

Managing Your Law Practice and Avoiding Malpractice in the COVID-19 Environment

Unprecedented disruption caused by COVID-19 has changed the practice of law, at least temporarily, and in many ways these changes have occasioned increased risk of malpractice claims. The pandemic has had an immediate impact on our use of technology and how we interact with clients, colleagues and the courts. Attorneys face dangers exacerbated by the virus yet our ethical obligations and client duties remain. The stock market is dropping and businesses are failing due to an economic downturn, routines are flipped upside down, deadlines are uncertain as previously longstanding rules are changing daily, and increased personal obligations collide and conflict with client obligations. To help our clients meet new challenges in uncertain times, Goldberg Segalla's Management and Professional Liability team has compiled the following risk-management strategies geared toward avoiding and mitigating legal malpractice claims stemming from COVID-19.



AWARENESS AND PLANNING

Successfully avoiding malpractice claims in the COVID-19 environment will require legal practitioners to stay informed of any developments which may impact the wellbeing of clients, colleagues, and their practice; to stay up-to-date with firm policies and procedures; and to stay well—physically, mentally, and emotionally.

Stay informed

An attorney is obligated to provide “competent representation to a client.” *See, ABA Model Rule 1.1: Competence.* This includes the obligation to monitor and comply with new rules arising from COVID-19. Courts and offices may be closed, deadlines are uncertain, calendars and statutes of limitations are in flux. Thus, attorneys must review applicable court orders regarding closures, continuances, and schedule changes and ensure effective communication—taking into account and addressing the increased risks of miscommunication that will arise in remote working scenarios. Missed deadlines are a leading cause of malpractice claims, even under routine circumstances.

On a day-to-day level, attorneys should monitor news, health advisories, and internal firm alerts that could impact client goals or the attorney's plans in accomplishing those goals. Practice-specific information is readily available, whether it be in labor and employment law (e.g., guidelines issued by the EEOC arising from COVID-19), insurance coverage (with articles addressing business interruption coverage arguments), to workers compensation and more. Take the time to find and digest how COVID-19 is impacting your particular practice.

Stay up-to-date with firm documentation

We now know that any firm continuity plan must have a proviso for pandemic response. Law firms should draft or update internal policies—on subjects including such as working remotely, sick leave, and security—to reflect what we have already learned from the pandemic, and to accommodate the realities of social distancing and other disruptions to the rhythms and routines of work. Policies should be transparent and readily available. Be mindful of the need for flexibility and to identify a point-person virtually accessible to employees to address questions or concerns. Likewise, business continuity and succession planning may be necessary to avoid problems down the road.

Stay well

The stresses of the practice of law take a toll on many of our peers, clients, and colleagues. Reportedly, even before the COVID-19 outbreak, one in three practicing attorneys were considered “problem drinkers,” over 25 percent suffered from depression, and nearly 20 percent showed symptoms of anxiety. Many malpractice claims arise from an attorney’s mental health or substance abuse struggles. Such problems may intensify in times of increased stress. Be mindful of the pressures caused by this pandemic and how it has impacted your routine and your state of mind. There are countless resources available to help establish a healthier work-from-home approach and to help prioritize breaks, healthy eating, and social interaction through virtual sources.

Given the uncertainty surrounding COVID-19, and the particularly high contagion rate, attorneys should also plan for the possibility of physical incapacity. Update any contingency and succession plans and review such policies with attorneys and staff. Attorneys are ethically obligated to implement transition plans to account for representation on short notice in the event of unavailability.



OPERATING THE LAW FIRM

An attorney’s obligation to represent their client competently includes technological familiarity. Remote access was already on the rise recently but COVID-19 has forced many employers to implement an immediate work-from-home mandate. Many attorneys had experience working remotely, but most could not have anticipated the immediate global shift to a virtual environment of this scale and with such urgency.

