# Virtual Law:
# The Ethical Issues of Remote Lawyering in Post-Pandemic Law Practice

L.O. Natt Gantt, II
Regent University School of Law

Benjamin V. Madison, III
Regent University School of Law

October 1, 2021

---

## SUMMARY

The COVID-19 pandemic pushed the legal profession to rapidly adopt new technologies. Requiring lawyers to work remotely/virtually and to leverage video conferencing and related technologies has changed the profession forever. Additionally, the ABA and several states are now looking to modify ethical rules that have been hurdles to innovation regarding virtual and remote practice. As lawyers in this new world, we need to be not only be aware of these changes, but also competent to ensure effective and ethical service of our clients.

The following outline highlights the ethical issues related to virtual law offices (also referred to as remote practice). The outline includes references to relevant ABA Model Rules of Professional Conduct and Virginia Rules of Professional Conduct, as well as selected North Carolina Rules of Professional Conduct and other pertinent sources of ethical guidance. After the outline is an appendix that includes the full text of the three most relevant legal ethics opinions and summaries of other opinions.

## OUTLINE

### I. Virtual Law Practice and Working Remotely – Overview

a. As the COVID-19 pandemic spread, the American Bar Association and State Bar Associations observed the reality that lawyers were in many instances being forced to practice law "virtually" or remotely. To that end, the American Bar Association recently issued two formal Legal Ethics Opinions offering guidance on the ethical issues implicated by virtual offices and remote law practice:

   i. ABA Formal Opinion 495 - Lawyers Working Remotely (December 16, 2020)

   ii. ABA Formal Opinion 498 - Virtual Practice (March 10, 2021)

b. These two ABA Formal Opinions—Formal Opinion 495 (December 2020) and Formal Opinion 498 (March 2021)--offer excellent guidance on the meaning of a virtual law office, the means by which such an office will operate, and the Model Rules and ethical issues implicated by practicing law virtually. As the opinions discuss, virtual law practice raises several ethical issues that center around lawyers' core responsibilities of competence, diligence, communication, confidentiality, and supervision.

c. ABA Formal Opinion 498 defines virtual practice as "technologically enabled law practice beyond the traditional brick-and-mortar law firm." Virtual practice raises additional issues

when a lawyer licensed to practice in a state (or states) conducts virtual practice while being physically located in another state in which the lawyer is not licensed to practice law (also called "interstate virtual practice").

d. These opinions note that lawyers are not required to have brick and mortar buildings in which to practice law. Legal ethics issues are implicated, however, with the advent of technology that allows lawyers to conduct practice by interacting with their clients, court officials, and other interested parties purely through electronic means, and not face-to-face.

e. State Bar Associations likewise have issued legal ethics opinions guiding lawyers in respective states as to ethical practices in virtual law practice. The Virginia State Bar has issued the following opinions that have a bearing on the ethical practice of a virtual office or of remote lawyering. Following the opinions are the Virginia Rules of Professional Conduct identified as being implicated.

i. VA Ethics Opinion - 1872 Virtual Law Office and Use of Executive Office Suites

Rule 1.1 Competence
Rule 1.6 Confidentiality of Information
Rule 5.1 Responsibilities of Partners and Supervisory Lawyers
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
Rule 7.1 Communications Concerning a Lawyer's Services

ii. VA Ethics Opinion - 1850 Outsourcing of Legal Services

Rule 1.1 Competence
Rule 1.2(a) Scope of Representation
Rule 1.4 Communication
Rule 1.5 Fees
Rule 1.6 Confidentiality of Information
Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

f. The North Carolina State Bar has also issued an ethics opinion that addresses the ethical concerns raised by an internet-based or virtual law practice. See NC 2005 FEO 10 (available at https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-10/). See also "Home is Where the Heart Is" by Suzanne Lever (https://www.ncbar.gov/for-lawyers/ethics/ethics-articles/home-is-where-the-heart-is/).

g. Wisconsin Formal Ethics Opinion EF-21-02 contains an excellent list of practices that a virtual lawyer or law firm should consider to avoid violating rules of ethical conduct in virtual practice. The full text of this opinion is included in the Appendix.

**II. Competence in the Use of Technology**

a. Both the ABA and the Virginia State Bar's ethics opinions recognize that the lawyer's duty of competence is implicated by using technology to engage in virtual practice.

b. Lawyers cannot claim ignorance but must know how the technology they are using works and especially how it can result in ethical problems.

c. The opinions acknowledge that lawyers and law firms often will need to rely on consultants in the use of technology but caution that in doing so the lawyers must still ensure ethical standards are satisfied.

d. As early as 2012, the ABA emphasized the need for competence in technology as it relates to law practice. The following quote from Comment 8 to ABA Rule 1.1 explains:

"[8] 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." (Emphasis added).

e. The Comments to Virginia Rule 1.1 and North Carolina Rule 1.1 similarly underscores that lawyers' competence is linked to their knowledge of relevant technologies:

i. Virginia Rule—"[6] To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education in the areas of practice in which the lawyer is engaged. *Attention should be paid to the benefits and risks associated with relevant technology. . . ."* (Emphasis added).
ii. North Carolina Rule—"[8] 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 the technology relevant to the lawyer's practice*, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject." (Emphasis added).

**III. Avoiding Unauthorized Practice of Law**

a. Formal Opinion 495 first reasons that lawyers are not engaged in the unauthorized practice of law (UPL) simply by being physically present in a state in which they are not licensed (the "local jurisdiction") <u>if</u>:

i. "the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law" and
ii. "they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction"

b. The opinion next discusses how Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." (State rules such as North Carolina Rule 5.5(b)(1) parallel this Model Rule.) The opinion adds that having a physical location from which the lawyer operates, like a second home, does not establish such a presence although "[h]aving local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules."

c. An important question that the opinion does not discuss is what factors would lead a state to conclude that a lawyer not licensed in that state is engaging in the unauthorized practice of law there. The Wisconsin Formal Ethics Opinion EF-21-02 also does not explain these factors although it does reason that a lawyer who is physically present in one state is not practicing law in that state if the client is located in another state and the "matter" is located in another state.

## IV. Confidentiality and Virtual Law Practice

a. ABA Formal Opinion 498, Virginia LEO 1872, and North Carolina 2005 Formal Ethics Opinion 10 emphasize that the confidentiality of client information is of paramount importance in virtual practice. ABA Rule 1.6, Virginia Rule 1.6, and North Carolina Rule 1.6 all include express language clarifying that lawyers must undertake "reasonable efforts" to prevent the unauthorized disclosure of confidential information and explaining how lawyers' negligent use of technology can lead to a breach of their ethical duty of confidentiality. See also ABA Formal Op. 477R (noting "it is not always reasonable to rely on the use of an unencrypted email").

i. ABA Model Rule 1.6: Confidentiality of Information

(c) 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] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of

privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

ii. Virginia Rule 1.6: Confidentiality of Information

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

[20] Paragraph (d) makes clear that a lawyer is not subject to discipline under this Rule if the lawyer has made reasonable efforts to protect electronic data, even if there is a data breach, cyber-attack or other incident resulting in the loss, destruction, misdelivery or theft of confidential client information. Perfect online security and data protection is not attainable. Even large businesses and government organizations with sophisticated data security systems have suffered data breaches. Nevertheless, security and data breaches have become so prevalent that some security measures must be reasonably expected of all businesses, including lawyers and law firms. Lawyers have an ethical obligation to implement reasonable information security practices to protect the confidentiality of client data. What is "reasonable" will be determined in part by the size of the firm. See Rules 5.1(a)-(b) and 5.3(a)-(b). The sheer amount of personal, medical and financial information of clients kept by lawyers and law firms requires reasonable care in the communication and storage of such information. A lawyer or law firm complies with paragraph (d) if they have acted reasonably to safeguard client information by employing appropriate data protection measures for any devices used to communicate or store client confidential information. To comply with this Rule, a lawyer does not need to have all the required technology competencies. The lawyer can and more likely must turn to the expertise of staff or an outside technology professional. Because threats and technology both change, lawyers should periodically review both and enhance their security as needed; steps that are reasonable measures when adopted may become outdated as well.

[21] Because of evolving technology, and associated evolving risks, law firms should keep abreast on an ongoing basis of reasonable methods for protecting client confidential information, addressing such practices as:

(a) Periodic staff security training and evaluation programs, including precautions and procedures regarding data security;

(b) Policies to address departing employee's future access to confidential firm data and return of electronically stored confidential data;

(c) Procedures addressing security measures for access of third parties to stored information;

(d) Procedures for both the backup and storage of firm data and steps to securely erase or wipe electronic data from computing devices before they are transferred, sold, or reused;

(e) The use of strong passwords or other authentication measures to log on to their network, and the security of password and authentication measures; and
(f) The use of hardware and/or software measures to prevent, detect and respond to malicious software and activity.

iii. North Carolina Rule 1.6: Confidentiality of Information

(c) 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.

