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Elder Law

The newsletter of the Illinois State Bar Association's Section on Elder Law

Tips for Handling Medicaid Applications & Appeals During COVID-19

BY MICHAEL J. DRABANT

As a result of COVID-19, there have been additional strains put on the Medicaid application and appeal processes in Illinois. These strains present unique challenges for attorneys practicing in this area. As a result, attorneys handling applications and appeals need to be more diligent in their efforts to closely monitor each of their cases. This article explores some practical suggestions to assist the practitioner in maintaining an efficient practice.

Develop a System to Closely Track Incoming Mail

Right now, many attorneys are working remotely or only working part time at their offices. As a result, there may be a

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Self-Isolation Do's and Don'ts

BY JEWEL KLEIN

I don't know about everyone else, but this crazy time has taught me several lessons. My office files are pretty well organized. But, searching the home office, I've found toys that the children outgrew decades ago and after being sanitized, I've distributed them to the grandchildren, and the neighbors' kids. I've made a sign to thank the USPS person who slogs through to deliver bills and junk mail. I've reached out to relatives from coast to coast. I've done two 1000-piece puzzles.

When my husband began his retirement/working from home, he moved files to our home office. Now, I have time to recycle the files from the 1990's and early 2000's, being careful that there are no photocopies of checks from accounts that are still open. In my old files, I found a copy of a will done more than 40 years ago. I know that attorneys now must keep original wills, 755 ILCS 5/6-1(a), yet I also haven't heard from the client in the same period of time. In the old days, we did not use Constant Contact or other social media to keep in touch with clients.

More important, I've been catching up on my ISBA e-clips, as there has rarely been a day in the past when I have had the

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delay between the time the mail arrives at the office and the time the attorney actually receives and reviews the mail. Although many practitioners use the online application system, it is still important to track all incoming mail. With Medicaid appeals, timing is crucial because of the numerous deadlines involved. When a notice of decision is issued, the Medicaid applicant has 60 days to file an appeal from the date of the notice.[1] If the Medicaid application is being reviewed by the Office of Inspector General (OIG), the attorney may receive a verification checklist asking for numerous documents that were not provided with the initial application. The checklist will state the deadline by which the documents are to be turned over to OIG. Sometimes the turnaround time for these requests can be as short as 2 weeks.

Some law offices have attorneys working remotely, but there may be a staff member who is physically present at the office to receive and process the mail. In these circumstances, the staff member should be trained to identify envelopes from the Department of Healthcare and Family Services (HFS), the Department of Human Services (DHS) or OIG. Once the staff member spots one of these items, it should be brought to the immediate attention of the attorney or paralegal working on the matter. It is not sufficient to simply leave the envelope on the attorney's desk, which may sit there for days until the next time the attorney comes into the office to pick up paperwork. Each day the mail sits on the desk makes it that much harder to meet the specified deadline.

Save and Scan Envelopes

In addition to timely processing the mail, it is recommended that attorneys keep and scan the actual envelopes the mail comes in. Doing so documents whether there may have been a delay on the part of DHS between the date the notice of decision was issued and the time it was actually mailed. Some practitioners have seen instances where the notice was not mailed until *after* the 60-day deadline to appeal had already passed. In these circumstances it is crucial to have proof of the postmark on the envelope. When the appeal is being heard by an Administrative Law Judge, the first issue addressed is that of jurisdiction. If the appeal was filed outside of the 60-day window, it will usually be dismissed for a lack of jurisdiction. However, if the attorney can present proof of when the notice was actually mailed or received, it should be sufficient to overcome this hurdle.

Be Wary of Multiple Notices

In addition to attorneys working from home, many caseworkers from DHS are also working remotely. Sometimes this has caused confusion on the part of DHS as to which caseworkers are supposed to be working a certain file. As a result, some practitioners have reported receiving multiple notices of decision with each one stating something different. This can be difficult for the attorney to manage because of the uncertainty as to whether an appeal is actually necessary. For each notice of decision, the attorney should calendar each deadline for when the appeal must be filed. However, if any of the notices are unfavorable to the applicant, it is recommended that an appeal be filed within 60 days of the *first* notice of decision. This will preserve the rights of the applicant until there is clarification as to which notice of decision should be followed. The applicant always has the option to withdraw the appeal at a later date if it is deemed unnecessary.

