

***Defending in an Era of COVID 19: A Conversation on
Ethics with Professor John Strait.***

[Note: This call occurred in early May, when there was a statewide stay-at-home-order in effect]

Since we began been living and working in a pandemic things have changed dramatically in so many ways. The defender community is used to hard work and challenging circumstances, but the COVID 19 pandemic has brought a layer of new challenges to the job. The Constitution isn't quarantined, and the RPCs don't take any breaks in these tough times. Our clients are still entitled to ethical and effective assistance of counsel. Defenders are facing new and pressing issues as a result of COVID 19. After getting no small number of questions on "how to ..." in these times, I picked up my phone and had a chat with our local ethics guru, Professor John Strait of Seattle University School of Law. His phone has been ringing lately too. He lamented that the bar has not issued any considerations to modify the ethics rules applications for this pandemic.

Q. Attorney client communication is definitely impacted by the coronavirus pandemic. What are attorneys' ethical duties to communicate with their clients during this time? Can attorneys just wait it out until things get rolling again? Do attorneys have a duty to meet with clients in person when stay-at-home orders are in effect?

Professor Strait: Attorneys have an ongoing duty to communicate with their clients in the present circumstances. Pursuant to RPC 1.4, attorneys have an ethical duty to communicate with their clients adequately about the facts and the law and to provide the client the necessary information so the client can decide under RPC 1.2 what to do with their case. RPC 1.2 delegates important decisions to the client: whether to plead guilty or go to trial, whether to accept or reject a plea offer, and whether to make an offer to other side. While attorneys have authority to decide how to best accomplish the client's goals, they must do so only after consulting with the client. There is no ethical relief from this obligation during a pandemic. Attorneys don't have to communicate directly face to face, but they must find a way to communicate with their clients.

Q. How do attorneys balance their own health and safety concerns with their duties to their clients? I have heard from lawyers who are not able or willing to go into jails right now to meet with in custody clients because of the health threat jails pose.

Professor Strait: This is a common question which I am quite sympathetic to, speaking as a high risk person. There is nothing from the bar specifically on this. The applicable RPCs are still in place: RPC 1.1 – an attorney is not supposed to take a case if the attorney is not competent to handle it; RPC 1.3 requires diligence, RPC 1.4 requires adequate communication; and RPC 1.7(a)(2) provides that an attorney may be in conflict with their client if the attorney's self-

interest may materially affect the representation. If an attorney can accomplish what's required by zoom, phone, etc., then that's going to be OK for now, but if the attorney can't try a case, if the attorney can't go into the jail to meet with a client, if the attorney can't continue to represent the client because of the attorney's own physical health issues, the attorney should decline the representation or withdraw under RPC 1.16(a) which is mandatory.

Q. What if the attorney can appear in court but is not comfortable going to the jail due to the attorney's own health risks or that of a member of their household? Can another attorney or staff member of his office meet with the in custody client instead?

Professor Strait: Another lawyer in the office, an investigator or other staff member in the same office, those folks can go meet with the client, that's fine. If the attorney hires an outsider, such as an independent contractor or if the attorney asks a person who is not part of their office to meet with the client, the attorney must make it clear that the outside person is bound by the same RPCs as the attorney. The outside person cannot discuss the case or any information that person learns with anyone without the attorney's specific clear permission. See RPCs 5.1, 5.2 and 5.3. The attorney has an obligation to communicate the obligation to them and the attorney should document that conversation as best as possible. In these pandemic times, that might be an email and a confirmation where the outside person receives and acknowledges their obligations. It should include language that tells them something like this: "You are an employee for purposes of communication and are bound by the RPCs to report only to me. You can't disclose information to anyone, unless I authorize the disclosure." This is especially true for a non-lawyer or someone not used to working in the legal system. If it weren't for COVID, I would recommend something more detailed and signed, but in an era of COVID, an email that is acknowledged may be the best an attorney can do.

Q. How can attorneys ethically communicate with their clients if the logistics or circumstances during the pandemic don't provide for confidential conversations?

