



# Town Hall Small Firms and Solo Practitioners Zoom Conference Meeting

Thursday, April 2, 2020

# Panel 1

## Ethical Considerations for Delaware Lawyers during the COVID-19 Pandemic

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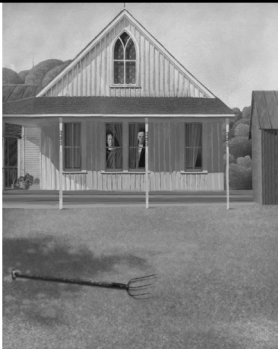
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### What We Will Discuss

- Delaware Judiciary response to Covid-19 and impact of stay-at-home orders
- Continuity of care for clients
- Ethics of working remotely
- Need for succession planning
- Ethics and practice resources

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### Delaware Judiciary response to COVID-19 and impact of stay-at-home orders

- Supreme Court Order(s)
- Updated information on Delaware Courts insert website address
- Stay-at-home orders
- MCLE requirements

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### Continuity of Duty to Clients

- Communication with Client – Rule 1.4
  - Notice to clients and setting expectations
  - Client appointments and social distancing
  - In person, phone, video conferencing
  - Changes to court appearances
- Competence and Diligence – Rules 1.1 and 1.3
  - Meeting deadlines
  - E-filing

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### Considerations for working remotely

- Business continuation plan that includes access to
  - Electronic and paper files
  - Telephone and voicemail
  - Mail and deliveries
  - Email
  - Court e-filing
  - Calendar
  - Trust business accounts

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### Ethics of working remotely

- Competence in using technology - Rule 1.1 Comment [8]
  - Added risks of using remote technologies
- Maintaining confidentiality - Rule 1.16
  - Appropriate use of technology
- Supervising office staff while working remotely Rules 5.1, 5.2, 5.3
- Client files
- Trust accounts - Rule 1.15
  - Electronic transfers - Rule 1.15(d)(12)(i)
  - Record keeping - Rule 1.15(d)

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### The need for succession planning

- Quarantine or incapacity of lawyer - Rule 1.3 Comment 5
- Declining or terminating representation Rule 1.16
- Designation of successor counsel
- Agreements and authorizations with successor counsel
- American Bar Association

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### Ethics and practice resources

- Delaware Lawyers Assistance – Carol Waldhauser 777-0124
- ABA Formal Opinion 482 (Sept. 19, 2018) Ethical Obligations Related to Disasters
- Supreme Court Rule 58 Provision of Legal Services following determination of major disaster.
- ZOOM, Quick Books, DSBA, ABA, Malpractice Carriers
- [https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyersintransition/successionplanning/](https://www.americanbar.org/groups/professional_responsibility/resources/lawyersintransition/successionplanning/)

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# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 482

September 19, 2018

## Ethical Obligations Related to Disasters

*The Rules of Professional Conduct apply to lawyers affected by disasters. Model Rule 1.4 (communication) requires lawyers to take reasonable steps to communicate with clients after a disaster. Model Rule 1.1 (competence) requires lawyers to develop sufficient competence in technology to meet their obligations under the Rules after a disaster. Model Rule 1.15 (safekeeping property) requires lawyers to protect trust accounts, documents and property the lawyer is holding for clients or third parties. Model Rule 5.5 (multijurisdictional practice) limits practice by lawyers displaced by a disaster. Model Rules 7.1 through 7.3 limit lawyers' advertising directed to and solicitation of disaster victims. By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster.*

### Introduction<sup>1</sup>

Recent large-scale disasters highlight the need for lawyers to understand their ethical responsibilities when those events occur. Extreme weather events such as hurricanes, floods, tornadoes, and fires have the potential to destroy property or cause the long-term loss of power. Lawyers have an ethical obligation to implement reasonable measures to safeguard property and funds they hold for clients or third parties, prepare for business interruption, and keep clients informed about how to contact the lawyers (or their successor counsel). Lawyers also must follow the advertising rules if soliciting victims affected by a disaster.

Much information is available to lawyers about disaster preparedness. The American Bar Association has a committee devoted solely to the topic and provides helpful resources on its website.<sup>2</sup> These resources include practical advice on (i) obtaining insurance, (ii) types and methods of information retention, and (iii) steps to take immediately after a disaster to assess damage and rebuild. Lawyers should review these and other resources and take reasonable steps

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

<sup>2</sup> ABA COMMITTEE ON DISASTER RESPONSE AND PREPAREDNESS, <https://www.americanbar.org/groups/committees/disaster.html> (last visited Sept. 6, 2018). ABA Committee on Disaster Response and Preparedness, *Surviving a Disaster A Lawyer's Guide* (Aug. 2011), [https://www.americanbar.org/content/dam/aba/events/disaster/surviving\\_a\\_disaster\\_a\\_lawyers\\_guide\\_to\\_disaster\\_planning.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning.authcheckdam.pdf).

to prepare for a disaster before one strikes the communities in which they practice. Lawyers should also review their disaster preparedness plans when a disaster threatens. Included within disaster planning, and of particular importance for sole practitioners, is succession planning so that clients and others know where to turn if a lawyer dies, is incapacitated, or is displaced by a disaster.

Despite the wealth of information available on preparing for a disaster and on the practical steps a lawyer should take to preserve the lawyers' and the clients' property and interests after a disaster, there is a dearth of guidance on a lawyer's ethical responsibilities (i) when a disaster threatens, and (ii) after a disaster occurs.<sup>3</sup> This opinion addresses the lawyers' obligations in these circumstances.<sup>4</sup>

### A. Communication

Model Rule 1.4 requires lawyers to communicate with clients.<sup>5</sup> One of the early steps lawyers will have to take after a disaster is determining the available methods to communicate with clients. To be able to reach clients following a disaster, lawyers should maintain, or be able

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<sup>3</sup> There are three ethics opinions from state bars on a lawyer's obligations after a disaster: N.Y. City Bar Ass'n Formal Op. 2015-6 (2015) advises lawyers to notify clients of destruction of client files in a disaster if the destroyed documents have intrinsic value (such as a will) or if the lawyer knows the client may need the documents; La. Advisory Op. 05-RPCC-005 (2005) advises lawyers on providing pro bono assistance through a hotline or both; and State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) advises lawyers not to participate in a mass disaster victims chat room because it is intrusive, but not because it is prohibited as in-person solicitation.