*Acting Competently to Preserve Confidentiality*

[19] Paragraph (c) requires a lawyer to act competently to safeguard information acquired during the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information acquired during the professional relationship with a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information to comply with other law—such as state and federal laws that govern data privacy, or that impose notification requirements upon the loss of, or unauthorized access to, electronic information—is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[20] When transmitting a communication that includes information acquired during the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the client's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

b. Confidentiality issues arise in virtual lawyering in many ways, and firms should adopt policies to address such issues related to virtual lawyering. The New York County Lawyers

Association Ethics Committee recently outlined several areas law firm policies should address related to virtual lawyering. For instance, the Committee recommended:

i. "Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach."
ii. "Ensuring that working at home has not significantly increased the likely of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home." N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

c. The typical means of communicating in virtual lawyering is videoconferencing (e.g., Zoom). Under the ethics standards above, lawyers must be knowledgeable about how to use the technology in a way that secures communications so that only the client and the attorney team are on the call. Configuring the call such that it can easily be joined by third parties or conducting the call in a location where third parties can hear the videoconference would breach lawyers' ethical duty of confidentiality. Moreover, if third parties do indeed access the call, such access would destroy the attorney-client privilege. VA LEO 1872; ABA Formal Op. 498. In such cases, the lawyer is obligated to notify any clients affected by the data breach. See ABA Formal Op. 483, ABA Rule 1.4. For suggested best practices on how to use video conferencing so as to avoid unauthorized access, see Pennsylvania Formal Op. 2020-300 (2020).

d. Both the ABA and Virginia also recognize that Rule 1.6's duty of confidentiality is an issue in a virtual practice which relies on electronic data and information stored, in many cases, not only in local firm files but in cloud storage with a vendor who maintains the files.

e. In the law firm, the choice of secure hardware, appropriate anti-virus and anti-malware software, use of strong passwords, and use of multi-factor authentication are all important to protecting the confidentiality of client information. ABA Formal Op. 498.

f. When communicating with the client or with the vendor, use of virtual private networks or other secure means of transmission should be considered. ABA Formal Opinion 498. As noted, safe communication needs to involve ensuring that the lawyer understands the video conferencing platform but also adopts policies and practices that ensure confidentiality during videoconferencing. Moreover, when using such video conferencing platforms, lawyers should strongly consider paying for additional security features over the free, consumer-friendly versions. See ABA Formal Op. 498.

g. Such practices should include turning off "smart" speakers (e.g., Siri or Alexa) and virtual assistants unless these are essential because leaving them on can result in disclosure to a third party of communications between an attorney and client. The knowledgeable lawyer realizes that smart speakers and virtual assistants keep recordings that Apple, Google, or another provider my access to improve the quality of the speaker/assistant. However, lawyers should not allow such recordings because the ability of the third party to hear conversations with the client compromises the attorney-client privilege.

h. Lawyers who use cloud storage of client information thus must take precautions to ensure confidentiality. ABA Formal Opinion 498 provides detailed guidance on the considerations necessary to ensure the protection of a client's files and communications through a vendor who provides cloud storage. Specifically, ABA Formal Opinion 498 states: "If the access to

such ‘files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer.’” ABA Formal Op. 498 (quoting ABA Formal Op. 482).

i. In addition, the virtual lawyer cannot simply satisfy one’s duty by choosing a reputable vendor. The virtual firm itself has important steps to follow to ensure the confidentiality of the client’s information. The lawyer must take steps to ensure the vendor regularly backs up any client data stored with the vendor. The lawyer must also ensure other lawyers and nonlawyers the lawyer supervises and any relevant vendors understand the requirements necessary to protect confidential information. ABA Formal Op. 498.

j. A particularly important area of supervision of the lawyers and others in the law firm is to have clear guidelines on lawyers’ and staff members’ use of their own devices for client communications or to access client information (these policies are sometimes referred to “bring-your-own-device” (BYOD) policies). ABA Formal Op. 498. Strong passwords, training to avoid phishing attempts, and other “tight” security practices are essential. One of the known rules of thumb in data security is that the weakest link is usually the human element in that the ones accessing the data who often do not practice the secure measures that they should. ABA Formal Op. 498.

k. Recording of videoconference or other communication with clients also must be seriously considered each time the attorney communicates with the client. ABA Formal Opinion 498 suggests that, if communications would typically be recorded in the means of communication (e.g. Zoom), the lawyer should not record such communications without the clients’ consent.

**V. Lawyers’ Duties of Diligence and Communication in Virtual Practice**

a. The topic of lawyers’ duty of diligence relates particularly to the circumstances of the COVID-19 pandemic in which virtual practice has become more common.

    i. Comment [1] to ABA Rule 1.3 emphasizes that lawyers must “pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.”

    ii. Thus, in the context of a pandemic or when other factors affect the lawyer’s ability to pursue a client’s case as expeditiously as the lawyer would in ordinary circumstances, the lawyer owes the client an explanation of the circumstances. In other words, the lawyer needs to keep the client aware of the impact of external circumstances of the ability of the legal system to resolve the client’s case. The lawyer, moreover, must still pursue representation of a client within the context of the limitations in place. ABA Formal Op. 498.

    iii. If a pandemic, natural disaster, or other factor prevents a lawyer from fulfilling the lawyer’s ethical duties to the client, the lawyer is required to withdraw from the representation. ABA Formal Op. 498, ABA Model Rule 1.16.

b. Regarding communication, lawyers must ensure they maintain regular communications with their clients. As is true in representing a client with whom one physically meets, a lawyer representing a client virtually must, under ABA Rule 1.4 “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; [and] promptly comply with reasonable requests for information. . . ."

c. A lack of in-person contact with the client heightens the need for the lawyer to be attentive to maintaining contact with, and addressing the concerns of, the client. Wisconsin Formal Ethics Opinion EF-21-02. The virtual lawyer would do well to remain attentive to such a reality and ensure that the lawyer communicates with the client regularly.

**APPENDIX**

**ABA Formal Opinions**

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 495** **December 16, 2020**

## Lawyers Working Remotely

*Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.*[1]

### Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

### Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."[2] A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.[33] Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website, letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

> 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

[2] DICTIONARY.COM, https://www.dictionary.com/browse/establish?s=t (last visited Dec. 14, 2020).

[3] To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

> 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. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah Stat349e Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in 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. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

**Conclusion**

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, 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, unless otherwise authorized.

---

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 498** **March 10, 2021**

## Virtual Practice

*The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.[1] When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.*

### I. Introduction

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.[2]

### II. Virtual Practice: Commonly Implicated Model Rules

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.[3] A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

[3] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

the ethics rules apply to both traditional and virtual law practice,[4] virtual practice commonly implicates the key ethics rules discussed below.

### *A. Commonly Implicated Model Rules of Professional Conduct*

#### 1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], 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." (*Emphasis added*). Comment [1] to Rule
1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "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; [and] promptly comply with reasonable requests for information. . . ."[5] Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.[6]

#### 2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[7] The following non-exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device

[4] For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

[5] MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

[6] Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "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 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." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

or important piece of software excessively difficult to use)."[88] As ABA Formal Op. 477R notes, lawyers must employ a "fact- based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation.[99] At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[10] However, depending on the circumstances, lawyers may need to take special precautions.[11] Factors to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."[12] As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.[1313] Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."[14] Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision*."[15] The duty to supervise nonlawyers extends to those both within and outside of the law firm.[16]

---

[8] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].

[9] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

[10] *Id.*

[11] The opinion cautions, however, that "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." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].

[13] MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).

[14] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

[15] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

[16] As noted in Comment [3] to Model Rule 5.3:

> When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly

### *B. Particular Virtual Practice Technologies and Considerations*

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti- Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

#### 1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.[17] To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

#### 2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such "files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer."[18] Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.[19]

---

with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

[17] For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

[18] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018).

[19] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) ("Even lawyers who, (i) under Model Rule 1.6(c), make 'reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,' (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data

### 3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer's ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.[20] Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,[21] to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

### 4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers' virtual document and data exchange platforms should ensure that documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).[22]

### 5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law 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. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

---

breach 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.'").

[20] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

[21] Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

[22] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

### 6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.[23] Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those 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."

#### a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.[24] This duty requires regular interaction and communication with, for example, associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.[25]

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client- related information will be adequately and safely archived and available for later retrieval.[26]

---

[23] As ABA Formal Op. 477R noted:

> In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

[24] The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.
- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

[25] *See* ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

[26] For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,[27] and should ensure that all client-related information is secure, indexed, and readily retrievable.

7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.[28] The lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

## III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

---

cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

[27] *See, e.g.*, Mo. Bar Informal Advisory Op. 20070008 & 20050068.

[28] *See* MODEL RULES OF PROF'L CONDUCT R. 1.15; *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.").

## Virginia Legal Ethics Opinions (LEOs)

### VA Ethics Opinion 1872: Virtual Law Office and Use of Executive Office Suites

- Rule 1.1 Competence
- Rule 1.6 Confidentiality of Information
- Rule 5.1 Responsibilities of Partners and Supervisory Lawyers
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
- Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
- Rule 7.1 Communications Concerning a Lawyer's Services

### VA Ethics Opinion 1850: Outsourcing of Legal Services

- Rule 1.1 Competence
- Rule 1.2(a) Scope of Representation
- Rule 1.4 Communication
- Rule 1.5 Fees
- Rule 1.6 Confidentiality of Information
- Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
- Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

## VIRGINIA LEGAL ETHICS OPINION 1872:

## VIRTUAL LAW OFFICE AND USE OF EXECUTIVE OFFICE SUITES

Committee Opinion: March 29, 2013
Supreme Court Approved: October 2, 2019

This opinion is an examination of the ethical issues involved in a lawyer's or firm's use of a virtual law office, including cloud computing, and/or executive office suites. These issues include marketing, supervision of lawyers and nonlawyers in the firm, and competence and confidentiality when using technology to interact with or serve clients.

A virtual law practice involves a lawyer/firm interacting with clients partly or exclusively via secure Internet portals, emails, or other electronic messaging.[1] This practice may be combined with an executive office rental, where a lawyer rents access to a shared office suite or conference room. This space is generally either unstaffed or staffed by an employee of the rental company who provides basic support services to all users of the space, rather than by an employee of the lawyer. The space is also not exclusive to the lawyer — even if she has exclusive access to a particular office or conference room, the suite is open to all other "tenants." Lawyers who maintain a virtual practice, who work from home, or who wish to expand their geographic profile without the higher costs of exclusive office space and staff all use these spaces as client meeting locations. In other words, virtual law offices and executive office suites do not always go together, but they frequently do.

