



## **Ethical Concerns and Considerations During a Pandemic**

**May 1, 2020**

**12:00 - 12:30 p.m.**

**LIVE WEBCAST**

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## **Ethical Concerns and Considerations During a Pandemic**

May 1, 2020

### **Faculty Biographies**

**CHRISTINE DAVIS** is Ethics Counsel for the State Bar of Arizona, where she advises lawyers via the Ethics Hotline, chairs ethics-related CLEs, is legal advisor to the Fee Arbitration Program, serves on the Bar's Ethics Advisory Group, and supports the Arizona Supreme Court's Attorney Ethics Advisory Committee. Previously, she worked for the Maricopa County Attorney's Office, prosecuting family violence and sex crimes cases, and was Adjunct Faculty in the Administration of Justice program at Phoenix College. Christine received her BA from Linfield College, in McMinnville, OR and her JD from Sandra Day O'Connor College of Law. She is a member of the Association of Professional Responsibility Lawyers and the American Bar Association Center for Professional Responsibility.

# Ethical Concerns and Considerations During a Pandemic

Faculty: Christine Davis

Friday, May 1, 2020

12:00-12:30 p.m.

## **MATERIALS AND RESOURCES:**

American Bar Association Formal Opinion 477R: Securing communication of protected client information

<https://www.americanbar.org/news/abanews/publications/youraba/2017/june-2017/aba-formal-opinion-477r--securing-communication-of-protected-cli/>

American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 92-369

<http://files.lsba.org/documents/Mentoring/ABAFormalOpinion92369.pdf>

Bloomberg Law, INSIGHT: To Zoom or Not to Zoom – Privacy and Cybersecurity Challenges

<https://news.bloomberglaw.com/tech-and-telecom-law/insight-to-zoom-or-not-to-zoom-privacy-and-cybersecurity-challenges>

Pennsylvania Bar Association, Committee on Legal Ethics and Professional Responsibility, Formal Opinion 2020-300

<https://aboutblaw.com/Qbw>

Professional Responsibility Law Blog – Of Unicorns and Men

<https://professionalresponsibility.fkks.com/post/102g42g/of-unicorns-and-men>

State Bar of Arizona Ethics Opinion 04-05: Deceased and Disabled Lawyers; Client Property; Trust Accounts

<https://www2.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=514>

State Bar of Arizona, Ethical Guidance for Lawyers, COVID-19

<https://www.azbar.org/for-lawyers/ethics/ethical-guidance-for-lawyers-during-the-coronavirus-pandemic>

State Bar of Arizona, What's new at Practice 2.0

<https://www.azbar.org/for-lawyers/practice-tools-management/practice-2-0/what-s-new-at-practice-2-0>

U.S. General Services Administration, NIST Cybersecurity Framework (CSF)

<https://www.gsa.gov/technology/technology-products-services/it-security/nist-cybersecurity-framework-csf>

Zoom Training for Lawyers – and Using It Securely

<https://senseient.com/wp-content/uploads/Zoom-Training-for-Lawyers-and-Using-it-Securely-1.pdf>

# Ethical Concerns and Considerations During a Pandemic

May 1, 2020



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## Practicing Law in 2020

Practicing law in 2020



STATE BAR  
OF ARIZONA

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“We’re all in-house counsel  
now...”



STATE BAR  
OF ARIZONA

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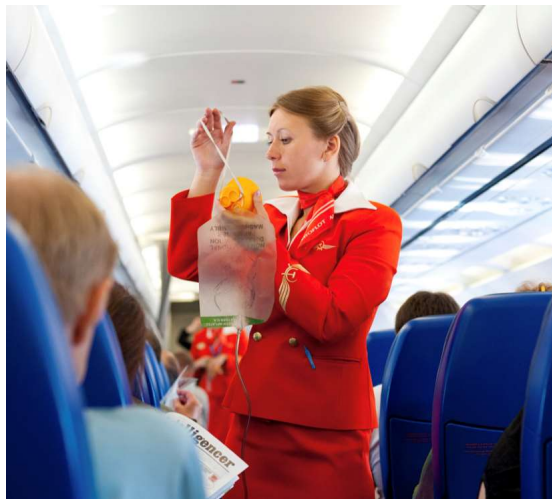
## ERs and Remote Practice

- Competence
- Diligence
- Communication
- Conflicts
- Confidentiality
- Supervision
- Civility



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## Your Oxygen Mask First



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## Self-Care

When you've only slept for 2 hours and you think coffee will help.



