

PRESENTED AT

The University of Texas School of Law
56th Annual William W. Gibson, Jr. Mortgage Lending Institute

September 29-30, 2022
AT&T Conference Center
Austin, TX

The Ethics of Practicing Law Remotely: How to Ethically Navigate the Remote Practice of Law Post-Covid

Carrie Johnson Phaneuf
Michelle D. Daniel

Carrie Johnson Phaneuf
Cobb Martinez Woodward, PLLC
Dallas, TX

cphaneuf@cobbmartinez.com

214-220-5206

Michelle D. Daniel
Cobb Martinez Woodward, PLLC
Dallas, TX

mdaniel@cobbmartinez.com

214-220-5238

TABLE OF CONTENTS

| | Page(s) |
|---|---------|
| Table of Contents..... | i |
| The Ethics of Practicing Law Remotely: How to Ethically Navigate the Remote Practice of Law Post-Covid..... | 1 |
| I. Introduction | 1 |
| a. The Covid-19 Pandemic Led to a Sea Change in the Way We Work | 1 |
| b. Ethical Implications of Remote Practice | 1 |
| II. ABA Formal Opinion 498, March 2021 | 2 |
| a. The Same Ethical Rules Apply to Both Traditional and Virtual Law Practice | 2 |
| III. Competence and Diligence | 2 |
| a. ABA Formal Opinion 482..... | 2 |
| b. ABA Model Rule 1.1 | 3 |
| i. Comment 8 to Rule 1.1 – Keeping up with Technology..... | 3 |
| c. ABA Model Rule 1.3 – Diligence..... | 3 |
| d. Texas Disciplinary Rule of Professional Conduct 1.01 – Competence and Diligence..... | 4 |
| e. Managing Risk Factors Involved in Remote Practice | 5 |
| f. Maintaining Competence also Means Maintaining your Mental, Emotional and Physical Health..... | 6 |
| g. Scams Targeting Attorneys | 6 |
| IV. Communications | 6 |
| a. Model Rule 1.4..... | 6 |
| b. Texas Disciplinary Rule of Professional Conduct 1.03 | 7 |
| c. Duty to Communicate Remains the Same – or is Probably Increased | 7 |
| d. Failure to Communicate is one of the most common complaints in State Bar Grievance Proceedings | 8 |
| e. Beware of Unfortunate Emails | 8 |
| V. Confidentiality of Client Information | 8 |
| a. Model Rule 1.6..... | 8 |
| b. ABA Formal Opinion 477R | 9 |
| c. Texas Disciplinary Rule of Professional Conduct 1.05 | 10 |
| d. Texas Ethics Opinion 648 | 11 |
| e. Texas Ethics Opinion No. 680 | 12 |
| f. Tips and Tools for Maintaining Confidentiality..... | 12 |
| VI. Supervision..... | 13 |
| a. Model Rule 5.1 and Comments | 13 |
| b. Model Rule 5.3 and Comments | 13 |
| c. Texas Disciplinary Rule of Professional Conduct 5.01 | 14 |
| d. Texas Disciplinary Rule of Professional Conduct 5.03 | 14 |
| e. Virtual Practice Requires the Same, if not More, Diligence in Supervision | 14 |
| f. Policies, Procedures and Training of Employees in Reasonably Secure Methods of Electronic Communications | 15 |
| i. ABA Formal Opinions 477R and 498 | 15 |
| ii. BYOD policy..... | 16 |
| iii. Virtual Private Network (VPN) | 16 |
| iv. Clean Desk or Clean Screen Policies | 16 |

| | | |
|-------|---|----|
| VII. | Technology Safeguards | 17 |
| a. | ABA Formal Opinion 498..... | 17 |
| i. | Hard/Software System Security..... | 17 |
| ii. | Ensuring Remote Access to Client Files and Data..... | 17 |
| iii. | Video Conferencing and Virtual Meeting Platforms..... | 18 |
| iv. | Virtual document and data exchange platforms | 19 |
| v. | Smart speakers, virtual assistants, other listening-enabled devices..... | 19 |
| b. | Best Practices for Cybersecurity | 19 |
| i. | Require strong passwords | 19 |
| ii. | Two-factor/ multi factor authentication | 19 |
| iii. | No Unsecured or Public Wi-Fi | 20 |
| iv. | Virtual Private Network (VPN) | 20 |
| v. | Firewalls and Secure Router Settings | 20 |
| vi. | Maintain Current Anti-Virus and Anti-Malware Software | 20 |
| vii. | Keep Software Current – Install Updates Immediately | 20 |
| viii. | Supply Encrypted and Secure Laptops..... | 21 |
| ix. | Do not use USB devices that are Not from a Trusted Source..... | 21 |
| x. | Storage and Backup of Remotely Created Data | 21 |
| xi. | Save Data on Firm Network – Not Personal Devices | 21 |
| xii. | Use Reputable Vendors for Cloud Services | 21 |
| xiii. | Encrypt Email or Use other Security to Protect Client Information | 21 |
| xiv. | Encrypt Electronic Records that contain Sensitive/Confidential Information..... | 22 |
| xv. | Do not Open Suspicious Attachments or Click on Unusual Links | 22 |
| xvi. | Use Websites with Enhanced Security..... | 22 |
| xvii. | Do not have Work-Related Conversations in the Presence of Smart Devices | 22 |
| VIII. | Safeguarding Client Property | 22 |
| a. | Trust Accounting Rules | 23 |
| b. | Texas Disciplinary Rule of Professional Conduct 1.14 | 23 |
| c. | Unearned fees, Trust accounts and Operating Accounts | 24 |
| d. | State Bar of Texas – A Lawyer’s Guide to Client Trust Accounts | 24 |
| IX. | Interstate Virtual Practice and the Unauthorized Practice of Law | 24 |
| a. | ABA Formal Opinion 495..... | 25 |
| b. | Texas Rules on Unauthorized Practice of Law | 26 |
| i. | Texas Disciplinary Rule of Professional Conduct 5.05 | 26 |
| ii. | Definition of the Practice of Law in Texas – Texas Gov’t Code § 81.101..... | 27 |
| iii. | Ethics Opinion 686 | 28 |
| iv. | Ethics Opinion 597 | 28 |
| v. | Ethics Opinion 516 | 29 |
| X. | Conclusion..... | 30 |

