

“Ethical Issues Related to Representation Before the Grievance Committee”

I. OVERVIEW

A. Purpose of Attorney Disciplinary Proceedings

The primary purpose of the statutory and regulatory scheme governing the attorney disciplinary process in New York is to preserve the integrity of the bar and to protect the public and the courts in their reliance upon the presumed integrity and responsibility of lawyers (*Matter of Levy*, 37 NY2d 279, 281 (1975), *Matter of Kahn*, 38 AD2d 115, 124 (1st Dep’t 1972), *aff’d* 31 NY2d 752)).

Accordingly, the ultimate issues in any attorney disciplinary matter concern whether the attorney is fit to continue in the profession and whether the attorney’s continued practice would diminish the integrity of the bar. Thus, the purpose of attorney disciplinary proceedings is not the punishment of attorneys. (*Matter of Cellino*, 21 A.D.3d 229 (4th Dep’t 2005); American Bar Association Standards for Imposing Lawyer Sanctions (“ABA Standards”), Standard 1.1).

B. Legal Authority

In New York, the legal standards concerning the admission to practice, the conduct of attorneys, and the discipline of attorneys are primarily contained in the following:

- 1) Judiciary Law § 90 (granting to the Appellate Division general authority over the admission and discipline of attorneys);
- 2) Various provisions of article 15 of the Judiciary Law governing admission to the practice of law, biennial registration of attorneys, and certain conduct of attorneys (e.g. Judiciary Law § 460 [bar examination]; § 468-a [biennial registration of attorneys]; § 480 [unlawful to enter a hospital to negotiate a settlement or to obtain a general release or statement in connection with the personal injuries of a person confined to the hospital]);
- 3) The rules of the Appellate Division, which govern the procedures for attorney disciplinary matters and incorporate by reference the Rules of Professional Conduct (22 NYCRR 1200.0) (“Rules”); and

- 4) Case law (primarily the published decisions of the Appellate Division and Court of Appeals concerning attorney disciplinary proceedings).

Inasmuch as Judiciary Law § 90 confers upon the Appellate Division the general authority to regulate the conduct of attorneys and to administer the process by which attorneys are disciplined for misconduct, each Department of the Appellate Division has created a grievance committee or committees to investigate complaints against attorneys and, when warranted, to file in the Appellate Division charges of professional misconduct against an attorney.

The rules that govern the disciplinary process include part 1240 of the Rules of the Appellate Division, All Departments (22 NYCRR) and part 1020 of the Rules of the Appellate Division, Fourth Department (22 NYCRR).

The primary source of the ethical standards enforced by New York's attorney disciplinary system is the Rules, which can be considered the "black letter law." The Rules are adopted by the Appellate Divisions, most often based on text suggested by the New York State Bar Association ("NYSBA"). In interpreting the Rules, it is helpful to refer to the Comments, which are explanatory notes following each Rule. The Comments are written by the NYSBA, and not adopted by the Appellate Divisions. Also helpful are ethics opinions issued by various bar associations ethics committees.

C. Proceedings before the Grievance Committees

1. Complaint - proceedings before a grievance committee are generally instituted when a client or some other witness to alleged misconduct (*e.g.* judge, opposing counsel) files a complaint against an attorney.

2. Intake - the grievance committees and their counsel are authorized to perform an initial investigation and to evaluate complaints to determine an appropriate course of initial action, including dismissal of the complaint, referral to another suitable forum (*e.g.*, fee arbitration or bar association committee), or further investigation by the committee.

3. Investigation - if further investigation by a committee is warranted, counsel to the committee may seek information by the means set forth in the rules of the Court, including requesting that the respondent produce documents or appear for an examination, interviewing

witnesses, or requesting that the Court issue a subpoena for records or testimony of the respondent or any other party (22 NYCRR 1240.7 [b]).

4. Duty to cooperate - attorneys are generally obligated to cooperate in an investigation conducted by a grievance committee.

5. Disposition - after conducting an investigation, a committee may take any appropriate action, including dismissal of the complaint, referral to another forum, make an application into diversion program, issue a written Admonition, issuance of a private Letter of Advisement, or the filing of formal charges in the Appellate Division (22 NYCRR 1240.7 [d]).

D. Proceedings in the Appellate Division

1. Petition - formal charges alleging that an attorney has engaged in professional misconduct (*e.g.* a violation of the Rules of Professional Conduct) are generally contained in a petition that is filed in the Appellate Division by a grievance committee (22 NYCRR 1240.8).

2. Answer - within 20 days of service of the petition, the respondent must file with the Appellate Division an original verified answer to the petition.

3. CPLR pleading rules generally apply, and the respondent must admit or deny the truth of each allegation in the petition, or deny knowledge or information sufficient to form a belief as to the truth of the allegation.

4. Issues of fact - issues of fact raised by the pleadings are generally referred to a referee for a hearing.

5. Discovery - formal discovery by the parties (other than notices to admit) generally must be approved by the Court or the referee.

6. Hearing - the referee hears witness testimony and considers other proof offered by the parties. Following the hearing, the parties may submit proposed findings to the referee, who thereafter files a report with the Court. The respondent may offer matters in mitigation during the hearing.

7. Appearance - after the referee files a report with the Court, the matter is scheduled for an appearance before the Appellate Division for oral argument of any motions directed to the report and to afford respondent an opportunity to be heard in mitigation.

II. RECENT DEVELOPMENTS

A. Report of the Commission on Statewide Attorney Discipline (2015)

The Commission on Statewide Attorney Discipline was formed in early 2015 by Chief Judge Lipmann to examine a number of issues, including the following: 1) whether New York should abandon the Department-based approach to the attorney disciplinary process and adopt a statewide body to oversee attorney discipline; 2) whether attorney disciplinary proceedings should be more open to the public; and 3) whether there is unreasonable delay in the disciplinary process.

The Commission ultimately concluded that, absent substantial legislative overhaul of Judiciary Law § 90, authority over the disciplinary process must continue to reside with the individual Departments of the Appellate Division. However, the Commission recommended that the Departments adopt uniform rules for disciplinary proceedings before the grievance committees and the Departments of the Appellate Division.

The report of the Commission on Statewide Attorney Discipline may be viewed at the following link: www.nycourts.gov/attorneys/discipline/Documents/AttyDiscFINAL9-24.pdf

B. Appellate Division Rules for Attorney Disciplinary Matters (2016)

In response to the report of the Commission on Statewide Attorney Discipline, the four Departments of the Appellate Division collaborated to draft statewide rules governing the disciplinary process in New York. Proposed rules were released for public comment in November 2015, and the Rules for Attorney Disciplinary Matters in the Appellate Division, All Departments (22 NYCRR part 1240) became effective October 1, 2016. Those rules address many of the recommendations of the Commission on Statewide Attorney Discipline, including:

- the adoption of statewide procedures for investigations and proceedings before the grievance committees (22 NYCRR 1240.7);
- the adoption of a statewide rule allowing an attorney who is suffering from substance abuse or mental health issues to obtain a stay of a disciplinary proceeding to allow the attorney seek treatment (22 NYCRR 1240.11);

- the adoption of rules governing disclosure during the disciplinary process, including mandatory disclosure of certain information at the grievance committee stage and after charges are filed in the Appellate Division (22 NYCRR 1240.7 [b], [c] [disclosure while the matter is pending before a grievance committee]; 22 NYCRR 1240.8 [a] [3], [4] [disclosure while the matter is pending before the Appellate Division]);
- the adoption of rules allowing an attorney to request that the Appellate Division review certain adverse actions that have been taken by a grievance committee, such as the issuance of a letter of advisement (formerly letter of caution) or letter of admonition (22 NYCRR 1240.7 [e]); and
- the adoption of rules allowing the entry of an order of discipline on consent when the respondent and committee stipulate to the relevant facts and agree on an appropriate sanction (22 NYCRR 1240.8 [a] [5]).

The rules governing attorney disciplinary matters before the grievance committees and in the Appellate Division may be viewed at the following link:

<http://www.nycourts.gov/courts/ad4/Clerk/AttyMtrrs/atty-discip.html>

C. Recent Amendments to the Rules of Professional Conduct

Effective June 18, 2020, amendments were enacted to Rule 1.8(e) and Rule 7.5.

Rule 1.8(e) was amended in response to the COVID-19 pandemic. The prior Rule prohibits lawyers from advancing any funds to or on behalf of a client other than court costs and expenses of litigation. The amended Rule allows Legal Services Organizations and Pro Bono attorneys to provide financial assistance to low income clients including basic living expenses. It is referred to as a humanitarian exception.

Rule 7.5, entitled “Professional Notices, Letterheads and Signs,” is one of the advertising rules. In response to prior and anticipated First Amendment challenges, the Rule has been

amended. The old Rule prohibited lawyers from practicing under a trade name. The new Rule allows trade names, but there are some limitations.

III. TOPICS OF INTEREST

A. Most Common Disciplinary Charges - Neglect and Trust Account Violations

Neglect. Rules 1.3 and 1.4 provide that an attorney must act with diligence and promptness and keep clients informed regarding their legal matters.

Rule 1.3 (a) – a lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.3 (b) – a lawyer shall not neglect a legal matter entrusted to him.

Rule 1.4 (a) (3) – a lawyer must keep clients reasonably informed about the status of their matters.

Rule 1.4 (a) (4) – a lawyer must comply in a prompt manner with a client’s reasonable requests for information.

Trust Account. Rule 1.15 generally provides that an attorney must preserve and safeguard funds or property belonging to others and must keep records of transactions involving such funds and property.

Rule 1.15 (a) – prohibits misappropriation of funds or property belonging to another person where the lawyer’s possession of such funds or property is incidental to the lawyer’s practice of law; the rule also prohibits commingling of such funds with the lawyer’s personal funds.

Rule 1.15 (b) – sets forth general requirement that a lawyer maintain an attorney special account or escrow account for all funds belonging to another person that come into the lawyer’s possession incident to the lawyer’s practice of law.

Rule 1.15 (c) – a lawyer must notify third parties when the lawyer receives funds or property in which the third party has an interest, identify and label property of another for safekeeping, maintain complete records of all funds or other property of third parties and account to those parties, and pay or deliver all property as requested by a person who is entitled to receive such funds or property.

