

LEGAL ETHICS DURING THE COVID-19 PANDEMIC

The Board of Bar Overseers and the Office of Bar Counsel recognize that the COVID-19 pandemic presents unique challenges to lawyers. In the following FAQs, we attempt to answer some common questions and hopefully alleviate some of the uncertainty and stress during this time. These FAQs are intended as general guidance; they are not legal advice. They do not represent the official position of the BBO.

At the end of these FAQs, we list additional resources for lawyers. The Office of Bar Counsel (OBC) continues to make available its Ethical Hotline every Monday, Wednesday, and Friday between 2:00 p.m. and 4:00 p.m. The number is [617-728-8750](tel:617-728-8750). We also encourage all lawyers to read the other material on the BBO web site concerning our operations during the coronavirus pandemic and to check back regularly. All lawyers are encouraged to communicate frequently with their clients to keep them informed on how the pandemic is impacting their matters

Q1: I am working remotely at home. What should I do to ensure confidentiality?

A: You must take reasonable steps to maintain client confidentiality:

- Don't leave confidential client documents lying around where others can see them.
- If possible, set up a separate work area in your home.
- Conduct conversations (including video-conferencing) with and about clients in a way that maintains client confidentiality.
- Protecting confidential information includes data security. Maintain internet security when communicating by email or otherwise about client matters by using accounts that are password protected. Avoid public or shared wifi networks, unless connecting over VPN. If you do not have a secure private internet connection in your home, you may also be able to use your phone as a hot spot.
- LOMAP has [resources](#) to help lawyers set up technology to work from anywhere and to assist lawyers with data security. The SJC standing committee on lawyer wellbeing has also [established a techline with resources](#).

Q2: I am working from home, but I have only limited technological resources. Do I have a duty to continue to work on my cases?

A: Yes. The Massachusetts Rules of Professional Conduct continue to apply during the COVID-19 pandemic. Please note the following:

- A lack of technology or a lack of facility with technology does not exempt lawyers from their ethical obligations to their clients. Rule 1.1, comment [8], requires lawyers to maintain competence in technology.
- The courts have implemented policies that make it possible for lawyers to continue most aspects of their practice. For example, the SJC has issued orders relating to electronic signing of documents, administering oaths in remote depositions, and obtaining emergency court hearings.
- Lawyers should also monitor the SJC and the state house for action on legislation concerning remote notarizations.
- If you cannot provide competent and diligent representation, you should consider referring matters to other lawyers and assisting your clients in transitioning to other representation.
- For additional obligations when working remotely, see [Q1](#).

Q3: Should I notify my clients if I become ill with COVID-19? If I am not ill, should I prepare for the possibility of illness and being unable to serve my clients?

A: Your duties to communicate with your clients and to provide competent representation require you to notify them if you are unable to continue to diligently work on their files and, to take reasonable steps necessary to protect their interests. Even if you are not ill, especially if you are a small/solo firm, you should put a succession plan in place in the event that you become unavailable, and you should advise a trusted colleague or family member of the plan. Specific questions can be raised with the OBC Ethical Hotline which continues to take calls for ethical questions on Monday, Wednesday and Friday from 2:00 p.m. until 4:00 p.m.

Q4: My colleague is a solo-practitioner and died (or is hospitalized) from COVID-19. What resources are available to assist in closing the practice?

A: If you know of an attorney who has passed away, potentially without a succession plan in place, please contact Michelle R. Yu, Legal Program Manager at the BBO. Her direct dial is [\(617\) 728-8751](tel:6177288751). Our office can discuss next steps and ethical obligations with you and/or the attorney's next of kin.

The SJC has the authority to appoint commissioners to step into the shoes of a deceased attorney for the purpose of protecting the clients in closing the practice. As part of our discussion with you or the deceased attorney's family, we can evaluate whether the BBO's in-house commissioner program should seek a commissioner appointment, given the particular set of circumstances.

