BBA Ethics Committee Pandemic Advisory
(April 2020)

The Boston Bar Association Ethics Committee, in response to a request from the BBA's COVID-19 Crisis Response Working Group, offers the following guidance to Massachusetts attorneys who are doing their best to continue to practice law and represent their clients faithfully in the face of unprecedented challenges and unspeakable tragedies. The lawyers in our community must remain particularly attentive to their ethical responsibilities as they adapt to the pandemic's restrictions. The Committee provides the following guidance without any claim that this advisory constitutes legal advice to any BBA member or other reader. (The Committee also notes that the Office of Bar Counsel has published its own guidance as well, found on the Board of Bar Overseers website at https://www.massbbo.org/Ethics.)

1. **Technology and security**: Few lawyers will meet in person with clients or others during social distancing and quarantine conditions. That inevitably means that lawyers are using technology, and especially videoconferencing, more than ever. Rule 1.1 of the Massachusetts Rules of Professional Conduct, in its Comment [8], states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ." That comment represents the mandate from the Supreme Judicial Court (SJC) that lawyers become familiar with the tools of their trade necessary to practice law effectively in the twenty-first century.

Technology not only facilitates the practice of law; it introduces risks which a lawyer must understand and anticipate. Comments [8] and [9] of Rule 1.6, the rule governing client confidentiality, address the importance of maintaining confidentiality when using electronic means to communicate with clients and others. The comments recognize that ordinary electronic communication vehicles (such as Gmail, Zoom, etc.) are often sufficiently secure for ordinary lawyer-client communications, as long as the lawyer employs the appropriate settings and pays attention to detail. More sensitive matters may require more complicated and expensive, but more secure, means of communication. The lawyer should discuss the security questions with her clients.

The BBA remains available to its members to assist with questions of how to begin to employ technology that a lawyer has not used before.

2. **Communicating with clients under conditions lacking privacy**: Many BBA members, including those who represent prisoners, immigrant detainees, and individuals subject to commitment proceedings, can only communicate with their clients through means that are not sufficiently private to ensure the confidentiality otherwise required by Rule 1.6. Many such clients do not have private computers or smart phones, and the telephones available in the facilities where they reside are not private. Those lawyers encounter a conflict of duties—on the one hand, to represent the clients competently and to satisfy the lawyers' duties under Rule 1.4 to keep clients informed of relevant matters, and, on the other, to maintain client confidentiality as required by Rule 1.6. Those lawyers must, and obviously do, advocate against such lack of privacy and insist that facilities offer better access to private lawyer conversations. But many facilities likely will not change in the near term, and therefore lawyers must exercise their

independent professional judgment about how to balance the competing considerations. Lawyers will often communicate with clients notwithstanding the absence of privacy, concluding that doing so is more effective than not communicating at all.

The Committee notes that, while communicating with a client without privacy is far from ideal, the best reading of the substantive law surrounding the attorney-client privilege would conclude that the absence of confidentiality should not forfeit the privilege. While ordinarily communications between a lawyer and a client are not privileged if not confidential,[1] where the lack of confidentiality is not a condition within the client's or the lawyer's control, the privilege should apply.[2]

3. **Lawyer health and safety versus ideal client communications**: In many contexts, and perhaps most contexts, lawyers in our community will be able to communicate effectively and generate lawyering work product with available technology. But there will be times when the lawyer's client has no access to a computer or a telephone, or when the lawyer believes that an in-person meeting is necessary to proceed competently with the representation. Lawyers representing detained immigrants, for example, sometimes have no meaningful access to their clients, especially in a language the clients understand, unless they personally visit the clients in detention.[3] But such visits present a grave risk for the lawyers, and for the communities within which the lawyers live and work. Not visiting the client in person may interfere with effective representation, but visiting the client creates a significant personal and public health danger.

In the opinion of the Committee, a lawyer need not sacrifice her own health and that of her family or neighbors in order to satisfy her duties to her clients. Lawyers have sworn fiduciary duties to pursue client matters faithfully and with zeal, but that duty does not require that the lawyer accept serious risks of personal harm. The lawyer should explore every available measure to identify an avenue of communication that keeps the participants safe, even if that avenue is not close to ideal or even satisfactory. The lawyer will not have breached any duty to her client if she does so, understanding that it is the best she can do.

4. **Succession planning**: COVID-19 is highly contagious, and anyone, regardless of age or health condition, may become infected. Once contracted, it is often debilitating and sometimes deadly. In a time of such great uncertainty about any individual's health, every person must have a plan in place for the possibility that he or she will become ill and unable to function. Even absent the pandemic, every lawyer should have a succession plan in place. In Maine, for example, the bar requires all practicing attorneys, as a condition of license renewal, to disclose on their annual registration the name of a proxy attorney who is willing to act as a receiver of

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[1] *See, e.g., Commonwealth v. Michel*, 367 Mass. 454, 460–61 (1975); *Peters v. Wallach*, 366 Mass. 622, 627 (1975).

[2] *See Commonwealth v. Waweru*, 480 Mass. 173 (2018) (regarding the psychotherapist-patient privilege); *People v. Godlewski*, 17 Cal.App.4th 940 (1993) (no waiver of attorney-client privilege when conversation took place in crowded jail).

[3] *See* Craig Dobson, Susan Church & Bryon M. Large, *Practical and Ethical Considerations in Detention Cases* (American Immigration Lawyers Association, April 6, 2020).

files and trust account funds upon the attorney's death, disability, or unavailability.[4] While Massachusetts does not impose such a condition, doing so is a quality of responsible practice. But lawyers who represent clients need more than a proxy for file safekeeping and oversight of trust accounts. A lawyer should have in place a plan for substitute counsel to be available to communicate with clients, courts, agencies and the like when the lawyer is incapacitated.

