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ETHICS BOUTIQUE:
HOT ISSUES IN ETHICS FOR MEDIA LAWYERS

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A. Managing Potential Conflicts of Interest Between Duty to Company and Duty to Journalists

The practice of defending news networks and the reporters that work for them from allegedly defamatory news coverage presents interesting ethical considerations for media lawyers when cases enter discovery. Often, documents and information requested in such cases may implicate reporters shield laws. These are laws that protect a reporter's right to protect newsgathering information, including confidential sources. Currently, every state but Wyoming and Hawaii have some form of shield law. Many shield laws protect more than just confidential sources. New York's shield law, for example, applies an absolute privilege to information regarding confidential sources and a qualified privilege to unpublished, nonconfidential information collected as a part of the newsgathering process, including information relating to the development of sources and the construction of broadcasts and news stories. The qualified privilege may be overcome by making a specific showing, including that the information is highly material and relevant, is critical or necessary to the maintenance of a party's claim, defense, or proof of a material issue, and is not obtainable from any alternative source.

The privilege belongs both to the journalist or the employer, which may be a potential source of conflict. Suppose a plaintiff demands production of all of a journalist's work emails as part of a defamation suit against a news organization for things the journalist has reported. The news organization wishes to produce the requested documents, but the journalist wishes to assert her reporter's privilege over her unpublished newsgathering information and information relating

to a confidential source. The in-house media lawyer has an ethical dilemma—how to represent the interests of both the organization and the journalist?

The analysis of this problem begins with the rule addressing organizational clients:

ABA Model Rule[1] **1.13**: Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

[1] References to the "Rules" mean to the ABA Model Rules of Professional Conduct, unless otherwise specifically indicated.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.13(g) points us to rule 1.7, the model rule relating to conflicts of interest.

ABA Model Rule 1.7 Conflicts Of Interest: Current Clients:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Suppose in our defamation action, the case hinges on whether the reporter made her statements with actual malice. [2] Recall that actual malice is knowledge of falsity or reckless disregard of truth or falsity. A propounding party may argue that shield law-protected newsgathering materials are relevant to proof of actual malice. New York has held in some circumstances that a reporter cannot rely on privileged materials to establish a lack of malice. *See Oak Beach Inn Corp. v. Babylon Beacon, Inc.,* 62 N.Y.2d 158, 476 N.Y.S.2d 269 (1984) (holding that defendant newspaper could not rely on material withheld as absolutely privileged under the Shield Law to establish lack of malice), *cert denied*, 469 U.S. 1158 (1985). Defendants may thus be precluded in an appropriate case "from using as a sword the information which they are shielding from disclosure" by invoking the reporter's privilege. *Collins v. Troy Pub. Co. Inc*., 213 A.D.2d 879, 881, 623 N.Y.S.2d 663, 665 (3d Dep't 1995). In the hypothetical case, it may be in both the reporter and the news organization's best interest to produce nonconfidential newsgathering material. Note also that, in a defamation action, the opposing party may be able to make the requisite showing to overcome the qualified privilege.

The organization's interests and the reporter's interests may diverge when it comes to information regarding confidential sources. This absolute privilege belongs to the journalist, and cannot be waived without the journalist's consent. Here, if the interests of journalist and news organization diverge too far, under Rule 1.7 it may be advisable for the journalist to seek her own representation to protect her interests.

B. Ethics of ChatGPT and other AI Offerings

1. <u>What is AI?</u>

- **Generative artificial intelligence (AI)** is a type of AI that generates new content or data in response to a prompt or question, by a user.

- AI **"hallucination"** is where the AI tool confidently produces a response that is not justified by its training data. When this happens, the AI cites fake case law or invents nonexistent case law.

2. <u>Applicable Rules</u>

Lawyers are ethically obligated to stay up to date on emerging technology. Lawyers must understand how to use an emerging technology like AI, as well as how not to use it, which requires a basic understanding of its capabilities. Lawyers must apply their legal judgment and experience when using generative AI, just as when using another any other type of technology.

[2] Reporters shield laws vary state by state. For purposes of this exercise, we consider New York's reporters shield law, N.Y. Civ. Rights Law § 79-h.