[1] Stephanie Kimbro, a practitioner and scholar of virtual law offices, defines a virtual law practice as one where "[t]he use of an online client portal allows for the initiation of the attorney/client relationship through to completion and payment for legal services. Attorneys operate an online backend law office as a completely web-based practice or in conjunction with a traditional law office." http://virtuallawpractice.org/about/, accessed Jan. 22, 2013.

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rules 1.1[2], 1.6(a) and (d)[3], 5.1(a) and (b)[4], 5.3(a) and (b)[5], and 7.1[6]. The relevant legal ethics opinions are LEOs 1600, 1791, 1818, and 1850.

ANALYSIS

Virtual law offices involve issues that are present in all types of law offices – confidentiality, communication with clients, and supervision of employees – but that manifest themselves in a new way in this context. *See also* LEO 1850 (exploring similar concerns in context of outsourcing legal support services).

A lawyer must always act competently to protect the confidentiality of clients' information, regardless of how that information is stored/transmitted, but this task may be more difficult when the information is being transmitted and/or stored electronically through third-party software and storage providers. The

---

[2] **Rule 1.1. Competence.**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[3] **Rule 1.6. Confidentiality of Information.**

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal:
* * *

(6) information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.
* * *

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected under this Rule.

[4] **Rule 5.1. Responsibilities of Partners and Supervisory Lawyers.**

1. A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority, 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.
2. 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

[5] **Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.**

With respect to a nonlawyer employed or retained by or associated with a lawyer:
(a) a partner or a lawyer who individually or together with other lawyers possesses 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
* * *

[6] **Rule 7.1. Communications Concerning a Lawyer's Services.**

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

lawyer is not required, of course, to absolutely guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to the representation of a client. *See* Rule 1.6(d). When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination.[7]

Similarly, although the method of communication does not affect the lawyer's duty to communicate with the client, if the communication will be conducted primarily or entirely electronically, the lawyer may need to take extra precautions to ensure that communication is adequate and that it is received and understood by the client. The Committee previously concluded in LEO 1791 that a lawyer could permissibly represent clients with whom he had no in-person contact, because Rule 1.4 "in no way dictates whether the lawyer should provide that information in a meeting, in writing, in a phone call, or in any particular form of communication. In determining whether a particular attorney has met this obligation with respect to a particular client, what is critical is *what* information was transmitted, not *how*." On the other hand, one of the aspects of communication required by Rule 1.4 is that a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Use of the word "explain" necessarily implies that the lawyer must take some steps beyond merely providing information to make sure that the client actually is in a position to make informed decisions. A lawyer may not simply upload information to an Internet portal and assume that her duty of communication is fulfilled without some confirmation from the client that he has received and understands the information provided.

Finally, the technology that enables a lawyer to practice "virtually" without any face-to-face contact with clients can also allow lawyers and their staff to work in separate locations rather than together in centralized offices. As with other issues discussed in this opinion, a partner or other managing lawyer in a firm always has the same responsibility to take reasonable steps to supervise subordinate lawyers and nonlawyer assistants, but the meaning of "reasonable" steps may vary depending upon the structure of the law firm and its practice. Additional measures may be necessary to supervise staff who are not physically present where the lawyer works.

The use of an executive office/suite rental or any other kind of shared, non-exclusive space, either in conjunction with a virtual law practice or as an addition to a "traditional" office- based practice, raises a separate issue. A non-exclusive office space or virtual law office that is advertised as a location of the firm must be an office where the lawyer provides legal services. A lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case. *See* Rule 7.1. As discussed above in the context of Internet-based service providers, a lawyer must also pay careful attention to protecting confidentiality if any client information is stored or received in a shared space staffed by nonlawyers who are not employees of the law firm and may not be aware of the nature or extent of the duty of confidentiality.

[7] See LEO 1818, where the Committee concluded that a lawyer could permissibly store files electronically and destroy all paper documents as long as the client was not prejudiced by this practice, but noted that the lawyer may need to consult outside technical assistance and support for assistance in using such a system.

# VIRGINIA LEGAL ETHICS OPINION 1850:
# OUTSOURCING OF LEGAL SERVICES

SCV Approved/Amended
January 12, 2021
Committee Opinion
December 28, 2010

This opinion deals with the ethical issues involved when a lawyer considers outsourcing legal or non-legal support services to lawyers or paralegals. Many lawyers already engage in some form of outsourcing to provide more efficient and effective service to their clients. Outsourcing takes many forms: reproduction of materials, database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example. Law firms have always and will always engage other lawyers and nonlawyers in the provision of various legal and non-legal support services. Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the lawyer the opportunity to seek the services of outside lawyers and staff in complex matters. Legal outsourcing also gives sole practitioners and small law firms more flexibility in not having to hire staff or employees when they experience temporary work overflows for which a contract lawyer or non-lawyer may be appropriate.

A few examples of outsourcing arrangements are:

1. A Virginia law firm retains an outsourced law firm in India to conduct patent searches and to prepare patent applications for some of its clients. Lawyers and nonlawyers at the outsourced firm may work on the matters. The outsourced firm will not have access to any client confidences except confidential information that is necessary to perform the patent searches and prepare the patent applications. The outsourced law firm regularly does patent searches and applications for U.S. law firms. In some situations, the outsourced law firm might be hired through an intermediary company that verifies the credentials of the firm and checks conflicts; in other situations, the Virginia law firm might directly retain the outsourced law firm.
2. A Virginia law firm occasionally hires Lawyer Z, who works for several firms on an as-needed contract basis, to perform specific legal tasks such as legal research and drafting legal memoranda and briefs. Lawyer Z is a Virginia-licensed lawyer who works out of her home and works on an hourly basis for the law firm, but does not meet with firm clients. She has access to firm files and matters only as needed for the discrete tasks she is hired to perform.
3. A Virginia law firm sends legal work involving legal research and brief writing to a legal research "think tank" to produce work product that is then incorporated into the work product of the law firm.

On the other hand, a situation that may be colloquially called "outsourcing" but that does not raise any of the concerns identified in this opinion is: a Virginia law firm regularly hires Lawyer Y to perform specific legal tasks for them, which may or may not involve contact with firm clients, working directly with and under the supervision of lawyers in the law firm. In that scenario, Lawyer Y is working under the direct supervision of lawyers in the firm and has full access to information about the firm's clients, and therefore is associated with the firm for purposes of the Rules of Professional Conduct, including confidentiality and conflicts.

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are: Rule 1.1, Competence, Rule 1.2(a), Scope of Representation, Rule 1.4, Communication, Rule 1.5, Fees, Rule 1.6, Confidentiality of Information, Rule

5.3, Responsibilities Regarding Nonlawyer Assistants, and Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law.

Applicable legal ethics opinions are LEOs 1712 and 1735, regarding the use of temporary lawyers and contract lawyers.

ANALYSIS

A lawyer's ethical duties when outsourcing tasks fall into four categories: supervision of nonlawyers, including unauthorized practice of law issues, client communication and the need for consent to outsourcing arrangements, confidentiality, and billing and fees. This opinion will address each of these categories in order.

*Supervision and Unauthorized Practice of Law*

The lawyer's initial duty when considering outsourcing, as established by Rule 5.3(b), is to exercise due diligence in the selection of lawyers or nonlawyers. Lawyers have a duty to be competent in the representation of their clients and to ensure that those who are working under their supervision perform competently. *See* Rule 1.1. To satisfy the duty of competence, a lawyer who outsources legal work must ensure that the tasks in question are delegated to individuals who possess the skills required to perform them and that the individuals are appropriately supervised to ensure competent representation of the client.

The lawyer must also consider whether the lawyer or nonlawyer understands and will comply with the ethical rules that govern the initiating lawyer's conduct and will act in a manner that is compatible with that lawyer's professional obligations, just as in any other supervisory situation. In order to comply with Rule 5.3(b), the lawyer must be able to adequately supervise the nonlawyer if the work is outsourced. Specifically, the lawyer needs to review the nonlawyer's work on an ongoing basis to ensure its quality, the lawyer must maintain ongoing communication to ensure that the nonlawyer is discharging the assignment in accordance with the lawyer's directions and expectations, and the lawyer needs to review thoroughly all work product to ensure its accuracy and reliability and that it is in the client's interest. The lawyer remains ultimately responsible for the conduct and work product of the nonlawyer. Rule 5.3(c).

The Committee recommends that overseas outsourcing, in particular, should include a written outsourcing agreement to protect the law firm and its clients. The agreement should include assurances that the outsourced firm or vendor will meet all professional obligations of the hiring lawyer, specifically including confidentiality, information security, conflicts, and the unauthorized practice of law. The hiring lawyer should make reasonable inquiry and act competently in choosing a provider that will honor these obligations and use reasonable measures to supervise the vendor's work.

*Client Communication and Consent*

In LEO 1712, the Committee concluded that when a lawyer hires a temporary lawyer to work on a client's matter, the lawyer must advise the client of that fact and must obtain the client's consent to the arrangement if the temporary lawyer will perform independent work for the client and will not work under the direct supervision of a lawyer in the firm. Applying Rules 1.2(a) and 1.4, the Committee concluded that the client is entitled to know who is involved in the representation and can refuse to allow the use of an outsourced lawyer or nonlawyer. Extending that analysis to other outsourcing situations, a lawyer must obtain informed consent from the client if the lawyer is outsourcing legal work to a lawyer or nonlawyer who is not associated with or working under the direct supervision of a lawyer in the firm that the client retained, even if no confidential information is being shared outside of the firm.