Conclusion

1. For practitioners handling Medicaid applications and appeals during COVID-19, the following steps are recommended to ensure efficient processing of each matter:
2. Develop a system to timely process incoming mail;
3. Train staff to recognize and prioritize items received from the HFS, DHS, and OIG;
4. Save and scan the envelopes to preserve appeal rights in case of

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delays in mail processing; and

5. In case of multiple notices of decision, carefully track each deadline and file an appeal within 60 days of the first notice if any are unfavorable to the applicant.

By following these steps, the practitioner will maintain an efficient practice and minimize the chances of missing an important deadline.■

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1. 89 Ill. Adm. Code 102.82.

Self-Isolation Do's and Don'ts

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luxury to do so. To be honest, I skip most of the criminal cases, because there's just too much out there. A sign on my mailbox won't reach the ISBA employees who continue enlightening us in this awful time, but I hope this article will.

Speaking of the ISBA, for members, the CLE courses continue to be available on-line and phone-in section council meetings go on. Again, a big shout out to the hard-working employees of the ISBA.

One thing I haven't done—even during this unprecedented time—is let clients do my work. The March 2020 issue of the ISBA Bar Journal has a wonderful article about prepping the witness/client who thinks he/she knows it all.[2] Those clients tell us what the law says and about the internet research they have done. They usually have a relative who had a similar experience[3] and that sister's third cousin has imparted wisdom.

A recent opinion from the seventh circuit, *McCurry v. Kenco Logistics Services, LLC*, 942 F.3d 783 (7th Cir. 2019), reminds us that letting a client do the work for us is a very, very bad idea. Ms. McCurry had worked at a warehouse owned by Mars, Inc. and operated by Kenco. When Kenco lost its contract with Mars, several employees were laid off. In a belated response to these happenings, she filed two pro se complaints. The district court in the Central District of Illinois consolidated the complaints and dismissed when the Defendants moved for summary judgment.

Following the dismissal, Plaintiff hired an attorney, who was a long-time friend, to undertake the appeal. The *McCurry* opinion wasted no time describing the case in the opening paragraph of the opinion. After describing the pro se complaints as "rambling" the seventh circuit explained, "Plaintiff accused Kenco, Mars, and several of her supervisors of discriminating against her based on her race, sex, age, and disability. She also alleged that Kenco and Mars conspired to violate her civil rights." By the third paragraph of the opinion, the court had affirmed the dismissal and ordered the attorney to show cause why he shouldn't be sanctioned under Rules 28 and 33 of the Federal Rules of Appellate Procedure.

Probably like the rest of you, I have seen both well-written and not so well-written briefs in my day. With the latter, those of us in who practice in Cook County courts are constrained by Local Rule 13.1(a)(1) which provides, "A lawyer shall treat the court, opposing counsel and adversaries in a civil and courteous manner, not only in court, but also in all written and oral communications." The rules of the seventh circuit court of appeals are similar, as are the rules of numerous other courts. Admittedly, four-letter words and worse have expressed my opinion of opposing counsel and/or adversaries.[4] Those words do not get included in any brief I have written, in any state or federal court.

In *McCurry*, the Plaintiff's appellant brief accused adversaries of "criminal conduct," and of "murder," as well as endangering human safety. During the appellate oral argument, Plaintiff's counsel was challenged about the brief and, "He replied that he is a 'solo practitioner' who tries to 'get the help of … clients and whoever can provide help to [him]' and then 'merge[s] that information.'" With that excuse for "unprofessional conduct," the seventh circuit issued a Rule to Show Cause why he shouldn't be sanctioned for "unprofessional conduct." The Court also referred the matter to the ARDC.