Rule 1.15 (d) – a lawyer must maintain for seven years certain records of transactions involving funds or property belonging to another person. Required records include records of all deposits and withdrawals from a special account or any other account that concerns the lawyer’s practice of law; records of all transactions in a special account; copies of retainer agreements; copies of statements to clients concerning transactions involving the client’s property; copies of bills rendered to clients; and copies of all checkbooks, check stubs, bank statements, and pre-numbered cancelled checks.

Rule 1.15 (e) – requires all special account withdrawals to be payable to a named payee and not to cash, and requires that a signatory on a special account be a lawyer admitted to practice in New York.

Rule 1.15 (i) – requires a lawyer to produce the aforementioned records in response to a notice or subpoena issued in connection with a disciplinary complaint.

Rule 1.15 (j) – provides that a lawyer who fails to make and keep the aforementioned records, or who fails to produce them in connection with a disciplinary complaint, shall be guilty of misconduct and be the subject of a disciplinary proceedings.

B. Common Mitigating or Aggravating Factors

Although the disciplinary rule violations alleged in a petition generally frame the issues for determination by the Appellate Division, the Court in determining an appropriate sanction may additionally consider relevant aggravating or mitigating factors, or “proof which is reasonably relevant to the ultimate issues – the character of the offense committed and the nature of the penalty, if any, appropriately to be imposed” (*Matter of Levy*, 37 NY2d 279, 281-282 [1975]). By rule, “the parties may cite any relevant factor, including but not limited to the nature of the misconduct, aggravating and mitigating circumstances, the parties’ contentions regarding the appropriate sanction under the [ABA Standards], and applicable case law and precedent.” 22 NYCRR § 1240.8(b)(2).

Mitigating factors that have been recognized by the Court include the following: remorse for the misconduct; misconduct that was unintentional or the result of inattentiveness; lack of intent to profit or gain from the misconduct; aberrational misconduct while under extreme mental

stress; personal health, psychological or family difficulties; any steps taken to correct harm caused by the misconduct or to prevent future misconduct.

Aggravating factors that have been recognized by the Court include the following: the respondent's disciplinary history, particularly if that history involves similar misconduct; intentional, knowing or wilful misconduct; misconduct for personal gain or that causes harm to another; an attempt to conceal the misconduct; a continuing or lengthy course of misconduct; failure to participate in the disciplinary process.

C. Statute of Limitations

"[N]either statute of limitations nor the doctrine of laches applies to disciplinary proceedings" (*Matter of O'Hara*, 63 AD2d 500, 503 [1st Dep't 1978]; see also *Matter of Mix*, 249 AD 442, 292 [4th Dep't 1937], *rev'd on other grounds*, 274 NY 183 [1937]). The fact that the statute of limitations may have expired with respect to any civil claim available to the client does not operate as a bar to an attorney disciplinary proceeding (see *Matter of Cohalan*, 241 AD17 [1st Dep't 1934]).

D. Duty to Supervise Employees

Rule 5.1 provides that a law firm and any lawyer with "management responsibility" in the firm "shall make reasonable efforts" to ensure that all lawyers in the firm conform their conduct to comply with the disciplinary rules.

Rule 5.3 provides that a lawyer must supervise the work of a non-lawyer who performs work for the firm.

A lawyer who fails to supervise another lawyer or a non-lawyer employed by the lawyer may, under certain circumstances, be guilty of misconduct for the misconduct of the other lawyer or employee. Such circumstances include the following:

- 1) the lawyer directs or ratifies the conduct of the other lawyer or non-lawyer employee (see RPC 5.1 [d] [1]; RPC 5.3 [b] [1]); or
- 2) the lawyer is a partner or has management responsibility in the law firm, or has direct supervisory authority over the other lawyer, and

- (i) the lawyer knows of the conduct at a time when its consequences could be prevented, but fails to take remedial action, or
- (ii) in the exercise of reasonable supervision, the lawyer should have known of the conduct such that remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated (*see* RPC 5.1 [d] [2]; RPC 5.3 [b] [2]).

Example case: *Matter of Galasso* (19 NY3d 688 [2012])

The Second Department suspended attorney Peter Galasso based on a finding that he had failed to properly supervise his brother, Anthony Galasso, who was the law firm's bookkeeper and office manager. Over several years, Anthony had devised a relatively complex scheme whereby he embezzled over \$5 million in client funds using fabricated banking statements, secret bank accounts, and a post office box to which only Anthony had access. It was undisputed that the respondent had no knowledge of the thefts committed by his brother. The Second Department determined that suspension for a period of two years was an appropriate sanction in view of the "actual and substantial harm" to clients caused by the respondent's failure to maintain appropriate vigilance over the firm's bank accounts (*see Matter of Galasso*, 94 AD3d 30 [2d Dep't 2012]).

On appeal, the Court of Appeals modified in part, but upheld the determination of the Second Department that the respondent had engaged in misconduct by failing to supervise his brother (*Matter of Galasso*, 19 NY3d 688, 694 [2012]):

"Respondent owed his clients a high degree of vigilance to ensure that the funds they had entrusted to him in his fiduciary capacity were returned to them upon request. To that end, implementation of any of the basic measures respondent has since adopted – personal review of the bank statements, personal contact with the bank and improved oversight of the firm's books and records – likely would have mitigated, if not avoided, the losses.

"Here, although respondent himself did not steal the money and his conduct was not venal, his acts in setting in place the firm's procedures, as well as his ensuing omissions, permitted his employee to do so. Moreover, [client] funds were used for the benefit of respondent and the firm. That respondent has acted without venality can be a factor considered in mitigation, but is not probative of whether he has failed to preserve client funds."

E. Representation by Counsel

Disciplinary proceedings are special civil proceedings over which the Appellate Division has original jurisdiction. The Grievance Committee is the petitioner and the attorney is the respondent. The Grievance Committee is represented by staff counsel. Respondent attorneys are entitled to be represented by counsel. In my opinion, attorneys who represent themselves are at a great disadvantage. The substantive and procedural rules are unique, and few attorneys have significant experience in this area. In addition, the attorney who is the subject of allegations of misconduct may have difficulty being objective in evaluating the allegations, investigating the underlying facts, and determining an appropriate course of action in response to the charges.

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Appendix

1. Vilardo, L.J. and Doyle, V. E. (Summer, 2006). Representing Lawyers. *Litigation Magazine*.
2. American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Opinion 482 (Ethical Obligations Related to Disasters) (2018).
3. Pennsylvania Bar Association, Committee on Legal Ethics and Professional Responsibility, Formal Opinion 2020-300 (Ethical Obligations for Lawyers Working Remotely) (2020).

APPENDIX A

REPRESENTING LAWYERS

by Lawrence J. Vilardo and Vincent E. Doyle III¹

There is something different about representing a lawyer, especially when the lawyer's license is on the line. It's not just that your client can evaluate and second guess your every move: Lots of bright clients -- lawyers and non-lawyers alike -- do that. It's not just that the stakes are high: There often is more at stake in a criminal prosecution. And it's certainly not that you may know, or even are friends with, your client: That happens all the time.

Representing a lawyer whose license is on the line is different because it somehow seems more personal. You cannot help but see some reflection of yourself when looking at your client. You practice the same profession, speak the same language, and share the same professional associations. You likely have experienced some of the pressures and stresses that may have contributed to the problems your client now faces. And sometimes, when your client's misstep was a mistake and not an act of dishonesty or malice, you can't help but think "there but for the grace of God"

For that reason, your first challenge when representing a fellow lawyer in a grievance proceeding is to

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take emotion, kinship and professional association out of the picture. You need to be cool, calculated, and objective when you counsel your client. After all, that is why the client hired you instead of representing himself. And if you let your personal identification with the client color your decisions, then your client will be almost as poorly served as the lawyer who chooses to represent himself.

And make no mistake about it -- a lawyer facing a disciplinary investigation or proceeding needs to be represented by a lawyer outside his own firm. Disciplinary proceedings cause a great deal of anxiety. Added to the stress of maintaining an active practice, the strain can tax the most able practitioner. Even if he could make objective assessments, the lawyer facing disciplinary charges will be too emotionally drained to provide himself even minimally effective representation. With great sadness, we read the reported disciplinary decisions released every term from our intermediate appellate court, the tribunal that decides disciplinary matters, and I see the names of lawyers disbarred or disciplined -- many of them self-represented. We cannot help but think that with objective, competent representation, many of those lawyers would have had better outcomes.

In fact, the best time for lawyers to seek ethical advice from outside counsel is when a significant ethical issue first arises. If you have a question about whether a certain course of action is ethical, talk to another attorney

about it. If it involves a matter of fees, finances or other self-interest or your partners, seek out a respected attorney outside your firm. If the issue is particularly thorny or complicated, you may want to encourage your attorney to seek the advice of an ethics expert, perhaps a law professor. And some bar associations make advice on ethics available upon request. Foresight when the issue arises may save time, money and worry later on.

If your client was not savvy enough to seek your advice early on, or if the authorities start an investigation despite your best advice, your work will begin with the very first contact with the disciplinary authorities. In Western New York, where I practice, attorney disciplinary matters are initially handled by an Attorney Grievance Committee. The committee itself is composed of a couple dozen lawyers and non-lawyers. The investigation and prosecution of individual cases is handled by the committee's Office of Staff Counsel.

Most often, the first notice of an investigation will be a letter of inquiry from staff counsel to the attorney under investigation. The letter will highlight the issue, often attaching a copy of the complaint or other document that triggered the investigation. Staff counsel's letter will ask for the attorney's written response, which most often will be shared with the complainant.

Because of the informality of this first contact, lawyers sometimes will prepare their own response. For all

but the simplest and most meritless complaints, however, that is a mistake. Lawyers facing allegations of misconduct typically react emotionally -- either with angry indignation or resigned remorse. Either way, these emotions color their response to the inquiry. That may mean an ad hominem attack on the complainant or a concocted defense inconsistent with the facts. Sometimes it results in a confession, as the lawyer looks to catharsis as a cure for what ails her. Such ill-advised early actions will set the disciplinary process on the wrong track -- a mistake from which it is nearly impossible to recover.