Federal Rule of Civil Procedure Rule 11 details sanctions and responsibilities that would come into play when using AI offerings in legal practice and in court proceedings. As to the rules of professional conduct, many are relevant to the use of AI, including the duty of confidentiality, duty of competence in the benefits and operation of technology, duty to supervise, duty of candor to the tribunal, and fairness to opposing counsel.

> **Fed. R. Civ. P. 11:** Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions
>
> (a) **Signature**. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
>
> (b) **Representations to the Court**. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
>
> (c) **Sanctions**.
>
> (1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be

held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(c) **Inapplicability to Discovery**. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

ABA Model Rule 1.1: Competence

Under ABA Model Rule 1.1, attorneys must represent their clients competently. In 2012, the ABA amended this rule to emphasize that an attorney's ethical duty of competence requires that an attorney have a reasonable understanding of the benefits and risks associated with relevant technology. To fulfill this obligation, attorneys must stay up to date on changes in the law and legal practice, including how technology like AI impacts their provision of legal services to their clients. *See* Comment 8 to ABA Model Rule 1.1.

Some states have ethical rules that make the duty of competence even more explicit when it comes to technology. The New York Rules of Professional Conduct, for example, expressly require that attorneys know the benefits and risks of technology used to store or transmit clients' confidential information. *See* Comment 8 to N.Y. Rules of Prof'l Conduct 1.1). Similarly, the State Bar of California issued a formal opinion regarding an attorney's knowledge of e-discovery issues in which it required attorneys without adequate technological knowledge to acquire sufficient learning and skill before using the technology. In 2016, Florida became the first state to require all attorneys to complete CLE courses devoted to technology training. North Carolina and New York also have a CLE technology training requirement. Like with all ethics issues, while the ABA Model Rules provide general guidance, lawyers must acquaint themselves with the rules of their jurisdiction.

ABA Model Rule 1.4: Communication

Under ABA Model Rule 1.4, as part of their duty to communicate with their clients, attorneys must reasonably consult with them about the means by which they intend to accomplish the client's objectives. *See* ABA Model Rule 1.4(a)(2).

When using AI technology while providing legal services, an attorney may comply with ABA Model Rule 1.4 by:

- Discussing the benefits and risks of using AI technology with the client if the attorney would like to use that technology during the representation.

- Explaining why the attorney does not intend to use AI technology for a particular task, if that technology is otherwise available for use.

- Obtaining the client's informed consent to either use or not use AI technology during the representation. Informed client consent is especially important if the attorney intends to share client data with an outside vendor.

ABA Model Rule 1.5: Fees

Under ABA Model Rule 1.5, attorneys may not charge an unreasonable fee or collect an unreasonable amount for expenses. Depending on what the parties have agreed to in the retainer agreement and any applicable outside counsel guidelines, it may be reasonable for an attorney to bill the client for the attorney's out-of-pocket costs to use an AI tool when providing legal services and engage with outside vendors that uses AI technology.

ABA Model Rule 1.6: Confidentiality of Information

Under ABA Model Rule 1.6, attorneys must not disclose their clients' confidential information unless they have received their clients' informed consent; disclosure is impliedly authorized; or disclosure is otherwise permitted. For example, a court can order disclosure of the information. Accordingly, when deciding whether to use AI technology or any other kind of technology that stores or processes confidential client data, an attorney should consider the following issues:

- The attorney's ability to assess the level of security the technology affords.
- Whether reasonable precautions may be taken when using the technology to increase the level of security.
- Limitations on who may monitor the technology's use.
- The legal ramifications to third parties of intercepting, accessing, or exceeding authorized use of another's electronic information.
- Client instructions to either use or not use the technology.

ABA Model Rule 3.3: Candor Toward the Tribunal

Under ABA Model Rule 3.3, attorneys cannot knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. ABA Model Rule 3.3(a).This duty continues to the conclusion of the proceeding, and applies even if compliance requires disclosure of information otherwise protected by Rule 1.6. ABA Model Rule 3.3(c). Abiding by this rule meaning all lawyers need to double check all work produced by an AI system. It is both an ethical and procedural violation to submit an AI "hallucinated" case to any court.

ABA Model Rule 3.4: Fairness to Opposing Party & Counsel

In a similar vein to ABA Model Rule 3.3, under ABA Model Rule 3.4, lawyers must approach their adversary relationship with the other side in a fair and truthful manner. A lawyer cannot knowingly misquote the contents of a paper, the language of a decision or a treatise, or with knowledge of its invalidity cite as authority a decision that has been overruled or a statute that has been repealed. In the world of AI, this rule has evolved, and under ABA Model Rule 3.4, it would be unethical for a lawyer to cite to a fake case. This would be unfair to the opposing party and counsel. Lawyers must take care to verify sources generated through AI.

