

Tips For Minimizing Law Firm Liability During COVID-19

By **Nicole Hyland**

The COVID-19 crisis has upended the legal industry, forcing law firms to adapt quickly to an almost entirely remote work environment. As with any significant upheaval, this sudden and radical transformation of the legal profession creates new risk management challenges for law firms.

This article discusses some of the risk management issues that law firms face during the COVID-19 pandemic and offers some tips for minimizing those risks.



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Giving COVID-19 Advice

Right now, clients are bombarding their lawyers with questions about how to respond to the COVID-19 crisis. These include, but may not be limited to:

- Does my business qualify for U.S. Small Business Administration loans and will I be required to give a personal guarantee?
- What is the impact if I need to lay off employees?
- What are the extended tax filing deadlines and how do they apply to me?
- Is the statute of limitations on my claim tolled?
- Do we need to comply with an upcoming discovery deadline?
- What are my risks if I ask an employee to go into the office to collect a critical item?
- Should I file an insurance claim for my business interruption losses?

The risk of responding to these questions is that COVID-19-related laws, executive orders and administrative court orders are being issued quickly and are changing on a daily basis. In addition, many of these edicts are not paragons of clarity and they have not yet undergone judicial review. As a result, lawyers may be answering these questions without the benefit of considered analysis or interpretive guidance.

Consequently, in the heat of the moment, well-intentioned lawyers may be giving faulty legal advice. Unfortunately, law firms will not feel the effects of those errors for months or years, after clients start filing legal malpractice claims.

And make no mistake. Clients will file legal malpractice claims arising from erroneous advice they are getting today. One thing we have learned from prior economic downturns is that they correlate to a rise in legal malpractice claims.

One cure for this ailment is coordination. Law firm management should implement some protocol for tracking COVID-19-related information and advice. For example, several law firms have assembled multidisciplinary resource teams to analyze COVID-19 legal developments and share information. Law firms should consider adding procedures to

coordinate how that information is disseminated within the firm and then dispensed as legal advice to clients.

Lawyers should also be instructed not to “go it alone” when advising clients on COVID-19 matters and — most importantly — to stay within their spheres of expertise. If a client asks her transactional lawyer an employment-related COVID-19 question, the lawyer should not try to figure out the answer herself. Instead, the firm should establish a clear procedure for referring these types of questions to the appropriate person.

This brings us to our next risk management topic.

Hoarding and Dabbling

Right now, the potential for hoarding extends beyond household paper products. Lawyers, like many people, are anxious about their financial futures. As business dries up, lawyers are worried their compensation will be cut or they may even lose their jobs. In desperation, some lawyers may start “hoarding” work.

What does that mean? It means, for example, that when a transactional lawyer learns that her client has a dispute with a business partner, the lawyer tries to solve the problem herself instead of passing it on to the firm’s litigation group, because she thinks she needs more billable hours.

A related problem is “dabbling” where a lawyer — due to similar financial concerns — starts to drift outside his practice area. For example, a commercial litigator whose business is slowing down due to court closures may put out feelers for employment, bankruptcy or insurance work, because that is where most of the business seems to be.

Hoarding and dabbling are dangerous because they almost inevitably lead to mistakes, which lead to unhappy clients and, in some cases, malpractice claims. Law firm management should remind lawyers of their duties of competence, caution against straying outside their practice areas, monitor client intake forms to ensure that new matters are allocated to the correct practice groups, and spot-check time entries to confirm that lawyers are spending their time appropriately.

Client Intake and Conflicts

One of the silver linings of our new remote-work environment is a slight relaxing of professional formalities. Business meetings held by videoconference are routinely interrupted by cats walking across keyboards, children hopping into laps, and the sounds of leaf blowers and lawn mowers.

Humans, being the incredible adapters that evolution has made us, have quickly modified our expectations to this new reality. We smile indulgently at our colleagues’ adorable pets, we greet their precocious children by name, and we sympathize about their inconsiderate, noisy neighbors. Then, we go back to our business discussion.

A little informality is great. But, when it comes to client intake and conflicts, let’s not get too comfortable. As with hoarding and dabbling, lawyers who are anxious to bring in business may be tempted to relax some of the barriers to entry for new clients. Giving in to that temptation now means trouble later, when that client whose red flags you ignored becomes a nightmare, or that missed conflict gets you disqualified from a multimillion-dollar litigation.

Law firm management should remind lawyers that client intake and conflicts procedures are still in place and should be strictly followed. This includes running conflicts and opening up new matters for all COVID-19-related inquiries, even for existing clients. Send around email reminders on these policies and consider conducting a remote ethics continuing legal education session to make sure these issues are front of mind for your lawyers.

Deadlines and Statutes of Limitations

Over the past month or so, governmental authorities have issued various emergency orders temporarily extending court deadlines, statutes of limitations, and tax filing deadlines. These measures provide some relief for lawyers and their clients as they struggle with the challenges of working from home, without access to their customary resources.

But, lawyers should play it safe when taking advantage of these extensions. Double- and triple-check that your deadline is, in fact, covered by the emergency order (some deadlines may not be). In addition, it is possible that some of the governmental authorities that issued these orders will be found to have exceeded their power, leading to messy court challenges down the road.

If it is possible for you to meet a deadline without relying on an emergency extension, minimize your risk by doing so. Moreover, even though New York has implemented some of these temporary protections, do not assume that other jurisdictions have done the same. Lawyers should check each jurisdiction where they have active matters to ensure that they are complying with the local requirements. And most importantly, continue to maintain a centralized law firm docketing and calendaring system to minimize the risk of missed deadlines.