Worse, for one reason or another many lawyers receiving inquiries simply ignore them. Failing to respond is certain to draw the ire of the disciplinary authorities. Moreover, court rules and ethical precepts obligate a lawyer to cooperate fully and forthrightly with the disciplinary investigation. Failing to respond to an inquiry can, and likely will, result in a separate charge of misconduct, regardless of the merit of the complaint being investigated.

A lawyer receiving a disciplinary inquiry must be counseled to remain calm and trust his counsel to respond appropriately. Tell your client that many inquiries are resolved without a finding of misconduct, and that, in most jurisdictions, the investigation remains private and confidential until and unless charges are brought. If the inquiry was triggered by a complaint from some individual,

caution the lawyer not to contact that individual directly to discuss the complaint or seek to have it "dropped." Explain that any such communication could be misconstrued by the complainant and result in additional allegations of misconduct. If the complainant is a current client of the lawyer, remind the lawyer that the filing of the complaint does not constitute an automatic discharge of the lawyer by the client. Although the complaint may create a conflict of interest, the lawyer may be relieved of her responsibility to continue representing the client only if she is discharged or withdraws -- with the permission of the court, if necessary.

Of course, your client should tell you all the relevant facts and circumstances to help you respond to the inquiry. But do not simply take your client's word for it. Memories fade and sometimes are colored by what we want to recall. Be sure to request all pertinent records from your client, even if they have to be ordered from storage. Where appropriate, interview others with knowledge of the relevant events. Simply relying on your client's knowledge or memory for important assertions that you make may well have you backpeddling later on.

One case we handled a while back arose when a lawyer who was personally counsel to a party in litigation accepted employment at a firm representing an adverse party. One of the questions raised by the complainant was when the attorney first had contact with the firm to which he eventually moved.

The complainant charged that the attorney had begun to pursue employment at the new firm while her matter was still pending; the attorney said that the first contact did not occur until well after that date. In our response to an inquiry by the Grievance Committee, we related what the attorney insisted was true. But further into the investigation, we found a letter enclosing the attorney's resume that was written months before. Although the timing was peripheral to the real issue, and although employment discussions did not begin in earnest until well after that, we were forced to admit to the Grievance Committee that we were mistaken in our initial representation. Not only did that focus attention on what should have been something trivial, but it created suspicion that infected the entire investigation. All of that could have been avoided had we insisted that my client provide me with all relevant documents before we submitted the initial response.

Your response should provide specific answers to specific questions or requests made in the inquiry. Do not ignore issues raised in the inquiry, even if there are no good answers.

Indeed, when it is clear that your lawyer-client has engaged in misconduct, it often is appropriate to begin accepting responsibility with the very first response. Unlike most litigation where defense counsel sets up as many hurdles as possible and forces the opposition to overcome those

hurdles, the best strategy in the attorney grievance process often is a candid acknowledgment of a mistake or wrongdoing. Especially if the grievance involves inadvertence as opposed to intentional deceit or dishonesty, now is the time to admit it. This is not a criminal case where the defendant can invoke his right to remain silent and put the prosecution to its proof. In fact, the failure to provide the Grievance Committee with information or respond to its questions may itself be misconduct. The truth is likely -- if not certain -- to come out. And if that truth constitutes professional misconduct, now is the best time for the lawyer to fall on her sword and ask for understanding and mercy.

If the reason behind the grievance involves some psychiatric or substance-related problem, you should encourage your client to -- no, you should insist that your client -- get immediate help. Not only is that probably the best thing for the client to do for her own well-being, but it is likely the best thing to do for strategic reasons as well. One of the ironies of our system is that even serious transgressions involving dishonesty and deception often end up with better results when they are caused by problems of drug or alcohol abuse. In such cases, you can point to a reason why an otherwise moral, competent, and upstanding attorney engaged in aberrant behavior, and you can offer a way to prevent recurrences in the future. What is more, showing a court that

your client took steps to correct the problem before she was forced to do so will score points in her favor.

Along the same lines, if your client tells you that he has dipped his hand into the clients' cookie jar and has co-mingled client funds with his own, the best advice you can give him is to correct the problem immediately. If he has to borrow money to pay the clients back, so be it. But it is always better to be able to show that the problem was corrected before the attorney got caught -- or at least before he was forced to make the correction.

In fact, by having your client correct correctable mistakes as your first item of business, you will gain credibility with your local grievance committee in a way that will inure to your clients' benefit. I do that regularly, and I therefore can make pitches like this one:

As soon as the client came to me, I made sure that she immediately repaid her clients and sought medical attention for her substance abuse. I did that because I thought that this was the best way to serve my client by putting her in a position to get the best possible result. If you prove me wrong by forcing a punitive result despite my client's immediate efforts to correct things, then you give me no reason to give that advice to the next client who comes into my office. After all, the Disciplinary Rules demand that my first duty is to represent my client zealously, and it is in both of our best interests if that zealous representation includes advice to correct correctable problems.

Of course, not all complaints have merit, and there are many situations in which you will have legitimate factual or legal defenses. In those cases, your letter response will be akin to a brief, trying to persuade staff counsel that the investigation should end now with a closed file. If that is your strategy, give the same time and attention to that letter that you would to a brief. Research the applicable code or rules of professional responsibility, any case law, and any bar association or other ethics opinions carefully and completely. Consider consulting with experts in legal ethics and obtaining opinions from law professors or other ethics gurus on the relevant ethical issues. Attach those opinions to your response.

When staff counsel receives the response, she usually sends it to the complainant and asks for a reply. Sometimes, the reply results in more letters from staff counsel and further responses from you. Sometimes, staff counsel will close the file without any adverse action. And sometimes, staff counsel takes the case to the next stage of the process. Where we practice, that means a review and evaluation of the case by staff counsel with her boss, the chief counsel, and with the chair of the local grievance committee.

At least where we practice, before formal proceedings can be initiated, you and your client will get a

chance to appear and make your case before the Attorney Grievance Committee itself. A few weeks before the appearance is scheduled, you and your client will receive a report from staff counsel outlining the professional misconduct that counsel believes your client has committed and citing chapter and verse of the Disciplinary Rules that have allegedly been violated. You have a chance to respond in writing and in person, and it is most often in your client's best interest to take advantage of both.

Your written response can take any of a variety of approaches. Again, if you recognize that your client has made a mistake, it is often better to look for mercy than to try to come up with some sort of legalistic justification that only a lawyer could concoct. Likewise, at the appearance before the Committee, a sincere recognition of the mistake and apology from your client can go a long way.

If your strategy is an admission and an apology, the Committee will want to hear from your client, not from you. The reason is no mystery. Perhaps you have served on such a committee; if not, put yourself in the shoes of one of its members. Would you rather hear a lawyer admit a mistake and apologize for it, willing to take his lumps? Or would you rather hear a mouthpiece apologize for the client? Prepare the client for the presentation, and let the client make the pitch. Jump in only if you have to or if there is some reason that you can make an observation that the client cannot.

For example, sometimes a client with an unblemished record will be particularly distraught about a violation. In such cases, after the client has admitted his mistake and apologized for it, you can point out the client's exemplary history and observe that the client's integrity has caused him to beat himself up because of this transgression. Under such circumstances, seeing the client acknowledge a mistake and then apologize and punish himself for it may be enough for the Committee. They may authorize a favorable disposition short of formal charges.

There likely are a number of ways in which the Committee and its counsel may dispose of a complaint short of formal disciplinary proceedings. Where we practice, complaints can be dismissed, referred to mediation, diverted, or disposed of by letters of caution or admonition. All of these dispositions are confidential and most are considered "non-disciplinary" in nature. Consider tailoring your presentation to the Committee to emphasize why one of these dispositions is more appropriate than the initiation of more formal disciplinary proceedings.

But your best efforts are not always good enough. Perhaps your client has a record of past transgressions, or perhaps this one is so serious that the Committee decides that formal proceedings are warranted. Under those circumstances, you will be faced with litigation more akin to what we are accustomed to in our civil and criminal courts. Your

litigator's instincts will serve you well in making most decisions.

But there are still some differences. For example, while there may well be a hearing before a referee who will report findings of fact and conclusions of law to the court charged with attorney discipline, that hearing need not always involve determining the truth of the allegations. Just as you may have encouraged your client to fall on his sword at the early stages of the investigation, so it is sometimes best to admit the allegations at the hearing stage and offer proof only of mitigating circumstances. That approach can have some advantages.

For example, you gain credibility with the referee - - and eventually with the court -- by candidly owning up to the facts and not wasting everyone's time by forcing the other side to prove them. In addition, you should be able to negotiate the stipulated findings of fact with opposing counsel. In fact, there should be some give and take if you are willing to admit facts that might give rise to a finding of professional misconduct. Perhaps you can keep the worst facts -- or at least some of the bad ones -- out of the referee's report and recommendation. Or perhaps you can craft language that puts those facts in a more sympathetic light for your client.

If your client has a drug or alcohol problem that affected his ability to function, then opposing counsel should

be willing to link allegations of client neglect to that problem. If your problem has a gambling addiction that was fed by dipping into client funds, then you may be able to draft stipulated admissions that convey both the addiction and the desperate straits in which that addiction placed your client. Like all negotiations, there will be some tough calls, and you may have to concede some allegations that you would prefer not to. But working out stipulations may well be your best -- or only -- option when there is no doubt that your client violated a disciplinary rule.

Stipulating to the allegations does not always mean that there will not be a hearing. In fact, although mitigating factors can sometimes be the basis for a stipulation as well, it often is better to have the referee -- or even the court, if your jurisdiction permits it -- hear live witnesses speak on the attorney's behalf. But be sure that your witnesses have something significant to say.

If your client is an alcoholic, for example, it may make sense to have his AA sponsor, his physician, or a counselor testify about the devastating impact that this disease has had on your client's life and professional practice. If your client is addicted to gambling, you may want to call an expert to testify about gambling addictions and then tie that in by calling your client's treatment provider. Call witnesses who can explain the efforts your

client has made to address his problem and the steps that he has taken to ensure that it will not recur.