<sup>4</sup> This opinion focuses primarily on the obligations of managers and supervisors within the meaning of Rule 5.1, recognizing that lawyers practice in a variety of contexts, including solo offices, small firms, large firms, government agencies and corporate offices. Subordinate lawyers may rely on the reasonable decisions of managers and supervisors on how to address the ethical obligations this opinion describes. Some of the obligations may be reasonably delegated or assigned to specific lawyers within a firm or organization. Methods of compliance with the obligations may vary depending on the practice context in which they arise. In addition, lawyers employed by governmental or other institutional entities may be subject to requirements imposed by law, or the policies of those entities. Reasonable implementation of the obligations described in this opinion satisfies the Model Rules. Opinion 467 provides examples of how to comply with obligations under several Model Rules in a variety of practice settings. See ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) provides:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible.<sup>6</sup>

In these early communications clients will need to know, for example, if the lawyer remains available to handle the client's matters, or, alternatively, if the lawyer is unavailable because of the disaster's effects, and may need to withdraw. In a situation in which a disaster is predicted, for example, with a hurricane or other extreme weather event, lawyers should consider providing clients with methods by which the lawyer may be reached in the event that emergency communication is necessary. Information about how to contact the lawyer in the event of an emergency may be provided in a fee agreement or an engagement letter.<sup>7</sup>

In identifying how to communicate with clients under these circumstances, lawyers must be mindful of their obligation under Rule 1.1 to keep abreast of technology relevant to law practice<sup>8</sup> and Rule 1.6(c)'s requirement "to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."<sup>9</sup>

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<sup>6</sup> This opinion addresses a lawyer's ethical responsibilities. Lawyers should take similar steps to maintain communication with their own colleagues and staff. It is also good practice for a lawyer to maintain and update this information on a secure Internet website after the disaster so that colleagues and support staff will have a centralized location to find contact information. For information about the appropriate methods for storing electronic or paper records, lawyers may consult the ABA Committee on Disaster Response and Preparedness website. Also, many state bars and courts provide information on disaster preparedness.

<sup>7</sup> Practical problems a lawyer may wish to consider in advance include whether (i) landline phones will be out of service, (ii) the U.S. Postal Service will be impaired, and (iii) electronic devices will lose battery power.

<sup>8</sup> ABA Model Rule 1.1 provides, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] to Rule 1.1 provides: ". . . [A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . ."

<sup>9</sup> As this Committee has previously noted, lawyers may transmit confidential information over the Internet if the lawyer has made reasonable efforts to prevent accidental or unauthorized access to the information. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017). *See also* Alaska Bar Ass'n Op. 98-2 (1998); State Bar of Ariz. Formal Op. 97-04 (1997); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2010-179 (2010); D.C. Bar Op. 281 (1998); Del. State Bar Ass'n Comm. on Prof'l Ethics Op. 2001-2 (2001); Haw. State Ethics Comm'n Formal Op. 40 (2001); Ill. State Bar Ass'n Advisory Op. 96-10 (1997); Iowa State Bar Ass'n Op. 15-01 (2015); N.C. State Bar Op. RPC 215 (1995); State Bar Ass'n of N.D. Advisory Op. 97-09 (1997); Ohio Bd. of Cmss'rs on Grievances & Discipline Op. 99-2 (1999); S.C. Bar Advisory Op. 97-08 (1997); Prof'l Ethics Comm. State Bar of Tex. Op. 648 (2015); Utah State Bar Advisory Op. 00-01 (2000); Vt. Advisory Op. 97-5 (1997); Wash. State Bar Ass'n Advisory Op. 2175 (2008).

## B. Continued Representation in the Affected Area

Lawyers who continue to provide legal services in the area affected by a disaster have the same ethical obligations to their clients as before the disaster, although they may be able to provide advice outside their normal area of expertise.<sup>10</sup>

Lawyers may not be able to gain access to paper files following a disaster.<sup>11</sup> Consequently, lawyers must evaluate in advance storing files electronically so that they will have access to those files via the Internet if they have access to a working computer or smart device after a disaster. If Internet access to files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.<sup>12</sup>

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<sup>10</sup> Comment [3] to Rule 1.1 allows: "In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances. Ill-considered action under emergency conditions can jeopardize the client's interest."

<sup>11</sup> Rule 1.15 requires that lawyers take reasonable steps to preserve trust account records and documents and property of clients and third parties when a lawyer has notice of an impending disaster. *See also* subsection (E), *infra*, for a discussion of a lawyer's obligations when files are lost or destroyed in a disaster.

<sup>12</sup> Lawyers must understand that electronically stored information is subject to cyberattack, know where the information is stored, and adopt reasonable security measures. They must conduct due diligence in selecting an appropriate repository of client information "in the cloud." Among suggested areas of inquiry are determining legal standards for confidentiality and privilege in the jurisdiction where any dispute will arise regarding the cloud computing services. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); Ala. State Bar Op. 2010-02 (2010) (Lawyer may outsource storage of client files through cloud computing if they take reasonable steps to make sure data is protected); State Bar of Ariz. Formal Op. 09-04 (2009) (Lawyer may use online file storage and retrieval system that enables clients to access their files over the Internet, as long as the firm takes reasonable precautions to protect the confidentiality of the information; in this case, proposal would convert files to password-protected pdf documents that are stored on a Secure Socket Layer server (SSL) which encodes the documents); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-184 (2012) (Lawyer may operate virtual law office "in the cloud" as long as the lawyer complies with all ethical duties such as confidentiality, competence, communication, and supervision; lawyer should check vendor credentials, data security, how information is transmitted, whether through other jurisdictions or third-party servers, the ability to supervise the vendor; and the terms of the contract with the vendor); Fla. Bar Op. 12-3 (2013) (Lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely); Ill. State Bar Ass'n Op. 16-06 (2016) (Lawyer may use cloud-based service to store client files as long as the lawyer "takes reasonable measures to ensure that the client information remains confidential and is protected from breaches"; lawyer should engage in due diligence in choosing the provider, including reviewing industry norms, determining the provider's security precautions such as firewalls, password protection and encryption, the provider's reputation and history, asking about any prior breaches, requiring that the provider follow confidentiality requirements, requiring that the data is under the lawyer's control, and requiring reasonable access if the contract terminates or the provider goes out of business); Iowa State Bar Ass'n Op. 11-01 (2011) (Due diligence a lawyer

As part of the obligation of competence under Rule 1.1 and diligence under Rule 1.3, lawyers who represent clients in litigation must be aware of court deadlines, and any extensions granted due to the disaster. Courts typically issue orders, usually posted on their websites, addressing extensions.<sup>13</sup> Lawyers should check with the courts and bar associations in their jurisdictions to determine whether deadlines have been extended.

Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.<sup>14</sup> Lawyers with notice of an

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should perform before storing files electronically with a third party using SaaS (cloud computing) includes whether the lawyer will have adequate access to the stored information, whether the lawyer will be able to restrict access of others to the stored information, whether data is encrypted and password protected, and what will happen to the information in the event the lawyer defaults on an agreement with the third party provider or terminates the relationship with the third party provider); State Bar of Nev. Formal Op. 33 (2006) (Lawyer may store client files electronically on a remote server controlled by a third party as long as the firm takes precautions to safeguard confidential information such as obtaining the third party's agreement to maintain confidentiality); New York City Bar Report, *The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations* (Nov. 2013), <https://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf>; N.Y. State Bar Ass'n Op. 842 (2010) (Permissible to use an online computer data storage system to store client files provided the attorney takes reasonable care to maintain confidentiality; lawyer must stay informed of both technological advances that could affect confidentiality and changes in the law that could affect privilege); State Bar Ass'n of N.D. Advisory Op. 99-03 (1999) (Permissible to use electronic online data service to store files as long as the lawyer properly protects confidential client information, perhaps via password protected storage); Pa. Bar Ass'n Op. 2011-200 (2011) ("An attorney may ethically allow client confidential material to be stored in 'the cloud' provided the attorney takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks"); S.C. Bar Advisory Op. 86-23 (1988) (A lawyer can store files in a storage facility operated by a third party if the lawyer ensures that confidentiality is maintained); Tenn. Formal Op. 2015-F-159 (2015) (Lawyer may store information in the cloud if the lawyer takes reasonable measures to protect the information); Vt. Advisory Op. 2010-6 (2010) (Lawyers may use cloud computing if they take reasonable steps to ensure confidentiality of information and that information is accessible).

