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Getting the Bugs Out: Preparing for the Next Phase

The pandemic will eventually go away. The Office of Attorney Ethics will not. While you are working out the bugs in your new COVID-friendly practice, take a look at how else you might avoid problems down the line.

By **Marc Garfinkle** | October 09, 2020

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The quarantine and its related limitations have caused law firms to retool their work environments and modify operational protocols. As with all forms of commerce, Law is upgrading and downscaling to create safe and sustainable systems for the COVID-19 and post-pandemic eras. Everywhere, law firms are working differently from before. Reimagining. Adapting. Trying to avoid the predictable risks and anticipate the remoter possibilities.

At our offices, we have restricted the use of common areas, installed countless sanitation devices, increased the distances between desks and tables, considered automatic door-openers and toilet-flushers, and have added infra-red temperature-checkers and enhanced HVAC systems. We are reconfiguring work schedules and floor plans and outdoor space to limit the number of people that occupy a room or other space at a

given time. We are upgrading our office sanitation and hygiene, educating our staff about new protocols, and enabling our work-from-home employees to maintain an appropriate level of electronic security in their devices and transmissions. All this, so that we may remain in business, so to speak, while protecting our clients, our staffs and ourselves. We have been acting swiftly.

We are not so quick to address some other issues, however, which also can put our livelihoods at risk. We still jeopardize our licenses with disciplinary situations that could have been easily detected or avoided. These were common problems before the pandemic, and they remain so. So, dear reader, today we look again at some chronic situations where we remain most vulnerable to a broadside from the Office of Attorney Ethics (OAE).

IOLTA trust accounts. There are 700 random audits performed each year, and most of them reveal some sort of non-compliance. Few firms score 100%. Fortunately, most common violations are easily rectified; unfortunately, others are not. Take three-way reconciliation of your trust account, a frequent theme of this column. This must be done monthly. Twelve times a year. Forever. This will reveal potential problems and insure against most account-related ethics violations. Your trust accounting will always be up to date and accurate.

Easy as this is, many, many solos and small firms continue to resist performing the three-way reconciliation. This is a bad idea. Unless you have had no activity at all in that account, it will require great effort to offer proper records at some future time, if you have not been maintaining them all along. If you hate doing that accounting stuff, pay someone else to do it. Just don't ignore it, hoping to dodge the Random Audit bullet and believing that you will be able to play catch-up if you ever have to make your books and records available to the OAE.

Another trust problem—unidentified funds. IOLTA accounts are not intended for the long-term storage of funds. We are supposed to pass money through those accounts as promptly as possible. However, many attorney trust accounts contain sums, large and small, that should have been paid over to a client or third party long ago. Escrows, refunds, our own fees—all kept in a sort or monetary Purgatory in our ATAs. As these funds stagnate in trust accounts—often undetected because of the lack of monthly three-way reconciliation—we lose track of whose money it is. A simple procedure allows us to remove the money from the account and pay it to the Clerk of the Superior Court. If you have "old money" worries, read the rule and follow it.

Next up: retainer agreements. In New Jersey, retainer agreements are required in every matter or case, unless the lawyer and the client have had an existing relationship involving similar matters handled on identical terms. Nevertheless, a surprising amount of legal work is done without a formal retainer agreement. Unless otherwise controlled by rule or statute, the requirements for a writing are minimal. You must advise the client of the services you will provide and the basis for your fee. Typically, attorneys include significant other covenants and conditions in their retainer agreements. But, at the very least, you should always have a writing—if only an email chain—where the essential terms of engagement are indicated. Keep a copy in the file. Few audits or ethics interviews pass without the OAE requesting a copy of the retainer agreement in a matter.

Competence. We get in trouble when we bite off more than we can chew, when we wade into a case until it is over our head, and when we lack the time, staff or financial resources to handle a matter optimally. We get into trouble when we take a case we probably should not have, or when we wait too long to withdraw.

Diligence. More and more attorneys are being disciplined for chronic lack of diligence. Granted, some clients are difficult, and others have unrealistic expectations, but most attorneys who are disciplined for lack of diligence (in its myriad forms) admit the fact. And while diligence may be hard to define, much like the concept of reasonableness, the Supreme Court expects us to understand it and to act accordingly. Lack of diligence can also appear as gross negligence or incompetence.

Lack of communication. At the least, attorneys are obligated to maintain open channels of communication with our clients, whose questions we must try to answer, and whom we must keep reasonably informed about significant developments in their case. Unfortunately, many people today believe that all communication must receive a reply immediately or nearly so. Our rules only require that we do so diligently, meaning promptly. Still, what is adequate and prompt communication for one client may not satisfy another. We often assume that our clients all require the same type and amount of information. This is a dangerous assumption, but the fix is easy: get to know your client better. You can also improve the channels by letting them know how and when they may contact you. Return all messages. Treat them as they expect to be treated.

There you have it, dear readers. The pandemic will eventually go away. The Office of Attorney Ethics will not. While you are working out the bugs in your new COVID-friendly practice, take a look at how else you might avoid problems down the line. Above all, stay safe!

Marc Garfinkle *practices in Morristown, focusing exclusively on legal ethics, attorney discipline, bar admission and judicial conduct. He is also an adjunct professor at Seton Hall University School of Law in Newark.*
