

# Ethics issues related to redacting Case.net filings subject to remote public access starting July 1

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**On July 1, 2023, publicly available documents will be accessible to any member of the public on their personal electronic devices<sup>1</sup> following the implementation of remote public access to records on Case.net.<sup>2</sup>**

Public documents have been available for several years, and will remain available, through public access terminals for Case.net in courthouses throughout the state.<sup>3</sup> This expanded remote public access only applies to public documents filed on or after July 1, 2023.<sup>4</sup> It is also consistent with the policy as stated in an order dated June 28, 2022, providing that:

Records of all courts are presumed to be open to any member of the public for purposes of inspection or copying. This policy does not apply to records that are confidential pursuant to statute, court rule or order, or other law; judicial or judicial staff work product; internal electronic mail; memoranda or drafts; or appellate judicial case assignments.<sup>5</sup>

Expanded remote public access means extra care must be taken to protect confidential information, which is not a new responsibility for lawyers, but the process and method for redaction has been clarified in Court Operating Rule 2.02, Rule 19.10, Rule 55.025, and Rule 84.015.<sup>6</sup> Court Operating Rule 2.02(d) states:

The responsibility for redacting confidential information rests solely with the counsel, parties, or any other person filing the document. Courts will not review each case document to ensure compliance and will not refuse to

accept or file a document on that basis.

While there is not a set list of which confidential information is subject to redaction, Court Operating Rule 2.02, Rule 19.10, Rule 55.025, and Rule 84.015 each enumerate types of information that could be considered confidential and in need of redaction as noted in the article on page 110. Given the expanded remote public access and the long standing availability of “Track This Case”<sup>7</sup> on Case.net that allows members of the public, including clients, to receive notifications about case filings, it is a good time for lawyers to review their existing ethical duties as to redacting confidential information for documents filed in court. Lawyers should review and consider the following Missouri Rules of Professional Conduct regarding remote public access to Case.net:

- Rule 4 1.1 Competence
- Rule 4 1.6 Confidentiality of information
- Rule 4 3.4 Duties to opposing party and counsel and ethical obligation to follow Court orders and rules
- Rule 4 3.6 Trial publicity
- Rule 4 5.3 Responsibilities regarding nonlawyer assistants
- Rule 4 8.4 Misconduct

## **Rule 4-1.1 Competence**

Rule 4 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Comment [6] to Rule 4 1.1 provides guidance on maintaining competence, noting:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study

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and education, and comply with all continuing legal education requirements to which the lawyer is subject.<sup>8</sup>

The duty of competence is at the heart of ethical practices as it relates to compliance with the redaction requirements for court filings. First, a lawyer must ensure they understand what information they must redact by court rule or substantive law. Second, a lawyer must make sure they complete filings and redactions in accordance with the rules of the Court. Finally, the lawyer should understand the technical aspects of completing redactions, even if the lawyer has nonlawyer assistants helping prepare documents for filing. Assistance by nonlawyers is not a substitute for the lawyer's own competency.<sup>9</sup>

While there are no disciplinary cases in Missouri related specifically to e filing competence, an example is available from Oklahoma. The U.S. Bankruptcy Court for the Western District of Oklahoma suspended an Oklahoma lawyer for failing to file documents in a manner compatible with applicable rules, which included accurately filling out electronic bankruptcy forms pursuant to rules and procedures of that court.<sup>10</sup> In issuing reciprocal discipline of a public censure of the lawyer, the Supreme Court of Oklahoma noted the lawyer's lack of technical proficiency, and the lawyer was encouraged to improve his computer skills or hire an adept administrative assistant.<sup>11</sup>

#### **Rule 4-1.6 Confidentiality of information**

Rule 4 1.6(a) provides the standard that “[a] lawyer shall not reveal information relating to the representation of the client...”<sup>12</sup> The aspect of Rule 4 1.6 most relevant to redactions and remote public access to Case.net is the requirement of paragraph (c), which states, “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client.”

Through this duty of confidentiality, lawyers owe responsibilities to their clients to ensure pleadings are properly redacted to prevent unauthorized disclosure or access to information relating to the client representation. This includes properly removing metadata in redacted documents that will be public such that someone viewing the document cannot reveal the redacted information.<sup>13</sup>

Comments [15] and [16] to Rule 4 1.6 provide guidance to lawyers about responsibilities to prevent inadvertent or unauthorized access to client confidential information. They note that lawyers may need to follow additional steps beyond the reasonable efforts described in these comments to comply with other law.<sup>14</sup> These comments also note that state and federal laws regarding data privacy may apply, as well as notification requirements if there is a loss or unauthorized access, but that those are questions beyond the scope of these rules. However, lawyers should be mindful of these other possible implications.

