

PROFESSIONAL RESPONSIBILITY IN A PANDEMIC

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(This article appeared in Journal 25,2, Summer 2020)

As health concerns mandate social distancing and other precautions due to the COVID-19 (coronavirus) outbreak, many lawyers and their staff will find themselves working from home. The necessity to work remotely brings new challenges for lawyers as they continue to be governed by the Rules of Professional Conduct. However, despite the changes in the world around us, the Rules of Professional Conduct have not changed. Lawyers must continue to pursue their clients' matters "despite opposition, obstruction, or personal inconvenience to the lawyer," Rule 1.3, cmt. 1, and must otherwise strive to maintain as normal of a lawyer-client relationship as possible. This article examines professional responsibilities that demand special consideration during this unprecedented time. Lawyers may contact the State Bar's Ethics Staff for further guidance, if needed, by emailing ethicsadvice@nbar.gov.

Diligence

Although legal services were deemed an essential business by Governor Cooper's Executive Order 121 (March 27, 2020) and law firms are permitted to remain open, lawyers may choose to reduce in-person legal activities without violating the Rules of Professional Conduct. Under the present circumstances, lawyers should weigh public health considerations when exercising their professional judgment to determine the scope of services the lawyer is comfortable offering to clients and requiring of staff.

Notwithstanding government mandates and altered life circumstances, lawyers must continue to be diligent during this pandemic. Rule 1.3 requires lawyers to act with "reasonable diligence and promptness in representing a client." The Judicial Branch is continually monitoring the COVID-19 situation throughout the state, and has taken substantial steps on both a local and statewide level to protect the public welfare and accommodate lawyers, clients, and other parties by reducing staff in the courthouse, continuing cases, and extending deadlines. The constant changes to court schedules require lawyers to be vigilant about maintaining and updating client files and calendars. Lawyers should make it a habit to review the updated information from the Judicial Branch on its website, nccourts.gov.

Regardless of the various extensions and continuances ordered across the state, a lawyer should continue to pursue a client's case to the extent reasonably possible under these unique circumstances. Lawyers can continue to prepare documents, respond to discovery, or even settle matters while working remotely. Of course, just as one lawyer can continue pursuing a particular case, so too can opposing counsel; lawyers should put a plan into place for someone at the law office to occasionally check the office's delivered mail. Again, the Rules require "reasonable diligence and promptness in representing a client"—it's reasonable to expect that the ongoing public health crisis may delay, stall, or otherwise impact the representation of a client depending on the case and the relevant circumstances, but it's also reasonable to expect a lawyer to continue pursuing a client's case when possible.

Communication

The duty to communicate with a client is more important now than ever. Rule 1.4 recognizes that effective lawyer-client communication is a two-way street: the rule requires lawyers to keep their clients "reasonably informed" about the status of their matter, and the rule anticipates client inquiries by requiring lawyers to "promptly comply with reasonable requests for information" from their clients. Clients should have the ability to communicate with their lawyer during this unique time in history, so basic updates to the law office's contact information are important. Lawyers should update their outward-facing communications—including their firm's website and voicemail—with information detailing how a client can reach someone at the law office and/or how often mail or voicemails are checked.

The duty to communicate during the COVID-19 crisis also encompasses the lawyer's responsibility to explain to clients how current events may affect their case and detailing ways in which the lawyer is responding to these events. Clients need to be advised of any changes to office hours, court closings, and scheduled court appearances. Even if there is nothing pressing in a client's case, lawyers should consider sending a brief message to reassure clients that, despite this crisis, their matters are important and are not being neglected.

Similarly, communication with opposing counsel and third parties is crucial not just for the lawyer's representation of a client, but for purposes of professionalism. Communicating expectations or delays during these difficult times helps ensure all involved are on the same page, and potentially prevents frustration or future disputes over deadlines.

