

PROFESSIONAL RESPONSIBILITY IN THE TIME OF COVID-19



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WHAT CAN I DO TO INFORM MYSELF ABOUT COVID-19 ISSUES IN THE LEGAL PROFESSION?

The current status in the legal profession:

- There is acute awareness that we may be dealing with ill clients and that we ourselves or someone close to us may become ill. Governor Inslee, the Washington Supreme Court, federal courts and state courts are issuing emergency orders.
- Legal professionals are in flux both personally, in their practices, and are needing to adapt daily and even hourly to our present crisis. Legal professionals want to help out in their communities to support those in need of legal assistance.
- There is a massive increase in the need for assistance in civil justice problems: unemployment, unpaid bills and debts, unpaid rent and mortgages, family stress.
- There are justice problems created in probates (TEDRA petitions), undue influence issues, hasty estate planning, family caregiving disputes and access to records.
- Legal professionals will need to quickly adapt to their clients' changing legal needs: estate plans, federal and state benefits, unemployment and domestic abuse in family law cases, emergency steps to keep small businesses and nonprofits afloat.

OPERATIVE AUTHORITIES:

- RPC 1.1; 1.3; 6.5

WHAT RESOURCES CAN I USE TO ASSIST CLIENTS?

Check the WSBA.org pages for information and links for

- Member support resources
- Law firm management tools
- CLEs and Webinars
- Opportunities to help
- The latest information from the Washington courts
- Resources for the general public

OPERATIVE AUTHORITIES:

- RPC 1.1 (emergency orders, conducting remote depositions, conducting remote mediations, executing estate planning documents)
- RPC 1.6; 1.15A (cybersecurity, remote working, managing firm finances)
- RPC 2.1 (pointing to resources for economic, social and community support)

HOW CAN I PLAN FOR MY PRACTICE FUTURE IN THE EVENT I BECOME ILL?

What resources should I review to plan my action steps?

- Review RPC 1.1; 1.6; 1.15A
- Review the WSBA practice management website pages on succession planning. Check the *WSBA Law Firm Guide to Disaster Planning & Recovery*
- Consider options in planning for a temporary disability or a long-term permanent disability (or even death). Review your short-term disability plan, if any, for you and your employees.
- Designate a lawyer to handle your affairs in the event of your death and disability and reach out to them NOW. Authorize in writing your Assisting Attorney.
- Check with your financial institution to identify their requirements for another attorney to handle your IOLTA.

WHAT IF I BECOME ILL DURING THE COVID-19 PANDEMIC?

Hope for the best and plan for the worst

Especially if you are a sole or small firm practitioner – implement your prepared plan of action as soon as possible.

Keep your recovery and the safety of others front of mind. Follow public health guidelines and your doctor's instructions.

Immediately address this with your law firm, your clients, and appropriately your opposing counsel and the court.

Determine whether you will be able to practice remotely, whether your client matters can be continued or postponed, should you bring in another practitioner, or whether you or your firm will need to withdraw.

Inform yourself about small business assistance relief. Check your options.

- Review RPC 1.1; 1.3; 1.4; 1.6. Keep your clients informed and preserve confidentiality.
- Review RPC 1.16 (d) Protect your client's interests by organizing their legal file and making it available to them or their new counsel, if that is their choice. See WSBA Advisory Opinion 181

WHAT IF I BECOME ILL DURING THE COVID-19 PANDEMIC?

Hope for the best and plan for the worst

Discussion and Your Questions

WHAT SHOULD I CONSIDER WHEN I SELF-QUARANTINE DURING THE COVID-19 PANDEMIC?

Check your channels of virtual communication for privacy and security protection. Understand the platforms you are utilizing and understand the confidentiality risks. Watch for innocent looking, but malicious links. Above all, prioritize protecting your client's confidential information. RPC 1.1; 1.6; 1.15A.

Look around at your workspace. Is it dedicated and private? Can your conversations be overheard? Will your smart devices "hear" your voice? (e.g. Alexa, Google Assistant, Siri) Are you using a shared device that others in your remote office can access? Is your Wi-Fi password protected?

If you are using phone conferences or videoconferencing systems, are you using the best data-security practices when communicating during your legal representation? Are you using all the security options available?

Are you allowing for the extra time and "complication" of reaching other legal professionals and/or the Court when most are only accessible through remote access technology?

Review RPC 1.1; 1.4; 1.6; 1.15A Keep your clients informed and preserve confidentiality.

WHAT SHOULD I CONSIDER WHEN I SELF-QUARANTINE DURING THE COVID-19 PANDEMIC? (CON'D)

Are you ensuring that your support staff is following measures that will protect them as they interact with clients, the courts, and with the firm legal professionals? In addition to physical protections, is their remote access technology as protected through cybersecurity as the legal professionals?
RPC 5.1; 5.3

- Are you giving your nonlawyer assistants appropriate instruction and supervision regarding the ethical requirements of their employment, particularly confidentiality?
- You are responsible for their work product.
- Are you maintaining supervision and control over your firm's finances, and in particular your IOLTA account?
- Are you ensuring your nonlawyers assistants are not straying into the unauthorized practice of law? RPC 5.5; 8.4(a)

WHAT SHOULD I CONSIDER WHEN I SELF-QUARANTINE DURING THE COVID-19 PANDEMIC? (CON'D)

Are you practicing appropriate social distancing when meeting with clients and reviewing/executing documents?

