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# Wisconsin Formal Ethics Opinion EF-21-02: Working remotely

January 29, 2021

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## Synopsis

*The basic responsibilities that a lawyer owes the client – competence, diligence, communication, and confidentiality - lie at the core of lawyer’s professional obligations and remain unchanged irrespective of the lawyer’s physical location. What has changed is discharging these responsibilities effectively in a world increasingly dominated by technology and, more recently, in an environment where lawyers are isolated from their clients, their partners, their opponents and the courts in the face of the COVID-19 pandemic. The role of the partners, managers and supervising attorneys, whose responsibilities include insuring that both attorneys and non-attorneys in the firm, regardless of their location, comply with the requirements of SCR Chapter 20, is of increasing importance. Although certain current modifications in practice may diminish as the pandemic does, many are likely to continue as the profession and technology evolve. This opinion addresses several ways a lawyer’s responsibilities are affected.*

## Introduction

Historically, the practice of law 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. Over time, technological advances have replaced many of these personal interactions, as well as other aspects of practice such as the transfer and storage of client information. In addition, it is expected that lawyers, like other professionals, will continue to work remotely in some form after the pandemic.

## The Applicable Rules

Several rules are implicated when lawyers work remotely. These rules are SCR 20:1.1 Competence; SCR 20:1.3 Diligence; SCR 20:1.4 Communication; SCR 20:1.6 Confidentiality; SCR 20:5.1 Responsibilities of partners, managers and supervisory lawyers; SCR 20:5.3 Responsibilities regarding nonlawyer assistance, and SCR 20:5.5 Unauthorized practice of law; multijurisdictional practice of law.

## Competence

SCR 20:1.1 requires a lawyer to provide competent representation to a client through reasonably necessary legal knowledge, skill, thoroughness and preparation.<sup>1</sup> When first promulgated as part of the

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<sup>1</sup> “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

ABA Model Rules of Professional Conduct in 1983 the rule's focus was on the importance of a command of the substantive<sup>2</sup> and procedural<sup>3</sup> aspects related to resolution of the client's legal problems. See ABA Comments. ¶¶1-6.

In 2012 the ABA modified Comment [8] to Rule 1.1 to reflect the importance of competence in the use of technology:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.<sup>4</sup>

Basic technological competence includes, at a minimum, knowledge of the types of devices available for communication, software options for communication, preparation, transmission and storage of documents and other information, and the means to keep the devices and the information they transmit and store secure and private.<sup>5</sup> Larger firms will often employ expert staff to address these concerns.

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<sup>2</sup> See *Attorney Grievance Comm'n of Maryland v. Narasimhan*, 92 A.3d 512 Conduct 370 (Md. 2014) (inexperienced lawyer failed to properly file and manage client's permanent residency petition); *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Seyler*, 809 N.W.2d 766 (Neb. 2012) (lawyer mishandled personal injury case with resultant harm to client).

<sup>3</sup> See *In re Kellogg*, 4 P.3d 594 (Kan. 2000) (failure to properly serve out-of-state party in divorce proceeding); *In re Harris*, 180 P.3d 558 (Kan. 2008) (failure to follow required procedures to electronically file documents in bankruptcy court).

Procedural competence has also changed as a result of the pandemic. Many courts are operating under emergency orders subject to frequent modification. Scheduling is in a state of flux and hearings are increasingly conducted by video. At the time of this writing, the Wisconsin Supreme Court has ordered that local judicial districts develop plans to reopen their respective courts. See *In re the Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trial, Suspension of Statutory Deadlines for Non-criminal Jury Trials, and Remote Hearings During the COVID-10 Pandemic*, Wis. S. Ct., May 22, 2020. <https://www.wicourts.gov/>. It is likely different counties will adopt different procedures, all of which will be subject to ongoing modification. Counsel must take steps to be familiar with the procedures that control how the client's cases will be processed in the communities in which they practice.

<sup>4</sup> See *ABA Commission on Ethics 20/20 Report 105A* (2012). Wisconsin adopted this change in 2017. Sup. Ct. Order No. 15-03, 2016 WI 76. See also *Wisconsin Formal Ethics Op. EF-15-01 Ethical Obligations of Attorneys Using Cloud Computing*; *ABA Formal Ethics Op. 483* (2018) (ethical duties after a data breach or cyberattack); *District of Columbia Ethics Op. 371*; *Florida Ethics Op. 12-3* (2013); *New Hampshire Ethics Op. 2012-13/4* (2013); *New York County Ethics Op. 749* (2017). These opinions acknowledge that technical knowledge is an integral part of competence. More detailed discussion about the role of technology is included in other sections of this opinion.