The Ethics of Practicing Law Remotely:
How to Ethically Navigate the Remote Practice of Law Post-Covid
By Carrie Johnson Phaneuf and Michelle D. Daniel¹

I. Introduction

a. The Covid-19 Pandemic Led to a Sea Change in the Way We Work

The unforeseen events of the Covid-19 pandemic in 2020 forced many businesses to close their doors temporarily and move day-to-day operations off-site, requiring employees to work remotely. Thankfully, enhanced technology already in existence, such as Zoom™ and Microsoft Teams™, developed even more rapidly in response to the dire needs of the pandemic, allowing remote videoconferences. Cloud-based document storage services, readily available wi-fi, and other technological developments allowed attorneys and even entire law firms to practice law from virtually anywhere.

Surprisingly, the shift to remote work appears to be permanent. As one commentator recently noted, only a third of workers are back in the office full time, and executives expect that number may fall as low as 20% in the future.² Law firms are no exception. A 2021 survey of legal professionals found that 53% of law firms intended to allow attorneys and staff to work remotely full-time once offices reopened after the pandemic, and 70% planned to allow part-time remote work for lawyers and law firm staff,³ with the result that more and more law firms now allow attorneys and staff to work remotely all or part of the time. It is hard to imagine a more dramatic change for a profession that, historically, “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.”⁴

b. Ethical Implications of Remote Practice

Not surprisingly, this dramatic change—working almost entirely from home, without colleagues and support staff close by—also created a host of new logistical and ethical issues for attorneys, affecting duties of competence, diligence, communication, confidentiality, supervision, as well as the unauthorized practice of law, to name just a few. This paper is intended to give guidance on what the ethical rules for attorneys require with respect to the remote practice of law. **(Disclaimer: this strictly an ethics paper, and not a tech-based paper. To ensure that your firm meets the technical requirements necessary to fulfill its ethical duties, we**

¹ Carrie Johnson Phaneuf is a member at Cobb Martinez Woodward, PLLC. Michelle Daniel is a senior associate at the firm.

² *The Office is Dying. It's time to Rethink How We Work*, THE EZRA KLEIN SHOW (Aug. 16, 2022), <https://www.nytimes.com/column/ezra-klein-podcast>.

³ Nicole Black, *A Remote Work Ethics Roundup*, ABOVE THE LAW (Dec. 9, 2021), <https://abovethelaw.com/2021/12/a-remote-ethics-roundup/>.

⁴ Wisconsin Formal Ethics Op. EF-21-02: Working Remotely, at 1.

strongly encourage you to retain expert consultants to review your computer systems, internet connections, and document management systems and upgrade them as needed). Having said that, we will offer the following overview of the ethical implications of the remote practice of law.

II. ABA Formal Opinion 498, March 2021

About one year into the pandemic, the American Bar Association issued Formal Opinion 498, “Virtual Practice,”⁵ to specifically address many of the ethical issues raised by the remote practice of law.

a. The Same Ethical Rules Apply to Both Traditional and Virtual Law Practice

ABA Formal Opinion 498 affirms that the same ethical rules attorneys are required to follow every day, concerning competence, diligence, communication, confidentiality, and supervision, apply equally, if not more so, to virtual practice.⁶ In other words, if you are prohibited from doing something in person, such as communicating with certain witnesses during trial, or from sharing confidential information, you are still prohibited from doing so if you are working virtually. To meet your ethical obligations in this new age of virtual work, you must make sure that your firm’s technology, policies regarding those you supervise, and each attorney’s out-of-office virtual work environment is consistent with your ethical obligations.

III. Competence and Diligence

A lawyer remains bound by his duties of competence and diligence in all types of circumstances, even in the face of disasters such as hurricanes, fires, flooding, and pandemics. In 2018, the American Bar Association Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 482, “Ethical Obligations Related to Disasters.”⁷ Although we could not know in 2018 that there would be a pandemic in 2020, Opinion 482 provided much guidance to attorneys in the early days of the pandemic as it related to virtual practice.

a. ABA Formal Opinion 482

In the event of a disaster, where an attorney may be unexpectedly thrust into practicing virtually, attorneys must have a business continuation plan to keep clients apprised of their matters and to keep matters moving forward competently and diligently.⁸ This includes “implement[ing] reasonable measures to safeguard property and funds of clients or third parties,

⁵ ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 498 (2021).

⁶ *Id.* at 2-3.

⁷ ABA Comm. On Ethics & Prof’l Responsibility, Formal Op. 482 (2018).

⁸ See Hannah Dyal, *Are You Ready Now? Building a Disaster Plan for your Law Practice*, TEXAS BAR JOURNAL, June 2021, at 518.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: The Ethics of Practicing Law Remotely

First appeared as part of the conference materials for the
56th Annual William W. Gibson, Jr. Mortgage Lending and Servicing Institute session
"The Ethics of Practicing Law Remotely"