Depending on your practice, your interests, and your firm’s resources, there may be a dramatic difference between the technological assets and capabilities in your traditional office and those available in your home office. When transitioning to remote work, consider the technology necessary to fulfill each step in the life of a matter from conflict check through document retention for closed files. Are you prepared to meet your client’s needs securely from your living room? Technological advancements in equipment and software including paperless systems, collaboration platforms, and presentation tools permit attorneys to perform nearly every aspect of the practice of law from a virtual environment. These tools are fallible, of course, and efficacy will depend on the user’s comfort level, connection speed, and available IT support. Refusing to use modern technology is not an option, though, as doing so could be considered an ethical violation and/or a breach of the standard of care if the client incurs a recoverable harm.

Billing

Given the obvious importance of preparing, issuing, and receiving payment for bills, special attention must be paid to the invoicing process in a remote environment. This may be an opportune time to transition to electronic invoicing and online payment options as opposed to mailed bills. In these uncertain times, firms cannot afford to blunder in the billing process. The economy has taken a hit, and many clients will be struggling financially. Law firms are imposing pay cuts and furloughs to reduce the financial impact of COVID-19. Perhaps this is a necessary consequence of closed courts and fewer lawsuits. Clients may be tightening purse strings and limiting the work available to outside counsel. Thus, depending on the focus of your practice, there simply may be less work to do.

Firm leadership should take the appropriate steps to track and collect payment for the work performed and, as always, be mindful that efforts to collect outstanding client invoices often lead to malpractice claims. Given that certain tasks may take longer when working from home without the conveniences of an office setting, consider whether the attorney may bill for that “extra” time. Monitor employee productivity, both the good and the bad, to obtain a clearer picture of those whose transition to a remote environment may be cumbersome as the inability to conduct business as usual may also result in a reduction in billable hours. Others may seamlessly embrace technology and the adjustment to a new form of client service. Some may hoard work or be more willing to accept assignments that are clearly outside of their practice area, which can increase the likelihood of an error and eventual malpractice claim as evidenced by the increase in legal malpractice claims following the 2008 recession. Oversight and collaboration are key.



CLIENT SERVICE

Client service is paramount. If there ever was a valid excuse for missing a deadline, for neglecting a task, for allowing something to slip through the cracks, it is COVID-19. However, while justifiable by common-sense standards, such mistakes amount to professional negligence. Particularly in a difficult economic environment, clients may be more likely to file suit for such negligence. Attorneys must stick to their ethical obligations. A good approach may be to heed the “four Cs”: communication, confidentiality, civility, and control.

Communication

Effective client communication is one of the fundamental attorney requirements. Also, it is a necessary risk-management tool as miscommunication leads to misunderstanding which leads to unmanaged expectations and, potentially, a malpractice claim. Without the benefit of the traditional face-to-face client meetings, attorneys must use other communication methods and consider a different approach. Undoubtedly your client’s personal or professional needs have changed due to COVID-19. Concern yourself with those changes and be mindful if said changes have impacted the scope of your engagement. Document any change of scope, if necessary.

Attorneys will use email, phone, texting, and video conferencing to communicate with clients in place of in-person meetings. For email correspondence, update the signature block to communicate any pertinent changes and consider the pros and cons of auto-reply/out-of-office messages. When conferring via telephone, be mindful that outgoing client calls may depict a different telephone number than your client is accustomed to and therefore preplanning may be helpful. When necessary, be sure to document pertinent phone and video conference client communications to memorialize the conversation. Texting with clients can be incredibly efficient but is likely not the best option for all client communication; *i.e.*, sensitive, critical correspondence should not be conveyed through text messaging. To be sure, texting with clients should not be considered a viable alternative to e-mail or phone communication, but is available as a simple and efficient way to communicate.