<sup>5</sup> See Nicole Black, *7 types of tech tools to help lawyers set up virtual offices*, <https://www.abajournal.com/web/article/law-in-the-time-of-coronavirus-what-tools-do-lawyers-need-to-set-up-virtual-offices>; Christie, *What Should an Ethical Lawyer Know About Technology?* *The Brief*, Volume 46 Number 2 (2017).

Smaller firms or sole practitioners may need to retain the services of an expert if they lack the knowledge to personally manage the technological aspects of practice.

## **Diligence**

SCR 20:1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client.<sup>6</sup> Generally, this rule has been viewed as requiring a lawyer to pursue a client's objectives promptly and thoroughly until its conclusion.<sup>7</sup> How this duty is discharged during a pandemic and working remotely presents unique challenges. This duty, however, requires reasonable diligence, which implies that particular circumstances may affect the parameters of this duty.

Notwithstanding the disruption caused by the pandemic, circumstances may delay court hearings or complicate legal and factual investigation. The lawyer must seek to proceed with the representation as to the best of their abilities under the circumstances. Much of the difficulty can be avoided if the lawyer's firm has a system in place to access files, conduct research, and facilitate collaboration with others in the notwithstanding the lawyer's physical isolation from others.

If delay in resolution of the client's case is unavoidable, the lawyer is required by SCR 20:1.4 to explain the circumstances to the client and the likely time frame for resolution.

Moreover, given that the present circumstances constitute a national health emergency of unknown duration, it may be appropriate for the lawyer to consider what steps may be necessary if the lawyer or the client becomes incapacitated.<sup>8</sup> Development of a succession plan is part of the lawyer's duty to provide competent and diligent representation.<sup>9</sup> In the firm context, management should consider which other members of the firm would be responsible for the unavailable lawyer's cases. If the lawyer is a sole practitioner, the lawyer should reach out to other lawyers to develop a plan to protect the clients in the event of the lawyer's impairment.<sup>10</sup>

## **Communication**

SCR 20:1.4 addresses the lawyer's duty to communicate with the client.<sup>11</sup> The current pandemic or any other disaster or emergency makes regular contact with clients more important than ever. The client needs to know how to contact the lawyer just as the lawyer must know how to contact the clients.

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<sup>6</sup> "A lawyer shall act with reasonable diligence and promptness in representing a client."

<sup>7</sup> The duty of diligence will vary depending on what services the lawyer will provide. For example, it will differ if the lawyer is only preparing a document as compared to conducting a trial, pursuing an appeal, or providing services of an ongoing nature. SCR 20:1.2(c).

<sup>8</sup> See *ABA Formal Opinion 482* (2018) (Ethical Obligations Related to Disasters).

<sup>9</sup> See SCR 20:1.3, ABA Comment [5].

<sup>10</sup> See Kaiser, Shattuck, *Lawyer Death or Disability: Who Will Protect Your Clients?* 91 *Wisconsin Lawyer* 3 (March 2018).]

<sup>11</sup> SCR 20:1.4 states:

For example, if telephone calls and e-mails are routed through the firm's communication system, the lawyers must regularly access office voicemail, e-mail and any other methods of client communication regularly used in the office to ensure no communications are missed. If firm lawyers work remotely, they must have a system in place to regularly handle mail – both timely sending and obtaining that which is delivered to the firm office.

The lack of personal contact with the client can create additional communication challenges. Video hearings often will not allow for confidential discussions between the lawyer and client, making advance preparation important. Execution and notarization of documents also present special challenges, which must be communicated to the client.

Issues of concern to clients will vary. Certain topics may be of special importance during a pandemic such as the impact of emergency court operations on the client's case or what steps are appropriate should the client become incapacitated. The latter question may involve discussions about powers of attorney or about identification of whom the lawyer should contact if the client is not able to maintain communication with the lawyer.