*Confidentiality*

If, when outsourcing, confidential client information will be shared with a lawyer or nonlawyer outside of the law firm (where "outside of the law firm" means neither associated with the firm nor directly supervised by a lawyer in the firm), the lawyer must secure the client's consent in advance. The implied

authorization of Rule 1.6(a) and its Comment [6][1] to share confidential information within a firm generally does not extend to entities or individuals working outside the law firm. Thus, in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. The exception to this requirement is when the outsourced service is an "office management" task of the types identified in Rule 1.6(b)(6)[2], for which client consent is not required. In all cases, the lawyer needs to ensure that appropriate measures have been employed to educate the nonlawyer on the lawyer's duties to protect client confidences.

When sharing or storing confidential information, the lawyer must act reasonably to safeguard the information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by anyone under the lawyer's supervision. *See* Rule 1.6, Comment [19]. For example, the nonlawyer should assure the lawyer that policies and procedures are in place to protect and secure data while in transit and that he or she understands and will abide by the policies and procedures. Written confidentiality agreements are strongly advisable in outsourcing relationships. The outsourcing lawyer should also ask the nonlawyer whether he or she is performing services for any parties adverse to the lawyer's client, and remind him or her, preferably in writing, of the need to safeguard the confidences and secrets of the lawyer's current and former clients. *See* Rule 1.6, Comment [5c].[3]

*Billing and Fees*

In LEO 1712, the Committee discussed the issue of payment arrangements when legal services are outsourced or when temporary lawyers are used. The Committee reiterated its position in LEO 1735, which deals with a lawyer independent contractor. This Committee opines that if payment is billed to the client as a *disbursement*, then the lawyer must disclose the actual amount of the disbursement including any mark-up or surcharge on the amount actually disbursed to the nonlawyer. Any mark-up or surcharge on the disbursement billed to the client is tested by the principles articulated in ABA Formal Opinion 93-379 (1993):

When that term ["disbursements"] is used, clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if a lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.

It is the view of this Committee that in the absence of disclosure to the contrary it would be improper for the lawyer to assess the surcharge on these disbursements over and above the amount actually incurred unless the lawyer incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper for the lawyer to charge the client the full rate and to retain the profit instead of giving the client the discount. Clients could view this practice as an attempt to create profit centers when they had been told they would be billed for disbursements.

On the other hand, if the lawyer or firm hires a contract lawyer or non-lawyer to work on site or under the direct supervision of the lawyer such that they are considered "associated" with the firm, the lawyer or

---

[1] Rule 1.6, Comment [6]: Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be limited to specified lawyers.

[2] Rule 1.6(b)(6): To the extent a lawyer reasonably believes necessary, the lawyer may reveal information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.

[3] Rule 1.6 Comment [5c]: Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

firm may bill the client for the usual or customary charge the firm would bill for any other associate or employee even if that amount is more than what the firm pays the staffing agency or vendor. The amount paid to the staffing agency or vendor is an overhead expense that the firm is not required to disclose to a client.

This Committee believes that these same principles apply in the case of outsourced legal services. Fees must be reasonable, as required by Rule 1.5(a), and adequately explained to the client, as required by Rule 1.5(b). Further, in a contingent fee case it would be improper to charge separately for work that is usually done by the client's own lawyer and that is incorporated into the standard fee paid to the lawyer, even if that cost is paid to a third-party provider.

CONCLUSION

A lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed consent in advance of outsourcing the work.

## 2005 FORMAL ETHICS OPINION 10

VIRTUAL LAW PRACTICE AND UNBUNDLED LEGAL SERVICES

*Adopted: January 20, 2006*
*Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.*

Inquiry #1:

Law Firm markets and provides legal services via the internet under the name Virtual Law Firm (VLF). VLF plans to offer and deliver its services exclusively over the internet. All communications in the virtual law practice are handled through email, regular mail, and the telephone. There would be no face-to-face consultation with the client and no office in which to meet.

May VLF lawyers maintain a virtual law practice?

Opinion #1:

Advertising and providing legal services through the internet is commonplace today. Most law firms post websites as a marketing tool; however, this opinion will not address passive use of the internet merely to advertise legal services. Instead, the opinion explores use of the internet as an exclusive means of promoting and delivering legal services. Many lawyers already use the internet to offer legal services, answer legal questions, and enter into client-lawyer relationships. While the Rules of Professional Conduct do not prohibit the use of the internet for these purposes, there are some key concerns for cyberlawyers who use the internet as the foundation of their law practice. Some common pitfalls include 1) engaging in unauthorized practice (UPL) in other jurisdictions, 2) violating advertising rules in other jurisdictions, 3) providing competent representation given the limited client contact, 4) creating a client-lawyer relationship with a person the lawyer does not intend to represent, and 5) protecting client confidences.

Advertising and UPL concerns are endemic to the virtual law practice. Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble. See South Carolina Appellate Court Rule 418, "Advertising and Solicitation by Unlicensed Lawyers" (May 12, 1999)(requiring lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers). Advertising and UPL restrictions vary from state to state and the level of enforcement varies as well. At a minimum, VLF must comply with North Carolina's advertising rules by including a physical office address on its website pursuant to Rule 7.2(c). In addition, VLF should also include the name or names of lawyers primarily responsible for the website and the jurisdictional limitations of the practice. Likewise, virtual lawyers from other jurisdictions, who actively solicit North Carolina clients, must comply with North Carolina's unauthorized practice restrictions. See N.C. Gen. Stat. §84-4. 2.1. In addition, a prudent lawyer may want to research other jurisdictions' restrictions on advertising and cross-border practice to ensure compliance before aggressively marketing and providing legal services via the internet.

Cyberlawyers also tend to have more limited contact with both prospective and current clients. There will rarely be extended communications, and most correspondence occurs via email. The question becomes whether this limited contact with the client affects the quality of the information exchanged or the ability of the cyberlawyer to spot issues, such as conflicts of interest, or to provide competent representation. See generally Rule 1.1 (requiring competent representation); Rule 1.4 (requiring reasonable communication between lawyer and client). Will the cyberlawyer take the same precautions (i.e., ask the right questions, ask enough questions, run a thorough conflicts check, and sufficiently explain the nature and scope of the representation), when communications occur and information is exchanged through email?

While the internet is a tool of convenience and appears to respond to the consumer's need for fast solutions, the cyberlawyer must still deliver competent representation. To this end, he or she should make every effort to make the same inquiries, to engage in the same level of communication, and to take the same precautions as a competent lawyer does in a law office setting.

Next, a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis.

Finally, cyberlawyers must take reasonable precautions to protect confidential information transmitted to and from the client. RPC 215.

Inquiry #2 (Omitted)

## 2007 FORMAL ETHICS OPINION 12

OUTSOURCING LEGAL SUPPORT SERVICES

*Adopted: April 25, 2008*
*Opinion rules that a lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent.*

Inquiry:

May a lawyer ethically outsource legal support services abroad, if the individual providing the services is either a nonlawyer or a lawyer not admitted to practice in the United States (collectively "foreign assistants")?

Opinion:

The Ethics Committee has previously determined that a lawyer may use nonlawyer assistants in his or her practice, and that the assistants do not have to be employees of the lawyer's firm or physically present in the lawyer's office. See, e.g., RPC 70, RPC 216, 99 FEO 6, 2002 FEO 9. The previous opinions emphasize that the lawyer's use of nonlawyer assistants must comply with the Rules of Professional Conduct. Generally, the ethical considerations when a lawyer uses foreign assistants are similar to the considerations that arise when a lawyer uses the services of any nonlawyer assistant.

Pursuant to RPC 216, a lawyer has a duty under the Rules of Professional Conduct to take reasonable steps to ascertain that a nonlawyer assistant is competent; to provide the nonlawyer assistant with appropriate supervision and instruction; and to continue to use the lawyer's own independent professional judgment, competence, and personal knowledge in the representation of the client. See also Rule 1.1, Rule 5.3, Rule 5.5. The opinion further states that the lawyer's duty to provide competent representation mandates that the lawyer be responsible for the work product of nonlawyer assistants. See also Rule 5.3.

2002 FEO 9 states that, in any situation where a lawyer delegates a task to a nonlawyer assistant, the lawyer must determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealing with the client. See also Rule 1.1 and Rule 5.3.

Therefore, as long as the lawyer's use of the nonlawyer assistant's services is in accordance with the Rules of Professional Conduct, the location of the nonlawyer assistant is irrelevant. Rule 5.3(b) requires lawyers having supervisory authority over the work of nonlawyers to make "reasonable efforts" to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

When contemplating the use of foreign assistants, the lawyer's initial ethical duty is to exercise due diligence in the selection of the foreign assistant. RPC 216 states that, before contracting with a nonlawyer assistant, a lawyer must take reasonable steps to determine that the nonlawyer assistant is competent. 2002 FEO 9 states that the lawyer must evaluate the training and ability of the nonlawyer in determining whether delegation of a task to the nonlawyer is appropriate. The lawyer must ensure that the foreign assistant is competent to perform the work requested, understands and will comply with the ethical rules that govern a lawyer's conduct, and will act in a manner that is compatible with the lawyer's professional obligations.

In the selection of the foreign assistant, the lawyer should consider obtaining background information about any intermediary employing the foreign assistants; obtaining the foreign assistants' resumes; conducting reference checks; interviewing the foreign assistants to ascertain their suitability for the particular assignment; obtaining a work product sample; and confirming that appropriate channels of communication are present to ensure that supervision can be provided in a timely and ongoing manner. Individual cases may require special or further measures. See New York City Bar Ass'n. Formal Opinion 2006-3; San Diego County Bar Ass'n. Ethics Opinion 2007-1.

