

State of Litigation

June 16, 2021

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Trials and Litigation in a Post Pandemic World



**Honorable J.
Michelle
Childs**

U.S. District Court
Judge for the District
of South Carolina



Rick Bien

Lathrop GPM LLP
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Immigration Law Update



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A reported 1,000 plus immigration measures put in place under previous administration



Major changes under Biden administration

- Revoked Trump era Buy American and Hire American (“BAHA”) executive order, January 25, 2021
 - BAHA directed agency heads to issue rules to protect U.S. workers through administration of U.S. immigration system
 - Foundation for many restrictive immigration policies
- Overturned so called “Muslim Ban,” Jan 20, 2021
 - Barred entry of foreign nationals from 13 predominately Muslim and/or African countries.
 - Repealed first day in office



Major changes under Biden administration (continued)

- Rescinded public charge wealth test, March 11, 2021 & restored deference to prior determinations of benefits eligibility, April 27, 2021
 - Declaration of Self-Sufficiency eliminated for permanent residence applicants
 - Non-immigrants no longer required to answer public benefit questions
 - Deference likely to lead to more predictability, streamlining of processes
- Rescinded immigrant visa ban, February 24, 2021 and let non-immigrant visa ban expire, March 31, 2021
 - No suspension of entry of immigrants and non-immigrants “who present a risk to US labor market”
 - Extended country-specific COVID-19 travel bans



Changes in humanitarian immigration – securing values as nation of immigrants

- Directed DHS to “preserve and fortify DACA,” January 20, 2021
- Begin process of increasing refugee quota & reverse policies leading to separation of families at border, February 4, 2021
- Proposed Citizenship Act of 2021, January 20, 2021 – comprehensive immigration bill



Pro Bono Updates Featuring the Midwest Innocence Project



Tricia Rojo Bushnell
Executive Director, Midwest Innocence Project

Kansas CLE code:

LGPM2021

Ethical Considerations: Remote Work & Other Post Pandemic Issues



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Law in the Time of COVID

- TOPICS WE INTEND TO COVER
 - Practicing law from the “this”---can I work from my lake house/mountain cabin/beach bungalow?
 - Unauthorized Practice of Law
 - Challenges and Strategies to Conform to selected ethical obligations that are highlighted by a distributed work place
 - Competence
 - Communication
 - Diligence
 - Communication
 - Supervision
 - Lawyers supervising lawyers
 - Lawyers supervising nonlawyers

Law in the Time of COVID—working in a distributed model

I will be away from the **this** afternoon with very limited access to email and voicemail during this time. For immediate assistance, please contact [REDACTED] at [REDACTED]. I will respond to your message as soon as I am able.

Thank you,

C [REDACTED]

Law in the Time of COVID

- **Quiz Question 1**
- Suzie Lawyer is an Estates and Trusts lawyer admitted in State of Misery and her office is in Misery but she lives in the State of Confusion, immediately next to Misery. She has a beautiful house on a suburban lake with a dedicated work space that has a separate ground level entrance and room for parking without blocking the driveway. During Covid her firm asked her to work from home and it turns out she is far more productive. She saves an hour of commute time, she has far fewer pop-in distractions and it has improved her attitude because it is not such a struggle to get to her kids' after school activities.
- **T/F.** Suzie is not at risk of violating the rules prohibiting the unauthorized practice of law because her work from home is temporary.

Law in the Time of COVID

- ***Quiz Question 2.***
- Once vaccinations became consistently available Suzie started meeting with clients that were also working from home including neighbors that she had never really met because their schedules kept them from meeting.
- **T/F.** Suzie is in violation of the rules prohibiting the unauthorized practice of law because she is meeting with clients.

Law in the time of COVID

- **Quiz Question Nos. 3, 4, 5.**
- Starting in September Suzie's firm asked all lawyers and staff to return to the office full-time but she has decided to stay in Confusion. She gave up her office in the tower, got new business cards listing her home address and regularly meets with clients from her home office. The firm sends all her mail to her home and provides a full computer, printer/scanner and updated the firm website to note she works in Confusion.
- 3. **T/F.** Suzie is participating in the unauthorized practice of law.
- 4. **T/F.** Except for Mark, who we will discuss later, the other partners in the firm all still come to the office so they have nothing to be concerned about with Office of Discipline.
- 5. **T/F.** If Suzie was an in-house lawyer providing 100% of her legal services to the single entity that is her employer it would not be a violation.