Professor Strait: Attorneys have an obligation under RPC 1.6 to protect the confidentiality of their clients' information. There is no ethical relief from this obligation in a pandemic. While the WSBA may be unlikely to punish an attorney for this if this is the only means for communication, attorneys should take it to court and force the issue. This might sound like it's not a very helpful answer, but it's the best alternative if you can't get confidential communication established.

Q. There is some good case law on the importance of confidential communication, including the recent federal case of *Wilbur v. Mt. Vernon*. I have suggested defenders bring the problem to the courts attention and make the court solve it. If jails won't facilitate alternative methods of confidential communication, how about asking the court to use the court room for an attorney client meeting? It might look like a request to schedule a hearing but really there is no hearing, the jail transports the client to court, and the attorney uses the time and space to have a confidential attorney client meeting. What do you think of that idea?

Professor Strait: Sure, whatever works. Just don't make factual misstatements to the court to set up the hearing.

Q: We have heard that some courts have not been following public health recommendations. Can attorneys refuse to appear in court if the public health recommendations (masks, social distancing) are not required to be followed in the court room? What if they are worried about the client's health?

Professor Strait: Attorneys should litigate it. The real concern is for clients who are in custody and the requirement of diligence under RPC 1.3. I realize this is a huge burden under the circumstances. We can't roll over and let the courts vitiate the speedy trial and jury trial rights of individual clients. If the court can't provide a safe environment, then the client's right to counsel is impacted. If the attorney can't render effective assistance and competent representation, the attorney must withdraw. The court has the power to solve this problem, and if it isn't going to do that, attorneys need to document the court's role in creating the problem. An attorney should also include and document that the attorney would not withdraw if the court would provide the correct safety measures. The attorney should also point out that it is likely that any other lawyer taking over the case will be influenced by the same inadequate conditions.

Q. Many out of custody hearings have been postponed. What if the clients don't reach out to the attorney, and the attorney tries to reach them but can't find them? What if client won't communicate?

Professor Strait: If it is apparent that the client won't participate, the only ethical remedy, and it's not a good one, is a motion to withdraw, unless you have competency concerns. RPC 1.14 requires an attorney to take protective measures for the client who is not or may not be competent, in these circumstances the attorney must raise competency concerns. If the client may cooperate, you are under no obligation to withdraw. So it would be fine to keep the file open for a period of time to see if the client surfaces and to continue to attempt to convince the client to cooperate.

Q. Can courts require defense attorneys to provide information about the attorney's communication with the client? I am specifically interested in communication from an attorney to a client about changes to the court date.

Professor Strait: No, attorneys should refuse to respond under RPC 1.6. This may also be covered under attorney client privilege and work product. If court orders an attorney to respond, the attorney can follow the court's order but should make a record and protect the client against the subsequent consequences. The attorney does not have to take a contempt of court.

Q: What can an attorney disclose? For example, what if an attorney can't review the evidence gathered by the defense investigator or expert reports with the client before sharing it with the prosecutor?

Professor Strait: The client has to decide whether to plead guilty or to make offer or approve one; the client also must decide if they are going to trial if there is no acceptable plea offer. Where there is a personal right of the client, those are rights the client can assert, regardless of what the lawyer thinks the client should do. Case law is ambiguous once you get past whether to plead guilty or go to trial, aside from the decision to testify or not, which is a 5th Amendment right, but beyond that there is not a lot of case law. The client is required to be involved in basic decisions – plea or not plea, go to trial or settle, accept or reject offer, and then consultation is required under RPC 1.2 as to the means to achieve the goal, but the lawyer decides how to achieve the goal, following consultation with the client.