Q5: I worked for a law firm. I've been laid off, and I have cases and clients assigned to me. My employer expects me to handle these cases but says I won't get paid for any work I do. What are my ethical duties?

A: Several factors are involved:

- If your law firm accepted a case, then it is the firm's responsibility to represent the client diligently until the representation is properly terminated pursuant to Mass. R. Prof. C. 1.16. See Matter of Kiley, Petitioner, 459 Mass. 645 (2011).
- The firm cannot compel you to continue representing the clients if it no longer employs you. The firm should assign another firm lawyer to the matter, in which case you can file your withdrawal.
- It is up to the client to decide which lawyer s/he wants to handle a case, assuming more than one lawyer is willing to continue the representation.
- If you have filed an appearance in a case, and no other lawyer (whether or not from your firm) has done so, you will have to file a motion to withdraw, with notice to the client and all other parties/counsel.
- Your motion should explain the circumstances of your request to withdraw but should be careful not to disclose information that may prejudice your client's case. In other words, you cannot make a "noisy withdrawal."

Q6: I am a partner in a firm and the firm has decided to close, with lawyers going in different direction. What are my ethical duties?

A: You have several duties:

- You must notify each client of your intent to close the firm so they can find successor counsel. If any lawyers are planning to form their own firm, the new firm and the old firm should send each client a joint letter, advising the client of the change and, giving the client the chance to choose her/his new lawyer. See Meehan v. Shaughnessy, 404 Mass. 419 (1989).
- You must take steps to ensure that your withdrawal will not result in any material harm to the client's interest, such as by attending to any imminent deadlines prior to withdrawing, and advising the client of the statute of

limitations, etc.

- You should contact opposing counsel and obtain extensions for any approaching discovery deadlines, tracking orders, taking of depositions, etc.
- You must promptly turn over the file to the client or successor counsel as instructed.
- You must promptly account for and refund any unearned fees and expense payments.
- You must disburse funds from your IOLTA to the appropriate clients and third parties and close the account.
- You must notify the Registration Department of the BBO of your change of office address.
- You must continue to maintain client files and client confidences pursuant to Mass. R. Prof. C. 1.15A and 1.6(a), respectively.
- If the matter is in litigation and you have filed a court appearance in the matter, you will need permission from the court to withdraw.

Q7: What are my financial obligations to my employees while my office is closed?

A: The ethical rules can apply to conduct outside the attorney-client relationship; misconduct toward employees may constitute a violation of the Rules of Professional Conduct. Therefore:

- You must make payroll tax deposits and retirement plan contributions on behalf of an employee. Failure to do so is a violation of Mass. R. Prof. C. 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation). See Matter of Lussier, 2019 WL 998724 (2019) (indefinite suspension for sole practitioner who used employee's payroll retirement withholdings to pay his personal and business expenses and who failed to make required employer contributions to the employee's IRA).
- The Department of Unemployment Assistance says you must make those payments as well. Please see the [DUA for employers'](#) COVID-19 related FAQs.

Q8: As a result of the COVID-19 crisis, I was unable to retrieve my files or check my mail before losing access to my office. What should I do?

A: Reasonable diligence is contextual and must be considered in light of the COVID-19 pandemic. Practical steps should be taken to obtain necessary information while minimizing the risk of acquiring or transmitting the virus. If

practical, obtain permission to access your office. If this is not feasible, then temporarily forwarding mail to your residence may be considered. Regardless, you should notify your clients how they can reach you.

Q9: I have cases with approaching court-imposed deadlines and cases where the statutes of limitations will soon expire. What should I do since the courts are closed except for emergency matters?

A: Statutes of limitations with respect to filing actions have been extended by the SJC but keep abreast of the SJC's COVID-19 [related orders](#) to avoid missing deadlines. Missing deadlines and statutes of limitations are often the cause of client complaints and can result in attorney discipline as well as malpractice claims. Make sure you are utilizing your calendaring system to keep track of deadlines. If you do not believe you will be able to meet approaching deadlines, contact opposing counsel and the court and take steps to obtain extensions.