Try to find judges who will testify about the fine representation your client gave her clients at trials and other proceedings over which they presided. Find other lawyers who will testify to positive experiences in negotiating deals or litigating with your client. Find clients who are satisfied with your client's skill and especially her integrity. Find business associates, friends, and family who can help cast the transgressions as aberrations from what was otherwise an exemplary professional life.

The final step in the process is often an appearance before the court charged with attorney discipline. In Western New York, that means an appearance before a panel of five judges on our local intermediate appellate court, often firing questions like those in an appeal. But unlike an appeal, the questions are fired at both the lawyer and the client. And as was the case before the Grievance Committee, the questioners most often want to hear what the client has to say.

Prepare yourself, and your client, just as you would prepare for an appeal. Write a script that includes a defense or an apology, depending on your strategy, but be prepared to supplement that script. In my experience, the court will often hear what you and your client have to say and ask questions only when you are finished. Prepare for those questions by anticipating them. Think of the hardest

questions that the court can possibly pose to you and come up with the best answers that you can.

The strategy for answering questions during the appearance is no different than the strategy of answering questions on appeal. Answer each question when it is asked. Don't skirt the issue. Respond directly and politely. Don't interrupt the questioner.

If the question is posed to your client, let your client answer. Of course, if he is truly fumbling the response, interrupting him may be your only alternative. But don't do that unless you have to. Let your client finish, and then offer your own observations.

If the court appears angry with your client and scolds him, don't try to argue or offer excuses. Sometimes, a good scolding is intended to instill the requisite amount of fear when the court knows that it will impose a somewhat lenient punishment. In appellate arguments, judges often try to hide any predisposition about the case. In disciplinary proceedings, on the other hand, judges often wear their feelings on their sleeves. Listen to and acknowledge what each judge has to say. Prepare your client to show that he understands and accepts the court's admonitions.

Representing a lawyer in an attorney grievance proceeding may be one small part of your practice, but it is never just another case. The professional future of one of your colleagues may be on the line, and that will

undoubtedly hit close to home. Keep your wits about you, and you may be able to steer your client through the process. And that may give you the singular pleasure of some day again seeing him in court -- on the professional side of the bar.

APPENDIX B

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 482

September 19, 2018

Ethical Obligations Related to Disasters

The Rules of Professional Conduct apply to lawyers affected by disasters. Model Rule 1.4 (communication) requires lawyers to take reasonable steps to communicate with clients after a disaster. Model Rule 1.1 (competence) requires lawyers to develop sufficient competence in technology to meet their obligations under the Rules after a disaster. Model Rule 1.15 (safekeeping property) requires lawyers to protect trust accounts, documents and property the lawyer is holding for clients or third parties. Model Rule 5.5 (multijurisdictional practice) limits practice by lawyers displaced by a disaster. Model Rules 7.1 through 7.3 limit lawyers' advertising directed to and solicitation of disaster victims. By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster.

Introduction¹

Recent large-scale disasters highlight the need for lawyers to understand their ethical responsibilities when those events occur. Extreme weather events such as hurricanes, floods, tornadoes, and fires have the potential to destroy property or cause the long-term loss of power. Lawyers have an ethical obligation to implement reasonable measures to safeguard property and funds they hold for clients or third parties, prepare for business interruption, and keep clients informed about how to contact the lawyers (or their successor counsel). Lawyers also must follow the advertising rules if soliciting victims affected by a disaster.

Much information is available to lawyers about disaster preparedness. The American Bar Association has a committee devoted solely to the topic and provides helpful resources on its website.² These resources include practical advice on (i) obtaining insurance, (ii) types and methods of information retention, and (iii) steps to take immediately after a disaster to assess damage and rebuild. Lawyers should review these and other resources and take reasonable steps

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

² ABA COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS, <https://www.americanbar.org/groups/committees/disaster.html> (last visited Sept. 6, 2018). ABA Committee on Disaster Response and Preparedness, *Surviving a Disaster A Lawyer's Guide* (Aug. 2011), https://www.americanbar.org/content/dam/aba/events/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning_authcheckdam.pdf.

to prepare for a disaster before one strikes the communities in which they practice. Lawyers should also review their disaster preparedness plans when a disaster threatens. Included within disaster planning, and of particular importance for sole practitioners, is succession planning so that clients and others know where to turn if a lawyer dies, is incapacitated, or is displaced by a disaster.

Despite the wealth of information available on preparing for a disaster and on the practical steps a lawyer should take to preserve the lawyers' and the clients' property and interests after a disaster, there is a dearth of guidance on a lawyer's ethical responsibilities (i) when a disaster threatens, and (ii) after a disaster occurs.³ This opinion addresses the lawyers' obligations in these circumstances.⁴

A. Communication

Model Rule 1.4 requires lawyers to communicate with clients.⁵ One of the early steps lawyers will have to take after a disaster is determining the available methods to communicate with clients. To be able to reach clients following a disaster, lawyers should maintain, or be able

³ There are three ethics opinions from state bars on a lawyer's obligations after a disaster: N.Y. City Bar Ass'n Formal Op. 2015-6 (2015) advises lawyers to notify clients of destruction of client files in a disaster if the destroyed documents have intrinsic value (such as a will) or if the lawyer knows the client may need the documents; La. Advisory Op. 05-RPCC-005 (2005) advises lawyers on providing pro bono assistance through a hotline or both; and State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) advises lawyers not to participate in a mass disaster victims chat room because it is intrusive, but not because it is prohibited as in-person solicitation.

⁴ This opinion focuses primarily on the obligations of managers and supervisors within the meaning of Rule 5.1, recognizing that lawyers practice in a variety of contexts, including solo offices, small firms, large firms, government agencies and corporate offices. Subordinate lawyers may rely on the reasonable decisions of managers and supervisors on how to address the ethical obligations this opinion describes. Some of the obligations may be reasonably delegated or assigned to specific lawyers within a firm or organization. Methods of compliance with the obligations may vary depending on the practice context in which they arise. In addition, lawyers employed by governmental or other institutional entities may be subject to requirements imposed by law, or the policies of those entities. Reasonable implementation of the obligations described in this opinion satisfies the Model Rules. Opinion 467 provides examples of how to comply with obligations under several Model Rules in a variety of practice settings. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

⁵ MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) provides:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible.⁶

In these early communications clients will need to know, for example, if the lawyer remains available to handle the client's matters, or, alternatively, if the lawyer is unavailable because of the disaster's effects, and may need to withdraw. In a situation in which a disaster is predicted, for example, with a hurricane or other extreme weather event, lawyers should consider providing clients with methods by which the lawyer may be reached in the event that emergency communication is necessary. Information about how to contact the lawyer in the event of an emergency may be provided in a fee agreement or an engagement letter.⁷

In identifying how to communicate with clients under these circumstances, lawyers must be mindful of their obligation under Rule 1.1 to keep abreast of technology relevant to law practice⁸ and Rule 1.6(c)'s requirement "to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."⁹

⁶ This opinion addresses a lawyer's ethical responsibilities. Lawyers should take similar steps to maintain communication with their own colleagues and staff. It is also good practice for a lawyer to maintain and update this information on a secure Internet website after the disaster so that colleagues and support staff will have a centralized location to find contact information. For information about the appropriate methods for storing electronic or paper records, lawyers may consult the ABA Committee on Disaster Response and Preparedness website. Also, many state bars and courts provide information on disaster preparedness.

⁷ Practical problems a lawyer may wish to consider in advance include whether (i) landline phones will be out of service, (ii) the U.S. Postal Service will be impaired, and (iii) electronic devices will lose battery power.

⁸ ABA Model Rule 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] to Rule 1.1 provides: ". . . [A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"

⁹ As this Committee has previously noted, lawyers may transmit confidential information over the Internet if the lawyer has made reasonable efforts to prevent accidental or unauthorized access to the information. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017). See also Alaska Bar Ass'n Op. 98-2 (1998); State Bar of Ariz. Formal Op. 97-04 (1997); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010); D.C. Bar Op. 281 (1998); Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 2001-2 (2001); Haw. State Ethics Comm'n Formal Op. 40 (2001); Ill. State Bar Ass'n Advisory Op. 96-10 (1997); Iowa State Bar Ass'n Op. 15-01 (2015); N.C. State Bar Op. RPC 215 (1995); State Bar Ass'n of N.D. Advisory Op. 97-09 (1997); Ohio Bd. of Cmss'rs on Grievances & Discipline Op. 99-2 (1999); S.C. Bar Advisory Op. 97-08 (1997); Prof'l Ethics Comm. State Bar of Tex. Op. 648 (2015); Utah State Bar Advisory Op. 00-01 (2000); Vt. Advisory Op. 97-5 (1997); Wash. State Bar Ass'n Advisory Op. 2175 (2008).

B. Continued Representation in the Affected Area

Lawyers who continue to provide legal services in the area affected by a disaster have the same ethical obligations to their clients as before the disaster, although they may be able to provide advice outside their normal area of expertise.¹⁰

Lawyers may not be able to gain access to paper files following a disaster.¹¹ Consequently, lawyers must evaluate in advance storing files electronically so that they will have access to those files via the Internet if they have access to a working computer or smart device after a disaster. If Internet access to files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.¹²

¹⁰ Comment [3] to Rule 1.1 allows: "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. Ill-considered action under emergency conditions can jeopardize the client's interest."

¹¹ Rule 1.15 requires that lawyers take reasonable steps to preserve trust account records and documents and property of clients and third parties when a lawyer has notice of an impending disaster. *See also* subsection (E), *infra*, for a discussion of a lawyer's obligations when files are lost or destroyed in a disaster.

