

LEGAL ETHICS AND THE CORONAVIRUS

By Neil J Wertlieb, with editorial and other contributions from Kevin Mohr and Suzanne Burke Spencer.

As fears and concerns regarding the spread of the coronavirus Covid-19 grow – and an increasing number of courts, schools, offices and gatherings are closed or cancelled – it is important to keep in mind your ethical responsibilities as lawyers during this time of crisis. Although the Covid-19 pandemic is having a significant effect on how lawyers will be practicing over the next few weeks or months (e.g., from home rather than office), it is important to appreciate that the Rules of Professional Conduct (the “Rules”) and the duties they set forth are not suspended.

On behalf of the Ethics Committee of the California Lawyers Association, we offer the following reminders for your consideration.¹

Competence in an Emergency:

At all times, a lawyer must perform legal services with “competence,” defined in Rule 1.1 as “the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of [required legal] service.”

Personal issues relating to the spread of the coronavirus, such as school closures and the lack of child care, or other responsibilities for family members or concern for their health, normally would not excuse a lawyer’s duty of competence to the client. Lawyers are expected to put their clients’ interests ahead of their own personal interests or issues.²

During the current Covid-19 crisis (and any other similar emergency), lawyers should be prepared to continue to competently protect their client’s interests. Some obvious and simple measures include:

- If you use a laptop or tablet, keep it charged and available.
- Keep track of your calendar, and ensure that you do not miss filing and other client-related deadlines.
- Be aware of court, agency and other closures or limitations, and the impact such events may have on such deadlines (or your ability to comply with such deadlines). See below for links to updated information regarding court and agency accessibility.
- Make sure that you have access to necessary client files and other client-related data in the event you are working remotely and your office is inaccessible or your office staff is unavailable.

¹ This brief article is not intended to be a comprehensive list of ethical issues raised by Covid-19. Diligence and caution will be required when considering how to best fulfill ethical obligations in this fluid situation.

² See *Smith v. State Bar* (1987) 43 C3d 525 (“even in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his client’s interests.”).

- Ensure that your means of remote access is appropriately protected against potential hacking and other cyberattacks (e.g., by use of a secure virtual private network or VPN).
- If working remotely, consider ways to have incoming hard-copy mail rerouted or scanned and delivered electronically.
- Be available and responsive to your client’s needs, even if while maintaining social distancing (for example, by use of electronic communication).
- If working remotely, make sure your clients and colleagues know how to reach you by phone. Give them cell or home phone numbers, as needed, so that clients and essential personnel have a reliable way to reach you, even if you are not in the office.

Attorney absences or illness may also give rise to situations in which clients in need of legal services cannot get them from their regular providers. These clients may need help in an emergency concerning legal matters that are not within the lawyer’s regular area of practice. In such situations, the Rules recognize that a client’s need for emergency legal services may excuse the lawyer’s lack of competence under particular circumstances. Paragraph (d) of Rule 1.1 provides that, in an emergency, “a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required,” but only “if referral to, or association or consultation with, another lawyer would be impractical.” The Rule further provides that such assistance in an emergency “must be limited to that reasonably necessary in the circumstances.”

Supervision & Delegation:

During a situation such as is presented by the Covid-19 pandemic, where personal and professional responsibilities can be in direct conflict, the resulting pressures on a lawyer’s time might lead the lawyer to delegate client work or other responsibilities to another lawyer within or outside the lawyer’s firm, or to nonlawyers in the lawyer’s firm. In addition, those upon whom you rely might become unavailable or distracted by their own personal concerns.

The Rules provide that lawyers, whether they have overall law firm management responsibilities or not, could be held responsible if they don’t take reasonable steps to ensure lawyers in the firm they manage or lawyers they supervise are in compliance with their ethical duties, including competence and confidentiality. Rule 5.1 requires that lawyers with “managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm comply with” the Rules. Rule 5.1 further requires that any lawyer with “direct supervisory authority over another lawyer ... shall make reasonable efforts to ensure that the other lawyer complies with” the Rules.

Pursuant to Rule 5.3, lawyers have similar responsibilities for the conduct of their non-lawyer assistants, including any work that has been outsourced (e.g., contract workers) or offshored (e.g., back office work such as human resources or payments).

In addition, many lawyers and law firms have outside or in-house personnel who pay bills and handle client funds and deposits. Because of the possibility that these personnel may become unavailable due to illness, quarantine or otherwise, such lawyers should have a back-up plan in place (e.g., by getting necessary log-in information and/or access to checks, or having other personnel prepared to take over those critical responsibilities if necessary).

It is also important to keep in mind that certain ethical obligations are non-delegable. This is especially the case with respect to the safeguarding of client funds and property. The duty to keep a client's funds safe under Rule 1.15 is a personal obligation of the lawyer which cannot be delegated.³ As stated in the State Bar's [*Handbook on Client Trust Accounting for California Attorneys*](#):

Whether you find it easy or difficult, the fact is that if you agree to hold money in trust, you take on a non-delegable, personal fiduciary responsibility to account for every penny as long as the funds remain in your possession. Whomever you hire to do your books or fill out your deposit slips, you have full responsibility for his or her actions when you receive money in trust. This responsibility can't be transferred, and it isn't excused by ignorance, inattention, incompetence or dishonesty by you, your employees or your associates. The legal and ethical obligation to account for those monies is yours and yours alone, regardless of how busy your practice is or how hopeless you are with numbers. You may employ others to help you fulfill this duty, but if you do you must provide adequate training and supervision. Failure to live up to this responsibility can result in personal monetary liability, fee disputes, loss of clients and public discipline.