Confidentiality

Attorneys know that they are bound by the obligation to maintain client confidences. This mandate is complicated by the virtual environment where attorneys may struggle to preserve confidentiality, and without the option of face-to-face contact, communication may be confined to less secure technology. For instance, the ease of use of some virtual meeting programs may permit unwelcomed intruders to participate in attorney-client meetings anonymously. Similar to an in-person meeting, attorneys must be mindful of their surroundings when discussing sensitive client information in a virtual setting. Likewise, the types of sloppy email mistakes caused by the unintended use of “reply all” or addressing a message to the wrong recipient which are rare in the office setting may be more likely when working remotely. Be extra vigilant. In terms of record destruction, many firms use shredders or document destruction vendors to retrieve and destroy client documentation and other sensitive information. Hopefully, that same information is not placed in a curbside trashcan outside your home.

Civility

We are all facing incredible uncertainty and we each deal with the impact of COVID-19 differently. To that end, ethics committees such as the Los Angeles County Bar Association have urged “all lawyers to liberally exercise every professional courtesy and/or discretionary authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk.” This is sound advice. Generally, reasonable requests for extensions and other accommodations should be granted under the circumstances. Be sure to obtain client consent, if necessary and/or it is believed that your client would have concerns about extending such courtesies. Expect that the civility you show to your adversary will be reciprocated in your client’s favor.

Control

Attorneys are responsible for monitoring, supervising, and controlling associates, paralegals, and support staff in a virtual environment as they would in a physical office. All personnel must be trained to comply with firm protocol governing the transition to a remote environment. Delegation is sometimes a difficult skill for attorneys, but this will be more important for firm leadership than at any time in recent memory. Frequent inner-firm contact and supervision are absolutely necessary when in-person check-ins are impossible.



SECURITY

Fraudsters and cyber criminals are exploiting COVID-19 to prey on vulnerable attorneys. Already one of the greater malpractice risks facing attorneys, it is crucial that practitioners be wary of the threat of cybercrime in this remote environment. Reportedly, there are thousands of COVID-19 scam sites created daily, many of which target law firms. Attorneys are in the crosshairs of cyber criminals attuned to the industry's remote work transition, and therefore lawyers and law firms must intensify cybersecurity and training.

In addition to software designed to detect and combat cyber risks, firms must fortify the human element of the equation through training and supervision. According to the Department of Homeland Security, cyber criminals target victims by "masquerading as trusted entities" who use COVID-19-themed phishing messages or malicious applications. Cybercriminals deploy a variety of techniques, including phishing and malware distribution via email using the subject of COVID-19 as a lure. Others rely on curiosity and concern surrounding the virus in order to persuade targets to click on a link, download a phishing app, or open a file that contains malware. By way of example, hackers have used "Coronavirus Update" or "2019-nCov: Coronavirus outbreak in your city (Emergency)" to gain entry.

To appear authentic, cyber criminals may alter sender information to appear to come from a trustworthy source, such as the World Health Organization, a physician, or even a leader in your firm advising an employee to open a corrupt attachment. As is always the case, be on the lookout for unusual emails as this may suggest a phishing attack. Many firms have implemented the security change of including an external email notification banner in all email communications to notify users when a communication originated outside the firm.

Practice caution when executing wire transfers, which may be on the rise given the logistical difficulties of submitting physical checks from a remote location. Now is a great time to update passwords. Finally, do not forget about the security of your physical office. Short of Kevin McAllister defending your unoccupied office, ensure that the office is physically locked and secure given the uncertainty of when you will be in a position to return.

THIS TOO SHALL PASS. The risks facing attorneys due to COVID-19 are real but flexibility, caution, and common sense may help to reduce the likelihood of a malpractice claim. Should you have questions about transitioning to a remote environment or about the implications of COVID-19, Goldberg Segalla's Management and Professional Liability practice and our firmwide and interdisciplinary COVID-19 Task Force are available to guide and assist.

For more information on our **COVID-19: Response Teams and Resources**, visit: goldbergsegalla.com/coronavirus

FOR MORE INFORMATION OR TO LEARN HOW OUR TEAMS CAN WORK TOGETHER, CONTACT:

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