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Ethical Issues When Working Remotely (or did Alexa just waive privilege?)

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A. INTRODUCTION

In a nationwide survey of lawyers conducted at the beginning of April, almost 90% of respondents reported that their offices were operating remotely in full or at least in part due to the COVID-19 pandemic.¹ By June, the percentage of firms surveyed who were working remotely in part or fully had dropped to 56%.² The 34% decrease in remote operations is likely the result, at least in part, of relaxed or expired state and local stay-at-home orders.³ Despite this decrease, it is foreseeable that some number of lawyers will continue to work remotely, perhaps due to health concerns or to increasing responsibilities that ensued in the wake of the pandemic such as educating and caring for children and others at home. Even lawyers unburdened by those kinds of responsibilities might prefer to continue to work remotely due to the flexibility that remote working allows.⁴ Many are predicting that the legal industry will continue to work remotely in some fashion even when the pandemic is over rather than reverting to the traditional brick-and-mortar practice of law.⁵

How does this “new normal” impact lawyers’ ethical obligations to their clients? The easy answer is that the rules of professional conduct continue to apply despite the pandemic.⁶ Nonetheless, it is worth reexamining several ethical duties that are implicated when practicing law remotely. This article considers the following ethical duties:

- Competence and diligent representation (Rule 1.01)⁷
- Communication (Rule 1.03)

¹ Martin Cogburn, *How Law Firms are Responding to Covid-19-Remote Work*, <https://www.mycase.com/blog/2020/04/survey-results-how-law-firms-are-responding-to-covid-19-remote-work/>.

The survey was conducted from April 8-10, 2020, and involved 819 respondents.

² Martin Cogburn, *How Law Firms are Adapting to New Normal of COVID-19 – State of Office and Challenges*, <https://www.mycase.com/blog/2020/07/new-survey-results-how-law-firms-are-adapting-to-new-normal-of-covid-19-state-of-office-challenges/>.

³ *Id.*

⁴ See, e.g., 2019 Millennial Attorney Survey, *New Expectations, Evolving Beliefs and Shifting Career Goals*, https://cdn2.hubspot.net/hubfs/209075/MLA_MillennialSurvey_040519_forWeb-1.pdf?hstc=51254006.713226280951a037a37ce402169ad1bc.1604758029585.1604758029585.1604758029585.1&hssc=51254006.1.1604758029585&hsfp=176983327. This Above the Law survey of over 1,200 respondents indicates that 75% of millennial lawyers would prefer a more flexible work schedule to more pay.

⁵ See, e.g., Law360, *New Normal of Legal Telework Likely to Outlast Pandemic* (July 24, 2020), <https://www.law360.com/articles/1295207/new-normal-of-legal-telework-likely-to-outlast-pandemic>; Bloomberg Law, *Analysis: The New Normal-Law Firms May Never be the Same* (May 7, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-new-normal-law-firms-may-never-be-the-same>; David Lawson, *The Coronavirus Pandemic Could Mark the Dawn of the Virtual Office Revolution in the Legal Industry*, ABA Journal (Apr. 2, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/04/virtual-office-revolution/.

⁶ See, e.g., ABA Formal Opinion 482 (2018) (the rules of professional conduct continue to apply despite a natural disaster). Numerous state bars have issued ethics opinions and other guidance in response to COVID-19. See, e.g., PA Formal Opinion 2020-300, *Ethical Obligations for Lawyers Working Remotely* (Apr. 10, 2020), <http://www.pabar.org/site/Portals/0/Ethics%20Opinions/Formal/F2020-300.pdf?ver=2020-04-21-111114-117>; NYSBA, *Cybersecurity Alert: Tips for Working Securely While Working Remotely* (Mar. 12, 2020), <https://nysba.org/app/uploads/2020/03/NYSBA-Cyber-Alert-031220.pdf>.

⁷ Unless otherwise stated, references to Rules are to the Texas Disciplinary Rules of Professional Conduct.

- Confidentiality (Rule 1.05)
- Remote supervision of junior lawyers and non-lawyers (Rules 5.01 and 5.03)

The discussion that follows may need to be tailored depending on the type and size of your law practice.⁸ For example, large law firms presumably are better resourced as compared to solo practitioners and smaller firms, and thus, larger firms might be expected to implement more sophisticated security measures. There also may be special considerations for in-house legal departments and government lawyers. Moreover, the sensitivity of data that must be protected surely will vary depending on the type of practice. Also, keep in mind that a distinction should be made between what is minimally required to satisfy your ethical obligations as opposed to what are best practices.

B. RULE 1.01: COMPETENT AND DILIGENT REPRESENTATION

It goes without saying that lawyers must possess the requisite legal knowledge, skill, and training to fulfill their ethical obligations to their clients. This obligation is expressed in Rule 1.01(a), which provides in relevant part that “A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer’s competence.”⁹ When COVID-19 hit the United States and quickly began spreading, countless lawyers had to pivot their practices. For some, it was keeping up with evolving court and agency closures. For many others, the pandemic has undoubtedly uncovered novel legal issues in areas such as employment law and health law, as well as a host of contracts issues. Still other lawyers have had to study and investigate laws that have been enacted in response to COVID-19 such as the Payroll Protection Program and the economic impact payments made by the Treasury Department to individuals earlier this year.¹⁰ The comments to Rule 1.01 make clear that lawyers can agree to a representation without having the requisite legal knowledge so long they can become competent through study and investigation.¹¹

In 2019, the duty of competence applicable to Texas lawyers was expanded beyond substantive competence to include technological competence.¹² No disciplinary action may arise for being technologically incompetent because only the comments were amended, as opposed to the competency rule itself.¹³ Nonetheless, the practice of law in a remote environment is inextricably reliant on technology. It would be difficult to competently represent clients without the ability to navigate video conferencing platforms, to access email communications and documents remotely,

⁸ See generally ABA CYBERSECURITY LEGAL TASK FORCE, THE ABA CYBERSECURITY HANDBOOK (2d ed. 2018) (discussing cybersecurity in the context of different legal practice settings, including large and small firms, in-house counsel, government lawyers, and public interest attorneys).

⁹ “Competence” refers to the “possession of legal knowledge, skill, and training reasonably necessary for the representation.” Rule 1.01, cmt. 1, referring to Terminology section in the Preamble to the Rules.

¹⁰ Coronavirus Aid, Relief, and Economic Security Act, P.L. 116-136, 3/27/2020.

¹¹ Rule 1.01, cmt. 4.

¹² Rule 1.01, cmt. 8 (lawyers should “strive to become and remain proficient and competent in the practice of law, *including the benefits and risks associated with relevant technology*”) (emphasis added). This 2019 change substantially follows a 2012 change to the ABA’s Model Rule regarding competence, which provides: “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*.” ABA Model Rule of Professional Conduct 1.1, cmt. 8 (emphasis added).

¹³ TRPC, Preamble: Scope ¶ 10.

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