19 turned out to be nastier, more transmissible, and much more disruptive than many of us ever dared to guess. The concept of an open and accessible court system, readily available for the enforcement of laws and the resolution of civil disputes was challenged at its core by the fact that public

meeting places and gatherings were now dangerous and often prohibited. Buildings, elevators, courtrooms, jury boxes, holding cells, and chambers were suddenly functionally obsolete to the point of being public dangers. The way that justice has been delivered for centuries had to change or be suspended for the duration of the threat, if not forever. Goodbye short calendar. Goodbye meeting with clients and litigants in hallways and conference rooms and hammering out agreements in civil and family cases. Goodbye small claims. Goodbye to the assembly line of Part B criminal dockets.

New ways of effectuating the administration of justice had to be invented, sometimes overnight. Fast forward a few short months, and remote teleconferences are the rule, not the exception. Platforms such as Zoom, Skype, FaceTime, Webex, and Google Meet became a normal tool of the trade. The technology, which was there but little used, has been embraced and integrated into our processes in an incredibly short period of time.

This rapid change in the way proceedings are conducted implicates Rule 1.1, the attorney's duty of competence, which includes the obligation to understand and master the technology used to facilitate the methods, means, and processes of justice delivery. Thus, although the inability to secure an out-of-state witness's testimony by virtual teleconference due to unfamiliarity with the technology may have been excusable in February 2020, the expectation would likely be quite different in the current atmosphere.

When law offices are closed or severely curtailed because of social distancing protocols, there are a myriad of ways in which our ethical obligations are impacted. Under Rule 1.3, lawyers are obligated to represent their clients "with reasonable diligence and promptness." Although an attorney's ability to prosecute a client's matter in timely fashion is doubtlessly impacted by the delays occasioned by the pandemic, a client's subjective understanding may not grasp this concept. We have already seen ethics complaints by clients who have cast the blame for such delays upon their counsel.

In the absence of in-person contact, how do we fulfill our ethical duty to communicate with our clients in a meaningful manner? Can we have the type of deep discussions and engage in the nuanced counselling necessary to properly advance a client's interests over Skype or Zoom? How do we ensure confidentiality when attorney-client communications are being conducted mostly in the ether?

In addition to these questions, the pandemic has broadened the ethical quagmire of unauthorized practice of law (UPL), a felony in some jurisdictions. If a lawyer lives in one state and "remotes" into her office in another, is she practicing law where she sits, where the "office" is, or in both? When my office is mostly virtual, and I am working where I live instead of where I am licensed, am I violating unauthorized practice of law statutes and rules? Do jurisdictional limits only apply to content? For instance, can I practice Connecticut law for Connecticut clients from another state, or do I need to have an office or a server in Connecticut or have a relationship with someone who does? Given the exposure to criminal liability, these concerns are more than hypothetical musings.

In December, the ABA issued Opinion 495,[1] which tried to address some of these concerns. Unfortunately, the opinion is very general and it leaves the determination of whether such conduct constitutes UPL up to the jurisdiction in which the conduct is occurring. The only constant among the many jurisdictions regulating the practice of law seems to be that there is no one rule that fits all and lawyers are advised to consult bar opinions and court and ethics rules in their own jurisdictions. Practitioners working remotely from jurisdictions in which they are not licensed should note that Opinion 495 advises that "having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules." Again, an attorney is cautioned to check the rules of their particular jurisdictions. Because reciprocal discipline is an ever-present threat, it behooves a lawyer to ensure their conduct is in conformity with both the jurisdiction in which they are physically located, and in which they are servicing clients.

It is often said that a 19th century lawyer dropped into a 21st century courtroom could figure things out pretty quickly because a lot of what we do now is done the same way as it was centuries ago. But it wasn't possible to establish a legal presence in a jurisdiction sufficient to trigger the applicability of authorized practice of law rules with a few mouse clicks until a few years ago. Now, it's done every day, as lawyers required to stay home in one state must continue to service their clients in another. Very few states have rules that reflect this new way of doing business. It is difficult to discern the boundaries of appropriate conduct when the consequences of straying across a state line on your computer may be grounds for bar discipline or criminal prosecution.

## The Presidential Election and Legal Ethics

The other half of the "pandemic and politics" discussion is the way the presidential election and its aftermath focused attention on lawyers' duties under Rules 3.1 and 3.3 as well as Federal Rule 11 to avoid filing or pursuing frivolous or unsupported claims. Because election-related litigation seeks injunctive relief and other immediate remedies to avoid mootness issues, many dozen lawsuits were filed in battleground states where the outcome might be determinative of the result of the election, kind of like an amplified *Bush v. Gore*. Many were filed by Biglaw firms that withdrew actions just as quickly as they filed them, possibly fearing serious sanctions if not criticism, bad publicity, shunning, and ridicule.