<sup>13</sup> See, e.g., Sup. Ct. of Fla. Administrative Order No. AOSC17-57 (2017), <http://www.floridasupremecourt.org/clerk/adminorders/2017/AOSC17-57.pdf> (extending time periods in the wake of Hurricane Irma); N.D. Sup. Ct. Administrative Order 20 (2011), <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (staying deadlines due to flooding); N.D. Sup. Ct. Rules Section 6, Emergency Procedural Rule, Administrative Rule, or Administrative Order, available at <http://www.ndcourts.gov/court/rules/administrative/ao20.htm> (last visited Sept. 4, 2018); Sup. Ct. of Texas Emergency Order Suspending Criminal Court Proceedings in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438759/179091.pdf>; Supreme Court of Texas Emergency Order on Statutes of Limitations in Civil Cases in the Wake of Hurricane Harvey (2017), <http://www.txcourts.gov/media/1438804/179098.pdf>.

<sup>14</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1 & 1.3 (2018). Designating a successor and adding trusted signatories are good practices that may already be in place as part of normal succession planning. Some states require designation of a successor counsel or inventory lawyer. See, e.g., Rules Regulating the Fla. Bar R. 1-3.8(e),

impending disaster should take additional steps. For example, a transactional lawyer should review open files to determine if the lawyer should transfer funds to a trust account that will be accessible after the disaster or even attempt to complete imminent transactions prior to the disaster if practicable.

A disaster may affect the financial institution in which funds are held, or the lawyer's ability to communicate with the financial institution. Consequently, lawyers should take appropriate steps in advance to determine how they will obtain access to their accounts after a disaster. Different institutions may have varying abilities to recover from a disaster.<sup>15</sup> After a disaster, a lawyer must notify clients or third persons for whom the lawyer is holding funds when required disbursements are imminent and the lawyer is unable to access the funds, even if the lawyer cannot access the funds because the financial institution itself is inaccessible or access is beyond the lawyer's capability.<sup>16</sup>

### C. Withdrawal from Representation After a Disaster

Lawyers whose circumstances following a disaster render them unable to fulfill their ethical responsibilities to clients may be required to withdraw from those representations. Rule 1.16(a)(1) requires withdrawal if representation will cause the lawyer to violate the rules of professional conduct. Rule 1.16(a)(2) requires withdrawal if "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client," for example, if the lawyer suffers severe injury or mental distress due to the disaster. Rule 1.16(b)(7) allows termination of the representation when the lawyer has "other good cause for withdrawal." These conditions may be present following a disaster. In determining whether withdrawal is required, lawyers must assess whether the client needs immediate legal services that the lawyer will be unable to timely

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Iowa Ct. Rule 39.18(1), Me. Bar R. 32(a), and Mo. R. 4-1.3 cmt. [5] & R. 5.26. Some states permit voluntary designation, including California, Delaware, Idaho, South Carolina, and Tennessee. See *Mandatory Successor Rule Chart* (June 2015), ABA, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mandatory\\_successor\\_rule\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mandatory_successor_rule_chart.authcheckdam.pdf). Lawyers should also be aware that, in most jurisdictions, a power of attorney to handle law firm affairs will be insufficient because it expires on the principal's death.

<sup>15</sup> The rules do not require a lawyer to place funds in a large or national financial institution. See MODEL RULES OF PROF'L CONDUCT R. 1.15 (2018). However, a prudent lawyer in a disaster-prone area should inquire about a financial institution's disaster preparedness before placing funds there. The lawyer must comply with IOLTA requirements regardless of which financial institution the lawyer chooses.

<sup>16</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4 and 1.15(d) (2018).

provide. Lawyers who are unable to continue client representation in litigation matters must seek the court's permission to withdraw as required by law and court rules.<sup>17</sup>

#### **D. Representation of Clients by Displaced Lawyers in Another Jurisdiction**

Some lawyers may either permanently or temporarily re-locate to another jurisdiction following a disaster. Their clients and other residents of the lawyers' home jurisdiction may relocate to the same jurisdiction, or elsewhere, and still require legal services. Although displaced lawyers may be able to rely on Model Rule 5.5(c) allowing temporary multijurisdictional practice to provide legal services to their clients or displaced residents, they should not assume the Rule will apply in a particular jurisdiction. Comment [14] to Rule 5.5 provides:

... lawyers from the affected jurisdiction [by a major disaster] who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

Displaced lawyers who wish to practice law in another jurisdiction may do so only as authorized by that other jurisdiction. Subdivision (c) of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster provides:

Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis if permitted by order of the highest court of the other jurisdiction. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.<sup>18</sup>

This ABA Model Court Rule further provides that lawyers:

- are required to register with the Supreme Court in the state where they are temporarily allowed to practice;

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<sup>17</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(c) (2018).

<sup>18</sup> Full text of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (2007) can be found at:

[https://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/model\\_rule\\_disaster\\_katrina.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/model_rule_disaster_katrina.authcheckdam.pdf). The ABA Standing Committee on Client Protection Chart on State Implementation of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster (Sept. 8, 2017) can be found at: [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/katrina\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf).

- are subject to the disciplinary authority in the jurisdiction of the Supreme Court in the state where they are temporarily allowed to practice; and
- must cease practice within 60 days after the Supreme Court in the state where they are temporarily allowed to practice determines the conditions of the disaster have ended.<sup>19</sup>

### E. Loss of Files and Other Client Property

Some lawyers located in an area affected by a disaster may have their files destroyed. Lawyers who maintain only paper files or maintain electronic files solely on a local computer or local server are at higher risk of losing those records in a disaster. A lawyer's responsibilities regarding these files vary depending on the nature of the stored documents and the status of the affected clients.

Under the lawyer's duty to communicate, a lawyer must notify current clients of the loss of documents with intrinsic value, such as original executed wills and trusts, deeds, and negotiable instruments.<sup>20</sup> Lawyers also must notify former clients of the loss of documents and other client property with intrinsic value. A lawyer's obligation to former clients is based on the lawyer's obligation to safeguard client property under Rule 1.15.<sup>21</sup> Under the same Rule, lawyers must

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<sup>19</sup> See ABA Model Court Rule Provision of Legal Services Following Determination of Major Disaster, *supra* note 17. For an example, see the emergency order entered by the Supreme Court of Texas in 2017, permitting the temporary practice of Texas law by lawyers displaced from their home jurisdictions after Hurricane Harvey. The Court adopted requirements and limitations similar to those in the ABA Model Court Rule. See Court of Texas Amended Emergency Order After Hurricane Harvey Permitting Out-of-State Lawyers to Practice Texas Law Temporarily, Misc. Docket No. 17-9101 (Aug. 30, 2017), available at <http://www.txcourts.gov/media/1438820/179101.pdf>.

