



COVID-19 Impact on the Practice of Law and Legal Malpractice Liability

Authors:

Courtney Curtis-Ives

Partner

Co-Chair of Professional Liability Practice Group

Jennifer Casazza Carter

Attorney

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The COVID-19 pandemic has changed the face of our legal practices, and tested the ability of the profession as a whole to adapt to the various changes mandated by social distancing and the related economic conditions that have developed and continue to evolve. Whether law firms can adapt to the new mandates of the practice will have a significant bearing on the risk of legal malpractice claims and future exposure. When a transaction has a negative outcome, it is often the attorney who is the first to be blamed for the result. The impact of COVID-19 will be no different. Therefore, it is essential for legal practitioners in all areas to take extra precautions to ensure that they adequately adapt to the “new normal” created by COVID-19, and reduce exposure where possible.

Virtual Practice of Law and Litigation

Attorneys dealing with the impact of COVID-19 and social distancing will need to adapt to the mandates of a virtual practice of law, especially in the realm of litigation. This means paying particular attention to applicable deadlines, document handling, and changes in how discovery is conducted. Furthermore, attorneys must be flexible and participate in virtual proceedings as appropriate.

Managing Changing Deadlines

COVID-19 has changed applicable deadlines to accommodate court closures, social distancing, availability of essential workers, and other applicable restrictions. Accordingly, attorneys must pay particular attention to the changing deadlines and how it implicates their respective practice.

For litigators in particular, statutes of limitations, in some cases have been extended. For example, New York has extended statutes of limitations and prohibited the filing of new matters.⁽¹⁾ New Jersey has established that March 16, 2020 through May 10, 2020 shall be deemed a holiday when computing time for statutes of limitations.⁽²⁾ In Connecticut, statutes of limitations are “suspended” during the state of emergency.⁽³⁾ In California, statutes of limitations are also tolled, starting April 6, 2020 and until 90 days after the “state of emergency” is over.⁽⁴⁾ Other states have extended the deadlines by statute, by Executive Order or by Court Order. Importantly, while some states have extended or tolled statutes of limitations, and other filing deadlines, including Notice of Tort Claims and Affidavits of Merit, others have done nothing to change the application of time bars. Similarly, statutes of limitations for federal claims have not been altered.

(1) Executive Order [A. Cuomo] No. 202.8, 202.24, 202.18; Administrative Order of Chief Admin Judge of Cts. AO/87/20.

(2) New Jersey Supreme Court Omnibus Order (April 24, 2020) <https://njcourts.gov/notices/2020/n200424a.pdf?c=5L3>; New Jersey Supreme Court Order (March 17, 2020) <https://www.njcourts.gov/notices/2020/n200317d.pdf?c=0cb>; New Jersey Supreme Court Omnibus Order (March 27, 2020) <https://njcourts.gov/notices/2020/n200327a.pdf?c=PYj>.

(3) Executive Order [Lamont] No. 7G.

(4) Cal. Rules of Court, Emergency Rule 9.

Given the frequently changing landscape of applicable statutes of limitations and other deadline-based claim bars as a result of COVID-19, practitioners must be vigilant and stay up to date with any changes that have been made to these deadlines, in their respective jurisdiction(s). Practitioners should also pay close attention to their choice of venue and the applicable choice of law applied. Finally, practitioners should always err on the side of caution when evaluating the applicable deadlines and seek tolling agreements, if necessary.

Practitioners must also be careful to properly calendar and manage all scheduling changes that are the result of COVID-19 based continuances and adjournments, motion deadlines and discovery deadlines. This can be particularly challenging when attorneys work from home and lack the infrastructure of the office and support personnel. This is precisely why extra focus is critical to ensure these changes are adequately monitored.

Document Handling and Discovery

Social distancing as a result of COVID-19 has required many practitioners to work remotely from home. The practice of law in this way requires remote work infrastructure that practitioners should have to keep up with applicable deadlines, discovery, and document management.