### **Confidentiality**

SCR 20:1.6<sup>12</sup> describes the lawyer's duty of confidentiality to the client. Perhaps no professional obligation has been impacted more by technology than the duty of confidentiality. The use of technology has

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(a) A lawyer shall:

- (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0 (f), is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests by the client for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

<sup>12</sup> SCR 20:1.6 states:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).
- (b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.
- (c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably likely death or substantial bodily harm;
  - (2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

increased convenience but has at the same time increased the risk of unauthorized access to an inadvertent disclosure of confidential client information.<sup>13</sup>

The 2012 Model Rule changes included modification of Rule 1.6. The ABA added subsection (d)<sup>14</sup> which states:

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA Comment paragraphs [18] and [19] were also modified to address the impact of technology on the duty of confidentiality:

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to,

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- (3) to secure legal advice about the lawyer's conduct under these rules;
  - (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law or a court order; or
  - (6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

<sup>13</sup> See generally *55 Law. Man. Prof. Conduct* 401-421 (2020).

<sup>14</sup> SCR 20:1.6 differs from the ABA version of the rule in a number of respects, one of which is that the new ABA subsection (c) is renumbered in Wisconsin as subsection (d).

electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Wisconsin adopted both of these changes in 2017.<sup>15</sup> The ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 477R (2017), explained that the change does not require specific security steps in all cases nor does it suggest that any breach automatically constitutes a rule violation. Instead, lawyers are required to make “reasonable efforts” to secure client information. What constitutes “reasonable efforts” is fact dependent based on consideration of a range of factors.

What information is protected and the exceptions that require or permit disclosure remain unchanged.<sup>16</sup> What has changed, however, is the variety of circumstances under which the lawyer’s responsibility to protect the information from unwarranted disclosure. Compliance with these duties can be complicated, particularly when the lawyer is working remotely, physically separated from co-workers, staff, and the information to be protected.

### **Responsibilities of partners, managers and supervisory lawyers**

SCR 20:5.1 addresses the duties that law firm partners, managers and supervisory lawyers have to provide reasonable assurance that all lawyers in the firm conform to the Rules.<sup>17</sup> Similarly, SCR 20:5.3 addresses

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<sup>15</sup> Sup. Ct. Order No. 15–03, 2016 WI 76.

<sup>16</sup> The duty of confidentiality covers all information that relates to the representation of client, whatever it’s source. See SCR 20:1.6, ABA Comment [3].

<sup>17</sup> SCR 20:5.1 states:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall 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.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct

the duties that partners, managers and supervisory lawyers have to provide reasonable assurance that the conduct of each nonlawyer, including consultants and vendors, is compatible with the Rules.<sup>18</sup> While the law firm's policies, procedures and supervision must provide reasonable assurance that all lawyers and nonlawyers comply with all of the Rules, the duties of competence, diligence, communication and confidentiality are especially critical when lawyers are working remotely.

Oversight of fellow professionals is challenging under any circumstance. It can be particularly challenging when those supervised are working in different, remote locations, separate from their supervisor and each other. Developing a structure to adhere to a schedule, facilitate collaboration, communication, and conduct regular meetings by videoconference can help achieve the level of supervision envisioned by the rules. Regular mandatory training, review of the circumstances of a remotely-working lawyer, the assignment of experienced mentors to new lawyers, and the creation of teams are also strategies that can facilitate efficiency in the context of remote work.

### **Unauthorized Practice of Law**

Much attention has been given in the last two decades to regulation of unauthorized practice, primarily in the context of multi-jurisdictional work. In 1998 the California Supreme Court held that a New York firm with no physical presence in California violated that state's prohibition against unauthorized practice in its representation of a California client.<sup>19</sup> This decision sparked a national debate eventually leading to modifications of Model Rule 5.5, which became the basis for and is substantially equivalent to Wisconsin's SCR 20:5.5. Subsequently, advances in technology have made it possible for lawyers to easily work remotely and in virtual law practices.<sup>20</sup>

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at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

<sup>18</sup> Similarly, SCR 20:5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and,

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

- (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
- (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

<sup>19</sup> See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998)

<sup>20</sup> In the late 1990s, the term "virtual office" became a common part of the industry lexicon. "In 2002, FisherBroyles LLP became the first full-service, Pure Virtual Law Firm relying exclusively on cloud-based applications formed in the United States. By 2011, according to Law Firm Suites, there were an estimated 200 to 300 Pure Virtual Law Firms in the U.S., in addition to the hundreds of attorneys practicing virtually and maintaining a virtual law office address.

