

**Common Ethics Issues
for Oregon Lawyers During
COVID-19**

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Roadmap

- ▶ Have your rules handy! Go to www.osbar.org/ethics or just Google Oregon Rules of Professional Conduct
- ▶ Written Materials
- ▶ Let's Talk about Hypotheticals
 - ▶ Is My Client Sick?
 - ▶ Key Staff Out Ill
 - ▶ Hospitalized Attorney
 - ▶ Working from Home

Let's Chat!

- ▶ Please add your thoughts in the chat!
- ▶ If you don't want to be identified by name, just chat to me only and I will not mention your name.

Ethics Issues in a Pandemic

- ❖ Competence, RPC 1.1
- ❖ Diligence, RPC 1.2
- ❖ Client Communication, RPC 1.4
- ❖ Duty of Confidentiality, RPC 1.6
- ❖ Client with Diminished Capacity, 1.14
- ❖ Duty to Safekeep Client Property, RPC 1.15-1(a)
- ❖ Withdrawal, RPC 1.16
- ❖ Current Client Conflicts: Personal Interest Material Limitations, RPC 1.7(a)(2)
- ❖ Duty to Supervise Nonlawyer Assistants, RPC 5.3

Hypo No. 1 – Is My Client Sick?

❖ Despite her reasonable efforts, Attorney X cannot reach Client Y to discuss whether to go settle her PI case or appear for trial date-certain three months out. Attorney X is concerned Client Y may be ill based on a voicemail message, and knows Client is at high risk for COVID-19.

What Rules of Professional Conduct are implicated?

Hypo No. 1 – Is My Client Sick?

- ❖ Or...“What Rules are not implicated?”
- ❖ Considerations before acting.
- ❖ What information is confidential?
- ❖ Mandatory or permissive withdrawal?

Hypo No. 1 – Is My Client Sick?

- ❖ Mandatory Withdrawal, RPC 1.16(a):
 - ❖ Continued representation would violate RPCs
 - ❖ Attorney’s own physical/mental limitations prevent competent and diligent representation
- ❖ Permissive Withdrawal, RPC 1.16(b):
 - ❖ Any other good cause

Hypo No. 1 – Is My Client Sick?

- ❖ Abide by our duty of confidentiality upon withdrawal. Disclosure is likely limited to a vague statement:
 - ❖ “For professional considerations.”
 - ❖ Do not disclose client medical information without informed consent.

Hypo No. 2 – Key Staff Out Ill

- ▶ Attorney A represents Client B in high-value personal injury claim, but Attorney A’s primary paralegal is ill with COVID-19 and attorney is understaffed. Without paralegal, Attorney A realizes the office is understaffed.
- ▶ Weeks after paralegal gets sick, insurance claims adjuster alerts Attorney A to passing of the statute of limitations in Client B’s case.

Hypo No. 2 – Key Staff Out III

- ▶ All of Attorney A's remaining staff is working from home and communication is limited.
- ▶ Attorney A is embarrassed about missing the deadline to file complaint.
- ▶ So, Attorney A fails to disclose error to Client B.
- ▶ Attorney A fails to reach out to the PLF.

.... But it gets worse.

Hypo No. 2 – Key Staff Out III

- ▶ Attorney's is worried about reputational damage, a potential bar complaint and malpractice exposure.
- ▶ So, Attorney A conceals mistake from Client B and sends a fabricated complaint that Attorney A falsely claims was filed.

What Rules of Professional Conduct are Implicated?

Blame Game?

- ▶ Attorney A had a duty to supervise nonlawyer assistants to "ensure that the person's conduct is compatible with the professional obligations of the lawyer" RPC 5.3(a)
- ▶ Duties of Competence and Diligence, RPC 1.1, 1.2 require Attorney A to consider own limitations given staffing available

Elements of Personal Interest Conflicts

- ❖ A personal interest conflict of interest exists when circumstances raise a “significant risk” that an attorney’s personal interest will “materially limit” the representation. RPC 1.7(a)(2).

Spot Them: Personal Interest Conflicts

- ❖ When are you deemed to have knowledge of a conflict?
- ❖ Analysis of conflicts is fact-specific.

Waivers of Personal Interest Conflicts

- ❖ IF Lawyer reasonably believes it’s possible to continue to provide diligent & competent representation; and
- ❖ Client gives written informed consent. RPC 1.7(b).

Hypo No. 3 – Hospitalized Attorney

- ▶ Attorney B is a solo practitioner who is retained to represent Client C in a Measure 11 criminal matter.
- ▶ Sadly, Attorney B becomes seriously ill and is hospitalized with COVID-19. Attorney B is unable to pay one staff member, who stops coming to work.

Hypo No. 3 – Hospitalized Attorney

- ▶ Attorney B does not have a succession plan in place.
- ▶ No one is opening Attorney B's mail or answering the phone.
- ▶ Client C cannot reach Attorney B and finally files a bar complaint. Attorney B does not respond.

What Rules of Professional Conduct are Implicated?

Competence & Succession Planning

- ▶ Two kinds of succession planning:
 - ▶ Retire to the beach
 - ▶ Deal with unexpected emergency

Competence & Succession Planning

- ▶ Competent representation requires succession planning to safeguard client interests, OSB Formal Ethics Op 2005-129
- ▶ PLF Guide Planning Ahead: A Guide to Protecting Your Client’s Interests in the Event of Your Disability or Death (“Gold Book”)

Hypo No. 4 – Working from Home

- ▶ Attorney D has been working from home since the pandemic started.
- ▶ At the same time, Attorney D is homeschooling two children.
- ▶ Attorney D has a Zoom call with a client about filing a possible divorce petition.
- ▶ Child overhears, and tells friend who happens to be a child of Client about divorce.

What Rules of Professional Conduct are Implicated?

Duty of Confidentiality

- ▶ Working from home raises new confidentiality concerns.
- ▶ What reasonable steps can you take to protect client confidentiality?

What about other data breaches?

- ▶ Do other vendors or third-party services have access to client information?
 - ▶ Will they "reliably secure client data and keep information confidential"? OSB Formal Ethics Op No 2011-188
 - ▶ Are you adequately safekeeping client property? RPC 1.15-1(a)