What can a lawyer disclose? RPC 1.6 governs disclosure, and that requires either the client's consent to share information or an implied authorization to share information. This is a very broad standard; it applies to even public information that attorneys obtain in the course of the representation for the purposes of representation, not just attorney-client and or work product privilege material. Attorneys have an implied authorization to release *information if it is reasonably necessary to accomplish the client's goal and if it is reasonable to do so under RPC 1.2*. Attorneys are free to release confidential information to the extent it is *reasonable*. This is a reasonable professional judgement standard: what would a reasonable defense lawyer in the same circumstance do, i.e., release the information to a prosecutor, detective, lay witnesses – that's a judgement call of attorney under RPC 1.6(a). Beyond that it would have to fall under mandatory duty 1.6(b)(1) (duty to disclose information to prevent serious bodily injury or death) or permissive under (b)(2) and (3) (duty to disclose to prevent client from committing a crime or prevent financial or other loss). **Remember my fundamental ethics rule for criminal defense attorneys: If anyone goes to jail make sure it is the client and not the attorney!**

Q. We know that the virus can easily spread in jails and prisons. Defenders are all very worried about the health of their clients. What if a client wants the attorney to present information about the client's health risks for COVID 19 and it's not true?

Professor Strait: I spoke about this recently at a CLE. What if the attorney wears a mask to obtain sympathy for the client if client doesn't have the virus? If the attorney is making an affirmative misrepresentation of fact or a misstatement of law the attorney is violating RPC 3.3(a). If a client tells you they intend to misstate facts, you must tell court, see RPC 3.3 and 1.6(b), which mandate you tell the court if client intends to lie. If the client comes up with this idea and the attorney sits silent, then the attorney falls into the messy category of offering a false statement. The RPCs mandate the attorney tell court. If a client spontaneously makes false statement then that's even messier, the attorney must find a permissive reason under RPC 1.6 to share the information, or seek to withdraw. There are some good resources available on

this subject. Check out the WSBA Criminal Law section newsletter, I believe there is an article or a publication called “So your client wants to lie.”

Q. Any other ethics rules you want to discuss or that apply in a pandemic?

Professor Strait: Yes I have a few additional thoughts. First, RPC 1.1, as recently amended, requires lawyers to ask and know about the security offered by providers such as Zoom. Attorneys can’t give client confidential information to a digital provider. This requires at least enough investigation to make sure the company has industry standard protections in place. If the provider claims they get all cloud data if the attorney ends the contract with them that doesn’t work; the attorney can’t sign such a contract.

RPC 4.2, 4.3 -Be careful when investigating a witness or an alleged victim on private social media. Don’t “friend” anyone on Facebook, etc., to gather information, that conduct has been disciplined. You can’t affirmatively misrepresent who you are and what you are doing. RPC 4.2 comes up if a witness is represented and you seek to discuss the subject matter of representation.

RPC 5.3 – When supervising non-lawyers, attorneys must make sure that their employees or independent contractors’ actions are consistent with the ethics rules, i.e., investigators obtaining or releasing information that doesn’t comply with the RPCs. Attorneys have an ethical duty to supervise non-lawyers for compliance. RPC 8.4(a) provides that an attorney can’t do through another the person what they are not allowed to do, i.e., they can’t allow an investigator to misrepresent who they are.

Bail and release motions: It is a personal right of the defendant to make an argument for release. Can the attorney refuse to make bail motion for the client if the attorney thinks the client will mess up and make the situation worse? No, because it violates RPC 1.2. The attorney can tell the client that the attorney strongly advises against bail and will withdraw if the client rejects the advice if the clients demand is so repugnant to the attorney that the attorney couldn’t effectively advocate for the client under RPC 1.16(a). This calculation to withdraw will have to be weighed against the COVID risk for this client and the relative risks if bail is granted.

Attorneys should be preparing to raise systemic challenges and discuss these issues with clients. I see many issues that are likely to come up: the right to speedy trial, the right to a jury trial, the right to confrontation, and concerns with maintaining client confidences, just to name a few. Clients need to be informed about possible systemic challenges and the impact these arguments may have on their case in order to make informed decisions about whether to settle or go to trial. Several RPCs apply, RPC 1.1 competence, 1.2 client decisions, 1.4 effective communication, 1.6 confidences, and 2.1 counseling the client.

Thanks for taking time to talk with me Professor. I know our members will appreciate this!

You are welcome.