

By Margaret Christensen



DON'T FLUSH CANDOR AND TRUTHFULNESS IN VIRTUAL PROCEEDINGS

Long after a safe and effective vaccine for COVID-19 is available and we can get back to hugging old friends at holiday parties and high-fiving strangers at sporting events, we'll be planning meetings, depositions, and even some hearings as virtual events. At this point, nearly a year into the pandemic's disruption of legal practice as we knew it in Indiana, we've heard plenty of warnings about wearing pants during video calls, remembering to relieve oneself *and flush* before attending court hearings (not during)¹, and the importance of maintaining confidentiality when participating in virtual client meetings. Back in the day, when lawyers did not regularly don a "Zoom jacket" as they dialed into professional events, it was not an option to "forget pants" or "forget to mute." And much like the obligation to get dressed for court, the increasing use of new virtual communication modalities has not changed lawyers' obligations in communicating with parties, opposing counsel, and the courts.

Whether a hearing is live or virtual, a lawyer's duty of candor requires that the

lawyer’s statements be honest and forthcoming. Professional Conduct Rule 3.3 prohibits attorneys from “mak[ing] false statements of fact or law to a tribunal or fail[ing] to protect a false statement of material fact or law previously made to the tribunal by the lawyer.”² Importantly, a lawyer’s own statement in open court must be true or based on the lawyer’s good faith belief.³ And perhaps more critical than ever before, “Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness. . . .”⁴ In plain English, lawyers must treat the “Zoom room” with the same integrity afforded to a court room. Neither lawyers, nor their clients, are permitted to whisper suggested testimony in a witness’s ear or pass

notes during a witness’s testimony. Moreover, if a judge inquires about the conduct of persons who are off-camera, a lawyer must answer truthfully. If the lawyer later learns that his or her explanation of off-camera conduct was mistaken, the lawyer will have to consider whether the false statement amounts to material evidence requiring remedial measures under Rule 3.3(a) (3) or (c). The nuances of the ethical obligation to correct the record must be saved for another issue of *Res Gestae*, because the lawyer’s candor obligation extends beyond the courtroom.

“lawyers must treat the ‘Zoom room’ with the same integrity afforded to a court room.”

Professional Conduct Rule 4.1, which prevents lawyers from making false statements of material fact or law to opposing parties, witnesses, counsel, or any other third person, applies in all contexts arising in the course of representing a client. Unsurprisingly, there is no exception for virtual communications. Likewise, the broad application of Rule 8.4 prohibits lawyers from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation,”⁵ or “conduct prejudicial to the administration of justice.”⁶

Although the respondent’s conduct in *Matter of Pizur* went beyond a single false statement, the case aptly illustrates that false communications to the tribunal, opposing parties, and the media implicate Rules 3.3(a), 4.1, 8.4(c), and 8.4(d).⁷ There, the City of Indianapolis inspected and removed dogs from a private kennel. The following month approximately

Pursuant to Indiana Court Rule 1.15, an audited financial statement of the Indiana Bar Foundation’s IOLTA program for the prior year is published in this issue of Res Gestae.

Indiana Bar Foundation, Inc.

Schedule of IOLTA Activities
Year Ended June 30, 2020

REVENUE:

| | |
|---------------|------------------|
| IOLTA revenue | 1,240,472 |
| Total revenue | <u>1,240,472</u> |

EXPENSE:

Administrative expense:

| | |
|---------------------------------------|-----------------|
| Payroll, taxes, and employee benefits | 154,998 |
| Office supplies and leased equipment | 20,858 |
| Accounting fees | 18,937 |
| Meetings | 447 |
| Membership dues | 3,811 |
| Telephone | 2,833 |
| Unreimbursed IOLTA expenses | <u>(69,884)</u> |
| Total IOLTA administrative expense | <u>132,000</u> |

Net IOLTA income \$ 1,108,472

14 puppies were born from dogs seized by the city and at least five of those puppies died. Pizur responded to a reporter's request seeking

“Pizur falsely told the court that he had been misquoted by the reporter.”

information about the puppies and sent an email stating that the kennel owner had not notified the city that any of the dogs were pregnant. During a hearing a few months later, the kennel owner advised the court that Pizur's statement to the reporter was false. Pizur falsely told the court that he had been misquoted by the reporter. Thereafter, Pizur knowingly altered his email to the reporter before it was produced to the kennel owner in response to a public records request.