Following the seventh circuit's November 7, 2019, decision, the Rule to Show Cause was briefed. In Plaintiff's counsel's two-page Response to the Rule Cause in the seventh circuit, he admitted his "grave errors of judgment," and articulated the shame that had been brought on him, his professional reputation, his family, and his law school. Citing 32 years of an untarnished reputation, he apologized. Plaintiff's attorney admitted filling a brief that the client had actually written and that he put his name on pleadings with only cursory review. On January 22, 2020, the seventh circuit ordered Plaintiff's counsel to pay Kenco and its co-parties over $70,000 in attorney's fees and double the court fees.

The lesson of *McCurry* is pretty clear. It is not enough to feel sorry for a client. The attorney has a duty to rigorously analyze the facts and the law and tell the client the truth, even when the ugly conclusion is that the client has no case. If the attorney is persuaded to undertake the case, he/she also has the obligation to prepare appropriate filings consistent with the rules. Telling the client what the client wants to hear, may make the lawyer feel good, but the lawyer's

feelings are not applicable. While the world undergoes this pandemic, let's hope that none of us gets so busy self-isolating that we fail to remember that a dutiful attorney simply does not accept what the client tells us and never file the client's writing as his/her own. At the same time, we need to remember that we are required to rigorously analyze the facts and the law without regard to personal feelings.

Stay safe all.■

1. Alan Wall & Caitlyn R. Culbertson, *Talk Shows*, 108 Illinois Bar Journal 30 (2020).
2. An article in Lowering the Bar, https://loweringthebar.net/2019/11/seventh-circuit-we-draw-the-line-at-gibberish.html, lists some of the words used by the seventh circuit to describe Plaintiff's brief including "utterly frivolous," "patently frivolous," and "86 interminable pages."
3. The Standard for Professional Conduct within the seventh circuit provide in part: We will practice our profession with a continuing awareness that our role is to advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications." https://www.insd.uscourts.gov/sites/insd/files/Standards%20for%20Professional%20Conduct.pdf.

Time to Allow Possession of Cell Phones in Courthouses and Courtrooms

BY EVAN BRUNO

As part of its 2020-2023 Strategic Plan, the Illinois Supreme Court Commission on Access to Justice plans to draft a uniform policy, to be presented to the Illinois Supreme Court, allowing greater use of cell phones in courthouses and encouraging adoption of a uniform policy statewide.

I believe it's high time to permit cell phones in courthouses and courtrooms, not just for lawyers, but for *pro se* litigants and members of the public as well. In January 2020, the Michigan Supreme Court adopted a new statewide policy allowing just that. Under Michigan's new policy, cell phones must be silenced, they cannot be used for photography, recording, or communication with witnesses or jurors, and the judge retains ultimate discretion to determine what cell phone activity is disruptive or likely to compromise courthouse security. Michigan's policy is eminently reasonable and loaded with appropriate safeguards. Illinois should follow suit.

The Michigan Supreme Court's order came with a dissenting opinion by Justice Stephen Markman, who characterized the use of cell phones as "a mere individual convenience" and laid out his arguments against the new statewide policy. First, he criticized the new policy's one-size-fits-all approach, opining that policing the new rules will be more difficult in large, busy courtrooms than in small courtrooms. Second, he expressed his worry that cell phones will threaten the "solemn proceedings" and "compromise the necessarily formal and focused atmosphere of the courtroom." Third, he warned that cell phones could be used to capture photos or recordings "to gain information about witnesses and jurors in order to intimidate, compromise, or embarrass these persons." Justice Markman's parade of horribles could be better described as a parade of *dagnabbits*.

His argument against the one-size-fits-all approach—an argument that could be made against *any* rule of general applicability—is a mischaracterization of the new Michigan policy, which gives courtroom judges discretion to "terminate activity that is disruptive or distracting to a court proceeding, or that is otherwise contrary to the administration of justice."