ABA Model Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer

Under ABA Model Rule 5.1(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. Similarly, ABA Model

Rule 5.1(b) requires any lawyer having direct supervisory authority over another lawyer to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. This means that the law firm, its partners, and any supervising attorney can be responsible for a subordinate's improper use of AI under any of the Model Rules.

ABA Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

Under ABA Model Rule 5.3(b), an attorney with supervisory authority over a nonlawyer has a duty to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the attorney's professional obligations. This includes any and all AI use. In the past, a nonlawyer under this rule typically meant a person. However, in 2012, the ABA amended Model Rule 5.3's title from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance."

3. Best Practices and Risks to Consider

AI tools have great potential to increase efficiency in the practice of law, and their thoughtful and strategic adoption into legal practice can offer significant advantages. Lawyers can use generative AI to aid in the following:

- Drafting documents, forms, and templates
- Summarizing articles, correspondence, laws, regulations, and cases
- Contract review and analysis
- Due diligence for a variety of corporate transactions
- E-discovery
- Litigation preparation, including sample questions for voir dire or cross-examination
- Brainstorming ideas
- Legal research
- Document review
- Proofreading, error correction and document organization
- Risk assessment

A helpful tip for using AI is to carefully craft prompts and to be as specific as possible to obtain the desired response. The key elements to a successful query are:

- **Specificity**: Provide clear and detailed prompts.

- **Context**: Offer enough background information for the topic.

- **Instruction**: Explicitly request the type of response you want.
- **Proper Formatting**: Use correct grammar and structure in your prompts.

- **Understanding AI's Limitations**: Keep in mind the AI's limitations, including knowledge and date cutoffs.

It is important to remember to not rely solely on ChatGPT or any other AI-based system for legal work. Generative AI can provide useful information and suggestions, but it is not a substitute for the expertise and judgement of a licensed attorney. Remember the following:

- **Confidentiality Concerns**: It's imperative that you fully understand how any data queries are handled and who has access to them. If you are unable to adjust the product's privacy settings to reduce data sharing for product improvement purposes or otherwise, you should refrain from including any confidential client information when submitting queries to AI databases.

- **Double-Check the Research**: Do not fall for "hallucinations." GPT models are known to hallucinate, meaning they provide incorrect answers with a high degree of confidence. Because these models are not able to reason as human beings do and are not always knowledgeable about the topic they are discussing, they are known to produce false or nonsensical answers.

- **Be aware of AI Bias**: AI can embed bias in automated systems. Machine learning can easily detect and learn from explicit and implicit human bias in data.

- **Check Local Rules**: Similarly, as with any filing, it is the lawyer's responsibility to ensure that any filing complies with the local rules. The lawyer should still check the local rules for requirements regarding formatting, citations, etc., to ensure compliance. In addition, some local orders (as discussed below) may prohibit the use of AI in any filing submitted to the court. As with all filings, know the rules.

4. <u>The Lawyers that Started it All and the Sanctions that Followed</u>

In May of 2023, attorney Steven Schwartz and Peter LoDuca from Levidow, Levidow & Oberman P.C. utilized ChatGPT to "supplement" their legal research — all of which was completely hallucinated by the language model. *See Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC). That research was included in a brief filed in litigation pending in the Southern District of New York. Schwartz assumed that the cases were real after they were supplied to him by the artificial intelligence-powered chatbot. After opposing counsel notified the court about the bogus cases, Judge P. Kevin Castel issued an order to show cause as to why Schwartz's conduct had not violated Federal Rule of Civil Procedure 11.

A few weeks later, on June 22, 2023, Judge Castel ordered sanctions against Schwartz, LoDuca, and their firm. Judge Castel ruled that the lawyers and their firm abandoned their Rule 11 responsibilities by submitting non-existent judicial opinions with fake quotes and citations created by ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question. Judge Castel reasoned that "many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity." *See Mata v. Avianca, Inc.*, No. 22-cv-1461 (PKC), Opinion and Order on Sanctions (S.D.N.Y. June 6, 2023)

Judge Castel imposed significant sanctions. He ordered the lawyers and their firm to jointly and severally pay the court a fine of $5,000. He also required the lawyers to send copies of the sanctions ruling to Roberto Mata, the plaintiff in the underlying personal injury suit, within two weeks, as well as to forward the ruling to each judge whom ChatGPT falsely identified as an author of the fake opinions.