Such non-delegable duties under Rule 1.15 also extend to other property received or held by a lawyer on behalf of a client. Such property must be secured "in a safe deposit box or other place of safekeeping as soon as practicable."

Communication with Clients:

A lawyer's duty of communication, especially in a time of crisis, is particularly important. In this regard, keep in mind your obligations under Rule 1.4, which requires a lawyer to "keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." If a lawyer will be away from the office, the lawyer should take steps to ensure that the lawyer's clients will be able to reach the lawyer.

In addition, consider whether it is necessary to communicate with clients about any risk factors or concerns they may have about the coronavirus so as to inform decisions about whether events at which the client might ordinarily be required to appear (such as depositions, settlement conferences, or trial) should be postponed. The lawyer should timely determine if a client's health condition or concerns will make it unlikely for the client to leave the house. A client should not face sanctions for failing to appear due to the client's public health concerns when permission to relieve the obligation to appear could have been sought if raised earlier by the lawyer.

Soliciting Clients ("Ambulance Chasing"):

³ See, e.g., *In the Matter of Robins* (Rev. Dept. 1991) 1 Cal. State Bar Ct. Rptr. 708.

While lawyers can provide helpful services in a time of crisis, there are limitations imposed by the Rules on the solicitation of clients. For example, Rule 7.3 prohibits a lawyer from soliciting “professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact ... if ... the solicitation is transmitted in any manner which involves intrusion, coercion, duress or harassment.”⁴

The Legal Ethics Committee of the San Diego County Bar offers guidance on geographically targeted advertisements to mass disaster victims on social media.⁵

Additional Guidance Provided in Ethics Opinions:

Virtual Law Office and Technological Competence: The Committee on Professional Responsibility and Conduct of the California State Bar (“COPRAC”) offers guidance on your responsibilities to the extent you [maintain a virtual law office](#) or [use public wireless internet connections](#).

Dissolution of Law Practice: COPRAC offers guidance on your [responsibilities in the event your law firm dissolves](#).

Disposition of Deceased Sole Practitioners’ Client Files and Property: The Standing Committee on Ethics and Professional Responsibility of the American Bar Association (“ABA”) offers [guidance on the obligation to protect client files and property, including in the event of the lawyer’s death, and also provides guidance for a lawyer who assumes responsibility for the client files and property of a deceased lawyer](#).⁶

Outsourcing of Legal Services: The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association (“PREC”) offers guidance on your [responsibilities when you outsource legal services](#).

Ethics Obligations Related to Disasters: The ABA offers guidance on various obligations under the ABA’s Model Rules of Professional Conduct [in the event of a disaster](#) (such as loss of files and other client property, and displaced lawyers).

Other Resources:

Coronavirus-related updates can be found on the following websites:

Federal District Courts:

- [Central District of California](#)
- [Eastern District of California](#)
- [Northern District of California](#)
- [Southern District of California](#)

⁴ Such prohibition does not apply to communications to the “general public.” Rule 7.3, Comment [1].

⁵ Opinion Number 2018-1, which can be accessed on the [San Diego County Bar website](#).

⁶ Free to members of the American Bar Association.

California State Courts:

- [Supreme Court of California](#)
- Superior Courts of California:⁷
 - [Alameda County](#)
 - [Contra Costa County](#)
 - [Los Angeles County](#)
 - [Orange County](#)
 - [Riverside County](#)
 - [Sacramento County](#)
 - [San Bernardino County](#)
 - [San Diego County](#)
 - [San Francisco County](#)
 - [Santa Clara County](#)

Bar Associations:

- [California Lawyers Association](#)
- [State Bar of California](#)
- [Los Angeles County Bar Association](#)
- [Orange County Bar Association](#)
- [San Diego County Bar Association](#)
- [Bar Association of San Francisco](#)

Conclusion

These are trying times. Be safe, be careful, be healthy – and, as always, be ethical.

Neil J Wertlieb, the author of this article, is a Founding Member and Co-Chair of the California Lawyers Association Ethics Committee. Mr. Wertlieb is an experienced transactional lawyer, educator and ethicist, who provides expert witness services in disputes involving business transactions and corporate governance, and in cases involving attorney malpractice and attorney ethics. For additional information, please visit www.WertliebLaw.com. The views expressed herein are his own.

Kevin Mohr is a Professor of Law at Western State College of Law, where he teaches professional responsibility. Professor Mohr is also a Founding Member of the California Lawyers Association Ethics Committee and served as Consultant to the State Bar of California's Special Commission for the Revision of the California Rules of Professional Conduct.

Suzanne Burke Spencer is the managing shareholder of Sall Spencer Callas & Krueger and is also a Founding Member of the California Lawyers Association Ethics Committee.

⁷ Includes counties with populations in excess of 1,000,000.