Confidentiality

Technology enables lawyers to work remotely in a more productive and smoother manner than ever before. However, along with the ease of bringing the entire case file/client database/law firm home comes the increased vulnerability to the precious data that makes up a client's case and the lawyer's practice. Lawyers working remotely continue to have the duty to protect confidential client information. Rule 1.6(c) states that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Additionally, as a part of maintaining a lawyer's competency, comment 8 to Rule 1.1 states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with the technology relevant to the lawyer's practice[.]" Simply put, if a lawyer is going to utilize technology to work remotely, the lawyer needs to have a basic understanding of the technology used to ensure that the lawyer complies with his or her professional obligations. *See also* 2011 FEO 6 (Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property) and 2005 FEO 10 (Virtual Law Practice and Unbundled Legal Services). Lawyers should consider the following when assessing the vulnerabilities of confidential information while working from home:

- Home network security – Lawyers put a great deal of effort into making their law office a secure environment, and for good reason. When working with and transmitting confidential client information from home, a lawyer must similarly take steps to ensure the confidential information on the home network is protected. At the very least, lawyers should ensure that the network has been updated with the latest security patches and is password protected. The same goes for all devices that are connecting to the home network—they should be kept updated, and at least password protect any device on your home network that you use to access confidential information. Lawyers who have questions about the security of their home network should contact a network security professional.
- Discussing confidential information at home – Lawyers should set up a reasonably private workspace while working from home. When taking a call with a client, lawyers should close the door or step into another room if sensitive information is discussed. Additionally, much has been reported and debated over the past few years about the security concerns surrounding voice assistants like Google Assistant, Amazon Echo, or Apple HomePod. These devices listen to conversations heard within range of the device; while they may not "turn on" unless the activation word is spoken, the device is nevertheless listening for that activation word (and what is heard may be processed and reviewed by a computer or even a person somewhere else). Lawyers should avoid discussing confidential information within earshot of such listening devices.
- Utilizing online software and services – Services like cloud storage, online case management/databases, and video conferencing are proving to be necessities in practicing law remotely. These services offer remarkable accessibility and facilitate efficient practice and communication like never before. However, as impressive as these services are, they nevertheless suffer from significant security vulnerabilities if mishandled. It is not a lawyer's duty to know the intricacies of security protocols employed by the services they utilize, but it is a lawyer's duty to take reasonable care in selecting and vetting a particular service to determine if confidential client information will be protected while using the service, what vulnerabilities might exist, and how the lawyer can best protect against those vulnerabilities. 2011 FEO 6 states, "[W]hile the duty of confidentiality applies to lawyers who choose to use technology to communicate, this obligation does not require that a lawyer use only infallibly secure methods of communication. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality." (internal citations omitted). This duty of reasonable care continues beyond initial selection of a service and extends during the lawyer's use of the service. Lawyers should continuously educate themselves on the ever-evolving state of technology and the services they employ to facilitate their practices, and make necessary adjustments (including abandonment, if necessary) when discoveries are made that call into question services previously thought to be secure.

All that is to say, lawyers can use online services in their respective practices; but at a minimum, lawyers should spend some time researching the online services they intend to use. Lawyers should review the company's information on security, and search for third party reports about the services. Doing so may reveal past breaches and recent security concerns—as well as the company's response to those events—that can inform their selection.

Once a lawyer has made their selection, when accessing any online service to practice law and handling confidential information, they should at least use a secure network and use strong passwords that are regularly changed to access your accounts.

Lastly on confidentiality, it is inevitable that a lawyer or someone the lawyer interacts with will test positive for COVID-19. A lawyer who is questioned by public health or medical officials about the lawyer's recent contacts due to the lawyer's exposure to COVID-19 may be asked to disclose her client's identity and contact information, which is confidential

information pursuant to Rule 1.6. In such circumstances, pursuant to Rule 1.6(b)(3), the lawyer may disclose such confidential information “to the extent the lawyer reasonably believes necessary...to prevent reasonably certain death or bodily harm[.]” *See also* Rule 1.6, cmt. 6 (“Rule 1.6(b)(3) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.”). A lawyer who is exposed to COVID-19 may disclose confidential client information to medical officials to the extent the lawyer reasonably believes necessary to prevent the spread of the virus. Additionally, if a client is incapacitated due to COVID-19, Rule 1.14 requires a lawyer to “as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Rule 1.14(a). If the client is unable to protect his or her own interests, the lawyer should consult Rule 1.14(b) and (c) for guidance on what a lawyer may do to facilitate the representation including what information the lawyer may reveal to third parties when seeking assistance and whether to seek the appointment of a guardian or other legal representative for the client.

