Earlier this year, the legal profession was forced to adjust quickly and shift to a remote work environment when faced with the unprecedented COVID-19 public health emergency. Shifting to remote work raised questions and concerns about the ethical implications of working from home. While as a profession, many of us work when we are away from the office or are traveling, this prolonged period of remote work is unique. With so many changes and adjustments, the last thing anyone wants to do is violate an ethics rule.

This article, which I wrote from home, discusses the ethical challenges that can arise from remote work and addresses some of the common issues and questions about: (1) avoiding the unauthorized practice of law; (2) being competent in the face of changing technology; and, (3) communicating securely and confidentially when your home office may also be your child’s classroom.

Avoiding the Unauthorized Practice of Law

Not every attorney is admitted to practice law in the state where they live. Some lawyers, faced with months of working from home, relocated to be near family, or may have decided for a more dramatic change of scenery. Most attorneys did not stop to question whether there were ethical implications raised by working from home when their states or cities went into lockdown because of COVID-19. However, ethical issues can arise, particularly if the attorney is not admitted in the state from which they are working. And the answer to questions regarding the ethical implications of remote work are far from settled in most jurisdictions.

Let’s first start with the ethical rules. Many states have adopted part or all of the ABA Model Rules of Professional Conduct, which address the multijurisdictional practice of law and the unauthorized practice of law. That said, the ethics rules in each state are unique, and lawyers should definitely consult the rules applicable to the jurisdictions in which they are admitted and work. ABA Model Rule 5.5(a) states that 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. Model Rule 5.5(b) prohibits establishing an “office or other systematic and continuous presence” in a jurisdiction where the attorney is not admitted. However, ABA Model Rule 5.5(c)(4) allow lawyers to provide services on a “temporary” basis where the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

To date only one jurisdiction, the District of Columbia, has issued an opinion specifically related to COVID-19, entitled: “Teleworking from Home and the COVID-19 Pandemic.” Opinion 24-20 held that persons who are not members of the D.C. Bar may practice law from their homes or other locations within D.C., under its incidental and temporary practice rules. Similar to ABA Rule 5.5, D.C. allowed for the provision of legal services on an incidental and temporary basis if the lawyer is authorized to practice law and in good standing in another state or territory. The commentary to the rule explains that the exception recognizes that admission to the D.C. Bar is not required if a lawyer has an office outside of the District of Columbia and is incidentally and temporarily required to be in D.C. to provide legal services to a client.

In an opinion unrelated to COVID-19, the Florida Bar Standing Committee on the Unlicensed Practice of Law...
Law, concluded in Proposed Advisory Opinion 2019-4 issued August 17, 2020, that simply being located in Florida was not enough to constitute the unauthorized practice of law. In the case of a resident of Florida who was providing legal work to out-of-state clients from a Florida residence, the Committee stated the lawyer was not establishing a regular presence in Florida for the practice of law. Thus, it would not be the unauthorized practice of law for a Florida resident, employed by a New Jersey law firm, to work solely on matters that did not concern Florida law, without having or creating a public presence or profile in Florida as an attorney.

The current remote work situation is likely to be considered temporary and incidental to the practice of law in the jurisdiction in which they are licensed. It is important to note, however, that not every jurisdiction may agree. In the absence of an official opinion or other pronouncement, caution is always advisable. In other words, it is advisable to maintain a low profile and provide no outward indications that the lawyer is practicing law in the home. Lawyers in a temporary location should not hold themselves out as authorized to practice law in the jurisdiction if they are not admitted, and should not seek out clients or service clients in the jurisdiction. Further, lawyers should always use the street address and phone number of their resident office on all legal communications.

If a lawyer is considering a permanent work from home arrangement with their firm or agency in a jurisdiction where they are not admitted, they may need to seek admission to the state where they live. Under those circumstances, it would be difficult to assert that the lawyer’s practice is temporary or incidental, because it is permanent. Working in other jurisdictions may create tax obligations for their firm or organization, so it is always a good idea to let your firm know if you are relocating. Given the circumstances under which the current work-at-home situation arose, lawyers are probably at lower risk of being found in violation of unauthorized practice rules. However, there are no guarantees.

**Practicing Competently in the World of Remote Work**

Practicing competently embodies both technological competence and legal competence. ABA Model Rule 1.1 requires that lawyers provide competent representation to a client, which requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. These days, basic competency now also includes having knowledge and skills regarding the technology that is necessary to provide competent representation to a client.