Law in the Time of COVID – Applicable Authority

- Starting place is Model Rule of Professional Conduct Rule 5.5
- Rule 5.5 Unauthorized Practice of Law/Multijurisdictional Practice
- ABA Formal Opinion 495. December 16, 2020
 - Don't act like you can practice in a location where not licensed.
 - Don't advertise.
 - Don't hold self out as having an office
 - Don't offer or provide legal services
 - Websites, business cards and advertising approach a bright line violation.
 - Big caveat---If the local jurisdiction has not expressed the opinion that it is not permitted.
 - Pursuant to 5.5(c)—lawyers may provide temporary services when associated with licensed lawyers or pursuant to pro hac vice rules or other laws---if they can do them from an office where they are licensed likely not a problem to do them from home.

Law in the time of COVID – Applicable Authority

- Opinions
 - Florida Opinion; New Jersey licensed lawyer can work from his home in Florida as long as:
 - Does not hold himself out as a Florida lawyer
 - Does not meet with clients in Florida
 - Was practicing federal IP law exclusively—Not Florida Law
 - District of Columbia. Opinion 24-20 (March 2020) DC resident lawyers can temporarily work from home due to COVID-19 even if not licensed in DC
 - Incidental and temporary
 - Maintain an office where licensed
 - Don't hold yourself out
 - Not host regular meetings

Law in the time of COVID – Applicable Authority

- Maine Ethics Opinion 189 (2005), cited in ABA 495
 - Maine has no interest in regulating lawyers not practicing in Maine
- Utah Ethics Opinion 19-03 (2019)
 - Utah not interested in regulating an out of state lawyer with a private home in Utah
- New Hampshire—Comment –not necessary to be licensed in NH just because present in in NH
- Minnesota—can live in MN and practice federal law, tribal or law of state where licensed
- Arizona---similar to MN
- Excellent Article by Massachusetts lawyer Richard Rosensweig. ABA Journal, August 12, 2020

Law in the time of COVID – Answers to Quiz

1. Probably True, assuming the State of Confusion has not specifically prohibited it. Temporary. Not holding herself out.
2. Probably True. Note that although still temporary, Suzie is now meeting with clients who live in Confusion where she is licensed. The nature of Estates and Trusts work suggests it is state law-centric.
3. Almost Certainly True. Holding herself out as a lawyer in Confusion is as close to a bright line as you will find.
3. Probably False. Rule 5.5 also prohibits assisting another in UPL.
4. It's a trick question. Depends on how the state treats in-house lawyers.
 - Majority (26) require at least an in-house license.

Of Lawyers, Cats, Birds, Oh my!

- Suzie's Partner **Mark** is licensed in Misery and lives in Misery. He works on big M/A deals that involve teams of 3-5 lawyers including associate and contract attorneys, plus several paralegals, analysts and multiple Legal Administrative Assistants. Mark has flat out said he is not coming back to the office, ever. He is not on the management committee, is not assigned an associate as part of the firm's one-to-one mentoring program and the firm has an experienced HR manager.
- **Quiz Question 1. T/F.** Mark does not have to worry about the associates and staff because other people in the firm are responsible for "all that that stuff."
- **Quiz Question 2. T/F.** Being off-site is a huge advantage because Mark has an unpublished home number, no cell phone and doesn't have to worry about being interrupted by clients all the time.

More on Mark

- At the start of the pandemic Mark had the firm bring a computer, and a wireless printer/scanner to his condo. At first he connected through a home router but he found out his neighbor's unsecured WIFI is actually stronger so he connects through that. And, the firm did not have a portable shredder for him so Mark puts drafts that he prints in the kitchen trash which the cleaning service places in a common dumpster. His wife, grandkids and housekeeper all use his firm-supplied lap top for internet shopping and playing games.

Quiz Questions – Of Lawyers, Cats, Birds, Oh my!

- **Quiz Question 3. T/F.** Mark is okay to link by WIFI to his neighbor's network and throw away drafts of documents because it goes to a common dumpster.
- **Quiz Question 4. T/F.** Working from home means the rules of decorum are waived.

Of Lawyers, Cats, Birds, Oh my!



Of Lawyers, Cats, Birds, Oh my!