What, then, is a lawyer's duty of pre-suit investigation as to the merits and bona fides of a client's claim, especially when tight time limits and a lack of a clear smoking gun make the "upon

knowledge and belief" allegation an attractive alternative? Can a lawyer publish anything in a lawsuit based solely on a client's subjective belief that there must be something wrong somewhere?

While the sanctions issues in these cases haven't been sorted out as of the writing of this article, and because bar discipline cases often proceed in secret, at least until probable cause is found, it's hard to say whether the 2020 elections cases are going to redefine our understanding of the law in this regard. Nonetheless, as the lack of substance behind many of these claims is made apparent, even under existing rules some lawyers are going to have problems.

Restatement, Third, of the Law Governing Lawyers defines a claim or contention as being frivolous when it is one "that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal will accept it." While Connecticut law provides that "even a weak case may be strong enough to withstand the zephyr of an evidentiary nonsuit,[2] *O'Brien v. Superior Court*[3] and *Brunswick v. Statewide Grievance Committee*[4] teach us that the test for frivolity is an objective one and "though a claim need not be based on fully substantiated facts when filed, once it becomes apparent that the claim lacks merit, an attorney violates rule 3.1 by persisting with the claim, rather than withdrawing it."[5] Thus, Connecticut lawyers pursuing claims that the late Hugo Chavez and a cabal of deep state actors hacked voting computer systems and changed the results of the election are going to get into trouble every time they file.

## Advertising, Professionalism, and Non-Lawyer Service Providers Advertising

Though less dramatic and entertaining than the "pandemic and politics" tranche of ethics issues, there were important developments related to advertising, professionalism rules, and firm ownership and non-lawyer legal service providers last year.

Much of the advertising rule regime has been simplified and rewritten, with changes effective both in 2020 and 2021. Many of these changes resulted from amendments to the ABA model rules, which began a few years ago with a comprehensive re-write of the rules by the Association of Professional Responsibility Lawyers and other interested parties. Rule 7.4 was repealed and its regulation of field of practice claims rolled into Rule 7.4A. Rule 7.5 was repealed and its restrictions on law firm names and letter heads are now in the commentary to Rule 7.1. The rules are now somewhat inconsistent with the statutes governing lawyer advertising, but under the rule of *Persels v. Banking Commissioner*,[6] in any instance of variance, the rules will control.

These changes embraced the reality that 40-plus years after lawyer advertising became legal, much marketing is done on the Internet and through social media. The rules always struggle to stay abreast of technological changes. Though Connecticut retains a robust body of regulation concerning specialization, as found in Rules 7.4A-C, the basic and single rule of legal marketing remains in Rule 7.1's prohibition of false and misleading claims. Because one person's permissible commercial hyperbole may be another's misleading trade practice, we urge lawyers who advertise to stay familiar with the rules, comply with Practice Book 2-28A's requirement of filing all advertising and consider the availability of advisory opinions from the Grievance Committee found in Practice Book 2-28B.[7]

## Discriminatory and Harassing Speech or Conduct

On February 8, 2021, the Rules Committee voted to approve an amendment to Rule 8.4 based upon ABA Model Rule 8.4(g) governing conduct that a lawyer "knows or reasonably should know is harassment or discrimination on the basis of race, color, ancestry, sex, pregnancy, religion, national origin, ethnicity, disability, status as a veteran, age, sexual orientation, gender identity, gender expression or marital status in conduct related to the practice of law."[8] The version of the rule that was approved by the Rules Committee contains a number of changes from the ABA Model Rule. These changes were made to ensure the rule's consistency with the substantive law of antidiscrimination and antiharassment, and to address concerns of constitutionality, overbreadth, and overreach. Though more than half of the states have prohibitions on such conduct within their rules, the proposal is not without controversy.

Very recently a federal court in Pennsylvania enjoined enforcement of a version of the rule there based upon concerns under the First Amendment, particularly that the Pennsylvania rule could be read to reach speech alone.[9] Answering these concerns, the Connecticut version is directed at conduct, has commentary requiring the conduct to be "directed at an individual or individuals" and that the conduct be "harmful" or "severe or pervasive" before it can be actionable. Additionally, the Connecticut proposed rule includes commentary that clarifies that the rule does not reach constitutionally-protected conduct.

The proposed rule has broad support in the CBA with eleven sections and committees sponsoring or approving the proposed rule before its approval by a substantial majority of the CBA House of Delegates in September of 2020. A survey conducted by the CBA in September of 2020, which included over 500 attorney participants, revealed that approximately 50 percent of respondents "reported that they had experienced discrimination, harassment, or sexual harassment based on membership in a protected class in conduct related to the practice of law."[10] Over 40 percent of respondents identified that they had witnessed such conduct in professional contexts. Yet some of the comments submitted to the Superior Court's Rules Committee by lawyers reflect that the tensions between claims of free speech and so-called "cancel culture," which are hotly discussed in other public fora, exist in this debate. We'll have to wait to see how the judges vote in June.