Lawyers practicing in virtual practices and lawyers working remotely during the pandemic have raised questions about the unauthorized practice of law. Although unauthorized and multi-jurisdictional practice involve a plethora of issues,<sup>21</sup> the focus of this opinion is whether a lawyer, while in a location where the lawyer is not licensed, may conduct a virtual practice in a jurisdiction where the lawyer is licensed.

Both Model Rule 5.5(b)(1) and SCR 20:5.5(b)(1) provide that a lawyer who is not admitted to practice in this jurisdiction shall not “establish an office or maintain a systematic and continuous presence in this jurisdiction for the practice of law.” In December 2020, the ABA’s Standing Committee issued ABA Formal Opinion 495 to provide guidance.

Words in the rules, unless otherwise defined, are given their ordinary meaning. “Establish” means “to found, institute, build, or bring into being on a firm or stable basis.” A local office is not “established” within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer’s presence. Likewise it does not “establish” a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer’s physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law. (Footnotes omitted.)

Similarly, both Model Rule 5.5(b)(2) and SCR 20:5.5(b)(2) prohibit a lawyer who is not admitted to practice in this jurisdiction from “hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to the practice of law in this jurisdiction.” ABA Formal Opinion 495 provides further guidance.

A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is “holding out” as practicing law in the local jurisdiction. If the lawyer’s website, letterhead, business cards, advertising, and the like clearly indicate the lawyer’s jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not “held out” as prohibited by the rule.

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The concept and viability of *eLawyering* or a virtual law practice has been around now for about 10 years, more or less. For developers, of course, it has existed much longer than for users. But I think 2003 is a good year to target the time when lawyers began noticing movement to the cloud and the rise of cloud products, aided by the development of the iPad and tablets, smartphones getting smarter, and a general progression toward a device-driven world, wirelessly connected.” <https://ssensikombi.wordpress.com/2019/10/20/virtual-law-firms-law-firms-of-the-future%E2%80%8A-%E2%80%8Ahow-virtual-law-firms-are-doing-business-part-one/>

<sup>21</sup> See *Annotated Model Rules of Professional Conduct* (Eighth Ed. 2015) 518-534; Wolfram, *Modern Legal Ethics* (1986) 824-856.



Based on the language of Model Rule 5.5, ABA Opinion 495 concluded:

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Two previous state ethics opinions reached the same conclusion. In Utah Ethics Opinion 19-03 (2019), the Ethics Advisory Committee questioned, "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah?" The Committee reached an emphatic conclusion, "none."

The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business.

The Maine Professional Ethics Commission reached the same conclusion in Maine Ethics Opinion 189 (2005).<sup>22</sup>

Like the Utah Ethics Advisory Committee, we found no case where an attorney has been disciplined for practicing law out of a private residence for out-of-state clients located in the state where the attorney is licensed.

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<sup>22</sup> The Maine Ethics Opinion concluded:

[T]he mere fact that an attorney, not admitted in Maine, is working in Maine does not automatically mean that the attorney is engaged in the unauthorized practice of law. For example, an out-of-state lawyer who has a vacation home in Maine might bring work to Maine to complete while on vacation. Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine while the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Based on the language of SCR 20:5.5, its purpose, and the other ethics opinions, we conclude that the Rule does not prohibit an out-of-state lawyer from representing clients from the state where the attorney is licensed even if the out-of-state lawyer does so from the lawyer's private location in Wisconsin. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state lawyer must not establish a public office in Wisconsin or solicit Wisconsin business unless otherwise authorized by law.

Each state, however, establishes its own laws and rules regulating the practice of law within its borders: there is no nationally uniform rule. Therefore, the question of whether a properly licensed Wisconsin lawyer, representing Wisconsin clients with respect to Wisconsin matters is engaged in unauthorized practice in another jurisdiction is dependent on the rules of the jurisdiction in which the lawyer is physically present. Thus, lawyers need to be mindful of the rules that apply in the jurisdiction in which they are located.

### General Guidance

It is impossible to provide specific requirements for working remotely because lawyers' ethical duties are continually evolving as technology changes. It is possible, however, to provide some guidance.