¹² Lawyers must understand that electronically stored information is subject to cyberattack, know where the information is stored, and adopt reasonable security measures. They must conduct due diligence in selecting an appropriate repository of client information "in the cloud." Among suggested areas of inquiry are determining legal standards for confidentiality and privilege in the jurisdiction where any dispute will arise regarding the cloud computing services. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); Ala. State Bar Op. 2010-02 (2010) (Lawyer may outsource storage of client files through cloud computing if they take reasonable steps to make sure data is protected); State Bar of Ariz. Formal Op. 09-04 (2009) (Lawyer may use online file storage and retrieval system that enables clients to access their files over the Internet, as long as the firm takes reasonable precautions to protect the confidentiality of the information; in this case, proposal would convert files to password-protected pdf documents that are stored on a Secure Socket Layer server (SSL) which encodes the documents); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-184 (2012) (Lawyer may operate virtual law office "in the cloud" as long as the lawyer complies with all ethical duties such as confidentiality, competence, communication, and supervision; lawyer should check vendor credentials, data security, how information is transmitted, whether through other jurisdictions or third-party servers, the ability to supervise the vendor; and the terms of the contract with the vendor); Fla. Bar Op. 12-3 (2013) (Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely); Ill. State Bar Ass'n Op. 16-06 (2016) (Lawyer may use cloud-based service to store client files as long as the lawyer "takes reasonable measures to ensure that the client information remains confidential and is protected from breaches"; lawyer should engage in due diligence in choosing the provider, including reviewing industry norms, determining the provider's security precautions such as firewalls, password protection and encryption, the provider's reputation and history, asking about any prior breaches, requiring that the provider follow confidentiality requirements, requiring that the data is under the lawyer's control, and requiring reasonable access if the contract terminates or the provider goes out of business); Iowa State Bar Ass'n Op. 11-01 (2011) (Due diligence a lawyer

As part of the obligation of competence under Rule 1.1 and diligence under Rule 1.3, lawyers who represent clients in litigation must be aware of court deadlines, and any extensions granted due to the disaster. Courts typically issue orders, usually posted on their websites, addressing extensions.¹³ Lawyers should check with the courts and bar associations in their jurisdictions to determine whether deadlines have been extended.

Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.¹⁴ Lawyers with notice of an

should perform before storing files electronically with a third party using SaaS (cloud computing) includes whether the lawyer will have adequate access to the stored information, whether the lawyer will be able to restrict access of others to the stored information, whether data is encrypted and password protected, and what will happen to the information in the event the lawyer defaults on an agreement with the third party provider or terminates the relationship with the third party provider); State Bar of Nev. Formal Op. 33 (2006) (Lawyer may store client files electronically on a remote server controlled by a third party as long as the firm takes precautions to safeguard confidential information such as obtaining the third party's agreement to maintain confidentiality); New York City Bar Report, *The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations* (Nov. 2013), <https://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf>; N.Y. State Bar Ass'n Op. 842 (2010) (Permissible to use an online computer data storage system to store client files provided the attorney takes reasonable care to maintain confidentiality; lawyer must stay informed of both technological advances that could affect confidentiality and changes in the law that could affect privilege); State Bar Ass'n of N.D. Advisory Op. 99-03 (1999) (Permissible to use electronic online data service to store files as long as the lawyer properly protects confidential client information, perhaps via password protected storage); Pa. Bar Ass'n Op. 2011-200 (2011) ("An attorney may ethically allow client confidential material to be stored in 'the cloud' provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks"); S.C. Bar Advisory Op. 86-23 (1988) (A lawyer can store files in a storage facility operated by a third party if the lawyer ensures that confidentiality is maintained); Tenn. Formal Op. 2015-F-159 (2015) (Lawyer may store information in the cloud if the lawyer takes reasonable measures to protect the information); Vt. Advisory Op. 2010-6 (2010) (Lawyers may use cloud computing if they take reasonable steps to ensure confidentiality of information and that information is accessible).

¹³ See, e.g., Sup. Ct. of Fla. Administrative Order No. AOSC17-57 (2017), <http://www.floridasupremecourt.org/clerk/adminorders/2017/AOSC17-57.pdf> (extending time periods in the wake of Hurricane Irma); N.D. Sup. Ct. Administrative Order 20 (2011), <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (staying deadlines due to flooding); N.D. Sup. Ct. Rules Section 6, Emergency Procedural Rule, Administrative Rule, or Administrative Order, available at <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (last visited Sept. 4, 2018); Sup. Ct. of Texas Emergency Order Suspending Criminal Court Proceedings in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438759/179091.pdf>; Supreme Court of Texas Emergency Order on Statutes of Limitations in Civil Cases in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438804/179098.pdf>.

¹⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.3 (2018). Designating a successor and adding trusted signatories are good practices that may already be in place as part of normal succession planning. Some states require designation of a successor counsel or inventory lawyer. See, e.g., Rules Regulating the Fla. Bar R. 1-3.8(e),

impending disaster should take additional steps. For example, a transactional lawyer should review open files to determine if the lawyer should transfer funds to a trust account that will be accessible after the disaster or even attempt to complete imminent transactions prior to the disaster if practicable.

A disaster may affect the financial institution in which funds are held, or the lawyer's ability to communicate with the financial institution. Consequently, lawyers should take appropriate steps in advance to determine how they will obtain access to their accounts after a disaster. Different institutions may have varying abilities to recover from a disaster.¹⁵ After a disaster, a lawyer must notify clients or third persons for whom the lawyer is holding funds when required disbursements are imminent and the lawyer is unable to access the funds, even if the lawyer cannot access the funds because the financial institution itself is inaccessible or access is beyond the lawyer's capability.¹⁶

C. Withdrawal from Representation After a Disaster

Lawyers whose circumstances following a disaster render them unable to fulfill their ethical responsibilities to clients may be required to withdraw from those representations. Rule 1.16(a)(1) requires withdrawal if representation will cause the lawyer to violate the rules of professional conduct. Rule 1.16(a)(2) requires withdrawal if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client," for example, if the lawyer suffers severe injury or mental distress due to the disaster. Rule 1.16(b)(7) allows termination of the representation when the lawyer has "other good cause for withdrawal." These conditions may be present following a disaster. In determining whether withdrawal is required, lawyers must assess whether the client needs immediate legal services that the lawyer will be unable to timely

Iowa Ct. Rule 39.18(1), Me. Bar R. 32(a), and Mo. R. 4-1.3 cmt. [5] & R. 5.26. Some states permit voluntary designation, including California, Delaware, Idaho, South Carolina, and Tennessee. See *Mandatory Successor Rule Chart* (June 2015), ABA, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mandatory_successor_rule_chart.authcheckdam.pdf. Lawyers should also be aware that, in most jurisdictions, a power of attorney to handle law firm affairs will be insufficient because it expires on the principal's death.

¹⁵ The rules do not require a lawyer to place funds in a large or national financial institution. See MODEL RULES OF PROF'L CONDUCT R. 1.15 (2018). However, a prudent lawyer in a disaster-prone area should inquire about a financial institution's disaster preparedness before placing funds there. The lawyer must comply with IOLTA requirements regardless of which financial institution the lawyer chooses.

¹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.4 and 1.15(d) (2018).

provide. Lawyers who are unable to continue client representation in litigation matters must seek the court's permission to withdraw as required by law and court rules.¹⁷

D. Representation of Clients by Displaced Lawyers in Another Jurisdiction

Some lawyers may either permanently or temporarily re-locate to another jurisdiction following a disaster. Their clients and other residents of the lawyers' home jurisdiction may relocate to the same jurisdiction, or elsewhere, and still require legal services. Although displaced lawyers may be able to rely on Model Rule 5.5(c) allowing temporary multijurisdictional practice to provide legal services to their clients or displaced residents, they should not assume the Rule will apply in a particular jurisdiction. Comment [14] to Rule 5.5 provides:

... lawyers from the affected jurisdiction [by a major disaster] who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

Displaced lawyers who wish to practice law in another jurisdiction may do so only as authorized by that other jurisdiction. Subdivision (c) of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster provides:

Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis if permitted by order of the highest court of the other jurisdiction. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.¹⁸

This ABA Model Court Rule further provides that lawyers:

- are required to register with the Supreme Court in the state where they are temporarily allowed to practice;

¹⁷ MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2018).

¹⁸ Full text of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (2007) can be found at:

https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/model_rule_disaster_katrina_authcheckdam.pdf. The ABA Standing Committee on Client Protection Chart on State Implementation of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (Sept. 8, 2017) can be found at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart_authcheckdam.pdf.

- are subject to the disciplinary authority in the jurisdiction of the Supreme Court in the state where they are temporarily allowed to practice; and
- must cease practice within 60 days after the Supreme Court in the state where they are temporarily allowed to practice determines the conditions of the disaster have ended.¹⁹

E. Loss of Files and Other Client Property

Some lawyers located in an area affected by a disaster may have their files destroyed. Lawyers who maintain only paper files or maintain electronic files solely on a local computer or local server are at higher risk of losing those records in a disaster. A lawyer's responsibilities regarding these files vary depending on the nature of the stored documents and the status of the affected clients.

Under the lawyer's duty to communicate, a lawyer must notify current clients of the loss of documents with intrinsic value, such as original executed wills and trusts, deeds, and negotiable instruments.²⁰ Lawyers also must notify former clients of the loss of documents and other client property with intrinsic value. A lawyer's obligation to former clients is based on the lawyer's obligation to safeguard client property under Rule 1.15.²¹ Under the same Rule, lawyers must

¹⁹ See ABA Model Court Rule Provision of Legal Services Following Determination of Major Disaster, *supra* note 17. For an example, see the emergency order entered by the Supreme Court of Texas in 2017, permitting the temporary practice of Texas law by lawyers displaced from their home jurisdictions after Hurricane Harvey. The Court adopted requirements and limitations similar to those in the ABA Model Court Rule. See Court of Texas Amended Emergency Order After Hurricane Harvey Permitting Out-of-State Lawyers to Practice Texas Law Temporarily, Misc. Docket No. 17-9101 (Aug. 30, 2017), available at <http://www.txcourts.gov/media/1438820/179101.pdf>.

²⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015); See also ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1977) (Lawyer should not dispose of client property without client consent, should not destroy information that would be useful to the client if the statute of limitations has not run, should not destroy information that the client may need and is not otherwise easily accessible by the client, should exercise discretion in determining which information might be particularly sensitive or require longer retention than others, should retain trust account records, should protect confidentiality in the destruction of any files, should review files before destruction to determine if portions should be retained, and should retain an index of destroyed files); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2001-157 (2001) (Regarding destruction of closed files, indicating that property of the client such as original documents (like wills) is subject to bailment law or other statute, lawyers may not destroy other file materials without making reasonable efforts to obtain client consent, lawyers may not destroy items required to be retained by law, lawyers may not destroy items if destruction would prejudice the clients' interests, and criminal case files should not be destroyed while the client is living); State Bar of Mich. Op. R-12 (1991) (Lawyers must give notice to clients regarding file destruction after 1998, files before 1998 may not be destroyed without reasonable efforts to notify the client, and lawyers are not required to notify clients of file destruction if the lawyer maintains a copy of the documents on microfilm (excluding original documents of the client or if destruction of the documents would prejudice the client's interests)). Lawyers should note that in some states, the client may be entitled to all substantive documents in the file at the client's request. See *e.g.*, State Bar of Ariz. Op. 15-02 (2015).

²¹ See also N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

make reasonable efforts to reconstruct documents of intrinsic value for both current and former clients, or to obtain copies of the documents that come from an external source.²²

A lawyer need not notify either current or former clients about lost documents that have no intrinsic value, that serve no useful purpose to the client or former client, or for which there are electronic copies. The lawyer must respond honestly, however, if asked about those documents by either current or former clients.²³

The largest category of documents will fall in the middle; i.e., they are necessary for current representation or would serve some useful purpose to the client. For current clients, lawyers may first attempt to reconstruct files by obtaining documents from other sources. If the lawyer cannot reconstruct the file, the lawyer must promptly notify current clients of the loss. This obligation stems from the lawyer's obligations to communicate with clients and represent them competently and diligently.²⁴ A lawyer is not required either to reconstruct the documents or to notify former clients of the loss of documents that have no intrinsic value, unless the lawyer has agreed to do so despite the termination of the lawyer-client relationship.²⁵

ABA Model Rule 1.15(a) also requires lawyers to keep complete records accounting for funds and property of clients and third parties held by the lawyer and to preserve those records for five years after the end of representation. A lawyer whose trust account records are lost or destroyed in a disaster must attempt to reconstruct those records from other available sources to fulfill this obligation.

To prevent the loss of files and other important records, including client files and trust account records, lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly.²⁶ Although not required, lawyers may maintain these files solely as electronic files, except in instances where law, court order, or agreement require maintenance of paper copies, and as long as the files are readily accessible and not subject to inadvertent

²² Lawyers should consider returning all original documents and documents with intrinsic value created by the lawyer as a result of the representation to clients at the end of representation to avoid this situation.

²³ See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

²⁴ See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 & 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

²⁵ Lawyers should consider including in fee agreements or engagement letters the understandings between the lawyer and the client about how the lawyer will handle documents once the representation is ended. In addition, lawyers should consult statutes, common law, and court rules that may also govern the retention of client files.

²⁶ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2018).

modification or degradation.²⁷ As discussed above, lawyers may also store files “in the cloud” if ethics obligations regarding confidentiality and control of and access to information are met.

²⁷ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1127 (1970) (Lawyers may use company that stores attorney files on computer as long as the company is set up so that the material is available only to the particular attorney to whom the files belong and the employees of the company; lawyers must take care to choose an appropriate company that has procedures to ensure confidentiality and to admonish the company that confidentiality of the files must be preserved); State Bar of Ariz. Op. 07-02 (2007) (Lawyer may not destroy original client documents after converting them to electronic records without client consent, but may destroy paper documents if they are only copies); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct 2001-157 (2001) (Electronic records may be insufficient if originals are not accurately reproduced, and some documents cannot be copied by law); Fla. Bar Op. 06-1 (2006) (Lawyers may, but are not required to, store files electronically unless a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests; files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction); Me. Bd. of Overseers Op. 185 (2004) (Lawyers may maintain closed files electronically, rather than paper copies, if they are accessible to the client); Me. Bd. of Overseers Op. 183 (2004) (“If an attorney dispenses with the retention of paper files in favor of computerized records, the attorney must be mindful that the obligation to the client may require the attorney to maintain the means to provide copies of those records in a format that will make them accessible to both the attorney and the client in the future. Because the attorney is obligated to ensure that the client is able to make informed decisions regarding the disposition of the file and also must take care in destroying files to be sure that useful information is retained, an attorney will need to consider how new hardware or software will impact future access to old computerized records.”); Mo. Informal Advisory Op. 127 (2009) (Lawyer may keep client's file in exclusively electronic format except documents that are legally significant as originals and intrinsically valuable documents and providing that the appropriate software to access the information is maintained for the time period the file must be retained); State Bar of Mich. Op. R-5 (1989) (File storage via electronic means should be treated carefully to ensure confidentiality by limiting access to law firm personnel); N.J. Advisory Comm. on Prof'l Ethics Decisions Op. 701 (2006) (Documents may be stored electronically if sufficient safeguards to maintain confidentiality of the documents, particularly if they are stored outside the law firm, except for documents that are client property such as original wills, trusts, deeds, executed contracts, corporate bylaws and minutes); N.Y. County Lawyers Ass'n Op. 725 (1998) (General opinion on the ethical obligation to retain closed files, including that it may be proper for a lawyer to retain only electronic copies of a file if “the evidentiary value of such documents will not be unduly impaired by the method of storage”); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 680 (1996) (Although some items in a client's file may be stored electronically, some documents (such as original checkbooks, check stubs, cancelled checks, and bank statements) are required by the rules to be kept in original form; documents stored electronically should be stored in “read-only” form so they cannot be inadvertently destroyed or altered; and records must be readily produced when necessary); N.C. State Bar Op. RPC 234 (1996) (Closed client files may be stored electronically as long as the electronic documents can be converted to paper copies, except for “original documents with legal significance, such as wills, contracts, stock certificates, etc.”); S.C. Bar Advisory Op. 02-14 (2002) (General opinion on disposition of closed files when one member of a two-member firm retires, discussing various situations and notes that files may be placed on computer or other electronic media; Note: In South Carolina, the files are the property of the client); S.C. Bar Advisory Op. 98-33 (1998) (The committee declined to give an opinion on electronic retention of closed files as a legal question, but indicated there was no prohibition against retaining documents in electronic format as long as doing so did not adversely affect the client's interests and as long as the lawyer took reasonable precautions to make sure that third parties with access to the electronic records kept the records confidential); Va. State Bar Op. 1818 (2005) (Lawyer can maintain client files in electronic format with no paper copies as long as the method of record retention does not adversely affect the client's interests); Wash. State Bar Ass'n Op. 2023 (2003) (Lawyer may have firm file retention policy in which original documents are provided to the client and the lawyer keeps only electronic copies of file materials as long as documents “with intrinsic value” or that are the property of the client cannot be destroyed without client permission); State Bar of Wis. Op. E-00-3 (2000) (If lawyer has stored files electronically, lawyer should provide

F. Solicitation and Advertising

Lawyers may want to offer legal services to persons affected by a disaster. The existence of a disaster, however, does not excuse compliance with lawyer advertising and solicitation rules.²⁸ Of particular concern is the possibility of improper solicitation in the wake of a disaster. A lawyer may not solicit disaster victims unless the lawyer complies with Model Rules 7.1 through 7.3.²⁹ “Live person-to-person contact” that is generally prohibited means “in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection,”³⁰ and a significant motive for the lawyer’s doing so is pecuniary gain.³¹ In addition to ethical prohibitions, lawyers should be aware that there may be statutory prohibitions that may apply.³²

Lawyers may solicit in-person to offer pro bono legal services to disaster victims, because the lawyer’s motive does not involve pecuniary gain.³³ Additionally, lawyers may communicate with disaster victims in “targeted” written or recorded electronic material in compliance with Rules 7.1 through 7.3. Lawyers also should be mindful of any additional requirements for written or recorded electronic solicitations imposed by particular jurisdictions.³⁴

client copies on disk at client's request. However, lawyer can bill client for time/expense if required to obtain information in format client wants. Attorney does not need to provide client with internal memos, personal notes, and the like).

²⁸ See MODEL RULES OF PROF'L CONDUCT R. 7.1 – 7.5 (all of these Rules were amended in August 2018).

²⁹ See MODEL RULES OF PROF'L CONDUCT R. 7.3 (2018). See also *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000) (Lawyer suspended for one year for soliciting clients by passing out brochures in affected areas in wake of tornados); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) (Solicitation of prospective clients in mass disaster victim chat room is not considered in person solicitation but nevertheless is prohibited because it is “intrusive”).

³⁰ MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. [2] (2018). Rule 7.3(b) contains some exceptions, and Rule 7.3(c) contains an additional prohibition. Both should be consulted.

³¹ *Id.*

³² See, e.g., FLA. STAT. §877.02 (Prohibiting solicitation on behalf of lawyers by hospitals, police, tow truck operators, insurance adjusters); 49 U.S.C. §1136(g)(2) (Prohibiting lawyer solicitation within 45 days of an air transportation accident).

³³ MODEL RULES OF PROF'L CONDUCT R. 7.3(a); La. Bd. of Ethics Op. 05-RPCC-005 (2005) (Lawyer may solicit disaster victims in person to provide pro bono legal services). Providing pro bono legal services is encouraged by, inter alia, Model Rules 6.1 and 6.2.

³⁴ See, e.g., Rules Regulating the Fla. Bar R. 4-7.18(b)(2) (requiring contrasting “advertisement” mark on envelope and enclosures; statement of qualifications and experience; information on where the lawyer obtained the information prompting the written solicitation; and specified first sentence, among others).

G. Out-Of-State Lawyers Providing Representation to Disaster Victims

Lawyers practicing in jurisdictions unaffected by the disaster who wish to assist by providing legal services to disaster victims must consider rules regulating temporary multijurisdictional practice.³⁵ Out-of-state lawyers may provide representation to disaster victims in the affected jurisdiction only when permitted by that jurisdiction's law or rules, or by order of the jurisdiction's highest court.

The ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster³⁶ provides that the Supreme Court of the affected jurisdiction must declare a major disaster and issue an order that allows lawyers in good standing from another jurisdiction to temporarily provide pro bono legal services in the affected jurisdiction through a non-profit bar association, pro bono program, legal services program, or other organization designated by the courts.³⁷ The Model Court Rule also requires those lawyers to register with the courts of the affected jurisdiction, and subjects those lawyers to discipline in the affected jurisdiction.³⁸

Conclusion

Lawyers must be prepared to deal with disasters. Foremost among a lawyer's ethical obligations are those to existing clients, particularly in maintaining communication. Lawyers must also protect documents, funds, and other property the lawyer is holding for clients or third parties.