Justice Markman's second fear, that the introduction of cell phones will destroy the solemnity of the courtroom, rests on the faulty assumptions that (1) cell phones are not already ubiquitous in courtrooms (they are, in the hands of lawyers) and (2) cell phone possession cannot coexist with solemnity (it can, as is obvious to anyone who has attended a church service, wedding, or funeral during the age of cell phones). Similar curmudgeonly arguments were made against allowing extended media coverage, closed-circuit video arraignments, and doing away with the powdered wig. And although Justice Markman is correct that occasional "beeps, buzzes, and personalized ringtones" could invade the serenity of the courtroom from time to time, the justice system is not so fragile as to collapse under such trivial disturbances, if they occur.

Finally, the claim that cell phones will be used to somehow tamper with witnesses or jurors is more of an imagined boogeyman than a practical reason to maintain cell phone bans. Illinois already allows extended media coverage of trials, including audio and video recordings that are televised and posted online. Journalists often publish witness names and verbatim reports of their testimonies. Those who arrive in courtrooms to testify or serve as jurors are already subject to the gazing eyes of audience members whose right it is to attend public proceedings. Anyone with a cell phone may stand outside a courthouse's front doors and document all who enter. And any fear that outside information might reach a juror during trial

can be remedied by embargoing the jurors' cell phones during proceedings. Witness and juror tampering is bad when it happens, but given the already public and open nature of our court systems, it's hard to believe cell phone bans are the floodgates that, if broken, would unleash a meaningful increase in such misconduct.

The downside of cell phones in the courtroom is mild, but what about the upside? Take the following made-up case of Jane Doe as an illustration.

Jane, a single working mother, wakes up one morning to find a threatening voicemail from her abusive ex-boyfriend. She texts a babysitter to come look after the kids while she goes to the courthouse to obtain an emergency order of protection. Arriving at the courthouse via Uber, Jane is turned away at the metal detectors and told she can't bring her cell phone inside. She walks around the block and, making sure the coast is clear, slips her cell phone into a bush, hoping the rain holds off. (This is an actual practice—I've seen it done.)

Inside the courthouse, Jane starts on her petition. The form asks for the date of birth, addresses, and other biographical information for her ex. She doesn't have this information memorized, but she could have figured it out using various apps and information stored on her cell phone. She leaves those lines blank. Doing her best to remember the contents of the threatening voicemail she received, she jots down a paraphrased version and goes to the courtroom for the emergency hearing.

She waits almost an hour for the judge to call her case, regretting having told the babysitter she wouldn't be gone for long. Finally her case is called. The judge, reading her petition, is hesitant to grant an emergency order of protection based on a single voicemail. He asks Jane if she's received other threatening messages in the past. She has, but cannot recall the exact dates or details. "That's all on my phone, Your Honor." The judge denies the emergency order of protection, but tells Jane to come back in exactly two weeks at 3:00 p.m. with printouts of the other threatening messages. (She'll need to find someone who owns a printer.) "Does that date work for you?" the judge asks. Jane, not able to consult her electronic calendar, says "sure," forgetting her son, Johnny, has an appointment with his asthma specialist that same date and time.

Finally, exiting the courthouse, Jane retrieves her phone from the bush and sees a series of text messages from the babysitter:

"Johnny says he's having trouble breathing. What do I do?"

"Where do you keep Johnny's inhaler!??"

"I don't know what to do. He's not getting better."

"Just called 911. Ambulance on its way."

Jane's story is fictional, but the troubles she faces are not. People come to courthouses to conduct important business, but cell phones bans often deprive those people of the tools necessary to accomplish their tasks. Cell phone bans also trivialize the important role, for better or worse, that cell phones play in important daily life affairs of most adults.

Illinois must seriously rethink the pros and cons of cell phone bans. The cons have changed little over the past 10 to 20 years. Phones still make occasional beeps and buzzes, and they can be used to make recordings. The pros, on the other hand, have ballooned proportionate to the technology. The modern cell phone is an extension of its owner's brain and the primary mechanism through which he organizes and manages his daily life. They are so much more than "a mere individual convenience," as Justice Markman opines. Courthouses and courtrooms are the last public places where the greatest technological innovations of our lifetimes remain contraband. It's time to change that.