Working remotely has brought several new technologies to the forefront, particularly video platforms that can be used for client or lawyer meetings. Gone are the days of dictating letters for someone else to type, and we have welcomed our electronic overlords that now allow (require) us to be on-the-clock and available to clients via email, video conference, social media, text, IM and phone. Technology is evolving at a rapid pace, and lawyers have been forced to evolve with it. If you are going to use technology, then you are obligated to know how it works, and how to use it properly.

To maintain legal competence, lawyers who are advising clients on COVID-19 related issues need to stay on top of a rapidly changing legal landscape. COVID-19-related court orders, laws and executive orders are frequently changing. Tax filing deadlines and relief programs may be subject to shifting deadline dates and eligibility criteria. There may also be court challenges to these proposed changes, which makes it even harder to give clear and competent advice to clients. As a result, lawyers must carefully research COVID-19-related issues before advising clients.

It is important for lawyers to keep up with changes regarding court closures and re-openings due to COVID-19, with particular attention to upcoming deadlines and hearing dates. For example, some federal agencies, such as the U.S. Citizenship and Immigration Services, put out guidance automatically extending due dates for certain kinds of filings during this period of emergency, but did not update the correspondence being sent to lawyers and their clients to indicate that the automatic extension applied to their filing. To avoid missing a deadline, lawyers should confirm that their deadline is, in fact, covered by an order extending deadlines. When in doubt, lawyers may want to err on the side of caution and make the filing on the original due date. While some courts have started to reopen in different states, it is often on a court by court basis, meaning that within a certain state, some courts may be open, and others are not. As a result, lawyers must keep careful track of various cases, discovery deadlines and appearance obligations.

Lawyers should also be careful not to allow their anxiety over the economy to cause them to accept cases that they would not ordinarily take, or to accept work outside their practice areas. Dabbling outside a practice area without the proper competency can lead to mistakes. Under the ethics rules, a lawyer can become competent in a new practice area, whether through
study or by associating with a lawyer experienced in the area, but those ethical requirements are not mere formalities. Winging it is never a good legal strategy.

## Communicating Securely and Confidentially

Working at home can present challenges to safeguarding, storing and transmitting protected information. With new technologies have come concerns about cybersecurity, including protecting communications and the duty to supervise lawyer and non-lawyer subordinates in the use of technology. Cybercrime and hacking are on the rise because working remotely presents new vulnerabilities that can be exploited. Clients provide personal information about themselves and their cases to lawyers, and lawyers are ethically obligated to safeguard clients’ electronically stored information. When a lawyer’s office is also their dining room table, maintaining the confidentiality of documents and communications can be challenging.

As lawyers, we are ethically obligated to maintain client confidentiality. ABA Model Rule 1.6 requires lawyers to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. Under ABA Rule 5.1, lawyers having supervisory authority over other lawyers are required to make reasonable efforts to ensure that the other lawyers conform to their ethical obligations. Under Rule 5.3, lawyers are also required to make efforts to ensure that the conduct of their nonlawyer staff is compatible with the professional obligations of the lawyer. In a remote work environment, it can be challenging to make sure proper steps are being taken across the organization to ensure that everyone who has access to confidential client information or data complies with the applicable rules of professional conduct with regard to data access and maintains the confidentiality of any discussions regarding client matters. But, it is critically important that those steps are being taken because the failure to adequately protect sensitive communications can result in ethical violations or a waiver of attorney-client privilege.

### Information Systems/Technology Security

The news is full of stories about phishing, ransomware, and cyberattacks against law firms. Law firms or legal service agencies are often seen as attractive targets for cybercrime because lawyers have a lot of sensitive client information, including financial information, and lawyers are not always the most technologically savvy.

Because lawyers and legal staff are working remotely, it is important to have organizational protocols that support and encourage cybersafety. The failure of an organization to have adequate cyber-protections can expose lawyers to malpractice liability or ethical violations. For example, lawyers should never use their personal email for their legal work, whether it is communicating with a client or mailing themselves documents or other information to work on via a non-work computer or device. Mailing client or other work-related documents to download on a personal home computer may also make those documents vulnerable to hacking. Personal email accounts often lack the security necessary to protect sensitive information and are vulnerable to hackers. The terms of service for many “free” email platforms state that the service provider can mine or search accounts for keywords or other information that is used for data analytics or targeted advertising. Firm and client email should be sent, received and responded to via firm systems and platforms.