Importantly, practitioners should maintain a central repository or database so active case files are accessible at all times. Although it is becoming less frequent, many practitioners still rely solely on paper files. As a result of COVID-19, attorneys who are reliant on paper files have, in some cases, caused their cases to come to a standstill simply because they do not have access to the information they need. Not only could this have negative implications on case movement, it can also create difficulty in meeting deadlines and analyzing claims, and can increase liability risk. Maintaining access to one’s files electronically, can prevent these types of problems.

Practitioners who are now working from home and maintaining their files electronically should also be prepared to back up their data on a regular basis and impose safeguards to ensure that there is no spoliation of evidence. Furthermore, litigators should be prepared for Courts to begin to require discovery to proceed as usual. This means utilizing email and file sharing software (e.g., Dropbox, One Drive), to exchange discovery. Failure to maintain systems that will allow for discovery to proceed could result in liability and the possibility of sanctions.





Virtual Proceedings

Courts have moved toward having virtual proceedings as a result of the social distancing and COVID-19. Practitioners need to be prepared to adapt to these proceedings. For example, many Courts are encouraging, if not mandating, parties to continue to conduct depositions through video conference. Many court reporting agencies provide this service already, but for those who have not participated in a remote video-deposition, there are some challenges. Parties should allow for extra time in between question and answer to allow for applicable objections, as there may be a time-delay. Parties should also be prepared to be flexible in working out technological glitches. If documents are used, parties and the court reporting agency should work out ahead of time how those exhibits will be presented to the witness and shared with counsel.

Similarly, many Courts are preparing to hold virtual conferences and oral argument through Zoom, Skype, and other video conferencing services. If a practitioner is not familiar with using these services, check with the Court or Bar Associations to see if there is training available. Presentation is still important, and while the hearing or conference is not being held in an actual courtroom, the practitioner should still treat the virtual forum as if it were.

Finally, some states have adopted statutes or procedures to allow for remote notarization, through video conferencing. States, such as New Jersey, for example, have permitted remote notarization so long as the notary and the signatory are able to communicate simultaneously through sight and sound. P.L.2020 c.26. But, as always, there are some limitations and exclusions. Practitioners must be sure to check their jurisdiction's rules to ensure it a) permits remote notarization, and b) that no limitations or restrictions apply, prior to having any document notarized to avoid potential unenforceability.

Cyber Security

While working from home and reliance on electronic databases is essential in the COVID-19 era, the "new normal" comes with its own risks. Files should be backed up so as to avoid the risk of spoliation of discovery or simply losing one's work product.

Having files in electronic form can also create security risks, exposing your work product, privileged communications and client data to hackers and other nefarious actors seeking to obtain your firm's information. These risks have increased since COVID-19 because hackers are now aware that law firms are primarily working remotely and keeping their information in digital form. Practitioners may have noticed an increase in the number of fraudulent fishing emails they receive, or have heard about high profile law firms being hacked to steal client data. Adequate cyber security measures, including cyber security training of personnel, is therefore critical in today's "new normal."



Specifically, be on the lookout for emails that may contain ransomware or other malware disguised as:

- Court notices regarding upcoming appearances;
- Paycheck Protection Program enrollment;
- Assistance in securing stimulus checks;
- Job postings;
- Bank account problems;
- Cloud storage documents;
- Zoom conference invites; and
- UPS/USPS/FedEx package holds.

Practitioners and their employees should also be wary of emails and faxes from clients with changes in escrow or wire instructions, phony directions to issue payment from a partner or management level employee, and communications impersonating third-party vendors.

Law firms should take the following steps to manage these risks:

- Require 2-factor authentication for access to your systems/files;
- Maintain regular security updates;
- Back-up systems regularly;
- Advise employees to be wary of all links they click on;
- Double check that the sender of an email is who it appears to be – click the details to see the actual email account;
- When in doubt, call the individual who purportedly sent the communication to ensure it is authentic;
- Use call back verification for vendor or client account changes and fund transfers for any amount over a predetermined threshold;
- Maintain computers and other electronic devices in secure location;
- Always log out when you are not using the computer;
- Use strong passwords; and
- Access corporate information with a VPN, particularly if you are on a public wi-fi network.