<sup>20</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015); See also ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1977) (Lawyer should not dispose of client property without client consent, should not destroy information that would be useful to the client if the statute of limitations has not run, should not destroy information that the client may need and is not otherwise easily accessible by the client, should exercise discretion in determining which information might be particularly sensitive or require longer retention than others, should retain trust account records, should protect confidentiality in the destruction of any files, should review files before destruction to determine if portions should be retained, and should retain an index of destroyed files); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2001-157 (2001) (Regarding destruction of closed files, indicating that property of the client such as original documents (like wills) is subject to bailment law or other statute, lawyers may not destroy other file materials without making reasonable efforts to obtain client consent, lawyers may not destroy items required to be retained by law, lawyers may not destroy items if destruction would prejudice the clients' interests, and criminal case files should not be destroyed while the client is living); State Bar of Mich. Op. R-12 (1991) (Lawyers must give notice to clients regarding file destruction after 1998, files before 1998 may not be destroyed without reasonable efforts to notify the client, and lawyers are not required to notify clients of file destruction if the lawyer maintains a copy of the documents on microfilm (excluding original documents of the client or if destruction of the documents would prejudice the client's interests)). Lawyers should note that in some states, the client may be entitled to all substantive documents in the file at the client's request. See e.g., State Bar of Ariz. Op. 15-02 (2015).

<sup>21</sup> See also N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

make reasonable efforts to reconstruct documents of intrinsic value for both current and former clients, or to obtain copies of the documents that come from an external source.<sup>22</sup>

A lawyer need not notify either current or former clients about lost documents that have no intrinsic value, that serve no useful purpose to the client or former client, or for which there are electronic copies. The lawyer must respond honestly, however, if asked about those documents by either current or former clients.<sup>23</sup>

The largest category of documents will fall in the middle; i.e., they are necessary for current representation or would serve some useful purpose to the client. For current clients, lawyers may first attempt to reconstruct files by obtaining documents from other sources. If the lawyer cannot reconstruct the file, the lawyer must promptly notify current clients of the loss. This obligation stems from the lawyer's obligations to communicate with clients and represent them competently and diligently.<sup>24</sup> A lawyer is not required either to reconstruct the documents or to notify former clients of the loss of documents that have no intrinsic value, unless the lawyer has agreed to do so despite the termination of the lawyer-client relationship.<sup>25</sup>

ABA Model Rule 1.15(a) also requires lawyers to keep complete records accounting for funds and property of clients and third parties held by the lawyer and to preserve those records for five years after the end of representation. A lawyer whose trust account records are lost or destroyed in a disaster must attempt to reconstruct those records from other available sources to fulfill this obligation.

To prevent the loss of files and other important records, including client files and trust account records, lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly.<sup>26</sup> Although not required, lawyers may maintain these files solely as electronic files, except in instances where law, court order, or agreement require maintenance of paper copies, and as long as the files are readily accessible and not subject to inadvertent

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<sup>22</sup> Lawyers should consider returning all original documents and documents with intrinsic value created by the lawyer as a result of the representation to clients at the end of representation to avoid this situation.

<sup>23</sup> See MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

<sup>24</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 & 1.4 (2018); N.Y. City Bar Ass'n Formal Op. 2015-6 (2015).

<sup>25</sup> Lawyers should consider including in fee agreements or engagement letters the understandings between the lawyer and the client about how the lawyer will handle documents once the representation is ended. In addition, lawyers should consult statutes, common law, and court rules that may also govern the retention of client files.

<sup>26</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018); MODEL RULES OF PROF'L CONDUCT R. 1.3 (2018).

modification or degradation.<sup>27</sup> As discussed above, lawyers may also store files “in the cloud” if ethics obligations regarding confidentiality and control of and access to information are met.

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<sup>27</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (May 22, 2017) (Lawyer may send client information over the Internet if lawyer makes reasonable efforts to prevent inadvertent or unauthorized access, but may be required to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security); ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1127 (1970) (Lawyers may use company that stores attorney files on computer as long as the company is set up so that the material is available only to the particular attorney to whom the files belong and the employees of the company; lawyers must take care to choose an appropriate company that has procedures to ensure confidentiality and to admonish the company that confidentiality of the files must be preserved); State Bar of Ariz. Op. 07-02 (2007) (Lawyer may not destroy original client documents after converting them to electronic records without client consent, but may destroy paper documents if they are only copies); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct 2001-157 (2001) (Electronic records may be insufficient if originals are not accurately reproduced, and some documents cannot be copied by law); Fla. Bar Op. 06-1 (2006) (Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests; files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction); Me. Bd. of Overseers Op. 185 (2004) (Lawyers may maintain closed files electronically, rather than paper copies, if they are accessible to the client); Me. Bd. of Overseers Op. 183 (2004) (“If an attorney dispenses with the retention of paper files in favor of computerized records, the attorney must be mindful that the obligation to the client may require the attorney to maintain the means to provide copies of those records in a format that will make them accessible to both the attorney and the client in the future. Because the attorney is obligated to ensure that the client is able to make informed decisions regarding the disposition of the file and also must take care in destroying files to be sure that useful information is retained, an attorney will need to consider how new hardware or software will impact future access to old computerized records.”); Mo. Informal Advisory Op. 127 (2009) (Lawyer may keep client's file in exclusively electronic format except documents that are legally significant as originals and intrinsically valuable documents and providing that the appropriate software to access the information is maintained for the time period the file must be retained); State Bar of Mich. Op. R-5 (1989) (File storage via electronic means should be treated carefully to ensure confidentiality by limiting access to law firm personnel); N.J. Advisory Comm. on Prof'l Ethics Decisions Op. 701 (2006) (Documents may be stored electronically if sufficient safeguards to maintain confidentiality of the documents, particularly if they are stored outside the law firm, except for documents that are client property such as original wills, trusts, deeds, executed contracts, corporate bylaws and minutes); N.Y. County Lawyers Ass'n Op. 725 (1998) (General opinion on the ethical obligation to retain closed files, including that it may be proper for a lawyer to retain only electronic copies of a file if “the evidentiary value of such documents will not be unduly impaired by the method of storage”); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 680 (1996) (Although some items in a client's file may be stored electronically, some documents (such as original checkbooks, check stubs, cancelled checks, and bank statements) are required by the rules to be kept in original form; documents stored electronically should be stored in “read-only” form so they cannot be inadvertently destroyed or altered; and records must be readily produced when necessary); N.C. State Bar Op. RPC 234 (1996) (Closed client files may be stored electronically as long as the electronic documents can be converted to paper copies, except for “original documents with legal significance, such as wills, contracts, stock certificates, etc.”); S.C. Bar Advisory Op. 02-14 (2002) (General opinion on disposition of closed files when one member of a two-member firm retires, discussing various situations and notes that files may be placed on computer or other electronic media; Note: In South Carolina, the files are the property of the client); S.C. Bar Advisory Op. 98-33 (1998) (The committee declined to give an opinion on electronic retention of closed files as a legal question, but indicated there was no prohibition against retaining documents in electronic format as long as doing so did not adversely affect the client's interests and as long as the lawyer took reasonable precautions to make sure that third parties with access to the electronic records kept the records confidential); Va. State Bar Op. 1818 (2005) (Lawyer can maintain client files in electronic format with no paper copies as long as the method of record retention does not adversely affect the client's interests); Wash. State Bar Ass'n Op. 2023 (2003) (Lawyer may have firm file retention policy in which original documents are provided to the client and the lawyer keeps only electronic copies of file materials as long as documents “with intrinsic value” or that are the property of the client cannot be destroyed without client permission); State Bar of Wis. Op. E-00-3 (2000) (If lawyer has stored files electronically, lawyer should provide