The failure to use firm systems, when available, can lead to violations of a lawyer's ethical obligation of confidentiality. Lawyers have been cautioned for years against using free Wi-Fi networks that are often found in hotels, restaurants and coffee shops because privacy may be compromised. Working remotely from home is no different. Home-based wireless networks should be secured and password protected. Lawyers should use work servers and work email for their legal work. These systems tend to be encrypted and secured by technologies like two-factor authentication and password protection. Firms and other organizations often have policies that require stronger passwords and will often utilize firewalls or other software that prevents access to unsecure websites. Work email systems will scan for metadata and clean documents before sending information externally. Work email systems will often quarantine suspected spam or malware before it reaches the lawyer’s mailbox.

Videoconference platforms can also present hazards when it comes to privacy and confidentiality. In the remote work environment, videoconferences have become a common way for lawyers to communicate. Unfortunately, videoconferences have also become a frequent target of hackers seeking to “hijack” the call. These “hijacks” can compromise client confidentiality and privilege. In March 2020, the FBI issued a warning about teleconference hijacking and recommended...
that users take steps to mitigate the threat, including keeping meetings private, requiring password protection, keeping links private and limited only to meeting participants, controlling screen sharing options and making sure users were using an updated version of the application. Also keep in mind that video calls may be recorded by the host, but a participant can also take screen shots of calls or record their own computer. Some law firms and organizations have added video-conference platforms to their own firm networks, which may provide an additional layer of security to the calls. Lawyers should always use the videoconferencing platform that is approved by their organization.

**Communicating Confidentially**

When having confidential conversations, it is advisable that attorneys be aware of the capabilities of their smart speakers and other artificial intelligence devices. It may be that your smart TV or your virtual personal assistant is listening to your conversations and gathering information that you have an ethical obligation to keep confidential. When on, or “awake,” these devices can stream recordings from the user’s home and these recordings are available to the company and potentially subject to discovery via subpoena. Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2020-300, issued in April 2020, notes that devices such as Amazon’s Alexa or Google’s voice assistants maintain these recordings on servers and hire people to review the recordings. Lawyers who have such devices in their home should be knowledgeable about the features of such devices, as well as how to review and delete information that may have been recorded by them.

Technology aside, a lawyer must also ensure that their remote workspace is designed to protect against the disclosure of confidential communications. Many lawyers face privacy challenges from sharing home offices with spouses, children or roommates. When sharing space with others, it is important to have a location in the home (or other remote workspace), where a lawyer can take a call or a videoconference in private, whether it is outside or in the basement. Work phones can often be forwarded to multiple locations, including a computer or a personal phone, and these options can provide needed flexibility for taking calls away from the dedicated workspace.

When lawyers walk away from their workspace, or take a break, it is advisable to lock the computer screen to prevent the inadvertent disclosure of client confidences, including draft documents, emails, or other correspondence. While many offices have a policy requiring lawyers and other staff to lock their screens when they are away from their desk, it is easy to forget to do so when the remote office is a kitchen that others may walk through. The remote workspace is no different than the office, except without the commute, and it should be treated like the office, to the extent possible.

Paper files and other documents also must be protected from inadvertent disclosure. Client documents should be kept in file folders or a place otherwise not easily accessible to others. Maintaining a home storage system can help keep client and other work documents organized and protected. Attorney notes and printouts should not be left where they can be read by others. Documents that are no longer needed should be shredded at home, or brought into the office for proper disposal. Confidential client documents and information should never be put into a home recycling bin or trash.

**Conclusion**

The COVID-19 pandemic has disrupted many aspects of the practice of law and has renewed the focus on how lawyers can practice law ethically when they are not in their physical offices. Lawyers need to be aware that their ethical obligations are the same whether they are working at home, on the road, or in the office. Being mindful of competence and confidentiality can help avoid ethical violations, but it is also important for lawyers and staff to communicate with each other and their organizations. The remote workplace may very well be here to stay, in some form, as it seems less and less likely that the practice of law will completely return to what we once considered “normal.” Lawyers and their law firms or legal organizations need to anticipate and plan for the new normal. Clients need to be reassured that, despite the uncertainty swirling around everything, their lawyer’s commitment to providing competent and ethical service remains unchanged.

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