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**W-24: PRIVILEGE AND OTHER ETHICAL CONSIDERATIONS
IN THE WORK-FROM-EVERYWHERE ERA**

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PRIVILEGE AND OTHER ETHICAL CONSIDERATIONS IN THE WORK-FROM-ANYWHERE ERA

I. INTRODUCTION: THE WORLD OF LEGAL PRACTICE HAS CHANGED

Even before the COVID-19 pandemic, lawyers in both corporate law departments and law firms were increasingly working remotely, and that trend has accelerated and perhaps become irreversible. While remote work technology was widely available by early 2020, the global pandemic and resulting quarantine compelled the widespread adoption of those technologies and accelerated the cultural acceptance of remote work for office workers, including lawyers, worldwide. This cultural shift, adopted by necessity, has gained traction not merely from the pandemic quarantine, but also from the continued development and implementation of technology and a broad cultural shift toward a “work from anywhere” ethos.¹

While it does not mean permanent remote work will be the case for all lawyers, this cultural shift toward more flexibility in the work schedule is, in our opinion, broad and likely permanent. During the pandemic, many older workers worked from second homes or permanently relocated to warmer, less costly locales, permitting many to profit from rising real estate values in urban and suburban markets. Workers with young families enjoyed the flexibility that working remotely offered, enabling them to “work around” family, school, sports, and activities, and enabling them to participate more fully in family life where full-time in-office work precluded or limited such participation. Finally, many younger office workers took advantage of the pandemic to travel and/or relocate, creating a new “work/life” balance construct premised upon remote work, either in part or in full.

Many employers, particularly in urban centers, reacted to the global pandemic by reducing the size of their offices and re-configuring their workspaces to accommodate flexible scheduling. Further, it is widely understood that despite initial trepidation, many, if not most, employers ultimately concluded that office workers were equally, if not more, productive when working remotely during the pandemic, and the widespread adoption of the remote-work construct has increased the productivity of at home workers (many having adopted and improved their “home offices” as more permanent spaces in their homes).

It is apparent to the authors that the work from anywhere ethos will be more than a mere temporary phenomenon linked to and made necessary by the global COVID-19 pandemic. Instead, we expect that it reflects a fundamental shift in the way that office workers, and particularly lawyers, work. Indeed, we expect that nearly every lawyer reading this paper abruptly shifted to a work from home model on or about March 17, 2020, and the vast majority of those readers continue to work, at least in part, from home as you read this paper in November, 2023—nearly four years after the commencement of the COVID-19 quarantine. Whether the reader has remained in a fully remote model or has returned to an office for a few days per week, we expect that the majority of our readers are working remotely more often now than were in, say, 2019.

And, of course, lawyers have always worked remotely in other contexts, aside from their home offices. Whether working while travelling for client work, client development, or legal

¹ See Peter Grant, *The Return to the Office Has Stalled*, WALL ST. J., May 16, 2023, https://www.wsj.com/articles/the-return-to-the-office-has-stalled-e0af9741?mod=hp_lead_pos10 (noting that in 2023 approximately fifty-eight percent of companies surveyed allow employees to work a portion of their week remotely).

conferences (such as this one), working while commuting, or simply working during non-office hours from home during the weekend, lawyers work remotely in numerous ways.

Given what we expect to be the continued widespread adoption of remote work, now is a good time for all of us to consider afresh the ethical issues arising from remote legal practice, and to take all reasonable and necessary steps to be sure that we are complying with our ethical obligations while working remotely.

Working remotely requires an ever-increasing use of technology, and the ethical duty of competence extends to technology competence. This is a critical ethical consideration which many lawyers, often classifying themselves as “non-technical” people, routinely overlook or delegate while working full-time in law office environments. However, this broad ethical duty of technology competence cannot be ignored or fully delegated.

Remote work has not only increased the use, and potential misuse, of technology, but also has created a certain isolation risk that may not necessarily occur in a multi-person office setting. It has been suggested that more mistakes and unethical conduct, and perhaps even dishonesty, occur when we are working remotely without staff and colleagues with whom to interact. Further, issues concerning client confidentiality, privilege, attorney and non-lawyer supervision, and even unauthorized practice of law can result from the adoption of the work from anywhere model.

Fortunately, the ABA has provided ethical guidance through its amendments to the Comments to its Model Rules of Professional Conduct and also through the issuance of a series of very helpful Formal Opinions issued by the ABA Standing Committee on Ethics and Professional Responsibility. We strongly recommend that all lawyers working remotely, in whole or in part, take the time to carefully read the applicable Model Rules and Formal Opinions discussed below.

Technology continues to evolve, and the ethical standards applicable to its use evolve accordingly. But, three and a half years after the abrupt implementation of the COVID-19 pandemic quarantine, it is apparent that the work from anywhere ethos is here to stay. As a result, it is now incumbent upon all lawyers to review their ethical obligations arising from this fundamental shift in the way we serve our clients.

II. THE MODEL RULES OF PROFESSIONAL CONDUCT, ABA FORMAL OPINIONS, AND RELATED STATE RULES AND OPINIONS

Fundamentally, attorneys must have a thorough understanding of the ethical rules that most directly and meaningfully address lawyers’ ethical obligations arising from remote work. The ABA Model Rules of Professional Conduct (the “Model Rules”) were adopted by the ABA in 1983 and are published on the ABA’s website.² Fifty-five jurisdictions have adopted some version of the Model Rules – all 50 states, plus the District of Columbia, Guam, Puerto Rico, the Marianna Islands, and the Virgin Islands (recognizing that the states may have variations in their rules and

² A.B.A., MODEL RULES OF PROF'L CONDUCT (2023), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/.

may not adopt any or all of the ABA's Comments).³ With those state-specific potential variations in mind, this paper focuses on the ABA's Model Rules as the primary source of guidance in connection with the ethical duties implicated by remote work.

Fortunately, the ABA Standing Committee on Ethics and Professional Responsibility has issued a series of Formal Opinions construing these rules in the context of lawyers' use of technology and, more generally, remote practice, which we will also examine below. The Model Rules, as construed by these Formal Opinions, provide the backbone of our discussion.

A. The ABA Model Rules of Professional Conduct Relating to Remote Work

The Model Rules implicated by remote work include: 1.1 (Competence); 1.3 (Diligence); 1.4 (Communications); 1.6 (Confidentiality of Information); 1.15 (Safekeeping Property); 1.16 (Declining or Terminating Representation); 5.1 (Responsibilities of a Partner or Supervisory Lawyer); 5.2 (Responsibilities of a Subordinate Lawyer); 5.3 (Responsibilities Regarding Non-Lawyer Assistance); and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

In short, these Model Rules require that a lawyer: provide competent and diligent representation to the client; promptly inform and reasonably communicate with the client so the client may make informed decisions; keep client secrets and make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client; appropriately safeguard client property; return papers and property to which the client is entitled; ensure that lawyers, legal assistants and service providers are familiar with, and acting in a manner consistent with, the Model Rules; and, to practice law only in appropriate jurisdictions.

The ABA has repeatedly revised the Model Rules and their predecessors, to reflect changing circumstances that impact modern legal practice, including specifically the increasing use of technology such as email, the internet, digital communications, cloud computing, and potential threats in cyberspace. For example, the ABA's Ethics 2000 Commission added two Comments to Model Rule 1.6 concerning confidentiality of information: (i) Comment 15 was added to reiterate a lawyer's affirmative duty to protect the client's confidential information against inadvertent or unauthorized disclosure in the context of online technologies; and, (ii) Comment 16 cautioned lawyers about the harm that might flow from such inadvertent disclosure and to consider whether circumstances required additional security.⁴

More recently, the ABA Commission on Ethics 20/20 (the "20/20 Commission") reexamined the Model Rules governing a lawyer's duties and obligations in light of changing technology. On September 19, 2011, the 20/20 Commission adopted a resolution entitled "Technology and Confidentiality" in which they proposed changes to the Model Rules, some of which directly implicated the ethical considerations arising from the use of cloud computing and

³ See A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, JURISDICTIONAL RULES COMPARISON CHARTS, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (alphabetical list of jurisdictions adopting Model Rules) (last visited May 10, 2023).

⁴ A.B.A. MODEL R. PROF'L CONDUCT r. 1.6, cmt. 15 & 16 (2000).

other related uses of technology.⁵ The ABA House of Delegates adopted the 20/20 Commission's proposed amendments to the Model Rules in August 2012 (the "2012 Amendments").⁶

We discuss below the Model Rules that are directly relevant to the ethical issues arising from remote work, including additions and other changes that were made to the Model Rules, either directly in the text or in the Comments, as part of the 2012 Amendments.⁷

1. **Model Rule 1.1: Competence**

Lawyer competency is at the core of a lawyer's ethical responsibilities. Model Rule 1.1 provides, in simple terms, that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁸ Comment 1 explains that:

[I]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.⁹

Comment 1 makes clear that the duty of competence is broad enough to encompass just about every aspect of the practice of law.

The 20/20 Commission found that, given the "bewildering pace of technological change,"¹⁰ it was important to update the Model Rules to make explicit that a lawyer's duty of competence necessarily "requires the lawyer to stay abreast of changes in the law and its practice, includ[ing] understanding relevant technology's benefits and risks."¹¹ To reflect this important clarification that competence requires being, and continuing to become, reasonably informed about emergent technologies, the 2012 Amendments supplemented Comment 8 to Rule 1.1 to state:

⁵ A.B.A. COMM. ON ETHICS 20/20, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on-ethics-20-20/ (last visited May 10, 2023).

⁶ *Id.*

⁷ A number of commentators have criticized the Model Rules for not providing adequate specific guidance to interpret the duties imposed upon lawyers with regard to technology use and remote work generally. See, e.g., Ellen Platt, *Zooming Into A Malpractice Suit: Updating The Model Rules of Professional Conduct in Response to Socially Distanced Lawyering*, 53 TEX. TECH L. REV. 809 (2021).

⁸ A.B.A. MODEL R. PROF'L CONDUCT r. 1.1.

⁹ *Id.* R.1.1 cmt. 1.

¹⁰ See A.B.A. COMM'N ON ETHICS 20/20 INTRODUCTION & OVERVIEW at 8 (2013), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.pdf.

¹¹ See A.B.A. COMM'N ON ETHICS 20/20 RESOLUTION & REPORT: TECHNOLOGY & CONFIDENTIALITY at 9 (2013), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111228_summary_of_ethics_20_20_commission_actions_december_2011_final.pdf.

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.¹²

Thus, while not creating a new ethical obligation, the Comment explicitly affirms that the Model Rule includes a duty of technology competence. As of January 1, 2022, forty states have adopted this duty of technology competence.¹³

2. Model Rule 1.3: Diligence

Relatedly, Model Rule 1.3 provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” While not specific to remote practice, the logistical challenges of remote work may, at the extremes, implicate this basic ethical responsibility.

3. Model Rule 1.4: Communications

A lawyer’s ethical responsibilities include the duty to promptly inform and reasonably communicate with the client so that the client may make informed decisions. Rule 1.4 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.¹⁴

Although the language of Rule 1.4 does not directly address remote practice or the use of technology, it does require lawyers to inform their clients of any actual or potential security breach resulting in the actual or potential loss of confidential information.¹⁵ Given the increased frequency

¹² A.B.A. MODEL R. PROF’L CONDUCT r. 1.1 cmt. 8 (emphasis added).

¹³ Bob Ambrogi, *Another State Adopts Duty of Technology Competence for Lawyers, Bringing Total to 40*, Law Sites (Mar. 24, 2022), <https://www.lawnext.com/2022/03/another-state-adopts-duty-of-technology-competence-for-lawyers-bringing-total-to-40.html>.

¹⁴ A.B.A. MODEL R. PROF’L CONDUCT r. 1.4.

¹⁵ A.B.A. Comm. On Ethics & Prof’l. Responsibility, Formal Op. No. 483 at 10–11 (Oct. 17, 2018) [hereinafter Formal Opinion 483], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_fo_rmal_op_483.pdf (citing model Rule 1.4 and noting that “[w]hen a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach.”)

of electronic data breaches and other cyber threats, ethical standards may require, or at least encourage, a lawyer to inform clients about the lawyer's use of technology in connection with legal representation.¹⁶

4. Model Rule 1.6: Confidentiality of Information

A lawyer's ethical duty to maintain confidentiality is directly implicated by the use of technology and, more broadly, by remote law practice. Nearly every aspect of remote practice implicates this duty, sometimes in surprising ways. For example, Rule 1.6(a) sets forth the general prohibition against "reveal[ing] information relating to the representation of the client unless the client gives informed consent."¹⁷ This duty of confidentiality is obviously implicated when working remotely to the extent family members or others are within earshot of a lawyer communicating concerning client matters, whether on the phone, through a virtual platform (such as Zoom or Microsoft Teams), or even in person.