The 2020-2023 Strategic Plan of the Illinois Supreme Court Commission on Access to Justice can be found here: https://courts.illinois.gov/SupremeCourt/Committees/ATJ_Commn/01-Strategic_Plan_2020.pdf

The Michigan Supreme Court's Order and Justice Markman's dissenting opinion can be found here: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2018-30_2020-01-08_FormattedOrder_AmendtOfMCR8.115.pdf■

Post-Pandemic Practice (Or PPP)

BY MATTHEW A. KIRSH

Other than discovering that you can participate in a status wearing a dress shirt, tie and shorts, what have we learned from our practice of law during the time of coronavirus? From my perspective, and this article does not reflect the opinions of the ISBA, I think we have learned a lot.

Zoom status calls are efficient. When I was a newly minted lawyer, I practiced with a firm in Urbana. The federal courthouse was in Danville and the judges routinely conducted status hearings by phone. Probably because in my newly minted days a fax machine was considered high tech, I had forgotten all about that. It worked great then and it has worked great since mid-March. Zoom statuses save the time of going to the courthouse, which is a blessing for me and other downtown Chicago attorneys, but a an exponential blessing to suburban and rural practitioners who often need to drive great distances to give a ten minute update to the judge.

Depending on your perspective, though, Zoom statuses are both a blessing and a curse. Remote status calls allow for a lawyer to be in one county at 9:00 a.m. and

another at 9:30 a.m. Sounds great, right? What could be the downside? One time when I approached the bench in a suburban county the judge (a former Family Law Section Council member) announced to the entire courtroom "Look, it's Mr. Kirsh, a carpetbagger if I have ever seen one." He was joking, and I won my motion, but I understand the sentiment. Remote statuses allow lawyers to expand the geographic scope of their practice. Resentment of the encroachment by the local bar should be no surprise. The street runs two ways, though, and on behalf of the Cook County Bar, I want to extend a heartfelt invitation to all collar county lawyers.

While remote status calls are one thing, contested hearings are a completely different animal. Most non-evidentiary hearings can be conducted remotely with little, if any, loss of quality. You do not need to be in the same room with the judge to argue a motion to dismiss or a simple motion to compel. The persuasive power of saying: "The Respondent's discovery responses are 45 days overdue" is not diluted by the remoteness of the judge. Document intensive hearings, though, are a bit more problematic. Many lawyers are closeted Luddites. Asking them to efficiently share documents on the screen is like asking your dog to speak French. With all due respect to your awesome Labradoodle, it just isn't going to happen. Even lawyers who are fairly computer-savvy have difficulty with the more advanced features of Zoom. It is not fair for a client to gain an advantage or suffer a disadvantage based upon the attorneys' relative computer skills.

Remote contested evidentiary hearings, in my opinion, are a disaster and need to stop as soon as public health concerns can be safely addressed. Wigmore said that cross examination is "beyond any doubt the greatest legal engine invented for the discovery of truth." An element of effective cross examination is the discomfort of the witness. There is a huge difference between sitting in your family room in your favorite chair with your Labradoodle by your feet and sitting in the witness box with opposing counsel in your face and the judge observing every aspect of your physical being. Remote testimony has inherent reliability problems. It is impossible to tell if anyone else is in the room. It is difficult to determine what, if anything, the witness is looking at. Although it would be highly unethical, it is not beyond the pale of imagination that a lawyer could be texting the client as he is on the stand, saying something like "Hey dummy, answer the questions. You look like you are hiding something." While I understand the need to bring cases to conclusion, as soon as it is safe, I believe that all evidentiary hearings need to be conducted at the courthouse.