Q10: I have an upcoming deposition scheduled in one of my cases. What should I do?

A: In light of the public health concerns regarding the COVID-19 pandemic, as well as actions and orders by government officials, the SJC has issued orders that permit lawyers to take depositions without being in the presence of the deponent, if certain conditions can be met. Lawyers should review the Court's COVID-19 related orders in conjunction with the discovery rules to determine how to proceed in each case. Lawyers should consider the risks and benefits of conducting depositions remotely and consult with their clients about whether that method of discovery will further the clients' objectives.

Q11: I am not an estate planning lawyer but I have a client who wants a simple will done right away because of COVID-19, and I have other clients who are asking for advice on other matters outside of my practice area. I can't find someone else to handle these matters. What can I do ethically?

A: Preparing the will under such exigent circumstances may be permissible under Mass. R. Prof. C. 1.1, comment [3]. It provides as follows: "In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the

circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.” You should also make sure the client understands that you are not an estate planning lawyer and therefore that any will you draft should be reviewed with other, more expert counsel, at the client’s earliest opportunity.

Please note that Massachusetts courts remain open for emergency business and many lawyers and firms are continuing to practice from home, over the phone and internet during the present public health emergency. For these reasons, you should not undertake to perform legal work for which you lack the necessary competence except truly as a last resort. It is strongly recommended that you contact Bar Counsel’s Ethical Hotline for guidance prior to undertaking any representation in which you might not be able to meet the ordinary standard of competence set forth in Mass. R. Prof. C. 1.1.

Q12: I charge my clients an hourly fee and it seems to be taking longer than usual to get things done while working remotely. Can I bill for the additional time it is taking me to complete the work?

A: Mass. R. Prof. C. 1.5(a) prohibits a lawyer from charging clearly excessive fees. For a discussion of clearly excessive fees in the context of an hourly fee arrangement, please refer to [this article](#).

Charging a client your full attorney rate for extra time you expended on a task merely because you were working remotely would be unfair and would likely result in a violation of Rule 1.5(a). The client presumably agreed to pay your hourly rate based on the level of efficiency at which you customarily perform work at your office. If your efficiency suffers because you are working from home, then you should reduce the amount of your bill accordingly.

Q13: The partners in my firm are expecting me to bill the same hours as before the COVID-19 crisis hit and it is causing me a great deal of stress. What can I do?

A: There are things you cannot do to meet these expectations. If possible, speak to the partners about your inability to achieve this goal because of your particular circumstances.

- You may not “pad” your billable hours by increasing the time billed over the time actually spent on a given task.
- You should not bill for duplicate or wasteful tasks or spend more time than necessary on tasks in order to increase your billable hours. See rules 1.5(a)

(excessive fee), 8.4(c) (dishonest and fraudulent activity/misrepresentation) and 8.4(d) (conduct that adversely reflects on fitness to practice law).

- Padding bills results in substantial sanctions: Matter of Barach, 22 Mass. Att'y Disc. R. 43 (2006); Matter of Beaulieu, 29 Mass, Att'y Disc, R.33 (2013), Matter of Broderick, 20 Mass, Att'y Disc. R. 53 (2004).
- You should contact Lawyers Concerned for Lawyers, [\(617\) 482-9600](tel:6174829600), for assistance in dealing with the stress of these times.

Q14: I'm a lawyer and want to engage in work outside the practice of law. What are my ethical duties?

A: It depends on the type of work, but if the work is closely related to the practice of law, or is integrated with the legal practice, then you should review Mass. R. Prof. C. 5.4 and 5.7.

- You will want to have clear and distinctive branding for non-legal services to prevent the formation of an attorney-client relationship in the non-legal work.
- You will also want to be careful to research and comply with applicable laws because the violation of other laws may result in the OBC having to take action.

Q15: I'm dealing with other emergency issues such as domestic violence. The courts are closed, so what can I do?

