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

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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**

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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.

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