5. Judges' Orders Regarding the Restriction and Flat Out Ban of Artificial Intelligence in their Court and Court Proceedings

In all circumstances, it is important to know the local court rules and the specific procedures of the judge before whom you are appearing. In the realm of AI in particular, the rules are quickly changing, as evidenced by the multiple judges who have adopted standing orders this year to address this emerging technology.

On May 30, 2023, Judge Brantley Starr of the United States District Court for the Northern District of Texas became the first judge requiring all attorneys before his court to certify whether they used generative AI to prepare filings, and if so, to confirm any such language prepared by the generative AI was validated by a human for accuracy. Judge Starr explained: "These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why." Hon. Brantley Starr, "Mandatory Certification Regarding Generative Artificial Intelligence [Standing Order]," (N.D. Tex.). The order specifies that the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that

they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing. *Id.*

A day later, Magistrate Judge Gabriel Fuentes of the Northern District of Illinois followed suit with a revised standing order that not only requires all parties to disclose whether they used generative AI to draft filings, but also to disclose whether they used generative AI to conduct legal research. Judge Fuentes deemed the overreliance on AI tools a threat to the mission of federal courts, and stated that "[p]arties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry." Hon. Gabriel A. Fuentes, "Standing Order For Civil Cases Before Magistrate Judge Fuentes" (N.D. Ill.).

On June 8, 2023, Judge Stephen A. Vaden of the U.S. Court of International Trade issued an order requiring lawyers to disclose their use of generative artificial intelligence tools to create legal documents, citing security concerns related to confidential information. In cases before Judge Vaden, if someone uses a generative AI tool to help draft the text, they must also file a notice that discloses which program was used and "the specific portions of text that have been so drafted." Hon. Stephen A. Vaden, "Order on Artificial Intelligence" (USITC). They also have to file a certification that use of the technology "has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party." *Id.*

And, most recently, Judge Donald W. Molloy of the U.S. District Court for the District of Montana added a provision to the standard pro hac vice admission order, stating that the use of AI automated drafting programs, including Chat GPT, is prohibited. This restriction applies only to lawyers seeking pro hac vice admission, indicating the judge's disapproval of AI programs specifically in this context. Hon. Donald W. Molly, "Order For Pro Hac Counsel" (D. Mont.).

6. AI Offerings in Legal Research Platforms

Generative AI is coming to Westlaw Precision. Lawyers can join the waitlist to learn more about Generative AI and get exclusive Westlaw Precision demos. Thomson Reuters claims that it is committed to delivering Generative AI capabilities in Westlaw Precision by the end of the year. Completing the form puts lawyers on the waitlist and gets them exclusive access to news and information regarding generative AI.

7. Possibilities for Training and Legal Education

In response to the emerging technology and the challenges that come along with using Artificial Intelligence, many legal outlets, law firms, and universities are offering teaching tools and ethics panels. The ABA recently held a presentation that discussed how lawyers' ethical responsibilities impact their use of technology tools including artificial intelligence, e-discovery, zoom or similar platforms, and contract review tools. Bloomberg Law held a "Generative AI & Legal Ethics: The Intersection of Efficiency and Ethical Discord" training for CLE credit. PLI has over 800 programs including live webcasts and on-demand videos related to Generative AI in the legal field that are CLE creditable. The University of Florida hosted an AI and Ethics Panel featuring faculty members with artificial intelligence and ethics expertise. Morgan Lewis also offers a webinar series on "The Ethics of Artificial Intelligence for the Legal Profession."

C. Ethical Issues Arising From Working Remotely

1. Unauthorized Practice of Law Issues

In a no longer hypothetical situation, suppose a lawyer is working remotely from a jurisdiction in which the lawyer is not licensed. Perhaps a lawyer licensed in Texas with an office in Texas works remotely from a vacation home in Colorado, where the lawyer is not licensed; or a lawyer licensed in New York with an office in New York works remotely from her permanent residence in Connecticut, where she is not licensed. Are there Unauthorized Practice of Law (UPL) issues in either, or both, scenarios?