## F. Solicitation and Advertising

Lawyers may want to offer legal services to persons affected by a disaster. The existence of a disaster, however, does not excuse compliance with lawyer advertising and solicitation rules.<sup>28</sup> Of particular concern is the possibility of improper solicitation in the wake of a disaster. A lawyer may not solicit disaster victims unless the lawyer complies with Model Rules 7.1 through 7.3.<sup>29</sup> “Live person-to-person contact” that is generally prohibited means “in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications, where the person is subject to a direct personal encounter without time for reflection,”<sup>30</sup> and a significant motive for the lawyer’s doing so is pecuniary gain.<sup>31</sup> In addition to ethical prohibitions, lawyers should be aware that there may be statutory prohibitions that may apply.<sup>32</sup>

Lawyers may solicit in-person to offer pro bono legal services to disaster victims, because the lawyer’s motive does not involve pecuniary gain.<sup>33</sup> Additionally, lawyers may communicate with disaster victims in “targeted” written or recorded electronic material in compliance with Rules 7.1 through 7.3. Lawyers also should be mindful of any additional requirements for written or recorded electronic solicitations imposed by particular jurisdictions.<sup>34</sup>

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client copies on disk at client's request. However, lawyer can bill client for time/expense if required to obtain information in format client wants. Attorney does not need to provide client with internal memos, personal notes, and the like).

<sup>28</sup> See MODEL RULES OF PROF'L CONDUCT R. 7.1 – 7.5 (all of these Rules were amended in August 2018).

<sup>29</sup> See MODEL RULES OF PROF'L CONDUCT R. 7.3 (2018). See also *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000) (Lawyer suspended for one year for soliciting clients by passing out brochures in affected areas in wake of tornados); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-166 (2004) (Solicitation of prospective clients in mass disaster victim chat room is not considered in person solicitation but nevertheless is prohibited because it is “intrusive”).

<sup>30</sup> MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. [2] (2018). Rule 7.3(b) contains some exceptions, and Rule 7.3(c) contains an additional prohibition. Both should be consulted.

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., FLA. STAT. §877.02 (Prohibiting solicitation on behalf of lawyers by hospitals, police, tow truck operators, insurance adjusters); 49 U.S.C. §1136(g)(2) (Prohibiting lawyer solicitation within 45 days of an air transportation accident).

<sup>33</sup> MODEL RULES OF PROF'L CONDUCT R. 7.3(a); La. Bd. of Ethics Op. 05-RPCC-005 (2005) (Lawyer may solicit disaster victims in person to provide pro bono legal services). Providing pro bono legal services is encouraged by, inter alia, Model Rules 6.1 and 6.2.

<sup>34</sup> See, e.g., Rules Regulating the Fla. Bar R. 4-7.18(b)(2) (requiring contrasting “advertisement” mark on envelope and enclosures; statement of qualifications and experience; information on where the lawyer obtained the information prompting the written solicitation; and specified first sentence, among others).

### G. Out-Of-State Lawyers Providing Representation to Disaster Victims

Lawyers practicing in jurisdictions unaffected by the disaster who wish to assist by providing legal services to disaster victims must consider rules regulating temporary multijurisdictional practice.<sup>35</sup> Out-of-state lawyers may provide representation to disaster victims in the affected jurisdiction only when permitted by that jurisdiction's law or rules, or by order of the jurisdiction's highest court.

The ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster<sup>36</sup> provides that the Supreme Court of the affected jurisdiction must declare a major disaster and issue an order that allows lawyers in good standing from another jurisdiction to temporarily provide pro bono legal services in the affected jurisdiction through a non-profit bar association, pro bono program, legal services program, or other organization designated by the courts.<sup>37</sup> The Model Court Rule also requires those lawyers to register with the courts of the affected jurisdiction, and subjects those lawyers to discipline in the affected jurisdiction.<sup>38</sup>

### Conclusion

Lawyers must be prepared to deal with disasters. Foremost among a lawyer's ethical obligations are those to existing clients, particularly in maintaining communication. Lawyers must also protect documents, funds, and other property the lawyer is holding for clients or third parties.

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<sup>35</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 (c), cmt. [14] (2018): "Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster." Most states have adopted some form of ABA Model Rule 5.5 on Multijurisdictional Practice. A chart on state implementation of ABA Multijurisdictional Practice Policies compiled by the ABA may be found at: [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/recommendations.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf).

<sup>36</sup> ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER, available at [https://www.americanbar.org/content/dam/aba/images/disaster/model\\_court\\_rule.pdf](https://www.americanbar.org/content/dam/aba/images/disaster/model_court_rule.pdf) (last visited Sept. 7, 2018). The ABA Chart on State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster can be found at: [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/katrina\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/katrina_chart.authcheckdam.pdf)

<sup>37</sup> Providing pro bono legal services in this situation would assist the lawyer in meeting the suggested goal of 50 hours per year set forth in Model Rule 6.1(a).

<sup>38</sup> As noted above, the Supreme Court of Texas issued an emergency order in 2017 after Hurricane Harvey following the ABA Model Court Order. See *supra* note 18.

By proper advance preparation and taking advantage of available technology during recovery efforts, lawyers will reduce the risk of violating professional obligations after a disaster.

**Dissent:** Keith R. Fisher dissents.

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**AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND  
PROFESSIONAL RESPONSIBILITY**

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**CENTER FOR PROFESSIONAL RESPONSIBILITY:** Dennis A. Rendleman, Ethics Counsel

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# Panel 2

# Panel 3

Prepared by the **U.S. CHAMBER OF COMMERCE**

# CORONAVIRUS EMERGENCY ANS Small Business Guide and Checklist



The Coronavirus Aid, Relief, and Economic Security (CARES) Act allocated \$350 billion to help small businesses keep workers employed amid the pandemic and economic downturn. Known as the Paycheck Protection Program, the initiative provides 100% federally guaranteed loans to small businesses.

Importantly, these loans may be forgiven if borrowers maintain their payrolls during the crisis or restore their payrolls afterward.

The administration soon will release more details including the list of lenders offering loans under the program. In the meantime, the U.S. Chamber of Commerce has issued this guide to help small businesses and self-employed individuals prepare to file for a loan.

Here are the questions you may be asking—  
and what you need to know.

## 1

# Am I ELIGIBLE?

You are eligible if you are:

- A small business with fewer than 500 employees
- A small business that otherwise meets the SBA's size standard
- A 501(c)(3) with fewer than 500 employees
- An individual who operates as a sole proprietor
- An individual who operates as an independent contractor
- An individual who is self-employed who regularly carries on any trade or business
- A Tribal business concern that meets the SBA size standard
- A 501(c)(19) Veterans Organization that meets the SBA size standard

In addition, some special rules may make you eligible:

- If you are in the accommodation and food services sector (NAICS 72), the 500-employee rule is applied on a per physical location basis
- If you are operating as a franchise or receive financial assistance from an approved Small Business Investment Company the normal affiliation rules do not apply

**REMEMBER:** The 500-employee threshold includes all employees: full-time, part-time, and any other status.



## 2

## What will lenders be LOOKING FOR?

In evaluating eligibility, lenders are directed to consider whether the borrower was in operation before February 15, 2020 and had employees for whom they paid salaries and payroll taxes or paid independent contractors.