#### **Rule 4-3.4 Duties to opposing party and counsel and ethical obligation to follow Court orders and rules**

Rule 4 3.4 states: “A lawyer shall not ... knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists...” Comment [4] to Rule 4 3.4 adds, “Lawyers have an ethical

duty to comply with court orders in both their professional and personal capacities.” Certainly, the redaction requirements are rules of the Court which lawyers must follow.

#### **Rule 4-3.6 Trial publicity**

Rule 4 3.6 sets forth the standards by which lawyers may and may not make statements that could be considered trial publicity, and the rule generally prohibits lawyers from making extra judicial statements or public communications that will have a substantial likelihood of materially prejudicing the adjudicative proceeding. This rule is cited as an ethical consideration related to redaction requirements and expanded remote public access because filing an improperly redacted document could trigger the standards under Rule 4 3.6.

#### **Rule 4-5.3 Responsibilities regarding nonlawyer assistants**

Rule 4 5.3(a) provides generally that lawyers who are partners, or who have comparable managerial authority over nonlawyers employed or retained by the lawyers, are required to “make reasonable efforts to ensure that that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.” Similarly, paragraph (b) requires lawyers with direct supervisory authority over nonlawyers to “make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.” These supervisory responsibilities apply whether the nonlawyer is employed within the firm or is outside the firm, such as a vendor or independent contractor.<sup>15</sup>

In the context of performing redactions of court documents, this means lawyers are responsible for training nonlawyers on what requires redaction and how to appropriately perform those redactions. Lawyers should consider creating appropriate internal workflows or checklists to ensure nonlawyers accurately perform assigned tasks.

However, even with appropriate training and workflows, lawyers are still responsible for reviewing documents prior to filing with the court, even if a nonlawyer assistant aided with the creation of that document. Lawyers are also responsible for performing other reasonable supervisory tasks along the way to ensure filings are made appropriately. Rule 4 5.3(c) provides that the lawyer is responsible for the conduct of the nonlawyer if that conduct would be a violation of the Rules of Professional Conduct if the lawyer had engaged in that conduct. Further, Rule 4 5.3(c) states if “(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) ... knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action[.]” the lawyer is ethically responsible for the conduct of that nonlawyer.

The Supreme Court of Missouri has made clear in disciplinary cases that lawyers may not blame support staff for their own professional misconduct.<sup>16</sup> If a lawyer asks a nonlawyer assistant to e file a document on the lawyer's behalf, that lawyer is responsible for the contents of that filing whether it is redacted properly or not. In the event an improperly redacted filing is made, the lawyer should take reasonable remedial measures both

within the applicable rules to remove and or correct that filing, and, depending on the circumstances, possibly advise the client as to a breach of confidentiality.<sup>17</sup>


#### Rule 4-8.4 Misconduct

Finally, violating or attempting to violate the Rules of Professional Conduct, or doing so through the acts of another (*i.e.*, a nonlawyer assistant), is considered misconduct pursuant to Rule 4 8.4(a). It is also misconduct to “engage in conduct that is prejudicial to the administration of justice” pursuant to Rule 4 8.4(d). With proper planning, care, and management as to completing required redactions of pleadings and complying with the rules and substantive law, lawyers can avoid engaging in any misconduct.

#### Conclusion

Prior to the effective date on July 1, and even thereafter, lawyers should review Court Operating Rule 2.02, Rule 19.10, Rule 55.025, and Rule 84.015,<sup>18</sup> as well as the Missouri Rules of Professional Conduct 4 1.1, 4 1.6, 4 3.4, 4 3.6, 4 5.3, and 4 8.4 to ensure they have a plan for compliance to protect clients’ confidential information that is subject to redaction in pleadings by rule or law.

If you have questions about the Missouri Rules of Professional Conduct regarding ethical compliance with redaction requirements, or other questions about ethics in your practice, you can contact the Office of Legal Ethics Counsel at MO Legal Ethics.org to seek an informal advisory opinion about your prospective conduct.