Another ethical concern is the lawyer's ability adequately to supervise the foreign assistants. Pursuant to RPC 216, to supervise properly the work delegated to the foreign assistants, the lawyer must possess sufficient knowledge of the specific area of law. The lawyer must also ensure that the assignment is within the foreign assistant's area of competency. In supervising the foreign assistant, the lawyer must review the foreign assistant's work on an ongoing basis to ensure its quality; have ongoing communication with the foreign assistant to ensure that the assignment is understood and that the foreign assistant is discharging the assignment in accordance with the lawyer's directions and expectations; and review thoroughly all work-product of foreign assistants to ensure that it is accurate, reliable, and in the client's interest. The lawyer has an ongoing duty to exercise his or her professional judgment and skill to maintain the level of supervision necessary to advance and protect the client's interest.

If physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assistant's work, the lawyer should not retain the foreign assistant to provide services.

A lawyer must retain at all times the duty to exercise his or her independent judgment on the client's behalf and cannot abdicate that role to any assistant. A lawyer who utilizes foreign assistants will be held responsible for any of the foreign assistants' work-product used by the lawyer. See Rule 5.3. A lawyer may use foreign assistants for administrative support services such as document assembly, accounting, and clerical support. A lawyer may also use foreign assistants for limited legal support services such as reviewing documents; conducting due diligence; drafting contracts, pleadings, and memoranda of law; and conducting legal research. Foreign assistants may not exercise independent legal judgment in making decisions on behalf of a client. Additionally, a lawyer may not permit any foreign assistant to provide any legal advice or services directly to the client to assure that the lawyer is not assisting another person, or a corporation, in the unauthorized practice of law. See Rule 5.5(d). The limitations on the type of legal services that can be outsourced, in conjunction with the selection and supervisory requirements associated with the use of foreign assistants, insures that the client is competently represented. See Rule 5.5(d). Nevertheless, when outsourcing legal support services, lawyers need to be mindful of the prohibitions on unauthorized practice of law in Chapter 84 of the General Statutes and on the prohibition on aiding the unauthorized practice of law in Rule 5.5(d).

Another significant ethical concern is the protection of client confidentiality. A lawyer has a professional obligation to protect and preserve the confidences of a client against disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rule 1.6, cmt. [17]. When utilizing foreign assistants, the lawyer must ensure that procedures are in place to minimize the risk that confidential information might be disclosed. See RPC 133. Included in such procedures should be an effective conflict-checking procedure. See RPC 216. The lawyer must make certain that the outsourcing firm and the foreign assistants working on the particular client matter are aware that the lawyer's professional obligations require that there be no breach of confidentiality in regard to client information. The lawyer also must use reasonable care to select a mode of communication that will best maintain any confidential information that might be conveyed in the communication. See RPC 215.

Finally, the lawyer has an ethical obligation to disclose the use of foreign, or other, assistants and to obtain the client's written informed consent to the outsourcing. In the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services. See Rule 1.4, 2002 FEO 9; San Diego County Bar Ass'n. Ethics Opinion 2007-1.

## 2011 FORMAL ETHICS OPINION 6

SUBSCRIBING TO SOFTWARE AS A SERVICE WHILE FULFILLING THE DUTIES OF CONFIDENTIALITY AND PRESERVATION OF CLIENT PROPERTY

*Adopted: January 27, 2012*
*Opinion rules that a lawyer may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential client information.*

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case or practice management, document management, and billing/financial management, is moving to the "software as a service" (SaaS) model. The American Bar Association's Legal Technology Resource Center explains SaaS as follows:

> SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm's server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously…SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front.[1]

Instances of SaaS software extend beyond the practice management sphere addressed above, and can include technologies as far-ranging as web-based email programs, online legal research software, online backup and storage, text messaging/SMS (short message service), voicemail on mobile or VoIP phones, online communication over social media, and beyond.

SaaS for law firms may involve the storage of a law firm's data, including client files, billing information, and work product, on remote servers rather than on the law firm's own computer and, therefore, outside the direct control of the firm's lawyers. Lawyers have duties to safeguard confidential client information, including protecting that information from unauthorized disclosure, and to protect client property from destruction, degradation, or loss (whether from system failure, natural disaster, or dissolution of a vendor's business). Lawyers also have a continuing need to retrieve client data in a form that is usable outside of a vendor's product.[2] Given these duties and needs, may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including the information in a client's file, from risk of loss.

The use of the internet to transmit and store client information presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential client information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly "end-user" vulnerabilities found in the lawyer's own law office. The lawyer must also engage in periodic education about ever-changing security risks presented by the internet.

Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information acquired during the professional relationship with a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [18] adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. >*See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"), RPC 234 (requiring the storage of a client's original documents with legal significance in a safe place or their return to the client), and 98 FEO 15 (requiring exercise of lawyer's "due care" when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. >*See* RPC 133 (stating there is no requirement that firm's waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unauthorized disclosure of confidential information). Moreover, while the duty of confidentiality applies to lawyers who choose to use technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential client information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality.

Furthermore, in 2008 FEO 5, the committee held that the use of a web-based document management system that allows both the law firm and the client access to the client's file is permissible:

> provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. >*See* RPC 133 and RPC 215…. A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information…. If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. >*See* RPC 133.

In a recent ethics opinion, the Arizona State Bar's Committee on the Rules of Professional Conduct concurred with the interpretation set forth in North Carolina's 2008 FEO 5 by holding that an Arizona law firm may use an online file storage and retrieval system that allows clients to access their files over the internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.[3]

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of client information and client files. A lawyer must fulfill the duties to protect confidential client information and to safeguard client files by applying the same diligence and competency to manage the risks of SaaS that the lawyer is required to apply when representing clients.

No opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Are there measures that a lawyer or law firm should consider when assessing a SaaS vendor or seeking to minimize the security risks of SaaS?

Opinion #2:

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required.

Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer. The extent of this obligation when using a SaaS vendor to store and manipulate confidential client information will depend upon the experience, stability, and reputation of the vendor. Given the rapidity with which computer technology changes, law firms are encouraged to consult periodically with professionals competent in the area of online security. Some recommended security measures are listed below.

• Inclusion in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement between the SaaS vendor and the lawyer or law firm, of an agreement on how the vendor will handle confidential client information in keeping with the lawyer's professional responsibilities.

• If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm will have a method for retrieving the data, the data will be available in a non-proprietary format that the law firm can access, or the firm will have access to the vendor's software or source code. The SaaS vendor is contractually required to return or destroy the hosted data promptly at the request of the law firm.

• Careful review of the terms of the law firm's user or license agreement with the SaaS vendor including the security policy.

• Evaluation of the SaaS vendor's (or any third party data hosting company's) measures for safeguarding the security and confidentiality of stored data including, but not limited to, firewalls, encryption techniques, socket security features, and intrusion-detection systems.[4]

• Evaluation of the extent to which the SaaS vendor backs up hosted data.

**Endnotes**

1. FYI: Software as a Service (SaaS) for Lawyers, ABA Legal Technology Resource Center at abanet.org/tech/ ltrc/fyidocs/saas.html.
2. >Id.
3. Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).
4. A firewall is a system (which may consist of hardware, software, or both) that protects the resources of a private network from users of other networks. Encryption techniques are methods for ciphering messages into a foreign format that can only be deciphered using keys and reverse encryption algorithms. A socket security feature is a commonly-used protocol for managing the security of message transmission on the internet. An intrusion detection system is a system (which may consist of hardware, software, or both) that monitors network and/or system activities for malicious activities and produces reports for management.

## Wisconsin Formal Ethics Opinion EF-21-02: Working remotely (Jan. 29, 2021)

**Synopsis**

*The basic responsibilities that a lawyer owes the client – competence, diligence, communication, and confidentiality - lie at the core of lawyer's professional obligations and remain unchanged irrespective of the lawyer's physical location. What has changed is discharging these responsibilities effectively in a world increasingly dominated by technology and, more recently, in an environment where lawyers are isolated from their clients, their partners, their opponents and the courts in the face of the COVID-19 pandemic. The role of the partners, managers and supervising attorneys, whose responsibilities include insuring that both attorneys and non-attorneys in the firm, regardless of their location, comply with the requirements of SCR Chapter 20, is of increasing importance. Although certain current modifications in practice may diminish as the pandemic does, many are likely to continue as the profession and technology evolve. This opinion addresses several ways a lawyer's responsibilities are affected.*

**Introduction**

Historically, the practice of law has been defined by in-person interactions: between lawyers and their clients, between opposing counsel, and through face-to-face discussions or contested hearings in court with all parties present to resolve clients' matters. Over time, technological advances have replaced many of these personal interactions, as well as other aspects of practice such as the transfer and storage of client information. In addition, it is expected that lawyers, like other professionals, will continue to work remotely in some form after the pandemic.

**The Applicable Rules**

Several rules are implicated when lawyers work remotely. These rules are SCR 20:1.1 Competence; SCR 20:1.3 Diligence; SCR 20:1.4 Communication; SCR 20:1.6 Confidentiality; SCR 20:5.1 Responsibilities of partners, managers and supervisory lawyers; SCR 20:5.3 Responsibilities regarding nonlawyer assistance, and SCR 20:5.5 Unauthorized practice of law; multijurisdictional practice of law.

**Competence**

SCR 20:1.1 requires a lawyer to provide competent representation to a client through reasonably necessary legal knowledge, skill, thoroughness and preparation.[1] When first promulgated as part of the ABA Model Rules of Professional Conduct in 1983 the rule's focus was on the importance of a command of the substantive[2] and procedural[3] aspects related to resolution of the client's legal problems. See ABA Comments. ¶¶1-6.