The instructive value of *Pizur* is that the series of misrepresentations may have begun as a mistake and led to misrepresentations to the court and fraudulent alteration of documents. It is easy enough to imagine a similar escalation if an attorney defending a deposition attempts to refresh the recollection of the witness. Perhaps the witness gets distracted and forgets to mention a true and important fact. In a live deposition, the attorney would never pass a note across the table in the middle of the witness's answer. But in a virtual setting, where the attorney is outside the observation of opposing counsel and the court reporter, the temptation to help the witness might lead the attorney astray. If the attorney is in the same room as the witness, the attorney might be tempted to whisper the information to the deponent. Or, if the attorney is

participating remotely, the attorney might send a private message to the deponent referencing the omitted information. Perhaps opposing counsel notices an odd expression flash across the deponent's face and asks if anyone is telling the witness how to answer. Embarrassed by the momentary lapse in judgment, the attorney quickly covers up the impermissible coaching and lies to opposing counsel. Our hypothetical attorney has likely violated Rules 4.1 and 8.4(c)-(d). If the situation were to occur in a virtual hearing instead of a deposition, we can add Rule 3.3 to the mix. The simple solution is to treat virtual proceedings the same as live proceedings: communicate with witnesses (as appropriate) during breaks, and not while the witness is testifying.

Virtual hearings also create pitfalls to the extent lawyers collaborate

with attorneys who are not admitted to practice in Indiana and participate in hearings by sending private messages to counsel of record during public hearings. It is, of course, appropriate and common for counsel of record to sit together and pass notes with suggestions for response and reply during oral arguments in the trial and appellate setting. But the virtual setting makes it possible for colleagues who have not entered an appearance to watch hearings and “pass notes” without the need to appear or seek temporary admission. Such conduct would violate Rule 5.5, which governs the unauthorized practice of law. It may also implicate Rule 8.4(d), by allowing a lawyer who is not legally permitted to practice in Indiana to surreptitiously influence arguments during the course of a hearing. The simple rule for lawyers looking for guidance about whom they can consult during

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a hearing is that they should restrict communications to their clients and anyone who would be entitled to sit at counsel's table with them during an in-person hearing.

Given the opportunity for misconduct during virtual proceedings, prudent lawyers should consider a few protections as they start any proceedings. At the outset of any virtual proceeding ask all virtual participants to identify themselves and anyone else physically present in the room with them. In the hearing setting, the court typically handles this task to create a record. But lawyers can encourage candor by affirmatively introducing anyone who is present and off-camera (for instance, a paralegal or a permissible client representative). Or, if a lawyer is alone, he or she can affirmatively announce that fact, which might encourage other virtual attendees to announce whether they have any off-camera company.

Lawyers conducting virtual depositions should add an admonishment to their standard witness instructions to remind witnesses that they are under oath and should not accept guidance from counsel as to how to answer a question while the question is pending. Lawyers defending a witness during a deposition or hearing should prepare their witnesses for the virtual testimony just as they would for live testimony. The lawyer should discuss with the deponent whether anyone is permitted to be physically present with the witness during the testimony, and if so, should instruct the witness not to accept notes or suggestions from the off-camera participant. Finally, in building a virtual team for a hearing or deposition, lawyers should consider whether each participant would be permitted to appear and participate in an in-person hearing.

As with all technological growth, virtual proceedings offer efficiencies

and cost savings that lawyers and clients appreciate. These benefits will most assuredly result in virtual proceedings continuing well past the pandemic. Prudent lawyers will treat these proceedings as they do any in-person proceeding and will not get caught with their pants down.

KEY TAKEAWAYS:

- Wear pants (or skirts, or dresses, you get the idea)
- Prepare witnesses to testify *before* they take the stand, and share comments and notes during breaks, not during testimony.
- Request that participants identify everyone in the room with them, including anyone who may be off-camera during depositions and hearings.
- During oral arguments, resist the temptation to chat or otherwise communicate with lawyers who would not be qualified to sit at counsel's table with you in a live hearing. 

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Footnotes

- 1 "Supreme embarrassment: The flush heard around the country" www.cnn.com/2020/05/06/politics/toilet-flush-supreme-court-oral-arguments/index.html
- 2 *Ind. R. Prof. Cond. 3.3(a)(1)*.
- 3 *Ind. R. Prof. Cond. 3.3, Cmt. [3]*.
- 4 *Ind. R. Prof. Cond. 3.3, Cmt. [12]*;
Ind. R. Prof. Cond. 3.4(b) (prohibiting a lawyer from assisting a witness to testify falsely).
- 5 *Ind. R. Prof. Cond. 8.4(c)*.
- 6 *Ind. R. Prof. Cond. 8.4(d)*.
- 7 84 N.E.3d 627, 628 (*Ind.* 2017).