Lenders will also ask you for a good faith certification that:

1. The uncertainty of current economic conditions makes the loan request necessary to support ongoing operations
2. The borrower will use the loan proceeds to retain workers and maintain payroll or make mortgage, lease, and utility payments
3. Borrower does not have an application pending for a loan duplicative of the purpose and amounts applied for here
4. From Feb. 15, 2020 to Dec. 31, 2020, the borrower has not received a loan duplicative of the purpose and amounts applied for here (Note: There is an opportunity to fold emergency loans made between Jan. 31, 2020 and the date this loan program becomes available into a new loan)

If you are an independent contractor, sole proprietor, or self-employed individual, lenders will also be looking for certain documents (final requirements will be announced by the government) such as payroll tax filings, Forms 1099-MISC, and income and expenses from the sole proprietorship.

## What lenders will NOT LOOK FOR

- That the borrower sought and was unable to obtain credit elsewhere.
- A personal guarantee is not required for the loan.
- No collateral is required for the loan.

## 3

# How much can I BORROW?

Loans can be up to 2.5 x the borrower's average monthly payroll costs, not to exceed **\$10 million**.



## How do I calculate my average monthly PAYROLL COSTS?



sum of  
**INCLUDED**  
payroll costs

—

sum of  
**EXCLUDED**  
payroll costs

=

**PAYROLL  
COSTS**

### **INCLUDED** Payroll Cost:

- 1. For Employers:** The sum of payments of any compensation with respect to employees that is a:
  - salary, wage, commission, or similar compensation;
  - payment of cash tip or equivalent;
  - payment for vacation, parental, family, medical, or sick leave
  - allowance for dismissal or separation
  - payment required for the provisions of group health care benefits, including insurance premiums
  - payment of any retirement benefit
  - payment of state or local tax assessed on the compensation of the employee
- 2. For Sole Proprietors, Independent Contractors, and Self-Employed Individuals:** The sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in one year, as pro-rated for the covered period.

### **EXCLUDED** Payroll Cost:

1. Compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the period February 15, to June 30, 2020
2. Payroll taxes, railroad retirement taxes, and income taxes
3. Any compensation of an employee whose principal place of residence is outside of the United States
4. Qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116–5 127); or qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act

#### NON SEASONAL EMPLOYERS:

**Maximum loan =**

2.5 X Average total monthly payroll costs incurred during the year prior to the loan date

***For businesses not operational in 2019:***

2.5 X Average total monthly payroll costs incurred for January and February 2020

#### SEASONAL EMPLOYERS:

**Maximum loan =**

2.5 X Average total monthly payments for payroll costs for the 12-week period beginning February 15, 2019 or March 1, 2019 (decided by the loan recipient) and ending June 30, 2019



## 4

# Will this loan be FORGIVEN?

Borrowers are eligible to have their loans forgiven.

## How Much?

A borrower is eligible for loan forgiveness equal to the amount the borrower spent on the following items during the 8-week period beginning on the date of the origination of the loan:

- Payroll costs (using the same definition of payroll costs used to determine loan eligibility)
- Interest on the mortgage obligation incurred in the ordinary course of business
- Rent on a leasing agreement
- Payments on utilities (electricity, gas, water, transportation, telephone, or internet)
- For borrowers with tipped employees, additional wages paid to those employees

The loan forgiveness cannot exceed the principal.

## How could the forgiveness be reduced?

The amount of loan forgiveness calculated above is reduced if there is a reduction in the number of employees or a reduction of greater than 25% in wages paid to employees. Specifically:

### Reduction based on reduction of number of employees



**PAYROLL COST**  
Calculated  
on page 2

**X**

Average Number of Full-Time Equivalent Employees (FTEs) Per Month for the 8-Weeks Beginning on Loan Origination

**÷**

#### Option 1:

Average number of FTEs per month from February 15, 2019 to June 30, 2019

#### Option 2:

Average number of FTEs per month from January 1, 2020 to February 29, 2020

#### For Seasonal Employers:

Average number of FTEs per month from February 15, 2019 to June 30, 2019

### Reduction based on reduction in salaries



**PAYROLL COST**  
Calculated  
on page 2

**—**

For any employee who did not earn during any pay period in 2019 wages at an annualized rate more than \$100,000, the amount of any reduction in wages that is greater than 25% compared to their most recent full quarter.

## What if I bring back employees or restore wages?

Reductions in employment or wages that occur during the period beginning on February 15, 2020, and ending 30 days after enactment of the CARES Act, (as compared to February 15, 2020) shall not reduce the amount of loan forgiveness **IF** by June 30, 2020 the borrower eliminates the reduction in employees or reduction in wages.

# WHAT'S NEXT?

Look out for more information about eligible lenders and additional guidance from the SBA soon.

For more guidance and resources for small businesses, visit [uschamber.com/co](https://uschamber.com/co)

**Anticipated Items Necessary to Processing SBA 7(a) Relief Loans:**

- Good faith certification from the borrower that: 1.) the uncertainty of current conditions makes the loan request necessary to support ongoing operations 2.) proceeds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments
- Articles of Incorporation
- By Laws/Operating Agreement for each borrowing entity
- Copy of all owners drivers licenses, front and back (color copy preferred)
- Payroll expense verification documents, including:
  - IRS Forms 940 and 941
  - Payroll Summary Report with corresponding bank statement
  - If Payroll Summary Report is not available, Employee Pay Stubs as of Feb 15<sup>th</sup>, 2020 (or corresponding period) with corresponding bank statement, and breakdown of payroll benefits (vacation, group healthcare benefits, retirement benefits, etc.
- 1099's (if Independent Contractor)
- Certification that all employees live in the US. If any do not, provide a detailed list with corresponding salaries of all employees outside of the US
- Trailing 12 month Profit & Loss statement (as of the date of application)
- Most recent Mortgage or Lease
- Most recent utility bills (gas, electric, telephone, internet, water, etc)
- SBA forms 1919 & 1920 will likely also be required, updated versions are expected to be released soon
- IRS form(s) 4506T

## **How Does Someone Apply for a Covered Loan?**

### *Generally*

For purposes of making covered loans, a lender approved to make loans under the PPP is deemed to have been delegated authority by SBA to make and approve covered loans, subject to the applicable provisions of the PPP.

### *Eligibility Considerations*

In evaluating the eligibility of an applicant for a covered loan, a lender is required to consider whether the applicant:

- was in operation on February 15, 2020
- had employees for whom the borrower paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

Specifically, during the covered period, the normal requirement that an applicant be unable to obtain credit from nonfederal sources on reasonable terms and conditions does not apply to a covered loan.

## **Borrower Application Requirements**

An applicant for a covered loan is required to make a good faith certification:

- that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the applicant;
- acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments;
- that the applicant does not have an application pending for a loan under the PPP for the same purpose and duplicative of amounts applied for or received under a covered loan; and
- during the period beginning on February 15, 2020 and ending on December 31, 2020, that the applicant has not received amounts under the PPP for the same purpose and duplicative of amounts applied for or received under a covered loan.

## **What Will Lenders Be Paid to Make PPP Loans?**

SBA is required, no later than five days after the disbursement of the covered loan, to reimburse the lender at a rate, based on the balance of the financing outstanding at the time of disbursement of the covered loan, of:

- 5 percent for loans of up to \$350,000
- 3 percent for loans greater than \$350,000 and less than \$2 million
- 1 percent for loans of \$2 million or greater.

