

# Thin Walls, Smart Homes, Zoom Towns & Data Breaches: 21 Things Lawyers Should Know About the Ethics of Lawyering Remotely in 2021

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1 CLE hour





Thin Walls, Smart Homes, Zoom Towns & Data Breaches:

# **21 Things Lawyers Should Know About the Ethics of Lawyering Remotely in 2021**

# PRESENTERS



Jessica A. Schoendienst

(Moderator)

Senior Legal Counsel,  
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David J. Kaplan

(Panelist)

General Counsel,  
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Nancy B. Rapoport

(Panelist)

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George L. Washington, Jr.

(Panelist)

Chief Litigation Counsel, Orange  
Business Services



# AGENDA

- Introduction
- Establishing A Good Foundation
- Key Ethical Duties for Using Technology in Remote Practice
- Understanding and Preventing Data Breaches
- Resources
- Q&A



# INTRODUCTION

**Jessica A. Schoendienst**

Senior Legal Counsel,  
Sierra Nevada Corporation



# ESTABLISHING A GOOD FOUNDATION

**Nancy B. Rapoport**

Garman Turner Gordon Professor of Law,  
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University of Nevada, Las Vegas  
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# DON'T WORK FROM HOME IF IT'S UNETHICAL

- Model Rule 5.5's general principle: "(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."
- "Continuous presence" issues.
- ABA Formal Op. 495 (2020): WFH is allowed under limited circumstances (no holding oneself as licensed in the remote jurisdiction; no providing legal services for people in the remote location; no contact info pointing to the remote location).

- ABA Formal Op. 495 (2020): Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction....

...This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules....



2

# CONSIDER WHETHER OR NOT YOU HAVE A VLO

- What type of advice are you giving, for whom, and where?
- How are people finding you/contacting you?
- Who's around to see your confidential client information (or hear it, including "helpers" like Alexa)?

- Can you stay diligent and keep in communication with your clients, or do your other demands (caregiving, self-care) make it more difficult for you to represent your clients?
- Be aware of your surroundings (backdrops), your clothes (<https://abovethelaw.com/2020/04/miami-judge-reminds-attorneys-to-wear-pants-for-zoom-hearings/>), and your filters (<https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html>).

# **SUPERVISE, EVEN IF WORKFORCE IS DECENTRALIZED**

- Rules 5.1 (supervising subordinate lawyers); Rule 5.3 (supervising nonlawyers).
- Already occasionally challenging in an in-person environment, but now?
- Supervising/mentoring/sponsoring the newest lawyers when few people are in the office on a regular basis.



4

# BE AVAILABLE TO YOUR CLIENTS

- Model Rule 1.4's general rule: A lawyer shall communicate material information to the client.
- Pay special attention to matters that require informed consent.
- Our 24/7 life as lawyers.
- We're at high risk for depression and suicide  
(<https://www.prainc.com/lawyers-and-suicide/>).
- Our clients' 24/7 lives.
- What if your client has COVID-19?

# WORK THROUGH POTENTIAL CONFLICTS OF INTEREST

- Rule 1.7: Current v. current/future client.
- Rule 1.9: Former client v. current client.
- Rule 1.18: The complication of prospective clients on future work.
- The twist:  
non-standard conflicts, such as conflicts that are dormant and temporary when they “do” occur.

# IT'S ALL ABOUT SYSTEMS

- What can you do to make sure that your organization is prepared to do the right thing?
  - To monitor UPL.
  - To supervise and mentor.
  - To engage in regular communications with clients.
  - To monitor conflicts of interest.
- Humans make cognitive errors; and they can be nudged with incentives and checklists.
- With new technology still comes the old problem of being a human.



# ONCE YOU'VE BUILT IT, WHY KILL IT?

- Succession planning is key.
- Baby steps - getting out of the office to have a life:  
<https://abovethelaw.com/2015/05/who-will-take-care-of-your-clients-when-you-cant/>.
- Bigger steps: apparently, everybody dies, and many people retire before they die.
- Planning ahead is key: what happens if someone you need is struck down too early?

# KEY ETHICAL DUTIES FOR USING TECHNOLOGY IN REMOTE PRACTICE

George L. Washington, Jr.