Prior to the COVID-19 pandemic in 2020, "working remotely" generally meant doing occasional work from home (or elsewhere) on the weekend or while on vacation, and few people even considered the possibility of UPL issues. But the COVID pandemic's "temporary" remote working protocols lasted almost two years, and at many companies and law firms, remote working, at least on occasion, is now a permanent part of the company culture. Under these circumstances, are the hypothetical lawyers described above now "practicing law" in Colorado and Connecticut, states in which they are not licensed? Although most jurisdictions have yet to issue a formal ethics opinion on the topic, the clear consensus among those which have addressed the question is that the answer is “no,” at least as long as the “remote” lawyers do not hold themselves out as licensed to practice in the “remote” jurisdiction in which they are not licensed.

Most opinions addressing the issue deal with the language of Rule 5.5 of the American Bar Association Model Rules of Professional Conduct or the applicable equivalent state rule. ABA Model Rule 5.5 notes in relevant part that “[a] lawyer who is not admitted to practice in [a] jurisdiction shall not, except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or hold out to the public or otherwise represent that the lawyer is admitted to practice law in [that] jurisdiction.”

A pre-pandemic Utah Ethics Opinion, one of the very few to address the question prior to 2020 and presumably triggered by inquiries relating to lawyers with second homes in Utah, asked bluntly "[W]hat 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 answer is... none." Utah Ethics Opinion 19-03 (2019).

Less than a month into the COVID pandemic, on March 23, 2020, the District of Columbia Committee on Unauthorized Practice of Law concluded in Opinion 24-20 that a District of Columbia resident not admitted to practice in D.C. may work from home under the "incidental and temporary practice" exception of the rules, provided that the lawyer "avoids using a District of Columbia address in any business document or otherwise [holds] out as authorized to practice law in the District of Columbia," and does not "regularly conduct in-person meetings with clients or third parties in the District of Columbia."

Similarly, in August of 2020, the Florida Bar's Standing Committee on Unlicensed Practice of Law issued a Proposed Advisory Opinion, FAO #2019-4, in which it concluded that a New

Jersey-licensed attorney employed by a New Jersey law firm and who practices "solely on matters that concern federal intellectual property rights" could work remotely from his permanent and exclusive residence in Florida. The Florida Supreme Court approved the opinion on May 20, 2021. The Florida Bar Re: Advisory Opinion-Out-of-State Attorney Working Remotely From Florida Home, No. SC20-1220 (May 20, 2021).

A watershed event occurred on December 16, 2020, when the ABA Standing Committee on Ethics and Professional responsibility issued a Formal Opinion in which it concluded that, under the Model Rules, "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." Formal Opinion 495. Once this ABA opinion was issued, many state authorities followed suit, whether by rule or by opinion, frequently relying upon, or at least citing, the ABA Opinion.

For example, the New York State Bar Association issued a proposed amendment to the New York rules pertaining to temporary practice of law that quotes ABA Opinion 495, stating that the ethical rules are "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." Report By the Professional Responsibility Committee, Professional Ethics Committee, Professional Discipline Committee, Legal Referral Service Committee, Small Law Firm Committee and the Council on the Profession, 2021 WL 462623 (2021). The recommendation was followed, and effective as of December 7, 2022 New York permits an attorney not licensed in New York to practice from a temporary or permanent residence in New York, provided the lawyer does not hold themselves out as licensed in New York or accept matters primarily involving advice on New York law. N.Y. Ct. Rules § 523.5.

On March 2, 2021, the Pennsylvania Bar Association adopted ABA Opinion 495, stating that lawyers may "ethically engage in the remote practice of law for clients… while being physically present in a jurisdiction in which they are not admitted [unless otherwise prohibited]. Ethical Considerations for Lawyers Practicing Law from Physical Locations Where They are not Licensed, Joint Formal Opinion 2021-100 (2021). The Delaware State Bar Association Committee on Professional Ethics followed suit in July of 2021, endorsing ABA Opinion 495 and stating "lawyers licensed in Delaware may ethically engage in the practice of Delaware law… while physically present in another jurisdiction." Formal Opinion 2021-1 (2021).