## Non-Lawyers and Access to Justice

Finally, and perhaps most significantly, this year saw the CBA study a proposal to expand access to justice by changing rules related to who can deliver legal services. In 2020, the supreme courts of Arizona[11] and Utah[12] adopted rules that eliminated Rule 5.4's prohibition on non-lawyers having a financial interest in a law firm, allowed the licensing of legal paraprofessionals who can give legal advice and appear and speak in court and at administrative hearings on behalf of clients on a limited basis and adopted rules and a regulatory framework permitting "Alternative Business Structures," enabling legal fee-sharing with non-lawyers and non-lawyer ownership of legal services providers.

In late March, just as the pandemic closed courts and cancelled public meetings, the CBA, which had been examining these issues in its State of the Legal Profession Task Force, aired a symposium where Justice Constandinos Himonas of the Utah Supreme Court, American Bar Foundation Faculty Fellow Rebecca Sandefur, and Zachariah DeMeola, University of Denver's Institute for the Advancement of the American Legal System manager, discussed how adopting such rules could expand the availability of legal help to many who can afford neither the time nor the money needed to advance their legal rights in courts and other dispute resolution forums.

Professor Sandefur, a sociologist, not a lawyer, who is deeply involved in the ABA Foundation's "Roles Beyond Lawyers Study" has championed separating the legal advice and the legal representation components of attorney-client services, allowing non-lawyers to give advice beyond general information on legal rights, remedies, and processes. Her thesis is that many non-lawyers need but cannot obtain information in important areas such as consumer debt, landlord-tenant issues, family law, including the care and custody of minor children and dependent adults, neighborhood safety, and environmental conditions, and that this could be provided by non-lawyers using technology and new means and models of service delivery.[13] The Arizona and Utah regimes allow experimental and new service delivery regimes that enable this vision. California and New York are reportedly taking serious looks at some of these changes too. To the extent that the bar embraces, or at least doesn't resist, these ideas, the practice of law may well be quite different in coming years, especially when judicial administrators make permanent what are now emergency measures that move much of what happened in courthouses to virtual forums.

## The Years Ahead

The effects of the COVID-19 pandemic on the practice of law and the operation of courts and systems of civil and criminal justice are going to be far-reaching and permanent. The two big-

gest cost centers in court administration are people and facilities. There is no escaping the fact that virtual, computer-based, calendar calls, status conferences, pretrial meetings, legal arguments, mediations and court-side events, including trials, can be efficiently and cheaply provided outside of the courthouse environment using easily accessible and available technology.

This may well mean that many more lay persons can effectively participate in legal processes. It will also mean that lawyers will have to develop new ways of offering and providing their services to consumers. Rule regimes, including ethics, often lag behind operational realities. It's quite probable that in years to come we'll see legal ethics shift from a set of strict performance standards to general propositions and considerations divorced from specific requirements or details. Lawyers may cede some of their turf to others who can do some of what was traditionally thought of as lawyer work cheaply and more efficiently and will focus on areas where they can add value to the transaction worthy of their fees.

Legal ethics regimes, much like the common law, evolve over time and in reaction to social and political developments. But this doesn't happen in a smooth, linear manner. Rather, they grow in fits and starts, often playing catch-up to commercial trends. When we look back at 2020 a decade from now, it may well be that it marks a milestone in this progress. ■

***Jonathan Friedler*** *and* ***Mark Dubois*** *practice legal ethics and discipline law at Geraghty and Bonnano LLC in New London.*

## NOTES

1. www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf.
2. *Hinchliffe v. American Motors Corporation*, 184 Conn. 607, 622 (1981)
3. 105 Conn. App. 774 (2008).
4. 103 Conn. App. 601, *cert. denied*, 284 Conn. 929 (2007).
5. *O'Brien v. Superior Court*, 105 Conn. App. 774, 786–87 (2008).
6. *Persels & Assocs., LLC v. Banking Com'r*, 318 Conn. 652, 122 A.3d 592 (2015).
7. Prior opinions are available on the judicial website at https://www.jud.ct.gov/SGC_old/Adv_opinions/default.htm.
8. www.ctbar.org/docs/default-source/lprc/september-2-2020/lprc-request-proposed-amended-ct-rpc-8-4(7)-8-21-20.pdf?sfvrsn=723148bf_2
9. *Greenberg v. Haggerty, et al.*, Civil Action No. 20-3822 (Dec. 2020).
10. Proposed Amended Rules of Professional Conduct 8.4(7) Report for the Connecticut Bar Association House of Delegates Meeting, Amended as of December 4, 2020.
11. www.azcourts.gov/Portals/201/Press%20Releases/2020Releases/082720RulesAgenda.pdf
12. www.utcourts.gov/utc/news/2020/08/13/to-tackle-the-unmet-legal-needs-crisis-utah-supreme-court-unanimously-endorses-a-pilot-program-to-assess-changes-to-the-governance-of-the-practice-of-law/
13. www.americanbarfoundation.org/research/project/106