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Ethics & Cybersecurity in the Virtual Practice of Law

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I. Introduction.

The pandemic changed the way many industries operate, allowing companies to reduce costs and increase flexibility for their employees by increasingly permitting remote work.¹ Though not at the forefront of industries making the switch to virtual practice,² the legal industry is included.³ A recent national survey by the ABA reported that most lawyers want the option to work from home, and that most workplaces accommodate.⁴ The ABA found that about 30% of lawyers work from home all the time, and most respondents agreed that “courts should allow remote court-ordered mediations (82%), depositions (88%), pretrial hearings (93%), and even bench trials (64%)”.⁵

While the Rules of Professional Conduct permit virtual practice, the rules do not relax to accommodate it.⁶ Practicing law virtually raises ethical concerns that can be traps for the unwary.⁷ This paper will discuss ethical concerns implicated by the virtual practice of law, including the unauthorized practice of law, the duties of competence, communication, and confidentiality, as well as implications for data security and the duty to supervise one’s associates and staff.

Disclaimer: This paper is not intended to provide or substitute legal advice, nor does it offer technical advice pertaining to appropriate technology or cybersecurity measures. For these purposes, the authors recommend you consult your local ethics committee and respective experts.

¹ Katherine Haan & Kelly Main, *Remote Work Statistics and Trends in 2024*, FORBES ADVISOR (June 12, 2023, 5:29am), <https://www.forbes.com/advisor/business/remote-work-statistics/> (stating that “[r]esearch shows that employers can save \$11,000 per employee when switching to remote work” and referencing the flexibility associated with working remotely).

² *Id.* (listing industries and occupations leading the way in the switch to remote work).

³ *Virtual Depositions: A Guide for Success*, JDSUPRA (May 17, 2023), <https://www.jdsupra.com/legalnews/virtual-depositions-a-guide-for-success-4667236/> (“Up to 90% of depositions taken throughout the height of the pandemic were virtual, and that short-term need has generated a long-term change”); Eric L. Toscano, *The Virtues of Going Virtual*, Plaintiff Magazine, <https://plaintiffmagazine.com/recent-issues/item/the-virtues-of-going-virtual> (discussing the post-COVID transition to virtually practicing law and recommending law firms transition to virtual law firms).

⁴ *ABA Survey: Most Lawyers Want Options for Remote Work, Court and Conferences*, ABA (Sept. 28, 2022), <https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote>

work/#:~:text=The%20vast%20majority%20(87%25),nearly%20100%25%20of%20the%20time. (“The vast majority (87%) said their workplace allows lawyers to work remotely”).

⁵ *Id.*

⁶ ABA Comm. on Ethics & Pro. Resp., Formal Op. 498 (2021).

⁷ *Id.* (identifying ethical rules implicated by virtual practice). In a compilation of ten legal malpractice traps, the American Law Institute (“ALI”) identified at least three that may be more prevalent when a lawyer practices virtually. KAREN E. RUBIN & JEAN MCQUILLAN, TEN LEGAL MALPRACTICE TRAPS AND HOW TO AVOID THEM, ALI-CLE Course Materials (2019), Westlaw TSBJ10 ALI-CLE 1.

II. The Unauthorized Practice of Law (UPL).

The unauthorized practice of law may refer to a nonlawyer practicing law or a lawyer practicing law in a jurisdiction in which they are unlicensed and unauthorized to practice. Rules and regulations pertaining to lawyers' unauthorized practice of law are premised on the notion that the legal profession should be locally regulated and that lawyers licensed to practice in one jurisdiction are not necessarily competent to practice in another.⁸

Some commentators suggest that regulations of the unauthorized practice of law ("UPL") are inconsistent with modern-day reality because for years attorneys' practices have extended beyond jurisdictional bounds.⁹ But attorneys should not take this as a license to ignore the rule; violations carry consequences.

A. Violations/Penalties

Repercussions may include professional discipline, loss of fees, sanctions, civil liability, and even criminal liability.¹⁰ Most states' professional rules of responsibility provide that an attorney not admitted to their jurisdiction is still subject to that state's disciplinary authority,¹¹ and misconduct an attorney commits in other jurisdictions can be disciplined in each state where that attorney is licensed.¹² This means a Texas lawyer may be subject to discipline in a state in which they engage in the unauthorized practice of law¹³ and in the state of Texas.¹⁴

Texas is one of few states that have not adopted the rule that an attorney not licensed in Texas is still subject to the state's disciplinary authority,¹⁵ but this may soon change as Texas has proposed

⁸ ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE, CLIENT REPRESENTATION IN THE 21ST CENTURY, at 13–16 (2002).

⁹ James Geoffrey Durham & Michael H. Rubin, *Multijurisdictional Practice and Transactional Lawyers: Time for A Rule That Is Honored Rather Than Honored in Its Breach*, 81 La. L. Rev. 679, 709 (2021); Diane Leigh Babb, *Take Action When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, U. Ala. L. J. 535 (2000).

¹⁰ RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, § 5.5-5 REMEDIES FOR UNAUTHORIZED PRACTICE, Legal Ethics, L. Deskbk. Pro. Resp. § 5.5-5 (2023-2024 ed.).

¹¹ ABA CPR Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct: Rule 8.5*, americanbar.org (as of Oct. 2022), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-8-5.pdf (last visited Dec. 28, 2023) (chart displaying each state's version of Model Rule 8.5).

¹² TEX. DISC. RULES PRO. CONDUCT r. 8.05(a); MODEL RULES OF PRO. CONDUCT r. 8.5(a).

¹³ See, *infra*, note 77 and accompanying text.

¹⁴ Tex. Disc. Rules Pro. Conduct r. 8.05(a) ("A lawyer is subject to the disciplinary authority of this state, if admitted to practice in this state or if specially admitted by a court of this state for a particular proceeding. In addition to being answerable for his or her conduct occurring in this state, any such lawyer also may be disciplined here for conduct occurring in another jurisdiction or resulting in lawyer discipline in another jurisdiction, if it is professional misconduct under Rule 8.04").

¹⁵ Tex. Pro. Ethics Comm., Formal Op. 597 (2010) (explaining that the "Texas Disciplinary Rules of Professional Conduct govern the conduct of lawyers licensed in Texas"); ABA CPR Policy

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