An agent that assists an applicant to prepare an application for a covered loan is not permitted to collect a fee in excess of the limits established by SBA.

## What Are the Loan Terms?

### Maximum Loan Amount

The maximum amount that can be borrowed under a covered loan is determined as follows but cannot exceed \$10 million:

- *in most instances*, the maximum loan amount is 2.5x the average total monthly payments by the applicant for “payroll costs” (as described in more detail below) incurred during the one-year period before the date on which the loan is made, **plus** the amount of any eligible EIDL to be refinanced into the covered loan
- *in the case of a “seasonal employer”* (as determined by SBA), the maximum loan amount is 2.5x the average total monthly payments by the applicant for payroll costs incurred during the 12-week period beginning February 15, 2019, or at the election of the applicant, March 1, 2019, **plus** the amount of any eligible EIDL to be refinanced into the covered loan
- *if requested by an applicant that was not in business during the period beginning February 20, 2019 and ending June 30, 2019*, the maximum loan amount is 2.5x the average total monthly payments by the applicant for payroll costs incurred during the period beginning on January 1, 2020 and ending on February 29, 2020, **plus** the amount of any eligible EIDL to be refinanced into the covered loan.

For purposes of the covered loans, “**payroll costs**” means:

- *as to companies having employees* — the sum of payments of any compensation with respect to employees that is a:
  - salary, wage, commission or similar compensation;
  - payment of cash tips or equivalent;
  - payment for vacation, parental, family, medical or sick leave;
  - allowance for dismissal or separation;
  - payment required for the provision of group health care benefits, including insurance premiums;
  - payment of any retirement benefit; or
  - payment of state or local tax assessed on the compensation of employees.
- *as to self-employed persons and individuals that have organized as a sole proprietor* — the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment or similar compensation and that is in an amount not more than \$100,000 in one year, as prorated for the covered period.

**However, payroll costs do not include the following:**

- the **compensation** of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period
- taxes imposed or withheld under Chapters 21 (Social Security and Medicare taxes, employee and employer portion), 22 (railroad retirement tax), or 24 (withholding obligations from employees) of the Internal Revenue Code of 1986
- any compensation of an employee whose principal place of residence is outside of the United States

- qualified sick leave wages and qualified family leave wages, in each case, for which a credit is allowed under the Families First Coronavirus Response Act.

#### What Are the Allowable Uses of Covered Loans?

During the covered period, an eligible recipient may use the proceeds of the covered loan for:

- payroll costs
- costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums
- employee salaries, commissions or similar compensations
- payments of interest on any mortgage obligation, but not any prepayment of or payment of principal on a mortgage obligation
- rent (including rent under a lease agreement)
- utilities
- interest on any other debt obligations that were incurred before February 15, 2020.

#### **What Is the Maximum Interest Rate? Is SBA Waiving Its Fees and Prepayment Fees?**

The interest rate for a covered loan is **not to exceed 4 percent**. There is no prepayment penalty for any payment made on a covered loan.

Under the 7(a) Program, SBA generally collects a fee that it establishes as necessary to reduce to zero the cost to SBA of making guarantees for 7(a) loans. The amount of the fee is not to exceed 0.55 percent per year of the outstanding balance of the deferred participation share of the loan, and this fee cannot be passed to the borrower. SBA is not permitted to collect this fee during the covered period with respect to a covered loan. SBA also generally collects a guaranty fee with respect to each 7(a) loan that its guarantees (other than a loan that is repayable in one year or less), the amount of which depends on the total loan amount and may be charged to the borrower. SBA is not permitted to collect this fee during the covered period with respect to a covered loan.

#### **Are Personal Guarantees and Collateral Required?**

**No personal guarantees or collateral are required for the covered loan.** In addition, **SBA has no recourse** against any individual shareholder, member or partner of an eligible recipient of a covered loan for nonpayment of any covered loan, except to the extent that the shareholder, member or partner uses the covered loan proceeds for a purpose not authorized.

#### **Are Payments on the Loan Deferred?**

During the covered period, SBA must require all lenders under the PPP to provide complete payment deferral for “impacted borrowers” having a covered loan. The deferral period is required to be no less than six months and no longer than one year. For these purposes, an “**impacted borrower**” is any eligible recipient that is in operation as of February 15, 2020 and that has an application for a covered loan that is approved or pending approval on or after the enactment of the CARES Act.

Historically, many 7(a) loans are packaged and sold in secondary markets. To protect against investors that decline to approve a deferral requested by a lender as a result of the CARES Act, SBA is required to

exercise the authority to purchase the loan so that impacted borrowers receive a deferral for a period of no less than six months and no more than one year.

SBA is required to provide guidance to 7(a) lenders on the deferment process within 30 days after the enactment of the CARES Act.

### **Is There a Forgiveness Feature of Covered Loans?**

#### *Generally*

**A borrower is eligible to have its covered loan forgiven.** The amount eligible to be forgiven is the sum of the following costs incurred and payments made during the eight-week period after the covered loan is originated (forgivable amount):

- payroll costs (as previously described)
- payments of interest on any liability of the borrower that is a mortgage on real or personal property and that was incurred before February 15, 2020 (covered mortgage obligation)
- payments on any rent obligated under a leasing agreement in force before February 15, 2020 (covered rent obligations)
- payments for a service for the distribution of electricity, gas, water, transportation, telephone or internet access for which service began before February 15, 2020 (covered utility payments).

A borrower with tipped employees, as described in the Fair Labor Standards Act of 1938, may receive forgiveness for additional wages paid to those employees.

**Amounts so forgiven are excluded from gross income for federal income tax purposes.** In addition, the cancellation of indebtedness on a covered loan under the PPP does not otherwise modify the terms and conditions of the covered loan.

#### *Reduction in Forgiveness Based on Reduction in Numbers of Employees or Reduction of Wages and Salary; Effect of Rehiring or Restoration of Wages and Salary*

The amount of loan forgiveness is reduced, but not increased, by multiplying the forgivable amount by the quotient (expressed as a percentage) obtained by dividing the average number of full-time equivalent employees per month employed by the borrower during the eight-week period after the covered loan is originated by:

- *in the case of nonseasonal employers* — either of the following (as elected by the borrower):
  - the average number of full-time equivalent employees per month employed by the borrower during the period beginning on February 15, 2019 and ending on June 30, 2019; or
  - the average number of full-time equivalent employees per month employed by the borrower during the period beginning on January 1, 2020 and ending on February 29, 2020.
- *in the case of seasonal employers* — the average number of full-time equivalent employees per month employed by the borrower during the period beginning on February 15, 2019 and ending on June 30, 2019.

The average number of full-time equivalent employees is determined by calculating the average number of full-time equivalent employees for each pay period falling within a month.

In addition, the amount of loan forgiveness is reduced by the amount of any reduction during the eight-week period after the origination of the covered loan in the total salary or wages of any employee who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000 by more than 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the beginning of that eight-week period.