Proofreading Errors

For many years, I have done most of my reading (both for work and leisure) on screens rather than on hard copies. Yet for some reason, I still find that proofreading on paper is more reliable and accurate than on a screen. In addition, it is always helpful to have a fresh pair of eyes proofread documents. After revising a document multiple times, there is a tendency to become blind to certain errors and skip over them.

Working from home means a lot more screen time and a lot less printing, which means a higher risk of proofreading errors. In addition, our colleagues are not as conveniently located as they once were, so we might forget to ask someone to proofread our documents before we hit the send button.

Proofreading shortcuts are a recipe for mistakes — and mistakes are the key ingredient in that untantalizing stew we know as legal malpractice (sorry, I've been doing a lot of home cooking lately). The cost of a misplaced comma, a missing "not," or using "and" instead of "or" can be substantial.

Law firm management should remind lawyers that best practices include having a second person proofread important documents, preferably in hard copy. If printing is not an option, increasing the document's font size on your screen or reading out loud can help catch mistakes.

Supervision of Attorneys and Staff

When your employees are scattered to the four winds, it is harder to keep tabs on what (and how) they are doing. But law firms not only have an ethical duty to supervise lawyers and staff, the role of supervision serves an essential risk management function. Supervising lawyers and nonlawyers reduces the risk of mistakes, thereby reducing the risk of malpractice claims.

Supervision involves more than just (figuratively) looking over people's shoulders. It is about promoting a law firm culture that encourages communication, openness, access and collaboration.

Many law firms have instituted regular videoconferences for the entire firm as well as for individual practice groups. These formal meetings are an important method of supervision, but more is needed during this time of self-isolation. Law firms should consider other measures to encourage regular communication among lawyers and staff.

Junior lawyers and nonlawyers should feel free to pick up the phone and call senior lawyers and partners to ask them questions or bounce ideas around. Conversely, a friendly check-in call from a partner or senior lawyer should not be so rare that it creates a sense of fear or trepidation in the recipient. As we shelter in place, it is all the more important that law firms encourage free-flowing and open lines of communication.

Confidentiality and Cybersecurity

So much ink has been spilled lately about the need for law firms to have strong data security protocols, I won't belabor this point. Cybercrime is on the rise because this transition into a fully remote work environment creates new vulnerabilities for the bad guys to exploit.

Law firms are far from immune. On the contrary, they are natural targets for cybercriminals because law firms store and transmit loads of sensitive confidential information, and lawyers are notorious for being technologically — let's just say — behind the times.

Law firms should implement protocols that make it easier — not harder — for attorneys and staff to practice data security hygiene. For example, if your servers are so antiquated that people keep getting booted off the system or they lose work because they have trouble saving files to the firm's document management system, guess what? They will email confidential documents to their personal email accounts and download them onto their personal computers so they can get their work done. These types of workarounds create openings for cybercriminals to access confidential information.

There are many articles out there written by people who are more qualified than I am to offer data security advice. The best advice I can give is to read those articles and consult with data security experts. Here are some tips for law firms:

- Institute a firmwide data security policy with appropriate safeguards.
- Use appropriate password protection, two-factor authentication, and encryption for all devices, including computers, home Wi-Fi routers and printers.
- Use secure recognized networks and a company-provided virtual private network if possible.

- Disable smart speakers and other artificial intelligence devices when having confidential conversations.
- Ensure that lawyers and staff are properly trained on new or unfamiliar technologies.
- Distribute a list of approved software, including cloud-storage and file-share solutions, to deter lawyers and staff from using unapproved software to transfer confidential data.
- Use secure videoconferencing platforms and use passwords when discussing confidential matters.
- Train personnel to identify, avoid and internally report potential cybercrimes and security incidents, such as phishing, ransomware attacks, inadvertently downloading malware, escrow and wire transfer scams, etc.
- Determine whether the law firm's insurance policy covers data security losses and, if not, consider supplementing the firm's coverage.

Isolation, Mental Health Issues and Sickness

Although many of us are holed up with spouses, children or other family members, others are sheltering alone. Even people who are surrounded by family still go through periods of feeling isolated and lonely, due to the lack of interaction with friends and colleagues. Physical and emotional isolation creates stress and can lead to depression and other mental health issues.

Even if someone is mentally healthy, they may suffer physical illness during this time, which will affect their ability to work. The risk of mental or physical impairment is not unique to the current crisis — but it can be more difficult to spot. Because no one is coming into the office, it may take a lot longer to notice that a member of your team has disengaged.

Going back to the theme of supervision, law firms should maintain regular and predictable communication with their lawyers and staff members, so that they notice if someone drops off the radar. Practice group leaders should keep track of who attends weekly conference calls and check in personally with anyone who is missing.

Monitoring time records is another way to track engagement. If someone has not entered their time for several days, it is a good idea to check in with them to see how they are doing.

Finally, make sure your personnel know about mental health resources that are available to them if they are feeling anxious or depressed. One place to start is the American Bar Association website, which has a [useful list](#) of mental health resources.

Conclusion

Every day, we receive confusing messages from the media and our political leaders about when, and under what conditions, things might go back to "normal." This confusion feeds anxiety, which can lead to mistakes. Law firm management should be working to alleviate some of that anxiety by communicating regularly with lawyers and staff and sending the message that — in the midst of this uncertainty — the firm is working hard to anticipate and

plan for whatever happens in the future.

That does not mean that law firms should fabricate a rosy outlook and pretend that everything is OK when it is not. It means that law firm management should be communicating with personnel on a regular basis about how the firm is responding to the crisis and should ensure that everyone (from the senior partners to the mailroom staff) feel they are receiving clear, accurate information and have open lines of communication.

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The data security tips in this article are from Frankfurt Kurnit associate James Mariani.

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