³⁵ MODEL RULES OF PROF'L CONDUCT R. 5.5 (c), cmt. [14] (2018): "Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster." Most states have adopted some form of ABA Model Rule 5.5 on Multijurisdictional Practice. A chart on state implementation of ABA Multijurisdictional Practice Policies compiled by the ABA may be found at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations_authcheckdam.pdf.

³⁶ ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER, available at https://www.americanbar.org/content/dam/aba/images/disaster/model_court_rule.pdf (last visited Sept. 7, 2018). The ABA Chart on State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster can be found at: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart_authcheckdam.pdf

³⁷ Providing pro bono legal services in this situation would assist the lawyer in meeting the suggested goal of 50 hours per year set forth in Model Rule 6.1(a).

³⁸ As noted above, the Supreme Court of Texas issued an emergency order in 2017 after Hurricane Harvey following the ABA Model Court Order. See *supra* note 18.

By proper advance preparation and taking advantage of available technology during recovery efforts, lawyers will reduce the risk of violating professional obligations after a disaster.

Dissent: Keith R. Fisher dissents.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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APPENDIX C



**PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY**

April 10, 2020

FORMAL OPINION 2020-300

ETHICAL OBLIGATIONS FOR LAWYERS WORKING REMOTELY

I. Introduction and Summary

When Pennsylvania Governor Tom Wolf ordered all “non-essential businesses,” including law firms to close their offices during the COVID-19 pandemic, and also ordered all persons residing in the state to stay at home and leave only under limited circumstances, many attorneys and their staff were forced to work from home for the first time. In many cases, attorneys and their staff were not prepared to work remotely from a home office, and numerous questions arose concerning their ethical obligations.

Most questions related to the use of technology, including email, cell phones, text messages, remote access, cloud computing, video chatting and teleconferencing. This Committee is therefore providing this guidance to the Bar about their and their staff’s obligations not only during this crisis but also as a means to assure that attorneys prepare for other situations when they need to perform law firm- and client-related activities from home and other remote locations.

Attorneys and staff working remotely must consider the security and confidentiality of their client data, including the need to protect computer systems and physical files, and to ensure that telephone and other conversations and communications remain privileged.

In Formal Opinion 2011-200 (Cloud Computing/Software As A Service While Fulfilling The Duties of Confidentiality and Preservation of Client Property) and Formal Opinion 2010-100 (Ethical Obligations on Maintaining a Virtual Office for the Practice of Law in Pennsylvania), this Committee provided guidance to attorneys about their ethical obligations when using software and other technology to access confidential and sensitive information from outside of their physical offices, including when they operated their firms as virtual law offices. This Opinion affirms the conclusions of Opinions 2011-200 and 2010-100, including:

- An attorney may ethically allow client confidential material to be stored in “the cloud” provided the attorney takes reasonable care to assure that (1) all materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks.
- An attorney may maintain a virtual law office in Pennsylvania, including a virtual law office in which the attorney works from home, and associates work from their homes in various locations, including locations outside of Pennsylvania;
- An attorney practicing in a virtual office at which attorneys and clients do not generally meet face to face must take appropriate safeguards to: (1) confirm the identity of clients and others; and, (2) address those circumstances in which a client may have diminished capacity.

This Opinion also affirms and adopts the conclusions of the American Bar Association Standing Committee on Ethics and Professional Responsibility in Formal Opinion 477R (May 22, 2017) that:

A lawyer generally may transmit information relating to the representation of a client over the [I]nternet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

The duty of technological competence requires attorneys to not only understand the risks and benefits of technology as it relates to the specifics of their practices, such as electronic discovery. This also requires attorneys to understand the general risks and benefits of technology, including the electronic transmission of confidential and sensitive data, and cybersecurity, and to take reasonable precautions to comply with this duty. In some cases, attorneys may have the requisite knowledge and skill to implement technological safeguards. In others, attorneys should consult with appropriate staff or other entities capable of providing the appropriate guidance.

At a minimum, when working remotely, attorneys and their staff have an obligation under the Rules of Professional Conduct to take reasonable precautions to assure that:

- All communications, including telephone calls, text messages, email, and video conferencing are conducted in a manner that minimizes the risk of inadvertent disclosure of confidential information;
- Information transmitted through the Internet is done in a manner that ensures the confidentiality of client communications and other sensitive data;
- Their remote workspaces are designed to prevent the disclosure of confidential information in both paper and electronic form;

- Proper procedures are used to secure and backup confidential data stored on electronic devices and in the cloud;
- Any remotely working staff are educated about and have the resources to make their work compliant with the Rules of Professional Conduct; and,
- Appropriate forms of data security are used.

In Section II, this Opinion highlights the Rules of Professional Conduct implicated when working at home or other locations outside of a traditional office. Section III highlights best practices and recommends the baseline at which attorneys and staff should operate to ensure confidentiality and meet their ethical obligations. This Opinion does not discuss specific products or make specific technological recommendations, however, because these products and services are updated frequently. Rather, Section III highlights considerations that will apply not only now but also in the future.

II. Discussion

A. Pennsylvania Rules of Professional Conduct

The issues in this Opinion implicate various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, other parties, and counsel, primarily focused on the need to assure confidentiality of client and sensitive information. Although no Pennsylvania Rule of Professional Conduct specifically addresses the ethical obligations of attorneys working remotely, the Committee's conclusions are based upon the existing Rules, including:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers")
- Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance")

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney, and persons or entities supervised by the attorney, to disciplinary sanctions. Comments to the Rules assist attorneys in understanding or arguing the intention of the Rules, but are not enforceable in disciplinary proceedings.

B. Competence

A lawyer's duty to provide competent representation includes the obligation to understand the risks and benefits of technology, which this Committee and numerous other similar committees believe includes the obligation to understand or to take reasonable measures to use appropriate technology to protect the confidentiality of communications in both physical and electronic form.

Rule 1.1 ("Competence") states in relevant part:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Further, Comment [8] to Rule 1.1 states

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. To provide competent representation, a lawyer should be familiar with policies of the courts in which the lawyer practices, which include the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

Consistent with this Rule, attorneys must evaluate, obtain, and utilize the technology necessary to assure that their communications remain confidential.

C. Confidentiality

An attorney working from home or another remote location is under the same obligations to maintain client confidentiality as is the attorney when working within a traditional physical office.

Rule 1.6 (“Confidentiality of Information”) states in relevant part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

...

(d) 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.

Comments [25] and [26] to Rule 1.6 state:

[25] Pursuant to paragraph (d), a lawyer should act in accordance with court policies governing disclosure of sensitive or confidential information, including the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania. Paragraph (d) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1, and 5.3. The

unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (d) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[26] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Comment [25] explains that an attorney's duty to understand the risks and benefits of technology includes the obligation to safeguard client information (1) against unauthorized access by third parties (2) against inadvertent or unauthorized disclosure by the lawyer or other persons subject to the lawyer's supervision. Comment [26] explains that an attorney must safeguard electronic communications, such as email, and may need to take additional measures to prevent information from being accessed by unauthorized persons. For example, this duty may require an attorney to use encrypted email, or to require the use of passwords to open attachments, or take other reasonable precautions to assure that the contents and attachments are seen only by authorized persons.

A lawyer's confidentiality obligations under Rule 1.6(d) are, of course, not limited to prudent employment of technology. Lawyers working from home may be required to bring paper files and other client-related documents into their homes or other remote locations. In these circumstances, they should make reasonable efforts to ensure that household residents or visitors who are not associated with the attorney's law practice do not have access to these items. This can be accomplished by maintaining the documents in a location where unauthorized persons are denied access, whether through the direction of a lawyer or otherwise.

D. Supervisory and Subordinate Lawyers

Rule 5.1 ("Responsibilities of Partners, Managers, and Supervisory Lawyers") states:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable 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 conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistance") states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and,

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Therefore, a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect requirements that any staff, consultants or other entities that have or may have access to confidential client information or data comply with the Rules of Professional Conduct with regard to data access from remote locations and that any discussions regarding client-related matters are done confidentially.

III. Best Practices When Performing Legal Work and Communications Remotely¹

A. General Considerations

In Formal Opinion 2011-200, this Committee concluded that a lawyer's duty of competency extends "beyond protecting client information and confidentiality; it also includes a lawyer's ability to reliably access and provide information relevant to a client's case when needed. This is essential for attorneys regardless of whether data is stored onsite or offsite with a cloud service provider." When forced to work remotely, attorneys remain obligated to take reasonable precautions so that they are able to access client data and provide information to the client or to others, such as courts or opposing counsel.

While it is beyond the scope of this Opinion to make specific recommendations, the Rules and applicable Comments highlight that the need to maintain confidentiality is crucial to preservation of the attorney-client relationship, and that attorneys working remotely must take appropriate measures to protect confidential electronic communications. While the measures necessary to do so will vary, common considerations include:

¹ These various considerations and safeguards also apply to traditional law offices. The Committee is not suggesting that the failure to comply with the "best practices" described in Section III of this Opinion would necessarily constitute a violation of the Rules of Professional Conduct that would subject an attorney to discipline. Rather, compliance with these or similar recommendations would constitute the type of reasonable conduct envisioned by the Rules.

- Specifying how and where data created remotely will be stored and, if remotely, how the data will be backed up;
- Requiring the encryption or use of other security to assure that information sent by electronic mail are protected from unauthorized disclosure;
- Using firewalls, anti-virus and anti-malware software, and other similar products to prevent the loss or corruption of data;
- Limiting the information that may be handled remotely, as well as specifying which persons may use the information;
- Verifying the identity of individuals who access a firm's data from remote locations;
- Implementing a written work-from-home protocol to specify how to safeguard confidential business and personal information;
- Requiring the use of a Virtual Private Network or similar connection to access a firm's data;
- Requiring the use of two-factor authentication or similar safeguards;
- Supplying or requiring employees to use secure and encrypted laptops;
- Saving data permanently only on the office network, not personal devices, and if saved on personal devices, taking reasonable precautions to protect such information;
- Obtaining a written agreement from every employee that they will comply with the firm's data privacy, security, and confidentiality policies;
- Encrypting electronic records containing confidential data, including backups;
- Prohibiting the use of smart devices such as those offered by Amazon Alexa and Google voice assistants in locations where client-related conversations may occur;
- Requiring employees to have client-related conversations in locations where they cannot be overheard by other persons who are not authorized to hear this information; and,
- Taking other reasonable measures to assure that all confidential data are protected.