This duty is also implicated through increased use of technology, including email and cloud computing. The 2012 Amendments substantively revised the confidentiality obligations in Rule 1.6 to extend the reasonableness standard into the cyber realm. Three substantive changes were made, one directly in the text of Rule 1.6 and two in Comments 18 and 19, all of which provide important discussions on safeguarding information both when the lawyer is holding the information and when the lawyer is transmitting the information.

First, the ABA added a new section, subparagraph (c), to the Rule. This new section makes clear that "[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."¹⁸

Second, Comment 18 to Rule 1.6 was expanded to emphasize the reasonableness standard and to provide guidance on the relevant factors when analyzing the ethical implications of an accidental or wholly unauthorized disclosure of client information.¹⁹

Third, Comment 19 to Rule 1.6 was amended to address the preservation of confidentiality when transmitting confidential data.²⁰

Neither of these Comments provides specific examples regarding technology use; instead, the Comments focus on a lawyer's obligations to take measures to protect confidential information and remind us that other laws may impose additional, and possibly more stringent, standards and

(citing A.B.A. Comm. On Ethics & Prof'l. Responsibility, Formal Op. No. 95-398 (Oct. 27, 1995), <https://www.americanbar.org/content/dam/aba/publications/YourABA/95-398.authcheckdam.pdf>).

¹⁶ See Section I.A *infra*.

¹⁷ A.B.A. MODEL R. PROF'L CONDUCT r. 1.6(a).

¹⁸ A.B.A. MODEL R. PROF'L CONDUCT r. 1.6(c).

¹⁹ A.B.A. MODEL R. PROF'L CONDUCT r. 1.6 (cmt. 18).

²⁰ A.B.A. MODEL R. PROF'L CONDUCT r. 1.6 (cmt. 19).

obligations. These Comments are well worth examining in detail, and we would recommend that you do so.

5. Model Rules 1.15 and 1.16: Safekeeping Property and Terminating Representation

Model Rules 1.15 and 1.16 both discuss technology competence and how it may impact ethical obligations to clients.

Rule 1.15(a) provides in pertinent part:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property... . Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.²¹

Rule 1.16(d) provides:

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for an employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.²²

Taken together, these rules require lawyers to take appropriate steps to reasonably assure the proper storage, safekeeping and return of client records, both paper and electronic, during and after the representation. These rules implicate not only the maintenance of hard copy files at remote office locations, but also the maintenance of client records in electronic storage mechanisms, such as cloud-based storage. It is noteworthy that Rules 1.15 and 1.16 were not revised in the 2012 Amendments and therefore offer no guidance on what constitute "appropriate steps" related to the storage, safekeeping and return of electronically stored information.

6. Model Rules 5.1 and 5.2: Responsibilities of Partners and Subordinate Lawyers

Despite the inherent separateness of remote practice, counsel must also consider Model Rules 5.1 and 5.2 regarding responsibilities of partners and other lawyers working together in a law practice.

Model Rule 5.1 provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm,

²¹ A.B.A. MODEL R. PROF'L CONDUCT r. 1.15.

²² A.B.A. MODEL R. PROF'L CONDUCT r. 1.16(d).

shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.²³

Model Rule 5.2 provides:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.²⁴

Taken together, these rules straightforwardly require lawyers to reasonably ensure that the lawyers over whom they have a supervisory role are familiar with and act in compliance with the Model Rules. Conversely, lawyers being supervised have an independent ethical obligation to adhere to the Model Rules, which continues to apply even if a supervisory lawyer acts in contravention of the Rules and directs a subordinate attorney to act in the same manner.

As discussed below, compliance with these Rules becomes somewhat complex when lawyers in a firm are practicing remotely, such that supervisory relationships may become attenuated, and lawyers being supervised have a reduced practical ability to confer with a supervisory lawyer and their colleagues to ensure compliance with these ethical responsibilities.

7. Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

Model Rule 5.3 regarding a lawyer's responsibilities with respect to non-lawyers is also relevant to remote practice, as virtually all lawyers use the assistance of non-lawyers, such as legal assistants, litigation consultants, technology vendors, ESI consultants, and others. Unlike

²³ A.B.A. MODEL R. PROF'L CONDUCT r. 5.1.

²⁴ A.B.A. MODEL R. PROF'L CONDUCT r. 5.2.

Rules 5.1 and 5.2, Rule 5.3 and its Comments were revised in 2012 and directly identify and address the increased use of technology.

Rule 5.3 provides:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.²⁵

The 2012 Amendments, among other things, added new Comments 3 and 4, which were meant to emphasize two aspects of the lawyer's ethical responsibilities with respect to outside nonlawyers who provide assistance to the lawyer and the representation. First, lawyers must make "reasonable efforts" to safeguard that the selected service providers acted in a manner that is consistent with the lawyer's professional obligations, which extend to protecting client information. And second, lawyers must give "appropriate instructions" to those outside services when retaining their services.²⁶ Again, these Comments 3 and 4 are well worth the reader's detailed review, especially to the extent the lawyer retains outside ESI, discovery, or other technology vendors (which is, practically, all practicing lawyers).

8. Model Rule 5.5: Unauthorized and Multijurisdictional Practice of Law

Rule 5.5 provides, generally, that a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, including the practice of law in a jurisdiction in which the lawyer is not admitted to practice. As discussed below, this ethical consideration is primarily implicated in remote practice when the location of the lawyer's remote

²⁵ A.B.A. MODEL R. PROF'L CONDUCT r. 5.3.

²⁶ A.B.A. COMM'N ON ETHICS 20/20 INTRODUCTION & OVERVIEW, *supra* note 10, at 12.

office is outside of the jurisdiction in which the lawyer is authorized to practice. For example, it applies to attorneys who are admitted to practice in New York and whose principal office is located in New York but reside in neighboring Connecticut or New Jersey. Other examples include lawyers who have re-located, full-time or part-time, to a second home or wholly relocated to a state in which they are not licensed to practice but continue to work for their law firms which are located in states in which they are authorized to practice. As discussed below, compliance with these ethical considerations merely requires careful planning and deliberate action.

B. ABA Standing Committee on Ethics and Professional Responsibility: Formal Opinions Concerning Remote Practice

The ABA Standing Committee on Ethics and Professional Responsibility issues Formal Opinions interpreting the Model Rules. ABA Formal Opinions have been cited as persuasive when courts around the nation interpret state-adopted Rules of Professional Conduct.²⁷ Since 2017, the Committee has issued a series of six Formal Opinions which, directly or indirectly, implicate the remote practice of law. The Formal Opinions provide in-depth practical guidance concerning the application of the Model Rules to the ever-evolving legal practice, focusing on various topics, all of which are implicated by remote work. Like the Model Rules, we strongly suggest that counsel working remotely, and counsel in firms where other lawyers are working remotely, review these Formal Opinions in detail. They are briefly summarized below.

1. Formal Opinion 477R: Securing Communication of Protected Client Information

This eleven-page Formal Opinion 477R,²⁸ issued in the halcyon days of May 2017 (three years before the COVID-19 pandemic), is a good place to start our review of the relevant Formal Opinions. Its introduction provides a good summary of the onset of the widespread use of electronic communications, email, the use of the internet and the “technology amendments” to the Model Rules in the approximately twenty years preceding it. The Opinion addresses the duty of competence, the duty of confidentiality, cybersecurity, protecting clients and vetting vendors of products and services. Even in 2017, it warned of the lack of client sophistication in connection with these technologies and the lawyer’s obligation to conduct due diligence on vendors providing communication technology.

The Opinion concluded that a lawyer generally may transmit information relating to the representation of the client over the internet without violating the Model Rules where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access.²⁹ However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.³⁰

²⁷ See https://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/.

²⁸ A.B.A. Comm. on Ethics & Prof'l. Responsibility, Formal Op. 477R (May 22, 2017) [hereinafter Formal Opinion 477R], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_477.pdf.

²⁹ *Id.* at 4.

³⁰ *Id.*

2. Formal Opinion 482: Ethical Obligations Related to Disasters

In September, 2018, the Committee issued the thirteen-page Formal Opinion 482 concerning ethical obligations related to lawyers effected by disasters.³¹ While the nation's seemingly increasing vulnerability to hurricanes, floods, tornadoes, and fires certainly prompted the Committee to issue this opinion, many of the issues discussed in the context of natural disasters are directly relevant to the COVID-19 pandemic and the resulting remote work environment. Both may cause lawyers to work remotely, although as discussed above, it appears that the pandemic was a tipping point that has rendered such remote work, in whole or in part, permanent.

This Opinion addresses communications, dealing with physical impediments, withdrawal as counsel, lawyers displaced to other jurisdictions, loss of files and client property, and solicitation/advertisement. Addressing many of the Model Rules discussed above, the Opinion concluded that lawyers must prepare in advance to practice despite natural disasters affecting them or their clients. 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. The Opinion concluded that lawyers have an obligation to reduce the risk of violating professional obligations after a natural disaster through proper advance preparation and taking advantage of available technologies during recovery efforts.³² Again, these concerns are equally relevant to remote work caused by other factors.

3. Formal Opinion 483: Lawyers' Obligations After An Electronic Data Breach or Cyberattack

Only a month later, the Committee issued Formal Opinion 483 concerning a lawyer's ethical obligations relating to an electronic data breach or cyberattack.³³ While these concerns may have seemed remote in 2018, experience since then has disabused most lawyers of that notion, since such electronic data breaches and other cyberattacks have become ever-more constant.

The thirteen-page Opinion discusses data breaches and other cyberattacks in the context of a lawyer's duty of competence, duty of confidentiality and breach notification requirements. The Opinion notes that when a data breach occurs involving, or having a substantially likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under the Model Rules. Those rules also require lawyers to make reasonable efforts to prevent the unauthorized disclosure of, or unauthorized access to, information related to the representation of the client (Model Rule 1.6(c)), stay abreast of changes in technology (Model Rule 1.1), and properly supervise other lawyers and third party electronic-information storage vendors (Model Rule 5.1 and 5.3).

³¹ A.B.A. Comm. on Ethics & Prof'l. Responsibility, Formal Op. 482 at 5 (Sept. 19, 2018) [hereinafter Formal Opinion 482], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_482.pdf.

³² *Id.*

³³ Formal Opinion 483, *supra* note 15.

Even assuming compliance with these Model Rules, when an attorney suffers a data breach or cyberattack, the attorney has a duty to notify clients under Model Rule 1.4 in sufficient detail to keep clients reasonably informed and with an explanation to the extent necessary to permit the client to make informed decisions regarding the representation.³⁴

4. Formal Opinion 495: Lawyers Working Remotely

Nine months into the pandemic quarantine (December 2020), the Committee issued Formal Opinion 495 concerning lawyers working remotely.³⁵ In the already-mobile world with laptops, tablets and smartphones existing before the pandemic, lawyers routinely provided clients with advice while traveling, on vacation or at a second home.

This Opinion, while not explicitly a response to the global pandemic, focuses on a lawyer's ethical responsibilities when engaging in the practice of law while being physically present in a jurisdiction in which they are not admitted to practice. The Opinion concludes that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice law as authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed to practice, if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.³⁶

5. Formal Opinion 498: Virtual Practice

Approximately one year into the pandemic quarantine (March 2021), the Committee issued Formal Opinion 498 concerning the virtual practice of law.³⁷ While it does not expressly address the pandemic, it is clearly a response to the mass migration of lawyers to a work-from-home environment which began on or about March 17, 2020. The Opinion begins with the premise that the Model Rules permit virtual practice, which it defines as "technologically enabled law practice beyond the traditional brick-and-mortar law firm."³⁸

The Opinion proceeds to discuss issues surrounding competence, diligence, communication, confidentiality, inadvertent disclosures and supervision of lawyers and non-lawyers, and suggests various best practices. The Opinion explains that when practicing virtually, a lawyer must particularly consider their ethical duties concerning competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, a lawyer must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such

³⁴ *Id.*

³⁵ A.B.A. Comm. On Ethics & Prof'l Responsibility, Formal Op. No. 495 (Dec. 16, 2020) [hereinafter Formal Opinion 495], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf.