---

[1] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[2] *See Attorney Grievance Comm'n of Maryland v. Narasimhan*, 92 A.3d 512 Conduct 370 (Md. 2014) (inexperienced lawyer failed to properly file and manage client's permanent residency petition); *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Seyler*, 809 N.W.2d 766 (Neb. 2012) (lawyer mishandled personal injury case with resultant harm to client).

[3] *See In re Kellogg*, 4 P.3d 594 (Kan. 2000) (failure to properly serve out-of-state party in divorce proceeding); *In re Harris*, 180 P.3d 558 (Kan. 2008) (failure to follow required procedures to electronically file documents in bankruptcy court).

Procedural competence has also changed as a result of the pandemic. Many courts are operating under emergency orders subject to frequent modification. Scheduling is in a state of flux and hearings are increasingly conducted by video. At the time of this writing, the Wisconsin Supreme Court has ordered that local judicial districts develop plans to reopen their respective courts. See *In re the Matter of the Extension of Orders and Interim Rule Concerning*

In 2012 the ABA modified Comment [8] to Rule 1.1 to reflect the importance of competence in the use of technology:

> 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.[4]

Basic technological competence includes, at a minimum, knowledge of the types of devices available for communication, software options for communication, preparation, transmission and storage of documents and other information, and the means to keep the devices and the information they transmit and store secure and private.[5] Larger firms will often employ expert staff to address these concerns.

**Diligence**

SCR 20:1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client.[6] Generally, this rule has been viewed as requiring a lawyer to pursue a client's objectives promptly and thoroughly until its conclusion.[7] How this duty is discharged during a pandemic and working remotely presents unique challenges. This duty, however, requires reasonable diligence, which implies that particular circumstances may affect the parameters of this duty.

Notwithstanding the disruption caused by the pandemic, circumstances may delay court hearings or complicate legal and factual investigation. The lawyer must seek to proceed with the representation as to the best of their abilities under the circumstances. Much of the difficulty can be avoided if the lawyer's firm has a system in place to access files, conduct research, and facilitate collaboration with others in the notwithstanding the lawyer's physical isolation from others.

If delay in resolution of the client's case is unavoidable, the lawyer is required by SCR 20:1.4 to explain the circumstances to the client and the likely time frame for resolution.

---

*Continuation of Jury Trial, Suspension of Statutory Deadlines for Non-criminal Jury Trials, and Remote Hearings During the COVID-10 Pandemic*, Wis. S. Ct., May 22, 2020. https://www.wicourts.gov/ . It is likely different counties will adopt different procedures, all of which will be subject to ongoing modification. Counsel must take steps to be familiar with the procedures that control how the client's cases will be processed in the communities in which they practice.

[4] *See ABA Commission on Ethics 20/20 Report 105A* (2012). Wisconsin adopted this change in 2017. Sup. Ct. Order No. 15−03, 2016 WI 76. *See also Wisconsin Formal Ethics Op. EF-15-01 Ethical Obligations of Attorneys Using Cloud Computing*; *ABA Formal Ethics Op. 483* (2018) (ethical duties after a data breach or cyberattack); *District of Columbia Ethics Op. 371*; *Florida Ethics Op. 12-3* (2013); *New Hampshire Ethics Op. 2012-13/4* (2013); *New York County Ethics Op. 749* (2017). These opinions acknowledge that technical knowledge is an integral part of competence. More detailed discussion about the role of technology is included in other sections of this opinion.

[5] See Nicole Black, *7 types of tech tools to help lawyers set up virtual offices,* https://www.abajournal.com/web/article/law-in-the-time-of-coronavirus-what-tools-do-lawyers-need-to-set-up-virtual-offices; Christie, *What Should an Ethical Lawyer Know About Technology?* The Brief, Volume 46 Number 2 (2017). Smaller firms or sole practitioners may need to retain the services of an expert if they lack the knowledge to personally manage the technological aspects of practice.

[6] "A lawyer shall act with reasonable diligence and promptness in representing a client."

[7] The duty of diligence will vary depending on what services the lawyer will provide. For example, it will differ if the lawyer is only preparing a document as compared to conducting a trial, pursuing an appeal, or providing services of an ongoing nature. SCR 20:1.2(c).

Moreover, given that the present circumstances constitute a national health emergency of unknown duration, it may be appropriate for the lawyer to consider what steps may be necessary if the lawyer or the client becomes incapacitated.[8] Development of a succession plan is part of the lawyer's duty to provide competent and diligent representation.[9] In the firm context, management should consider which other members of the firm would be responsible for the unavailable lawyer's cases. If the lawyer is a sole practitioner, the lawyer should reach out to other lawyers to develop a plan to protect the clients in the event of the lawyer's impairment.[10]

**Communication**

SCR 20:1.4 addresses the lawyer's duty to communicate with the client.[11] The current pandemic or any other disaster or emergency makes regular contact with clients more important than ever. The client needs to know how to contact the lawyer just as the lawyer must know how to contact the clients.

For example, if telephone calls and e-mails are routed through the firm's communication system, the lawyers must regularly access office voicemail, e-mail and any other methods of client communication regularly used in the office to ensure no communications are missed. If firm lawyers work remotely, they must have a system in place to regularly handle mail – both timely sending and obtaining that which is delivered to the firm office.

The lack of personal contact with the client can create additional communication challenges. Video hearings often will not allow for confidential discussions between the lawyer and client, making advance preparation important. Execution and notarization of documents also present special challenges, which must be communicated to the client.

Issues of concern to clients will vary. Certain topics may be of special importance during a pandemic such as the impact of emergency court operations on the client's case or what steps are appropriate should the client become incapacitated. The latter question may involve discussions about powers of attorney or about identification of whom the lawyer should contact if the client is not able to maintain communication with the lawyer.

---

[8] *See ABA Formal Opinion 482* (2018) (Ethical Obligations Related to Disasters).

[9] See SCR 20:1.3, ABA Comment [5].

[10] See Kaiser, Shattuck, *Lawyer Death or Disability: Who Will Protect Your Clients? 91 Wisconsin Lawyer 3* (March 2018).]

[11] SCR 20:1.4 states:

(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 SCR 20:1.0 (f), 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 by the client 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.

**Confidentiality**

SCR 20:1.6[12] describes the lawyer's duty of confidentiality to the client. Perhaps no professional obligation has been impacted more by technology than the duty of confidentiality. The use of technology has increased convenience but has at the same time increased the risk of unauthorized access to an inadvertent disclosure of confidential client information.[13]

The 2012 Model Rule changes included modification of Rule 1.6. The ABA added subsection (d)[14] which states:

> 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.

ABA Comment paragraphs [18] and [19] were also modified to address the impact of technology on the duty of confidentiality:

> [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the

---

[12] SCR 20:1.6 states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  (1) to prevent reasonably likely death or substantial bodily harm;
  (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  (3) to secure legal advice about the lawyer's conduct under these rules;
  (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  (5) to comply with other law or a court order; or
  (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney−client privilege or otherwise prejudice the client.

(d) 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.

[13] *See generally 55 Law. Man. Prof. Conduct* 401-421 (2020).

[14] SCR 20:1.6 differs from the ABA version of the rule in a number of respects, one of which is that the new ABA subsection (c) is renumbered in Wisconsin as subsection (d).

reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Wisconsin adopted both of these changes in 2017.[15] The ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 477R (2017), explained that the change does not require specific security steps in all cases nor does it suggest that any breach automatically constitutes a rule violation. Instead, lawyers are required to make "reasonable efforts" to secure client information. What constitutes "reasonable efforts" is fact dependent based on consideration of a range of factors.

What information is protected and the exceptions that require or permit disclosure remain unchanged.[16] What has changed, however, is the variety of circumstances under which the lawyer's responsibility to protect the information from unwarranted disclosure. Compliance with these duties can be complicated, particularly when the lawyer is working remotely, physically separated from co-workers, staff, and the information to be protected.

**Responsibilities of partners, managers and supervisory lawyers**

SCR 20:5.1 addresses the duties that law firm partners, managers and supervisory lawyers have to provide reasonable assurance that all lawyers in the firm conform to the Rules.[17] Similarly, SCR 20:5.3 addresses

[15] Sup. Ct. Order No. 15−03, 2016 WI 76.
[16] The duty of confidentiality covers all information that relates to the representation of client, whatever its source. See SCR 20:1.6, ABA Comment [3].
[17] SCR 20:5.1 states:

the duties that partners, managers and supervisory lawyers have to provide reasonable assurance that the conduct of each nonlawyer, including consultants and vendors, is compatible with the Rules.[18] While the law firm's policies, procedures and supervision must provide reasonable assurance that all lawyers and nonlawyers comply with all of the Rules, the duties of competence, diligence, communication and confidentiality are especially critical when lawyers are working remotely.

Oversight of fellow professionals is challenging under any circumstance. It can be particularly challenging when those supervised are working in different, remote locations, separate from their supervisor and each other. Developing a structure to adhere to a schedule, facilitate collaboration, communication, and conduct regular meetings by videoconference can help achieve the level of supervision envisioned by the rules. Regular mandatory training, review of the circumstances of a remotely-working lawyer, the assignment of experienced mentors to new lawyers, and the creation of teams are also strategies that can facilitate efficiency in the context of remote work.

**Unauthorized Practice of Law**

Much attention has been given in the last two decades to regulation of unauthorized practice, primarily in the context of multi-jurisdictional work. In 1998 the California Supreme Court held that a New York firm with no physical presence in California violated that state's prohibition against unauthorized practice in its representation of a California client.[19] This decision sparked a national debate eventually leading to modifications of Model Rule 5.5, which became the basis for and is substantially equivalent to Wisconsin's SCR 20:5.5. Subsequently, advances in technology have made it possible for lawyers to easily work remotely and in virtual law practices.[20]

---

(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, 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.