However, the amount of loan forgiveness will be determined without regard to a reduction in the number of full-time equivalent employees or a reduction in the salary or wages of one or more employees that occurred during the period beginning on February 15, 2020 and ending on the date that is 30 days after the date of enactment of the CARES Act if, as applicable:

- *in the case of any such reduction of employment* — not later than June 30, 2020, the borrower has eliminated the reduction in the number of full-time equivalent employees, as compared to the number of full-time equivalent employees as of February 15, 2020; or
- *in the case of any such reduction in salary or wages* — not later than June 30, 2020, the eligible employer has eliminated the reduction in the salary or wages of such employees, as compared to the salary and wages of such employees as of February 15, 2020.

The CARES Act permits SBA and the Secretary of the Treasury to prescribe regulations granting *de minimis* exemptions from the requirements for limiting the loan forgiveness with respect to covered loans.

#### *Maturity for Covered Loans with Remaining Balance after Application of Forgiveness*

With respect to a covered loan that has a remaining balance after giving effect to any loan forgiveness:

- the remaining balance continues to be guaranteed by SBA; and
- the covered loan shall have a maximum maturity of 10 years from the date on which the borrower applies for loan forgiveness.

#### **How Can A Borrower Apply for Loan Forgiveness?**

A borrower seeking loan forgiveness with respect to a covered loan is required to submit to the lender that is servicing the loan an application that provides certain documents and makes certain certifications. A borrower is not permitted to receive forgiveness without submitting to the lender the documentation required. These required documents and certifications include:

- documentation verifying the number of full-time equivalent employees on payroll and pay rates for the relevant pay periods, including:
  - payroll tax filings reported to the Internal Revenue Service
  - state income, payroll and unemployment insurance filings.
- documentation verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments, including cancelled checks, payment receipts, transcripts of accounts, or other documents
- a certification from a representative of the borrower authorized to make such certifications that:

- the documentation presented is true and correct; and
- the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments.
- any other documentation SBA determines necessary.

The lender is required to issue a decision on the forgiveness application no later than 60 days after the date on which it receives the application. If a lender has received the documentation required from a borrower attesting that the borrower has accurately verified the payments for payroll costs, payments on covered mortgage obligations, payments on covered lease obligations, or covered utility payments during the covered period:

- an enforcement action may not be taken against the lender under section 47(e) of the Small Business Act relating to loan forgiveness for the payments for payroll costs, payments on covered mortgage obligations, payments on covered lease obligations, or covered utility payments, as the case may be; and
- the lender will not be subject to any penalties by SBA relating to loan forgiveness for the payments for payroll costs, payments on covered mortgage obligations, payments on covered lease obligations, or covered utility payments, as the case may be.



# Panel 4

## STATE OF DELAWARE LOANS/GRANTS

<https://business.delaware.gov/2020/03/20/need-some-emergency-funds-for-your-de-small-business-because-of-coronavirus-here-are-some-possible-sources/>

U.S. Small Business Administration provides low-interest loans of up to \$2 million for small business and nonprofits regardless of industry

FINANTA, a nonprofit that serves Delaware, is offering emergency loans from \$5,000-\$15,000.

Facebook is planning to roll out the Facebook Small Business Grants program for up to 30,000 eligible small businesses

## FEDERAL GOVERNMENT LOANS/GRANTS

<https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources#section-header-0>

Paycheck Protection Program – determined by 8 weeks of prior average payroll plus 25% of that amount. Loan deferred for 6 months but if you maintain your workforce, SBA will forgive the portion of the loan proceeds used to cover the first 8 weeks of payroll and certain other expenses after the loan.

Economic Injury Disaster Loans and Loan Advance – Loan advance of \$10,000 and loan up to \$2 million to help overcome the temporary loss of revenue. Funds available within 3 days of successful application and the \$10,000 advance will not have to be repaid.

Expedited loan approval for other Small Business Administration Loans.

# Panel 5



## Essential Services Screening Recommendations for COVID-19 Pandemic

*To help protect the public against the spread of COVID-19, Governor John Carney and Delaware Division of Public Health Director Karyl T. Rattay, MD, MS, are requiring that high-risk businesses, and strongly recommend that all other employers, screen employees each day before work by following these steps:*

- All employees who are able to work from home should be working from home at this time.
- For those employees who must report to work: each employee must be asked about and report body temperature at or above 99.5 degrees Fahrenheit. If facility has the capability to perform active temperature monitoring, they may do so. If an employee reports or is noted to have body temperature at or above 99.5 degrees Fahrenheit, that employee should be sent home.
  - It is best to use touchless thermometers (forehead/temporal artery thermometers) if possible, but if you must use oral or other types of thermometers, make sure to clean the thermometers thoroughly between each employee, as to not spread infection.
  - Follow the manufacturer's directions to disinfect the thermometer.
  - If no directions are available, rinse the tip of the thermometer in cold water, clean it with alcohol or alcohol swabs, and then rinse it again.
  - If you do not have thermometers on site, have your employees take their temperatures at home. They should stay home if they have an elevated temperature at or above 99.5 degrees Fahrenheit and follow the same protocol.
  - Personnel screening employees for fever should consider wearing gloves and face masks per CDC recommendations.
- Employers must screen each incoming employee with a basic questionnaire, which should include at least the below, however can be made more comprehensive and/or employer-specific in consultation with medical professionals:
  - Do you have symptoms of respiratory infection (fever, cough, shortness of breath, severe sore throat, or muscle aches)?
    - If YES, but symptoms have a known cause (asthma, COPD, chronic sinusitis, etc.), employer or medical personnel should weigh risks for COVID-19 exposure and consider sending employee home.
    - If YES, or employee otherwise symptomatic and considered at risk for COVID-19 exposure, the employee should isolate at home.
      - The employee should remain at home for a total of seven (7) days **after symptoms have resolved** defined as the resolution of fever without the use of fever-reducing medications **and** improvement in respiratory symptoms (e.g., cough, shortness of breath); **and** resolution of body aches and sore throat, before being permitted to return back to work.
      - Three days after symptoms resolve, patients are no longer required to self-isolate at home; however, they must continue to practice strict social distancing, avoid sustained close contact with others and maintain good hand

hygiene, for the remaining four days (for a total of seven days) before returning to work and their normal daily routine.

- Persons may return to work after this 7-day period however should continue to recognize the risk of infectiousness and self-monitor for symptoms.
- Employees should consult medical professionals if desired or needed and may adhere to screening decisions made by on-site medical personnel as appropriate.
- If at any time a doctor confirms the cause of the employee's fever or other symptoms is not COVID-19 and approves them to return to work, then the employees can return.
- If NO, proceed to next step
- Have you been in *close contact* (e.g., within 6 feet for more than a few minutes) with a person with confirmed COVID-19 infection? (note: this does not apply to healthcare workers using appropriate PPE—see DPH guidance DHAN #429 for Management of Potential Exposure for Health care Personnel)
  - If YES, employee will be required to stay at home for 14 days from the time they were exposed to confirmed COVID-19.

Remember to continue to follow preventative measures no matter how many employees are in the office — physical distancing, stay home when sick, use cough and sneeze etiquette, and practice hand hygiene as often as possible. Clean all high-touch surfaces regularly. For more information, visit: [coronavirus.delaware.gov/](https://coronavirus.delaware.gov/). For answers to your COVID-19 questions, call 1-866-408-1899. Those with a hearing impairment can dial 7-1-1. Public inquiries and questions can be sent by email to [DPHCall@delaware.gov](mailto:DPHCall@delaware.gov).

(updated March 31, 2020)