## Self-Care



lawyerlogic

...

Opposing Counsel [ends email]: "I hope you're staying safe and healthy."

Me:





## Daily Wellness Checklist

- 15 minutes each:
- Physical Activity
- Household Chore
- Hobby
- Conversation



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## ER 1.16

- Requires withdrawal if physical/mental condition materially impairs the representation
- But must protect client's interests upon withdrawal.



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## Contingency Planning

me checking my temperature



## Succession Plan

- Rule 41(i) requires a lawyer to “protect the interests of current and former clients by planning for the lawyer’s termination of or inability to continue a law practice, either temporarily or permanently.”
- Practice 2.0 will help!
- 602.340.7332

## Communication

- ER 1.4 duty to keep clients reasonably informed and to respond promptly to clients.
- Proactively contact clients/set expectations
- Discuss altered case plans/scheduling.
- Explain your contingency plan and determine client's.
- Update outward-facing communications.
- Missing clients: EOs 01-08, 91-01, 97-03



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## Confidentiality and Competence

- ER 1.6 is far broader than ACP
- Risk management approach, especially re home technology/network
- Data security policies and procedures
- Supervision of staff/remote work plan
- Informed consent - EOs 07-02, 09-02, 15-02



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## Cybersecurity

### Increased Vulnerability = Increased Threat

- Surge in hackers/phishing attacks
- Malware
- Data theft
- Financial schemes
- Time to check coverage?



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## Pennsylvania Ethics Opinion

- Encryption
- Avoid free wi-fi
- Firewalls, anti-virus, anti-malware software
- VPN
- Multifactor authentication
- Strong passwords
- Backup remote data
- Secure videoconferencing



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## Confidentiality/Zoom

**Me: This show is boring.**

**Boss: Again, this is a Zoom conference.**



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## Diligence and Competence

- Stay informed
- Emergency orders
- Substantive law issues
- Revise systems as needed
- Assign, train, supervise, have backups
- Maximize use of technology



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## Conflicts

- Confirm your conflicts checking system works remotely. Direct staff.
- Resist the temptation to give legal advice on the fly, without checking conflicts.



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## Supervision



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## Supervision

- ERs 5.1 and 5.3
- Partners must ensure adequate supervision of client work and ethical compliance by firm lawyers.
- Lawyers supervising nonlawyer staff must ensure staff understands and abides by the lawyer's ethical duties, especially regarding client confidentiality.



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## Inadequate Supervision Risks

when the case doesn't settle  
at mediation



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## Inadequate Supervision Risks

- Missteps in client intake
- Conflicts
- Mismanagement of workload
- Errors in judgment
- Poor advice
- UPL
- Improper solicitation



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## Civility



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## Civility

- Oath and Creed
- ER 8.4d
- ER 1.2
- ERs matter most in a crisis; Avoid harsh practices that increase risk and stress.



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## Civility Tool: Fee Agreement

You further agree to be truthful and cooperative, promptly respond to inquiries and communications, and provide us with necessary information and documents. And you acknowledge an understanding that we retain control over certain decisions that affect our ability to deal professionally with opposing counsel and parties, such as deadline extensions, cooperation in scheduling, and the tone of correspondence and pleadings.



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## Unicorn Emergency



## Lawyers are allowed to be kind.

Be kind to one another in this most stressful of times. Remember to maintain your perspective about legal disputes, given the larger life challenges now besetting our communities and world. Good luck to one and all.

-U.S. District Judge Amy Totenberg  
Northern District of Georgia

## Malpractice Carrier Tips

- Cyber-resilience
- Check/recheck deadlines
- Communicate w/firm staff and attorneys
- Communicate w/clients
- Document client communications in writing
- Manage expectations in writing
- Use resources from Carrier and Bar Orgs



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## Resources

The State Bar's website, [www.azbar.org](http://www.azbar.org), has Arizona ethics opinions dating back to 1985 as well as the Arizona Rules of Professional Conduct (Rule 42, Ariz. R. Sup. Ct.) annotated by relevant opinions.

**Ethics Hotline:**  
**(602) 340-7284**



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## Resources

- Practice 2.0: 602.340.7332
- Trust Account Hotline: 602.340.7305
- Member Assistance Program: 602.340.7334
- Sections: 602.340.7332
- Mentor Program: 602.340.7290