[18] Similarly, SCR 20:5.3 states:

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 the 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 in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[19] See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998)

[20] In the late 1990s, the term "virtual office" became a common part of the industry lexicon. "In 2002, FisherBroyles

Lawyers practicing in virtual practices and lawyers working remotely during the pandemic have raised questions about the unauthorized practice of law. Although unauthorized and multi-jurisdictional practice involve a plethora of issues,[21] the focus of this opinion is whether a lawyer, while in a location where the lawyer is not licensed, may conduct a virtual practice in a jurisdiction where the lawyer is licensed.

Both Model Rule 5.5(b)(1) and SCR 20:5.5(b)(1) provide that a lawyer who is not admitted to practice in this jurisdiction shall not "establish an office or maintain a systematic and continuous presence in this jurisdiction for the practice of law." In December 2020, the ABA's Standing Committee issued ABA Formal Opinion 495 to provide guidance.

> Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis." A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence. Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law. (Footnotes omitted.)

Similarly, both Model Rule 5.5(b)(2) and SCR 20:5.5(b)(2) prohibit a lawyer who is not admitted to practice in this jurisdiction from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to the practice of law in this jurisdiction." ABA Formal Opinion 495 provides further guidance.

> A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website, letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

Based on the language of Model Rule 5.5, ABA Opinion 495 concluded:

---

LLP became the first full-service, Pure Virtual Law Firm relying exclusively on cloud-based applications formed in the United States. By 2011, according to Law Firm Suites, there were an estimated 200 to 300 Pure Virtual Law Firms in the U.S., in addition to the hundreds of attorneys practicing virtually and maintaining a virtual law office address. The concept and viability of *eLawyering* or a virtual law practice has been around now for about 10 years, more or less. For developers, of course, it has existed much longer than for users. But I think 2003 is a good year to target the time when lawyers began noticing movement to the cloud and the rise of cloud products, aided by the development of the iPad and tablets, smartphones getting smarter, and a general progression toward a device- driven world, wirelessly connected." https://ssensikombi.wordpress.com/2019/10/20/virtual-law-firms-law-firms- of-the-future%E2%80%8A-%E2%80%8Ahow-virtual-law-firms-are-doing-business-part-one/

[21] *See Annotated Model Rules of Professional Conduct* (Eighth Ed. 2015) 518-534; Wolfram, *Modern Legal Ethics* (1986) 824-856.

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, 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, unless otherwise authorized.

Two previous state ethics opinions reached the same conclusion. In Utah Ethics Opinion 19-03 (2019), the Ethics Advisory Committee questioned, "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah?" The Committee reached an emphatic conclusion, "none."

> The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business.

The Maine Professional Ethics Commission reached the same conclusion in Maine Ethics Opinion 189 (2005).[22]

Like the Utah Ethics Advisory Committee, we found no case where an attorney has been disciplined for practicing law out of a private residence for out-of-state clients located in the state where the attorney is licensed.

Based on the language of SCR 20:5.5, its purpose, and the other ethics opinions, we conclude that the Rule does not prohibit an out-of-state lawyer from representing clients from the state where the attorney is licensed even if the out-of-state lawyer does so from the lawyer's private location in Wisconsin. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state lawyer must not establish a public office in Wisconsin or solicit Wisconsin business unless otherwise authorized by law.

Each state, however, establishes its own laws and rules regulating the practice of law within its borders: there is no nationally uniform rule. Therefore, the question of whether a properly licensed Wisconsin lawyer, representing Wisconsin clients with respect to Wisconsin matters is engaged in unauthorized

[22] The Maine Ethics Opinion concluded:
[T]he mere 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. For example, an out-of-state lawyer who has a vacation home in Maine might bring work to Maine to complete while on vacation. 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. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine while the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

practice in another jurisdiction is dependent on the rules of the jurisdiction in which the lawyer is physically present. Thus, lawyers need to be mindful of the rules that apply in the jurisdiction in which they are located.

**General Guidance**

It is impossible to provide specific requirements for working remotely because lawyers' ethical duties are continually evolving as technology changes. It is possible, however, to provide some guidance.

**Cybersecurity Practices**

Because working remotely relies on technology, competence in technology and cybersecurity practices are essential. The following cybersecurity practices have been recommended by a number of ethics opinions[23] and other resources. None of these practices are new: they are reasonable precautions that have helped lawyers fulfill their ethical obligations, especially the duty of confidentiality, when working in the office and when working remotely, whether at home during evenings and weekends, or during travel for work or vacation.

- **Require strong passwords to protect data and to access devices.** The more complex the password, the less likely that an unauthorized user will be able to access data or devices by using password cracking techniques or software.

- **Use two-factor or multi-factor authentication to access firm information and firm networks.** Although requiring an additional authentication step, such as a six-digit code sent to the lawyer's phone or email, may seem inconvenient or burdensome, it is a reasonable precaution that increases protection and reduces the likelihood of unauthorized access by providing an additional layer of security beyond a strong password.

- **Avoid using unsecured or public WiFi when accessing or transmitting client information.** Hackers can access unencrypted information on unsecured WiFi and can use unsecured WiFi to distribute malware.

- **Use a virtual private network (VPN) when accessing or transmitting client information.** A VPN encrypts information and allows users to create a secure connection to another network.

- **Use firewalls and secure router settings.** A firewall monitors and controls incoming and outgoing network traffic based on predetermined security rules: it establishes a barrier between a trusted network and an untrusted network. A router connects multiple devices to the Internet, and connects the devices to each other.

- **Use and keep current anti-virus and anti-malware software.** Anti-virus and anti-malware both refer to software designed to detect, protect against, and remove malicious software.

- **Keep all software current: install updates immediately.** Updates help patch security flaws or software vulnerabilities, which are security holes or weaknesses found in a software program or operating system.

[23] *See, e.g.*, Wisconsin Formal Ethics Opinion EF-15-01: Ethical Obligations of Attorneys Using Cloud Computing (Amended September 8, 2017).

- **Supply or require employees to use secure and encrypted laptops.** All lawyers and staff should use only firm issued devices with security protections and backup systems and prohibit storage of firm or client information on unauthorized devices. All devices used by the lawyer, such as desktop computers, laptops, tablets, portable drives, phones, and scanning and copy machines, should be protected.

- **Do not use USB drives or other external devices unless they are owned by the firm or they are provided by a trusted source.**

- **Specify how and where data created remotely will be stored and how it will be backed up.**

- **Save data permanently only on the office network, not personal devices.** If saved on personal devices, taking reasonable precautions to protect such information.

- **Use reputable vendors for cloud services.** Transmission and storage of firm and client information through a cloud service is appropriate provided the lawyer has made sufficient inquiry that the service is competent and reputable.[24]

- **Encrypt emails or use other security to protect sensitive information from unauthorized disclosure.** A lawyer should balance the interests in determining when encryption is appropriate.

- **Encrypt electronic records, including backups containing sensitive information such a personally identifiable information.**

- **Do not open suspicious attachments or click unusual links in messages, email, tweets, posts, online ads.**

- **Use websites have enhanced security whenever possible.** Such websites begin with "HTTPS" in their address rather than "HTTP," and encrypt the communication.

- **Provide adequate security for video meetings or conferences.** The FBI has recommended the following steps: use the up-to-date version of the application; do not make the meetings public; require a meeting password; do not share the link to the video meeting on an unrestricted publicly available social media post; provide the meeting link directly to the invited guests; and manage the screen-sharing options.[25] In selecting a videoconferencing platform, the lawyer should make sure it is sufficiently secure both in its structure and its contractual terms of use, especially any terms on access to user information.[26]

---

[24] Wisconsin Formal Ethics Opinion EF-15-01.

[25] https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-ofteleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic.

[26] Lawyers must understand that if video conferences are recorded the vendor may retain a copy under the terms of service. *See INSIGHT: Zooming and Attorney Client Privilege*, https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQ1ZOVyIsImlkIjoiMDAwMDAxNzEtZWExYy1kMDAwLWE5N2YtZWE3ZTkwYWMwMDAxIiwic2lnIjoidVliaWhQR3J3ZmpWcDBKeE5KY1JYV1c0RlcwPSIsInRpbWUiOiIxNTkwMjQwMzM1IiwidXVpZCI6IndNWHUzdVFGajBEWGxkZFBKcTNSVVE9PU1ZZmVtSkhLU0hBMWtPNG8rTE50eGc9PSIsInYiOiIxIn0=?usertype=External&bwid=00000171-ea1c-d000-a97f-ea7e90ac0001&qid=6912181&cti=LSCH&uc=1320042032&et=SINGLE_ARTICLE&emc=bcvnw_cn%3A7&bna_news_ filter=true.

- **Do not have work-related conversations in the presence of smart devices such as voice assistants.** These devices may listen to and record conversations.[27]

**Training and Supervision**

To comply with the duties required by SCR 20:5.1 and 5.3, partners, managers and supervisory lawyers should consider whether the firm's policies and procedures are adequate to address the specific challenges that may arise when lawyers and nonlawyer assistants are working remotely.

- **Establish and implement policies and procedures for cybersecurity practices.** These policies and procedures should be in writing and provided to all lawyers and nonlawyer assistants, and stress compliance.

- **Establish and implement policies and procedures for the training and supervision of lawyers and nonlawyer assistants in the firm's cybersecurity practices.** Training is the most basic step in avoiding a cyberattack at a law firm. In other words, it is extremely important to develop a culture of awareness. The most serious vulnerabilities of a cybersecurity system are not the hardware or software, but rather the people who use it**.** It is estimated that 90% of cybersecurity breaches are due to human error.[28]

- **Establish and implement policies and procedures regarding remote work spaces to mitigate the risk of inadvertent or unauthorized disclosures of information relating to the representation of clients.** Remote workspaces should be private to ensure that others do not have access to phone conversations, video conferences, or case-related materials.