A: Courts are open for emergency matters and lawyers should consider whether the situation is an emergency. Other resources are also available:

<https://www.lclma.org/covid-19-resources-for-lawyers-law-students-and-judges/>

<https://www.masslomap.org/covid-19-remote-work-disaster-plans-news-in-the-massachusetts-legal-profession/>

<https://www.lclma.org/2020/03/13/covid-19-anxiety-news-in-the-massachusetts-legal-profession/>

Q16: I work in an area of the law where things are changing quickly because of COVID-19. Will I face bar discipline if I act in a manner consistent with the prior laws?

A: Although federal, state and local governments are issuing an array of new laws and regulations you are responsible as a professional to provide legal assistance consistent with all applicable laws and regulations. Otherwise, you may

be liable for malpractice claims and violate your ethical duties. We suggest you consult with specialty bar associations and, research available databases that may help you keep track of changes.

For example, there are recent changes that prevent actions that would result in residential evictions, except in certain emergencies. Residential foreclosures are also halted. Those practicing landlord-tenant law and foreclosure law should be aware of these. You can find out more about that and other COVID-19 related state house actions [here](#).

Q17: I need to confer with my client who is facing criminal charges and in custody. What do I do?

A: The restrictions and limitations imposed by the Department of Corrections and other law enforcement agencies in response to the COVID-19 pandemic will likely affect lawyers' ability to meet several of their ethical obligations including those related to diligence and communications. According to the Massachusetts Department of Corrections FAQs, attorney visits have not been suspended. Lawyers who are having trouble meeting with their clients or, who have other concerns with the Department of Corrections, might consider consulting the Committee for Public Counsel's website or the bar advocate program in their county to get help.

Other resources:

OBC Ethical Hotline: [\(617\) 728-8750](tel:6177288750), Monday, Wednesday and Friday, 2:00-4:00 p.m.

ABA resources free for ABA members:

https://www.americanbar.org/groups/departments_offices/abacle/trending-cle/
<https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem/>

That link includes resources for working remotely:

<https://www.youtube.com/channel/UCvtFMPoLYr-L4FcpFql7gpA>
<https://bostonbarlawyer.org/pages/news>

Several jurisdictions have issued advisory ethical opinions that may provide further guidance:

The Pennsylvania Bar Association, formal opinion 2020-300:
[*PBA Formal Opinion 2020-300 Ethical Considerations for Attorneys Working Remotely.*](#)

From Michigan:

<https://www.michbar.org/News/NewsDetail/nid/5671/Resources-for-Attorneys--FAQ-About-Coronavirus/FAQ-About-COVID-19-from-Michigan-Lawyers>

From Oregon:

<https://www.osbar.org/resources/covid19.html>

Massachusetts Court System COVID-19 orders and guidance:

<https://www.mass.gov/guides/court-system-response-to-covid-19>

The SJC Standing Committee on Lawyer Well-Being has launched a helpline attorneys can call to receive assistance operating a virtual law practice:

TechLine [\(888\) 314-7714](tel:8883147714)

<https://www.lawyerwellbeingma.com/>

Lawyers Concerned for Lawyers and the Law Office Management Assistance Program have developed a comprehensive list of resources for lawyers working remotely. LCL and LOMAP are operating remotely during the pandemic.

<https://www.masslomap.org/covid-19-remote-work-disaster-plans-news-in-the-massachusetts-legal-profession/>

Office of Bar Counsel article on a lawyer's duty of technology competence:

<https://www.massbbo.org/Files?fileName=TechCompetence.pdf>

Boston Bar Association COVID-19 Resource Page:

<http://covid-19.bbablogs.org/resources/>

Massachusetts Bar Association COVID-19 News and Information

<https://www.massbar.org/membership/covid-19-updates>

The following is a link to an article in the *National Law Review* about the Mass. landlord-tenant situation, with hyperlinks of its own:

<https://www.natlawreview.com/article/client-alert-what-landlords-and-tenants-need-to-know-about-massachusetts-house-bill>