Competence and Diligence

- **Rule 1.1**
- *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
- **Rule 1.3**
- *A lawyer shall act with reasonable diligence and promptness in representing a client.*

Competence and Diligence (continued)

- Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Lawyer must stay current
- “Including the benefits and risks associated with relevant technology.”
- No exception for a virtual office.
- Create, access and store information.
- Understand and be able to appropriately use e-filing, e-signature, e-notarization.

Competence and Diligence (continued)

- Understand how to use virtual communication
 - How to use the variety of platforms
 - Ensuring security
 - Understanding rules on recording communications with clients and others
- Temporary changes to rules for COVID-19 are expiring
 - Statutes of limitations that were statutorily or by Order delayed or “tolled” are expiring
 - Understanding exactly how those statutes or rules impacted timing—not universal.
 - CLE compliance dates returning to normal
- Understanding how the “new trial” is going to work
 - Off-site trials (e.g., in rented spaces with more room)
 - Virtual appearance of witnesses at trial

Confidentiality

- **Rule 1.6(a), Rule 1.9(c)** (applies 1.6 to former clients)
- *A lawyer shall not reveal information relating to the representation of the client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation or the disclosure is permitted by law.*
- Broader than the attorney client-privilege. Encompasses much of what we hear lawyers talking about regularly in bars, at the swimming pool, from their overly loud hands-free phone in the parking lot at the Court House, etc.
- Data Breach, Ransomware, malware, phishing, social fraud---all noted to be of increased risk with distributed work force.

Confidentiality

- Must make “reasonable efforts” to prevent inadvertent or unauthorized disclosure of information relating to representation
- Proper disposal of notes/drafts
- Cloud storage must be equally secure
- Must use reasonable precautions when transmitting client-related comm’s
- Unsecure Wi-Fi creates risk
- VPN’s preferred (Virtual Private Network)



Communication

Rule 1.4

(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 Rule 1.0(e), 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 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.

Communication (continued)

- Again, no exception for virtual office/remote office
- Be at least as accessible as you were in the office
- Inform clients of good news promptly and bad news just as promptly
- Understand how COVID has impacted client's strategy, goals, objectives
- Communication requires more than *sending* messages

Supervision

- Duties of Supervision found primarily in:
- MRPC 5.1 *Responsibilities of Partners, Managers and Supervisory Lawyers*
- MRPC 5.2 *Responsibilities for Subordinate Lawyer*
- MRPC 5.3 *Responsibilities Regarding Nonlawyer Assistants*
- Standard is basically reasonable efforts
- Being remote does not change these duties
- Arguably heightens the need to pay attention to them.
 - Day-to-day supervision may need to be more formal
 - Evaluations, reviews, feed back, guidance need to be at least as deliberate
 - Formulation of and Adherence to practice and procedural guidelines

Supervision (continued)

Tips:

1. Increased communication
2. Ask questions / share experiences
3. Address “new normal”
4. Recognize that change is stressful and stress leads to mistakes

Recent ABA Opinion

- ABA Formal Opinion 498 – Lawyers Working Remotely
- Kuehl, *Technologically Competent: Ethical Practice for 21st Century Lawyering*, Journal of Law, Technology & the Internet, Volume 10, Issue 1, 2019
- <https://www.lexisnexis.com/community/insights/legal/b/practical-guidance/posts/adventures-in-lawyering-when-your-client-insists-on-performing-surgery-during-a-virtual-trial>
- Syracuse, Stallone, Goldrich, Chp. 5, *The Ethics of Virtual Lawyering*, NYSBA Virtual Lawyering---A Practical Guide

Law in the time of COVID – Answers to Quiz

1. False. Duty of supervision is the same regardless of work location.
2. True and False. It may be an advantage to Mark, but it does not change his obligation to keep clients informed of the progress of their matters. If anything, he needs to make extra efforts to understand the needs of his clients including changing a primary means of communication.
3. Definitely False. There are real world stories of data breach and draft legal papers lying by the curb because they were not adequately secured. True or simply apocryphal, there are also stories of Alexa and similar devices inadvertently opening phone lines to unintended participants in phone calls.
4. False. Competence and simple professionalism still apply. Don't use a cat filter. Don't blame your grandchildren. Understand that you have to know when your camera is on—just because you cannot see them does not mean they cannot see you.







Thank you for attending!