B. Confidential Communications Should be Private

1. Introduction

When working at home or from other remote locations, all communications with clients must be and remain confidential. This requirement applies to all forms of communications, including phone calls, email, chats, online conferencing and text messages.

Therefore, when speaking on a phone or having an online or similar conference, attorneys should dedicate a private area where they can communicate privately with clients, and take reasonable precautions to assure that others are not present and cannot listen to the conversation. For example, smart devices such as Amazon's Alexa and Google's voice assistants may listen to conversations and record them. Companies such as Google and Amazon maintain those recordings on servers and hire people to review the recordings. Although the identity of the

speakers is not disclosed to these reviewers, they might hear sufficient details to be able to connect a voice to a specific person.²

Similarly, when communicating using electronic mail, text messages, and other methods for transmitting confidential and sensitive data, attorneys must take reasonable precautions, which may include the use of encryption, to assure that unauthorized persons cannot intercept and read these communications.

2. What is Encryption?

Encryption is the method by which information is converted into a secret code that hides the information's true meaning. The science of encrypting and decrypting information is called cryptography. Unencrypted data is also known as plaintext, and encrypted data is called ciphertext. The formulas used to encode and decode messages are called encryption algorithms or ciphers.³

When an unauthorized person or entity accesses an encrypted message, phone call, document or computer file, the viewer will see a garbled result that cannot be understood without software to decrypt (remove) the encryption.

3. The Duty to Assure Confidentiality Depends Upon the Information Being Transmitted

This Opinion adopts the analysis of ABA Formal Opinion 477R concerning a lawyer's duty of confidentiality:

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

² <https://www.vox.com/recode/2020/2/21/21032140/alexa-amazon-google-home-siri-apple-microsoft-cortana-recording>

³ <https://searchsecurity.techtarget.com/definition/encryption>

. . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a “process” to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c)⁴ includes nonexclusive factors to guide lawyers in making a “reasonable efforts” determination. Those factors include:

- the sensitivity of the information,
- the likelihood of disclosure if additional safeguards are not employed,
- the cost of employing additional safeguards,
- the difficulty of implementing the safeguards, and
- the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In addition to the obligations under the Pennsylvania Rules of Professional Conduct, which are based upon the Model Rules, clients may also impose obligations upon attorneys to protect confidential or sensitive information. For example, some commercial clients, such as banks, routinely require that sensitive information be transmitted only with a password protocol or using an encryption method.

C. There Are Many Ways to Enhance Your Online Security

⁴ Pennsylvania did not adopt Comment [18] in its entirety.

While this Opinion cannot provide guidance about specific products or services, its goal is to provide attorneys and law firms with guidance about how they can meet their obligation of competence while preserving client confidentiality. The following subsections of this Opinion outline some reasonable precautions that attorneys should consider using to meet their ethical obligations.

1. Avoid Using Public Internet/Free Wi-Fi

Attorneys should avoid using unsecured free Internet/Wi-Fi hotspots when performing client- or firm-related activities that involve access to or the transmission of confidential or sensitive data. Persons, commonly called hackers, can access every piece of unencrypted information you send out to the Internet, including email, credit card information and credentials used to access or login to businesses, including law firm networks. Hackers can also use an unsecured Wi-Fi connection to distribute malware. Once armed with the user's login information, the hacker may access data at any website the user accesses.

2. Use Virtual Private Networks (VPNs) to Enhance Security

A VPN, or Virtual Private Network, allows users to create a secure connection to another network over the Internet, shielding the user's activity from unauthorized persons or entities. VPNs can connect any device, including smartphones, PCs, laptops and tablets to another computer (called a server), encrypting information and shielding your online activity from all other persons or entities, including cybercriminals. Thus, the use of a VPN can help to protect computers and other devices from hackers.

3. Use Two-Factor or Multi-Factor Authentication

Two-Factor or Multi-Factor Authentication is a security method that requires users to prove their identity in more than one way before signing into a program or a website. For example, a user might require a login name and a password, and would then be sent a four- or six-digit code by text message to enter on the website. Entering this additional authentication helps to ensure only authorized persons are accessing the site. Although these forms of enhanced security may seem cumbersome, its use provides an additional layer of security beyond simple password security.

4. Use Strong Passwords to Protect Your Data and Devices

One of the most common ways that hackers break into computers, websites and other devices is by guessing passwords or using software that guesses passwords, which remain a critical method of gaining unauthorized access. Thus, the more complex the password, the less likely that an unauthorized user will access a phone, computer, website or network.

The best method to avoid having a password hacked is by using long and complex passwords. There are various schools of thought about what constitutes a strong or less-hackable password, but as a general rule, the longer and more complex the password, the less likely it will be cracked. In addition, mobile devices should also have a PIN, pass code or password. The devices

should lock/time out after a short period of time and require users to re-enter the PIN code or password.

5. Assure that Video Conferences are Secure

One method of communicating that has become more common is the use of videoconferencing (or video-teleconferencing) technology, which allows users to hold face-to-face meetings from different locations. For many law offices, the use of videoconferences has replaced traditional teleconferences, which did not have the video component.

As the popularity of videoconferencing has increased, so have the number of reported instances in which hackers hijack videoconferences. These incidents were of such concern that on March 30, 2020 the FBI issued a warning about teleconference hijacking during the COVID-19 pandemic⁵ and recommended that users take the following steps “to mitigate teleconference hijacking threats:”

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to “Host Only;”
- Ensure users are using the updated version of remote access/meeting applications.

6. Backup Any Data Stored Remotely

Backups are as important at home as they are at the office, perhaps more so because office systems are almost always backed up in an automated fashion. Thus, attorneys and staff working remotely should either work remotely on the office’s system (using services such as Windows Remote Desktop Connection, GoToMyPC or LogMeIn) or have a system in place that assures that there is a backup for all documents and other computer files created by attorneys and staff while working. Often, backup systems can include offsite locations. Alternatively, there are numerous providers that offer secure and easy-to-set-up cloud-based backup services.

7. Security is Essential for Remote Locations and Devices

Attorneys and staff must make reasonable efforts to assure that work product and confidential client information are confidential, regardless of where or how they are created. Microsoft has published its guidelines for a secure home office, which include:

⁵ <https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic>. Although the FBI warning related to Zoom, one brand of videoconferencing technology, the recommendations apply to any such service.

- Use a firewall;
- Keep all software up to date;
- Use antivirus software and keep it current;
- Use anti-malware software and keep it current;
- Do not open suspicious attachments or click unusual links in messages, email, tweets, posts, online ads;
- Avoid visiting websites that offer potentially illicit content;
- Do not use USBs, flash drives or other external devices unless you own them, or they are provided by a trusted source. When appropriate, attorneys should take reasonable precautions such as calling or contacting the sending or supplying party directly to assure the data are not infected or otherwise corrupted.⁶

8. Users Should Verify That Websites Have Enhanced Security

Attorneys and staff should be aware of and, whenever possible, only access websites that have enhanced security. The web address in the web browser window for such sites will begin with “HTTPS” rather than “HTTP.” A website with the HTTPS web address uses the SSL/TLS protocol to encrypt communications so that hackers cannot steal data. The use of SSL/TLS security also confirms that a website’s server (the computer that stores the website) is who it says it is, preventing users from logging into a site that is impersonating the real site.

9. Lawyers Should Be Cognizant of Their Obligation to Act with Civility

In 2000, the Pennsylvania Supreme Court adopted the Code of Civility, which applies to all judges and lawyers in Pennsylvania.⁷ The Code is intended to remind lawyers of their obligation to treat the courts and their adversaries with courtesy and respect. During crises, the importance of the Code of Civility, and the need to comply with it, are of paramount importance.

During the COVID-19 pandemic, the Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued a statement, which this Opinion adopts, including:

In light of the unprecedented risks associated with the novel Coronavirus, we urge 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. Accordingly, we remind lawyers that the Guidelines for Civility in Litigation ... require that lawyers grant reasonable requests for extensions and other accommodations.

Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations. Consistent with California

⁶ <https://support.microsoft.com/en-us/help/4092060/windows-keep-your-computer-secure-at-home>

⁷ Title 204, Ch. 99 adopted Dec. 6, 2000, amended April 21, 2005, effective May 7, 2005.

Rule of Professional Conduct 1.2(a), lawyers should also consult with their clients to seek authorization to extend such extensions or to stipulate to continuances in instances where the clients' authorization or consent may be required.

While we expect further guidance from the court system will be forthcoming, lawyers must do their best to help mitigate stress and health risk to litigants, counsel and court personnel. Any sharp practices that increase risk or which seek to take advantage of the current health crisis must be avoided in every instance.

This Opinion agrees with the Los Angeles County Bar Association's statement and urges lawyers to comply with Pennsylvania's Code of Civility, and not take unfair advantage of any public health and safety crises.

IV. Conclusion

The COVID-19 pandemic has caused unprecedented disruption for attorneys and law firms, and has renewed the focus on what constitutes competent legal representation during a time when attorneys do not have access to their physical offices. In particular, working from home has become the new normal, forcing law offices to transform themselves into a remote workforce overnight. As a result, attorneys must be particularly cognizant of how they and their staff work remotely, how they access data, and how they prevent computer viruses and other cybersecurity risks.

In addition, lawyers working remotely must consider the security and confidentiality of their procedures and systems. This obligation includes protecting computer systems and physical files, and ensuring that the confidentiality of client telephone and other conversations and communications remain protected.

Although the pandemic created an unprecedented situation, the guidance provided applies equally to attorneys or persons performing client legal work on behalf of attorneys when the work is performed at home or at other locations outside of outside of their physical offices, including when performed at virtual law offices.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.