Discuss with your clients the best way to confidentially contact you: mail, phone, video calls.

Are you periodically self assessing your general wellness and personal ability to handle the stress, anxiety and demands created by this pandemic?

Review RPC 1.1; 1.4; 1.6; 1.15A. Keep your clients informed and preserve confidentiality.

Review RPC 1.7 and 1.16(a)(2) as to whether to continue a representation.

WHAT SHOULD I CONSIDER WHEN I SELF-QUARANTINE DURING THE COVID-19 PANDEMIC?

Discussion and Your Questions

WHAT IF MY CLIENT IS SELF QUARANTINED?

Think about RPC 1.2 and the scope of representation – will you and your client be able to meet this challenge?

Consider RPC 1.14 and RPC 1.6(b)(1) if your client is at extreme risk and is not getting the assistance they need. Check for undue influence concerns. (RPC 1.14)

Find resources and become competent (RPC 1.1) in end of life issues to bring your clients comfort that their loved ones will handle their affairs if needed and will receive planned shares of their estate. For example, become competent in DPOAs for clients to plan for their own potential illness.

Be careful of “creative lawyering” in witnessing and executing estate planning documents. Follow statutory requirements to a “T”. (RPC 1.1)

Ask your client if they have a power of attorney or a legal representative with whom you should communicate in case they are no longer able to communicate with you.
RPC 1.6

WHAT IF MY CLIENT IS INFECTED?

COVID-19 is an unpredictable, highly contagious and possibly fatal virus.

- Keep your client informed about the status of their matter and widen the channels of communication with them. RPC 1.4
- Always consider RPC 1.6 and the circumstances.
- When your client is at risk of infecting others and does not want you to disclose or is engaging in risky behavior, consider RPC 1.6 (b)(1); 1.14.

COVID-19 and Quarantine

Discussion and Your Questions

WHAT ARE SPECIAL CONSIDERATIONS FOR GOVERNMENT ATTORNEYS?

Government agencies are working to manage the social, economic and other disruptions during the pandemic. How can government legal professionals do this ethically?

- Protect your own health and the health of your colleagues by following all CDC and other health and safety guidelines and orders.
- Ensure that your agency attorneys can access ethics resources and continue to receive individualized ethics advice, remotely.
- Provide proactive reminders about ethics and risk issues such as the use of nonpublic information, misuse of government equipment, and gift rules.
- Continue to ensure that your agency continues to conduct ethics education and briefings, remotely.
- Work with IT resources to facilitate confidential virtual meetings and support with an ethics component.

OPERATIVE AUTHORITIES:

- RPC 1.1; 5.1; 5.2; 5.3; 1.13; 8.4(a)

WHAT ARE SPECIAL CONSIDERATIONS FOR PROSECUTORS ?

Prosecutors control the entry points into the criminal justice system. During this pandemic prosecutors' discretion and decisions have influence as to whether defendants can be diverted from crowded courtrooms, jails, and prisons. Postponing cases and hearings that are not urgent is one tool. Other changes may be:

- Declining to initiate new prosecutions for low-level offenses that do not implicate public safety.
- Not requesting pretrial detention or imposition of cash bail for anyone charged with a non-violent offense.
- Recommending release for people charged with nonviolent offenses who are at high risk of contracting COVID-19. (e.g. the elderly and infirm)
- Consider agreeing to waive filing deadlines for appeals and post-conviction motions to the extent possible.
- Work with defense attorneys on a number of guidelines affecting the size and scope of the correctional system during this public health crisis. (See next slide.)

OPERATIVE AUTHORITIES:

- RPC Preamble and Scope; RPC 3.8

WHAT ARE SPECIAL CONSIDERATIONS FOR CRIMINAL DEFENSE COUNSEL?

COVID-19 poses a significant risk to individuals currently in regional jails. As the pandemic has closed or limited courts and postponed jury trials, pretrial detention is less definite. Other considerations may be:

- Work with prosecutors and pretrial services to develop plans for safe pretrial supervision, consistent with social distancing, and work for pretrial releases for misdemeanor and nonviolent felons in custody.
- Work with the courts and prosecutors to delay court appearances, if possible, and arrange for telephonic status conferences.
- Advocate to the courts and prosecutors to adjourn all sentencings for individuals who are on pretrial release.
- Advocate to the courts and prosecutors and local departments of corrections to adjourn dates to report to prison.
- With the rapid release of individuals in jails and prisons, advocate for programs to prepare the released including health screening, access to transportation, food, housing and resources for self-quarantine, if necessary.
- Understand the possible prejudicial effect of postponed investigations, of remote hearings and sentencings, and overall system delays and changes, and advocate effectively to offset any damage to your client.

OPERATIVE AUTHORITIES:

- RPC Preamble and Scope; RPC 1.1; 2.1

OTHER CONSIDERATIONS TO PONDER

- Probably the most difficult area to navigate is figuring out how to continue to serve your clients remotely, safely, and ethically.
- The time frame for this has been unexpected and exigent. The results are unfamiliar and stressful.
- Work to sort out your obligations toward clients and to the court on all current matters. Adjust to emergency court orders.
- Plan for a new reality in the legal profession.
- Generally, think about developing your future legal practice utilizing COVID-19 aware advertising, safely connect with and ethically represent new clients in new matters.
- How much of this will be temporary, and how much of this will be a permanent change in our profession?

OTHER CONSIDERATIONS TO PONDER

Discussion and Your Questions