³⁶ *Id.*

³⁷ A.B.A. Comm. on Ethics & Prof'l. Responsibility, Formal Op. No. 498 at 4 (Mar. 10, 2021) [hereinafter Formal Opinion 498], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf.

³⁸ *Id.*

information. Additionally, the duty of supervision requires that a lawyer make reasonable efforts to ensure compliance with the ethical rules by subordinate lawyers, non-lawyer assistants and contractors. The Opinion further discusses several virtual practice technologies and considerations, and possible limitations of virtual practice. In short, this Opinion squarely addresses the issues discussed in this paper and is a "must read."

6. Formal Opinion 504: Choice of Law

Opinion 504 concerns Model Rule 8.5 and the rather arcane choice of law questions which arise concerning which jurisdiction's ethics rules a lawyer must follow if the lawyer practices the law of more than one jurisdiction.³⁹ Under Model Rule 8.5(a), lawyers are subject to the disciplinary authority of jurisdictions in which they are licensed regardless of where the relevant conduct occurred, and are also subject to the disciplinary authority of the jurisdictions in which they are offering to provide or are providing legal services regardless of whether they are admitted to practice or licensed by that jurisdiction. These potentially conflicting ethical considerations may arise when a lawyer's remote work environment is outside of a jurisdiction in which the lawyer is licensed to practice. After conducting an in-depth analysis of Rule 8.5, the Opinion concludes that a lawyer will not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyers' conduct will occur, notwithstanding ethical rules of a different jurisdiction (including a jurisdiction in which the lawyer is working remotely).⁴⁰

C. State Rules of Professional Conduct

As noted above, virtually all states and other U.S. jurisdictions have adopted some version of the Model Rules, all before the ABA's 2012 Amendments. Since the 2012 Amendments, forty states have adopted, in whole or in part, the changes made in the 2012 Amendments in connection with the duty of competence as it relates to technology (which appears in Comment 8 of Model Rule 1.1) and other aspects of the 2012 Amendments relating to technology, confidentiality and responsibilities regarding non-lawyer assistance.⁴¹ These include Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming.⁴²

Some states have adopted the 2012 Amendment regarding technology competence and related issues verbatim, while other states have adopted modified versions. Examples of states with variations to the Model Rules include Indiana, Colorado, North Carolina, New Hampshire and New York. However, in general, the variations do not reflect significant departures from the Model

³⁹ A.B.A. Comm. On Ethics & Prof'l. Responsibility, Formal Op. No. 504 at 1 (Mar. 1, 2023) [hereinafter Formal Opinion 504], https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-504.pdf.

⁴⁰ *Id.*

⁴¹ The *Law Sites* blog provides useful summaries and links to the state professional rules of conduct and orders implementing changes relating to technology competence. See, LawSites, *Tech Competence*, <https://www.lawsitesblog.com/tech-competence> (last visited May 5, 2023).

⁴² *Id.*

Rule and Comments, but rather reflect adjustments in each state's approach to provide more specifics and in some cases to reflect a less stringent approach.

Certain states have adopted continuing legal educational requirements specific to technology competence.⁴³ Other states have clarified that the duty of technology competence relates only to the technology that is relevant to the lawyer's practice or otherwise build in flexibility and practicality into the duty of technology competence.⁴⁴ Many states or other jurisdictions, of course, have issued their own state ethics opinions or other guidance concerning these core Model Rules, as adopted, and the ethical issues arising from remote practice.⁴⁵

The ABA provides helpful resources on its website regarding state professional rules. These resources include lists by date of state adoption of the Model Rules,⁴⁶ links to state ethics opinions,⁴⁷ and summary of states' adoption of the Comments to the Model Rules and the effects of the Comments and Comparison of the Model Rules and State Rules.⁴⁸

III. MAINTAINING CONFIDENTIALITY WHILE WORKING REMOTELY

Model Rule 1.6 addresses a lawyer's ethical obligation to safeguard confidential information. This obligation impacts not only a lawyer's use of technology when practicing remotely, but also by the practicalities surrounding a work-from-anywhere environment, as opposed to a law office. Specifically, Model Rule 1.6 provides that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Further, Rule 1.6 creates an ethical obligation to "make reasonable

⁴³ *E.g.*, FL. ST. BAR Rule 6-10.3(b); 27 N.C. ADMIN. CODE 1D.1518(a)(2).

⁴⁴ *See* IN. ST. RULES OF PROF'L CONDUCT r. 1.1, cmt. 6; 27 N.C. ADMIN. CODE R. 101, cmt. 8; N.H. RULES OF PROF'L CONDUCT r. 1; N.Y. STATE BAR ASS'N, COMM. ON ATTORNEY PROFESSIONALISM RESOURCES (Apr. 1, 2019), <https://nysba.org/committees/committee-on-attorney-professionalism/> (last visited May 4, 2023); CO. ST. RULES OF PROF'L CONDUCT r. 1.1, cmt. 8; W.V. RULES OF PROF'L CONDUCT r. 1.1, cmt. 8.

⁴⁵ *E.g.*, Penn. Bar Ass'n, Comm. On Legal Ethics and Prof'l Responsibility Formal Op. 2020-300 (Apr. 10, 2020) [hereinafter Penn. Formal Opinion 2020-300], <https://www.lawnext.com/wp-content/uploads/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf>; State Bar of Michigan, Ethics in the COVID-19 Pandemic, <http://www.michbar.org/opinions/ethics/COVID-19> (last visited June 13, 2023); California Lawyers Association, Legal Ethics and the Coronavirus, calawyers.org/California-lawyers-association/legal-ethics-and-the-coronavirus (last visited June 13, 2023); Wis. Formal Ethics Op. EF-21-02, Working Remotely (Jan. 29, 2021), <https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/EF-21-02%20Working%20Remotely.pdf>; New York City Bar Assoc., Formal Opinion 754-2020, Ethical Obligations When Lawyers Work Remotely, 20220518P NYCBAR 23 (2022).

⁴⁶ A.B.A., ALPHABETICAL LISTS OF JURISDICTIONS ADOPTING MODEL RULES, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited May 4, 2023).

⁴⁷ A.B.A., ADD'L LEGAL ETHICS & PROF'L RESP. RESOURCES, https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest/.

⁴⁸ A.B.A., CPR POLICY IMPLEMENTATION COMMITTEE, STATE ADOPTION OF THE A.B.A. MODEL RULES OF PROF'L CONDUCT AND COMMENTS, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/adoption_mrpc_comments.authcheckdam.pdf (last visited May 4, 2023); A.B.A., CPR POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.1 COMPETENCE, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-1-1.pdf (last visited May 4, 2023).

efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”⁴⁹

Remote work encompasses a wide range of work environments, including virtual law offices (“VLO”), shared office space (e.g., Regus, WeWork), home offices, and public spaces (coffee shop, library, airport, etc.). Lawyers who practice in any type of remote work environment are subject to the same ethical guidelines as more traditional practitioners but must take additional steps to ensure that these environments do not adversely affect the lawyer’s ethical compliance.

A. Confidentiality Risks Arising from the Use of Technology

Comment 19 to Model Rule 1.6 explains that the obligation of confidentiality requires lawyers to take “reasonable precautions” when electronically communicating with clients.⁵⁰ Further, Formal Opinion 477R provides that “[a] lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client.”⁵¹ And, of course, Comment 8 to Model Rule 1.1 established the duty of technology competence.⁵²

The Model Rules do not mandate any specific security measures or other means to satisfy the obligation to make reasonable efforts. Rather, the Model Rules take a holistic approach to define “reasonable effort” to include consideration of a series of factors, including:

- (1) the sensitivity of the information;
- (2) the likelihood of disclosure if additional safeguards are not employed;
- (3) the cost of employing additional safeguards, and the difficulty of implementing the safeguards; and,
- (4) the extent to which the safeguards adversely affect the lawyer’s ability to represent clients.⁵³

Further, given the increasing rate of cyberattacks and data breaches, lawyers may need to discuss the security safeguards implemented in their practices, whether remote or otherwise, with their clients.⁵⁴ And when handling very sensitive client information, lawyers must at least consider utilizing enhanced security measures and obtaining a client’s informed consent concerning the use thereof.⁵⁵

⁴⁹ A.B.A. MODEL R. PROF’L CONDUCT r. 1.6(a) & (c).

⁵⁰ A.B.A. MODEL R. PROF’L CONDUCT r. 1.6, cmt. 3.

⁵¹ Formal Opinion 477R, *supra* note 28, at 5.

⁵² A.B.A. MODEL R. PROF’L CONDUCT r. 1.1, cmt. 8.

⁵³ Formal Opinion 477R, *supra* note 28, at 5.

⁵⁴ Formal Opinion 483, *supra* note 15.

⁵⁵ *Id.* at 5.

Practically, remote work implicates a broad range of technologies, many of which create confidentiality risks. These technologies include email, voicemail, text messaging, file sharing services, cloud computing, the use of personal connected devices, Wi-Fi connections, and the use of shared or common computers. Section IV.A, *infra*, provides practical advice concerning the use of technology in the context of the duty of technology competence under Model Rule 1.1. While a deep dive into the ethical use of these technologies is beyond the scope of this paper, we strongly suggest that lawyers audit the use of technology, both in office and remote work contexts for compliance with their ethical obligations.⁵⁶

B. Additional Confidentiality Risks Arising from Remote Practice

Aside from the strictly technology-based risks arising from remote work, additional, somewhat more practical, confidentiality risks arise. Most basically, to the extent a lawyer is practicing from a home office, the lawyer must be sure that client information, whether in hard copy or electronic, remains inaccessible to any other persons who have access to that home office, including their family members, visitors, and household workers. A lawyer cannot simply leave confidential client information on her desk at the end of the day or use a family computer that is accessible to other family members. These practical concerns are amplified if the lawyer is sharing a home office with a spouse or other family members, such that phone calls and video conference meetings can be overheard by anyone else in the shared space.

Arrangements must be made to ensure privacy and confidentiality when communicating concerning client matters, whether this means finding an alternate place in the home to take phone calls and video conferences or otherwise ensuring appropriate privacy and confidentiality can be maintained. Likewise, client files must be accessed and stored in such a way to ensure confidentiality, best in a secured, locked cabinet, and a lawyer should have a dedicated computer, appropriately password protected, to conduct client representation. Not only must these client documents be appropriately safeguarded, but when the representation is complete, the files must be disposed of in an appropriate manner. Paper files must be shredded (not merely thrown in the trash bin) and electronic files must be permanently deleted from all devices and cloud storage systems.

Similarly, unless the technology is assisting a lawyer's practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters.⁵⁷ Otherwise, a lawyer risks exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of data breaches or cyberattacks.

Of course, these confidentiality concerns are equally, if not more, applicable to the extent a lawyer is communicating with or concerning clients or using confidential client information from a public remote location, such as a library, coffee shop or airplane such that conversations and information cannot be overheard, seen or accessed by others who are not assisting in their representation, again to avoid jeopardizing the attorney client privilege and violating the ethical

⁵⁶ For an excellent discussion of the ethical implications arising from the use of technology in law practice, see Regina B. Amolsch & Leslie Smith, *Ethics: Keeping Up With Ever Evolving Technology, They Didn't Teach That In Law School*, ABA 42ND ANNUAL FORUM ON FRANCHISING W-24 (2019).

⁵⁷ For a further discussion of the ethical implications of the use of smart speakers and other "Internet of Things" ("IOT") devices by a lawyer, see Armina Manning, *It's Smart, But Is it Ethical? Confidentiality in an Environment That Is Listening*, 24 VA. J.L. & TECH. 1 (2021).

duty of confidentiality. In a world in which people have widely and habitually utilized the ability to use technology to participate in hands-free phone calls while in public spaces (to the annoyance of the Luddites of the world), lawyers must think carefully before accepting (or initiating) a client matter call while in the elevator, on the train, in a restaurant, at the ballgame, or at any other non-private space. Likewise, notwithstanding the convenience and other perceived benefits, lawyers must refrain from using laptops or other devices to review confidential client information, such as deal due diligence or agreements and litigation materials, in places where others can view the screen. Although we have not seen any reported cases or commentary concerning lawyers' misuse of confidential client information in public spaces, the continued adoption of the work from anywhere ethos will surely result in ethical lapses. Please do not be that lawyer.

