

Ethical concerns for attorneys facing a pandemic



By Erin K. Higgins and Conor Slattery

In light of the recent COVID-19 outbreak, many attorneys have been forced to alter their everyday routines and practices concerning representation of their clients.

Sudden and unexpected changes such as COVID-19 present a variety of challenges regarding the handling of client matters, while many lawyers at the same time are struggling to maintain their own businesses and their own mental health in a time of extreme isolation.

The following are some answers to commonly asked questions that may provide some guidance to attorneys in this challenging time.

Q: I am not currently sick, but should I be preparing for the possibility of becoming ill or being required to self-quarantine?

A: Attorneys should always have a succession plan in place on the off-chance that they become unexpectedly unavailable to their clients. Rule of Professional Conduct 1.1 – Competence requires an attorney to provide competent representation to a client. Per the Office of Bar Counsel, a lawyer’s duty of competent representation includes planning ahead to safeguard clients’ interests in the event of unexpected illness, incapacity or death. Rabe, “The Best-Laid Plans — Lawyers Duty Includes Preparing Their Practices for Incapacity,” Office of Bar Counsel (2000).

Attorneys should have a plan in place in the event they become incapacitated by COVID-19. For attorneys in a firm, this means having an up-to-date case list and calendar so that colleagues within the firm can step in. For solo practitioners or smaller firms, you should have a designed back-up attorney who is willing to step in if you become incapacitated and unable to competently represent your client.

In either case, pursuant to Rule 1.1 cmt. 6, you or your replacement counsel should obtain the client’s consent in writing to the substitution.

Q: I am not sick, but I am afraid to travel or to attend court appearances, meetings or any other in-person interactions because of the prevalence of COVID-19. What are my ethical duties to my clients?

A: At present, this is likely not an issue for most attorneys, because there are very few in-person interactions taking place. However, it seems likely that restrictions on in-person appearances will start to be loosened before the risks posed by COVID-19 have been entirely eliminated. If you find yourself in this situation, first and foremost, you should communicate your decision to your clients and the potential impact that your personal health decisions may have on their representation.

Pursuant to Rule 1.4(b) – Communication, an attorney is required to keep a client reasonably informed to the extent necessary to permit the client to make informed decisions regarding the representation. Explain to the client the reasons for your decision and how it may alter or impact your handling of the matter going forward.

Rather than in-person meetings with clients, witnesses or other necessary parties, you may choose to employ videoconferences or teleconferences, or postpone depositions, site visits or court proceedings. This will then allow clients to make an informed decision as to whether they are comfortable with your proposed course of action or if they wish to seek new counsel.

Finally, if you feel that your personal decisions may prejudice the client, it may be best to withdraw from the representation.

Q: I’ve been diagnosed with COVID-19 and I am too ill to continue representing my clients. What are my ethical responsibilities to my clients?

A: In accordance with Rule 1.4, you should immediately communicate this fact to your clients and inform them that your current situation may require you to postpone upcoming events in each client’s matter.

Pursuant to Rule 1.1 and Rule 1.3 – Diligence, you then must ask yourself whether you are able to represent your clients competently and diligently. If you are unable to do so, you should resort to your succession plan as discussed above, in order to protect your clients’ interests and ensure that your illness does not result in any prejudice to a client’s case.

Additionally, per Rule 1.16(a)(2) – Declining or Terminating Representation, if an attorney’s physical or mental condition mentally impairs the attorney’s

ability to represent a client, the lawyer’s ethical obligations require the attorney to withdraw from the representation.

Q: If my client is diagnosed with COVID-19, what are my ethical obligations to the client?

A: Regardless of a client’s medical diagnosis, an attorney is required to keep the client reasonably informed of the status of the client’s matter under Rule 1.4. As discussed previously, this may involve canceling in-person meetings and communicating with the client electronically or via videoconferences.

This may also result in the attorney being forced to postpone court proceedings in which the client’s attendance is required. Under Rule 1.14 – Diminished Capacity, when a client has diminished capacity the attorney may take reasonably necessary protective action in connection with the representation, including seeking the appointment of a guardian ad litem, conservator or guardian.

If a client becomes hospitalized due to COVID-19 and unable to adequately act in his or her own interest, the lawyer may need to seek out a family member or friend to act as a guardian and/or a health care proxy on the client’s behalf.

Attorneys should be mindful, however, that per Rule 1.14(c) the attorney can reveal confidential client information only to the extent needed to protect the client’s interests.

Q: I am working remotely at home due to the COVID-19 social distancing guidelines. How does this impact my ethical obligations to preserve my clients’ confidential information?

A: Pursuant to Rule 1.6 – Confidential Information, an attorney must protect his or her client’s confidential information. Additionally, under Rule 1.1, an attorney is ethically required to maintain competence in technology. The Office of Bar Counsel has advised that, at a minimum, attorneys should understand technology regularly utilized in the legal field. LaVigne, “From Technophobe to Technolawyer: A Lawyer’s Duties Related to Technology Competence and Prevention of Inadvertent Disclosure,” Office of Bar Counsel (March 2018).

An attorney should consider the security of at-home devices such as laptop and desktop computers, or i-Pads and i-Phones that the lawyer may use to access confidential client information. Are these items secure? Does the attorney utilize a secure cloud storage system that he or she may remotely access?

An attorney should also be on the lookout for phishing emails or other hacking attempts. If an attorney receives a questionable email from a known contact, reach out to that contact in a separate message or telephone call to ensure that the contact in fact sent the questionable correspondence.

Further, attorneys should be cautious about maintaining the attorney-client privilege in these unusual times. Is the attorney or client working from home where a family member or other third party may overhear a confidential conversation and destroy the attorney-client privilege?

At the beginning of a telephone call or videoconference with a client, make sure that both you and the client have the requisite privacy necessary to preserve the attorney-client privilege and prevent any advertent disclosure of confidential client information.

Q: With courts postponing certain proceedings and delaying certain filing deadlines, am I required to continually update important deadlines in client matters as the legal landscape continually changes?

A: Yes. Allowing a statute of limitations to run, or missing an important filing or discovery deadline in a matter, is one of the most common sources of legal malpractice claims.

It is vital for all attorneys to ensure that their calendars are up to date and that all deadlines are tracked and updated as necessary throughout the COVID-19 outbreak to protect themselves and their clients.

Both the Massachusetts and Boston bar associations and Lawyers Weekly have established web pages that collect all of the important court orders. Bookmark those websites and check them daily, along with the daily list of temporary court closures.

Q: It has been challenging for me to focus on client matters while being bombarded with grim news about the economy and the health care system, and at the same time being isolated from professional colleagues and friends. Is this normal?

A: Absolutely. The good news is that there are resources out there to help you deal with these challenges.

The American Bar Association has identified a host of resources to help lawyers with the challenges presented by COVID-19, which you can find on the ABA’s website under ABA Disaster Resources. Closer to home, Lawyers Concerned for Lawyers has great suggestions on its web page for how to deal with anxiety arising from the coronavirus pandemic.

Another idea is to reach out to lawyers you know and suggest a coffee by Zoom or some other meeting platform. Having that visual connection with others will make you feel a whole lot better about your day. And setting up such a meeting is way easier than any of us believed only a month ago, so give it a try.

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