### Cybersecurity Practices

Because working remotely relies on technology, competence in technology and cybersecurity practices are essential. The following cybersecurity practices have been recommended by a number of ethics opinions<sup>23</sup> and other resources. None of these practices are new: they are reasonable precautions that have helped lawyers fulfill their ethical obligations, especially the duty of confidentiality, when working in the office and when working remotely, whether at home during evenings and weekends, or during travel for work or vacation.

- **Require strong passwords to protect data and to access devices.** The more complex the password, the less likely that an unauthorized user will be able to access data or devices by using password cracking techniques or software.
- **Use two-factor or multi-factor authentication to access firm information and firm networks.** Although requiring an additional authentication step, such as a six-digit code sent to the lawyer's phone or email, may seem inconvenient or burdensome, it is a reasonable precaution that increases protection and reduces the likelihood of unauthorized access by providing an additional layer of security beyond a strong password.
- **Avoid using unsecured or public WiFi when accessing or transmitting client information.** Hackers can access unencrypted information on unsecured WiFi and can use unsecured WiFi to distribute malware.

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<sup>23</sup> See, e.g., Wisconsin Formal Ethics Opinion EF-15-01: Ethical Obligations of Attorneys Using Cloud Computing (Amended September 8, 2017).

- **Use a virtual private network (VPN) when accessing or transmitting client information.** A VPN encrypts information and allows users to create a secure connection to another network.
- **Use firewalls and secure router settings.** A firewall monitors and controls incoming and outgoing network traffic based on predetermined security rules: it establishes a barrier between a trusted network and an untrusted network. A router connects multiple devices to the Internet, and connects the devices to each other.
- **Use and keep current anti-virus and anti-malware software.** Anti-virus and anti-malware both refer to software designed to detect, protect against, and remove malicious software.
- **Keep all software current: install updates immediately.** Updates help patch security flaws or software vulnerabilities, which are security holes or weaknesses found in a software program or operating system.
- **Supply or require employees to use secure and encrypted laptops.** All lawyers and staff should use only firm issued devices with security protections and backup systems and prohibit storage of firm or client information on unauthorized devices. All devices used by the lawyer, such as desktop computers, laptops, tablets, portable drives, phones, and scanning and copy machines, should be protected.
- **Do not use USB drives or other external devices unless they are owned by the firm or they are provided by a trusted source.**
- **Specify how and where data created remotely will be stored and how it will be backed up.**
- **Save data permanently only on the office network, not personal devices.** If saved on personal devices, taking reasonable precautions to protect such information.
- **Use reputable vendors for cloud services.** Transmission and storage of firm and client information through a cloud service is appropriate provided the lawyer has made sufficient inquiry that the service is competent and reputable.<sup>24</sup>
- **Encrypt emails or use other security to protect sensitive information from unauthorized disclosure.** A lawyer should balance the interests in determining when encryption is appropriate.
- **Encrypt electronic records, including backups containing sensitive information such as personally identifiable information.**
- **Do not open suspicious attachments or click unusual links in messages, email, tweets, posts, online ads.**
- **Use websites have enhanced security whenever possible.** Such websites begin with “HTTPS” in their address rather than “HTTP,” and encrypt the communication.

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<sup>24</sup> Wisconsin Formal Ethics Opinion EF-15-01.

- **Provide adequate security for video meetings or conferences.** The FBI has recommended the following steps: use the up-to-date version of the application; do not make the meetings public; require a meeting password; do not share the link to the video meeting on an unrestricted publicly available social media post; provide the meeting link directly to the invited guests; and manage the screen-sharing options.<sup>25</sup> In selecting a videoconferencing platform, the lawyer should make sure it is sufficiently secure both in its structure and its contractual terms of use, especially any terms on access to user information.<sup>26</sup>
- **Do not have work-related conversations in the presence of smart devices such as voice assistants.** These devices may listen to and record conversations.<sup>27</sup>

## Training and Supervision

To comply with the duties required by SCR 20:5.1 and 5.3, partners, managers and supervisory lawyers should consider whether the firm’s policies and procedures are adequate to address the specific challenges that may arise when lawyers and nonlawyer assistants are working remotely.