IV. MAINTAINING COMPETENCE WHILE WORKING REMOTELY

The very first rule of legal ethics requires that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁵⁸ In the modern era, skill, thoroughness, and preparation require an understanding of technological platforms, constant vigilance of evolving rules and practice norms, and a keen awareness of the effects of stress and anxiety on mental health, physical health, and substance abuse. Like the effect of the Moneyball era of statistical analysis in baseball, being a licensed legal professional has never required more attention to detail and focus on lawyer health and wellness, and the resultant impact on legal services performance. But improved monitoring and compliance with competence obligations is not merely a competitive advantage, it is an ethical obligation. This section addresses the technological competence and personal competence issues that arise in the context of remote work.

A. Technological Competence

To satisfy the lawyer's duty of competence, requisite legal knowledge and skill requires that a lawyer “should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . .”⁵⁹ This is often referred to as a lawyer's “duty of technology competence.”⁶⁰ This duty applies to a variety of issues, including electronic discovery, social media, law practice management, virtual offices, and remote practice.⁶¹ Indeed, “basic knowledge of cybersecurity has become an essential lawyer competency.”⁶² The standard for compliance is not strict understanding of technology issues or adoption of specific security and technology protocols, but rather reasonable attorney efforts under the specific facts of the

⁵⁸ A.B.A. MODEL R. PROF'L CONDUCT r. 1.1.

⁵⁹ A.B.A. MODEL R. PROF'L CONDUCT r. 1.1 cmt. 8.

⁶⁰ State Bar of Cal. Standing Comm. On Prof'l Responsibility and Conduct, Formal Op. Interim No. 2023 208 at 3 (Apr. 13, 2023) [Hereinafter Cal. Formal Opinion 2023-208], <https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/Formal-Opinion-No-2023-208-WFH.pdf>.

⁶¹ Cal. Formal Opinion 2023-208, *supra* note 60, at 3.

⁶² Wis. Formal Ethics Op. EF-15-01: Ethical Obligations of Attorneys Using Cloud Computing at 7 (Sept. 8, 2017), <https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/EF-15-01%20Cloud%20Computing%20Amended.pdf> (quoting Andrew Perlman, *The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence*, 22 THE PROF'L LAW. 4 (2014)).

representation.⁶³ This may require attorneys to consult with technology experts for matters that are beyond their expertise.⁶⁴ Most jurisdictions have adopted a similar approach.⁶⁵ As discussed earlier, still others have gone farther, requiring ongoing legal education to satisfy technological competence obligations.⁶⁶

Through this lens, the pandemic unleashed a tidal wave of new technological features that, essentially overnight, transitioned from quirky but helpful tools to essential elements of the practice of law. In the span of a few weeks, attorneys were forced to leave the office and work from their bedrooms, guest rooms, home offices, basements, and backyard cottages. Attendant to this transition were necessary technological leaps, such as remote data management systems, the wholesale adoption of virtual communication platforms, challenges for backing up client data and protecting data security, and a bramble of patchwork Covid-19 local rules that were rolled out in a seemingly unending series of emergency court declarations. Each of these platforms and changes to traditional practice require careful consideration to make sure the attorney is meeting their ethical obligations.

1. Virtual Communication Platforms

Previously untested communication platforms, such as Zoom and Microsoft Teams became essential tools for communicating with clients, colleagues, and the courts during the pandemic lockdowns. Despite the relative novelty of these platforms when they were first adopted, attorneys have an obligation to evaluate, obtain, and utilize these technologies in order to satisfy their obligation of technical competence.⁶⁷

In utilizing these systems, law firms must adopt policies that ensure that use of virtual communication platforms minimizes the risk of inadvertent disclosure of confidential information.⁶⁸ Remote work environments should allow for privacy to prevent family members, guests, and

⁶³ Formal Opinion 477R, *supra* note 28, at 4 (citing Jill D. Rhodes & Vincent I. Polley, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 48–49 (2013)).

⁶⁴ Penn. Formal Opinion 2020-300, *supra* note 45; *In re Amendments to Rules Regulating The Fla. Bar 4-1.1* at 5, 200 So. 3d 1225 (Fla. 2016) (“Competent representation may also involve the association or retention of a non-lawyer advisor of established technological competence in the field in question.”); Formal Opinion 477R, *supra* note 28, at 10 (“Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.”).

⁶⁵ Cal. Formal Opinion 2023-208, *supra* note 60, at 3; Wis. Formal Ethics Op. EF-15-01: Ethical Obligations of Attorneys Using Cloud Computing at 9 (Sept. 8, 2017), <https://www.wisbar.org/formembers/ethics/Ethics%20Opinions/EF-15-01%20Cloud%20Computing%20Amended.pdf>; Conn. Bar Ass’n, Informal Ethics Op. 2013-07 (June 19, 2013), <https://www.ctbar.org/docs/default-source/publications/ethics-opinions-informal-opinions/2013-opinions/informal-opinion-2013-07>; Me. Bd. Of Overseers of the Bar, Ethics Op. 194 (June 30, 2008), https://www.mebardoverseers.org/attorney_services/opinion.html?id=86894; see also Scott B. Piekarsky, *The Increased Use and Permanency of Technology: How Those Changes Impact Attorneys’ Professional Responsibility and Ethical Obligations to Clients and Recommendations for Improvement*, 30 U. MIAMI BUS. L. REV. 225, 228 (2021-2022) (noting that thirty-nine states have adopted technology competence standards).

⁶⁶ Amolsch & Smith, *supra* note 56, at 12 (“In September 2016, Florida became the first state to require continuing legal education specific to technology competence. . . [consisting of] at least 3 hours of continuing legal education in approved technology programs per three-year period.”). See also 27 N.C. ADMIN. CODE 1D.1518(a)(2).

⁶⁷ Penn. Formal Opinion 2020-300, *supra* note 45.

⁶⁸ Penn. Formal Opinion 2020-300, *supra* note 45, at 2.

visitors from inadvertently overhearing confidential client conversations. Given that virtual platforms essentially invite clients and colleagues into the attorneys' home, attorneys must make sure that no documents or other sensitive information are visible. This includes both physical documents and electronic documents that are inadvertently shared through improper screen sharing.

Some recommendations to protect video conferences from abuse by hackers include:

- Make all meetings private and require a password or approved admission of guests by the meeting host;
- Do not share video conference links on an unrestricted website or social media;
- Provide the meeting link directly to specific people;
- The meeting host should control screen sharing and prevent public sharing except with express permission; and
- Require users to update their software to the latest version before any meeting.⁶⁹

When selecting the appropriate video-conferencing platform, law firms should analyze whether there are higher tiers of security available for businesses, rather than free versions made available to the general public.⁷⁰ Lawyers should be familiar with the terms of service of each application. And any recordings made of meetings should be tagged as confidential and stored in the same manner as confidential client data.⁷¹ Clients and vendors should be prohibited from recording video-conferencing meetings to comply with confidentiality obligations and legal prohibitions against non-consensual recordings.

2. Data Management Software, Data Backups and Data Security

As a standard best practice, law firms should require that all files are saved to a centralized secure case management system.⁷² If access to these files is through the internet or other cloud-based system, lawyers should choose a reputable company, and take reasonable steps to ensure confidentiality of the system, and attorney access.⁷³ Regular data backup of document management systems is necessary to ensure timely access to client information in the event of a data breach or other loss or deletion in the system (inadvertent or otherwise).⁷⁴ Law firms should ideally provide company-issued equipment to ensure that necessary software and network

⁶⁹ Penn. Formal Opinion 2020-300, *supra* note 45, at 12.

⁷⁰ Formal Opinion 498, *supra* note 37, at 5.

⁷¹ Formal Opinion 498, *supra* note 37, at 5.

⁷² Cal. Formal Opinion 2023-208, *supra* note 60, at 3.

⁷³ Formal Opinion 498, *supra* note 37, at 5.

⁷⁴ Formal Opinion 498, *supra* note 37, at 6; Cal. Formal Opinion 2023-208, *supra* note 60, at 3.

connections are in place, data is regularly backed up and sensitive client information is not lost. Attorneys should use this equipment to log remotely into the office system, or into offsite servers. Personal devices may also be used, subject to increased scrutiny.⁷⁵

The subject of data security generally is beyond the scope of this article.⁷⁶ Countless treatises, ethics opinions, and articles are devoted to the myriad of issues raised by the transmission, retention, and use of confidential client communications and data. But there are some cybersecurity issues that pertain directly to the issue of remote work that lawyers should be familiar with. For example, attorneys should generally avoid using free public wifi networks when using confidential client or firm information.⁷⁷ Instead, networks should be secured with virtual private networks to create private connections to document databases.⁷⁸ Multi-factor authentication is an added layer of security that is increasingly necessary. This security method goes beyond merely something the user knows (such as a password which can be easily stolen) and requires the user to authenticate their access attempt with something the user has in their possession. Commonly this is a physical cell phone, which has an installed app or which receives a text message. Multi-factor authentication makes it much more difficult for hackers to gain access to law firm data because they do not have access to the physical device that is the secondary means of authentication. It ensures that the person accessing the secured network is who they purport to be.

Lawyers working from home should ensure that they have basic security features in their home offices. Major software providers suggest that, at minimum, users should:

- Use a firewall;
- Keep all software up to date;
- Use antivirus software and keep it current;
- Use anti-malware software and keep it current;
- Do not open suspicious attachments or click unusual links in messages, emails, tweets, posts, or online ads;
- Avoid visiting websites that offer potentially illicit content;
- Do not use USBs, flash drives or other external devices unless you own them, or they are provided by a trusted source. When appropriate, attorneys should take reasonable precautions such as calling or contacting

⁷⁵ See discussion *infra* in Section I.E.

⁷⁶ “Many law firms are under constant cyber-attack.” Ethan S. Burger, *Professional Responsibility, Legal Malpractice, Cybersecurity, and Cyber-Insurance in the Covid-19 Era*, 11 ST. MARY’S J. LEGAL MAL. & ETHICS 234, 265 (2021). Cybersecurity demands attention beyond merely remote work given the potentially dire consequences of data breaches.

⁷⁷ Penn. Formal Opinion 2020-300, *supra* note 45, at 11.

⁷⁸ Penn. Formal Opinion 2020-300, *supra* note 45, at 11; Attorney Professionalism Comm., 92 N.Y. St. B.J. 50, 52 (July 2020) (“To avoid the potentially significant and disastrous effects of a [hacking] attack, you should work off a secure Wi-Fi network and avoid using ‘hotspots.’”).

the sending or supplying party directly to assure the data are not infected or otherwise corrupted.⁷⁹

Law firms should regularly require all staff to change their passwords, using unique and complex replacement passwords.⁸⁰ Lawyers should also be wary of virtual assistants like Siri, Alexa, and Ring, which have passive listening features that could be used to compromise client confidentiality.⁸¹ Such devices should be disabled during any client conferences.

3. Covid-19 Local Rules and Orders

The barrage of emergency court orders and modified local rules that accompanied the pandemic resulted in court closures, limited court hours, and requirements for remote court hearings and conferences. To comply with the duty of technological competence, lawyers must be prepared for these types of changes and must remain abreast of the changing landscape at all times.⁸² This includes changes to court deadlines and any extensions granted as a result of the pandemic or other similar disaster.⁸³ These orders are often issued on court websites without widespread dissemination, so lawyers and staff should be prepared to monitor internet and bar announcements to stay current on the latest information.⁸⁴

B. Lawyer Competence

In order to facilitate the delivery of quality and ethically sufficient legal services, lawyers must be physically, mentally, and emotionally capable of serving their clients' needs.⁸⁵ To provide competent services, a lawyer must constantly assess their own capabilities to provide services, including the financial and personal-life impact that private practice extracts.⁸⁶ The era of remote work has dramatically impacted all of these non-legal areas of lawyers' lives.

⁷⁹ Microsoft, *Keep Your Computer Secure at Home*, <https://support.microsoft.com/en-us/windows/keep-your-computer-secure-at-home-c348f24f-a4f0-de5d-9e4a-e0fc156ab221> (last visited May 7, 2023).

⁸⁰ Formal Opinion 498, *supra* note 37, at 5.

