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It's Zoom's World, We're Just Living in It: Confidentiality and Ethics in Video Conferencing

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It is difficult to dispute that the COVID-19 global pandemic has fundamentally altered how we live and work, and school districts in Texas are no exception. One of the most significant changes has been the rise of video conferencing, which has transitioned from an occasional convenient instrument to a vital component of the workplace, social and family interactions, and classes and conferences. The year 2020 saw an unprecedented rise in the use of video conference services such as Zoom, Google Meet, Cisco Webex, GoToMeeting, and Microsoft Teams, to name a few. As an example, Zoom reports that as of the end of December 2019, the highest number of daily meeting participants it had ever had on its platform was approximately 10 million.¹ Less than four months into 2020, Zoom reported that it had passed 300 million daily meeting participants.²

While there is no doubt many of us are itching to get back to “life as normal,” it would be foolish to assume video conferencing will disappear when the pandemic ends. Attorneys have increasingly turned to these platforms to provide legal services to clients and will more than likely continue to do so in the years to come. Although these technologies have proven invaluable in ensuring a continuity of legal services while schools and offices are closed, the school law community should consider the ethical implications of delivering remote legal services.

Competent and Diligent Representation

Both the the Texas Disciplinary Rules of Professional Conduct (the “Texas Rules”) and the American Bar Association Model Rules of Professional Conduct (“ABA Rules”) require an attorney to engage in competent and diligent representation.³ More specifically, the Texas Rules require that “[i]n representing a client, a lawyer shall not neglect a legal matter entrusted to the lawyer; or frequently fail to carry out completely the obligations

¹ Eric S. Yuan, *A Message to Our Users*, ZOOM BLOG, April 1, 2020, <https://blog.zoom.us/a-message-to-our-users>.

² *90-Day Security Plan Progress Report: April 22*, ZOOM BLOG, April 22, 2020, <https://blog.zoom.us/90-day-security-plan-progress-report-april-22>.

³ MODEL RULES OF PROF'L CONDUCT 1.1; Tex. Disciplinary R. Prof'l Conduct 1.01.

that the lawyer owes to a client or clients.⁴ Further, the Texas Rules tell us that “[a] lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness *despite opposition, obstruction or personal inconvenience* to the lawyer.”⁵ (Emphasis added).

It would be difficult to find a lawyer who has practiced law since March 2020 who *has not* experienced “opposition, obstruction or personal inconvenience” – in fact, if The Year 2020 wrote an autobiography, *Opposition, Obstruction or Personal Inconvenience* would be an apt title. Just like educators across the state can provide countless examples of the difficulties in educating students remotely, many attorneys have expressed frustration in trying to advise clients without the benefit of interacting in-person. This past year is likely the most many lawyers have engaged in remote practice via video conferencing, and it appears likely that the remote workplace is not going away anytime soon.⁶ As such, it is imperative that a lawyer’s remote practice is not a barrier to competent representation.

While neither the Texas nor ABA Rules directly address practicing via video conference, both acknowledge the use of technology. In 2019, the Texas Supreme Court added the following language to a comment under Rule 1.01: “[e]ach lawyer should strive to become and remain proficient and competent in the practice of law, *including the benefits and risks associated with relevant technology*.”⁷ (Emphasis added). Before 2020, a lawyer might have decided that it was too risky to use video conferencing in the lawyer’s practice because of uncertainty with how to use the technology or cybersecurity concerns and would therefore avoid it. Such a decision is much more difficult today; choosing not to interact with clients via video conferencing could narrow a lawyer’s client base or significantly reduce the lawyer’s ability to provide competent legal advice. Many clients

⁴ Tex. Disciplinary R. Prof’l Conduct 1.01(b)(1),(2).

⁵ Tex. Disciplinary R. Prof’l Conduct 1.01 cmt. 6.

⁶ Robert I Sutton, *Remote Work is Here to Stay. Bosses Better Adjust.*, THE WALL STREET JOURNAL,

August 2, 2020, <https://www.wsj.com/articles/remote-work-is-here-to-stay-bosses-better-adjust-11596395367>; Heidi Green, *Four Reasons Remote Work is Here to Stay (And How Employers Can Prepare)*, FORBES, June 3, 2020,

<https://www.forbes.com/sites/forbescommunicationscouncil/2020/06/03/four-reasons-remote-work-is-here-to-stay-and-how-employers-can-prepare/?sh=308bc4487195>.

⁷ Tex. Disciplinary R. Prof’l Conduct 1.01 cmt. 8.

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