- **Hold sufficiently frequent remote meetings between supervising attorneys and supervised attorneys, and between supervising attorneys and supervised nonlawyer assistants to achieve effective supervision.**

**Preparing Clients**

Representing a client remotely may present challenges to competent representation.[29] Consequently, a lawyer should carefully consider whether the lawyer can adequately prepare the client to testify or for interviews while working remotely.

- **The lawyer and the client should have sufficient ability with the technology.**

- **The lawyer and the client should have access to relevant documents.**

- **The lawyer and the client have adequate time and attention to ensure the client's comfort with the communicating by the medium that will be used.**

---

[27] For example, Google and Amazon maintain those recordings on servers and hire people to review the recordings. Although the identities of the speakers are not disclosed to these reviewers, they might hear sufficient details to be able to connect a voice to a specific person. https://www.vox.com/recode/2020/2/21/21032140/alexa-amazon-google-home-siri-applemicrosoft-cortana-recording.

[28] https://www.techradar.com/news/90-percent-of-data-breaches-are-caused-by-human-error#:~:text=A%20new%20report%20from%20Kaspersky,carried%20out%20by%20cloud%20providers.

[29] The New York County Lawyers Association Formal Opinion 754-2020 at 3.

**Conclusion**

The COVID-19 pandemic has dramatically changed how lawyers work and represent their clients. Some of these changes may be temporary but others are likely part of a movement towards increased reliance on technology in the practice of law. As working remotely has become the new normal, lawyers must develop new skills and knowledge to comply with their core responsibilities.

## Virginia Legal Ethics Opinion Summaries[1]

| LEO# Date | Summary |
|---|---|
| **ABA 495 12/16/20** | A lawyer's "physical presence in the local jurisdiction [where she is physically located while representing clients in other jurisdictions] is incidental; it is not for the practice of law" – as long as the lawyer "is for all intents and purposes invisible as a lawyer to a local jurisdiction with the lawyer is physically located, but not licensed." Thus, such a lawyer does not violate ABA Model Rule 5.5 as long as she does not hold out to the public that she is authorized to practice in that jurisdiction, and does not practice that jurisdiction's law. Although a jurisdiction might consider that conduct to be the unauthorized practice of law, and has an interest in ensuring that such a lawyer is "competent," such a "local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction." Among the various ABA Model Rule 5.5 provisions allowing lawyers to practice in a jurisdiction where they are not licensed, lawyers can rely on ABA Model Rule 5.5 (c)(4)'s provision permitting "temporary" practice under specified conditions where they are not licensed – and "[Now long that temporary period lasts could vary significantly based on the need to address the pandemic." |
| **ABA 496 01/13/21** | Lawyers tempted to respond to "online criticism and negative reviews" must remember their confidentiality duty – which even covers "information in the public record." The only likely applicable exception in ABA Model Rule 1.6 (b)(5) applies "in a controversy between the lawyer and the client." Even if "an online posting rose to the level of a controversy between lawyer and the client, a public response is not reasonably necessary or contemplated...in order for the lawyer to establish a claim or defense." Lawyers may: (1) "request that the host of the website or search engine remove the post" (without revealing any protective client confidential information, but "staging] that the post is not accurate or that the lawyer has not represented the poster if that is the case"); (2) "give serious consideration to not responding to negative online reviews" to avoid generating more online activity that might increase search result visibility; (2) "respond with a request to take the conversation offline and to attempt to satisfy the person;" (3) post a disclaimer of representation if the poster is not a client or former client; (4) be careful not to disclose client confidences if the poster has a relationship to the representation, remembering that "[e]ven a general disclaimer that the events are not accurately portrayed may reveal that the lawyer was involved in the events mentioned, which could disclose confidential client information," (5) respond to a negative post as follows: "[p]rofessional obligations do not allow me to respond as I would wish." |
| **ABA 498 03/10/21** | Providing guidance for lawyers' virtual practice, defined as follows: "This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm. A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer have a brick-and-mortar office."; addressing: (1) competence, diligence and communication; (2) confidentiality; (3) supervision; also providing advice about "virtual practice technologies": (1) "Hard/Software Systems"; (2) "Accessing Client Files and Data; (3)"Virtual meeting platforms and video conferencing" (including the following advice: "Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for business/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform |

[1] These summaries were prepared by McGuire Woods LLP lawyer Thomas E. Spahn and are located online: https://leo.mcguirewoods.com/.

| | |
|---|---|
| | will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdictions. Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation, to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.'; (4) "Virtual Document and Data Exchange Platforms"; (5) "Smart Speakers, Virtual Assistants, and Other Listening - Enabled Devices" (including the following advice: "Unless the technology is assisting the lawyer's law 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. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.% also providing advice about lawyers' supervision duties over their subordinates/assistants and their vendors; concluding with a reminder that: (1) "lawyers practicing virtually must make sure the trust accounting rules, which vary significantly across states, are followed;" (2) "lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office."; and (3) "[i]f a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents." |
| **VA 1750 10/2/19** | A compendium opinion on lawyer marketing reflects the 7/1/17 ethics rules changes. First, lawyers must disclose that their advertising includes actors rather than lawyers "when the language used implies otherwise" (as when actors "use first person references to themselves as lawyers"). Second, lawyers may use a phrase such as "no recovery, no fee" only when they have already decided that the "client's responsibility for advanced costs and expenses will be contingent on the outcome of the matter." Third, law firms may not include the name of a lawyer "not associated with the firm or a predecessor of the firm," and must "actually practice" under their advertised name. It is "potentially misleading" for lawyers to advertise "the use of a non-exclusive office space" if lawyers do not provide legal services there. Fourth, lawyers may not advertise that would-be clients "will have to consult an attorney" before speaking with an insurance company representative. Fifth, lawyers may advertise their participation in lawyer referral services, as long as the service is: "operated in the public interest; is open to all area lawyers who meet the services requirements; requires service members to pay malpractice insurance or otherwise ensure financial responsibility; has adopted procedures for admitting and removing lawyers; prohibits any fee-generated referral to any lawyers who have an ownership interest in the service. Among other things, such referral service membership advertising may not: falsely imply that membership is based on some objective "quality of services" assessment; state or imply that the services contain all eligible lawyers; falsely state or imply that a "substantial number" of lawyers participate in the service. Sixth, although advertising specific or cumulative case results no longer must be preceded by a specific disclaimer, such advertisements "can be misleading." For instance, it would be misleading to advertise a $1,000,000 verdict if the lawyer's client had turned down a $2,000,000 settlement offer before trial. Seventh, lawyers may not use such "extravagant or self-laudatory" advertisements such as "the best lawyers," "the most experienced," etc. Eighth, lawyers may not advertise or use client testimonials that cannot be "factually substantiated" – the same standard as the lawyers' own advertisements. Lawyers may use "soft endorsements" that describe lawyers' return of clients' phone calls, appearance of concern, etc. Ninth, lawyers may list their inclusion in publications such as The Best Lawyers in America, but if they are |

| | |
|---|---|
| | delisted they must accurately state the "year(s) or edition(s) in which the lawyer was listed." Tenth, lawyers may advertise as a "specialist" or "specializing in" certain areas, as long as they can establish its accuracy. Eleventh, lawyers may advertise using terms such as "expert" or "expertise" if they can factually substantiate the description. |
| **VA 1850 01/6/21** | Lawyers frequently outsource legal and non-legal support services to lawyers and non-lawyers. Examples include “reproduction of materials, database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts” (but do not include a scenario in which a lawyer “is working under the direct supervision of lawyers in the firm and has full access to information about the firms clients, and therefore is associated with the firm”). Lawyers who engage in such outsourcing must comply with four duties. First, such lawyers must “exercise due diligence in the selection of lawyers or non-lawyers,” must take reasonable steps to assure that they comply with the lawyers’ ethical rules, must review their work “on an ongoing basis,” and must “remain ultimately responsible for [their] conduct and work product.” Lawyers arranging for overseas outsourcing “should” enter into a written agreement confirming these steps. Second, lawyers who hire “a temporary lawyer to work on a client’s matter” must advise the client. Similarly, such lawyers “must obtain informed consent from the client if the lawyer is outsourcing legal work to lawyer or non-lawyer who is not associated with or working under the direct supervision of a lawyer in the firm that the client retained, even if no confidential information is being shared outside of the firm.” Third, lawyers “must secure the client’s consent in advance” if they will share “confidential client information” to a lawyer or non-lawyer who is not “associated with the firm nor directly supervised” by a firm lawyer. Lawyers should obtain written confidentiality agreements, and “should also ask the nonlawyer whether he or she is performing services for any parties adverse to the lawyer’s client.” Fourth, lawyers charging clients for outsourced work as a disbursement must disclose any mark-up. Under ABA LEO 379 (12/6/93), lawyers need not disclose any mark-up or staffing agency fee if they outsource to lawyers or non- lawyers working “under the direct supervision of the lawyer such that they are considered ‘associated’ with the firm.” |
| **VA 1872 10/2/19** | Lawyers relying on non-exclusive "executive office rental" space or similar space must: (1) "act competently to protect the confidentiality of clients' information"; (2) take reasonable steps to "supervise subordinate lawyers and nonlawyer assistants" that are not located with the lawyer; (3) avoid advertising such "non-exclusive office space or virtual law office" as "a location of the firm" unless it is an "office where the lawyer provides legal services." |