⁸¹ Edward J. Ungvarsky, *ABA Formal Opinion 498: Timely Guidance for Virtual Practice*, 45 CHAMPION 59, 60 (Aug. 2021) (citing Formal Opinion 498, *supra* note 37, at 6 ("[T]he lawyer should disable the listening capabilities of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.")).

⁸² Cal. Formal Opinion 2023-208, *supra* note 60, at 4.

⁸³ Formal Opinion 482, *supra* note 31, at 5.

⁸⁴ Formal Opinion 482, *supra* note 31, at 5.

⁸⁵ Cal. Formal Opinion 2023-208, *supra* note 60, at 4.

⁸⁶ Cal. Formal Opinion 2023-208, *supra* note 60, at 4.

1. Mental and Emotional

It is undeniable that being a lawyer is a high stress profession. Prior to the pandemic, over sixty-seven percent of lawyers report regularly working more than a typical forty-hour week.⁸⁷ In a large study of lawyers, more than twenty percent had problematic alcohol consumption patterns, and more than a third (thirty-six percent) met diagnostic criteria for hazardous drinking or alcoholism.⁸⁸ Similarly, large percentages of attorneys self-reported problems with drug abuse and addiction, while nearly one in five lawyers reported mild to moderate depression.⁸⁹ The profession is without a doubt unhealthy.⁹⁰

Yet somehow, the pandemic made all of this worse. For example, generalized anxiety and stress increased dramatically, from a pre-pandemic estimate of between twenty to thirty percent of practitioners to more than forty percent of survey respondents post-pandemic.⁹¹ This is not particularly surprising. The pandemic isolated many people for extended periods of time. During that time, lawyers not only had to continue to provide quality legal services under less-than-ideal working conditions, they also had to forgo regular child care, become teachers to their minor children, and care for sick family members.⁹² At the same time, lawyers were incapable of leaving work at the office when their office was in their home. The urge to “just send one more email” became all the stronger when the work computer was set up and ready at all hours of the day. This resulted in increasing time at work for many lawyers precisely at a time when they needed to work less for their own mental health. In the context of this added stress, lawyers self-reported steep decreases in job satisfaction and personal well-being, and since the pandemic, lawyers have reported three to four times more anxiety and depression than members of the general

⁸⁷ Michael Fore, *The Impact of Covid-19 Pandemic on Overall Well-Being of Practicing Lawyers*, PLOS One (Mar. 9, 2023), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0282836>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Beginning in 2018, the ABA had already instituted attempts to address this issue through the ABA Well-Being in the Legal Profession Pledge. “The campaign, organized by the ABA Working Group to Advance Well-Being in the Legal Profession, is designed to address the profession’s troubling rates of alcohol and other substance abuse disorders, as well as mental health issues.” Am. Bar Ass’n, *ABA Launches Pledge Campaign to Improve Mental Health and Well-Being of Lawyers* (Sept. 10, 2018), <https://www.americanbar.org/news/abanews/aba-news-archives/2018/09/aba-launches-pledge-campaign-to-improve-mental-health-and-well-b/>. The ABA makes available a well-being template that provides suggested guidelines for law firms for reducing and responding to substance abuse. See ABA Well-Being Template for Legal Employers, https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/well-being-template-for-legal-employers-final-3-19.pdf.

⁹¹ Compare Fore, *supra* note 87 with Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Mental Health Concerns Among American Attorneys*, J. OF ADDICTION MED. (Feb. 2016).

⁹² Pamela A. Bresnahan & Stephanie L. Gardner, *Managing Mental Health and Ethics in the Wake of the COVID-19 Crisis*, 47 LITIG. 28 (Summer 2021).

public.⁹³ This may result in a mass exodus of lawyers that leave the profession entirely to avoid the negative health consequences.⁹⁴

Despite these obstacles, the duty of competence is not excused by a lawyer's mental or emotional struggles.⁹⁵ It is therefore important for all attorneys to look for warning signs in colleagues and staff who may be struggling with the mental and emotional strain of remote work.⁹⁶ This can entail pre-scheduling check-in meetings (coffee meetings, lunches, dinners), or remote check-ins using video conferencing platforms. Regular contact not only allows an opportunity to evaluate mental health, it provides a feeling of camaraderie and involvement that can counter the isolating effects of remote work. Evaluating mental and emotional health should also entail monitoring work performance metrics such as billable hours, and behaviors such as missing deadlines or scheduled meetings.⁹⁷ Lagging performance is a common leading indicator of mental health disorders such as depression and anxiety, and a sign of possible substance abuse.⁹⁸

Attorneys should also take care to note that simple meetings, events, and team-building exercises can improve mental and emotional well-being by cultivating a sense of community and decreasing isolation.⁹⁹ Fostering a sense of togetherness will not only help alleviate stress, it will also encourage subordinates and staff to voluntarily come forward and report when they are feeling overwhelmed and in need of additional support.

2. Impaired Physical Ability

The pandemic is frequently referred to as a “mass disabling event.”¹⁰⁰ The symptoms of the SARS-CoV-2 virus vary widely from individual to individual, and in many cases the short course of the illness is followed by a lengthy convalescence. Individuals with “long Covid” report extended periods (sometime extending indefinitely) with shortness of breath, fatigue, and difficulty thinking or concentrating. These physical ailments are likely to impair the ability of an attorney to provide competent legal services.

⁹³ Fore, *supra* note 87.

⁹⁴ Nathalie Runyon, *Could the Legal Industry be Entering a Long-Term Lawyer Labor Shortage?*, THOMPSON REUTERS (Apr. 8, 2022) (noting that approximately one in five lawyers under the age of forty are contemplating leaving the profession in the next five years), <https://www.thomsonreuters.com/en-us/posts/legal/long-term-legal-labor-shortage/>.

⁹⁵ See, e.g., *Smith v. State Bar*, 213 Cal. Rptr. 236, 38 Cal.3d 525, 540 (1985) (“[E]ven in the face of serious personal problems, an attorney has a professional responsibility to fulfill his duties to his clients or to make appropriate arrangements to protect his clients' interests.”).

⁹⁶ Bresnahan & Gardner, *supra* note 92, at 29.

⁹⁷ Bresnahan & Gardner, *supra* note 92, at 29.

⁹⁸ Bresnahan & Gardner, *supra* note 92, at 29.

⁹⁹ See Piekarsky, *supra* note 65, at 236 (“Simple physical and mental exercises, fun events and the like should be more widely utilized by law firms and organizations.”).

¹⁰⁰ Benjamin Makar, *Long COVID Could be a ‘Mass Deterioration Event’*, THE ATL. (June 15, 2022) (“According to [the American Academy of Physical Medicine and Rehabilitation’s] calculations, more than 11 million Americans were already experiencing long COVID. The Academy’s dashboard has been updated daily ever since, and now pegs that number at 25 million. Even this may be a major undercount.”).

Unfortunately, a Covid-19 infection does not excuse compliance with court rules.¹⁰¹ Nor does it excuse compliance with ethical obligations. Bar associations are still willing to impose sanctions and disciplinary action on attorneys for failing to meet their duties, even when the failure was due to a physical impairment that makes the attorney unable to comply.¹⁰² This is particularly concerning for solo practitioners that are incapable of simply passing off work to colleagues when they face a long-term physical ailment. Solo practitioners should prepare a contingency plan in the event of hospitalization or long-term illness that interferes with their ability to provide legal services.¹⁰³ This may entail partnering with other attorneys to ensure continuity of client service.

In addition, in larger firm contexts, remote work may hide the impact of a physical impairment. Without going into the office on a daily basis, coworkers are less likely to see symptoms such as chronic fatigue, and shortness of breath when performing minor tasks. Planning in-person meetings, where feasible, is a good way of checking in on people to make sure they are physically capable of performing work, or whether they are in need of additional support and assistance to discharge their duties.

3. Financial and Personal Life Impacts

Allowing attorneys to continue to work from home may come with some other concessions that are necessary to deal with the personal life impacts of remote work, such as childcare and health care costs. The pandemic has permanently altered some life habits. In some cases, after-school care is no longer available, and parents have become accustomed to being at home when their children return from school. In addition to taking care of small children, attorneys coming out of the pandemic may be saddled long-term with expensive healthcare obligations for themselves or family members, or lost income from spouses that are disabled or ill for extended periods. While they are dealing with the fallout of these issues in their personal lives, their professional performance may suffer.

Legal employers should be prepared to acknowledge that in a post-pandemic remote work world, concessions are necessary to accommodate these disruptions. Primary among these concessions should be a more flexible work schedule to allow attorneys to work around their personal life impacts.¹⁰⁴ This includes limiting return to work mandates to allow remote work to continue. Many attorneys may work non-standard hours, or if they are working remotely in a different time zone, may have time-shifted hours to accommodate the time change. These remote workers need the flexibility to be available at non-standard times, without feeling the obligation to be at their desks at 8 a.m. local time. Regular well-being check-ins may be necessary to remind attorneys and staff of the necessity for balancing personal life and work obligations, and to engage in necessary self-care to ensure that they deal with personal and financial problems, so that these

¹⁰¹ Bresnahan & Gardner, *supra* note 92, at 30.

¹⁰² Emma Cueto, *Michigan Attorney Suspended for Missing Hearing with Virus Excuse*, LAW360 (July 17, 2020) (“The Michigan Attorney Discipline Board has ordered an indefinite interim suspension for an attorney who did not appear at a virtual hearing after telling the board he was suffering from health problems associated with COVID-19.”).

¹⁰³ John W. Olmstead, *Law Firm Succession/Exit Strategies: Practice Continuation Arrangements* (2014), <https://www.olmsteadassoc.com/resource-center/law-firm-succession-exit-strategies-practice-continuation-arrangements/>; LLOYD D. COHEN & DEBRA HART COHEN, *BEING PREPARED: A LAWYER’S GUIDE FOR DEALING WITH DISABILITY AND UNEXPECTED EVENTS* (2009).

¹⁰⁴ Bresnahan & Gardner, *supra* note 92, at 29.

do not turn into more serious future mental and emotional health problems.¹⁰⁵ Law firms may need to have more robust human resources departments that are able to evaluate situations on an individual basis to make sure that employed attorneys are given reasonable accommodations that allow them to work through these issues.

V. MAINTAINING CLIENT COMMUNICATION WHILE WORKING REMOTELY

Model Rule 1.4 requires a lawyer to, among other things, reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information; consult with the client concerning ethical or legal limitations on the lawyer's conduct or representation; and, explain a matter to the client to the extent reasonably necessary to permit the client to make informed decisions concerning the representation.¹⁰⁶ It is imperative that a lawyer continue to meet these ethical obligations, even when the lawyer and/or the client are working remotely.

When working outside an office environment and communicating with clients who are working outside an office environment, a lawyer must take extra care to meet these obligations. Remote work often entails communication through electronic means (email, texts, cloud computing, videoconferences, etc.) and mobile phones. Even sophisticated users of these technologies experience technical glitches by which communication becomes delayed or impossible. A lawyer must ensure that there are multiple channels of communication available by which to communicate with the client, so that the lawyer can be sure that the client is actually receiving the non-verbal communications.

Further, a lawyer must ensure that to the extent telephone calls are made from or to mobile phones, these connections are reliable and secure. And finally, to the extent a lawyer utilizes a mobile phone as well as a desk phone to communicate with clients, the lawyer must be sure that he or she is adequately monitoring both phones, to ensure receipt of calls and messages on both lines. In short, a lawyer must ensure that both lawyer and client each have the other's best contact information (e.g., desk phone, home phone, mobile phone, email, messaging apps) and clear instruction has been provided concerning how communication will be handled.

A lawyer must also be particularly careful about maintaining the confidentiality and privilege of client communications. Thus, the lawyer must ensure that neither side of a phone call or videoconference is accessible to non-client third parties, which would not only breach confidentiality obligations but likely render the communication non-privileged. Thus, telephone calls must be made in private, and a lawyer must ensure that videoconferences are not accessible to others by specifically confirming with the client that there is no non-client in the room.

Most fundamentally, because maintaining good communication with clients is not only an ethical imperative but the key to a successful attorney-client relationship, a lawyer must ensure that he or she is in regular contact with all of their clients. A lawyer must ensure that the clients understand that remote work by either the lawyer or client shall not impact the communication between lawyer and client and, more broadly, the quality of the legal services rendered. Many lawyers have built their reputations and practices upon the assumption that they are always available to their clients, and remote work does not change that. At minimum, lawyers must be

¹⁰⁵ See Bresnahan & Gardner, *supra* note 92, at 29.