Chief Litigation Counsel,  
Orange Business Services



- Duty to understand benefits and risks of relevant technology.
  - Model Rule 1.1, cmt. 8 (competence)
  - "need to understand basic features"
  - ABA Formal Opinion 477R
- Duty to protect client information and confidential communications.
  - Model Rule 1.6
- Duty to protect client property.
  - Model Rule 1.15





# MAINTAIN PROPER TECH RESOURCES

- Adequate
  - Internet bandwidth and wifi security
- Up-to-Date
  - Software updates and security patches
- Capable
  - Test applications and platforms before meetings and hearings.

# KEEP ALEXA (AND OTHERS) OUT OF YOUR CLIENT DISCUSSIONS

- Google Home, Amazon Echo, and similar devices
  - Can listen to conversations even before activation word is spoken
- Avoid discussions when family members or others are present.

# MAINTAIN A PRIVATE WORKSPACE

- Create a schedule if need to share space.
- Conduct calls and videoconferences in private to maintain confidentiality.
- Have a space to participate in proceedings and client calls competently and professionally.



# OPERATE VIDEO- CONFERENCE PLATFORMS SECURELY

- Remain "privacy conscious" at all times.
- Manage access to ensure session is private.
- Be careful when using the chat feature.
- Be careful when "presenting" or sharing.
- Become best friends with the "mute" function.
- Confirm no one else is in the room with clients.

# DO NOT SHARE DEVICES (OR, TAKE PRECAUTIONS)

- Make it a practice to lock devices when stepping away.
- If sharing:
  - Use separate profiles and passwords to protect folders and documents.
  - Use a schedule to help minimize unauthorized access.
  - Communicate and improve.

# KEEP CLIENT PROPERTY IN A SAFE AND SECURE PLACE

- Paper files and ESI.
- Locked cabinets or drawers.
- Regular backup of ESI.

# **AVOID BECOMING “SOCIALLY ENGINEERED”**

- FBI warning about campaigns focused on teleworkers.
- Lawyers are targets.
- Verify identity of other party.
- Look for warning signs.