- **Establish and implement policies and procedures for cybersecurity practices.** These policies and procedures should be in writing and provided to all lawyers and nonlawyer assistants, and stress compliance.
- **Establish and implement policies and procedures for the training and supervision of lawyers and nonlawyer assistants in the firm’s cybersecurity practices.** Training is the most basic step in avoiding a cyberattack at a law firm. In other words, it is extremely important to develop a culture of awareness. The most serious vulnerabilities of a cybersecurity system are not the hardware or

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<sup>25</sup><https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-ofteleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic>.

<sup>26</sup> Lawyers must understand that if video conferences are recorded the vendor may retain a copy under the terms of service. See *INSIGHT: Zooming and Attorney Client Privilege*, [https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQ1ZOVyIsImkljoiMDAwMDAxNzEtZWExYy1kMDAwLWE5N2YtZWE3ZTkWYWMwMDAxliwic2lnIjoidVliaWhQR3J3ZmpWcDBKeE5KY1JYV1c0RlcwPSIsInRpbWUiOilxNTkwMjQwMzM1liwidXVpZCI6IndNWHUzdVFGajBEWGxkZFBKcTNSVVE9PU1ZZmVtSkhLU0hBMWtPNG8rTE50eGc9PSIsInYiOilxIn0=?usertype=External&bwid=00000171-ea1c-d000-a97f-ea7e90ac0001&qid=6912181&cti=LSCH&uc=1320042032&et=SINGLE\\_ARTICLE&emc=bcvbw\\_cn%3A7&bna\\_news\\_filter=true](https://www.bloomberglaw.com/exp/eyJjdHh0IjoiQ1ZOVyIsImkljoiMDAwMDAxNzEtZWExYy1kMDAwLWE5N2YtZWE3ZTkWYWMwMDAxliwic2lnIjoidVliaWhQR3J3ZmpWcDBKeE5KY1JYV1c0RlcwPSIsInRpbWUiOilxNTkwMjQwMzM1liwidXVpZCI6IndNWHUzdVFGajBEWGxkZFBKcTNSVVE9PU1ZZmVtSkhLU0hBMWtPNG8rTE50eGc9PSIsInYiOilxIn0=?usertype=External&bwid=00000171-ea1c-d000-a97f-ea7e90ac0001&qid=6912181&cti=LSCH&uc=1320042032&et=SINGLE_ARTICLE&emc=bcvbw_cn%3A7&bna_news_filter=true).

<sup>27</sup> For example, Google and Amazon maintain those recordings on servers and hire people to review the recordings. Although the identities of the speakers are not disclosed to these reviewers, they might hear sufficient details to be able to connect a voice to a specific person. <https://www.vox.com/recode/2020/2/21/21032140/alexa-amazon-google-home-siri-applemicrosoft-cortana-recording>.

software, but rather the people who use it. It is estimated that 90% of cybersecurity breaches are due to human error.<sup>28</sup>

- **Establish and implement policies and procedures regarding remote work spaces to mitigate the risk of inadvertent or unauthorized disclosures of information relating to the representation of clients.** Remote workspaces should be private to ensure that others do not have access to phone conversations, video conferences, or case-related materials.
- **Hold sufficiently frequent remote meetings between supervising attorneys and supervised attorneys, and between supervising attorneys and supervised nonlawyer assistants to achieve effective supervision.**

### Preparing Clients

Representing a client remotely may present challenges to competent representation.<sup>29</sup> Consequently, a lawyer should carefully consider whether the lawyer can adequately prepare the client to testify or for interviews while working remotely.

- **The lawyer and the client should have sufficient ability with the technology.**
- **The lawyer and the client should have access to relevant documents.**
- **The lawyer and the client have adequate time and attention to ensure the client's comfort with the communicating by the medium that will be used.**

### Conclusion

The COVID-19 pandemic has dramatically changed how lawyers work and represent their clients. Some of these changes may be temporary but others are likely part of a movement towards increased reliance on technology in the practice of law. As working remotely has become the new normal, lawyers must develop new skills and knowledge to comply with their core responsibilities.

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<sup>28</sup><https://www.techradar.com/news/90-percent-of-data-breaches-are-caused-by-human-error#:~:text=A%20new%20report%20from%20Kaspersky,carried%20out%20by%20cloud%20providers> .

<sup>29</sup> The New York County Lawyers Association Formal Opinion 754-2020 at 3.