¹⁰⁶ A.B.A. MODEL R. PROF'L CONDUCT r.1.4; see *also* Formal Opinion 483, *supra* note 15.

reasonably and appropriately available to the client to address issues that arise in the matter.¹⁰⁷ In line with this obligation, the duty of technology competence under Model Rule 1.1 is central to a lawyer's ability to keep communication lines open in the work-from-anywhere environment. Of course, the implementation of technology and the many benefits of remote work will all be for nothing if the attorney-client relationship suffers due to a lack of prompt communication.

VI. SUPERVISION OBLIGATIONS WHILE WORKING REMOTELY

A significant obligation of senior attorneys is the duty to supervise subordinates, including associates and staff. There are no bright line rules regarding supervision.¹⁰⁸ In the era of remote work, with staff and associates sometimes spread out across the country, the office-pop-in has become an endangered tool of mentorship and guidance. Instead, senior attorneys are increasingly left with telephonic and virtual platforms as alternatives, which many anecdotal accounts suggest are inferior replacements to the face-to-face interactions that historically have been the backbone of new attorney development. As discussed below, this new paradigm opens a Pandora's box of issues that bar associations were quick to assess following the lockdowns in 2020. As it is now apparent that it is unlikely that the world will ever return to the same in-office culture that existed before the pandemic, practitioners should consider implementing permanent changes without delay.

Most professional codes of conduct require senior attorneys to supervise and manage junior attorneys and ensure their compliance with the rules of professional conduct.¹⁰⁹ All attorneys with responsibility for managing staff have an obligation to ensure that legal staff act in accordance with the lawyer's professional ethical obligations.¹¹⁰ This includes adopting policies that are "designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."¹¹¹ In the remote work context, this includes practices and policies such as:

- Monitoring use of firm networks for work purposes;

¹⁰⁷ See, e.g., The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion Interim No. 2023-208, <https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/Formal-Opinion-No-2023-208-WFH.pdf>; State Bar of Michigan, Ethics in the COVID-19 Pandemic, <https://www.michbar.org/opinions/ethics/COVID-19>.

¹⁰⁸ Attorney Professionalism Comm., 92 N.Y. ST. B.J. 50, 53 (July 2020).

¹⁰⁹ See, e.g., CAL. R. PROF'L CONDUCT r. 5.1(b) ("A lawyer having direct supervisory authority over another lawyer, whether or not a member or employee of the same law firm, shall make reasonable efforts to ensure that the other lawyer complies with these rules and the State Bar Act."), https://www.calbar.ca.gov/Portals/0/documents/rules/Rule_5.1-Exec_Summary-Redline.pdf. See also A.B.A. MODEL R. PROF'L CONDUCT R. 5.1(b) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_1_responsibilities_of_a_partner_or_supervisory_lawyer/.

¹¹⁰ A.B.A. MODEL R. PROF'L CONDUCT r. 5.3(b), cmt. 1.

¹¹¹ Formal Opinion 498, *supra* note 37, at 6.

- Implementing procedures to ensure that the increase in the number of worksites does not increase the entry points for a data breach;
- Monitoring compliance with firm cybersecurity procedures (e.g., subordinate transmission of work through unsecure channels, use of confidential paper records in unsecured locations, etc.);
- Ensuring that attorney work-from-home does not result in an increased likelihood of inadvertent disclosure to guests, family members, and others living in the attorney's home; and
- Ensuring "live" monitoring sessions between supervising attorneys and subordinates.¹¹²

Each of these factors raises a host of issues that must be considered and addressed, including such things as training, subordinate monitoring and supervision, outside counsel guidelines, and bring-your-own-device policies. The authors will address each of these issues in turn.

B. Training

Training is a key cornerstone to supervision that is necessary for compliance with an attorney's ethical obligations. Training requirements extend not only to subordinate attorneys, but also to staff members including paralegals and administrative assistants.

For example, staff members that participate in case filings should be trained regularly and familiar with Covid-19 emergency orders. In many jurisdictions, these changes have completely remade the way in which court hearings are conducted.¹¹³ Some jurisdictions have changed briefing deadlines.¹¹⁴ The manner of filing and service of things like proposed orders and working copies is different, often requiring electronic submission in lieu of hand delivery to chambers. Hearings in many instances are being held virtually or telephonically by default, with in-person oral argument being the exception and not the norm.¹¹⁵ Staff must be trained on compliance with these rules—which sometimes change from month to month—and proper docketing to ensure that no deadline are missed.

The ABA requires that lawyers "periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic

¹¹² Formal Opinion 498, *supra* note 37, at 6 (citing N.Y. County Lawyers Ass'n Comm. On Prof'l Ethics, Formal Op. 754-2020 (2020)).

¹¹³ See, e.g., In re Statewide Response by Washington State Courts to the COVID-19 Public Health Emergency, 5th Rev. and Extended Order Regarding Court Ops., No. 25700-B-658 (Feb. 19, 2021), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf>.

¹¹⁴ See, e.g., Covid Extension Order, U.S. 1st Cir. Ct. of App. (Mar. 20, 2020), <https://www.ca1.uscourts.gov/sites/ca1/files/COVIDExtensionOrder.pdf>.

¹¹⁵ See, e.g., In re Response by King County Superior Court to the Public Health Emergency in Washington State, Emergency Order #24 re: Civil, Family Law, and Dependency Matters, Cause No. 20-0-12050-5 (Dec. 22, 2020), <https://kingcounty.gov/~media/courts/superior-court/docs/COVID-19/FILED-Emergency-Order24-KCSC-200120505.ashx?la=en>.

communications with clients.”¹¹⁶ Accordingly, attorneys working remotely must be trained on compliance with confidentiality and cyber security policies to ensure the security of remote access.¹¹⁷ This includes things like protecting hard copy documents from disclosure when used at home, such as inadvertent disclosures to family members, or by placing documents within view of cameras during videoconferencing calls.¹¹⁸ Training should also include guidance regarding access to and storage of confidential communications.¹¹⁹ Cybersecurity training is also critical to prevent data breaches. Attorneys should be trained to avoid clicking links in emails, checking carefully to confirm email addresses are legitimate, and immediately notifying IT personnel of suspicious email communications.¹²⁰ Law firm information technology departments and outside vendors are critical to ensure that attorneys are using secure access (such as through a Virtual Private Network or other similar secure portal) while working from home, and in training staff how to use the technology.

C. Subordinate Lawyer and Staff Compliance

In a remote work environment, senior attorneys must take extra precautions to ensure that junior attorneys are developing and maintaining their compliance with ethical obligations. Best practices should include regular meetings, historically in person, but increasingly via a videoconference virtual remote platform, to facilitate regular communication and monitoring of attorney development.¹²¹ Meetings should also include legal assistants and paralegals, not only to ensure timely and competent service for clients, but also to evaluate and assess health and wellness, which are key cornerstones to ensuring professional service delivery.¹²² And attorneys should not forget staff members responsible for more technical tasks, such as Bates stamping of documents, collecting and producing physical evidence, and performing attorney time entry and collecting and disbursing client funds.¹²³

To ensure that vendors follow best practices and comply with attorney ethical obligations, it is advisable that outside parties working with counsel (be they expert witnesses, data analysis vendors, document collection and production vendors, private investigators, or process servers), enter into written contracts that allow the attorney to set expectations and, if necessary, enforce

¹¹⁶ Formal Opinion 477R, *supra* note 28.

¹¹⁷ Cal. Formal Opinion 2023-208, *supra* note 60, at 5.

¹¹⁸ Formal Opinion 498, *supra* note 37, at 7.

¹¹⁹ Formal Opinion 477R, *supra* note 28, at 5.

¹²⁰ Attorney Professionalism Comm., 92 N.Y. St. B.J. 50, 53 (July 2020).

¹²¹ Formal Opinion 498, *supra* note 37, at 6; Alison Standish Miller & Seepan V. Parseghian, Relevant Ethical Issues Three Main Ethical Considerations Arise When Discussing Technology And Remote Work in the Pandemic Landscape, 2023 Oil and Gas Disputes 13-II (“[C]onsider scheduling brief, efficiently-run weekly or bi-weekly team meetings on your cases to ensure that all bases are being covered.”); Devika Kewalramani, John Baranello & Eliza Barrocas, *Social Distance Lawyering: How Close is Your Ethical Compliance*, 92 N.Y. St. B.J. 35, 38 (Aug. 2020) (“[L]awyers should stay connected to their staff and to other lawyers using the same tools they would use to stay connected with clients.”).

¹²² Formal Opinion 498, *supra* note 37, at 6.

¹²³ See Burger, *supra* note 76, at 265.

contractual obligations.¹²⁴ This can include confidentiality and nondisclosure agreements, as well as data privacy protections and minimum technology standards.¹²⁵ A host of ethical opinions advise attorneys that they should enter into specific data protection agreements with vendors and cloud-hosting companies, or at minimum advise them of their obligation to maintain confidentiality of client documents.¹²⁶

D. Outside General Counsel Policies

In addition to ethical obligations, client outside counsel guidelines may require specific confidentiality practices and cyber security insurance.¹²⁷ An attorney is ethically obligated to comply with these additional guidelines as part of its agreement with the client to provide legal services. It is not uncommon for these guidelines to have a significant impact on the provision of remote legal services.

For example, some outside counsel guidelines prohibit the use of thumb drives or other devices that would allow someone to remove large amounts of data off an otherwise secure computer or network. Attorneys will need to utilize other technologies to work on large client data files remotely if they are incapable of carrying data on easily lost or stolen devices. Similarly, other clients require the use of encrypted email communications, often requiring secure web access or multi-factor authentication. These technological requirements will require secure access and multiple devices to satisfy the multi-factor authentication. Law firms will need to obtain the technology and train staff and subordinates on how to use the technology safely. Attorneys need to be prepared to deal with these technological hurdles to practice, with the necessary devices and security protocols to comply.

E. Bring-Your-Own-Device Policies

“Bring your own device,” commonly shortened to “BYOD,” is the practice whereby some law firms permit their attorneys and staff to use personal devices to provide legal services. Often this can entail accessing sensitive client data on personal devices. In the work from home era,

¹²⁴ Cal. Formal Opinion 2023-208, *supra* note 60, at 6–7.

¹²⁵ Formal Opinion 498, *supra* note 37, at 7 (citation omitted), <https://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/2010-179-Interim-No-08-0002-PAW.pdf> (“When appropriate, lawyers should consider use of a confidentiality agreement, and should ensure that all client-related information is secure, indexed, and readily retrievable.”); State Bar of Cal. Standing Comm. On Prof’l Resp. & Conduct, Formal Op. No. 2010-179 (“[W]hen a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard. In connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider’s assurance of confidentiality.”).

¹²⁶ See Stuart Pardau & Blake Edwards, *The Ethical Implications of Cloud Computing for Lawyers*, 31 J. MARSHAL J. INFO. TECH. & PRIVACY L. 69, 71 n.10 (2014), https://www.nvbar.org/wp-content/uploads/opinion_33.pdf (citing sixteen different state bar opinions on ethical obligations arising out of agreements with vendors that provide cloud data storage solutions); see also e.g., Nevada Formal Ethics Op. 33 at 5 (Feb. 9, 2006) (providing that attorneys are not liable for vendor’s breach of confidentiality if the attorney uses reasonable care in selecting vendor and “[i]nstructs and requires the third party contractor to keep the information confidential and inaccessible.”).

¹²⁷ Cal. Formal Opinion 2023-208, *supra* note 60, at 6.

where attorneys may have multiple workspaces (including while on vacation or traveling for work), they may be more likely to use personal devices as they switch between work locations.