For more information about remote public access to Case.net, how to select and perform redactions in various software options, or other educational resources, visit The Missouri Bar’s Remote Public Access and Redaction Resource Center at MoBar.org/RemotePublicAccess. 



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#### Endnotes

- 1 See *Supreme Court of Missouri to expand public access to court records*, MISSOURI COURTS, June 28, 2022, [www.courts.mo.gov/page.jsp?id=89450](http://www.courts.mo.gov/page.jsp?id=89450).
- 2 Sup. Ct. of Mo. order, *In re: Expanded Remote Access Implementation Date*, June 28, 2022, [www.courts.mo.gov/page.jsp?id=187705](http://www.courts.mo.gov/page.jsp?id=187705).
- 3 *Id.*
- 4 *Id.*
- 5 Sup. Ct. of Mo. order, June 28, 2022, *In re:*

(1) *Repeal of subdivision 2.02, entitled “General Policy,” of Court Operating Rule 2, entitled “Public Access to Records of the Judicial Department,” and in lieu thereof adoption of a new subdivision 2.02, entitled “General Policy.”*

(2) *Adoption of a new subdivision 19.10, entitled “Redaction Requirements,” of Rule 19, entitled “Infractions, Misdemeanors or Felonies – General.”*

(3) *Adoption of a new subdivision 55.025, entitled “Redaction Requirements,” of Rule 55, entitled “Pleadings, Motions, and Hearings.”*

(4) *Adoption of a new subdivision 84.015, entitled “Redaction Requirements,” of Rule 84, entitled “Procedure in All Appellate Courts,” [www.courts.mo.gov/page.jsp?id=187704](http://www.courts.mo.gov/page.jsp?id=187704).*

A subsequent order was entered January 31, 2023, effective July 1, 2023, *In re: Correction of order of June 28, 2022, of subdivision 2.02(e), entitled “Manner of Redacting,” of subdivision 2.02, entitled “General Policy,” of Court Operating Rule 2, entitled “Public Access to Records of the Judicial Department,” [www.courts.mo.gov/page.jsp?id=192042](http://www.courts.mo.gov/page.jsp?id=192042). Another subsequent order was entered April 4, 2023, effective July 1, 2023, *In re: Correction of subdivision 2.02(e), entitled “Manner of Redacting,” of subdivision 2.02, entitled “General Policy,” of Court Operating Rule 2, entitled “Public Access to Records of the Judicial Department,” effective July 1, 2023, [www.courts.mo.gov/page.jsp?id=92252](http://www.courts.mo.gov/page.jsp?id=92252).**

6 *Id.*

7 “Track This Case” overview is available at [www.courts.mo.gov/page.jsp?id=87154](http://www.courts.mo.gov/page.jsp?id=87154).

8 See also Mo. Informa Advisory Op. 2018-09 (providing guidance on technology competence in cloud computing through continuing education courses); *Electronic Communications and Practice*, OFFICE OF LEGAL ETHICS COUNSEL RESOURCE PAGE, [mo-ega-ethics.org/electronic-communication-resources/](http://mo-ega-ethics.org/electronic-communication-resources/).

9 See also Rule 4-5.3.

10 *State of Oklahoma ex rel., Oklahoma Bar Ass’n v. Oliver*, 369 P.3d 1074 (2016).

11 *Id.* at 1075 and 1077.

12 This rule allows exceptions within 4-1.6(a) and (b) which are not being addressed for the purposes of this article.

13 See also Mo. Informa Advisory Op. 2021-13 (ethical responsibilities related to metadata).

14 See also Mo. Informa Advisory Op. 2021-12 (ethical responsibilities related to virtual practice, including factors to consider as to implementing confidentiality measures pursuant to Rule 4-1.6).

15 See Rule 4-5.3, Comments [2] and [3].

16 See *In re: Farris*, 472 SW3d 549, 560 (2015) (when a lawyer is relying on a non-lawyer to fulfill the lawyer’s duty related to trust account, “the attorney bears the risk of the other’s non-performance,” and “is responsible for fulfilling the obligations and responsibilities imposed upon him by the Rules.”)

17 See also Mo. Informa Advisory Op. 2022-07 (email sent to incorrect address); Mo. Informa Advisory Op. 2021-03 (supervisory responsibilities over vendor); Mo. Informa Advisory Op. 2020-26 (loss of client confidential information); and Mo. Informa Advisory Op. 2017-02 (disclosure of confidential information by non-lawyer assistant).

18 See *supra* note 6.