So where does that leave us? Assuming that a vaccine is developed and we can once again safely personally interact, things do not need to automatically go back to the way they were. Just because 200 lawyers and 300 clients can safely go to the 16th and 30th floors of the Daley Center does not mean that they need to go there. The time savings for lawyers and the money savings for clients cannot be ignored. Clients who want to attend status hearings can take a fifteen-minute break from work instead of a day off of work. Hopefully, remote statuses are here to stay. There is no reason that prove-ups cannot continue to be conducted remotely, too. Trials and evidentiary hearings on the other hand, need to return to the courthouse ASAP. Clients deserve to receive the full benefit of their attorneys' skills. Clients should not be deprived of the best possible representation due to technology or the limitations of their lawyers to master it. Judges deserve to discover the truth in the manner that only an in-person evidentiary hearing can produce. All of this being said, the only thing we know about the future is that it is uncertain. It will be interesting to see how this all shakes out.■

Considerations for the Zoom Era of Client Conferences

BY JODIE DISTLER

Nearly every aspect of life has been affected in some manner by the COVID-19 pandemic. Perhaps most altered has been the way in which we interact with others – our family, friends, colleagues, and clients. Personal, face-to-face interactions were abruptly replaced with telephone calls (reminding us that yes, our smart devices are actually telephones), text, email, and videoconferencing. Hours previously spent in restaurants and bars and at theaters and sporting events quickly became happy hours and trivia nights via Zoom.[5] What appeared to be a little-known app suddenly was the meeting house for all forms of social and business communication.

Zoom was founded in 2011 and launched in 2013.[6] The platform had approximately 10 million daily meeting participants in December, 2019. This increased to 200 million daily meeting participants in March, 2020 and 300 million a month later.[7] And Zoom is just one platform in a growing industry—Skype, Cisco WebEx, Microsoft Teams, Google Meet, and others also experienced significant increases in usage.[8]

This explosion of usage exposed certain privacy and security weaknesses in Zoom's and others' security measures. Security upgrades and improvements were dispatched,[9] but many businesses have grappled with how to protect proprietary and customer information while using these platforms. Lawyers, operating under the duty of competence, will need to manage and address these concerns when using videoconferencing platforms to communicate with clients. Indeed, Rule 1.1 of the Illinois Professional Rules of Conduct

provides we must "keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*."[10] It is not enough that we can host videoconferences and understand the benefits to our practices. We must understand the risks involved in using that technology, including potential disclosure of client information and loss of attorney-client privilege.

Professional Rules of Conduct: Confidentiality

Confidentiality is one of the fundamental principles of the attorney-client relationship and is memorialized in the Illinois Professional Rules of Conduct. Absent a client's informed consent, a lawyer not only "shall not reveal information relating to the representation of a client" but a lawyer shall also "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or authorized access to, information relating to the representation of a client."[11]

This affirmative duty is reinforced in the Comments to Rule 1.6. Comment [18] states, "[p]aragraph (e) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties..."[12] Comment [19] notes that with respect to "transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[13]

Comment [19] does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy.[14] However, this is balanced against the sensitivity of the information, the presence of a confidentiality agreement, the likelihood of disclosure if additional safeguards are not employed, the cost and difficulty of employing additional safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients.[15]

Thus, whether a lawyer has taken reasonable efforts and precautions will be a facts and circumstances test, but there are practical steps to take to reduce the risk of violating the duties under Rule 1.6.

Protecting Client Information: Practical Considerations

Understand the Privacy Policy. Understanding the privacy policy and security capabilities is critical to using a videoconference platform. A lawyer must understand what he/she is asking of clients and be able to answer a client's questions about the data collected by the platform, how data may be stored, and what data is shared by the platform and with whom, for example – Must a client set up an account to use the platform?

- What information is requested to set up an account?
- Does the platform store VPN information or user locations?
- Does the platform use cookies?
- Can the platform store or scrape files or information shared during the meeting?
- Can the platform access or scrape files or programs not shared on a user's laptop or other device?
- Does the platform share information with affiliates or marketing partners or sell information to third parties?
- Does the platform collect facial recognition information?