All law firms that allow attorneys and staff to access confidential client information or work systems using personal devices should implement a BYOD policy that requires lawyers and staff to maintain the confidentiality of firm and client data.¹²⁸ “Reasonable BYOD practices include security measures such as password, anti-virus, firewall and encryption, prohibiting highly confidential information and trade secrets from being copied and saved on devices, and creating separate server and access controls for sensitive data.”¹²⁹ When using personal devices, law firms should require strong passwords for devices and routers, access through VPNs, regular and systematic installation of software security updates, and training on phishing attempts.¹³⁰ “BYOD policies should include employees’ consent to remote locking or wiping in the event of security breach, theft, loss of device, or employee departure.”¹³¹ Attorneys and staff must also make sure that client records are regularly archived from private devices in a way that is accessible should the client request the file.¹³²

A variety of resources describe best practices for developing a BYOD policy.¹³³ But among other things, a good policy should start with:

- Understanding the scope of the issue (number of devices, network messaging systems, IT systems);
- Establishing mobile use policies, such as password requirements, non-work hour use of devices, and use of the device by third parties;
- Establishing a secure mobile environment across platforms between company issued and personal devices;
- Segregation of personal and company data on the device;
- Robust employment agreements that provide company access to personal devices;

¹²⁸ Cal. Formal Opinion 2023-208, *supra* note 60, at 6.

¹²⁹ State Bar of Cal. Standing Comm. On Professional Responsibility and Conduct, Formal Op. Interim No. 20-0004 at 7–8 (Aug. 10, 2021) [hereinafter Cal. Formal Opinion 20-0004].

¹³⁰ Formal Opinion 498, *supra* note 37, at 7. Phishing has been described as “the act of sending an e-mail to a user falsely claiming to be an established legitimate enterprise in an attempt to scam the user into surrendering private information that will be used for identity theft.” John Krahmer, *Wire Transfers, Good Faith, and “Phishing”*, 65 CONSUMER FIN. L.Q. REP. 420 (2011).

¹³¹ Cal. Formal Opinion 20-0004, *supra* note 129, at 7–8.

¹³² Formal Opinion 498, *supra* note 37, at 7.

¹³³ See *id.*; see also Julia M. Webb, *The Lawyer’s Duty of Tech Competence Post-Covid: Why Georgia Needs a New Professional Rule Now—More than Ever*, 39 GA. ST. U. L. REV. 551, 591 (2023); Cal. Formal Opinion 20-0004, *supra* note 129, at 7–8; Daniel B. Garrie, *Top Ten Tips for Managing the “Bring Your Own Device to the Workplace” Environment* (Apr. 8, 2019), <https://www.acc.com/resource-library/top-ten-tips-managing-bring-your-own-device-workplace-environment>.

- Ensuring that different internal departments work together on the policy project, including IT, HR, and legal, so that all company organizations are on the same page on what the policy is intended to accomplish and how it will be implemented (or alternatively for smaller organizations, working with relevant external vendors with expertise in these areas); and
- Monitoring of mobile devices.¹³⁴

As the complexity of these issues will only increase over time, particularly given the patchwork of ethical rules that will apply as the attorney diaspora engages in remote work in jurisdictions with different (and ever-changing) rules, having a BYOD policy is increasingly critical to complying with ethical obligations.

VII. UNLICENSED PRACTICE OF LAW WHILE WORKING REMOTELY

For most of history, lawyers followed a very specific pattern of practice. Working out of brick-and-mortar offices nearby local courthouses, lawyers were fixtures of the community that understood the local laws, idiosyncrasies of local practice, and courthouse personalities.¹³⁵ Under this structure, it made sense for attorneys to be licensed in the state in which they were located. The advent of the internet, however, has made it easier than ever for attorneys to work in one location, and practice law in a completely different location. For the last two decades, this capability has steadily accelerated,¹³⁶ even making it possible to live in different countries while practicing law in the United States.

If this change to historical norms were a slow growing campfire, the global Covid-19 pandemic poured so much proverbial gasoline on it that it has turned into a forest-wide conflagration. Zoom, Teams, WebEx, and other platforms unlocked a firestorm of change to the industry and made remote practice the norm rather than the exception. Attorneys locked in their home, realized that the practice of law did not require going to the office or being located near the courthouse. Many moved their home to be closer to family, farther from the city, or closer to vacation locales, while continuing to practice law from their previous jurisdiction. This raises a host of questions about whether the physical location of the attorney providing legal services constitutes “practice of law” in that location; questions that ethics opinions were not yet ready to fully answer. That did not stop attorneys from living their lives, but it did require some thought.

Three years into the pandemic, we now have a better understanding of what “unlicensed practice of law” means. This section will discuss the implications of attorneys living outside the

¹³⁴ Garrie, *supra* note 133.

¹³⁵ A good example of this can be found at Appomattox National Historical Site, the location of the famous surrender of the Army of Northern Virginia that heralded the end of the Civil War. Across the street from the quaint courthouse that gave the township its name (and which subsequently became famous throughout the country) is a small, approximately 12.5x14.5-foot shack where local attorney John W. Woodson practiced law. See Historic Structures at Appomattox Court House, <https://www.nps.gov/apco/learn/historyculture/historic-structures-at-appomattox-court-house.htm>. The Appomattox model, i.e., an attorney working across the street from the courthouse where he practiced, has been emblematic of the profession for centuries.

¹³⁶ See Robert D. Liebenberg & Stephanie A. Scharf, *Where Does the Legal Profession Go From Here?*, AM. BAR ASS'N 11 (2022), <https://www.americanbar.org/content/dam/aba/administrative/law-practice-division/practice-forward/2022-practice-forward-report.pdf>.

jurisdiction where they are practicing law (both litigation and non-litigation), different approaches taken by different forums, and the effect of multi-jurisdictional practice on conflicts of laws. And the consequences for noncompliance could not be more severe; not only do attorneys face the threat of disciplinary action for unlicensed practice, in many places unlicensed practice is a crime.¹³⁷

A. Different Jurisdictional Approaches

The practice of law by an attorney living in one jurisdiction, but licensed in another, is a subject that has been much debated. Some jurisdictions have proactively addressed the issue by issuing rules on the subject.¹³⁸ Others have issued ethics opinions addressing the question in the absence of a formal rule of practice.¹³⁹ The vast majority of states, however, have no formal advisory information on the lawfulness of the practice.¹⁴⁰

To try to address the absence of authority, the ABA has adopted a formal ethics opinion that provides in relevant part as follows:

In the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed, if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction.¹⁴¹

The ABA test is fairly forgiving. It allows attorneys to reside in a jurisdiction where they are not licensed but continue to practice law in another jurisdiction where they are licensed so long as they don't actively court clients or business where they live. This is consistent with the most liberal jurisdictions that have formally addressed the issue, such as Arizona, Delaware, Maine, Minnesota, and New Jersey, where attorneys are generally allowed to practice remotely, but only if they do not establish an office or other systematic and continuous presence,¹⁴² and do not hold

¹³⁷ See, e.g., N.Y. JUD. LAW § 478 (making it a felony to engage in the unlicensed practice of law).

¹³⁸ Arizona, ARIZ. RULES OF PROF'L CONDUCT r. 5.5; Colorado, COLO. R. CIV. P. 205.1; Minnesota, MINN. RULES OF PROF'L CONDUCT r. 5.5; New Hampshire, N.H. RULES OF PROF'L CONDUCT r. 5.5; North Carolina, N.C. RULES OF PROF'L CONDUCT r. 5.5; and Ohio, OHIO RULES OF PROF'L CONDUCT r. 5.5.

¹³⁹ See Florida, Fla. State Bar Ass'n Standing Comm. On Unlicensed Practice of Law, Formal Advisory Op. 2019-4 (2020); Maine, Me. State Bar Ass'n Prof'l Ethics Comm'n, Op. 189 (2005); New Jersey, New Jersey 59/742 (2021); Pennsylvania, Pennsylvania/Philadelphia 2021-100 (2021); Utah, Utah State Bar Ethics Advisory Op. Comm., Op. 2019-03 (2019); and Virginia, Va. State Bar Standing Comm. On Legal Ethics, Op. 1856 (2016).

¹⁴⁰ David G. Keyko, *Working Remotely, eDiscovery for Corporate Counsel* § 27.37 (Mar. 2023) ("Unfortunately, most states have neither a rule nor an opinion on the subject.").

¹⁴¹ Formal Opinion 495, *supra* note 35, at 3–4.

¹⁴² Although not always defined, a continuous and systematic presence generally requires "an outward manifestation of a physical presence, as a lawyer" in the subject jurisdiction. See, e.g., New Jersey Comm. on the Unauthorized Practice of Law and the Advisory Comm. on Prof'l Conduct, 59/742 (Oct. 6, 2021), <https://www.njcourts.gov/sites/default/files/notices/2021/10/n211007c.pdf>.

themselves out to the public as being licensed in the state.¹⁴³ Utah, Florida, and Wisconsin are similar, but also prohibit the solicitation or provision of legal services to in-state residents.¹⁴⁴ New York adopted a similar rule with some additional restrictions beyond solicitation, including a prohibition on conducting in-person meetings, and a requirement that the lawyer expressly notify clients that he or she is not licensed in New York.¹⁴⁵ Virginia dispenses with the prohibition on establishing a law office or a systematic and continuous presence so long as the attorney is a member of a multi-jurisdictional law firm in Virginia, but limits their practice to the law of the jurisdictions where they are licensed, or to federal law not involving Virginia.¹⁴⁶

Other jurisdictions have imposed stricter restrictions that go beyond the prohibition on establishing an office and holding yourself out as a practitioner in the state. For example, in New Hampshire, a lawyer not admitted to the state bar, can practice law in New Hampshire “on a temporary basis” if the services are: (1) undertaken in association with a New Hampshire barred lawyer; (2) related to a litigation matter in which the lawyer is admitted pro hac vice; (3) related to a litigation matter outside New Hampshire in a jurisdiction where the lawyer is admitted; or (4) “reasonably related” to the lawyer’s practice in another jurisdiction.¹⁴⁷ It is unclear what constitutes

¹⁴³ ARIZ. RULES OF PROF’L CONDUCT r. 5.5(c)–(d), <https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/>; De. State Bar Ass’n, Comm. on Prof’l Ethics Formal Op. 2021-1 (July 9, 2021) (the Delaware opinion only provides advice on Delaware licensed attorneys practicing remotely outside of Delaware; it does not provide guidance on non-Delaware attorneys living in Delaware and practicing in another jurisdiction); MINN. RULES OF PROF’L CONDUCT r. 5.5(b)(1)–(2), (d), https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/5.5/; Me. State Bar Ass’n Prof’l Ethics Comm’n, Op. 189 (Nov. 15, 2005) (“[T]he fact that an attorney, not admitted in Maine, is working in Maine does not automatically mean that the attorney is engaged in the unauthorized practice of law. . . . Where the lawyer’s practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction.”), https://www.mebaroverseers.org/attorney_services/opinion.html?id=87369; N.J. Comm. on the Unauthorized Practice of Law and the Advisory Comm. on Prof’l Conduct 59/742 (2021), <https://www.njcourts.gov/sites/default/files/notices/2021/10/n211007c.pdf>. It appears that Maryland courts would reach a similar result if presented with the question. See Vish Mohan, *Update on the “Remote Work” Problem: Where Can I Safely Sit While Practicing From My Home State?*, Prof’l Resp. L. Blog (Feb. 6, 2022) (citing *In re Application of Carlton*, 708 F. Supp. 2d 524 (D. Md. 2010)).

¹⁴⁴ Utah Ethics Advisory Comm. Op. No. 19-03 (May 14, 2019), <https://www.utahbar.org/wp-content/uploads/2022/12/19-03.pdf>; Wisconsin Formal Ethics Op. EF-21-02: Working Remotely (Jan. 29, 2021), <https://www.lawnext.com/wp-content/uploads/2021/09/EF-21-02-Working-Remotely-1.pdf>; Florida Bar Standing Comm. on the Unlicensed Practice of Law Proposed Advisory Op. No. FAO #2019-4, *Out-of-State Attorney Working Remotely From Florida Home* (2020) (allowing a New Jersey barred attorney living in Florida was permitted to continue to practice federal intellectual property matters in Florida provided he did not hold himself out as having an office in Florida, did not give advice about Florida law, and did not provide legal services to Florida residents). The Florida opinion also prohibits an attorney working remotely from working for a law firm that has an office in Florida. *Id.*

¹⁴⁵ 22 N.Y. RULES FOR TEMP. PRAC. OF L. § 523.1, 523.5.