Video Conferences

Video conferences are the hot trend in doing business remotely during this unique time, and for good reason—advances made in camera technology, processing power, and internet speed make real-time video conversations a viable, effective option for both tech-savvy and tech-challenged users. The Rules of Professional Conduct do not prohibit a lawyer’s use of video conferences to speak with clients, attend mediations, or even participate in remote hearings (as permitted by the courts). However, in addition to the considerations mentioned above about vetting online services, lawyers should be mindful of three considerations when using video conferences to speak with clients. First, is the video conference secure? Lawyers should take the appropriate steps to ensure each video conference session is private, including employing unique password protection, when possible, to prevent uninvited third parties from accessing the video conference as has been recently reported. Given the general vulnerabilities of electronic communications, lawyers should consider sending the video conference link or meeting ID separate from the password needed to access the conference (e.g. send the meeting ID via email, and the password via text message). Second, is the conversation taking place actually confidential? Unless the client is using headphones, the conversation via video conference will be heard by physically present third parties. Lawyers may want to ask the client to pan the camera around the room to demonstrate and ensure that the conversation will be protected, and lawyers should watch to see if the client’s behavior indicates another person has joined the room and/or is exerting undue influence. Third, is a video conference appropriate for the purpose of the communication? A video conference can be an effective tool to speak with a new client about potential representation, but may not be sufficient if attempting to determine whether a client has capacity to make decisions about his or her affairs. Such situations will need to be assessed on a case-by-case basis by the lawyer exercising his or her professional judgment.

Succession

Lawyers should plan now for the possibility that they may suddenly become incapacitated. In the face of increased risk of serious illness, lawyers should have a ready succession plan for other lawyers to be available to assume responsibility for legal representations. At the very least, lawyers should have a plan that enables a court-appointed trustee for the law practice to access the necessary client files, trust account records, and other vital information that would enable clients to move to subsequent counsel. Assuring the continuity of representation can be difficult for solo practitioners. Comment [5] to Rule 1.3 provides that “to prevent neglect of client matters in the event of a sole practitioner’s death or disability, the duty of diligence may require that each sole practitioner prepare a plan...that designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.” Lawyers should be mindful that the ultimate decision to transfer the file to new counsel remains with the client. Rule 1.2.

Staff

As lawyers and law offices embrace the reality of working remotely amidst a global pandemic, principals in a law firm and lawyers with managerial authority must make reasonable efforts to ensure the law office has measures in effect giving reasonable assurance that both lawyers and nonlawyers associated with the firm conform to the Rules of Professional Conduct. *See* Rules 5.1 and 5.3. Now is the time for lawyers to update office procedures (or FINALLY write them down) that clearly state professional expectations and empower employees to ensure their conduct is compatible with the Rules of Professional Conduct. The law firm’s malpractice insurance carrier can offer advice and resources to solo practitioners and law firms on the topics of succession planning, remote work, and cybersecurity.

Professionalism

This is a stressful time for everyone. We need to take care of ourselves and each other. Recently, US District Judge Amy Totenberg of the Northern District of Georgia issued an order to every case on her docket outlining new procedures and extended deadlines following the pandemic. Judge Totenberg’s order contained the following words of advice:

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.

Lawyers are allowed to be kind. Rule 1.2(a)(2) encourages lawyers to accede to reasonable requests of opposing counsel that do not prejudice the rights of a client, avoid offensive tactics, and to treat all persons involved in the legal process with courtesy and consideration. Rule 1.2(a)(3) further allows a lawyer to “exercise his or her professional judgment to waive or fail to assert a right or position of the client.” In sum, Rule 1.2 allows a lawyer to be gracious—to check with opposing counsel about a missed deadline, rather than file for sanctions at the first opportunity; or to pick up the phone and offer an extension to opposing counsel who is also dealing with the difficulties of the present crisis. Now is the time to be kind and considerate with each other. Now is the time to demonstrate your professionalism.

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