A lawyer should confirm that a platform's privacy policy is consistent with his/her firm's privacy policy and be prepared to inform the client of any variance. This task is easier when a lawyer limits his/her use to a few platforms.

Apply Enhanced Security Features. Zoom bombing, Zoom-attacks, and Zoom raiding were reported extensively in the initial weeks of the pandemic.[16] These are intrusions into a video conference call by uninvited guests. Certainly if this occurred during a client conference, it would be embarrassing. But worse is if the uninvited guest is able to observe client information shared on a screen or overhear sensitive client information. Minimize the risk of third party intrusions by using passwords for each meeting (no, "password" is still not a good password), share the password securely, and use other available enhanced security features, such as two factor authentication, if available. [17]

In addition, if it is necessary to share your screen for the meeting, take care not to display social security or other tax identification numbers, account numbers, or other financial data. And be sure to close all documents, internet browser tabs, and turn off email notifications so you do not inadvertently share information related to your other clients.

Consider Written Consent. Recall also that Rule 1.6 permits a client to consent to the release of information related to the representation. Depending on the extent and scope of a lawyer's use of videoconferencing, it may be prudent to seek written consent from the client to use a certain platform for client conferences. Note, if the client is using a platform hosted by the lawyer, then the client may not have access to the platform's privacy policies, meaning the onus is on the lawyer to inform the client as to any data collection, storage, and sharing.

Issues with Recording Videoconferences: Practical Considerations

Much discussion has revolved around whether recording videoconferences may be helpful to substantiate (i) a client's intent and purpose with respect to estate planning decisions, (ii) a client's understanding of risks of certain legal or tax positions, or (iii) a client's capacity to execute his or her estate planning documents. Indeed, the videoconference platforms have made recording simple and efficient. Prior to recording, the lawyer should consider -

Obtain Consent. By default, only the meeting organizer can record a meeting on the Zoom platform. If a lawyer intends to record, remember that Illinois is a two-party consent state for recorded conversations. Pursuant to Illinois statute, a person "commits eavesdropping when he or she knowingly and intentionally … [u]ses an eavesdropping device, in a surreptitious manner, for the purpose of transmitting or recording all or any part of any private conversation to which he or she is a party unless he or she does so with the consent of all other parties to the private conversation."[18] A lawyer needs to inform and obtain consent from the client and any other participant to the conversation prior to recording.

Consider Privilege. Prior to recording, the lawyer should consider how the recording would be treated in a later dispute, specifically whether the recording would be

considered privileged. As attorney-client privilege is "the oldest of the privileges for confidential communication known to the common law,"[19] a full discussion of the contours of the privilege doctrine is beyond the scope of this article. The Seventh Circuit has articulated the following test for the existence of the attorney-client privilege: "(1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." [20] The privilege is not unlimited. It applies "only if [the communications] constitute legal advice, or tend directly or indirectly to reveal the substance of a client confidence."[21] As a recording of a videoconference would directly reveal the substance of a client communication, presumably the recording would meet the above articulated test. Note, the lawyer should be aware of who is in the room with his/her client and confirm that the conversation is private.

Privilege is Not Absolute. Privileged can be waived expressly or by inadvertent disclosure and is subject to limitations such as the crime-fraud exception.

Recording May Not Be Comprehensive. Despite a lawyer's efforts, misstatements, misunderstandings, and mistakes do occur. The lawyer should be aware of any recorded conference call that required further clarification or correction and carefully document in his/her notes how the misunderstanding was resolved in order to have a full and complete record of his/her advice.

Consider File Retention Policy. The lawyer should consider his/her file retention policies when storing or destroying any recordings of client videoconferences. ■

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The views expressed in this article reflect those of the author and they are not the opinions of BMO Harris Bank N.A.

