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A Guide To Zealously Representing Clients During COVID-19

By Anne Lockner (March 27, 2020, 3:56 PM EDT)

The obligation to zealously represent one's client is one that drives almost everything we do as lawyers. The American Bar Association's Model Rule of Professional Conduct 1.3 requires that a lawyer must "act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

The rule goes on, however, to caution: "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." But how do these rules apply during this unprecedented time of COVID-19?



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This is not the time to be a jerk.

Even before COVID-19, we've all been adverse to lawyers who interpreted "zeal in advocacy" as authorization to be a jerk all in the name of purportedly acting in the best interests of their clients. This was not acceptable then and it is even less acceptable now. No one should be using this worldwide crisis to unfairly gain an advantage in a case.

Clients' rights still need to be protected.

That said, this crisis does not mean that litigants must just stand down and wait for this crisis to pass. If parties are in litigation, there is likely a compelling reason that they got to such a point and it is unlikely that — pandemic or no pandemic — the compelling reason has gone away.

While it is very possible that priorities have shifted and the litigation objectives may take a back seat to more pressing needs, it is also very possible that those compelling reasons are now even more pressing. Or there could be new compelling needs arising out of this crisis that also require the need to resort to judicial intervention.

Cases must continue to be prosecuted and defended — zealously. Lawyers are among some of the more fortunate professionals — much of what we do can be done remotely. Therefore, parties can and should continue to proceed with their cases as best and efficiently as possible under the circumstances.

And while we may take issue with an opposing counsel refusing to give reasonable accommodations as a professional courtesy, we cannot begrudge someone for continuing to advocate and push to achieve their clients' objectives during this crisis.

Be attuned to the times.

Advocating for your clients' objectives requires good judgment — a trait that is more important than ever. That often means knowing when to pick your battles (or, in the words of the recently departed Kenny Rogers, "know when to hold 'em, know when to fold 'em").

One litigator recently chose wrongly when deciding to push — repeatedly — for injunctive relief arising from trademark infringement claims of "counterfeit unicorn drawings." [1] When the court postponed the hearing on the motion, the plaintiff's counsel sought reconsideration, pushed for a telephonic hearing, noticed the motion for a hearing on a day that the court had blocked off its calendar, and then filed an "emergency motion" before the chief judge.

The judge assigned to this matter, Judge Steven Seeger, did not take kindly to this strategy. "The filing calls to mind the sage words of Elihu Root: 'About half of the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.'" Ultimately, the court held: "The world is facing a real emergency. Plaintiff is not. The motion to reconsider the scheduling order is denied."

Thus, the need to be strategic demands being aware of how your client's lawsuit fits within the broader narrative of what is happening in the world. If you are litigating about the availability of masks and ventilators, you will likely have more leeway than the plaintiff above where the court pondered: "One wonders if the fake fantasy products are experiencing brisk sales at the moment."

There is likely a fair bit of nuance between those ends of the spectrum and it will be important to consider those nuances when advising your clients on how to proceed.

Health should be paramount.

As has been evident with the plethora of court orders across the country, including Judge Seeger's unicorn order, countless trials and hearings are being postponed to ensure that proper social distancing is being practiced. At some point, we will start exiting this phase of working remotely. And we are going to have to be sensitive that not everyone will be able to — or should — exit this phase at the same time or to the same degree.

Many people may have underlying health issues that could make them more vulnerable to the virus — or they live with family members with those vulnerabilities. In-person depositions, hearings, and trials — particularly jury trials — will no doubt be pushed back longer than many litigants (particularly plaintiffs) would desire. But we will all have to understand that many of our goals of achieving a conclusion to a matter will have to take a back seat to the health of those involved.

Do not manufacture an excuse that is not legitimate.

In order to ensure that those who need accommodations receive them, we also need to ensure that no one is unfairly exploiting this situation.

Is it OK to accept the unilateral and automatic 21-day extension to all deadlines like the one the Northern District of Illinois ordered, even if you might not need it? [2] Yes.

Is it acceptable to ask for a short deadline extension to accommodate some of the logistical issues arising from moving to a remote workforce? Yes.

Is it OK to use the COVID-19 crisis to justify your request for a two-week extension when the real reason is that you just want more time? No.

In that event, just ask for the extension without using the excuse and hope that you'll be granted it as a matter of professional courtesy. So long as you have not been a jerk, your chances of your request being granted are much higher.

Communication is key.

Effective communication has always been the foundation of an effective advocate. And those skills, like good judgment, are even more important during this crisis.

Obviously, staying in touch with your clients is paramount. How are they faring? What new legal issues are they facing every day (or every hour)? Do these changes in circumstances alter their litigation objectives? What kinds of new budget constraints might you now be under?

While your clients may have already let you know the answers to these questions, if you haven't heard, ask. Do not assume that the strategy you agreed upon last week is the strategy that will work today.

Likewise, stay in touch with your adversaries during this time. If your scheduling order will require adjustments, reach out to have that discussion with opposing counsel. You may not know what that schedule can or should look like now, but open a dialogue so that when you are ready to have those discussions, the door is already open.

Moreover, just like your own clients might be experiencing changes in their objectives, so too might your adversaries. Perhaps these delays in schedules is a good time to revisit settlement discussions in some of your cases.

In sum, this is a good time to remember that while we often find ourselves in adverse postures and adversarial settings, we are all going through this crisis together — albeit to different degrees. Hopefully, we can avoid being “damned fools” and work together to ensure the health and safety of our clients, our colleagues, the courts and their staff, and our adversaries.

And the better we do that, the sooner we will be in a position to lessen the need to fight this pandemic and, instead, we can go back to fighting — professionally and zealously — against each other on behalf of our respective clients.

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[1] Art Ask Agency v. The Individuals Corps., Ltd. Liab. Cos., P'ships, and Unincorporated Ass'ns Identified On Schedule A Hereto, Case: 1:20-cv-01666, Doc. No. 27, (J. Seeger, Mar. 18, 2020).

[2] See here.

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