Financial Issues

With the nearly universal work-from-home requirement for legal practitioners, there are some practical financial concerns that arise and can create liability risk. Practitioners should be careful when billing clients while working from home, making sure to document the work performed in a timely manner. Not only does this make sure all time is captured, but it increases billing accuracy and prevents overbilling. Clients may also be extra-skeptical of block billing or of various expenses charged. Make sure to document everything in case there are challenges to your billing.

Finally, in the current economic climate, many clients will be unable or unwilling to pay for the legal services provided. This will ultimately lead to more fee disputes, and resulting litigation. Often it is better to work with the delinquent client than resort to litigation to recover fees. One of the most common counterclaims asserted in a legal fee dispute is malpractice. Practitioners can avoid the risk by developing creative ways to work with the client to receive payment.

Ethical Considerations

While COVID-19 has changed many of the ways in which law is practiced, one thing that has not changed is the applicability of the Rules of Professional Conduct. In fact, these ethical obligations, in some respects, mandate that practitioners adapt to COVID-19 and social distancing in legal practice. Every state has its own version of the Rules of Professional Conduct, most of which are modeled after the ABA Model Rules. Of course, some jurisdictions have variations within their Rules. Attorneys must be mindful, though, to generally abide by a threshold level of competence in the course and scope of their legal representation. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *R.P.C.* 1.1. Furthermore, “a lawyer shall act with reasonable diligence and promptness in representing a client.” *R.P.C.* 1.3. Accordingly, attorneys have an ethical obligation to navigate and adapt to the new socially distanced world with reasonable diligence and promptness. By taking steps to adjust to the “new normal” that has resulted from the COVID-19 pandemic, practitioners can reduce the risk of legal practices liability.



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Offices

NEW YORK

Woodbury (Long Island)

135 Crossways Park Drive, Suite 201
Woodbury, NY 11797-2005
Tel: (516) 681-1100
Fax: (516) 681-1101

New York City

40 Exchange Place, 20th Floor
New York, NY 10005
Tel: (212) 485-9600
Fax: (212) 485-9700

NEW JERSEY

Hackensack

25 Main Street, Suite 500
Hackensack, NJ 07601
Tel: (201) 488-6655
Fax: (201) 488-6652

PENNSYLVANIA

Blue Bell (Philadelphia Metro)

1777 Sentry Parkway West
VEVA 17, Suite 100
Blue Bell, PA 19422-2227
Tel: (215) 461-1100
Fax: (215) 461-1300

Philadelphia

Four Penn Center
1600 John F. Kennedy Blvd., Ste 1030
Philadelphia, PA 19103
Tel: (215) 501-7002
Fax: (215) 405-2973

FLORIDA

Fort Lauderdale

One Financial Plaza
100 SE 3rd Avenue, Suite 1500
Ft. Lauderdale, FL 33394
Tel: (954) 712-7442
Fax: (888) 464-7982

Orlando

301 E. Penn Street, Suite 840
Orlando, FL 32801
Tel: (407) 789-0230
Fax: (888) 502-6353

ILLINOIS

Chicago

135 So. LaSalle St., Suite 2100
Chicago, IL 60603
Tel: (312) 759-1400, (312) 646-6744
Fax: (312) 759-0402

CALIFORNIA

Los Angeles

11755 Wilshire Blvd., Suite 2400
Los Angeles, CA 90025-1519
Tel: (310) 775-6511
Fax: (310) 575-9720

San Francisco

425 California Street, Suite 2100
San Francisco, CA 94104-2206
Tel: (415) 926-7600
Fax: (415) 926-7601

Sonoma

193 Sonoma Highway, Suite 100
Sonoma, CA 95476
Tel: (707) 509-5260
Fax: (707) 509-5261