5. **Client health contingency plans**: Of course, clients may also become ill and unable to function in the way that the lawyer needs in order to proceed with the representation. Conversations with clients about their personal health, outside of representation directly concerning a client's medical condition, will likely feel awkward and intrusive, but lawyers owe it to their clients to raise questions about how to proceed should the client become impaired. Rule 1.14(b) permits a lawyer to act in a protective manner with a client "when the lawyer reasonably believes that the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest . . . ." The lawyer will be much better prepared to act consistent with Rule 1.14 if the lawyer and client have discussed the client's preferences in advance, including with whom the lawyer may communicate if the client is not able to function adequately as a client.

6. **Retainer clarity regarding updates on federal, state, and local relief packages**: Lawyers who regularly represent business clients are surely paying attention to the newly authorized federal, state, and local benefits available to small businesses and employers as a result of the pandemic and the shutdown of many business establishments. For example, the federal CARES Act,[5] signed into law in March 2020, appropriated billions of dollars in grants and loans to be available to small businesses to assist with payroll, rent, and other expenses. Lawyers are quickly examining such relief avenues and preparing advisories for the lawyers' constituents. The complexity of the new laws and the importance of the relief to the business clients introduces a legal ethics question which the lawyers must confront: Does the lawyer owe her business clients a duty to advise the clients, proactively, about the availability of relief and the deadlines to obtain such relief? A lawyer obviously needs to know the answer to that question knowing that many business clients have shut down or have had their customer base diminished significantly.

The answer to that question will depend on the terms of the retainer between the lawyer and the client. To begin with the most obvious example, if a client expressly requests from the lawyer advice about available relief packages, and the lawyer agrees to provide that guidance, then the lawyer's duties are clear. If the client does not proactively seek out the lawyer, but the lawyer's written retainer[6] with the client includes a commitment to protect the client's interests or to update the client about matters covered by the relief packages, then again the lawyer's

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[4] Maine Bar Rule 1(g)(12).

[5] Coronavirus, Aid, Relief, and Economic Security Act ("CARES Act") (HR 748), Pub. L. No. 116-136, 134 Stat. 281, 116th Cong. 2d Sess (March 27, 2020).

[6] In Massachusetts, unlike most other jurisdictions, a lawyer's retainer agreement with the client must be in writing, with limited exceptions. Mass. R. Prof'l C. 1.5(b).

duties should be clear. Absent such an agreement, however, lawyers generally do not have a duty to keep clients abreast of changes in laws or of other developments of interest to the clients. Lawyers often send advisories to clients informing them of important legal developments, but absent an identifiable contractual arrangement those updates and advisories do not constitute the creation of a lawyer-client relationship on those issues.[7]

The Committee encourages lawyers to consult with their professional liability carrier to confirm the limits of a lawyer's responsibility to the client when significant new developments arise in the areas for which the lawyer has advised the client in the past.

7. **Diligence about court and agency practice during the pandemic**: Every court, agency, and government office has changed its operations and restricted access as a result of government orders or prudent protective judgments. A lawyer representing clients with matters affected or being heard by a court or agency must be vigilant to understand with precision how those changes affect the parties' responsibilities. In some settings, filing deadlines have been extended, or certain filings are prohibited until a later date. In other settings, all deadlines and similar duties remain the same notwithstanding an institution's physical closure and remote operations. These non-uniform and frequently revised changes add special responsibilities to lawyers to ensure that they meet all of their obligations lest their clients forfeit important rights.

8. **Restrictions on financial assistance to litigation clients**: Lawyers no doubt will compassionately experience a desire to financially assist clients who lose their jobs and sources of income. In many instances, they may not offer financial help to their clients. Massachusetts, like almost every other United States jurisdiction, prohibits a lawyer from providing "financial assistance to a client in connection with pending or contemplated litigation" except for costs and expenses of the litigation itself, which may be advanced on a contingent basis. Mass. R. Prof'l C. 1.8(e). That rule bars a lawyer from loaning or advancing funds to a litigation client to purchase groceries, pay rent, or make car repairs, for example. Lawyers have received discipline for doing so.[8] (The rule does not apply to lawyers representing clients in non-litigation matters.) In reaction to the pandemic, the American Bar Association's Standing Committee on Ethics and Professional Responsibility is in the process of proposing changes to Model Rule 1.8(e) to allow some compassionate assistance to lower-income clients, but until the SJC changes the Massachusetts rule, lawyers in the Commonwealth must honor it.

9. **The Office of Bar Counsel and the Board of Bar Overseers remain in operation**: During the pandemic's shutdown, most of the operations of the Office of Bar Counsel (OBC) and the Board of Bar Overseers (BBO) continue through remote operation. The OBC accepts complaints about lawyer misconduct by telephone ((617) 728-8750), and will investigate such complaints. The OBC Hotline, available to respond to Massachusetts lawyers' questions about legal ethics, remains operational, on Mondays, Wednesdays and Fridays between the hours of

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[7] *See* Lawrence J. Fox, *Non-Engaging, Engaging, and Disengaging Clients,* 36 No. 4 Litigation 18, 22 (Summer 2010).

[8] *See, e.g.,* Ad. 09-16, 25 Mass. Att'y Disc. R. 682 (2009) (admonition after lawyer loaned client $7,500 for living expenses while representing client in a personal injury suit); Ad. 06-12, 22 Mass. Att'y Disc. R. 877 (2006) (admonition after lawyer cosigned a loan for client's benefit while personal injury matter was pending).

2:00 p.m. and 4:00 p.m. at (617) 728-8750. While the BBO has suspended disciplinary hearings until further notice, all filing deadlines for ongoing disciplinary matters remain in place.