In August of 2021, the Bar Association of San Francisco issued an ethics opinion stating that "a lawyer who is not licensed to practice in California and who does not advertise or hold himself or herself out as a licensed California lawyer, does not establish an office or other systematic or continuous presence for the practice of law in California… but is merely physically present in California while using remote technology to remotely practice law… should not be held in violation of California's Unauthorized Practice of Law rule and laws." Opinion 2021-1.

New Jersey and Michigan soon followed. On October 6, 2021, New Jersey's Committee on the Unauthorized Practice of Law and the Advisory Committee on Professional Conduct issued

a joint opinion, stating "non-New Jersey licensed lawyers… who simply work remotely from their New Jersey homes… are not considered to be engaging in the unauthorized practice of New Jersey law." UPL Opinion 59/ACPE Opinion 742 (2021). In December of that year, the State Bar of Michigan followed, concluding that an out-of-state attorney may work "remotely from…Michigan, if the out-of-state attorney only practices only the law of a jurisdiction in which the out-of-state attorney is licensed." The opinion expressly referred those "interested in a greater understanding of what is and is not allowed" to ABA Opinion 495. Standing Committee on Professional Judicial Ethics, MI Eth. Op. RI-382 WL 6339243 (2021).

More jurisdictions followed this trend in 2022 and 2023, including:

Hawaii: The comments to the Hawai'i Rules of Professional Conduct, effective July 1, 2022, cite ABA Opinion 495 and approve of lawyers licensed in other jurisdictions practicing remotely while in Hawaii, provided that the out-of-state lawyers do not hold themselves out as licensed in Hawaii or otherwise offer to provide Hawaiian legal services. Rule 5.5. Unauthorized Practice of Law, HI R S CT EX A RPC Rule 5.5, cmt. 3.

Illinois: In October of 2022, the Illinois Judicial Ethics Committee issued an opinion agreeing with ABA Opinion 495, concurring with its conclusions and stating it was "applicable interpretation of the Illinois Rules." Law Firms; Multijurisdictional Practice; Unauthorized Practice of Law, 2022 WL 16934760 (2022).

Oregon: A November, 2022, formal opinion of the Oregon State Bar Association found ABA Opinion 495 "persuasive," and "consistent with the corresponding Oregon [Rules of Professional Conduct]." The opinion concluded that an Oregon resident licensed to practice in another state and practicing in that state remotely from Oregon does not engage in the unauthorized practice of law in Oregon so long as the lawyer "does not hold themselves out as being authorized and available to handle matters in Oregon." Remote Work and the Unlawful Practice of Law, Formal Opinion 2022-200 2022 WL 19574042.

Tennessee: ABA Opinion 495 was also approved of by the Board of Professional Responsibility of the Supreme Court of Tennessee, which noted that an office in Tennessee is not "established" pursuant to Rule 5.5 so long as the lawyer does not hold the address out to the public as an office through letterhead, business cards, and "other indicia of a lawyer's presence." This sort of activity does not establish a "systematic and continuous presence" as the physical location is merely incidental and is not for the practice of law. Formal Ethics Opinion 2022-F-168, Board of Professional Responsibility of the Supreme Court of Tennessee 2022 WL 19921172 (2022).

Vermont: Effective November 14, 2022, the Board's Notes to the Vermont Rules of Professional Conduct acknowledged ABA Formal Opinion 495 and stated that "similar principles apply in Vermont." The note further elaborated that the state's professional code "is not intended to keep lawyers who are not licensed in Vermont from providing remote legal services to clients in jurisdictions in which they are licensed." Rather, it notes that Vermont has no interest in regulating lawyers who reside in Vermont but who provide legal services that have no impact on the jurisdiction. Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law, Vt. R. Prof. Cond.

Virginia: The Virginia State Bar also endorsed ABA Opinion 495, stating "Virginia has no interest in restricting the practice of a lawyer whose only connection to Virginia is a physical location within the state [and] a lawyer who is not licensed in Virginia may work from a location in Virginia on a continuous and systematic basis, as long as that practice is limited to… the lawyer's licensing jurisdiction." Va. State Bar Standing Comm. On Legal Ethics Op. 1896 WL 342946 (2022). On January 11, 2022, the Supreme Court of Virginia approved the opinion.

2. Other Issues Facing Attorneys Working Remotely

Unauthorized Practice of Law issues are not the only ethical issues arising from the remote work environment. The issues that lawyers face every day in the in-person "real" world—the duties of competence, confidentiality, communication, and compliance with court orders and applicable rules, to name but a few—are also issues in the "virtual" world. One rule to live by is that if you would be prohibited from doing something in person, chances are great that you are also prohibited from doing it over Zoom. But for more specific guidance, additional resources are available.