¹⁴⁶ Va. State Bar Standing Comm. On Legal Ethics, Op. 1856 (2016), <https://www.vacle.org/opinions/1856.htm>. During the pandemic, Virginia expanded on this opinion to make it clear that “Virginia has no interest in restricting the practice of a lawyer whose only connection to Virginia is a physical location within the state. . . . To specifically extend this application of the rule to remote work, a lawyer who is not licensed in Virginia may work from a location in Virginia on a continuous and systematic basis, as long as that practice is limited exclusively to federal law and/or the law of the lawyer’s licensing jurisdiction, regardless of the reason for being in Virginia.” Va. State Bar Standing Comm. On Legal Ethics, Op. 1896 (2022), <https://www.vacle.org/opinions/1896.htm>.

¹⁴⁷ N.H. RULES OF PROF’L CONDUCT r. 5.5(c)(1)–(4).

a “temporary basis,”¹⁴⁸ but some jurisdictions, such as Colorado, appear to have adopted the “temporary” concept by prohibiting attorneys from establishing a place of domicile in the state as part of the test for the unauthorized practice of law.¹⁴⁹ Other jurisdictions, such as North Carolina and Ohio, have similar language to New Hampshire without any additional caveats about whether the practice is “temporary” in nature.¹⁵⁰ In the District of Columbia, an attorney not licensed in the district but living in the district may only practice law if the *reason* for the remote work is the Covid-19 pandemic.¹⁵¹ This specific restriction suggests that as the pandemic draws to a close,¹⁵² it will no longer be permissible for an attorney to live and work remotely in Washington DC while practicing law in another jurisdiction.

Perhaps unsurprisingly, California has some of the most onerous restrictions on remote practice. Rather than explaining the requirements in an advisory opinion, the State Bar directs practitioners to a number of different rules that contain a variety of restrictions, leaving it up to the reader to determine whether or not they are in compliance.¹⁵³ Some obvious restrictions include a prohibition on residency, on employment, and on engaging “regularly in substantial business or professional activities” in California.¹⁵⁴

The biggest takeaway from the patchwork of regulations is that in most jurisdictions, an attorney may work remotely so long as their work is semi-transient in nature, and provided the

¹⁴⁸ The comments to the rule expressly decline to define what constitutes a “temporary basis.” N.H. RULES OF PROF’L CONDUCT r. 5.5 cmt. 5 (“There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction. . . . Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.”). The ABA has concluded that working remotely due to office closures caused by a pandemic satisfies the “temporary” requirement. Formal Opinion 495, *supra* note 35, at 3 (“[I]n a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic.”).

¹⁴⁹ COLO. R. CIV. P. 205.1(1)(c) (permitting an out of state attorney to practice law in Colorado unless the person establishes a domicile in Colorado).

¹⁵⁰ See, e.g., N.C. RULES OF PRO. CONDUCT R. 5.5©(1)–(4); OHIO RULES OF PROF’L CONDUCT r. 5.5(c)(1)–(4).

¹⁵¹ D.C. Court of Appeals Op. No. 24-20 at 3 (Mar. 23, 2020) (permitting an attorney who is not licensed in D.C., subject to other conditions, to practice law from their residence located in D.C., but only if the attorney “is practicing from home due to the COVID-19 pandemic.”).

¹⁵² A fact punctuated by the federal government’s formal declaration of the end of Covid-19 emergency measures on April 10, 2023. See NPR News, *Biden ends COVID national emergency after Congress Acts* (Apr. 11, 2023), <https://www.npr.org/2023/04/11/1169191865/biden-ends-covid-national-emergency>.

¹⁵³ Cal. Formal Opinion 20-0004, *supra* note 129, at 7–8.

¹⁵⁴ CAL. RULES OF CT. 9.47(d), 9.48(d). The rules are sufficiently complex that wary practitioners would be wise to review them in detail before attempting to work remotely inside the State of California. Particularly given that there appear to be conflicting authorities. For example, the Bar Association of San Francisco takes the position that “A lawyer who is not licensed in California, and who does not advertise or otherwise hold himself or herself out as a licensed California lawyer, does not establish an office or other systematic or continuous presence for the practice of law in California, and does not represent a California person or entity, but is merely physically present in California while using modern technology to remotely practice law in compliance with the rules of the jurisdiction where the lawyer is licensed, should not be held in violation of California’s Unauthorized Practice of Law rule and laws. . . .” The Bar Ass’n of San Francisco, Ethics Op. 2021-1 (Aug. 2021), <https://www.sfbabar.org/wp-content/uploads/2021/08/BASF-Ethics-Opinion-re-UPLMJ-8.2.21-Final-002.pdf>.

attorney works only on federal law issues, or performs remote work in a jurisdiction where the attorney is licensed to practice law. But given the inconsistencies in approaches, an attorney that wishes to work remotely should carefully assess the requirements of the jurisdiction where the attorney intends to live while practicing law. Alternatively, more than half of U.S. jurisdictions currently have rules permitting reciprocal admission to experienced attorneys in lieu of bar examinations.¹⁵⁵ If a lawyer plans on living in a different jurisdiction permanently, it may simply be easier to consider state bar admission to avoid allegations of unlicensed legal practice.

B. Conflicts of Laws in Remote Multi-Jurisdictional Practices in Litigation and Non-Litigation Matters

An attorney working remotely who is engaged in a multi-jurisdictional law practice must address an additional layer of complexity in complying with ethical obligations. Specifically, “[w]hen jurisdictions have differing ethical requirements, the lawyer must determine which jurisdiction’s ethics rules govern the lawyer’s actions in the representation.”¹⁵⁶ As noted in the preceding section, this can be a significant determination in light of the differing approaches to remote practice, and limitations on “temporary” practices of lawyers living in jurisdictions where they are not licensed. Moreover, it is possible that more than one jurisdiction’s ethical rules may apply to lawyer conduct,¹⁵⁷ depending on such factors as the location where the attorney is licensed, the location where the legal services are provided, the venue of a dispute, and the location of the client.¹⁵⁸

In assessing which jurisdictions’ ethical rules apply to a lawyer’s conduct, the ABA’s model rules treat litigation matters and non-litigation matters differently.¹⁵⁹ For litigation matters, practitioners should look to the ethical rules in the jurisdiction where the tribunal sits, unless the tribunal provides otherwise.¹⁶⁰ Generally, this means that litigators can rely on the courts or tribunals where the case is venued for guidance in determining compliance with ethical obligations.

Non-litigation matters require more analysis. Specifically, attorneys should look to the ethics rules of the jurisdiction where the lawyer’s conduct occurred unless the predominant effect of the conduct is in a different jurisdiction.¹⁶¹ “Non-litigation” should be interpreted broadly in this context to include any conduct by a lawyer, including conduct in anticipation of a litigation

¹⁵⁵ See Bar Reciprocity by State, <https://www.clio.com/resources/bar-reciprocity/> (last visited May 6, 2023).

¹⁵⁶ Formal Opinion 504, *supra* note 39, at 1.

¹⁵⁷ Formal Opinion 504, *supra* note 39, at 1 (“[A] lawyer ‘may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.’”) (quoting A.B.A. MODEL RULES OF PROF’L CONDUCT r. 8.5(a)).

¹⁵⁸ Formal Opinion 504, *supra* note 39, at 1.

¹⁵⁹ *Id.* at 2.

¹⁶⁰ *Id.* (citing A.B.A. MODEL RULES OF PROF’L CONDUCT r. 8.5(b)(1)).

¹⁶¹ Formal Opinion 504, *supra* note 39, at 2 (citing A.B.A. MODEL RULES OF PROF’L CONDUCT r. 8.5(b)(2)).

proceeding¹⁶² that is not yet pending.¹⁶³ In addition, for non-litigation matters, there is a safe harbor for attorneys that reasonably believe that the predominant effect of the conduct is likely to fall in a different jurisdiction.¹⁶⁴ Attorneys should consider such factors as the client's location, where the transaction occurs, which jurisdiction's substantive law applies to the transaction, the location of the lawyer's principal office, where the lawyer is admitted, and the location of the opposing party.¹⁶⁵

One way of dealing with complex choice-of-law issues in non-litigation matters¹⁶⁶ is by agreement with the client in an engagement letter. "A written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered [in the conflict of laws analysis] if the agreement was obtained with the client's informed consent confirmed in the agreement."¹⁶⁷ These agreements can only be used in the context of conflicts issues; they cannot be used to specify applicable rules for matters such as the lawyer's duty of confidentiality.¹⁶⁸

Which state's rules apply will vary for obligations on mandatory reporting, law firm ownership, fee agreements, lawyer screening, and critically in this era, remote work obligations relating to confidentiality, communication, competence, supervision, and the unlicensed practice of law. While states are "slowly modifying their ethics rules and UPL regulations to keep up with" evolving remote practice,¹⁶⁹ attorneys should be cautious and ever vigilant when evaluating their ethical obligations so as not to fall into disciplinary trouble with one or more bar associations.

¹⁶² Thus, for example, entering into an engagement letter with a client, or sending a pre-litigation demand letter, would fall under the "non-litigation" rule, rather than the "litigation" rule. See Formal Opinion 504, *supra* note 39, at 4.

This is not true in all jurisdictions, however. See Mass. Bar Ass'n Op. 12-02 (2012) ("The lawyer's conduct at issue in this inquiry—the collection of a fee after litigation services have been rendered—properly belongs with the litigation jurisdiction even though the fee agreement was signed before the complaint was filed."), <https://www.massbar.org/publications/ethics-opinions/ethics-opinion-article/ethics-opinions-2012-opinion-12-02>; see also *In re Schiller*, 808 S.E.2d 378 (S.C. 2017) (applying rules at location of tribunal (North Carolina) to pre-litigation fee agreement, despite the fact that agreement was entered into in different state (South Carolina)).

¹⁶³ Formal Opinion 504, *supra* note 39, at 2 (citing A.B.A. MODEL RULES OF PROF'L CONDUCT r. 8.5 cmt. 4).

¹⁶⁴ A.B.A. MODEL RULES OF PROF'L CONDUCT r. 8.5(b)(2). A reasonable belief "denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." A.B.A. MODEL RULES OF PROF'L CONDUCT r. 1.0(i).

¹⁶⁵ Formal Opinion 504, *supra* note 39, at 2–3.

¹⁶⁶ "A lawyer and client cannot contract around Rule 8.5(b)(1)'s choice of law conclusion for conduct 'in connection with a matter pending before a tribunal.'" Formal Opinion 504, *supra* note 39, at 3, n.6.

¹⁶⁷ Formal Opinion 504, *supra* note 39, at 3 (citing A.B.A. MODEL RULES OF PROF'L CONDUCT r. 8.5 cmt. 5). "These kinds of agreements are analogous to waivers of future conflicts, which are already authorized. . ." Formal Opinion 504, *supra* note 39, at 3, n.6.

¹⁶⁸ Formal Opinion 504, *supra* note 39, at 3, n.6.

¹⁶⁹ Mohan, *supra* note 143, at 11.

VIII. CONCLUSION

The Covid-19 pandemic changed the world, probably forever, in a myriad of complex ways. But not all of it must be bad. The ability to work remotely offers huge opportunities to improve quality of life, and address things like affordable housing, childcare, and happiness. But with these improvements come challenges that cannot be ignored. Attorneys have always been held to the highest of ethical standards, and those standards do not change simply because there is a new way to practice law. To the contrary, with these changes comes the great weight of responsibility to ensure that clients continue to receive the high quality of legal services that the profession demands of practitioners. Only through vigilant preparation can attorneys meet their ethical obligations, and that will only continue to get more difficult as the way we practice law changes. So, for those attorneys that have embraced the remote work from anywhere ethos, you should make sure to constantly track the changing legal environment. Failure to do so may run afoul of your obligations to clients.

BIOGRAPHIES

Daniel J. Oates is the Partner-in-Charge of the Seattle office of Miller Nash, LLP. Dan's practice is focused on franchising and distribution litigation, and other heavily regulated industries. Dan's franchise litigation experience includes disputes ranging from pre-sale disclosure violations and fraud to breach of contract claims, to post-sale relationship disputes (arising under contract or by statute). Dan is an at-large member of the ABA Forum on Franchising Governing Committee and previously served as Editor-in-Chief of the ABA's *Franchise Law Journal* from 2018-2021. He earned his J.D. (*summa cum laude*) from Seattle University School of Law in 2007. Dan is admitted to practice in Washington and Oregon, all of the federal district courts in these states, and the United States Court of Appeals for the Ninth Circuit. Dan is a former judicial clerk to the Honorable Thomas S. Zilly, United States District Court Judge for the Western District of Washington.

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