# UNDERSTANDING AND PREVENTING DATA BREACHES

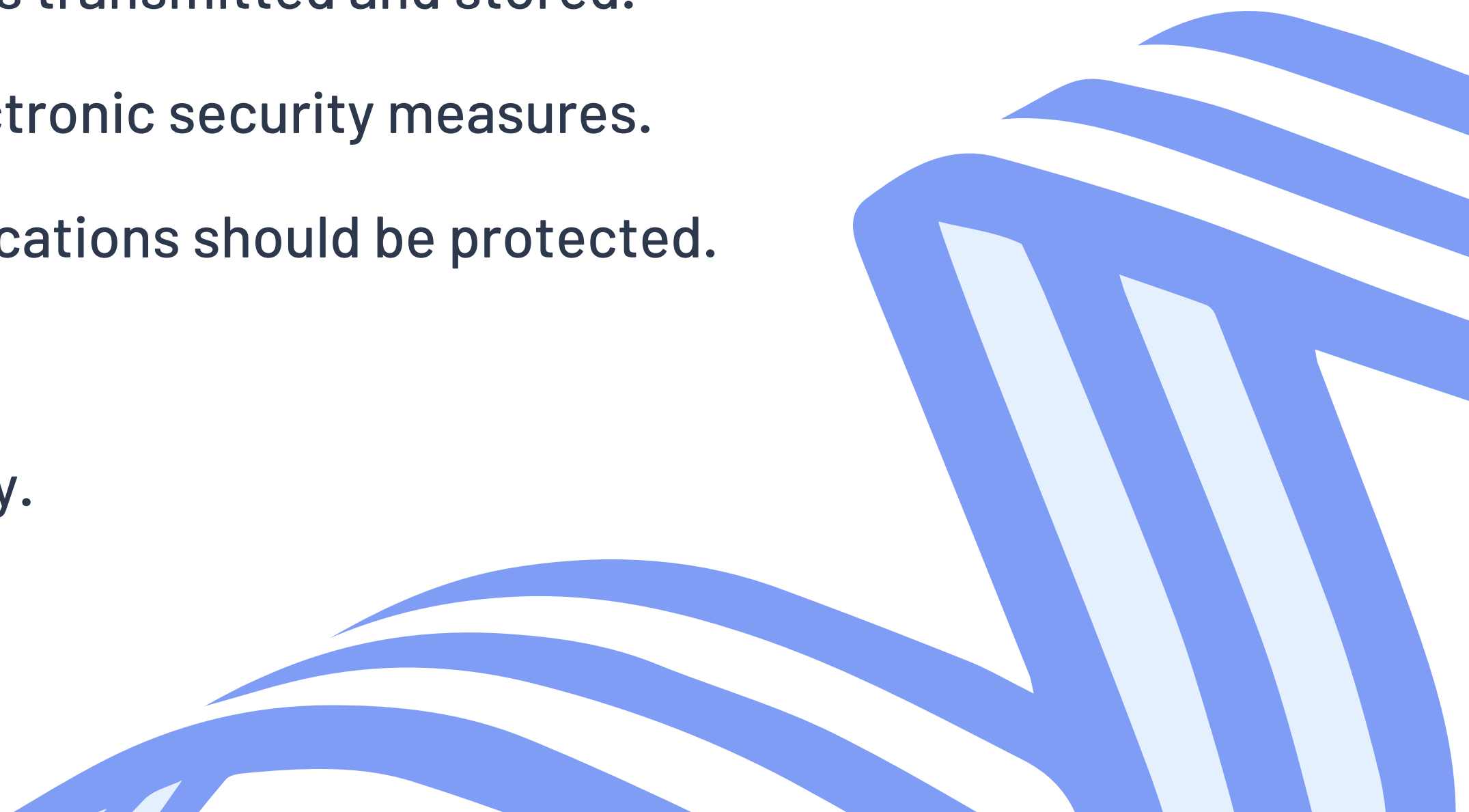
**David J. Kaplan**

General Counsel,  
AXEL



# ABA FORMAL OPINION 477R

Attorneys are required to:

- Understand the nature of threats.
  - Understand how client information is transmitted and stored.
  - Understand and use reasonable electronic security measures.
  - Determine how electronic communications should be protected.
  - Label confidential information.
  - Train lawyers and staff in technology.
  - Use due diligence on vendors.
- 

# KNOW THE TYPES OF THREATS

- Malware
- Phishing
  - 4 out of 10 Covid-themed emails are spam.
- Ransomware
  - Data with seemingly no outside value is susceptible.
  - Most common
  - Seven-fold year-over-year increase in ransomware reports in 2020
- Distributed denial of service attack

# BREACH TAKES ONLY ONE ENTRY POINT

- Security depends on weakest links
  - It only takes one person
  - Vendors
  - Home networks

# TOOLS AND TRAINING ARE CRITICAL

- **Make the right tools available**
  - Malware security suites
  - Secure Services
  - Encryption
  - Decentralization
  - Control admin rights
- **Train all users (attorneys and staff)**
  - Be vigilant before clicking links or providing information.
  - Password hygiene
  - Multi-factor authentication
  - Model Rules 5.1 and 5.3



# EXPECT TO BE BREACHED – IT'S A NUMBERS GAME

- ABA Formal Opinion 483: recognizes inevitability
- Lawyers must safeguard and monitor the security of electronically stored information.
- Rule of competence (Model Rule 1.1) requires a lawyer to act reasonably and promptly to stop breach and mitigate damage
- Once there is one breach, subsequent breaches are more likely.

# EXPLORE SYSTEMS AND POLICIES TO LIMIT SCOPE OF DAMAGE

Limit what is susceptible to attack.

- Consider routine and policies as to what is in an email box.
- Decentralize storage.

# DEVELOP INCIDENT RESPONSE PLAN

- Have readily available and useful backup
  - Limits leverage of ransom attackers
  - Ransomware often attacks backups
- Know who to call.
  - Your own internal team
  - Forensic Expert
  - Restoration Service
  - Data Breach Lawyer
  - Law Enforcement
  - Crisis Communication Consultant
- Preserve system logs
- Secure financials
- Get insurance policy
- Paying a ransom may not be advisable

# BE PREPARED TO NOTIFY CLIENTS QUICKLY

- Model Rule 1.4 requirement to keep client “reasonably informed” interpreted to be obligation to communicate about data breach (ABA Formal Op 483)
- Duty of notification for breach involving or “substantial likelihood of involving” material client confidential information
- Duty to notify does not necessarily extend to former clients
- Contractual terms of engagement may require notification
- State data breach notification laws may require notification
- Having plans in place can show clients that problem is under control at the same time they are notified

# WRITTEN RESOURCES

- [ABA Formal Opinion 495](#)
- [ABA Formal Opinion 477R](#)
- [ABA Formal Opinion 483](#)
- [CUPL Opinion 24-20](#)
- [Utah-Bar Coronavirus Response](#)
- [Michigan Bar Opinions Ethics COVID-19](#)
- [Florida Bar Ethics During COVID-19](#)
- [Pennsylvania Bar Association Opinion](#)



# Q&A

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