The beginning point for any research into these issues should be ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 498 (2021). Formal Opinion 498, issued on March 10, 2021, almost one year to the day from the beginning of the COVID pandemic, addressed the minimum requirements and best practices for virtual practice, stressing the increased importance of technology security, adequate supervision of associates and staff, and maintaining client confidentiality, among other issues. As the ABA stressed in its conclusion, "The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision." Formal Opinion 498.

Several state bar associations have issued opinions on the topic as well. Two of the more comprehensive opinions are from California and Wisconsin, both of which address issues arising from a virtual practice which potentially affect the duties of confidentiality, competence, communication, and supervision. Cal. State Bar Formal Opn. No. 2023-208; Wisconsin State Bar Professional Ethics Committee Opinion EF-21-02. While each opinion refers to the rules of that particular state, the principles and guidance are applicable anywhere.

Confidentiality:

The obligation to maintain client confidence has not changed with technology. What has changed, however, is, as the Wisconsin opinion put it, "the variety of circumstances under which the lawyer is responsible to protect the information from unwarranted disclosure." For example, while lawyers may engage third party cloud providers or other technology solution vendors, the California opinion notes that the lawyer "must engage in reasonable efforts to ensure that these vendors' conduct is compatible with the lawyer's ethical obligations." And remote working from home leads to question not present when working from an office—for example, can other people see the lawyer's computer screen, on which confidential information will sometimes be displayed?

If a lawyer brings paper files home, can they or will they be seen by visitors to the home, or by other family members?

Competence:

It is now well settled that the duty to provide competent representation to a client includes the "duty of technology competence," as expressed in Comment 8 to ABA Model Rule 1.1. The Wisconsin opinion states that this obligation includes, *at 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." And while most practitioners are now accustomed to Zoom hearings and meetings, the California opinion notes that lawyers must remain "adequately prepared to render competent legal representation at remote court hearings and conferences."

Communication:

It goes without saying that a lawyer must be able to communicate with the client. But, as the California opinion points out, when communicating with a client electronically the lawyer must ensure that the client is actually receiving and understanding the information conveyed. And Wisconsin's opinion notes that when working remotely lawyers must ensure that communications sent to them through office facilities—for example, voice mail messages left with the firm's telephone system, or old-fashioned paper mail delivered to the lawyer's office—can be retrieved and acted upon as necessary.

Supervision:

Any law firm partner or law department manager will understand, and probably agree with, the Wisconsin opinion's observation that "oversight of fellow professionals is challenging under any circumstance," and can be "particularly challenging" when those being supervised are working in different, remote locations, separate from the supervisor. Yet the duty of supervision continues, and is perhaps even more important in a remote environment, and managerial lawyers must have systems in place to ensure that this obligation is being met.

Finally, while it should now be obvious, one should always remember that a lawyer's ethical obligations do not disappear because the courtroom in which the lawyer is practicing is virtual. *Somberg v. Cooper*, a case discussed at this conference in 2021, arose out of actions by a criminal defense attorney who took a photograph of a Zoom state court proceeding and posted it on social media, along with commentary regarding the prosecuting attorney. The prosecutor brought contempt charges against the defense attorney, arguing that this action violated a Michigan court rule prohibiting the recording of court room proceedings. The state trial court ultimately dismissed the contempt charges on procedural grounds, but said she was "chagrined and troubled by the allegations, if true…because of Defendant's status as a member of the State Bar of Michigan." The court quoted Michigan Rule of Professional Conduct 1.0, which provides that:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Although the defense attorney escaped a contempt finding, he nevertheless filed suit in the Eastern District of Michigan, challenging the ban on recording virtual court proceedings on First Amendment grounds. The District Court denied his motion for summary judgment, but certified the ruling for interlocutory appeal pursuant to 28 U.S.C. §1292 (b). However, the Court of Appeals denied the petition for leave to appeal, and the case returned to the trial court, where it remains pending. *See Somberg v. Cooper*, 582 F. Supp. 3d 438 (E.D. Mich., 2021), *leave to appeal denied,* 31 F. 4th 1006 (6th Cir. 2022).