1. Zoom is a videoconferencing software program developed by Zoom Video Communications, Inc.
2. https://www.businessofapps.com/data/zoom-statistics.
3. *Id.*
4. https://www.pcmag.com/news/zoom-vs-microsoft-teams-vs-google-meet-a-videoconferencing-face-off.
5. https://www.consumerreports.org/video-conferencing-services/zoom-updates-user-privacy-security.
6. IL Rules of Prof'l Conduct R. 1.1 (2010).
7. IL Rules of Prof'l Conduct R. 1.6(a) and (e) (2016).
8. IL Rules of Prof'l Conduct R. 1.6 cmt. 18 (2016).
9. IL Rules of Prof'l Conduct R. 1.6 cmt. 19 (2016).
10. *Id.*
11. IL Rules of Prof'l Conduct R. 1.6 cmt. 18 (2016). Whether the disclosure of client information violates federal or state laws related privacy is beyond the scope of the Rules and this article.
12. https://www.nytimes.com/2020/03/20/style/zoombombing-zoom-trolling.html.
13. https://www.forbes.com/sites/kateoflahertyuk/2020/04/03/use-zoom-here-are-7-essential-steps-you-can-take-to-secure-it/#7fbfbc7c7ae1.
14. 720 ILCS 5/14-2(a)(2).
15. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).
16. *Heriot V. Byrne*, 257 F.R.D. 645, 656 quoting *Naik v. Boehringer–Ingelheim Pharms., Inc.*, No. 07 C 3500, 2008 WL 4866015, at *1 (N.D.Ill. June 19, 2008) (citing United States v. White, 950 F.2d 426, 430 (7th Cir. 1991)).
17. *Id.* (quoting U.S. v. Defazio, 899 F.2d 626, 635 (7th Cir. 1990)).

Updates & Resources

BY KAREN KLOPPE

Engage2Change

The Office of Adult Protective Services within the Illinois Department on Aging has received a $2.1 million grant from the Administration for Community Living to enhance advocacy and services for adults with disabilities and senior citizens in abuse cases. As part of its plans, the office is launching a new awareness campaign to remind the public, mandated reporters, and other professionals about the importance of reporting suspected abuse, neglect, and exploitation.

In conjunction with the CBS Community Partnership Division, the campaign theme, *Engage2Change*, will appear in broadcast television, digital platforms, and email marketing. To make a report, call the statewide 24-hour Abuse Hotline at 866-800-1409, or visit https://www2.illinois.gov/aging/Engage/Pages/default.aspx. Trained professionals are available and prepared to take reports of suspected abuse and forward them promptly to local adult protective service agencies. All calls and information related to abuse, neglect, and exploitation are strictly confidential.

Supreme Court Rule Changes

In July, the Illinois Supreme Court announced changes to the following rules:

Rule 7.3: Solicitation of Clients

(Amended July 17, 2020, effective immediately)

Rule 11: Manner of Serving Documents Other Than Process and Complaint on Parties not in Default in the Trial and Reviewing Courts

(Amended July 15, 2020, effective immediately)

Rule 101: Summons and Original Process--Form and Issuance

(Amended July 17, 2020, effectively immediately)

Rule 131: Form of Documents

(Amended July 15, 2020, effectively immediately)

Rule 139: Practice and Procedure in Eviction Cases

(Adopted July 17, 2020, effective immediately)

Rule 181: Appearances--Answers--Motions

(Amended July 17, 2020, effective immediately)

For more information, visit:

http://illinoiscourts.gov/Media/PressRel/CurrentRel.asp

http://www.illinoiscourts.gov/SupremeCourt/Rules/default.asp ■

Mark Your Calendars...

September 2020:

Hispanic Heritage Month

National Eye Exam Month

7: Labor Day
11: 911 Remembrance
17: Citizenship Day Constitution Day
21: National Senior Citizens Day
22: Autumn Equinox Business Women's Day
26: Women's Equality Day ■

Call for Articles

Interested in submitting an article for the newsletter? Everything you need to know about the publication process is posted at https://www.isba.org/publications/sectionnewsletters. Please submit your draft **and** signed a release form to us via email **by September 5, 2020**:

- Karen Kloppe - Karen.Kloppe@Illinois.gov

Let us know if there are any topics you would like to see covered in the future.■