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# Ethical Considerations for Lawyers Working Remotely

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The appearance of pumpkin spice lattes and a chill in the air serve as poignant reminders that we are approaching another season of remote work due to the COVID-19 pandemic. Lawyers, for the most part, continue to work either fully or partially remotely. A national survey conducted by MyCase, a practice management company, concluded that 87% of law firms were conducting their operations either entirely or partially remotely. See <https://www.lawsitesblog.com/2020/04/87-of-law-offices-working-remotely-survey-finds-as-they-struggle-to-maintain-financial-stability.html>

Federal courts have approved of the use of remote technology to conduct a number of procedures, including oral arguments, preliminary hearings and misdemeanor sentencings. As Ninth Circuit Court of Appeals Clerk Molly Dwyer aptly put it, “[w]e’re building the bike as we ride it and we’re going to do everything in our power to make sure that it doesn’t break.” See <https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak>

Guidance from the medical community suggests that the current paradigm could continue well into 2021, so now is a good time to re-visit your approach to remote

working and ask yourself if you are practicing good hygiene with respect to these issues: confidentiality, competence and communication.

**Confidentiality.** As always, protecting your client's interests is central to your ethical and professional duties. A number of both practical and tactical considerations have cropped up since the move to remote practice. Lawyers need to consider whether they are taking appropriate precautions in the remote environment to protect clients' confidential information. The Pennsylvania Bar Association issued guidance on this topic in Formal Opinion 2020-300 and suggested that lawyers could competently preserve electronic information by observing the following:

- Avoiding the use of public internet or free Wi-Fi;
- Using virtual private networks to enhance security;
- Using dual-factor authentication;
- Assuring that video conferences are secure;
- Backing up any data stored remotely;
- Securing any devices used remotely; and
- Verifying that websites have enhanced security;

Formal Opinion 2020-300 also noted that lawyers must ensure that their firm has appropriate measures in place to ensure that other lawyers whom they supervise and non-lawyer staff comply with the Rules of Professional Conduct relating to protecting client confidentiality.

**Competence.** Lawyers must continue to represent clients competently in the remote environment. Competence not only includes preparing documents and monitoring client matters so that all deadlines are met, but also maintaining (or perhaps gaining) technological competence as provided in Comment 8 to ABA Model Rule 1.1, which states that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." For example, lawyers may need to consider new trial strategies in light of rapid legislative and technology changes. Trial lawyers may have to weigh the benefit of conducting remote depositions against the downside of in-person depositions where a witness is wearing a mask. They may also need to consider the benefit of proceeding with a bench trial versus waiting for a jury trial. In addition to contemplating new strategies, lawyers are faced with understanding not only how remote deposition technology works, but also how remote deposition technology differs from conventional in-person depositions.

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Comment 3 to ABA Model Rule 1.1 (“[i]n an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical”) provides some leeway with respect to using professional judgment in emergency situations, but in order to comply with ethical obligations, lawyers must take necessary measures to get up to speed on these novel issues in the COVID-19 environment. These efforts could include attending industry or CLE conferences on emerging topics in their practices and technology areas, dividing research on new COVID-19 laws and guidelines within practice groups, and having someone within the firm monitoring daily the relevant state and federal court websites for rule changes and other emergent announcements.

***Communication.*** Lawyers should also be mindful of the duty to communicate with clients under ABA Model Rule 1.4. For some lawyers working remotely, communication systems between the lawyer and client have changed. Lawyers must ensure that clients know how to reach them and should make plans to monitor any physical mail that reaches the office. Furthermore, lawyers must keep their clients “reasonably informed” about the status of their matters. Given the current state of flux and the need to continually inform clients, lawyers and their firms may want to identify issues common to all their clients and frequently send blast emails regarding these status changes. Blast emails do not identify the other clients who are receiving the emails, thereby protecting client confidentiality. Given the current state of flux and the need to continually inform clients, lawyers and their firms may want to identify issues common to all their clients and continually send blast emails, which do not identify the other clients who are receiving the emails to protect client confidentiality, regarding these status changes.

As Comment 4 to ABA Model Rule 1.4 aptly points out, “[a] lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation.” Lawyers should be sensitive to the anxiety their clients face and should also make sure that they are explaining matters so that their clients can effectively participate in the representation.

***Lawyer Well-Being.*** During this period of heightened uncertainty, stress and physical illness, lawyers must consider the well-being of other lawyers and staff in their firm. In addition to being the right thing to do, support for and caring about fellow personnel is part of a lawyer’s ethical obligations. As Bree Buchanan, chair of the ABA Commission on Lawyers Assistance Programs, stated, “[w]e are looking at promoting our own resilience so that we preserve our competence and fitness to practice and looking at that through the lens of the Model Rules of Professional Conduct.” *See*

<https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-may-2020/tips-to-help-stressed-lawyers/>

Under ABA Model Rule 5.1(a), lawyers are under an ethical obligation to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Recognizing the likelihood of increased incidence of lawyer impairment, the Pennsylvania Bar Association issued Formal Opinion 2020-400, which endorses earlier D.C. Bar Association Ethics Opinion 377: Duties When a Lawyer Is Impaired. Formal Opinion 2020-400 highlights the duties of supervising lawyers to recognize and report lawyer impairment under Rule 5.1 and suggests having a written policy for reporting and addressing lawyer impairment. Formal Opinion 2020-400 also notes that it is critical for “the firm to provide an environment where an attorney suffering from addiction, depression, anxiety, or other illness that can often accompany the stress of practicing will find constructive assistance.” On its website, the ABA Commission provides a list of Lawyer Assistance Programs nationally and has a number of articles and resource materials for those seeking strategies to address their own mental health or provide law firm management and leadership on well-being.

**ABA: Commission on Lawyer Assistance Programs**

[https://www.americanbar.org/groups/lawyer\\_assistance/](https://www.americanbar.org/groups/lawyer_assistance/)

As remote work continues, lawyers should focus their efforts on confirming that they are practicing ethically, spotting emerging technical and strategic issues that they had not anticipated prior to the emergence of COVID-19 and recognizing the need to care for lawyer well-being.

**For more information on the topic, check out Deborah Winokur and Diana Ashton’s program, Ethical Considerations for Lawyers Working Remotely, available from PLI programs on demand:**

<https://www.pli.edu/programs/plis-ethical-considerations-for-lawyers-working-remotely?t=ondemand>

**Also available from PLI Programs On Demand:**

Locking Down Your Data: Adapting to Lawyers Working Remotely

<https://www.pli.edu/programs/locking-down-data-lawyers-working-remotely?t=ondemand>

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COVID-19 and the Cyber-Risks of Working from Home: Meeting the Challenges

<https://www.pli.edu/programs/covid-19-and-the-cyber-risks-of-working-from-home--meeting-the-challenges?t=ondemand>

Remote Legal Service – How Nonprofits Can Innovate to Reach Clients and Pro Bono Attorneys During Covid-19

<https://www.pli.edu/programs/remote-legal-service--how-nonprofits-can-innovate-to-reach-clients-and-pro-bono-attorneys-during-covid-19?t=ondemand>

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