



# VIRTUAL PROFESSIONALISM FOR MARYLAND LAWYERS

**By Colleen M. Aracri, Esq.**

MSBA LEGAL CONTENT EDITOR

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## **A. What is the Virtual Practice of Law?**

A variety of “virtual” law practices exist. Many attorneys who practice “virtually” are solo practitioners, but law firms can practice virtually as well. Entirely virtual law firms have no brick and mortar offices, but operate via the Internet and the computers of their attorneys. Some firms operate on a hybrid model, where they have centralized offices, but some or all of their lawyers connect with clients and colleagues virtually. A hybrid virtual law firm may have attorneys that work remotely or in the office, and some that split their time between the two. In cases in which an attorney typically works in an office in one location but occasionally works remotely from a different location, it may be referred to as telecommuting.

The virtual practice of law began before the COVID-19 pandemic, but has increased lately due to client needs, changes in the priorities of attorneys and law firms, and advances in technology. Regardless of the impetus for the recent boom of virtual firms, the remote practice of law in all of its manifestations will likely endure long after the pandemic is over. While all lawyers licensed to practice in Maryland are bound by the same rules, regardless of whether they work in a brick and mortar office or maintain a virtual practice, there are certain things anyone practicing law virtually should consider.

## B. Ethical Considerations in a Virtual Work Environment

*A lawyer that engages in the virtual practice of law will most likely depend on the Internet to communicate with clients. This can create distinct challenges with regards to upholding the ethical duties imposed by the Maryland Attorneys' Rules of Professional Conduct.*

### 1. Taking Measures to Prevent the Unauthorized Practice of Law

*Technology allows attorneys to work from virtually anywhere. They are nonetheless limited to the geographical constraints of their license, and must make sure they do not engage in the practice of law in jurisdictions in which they are not admitted, in violation of Maryland Attorneys' Rules of Professional Conduct 19-305.5.*

Rule 19-305.5 provides:

- (a) An attorney 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.
- (b) An attorney who is not admitted to practice in this jurisdiction shall not:
  - (1) 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
  - (2) hold out to the public or otherwise represent that the attorney is admitted to practice law in this jurisdiction.

The virtual practice of law often implicates this rule. An attorney or firm may exist virtually, but the individual engaging in the practice of law has a physical location. As such, attorneys representing clients virtually should take measures to ensure that they do not engage in the unauthorized practice of law in states in which they are not licensed.

Generally, rulings addressing the unauthorized practice of law focus on attorneys who either have a continuous and systemic office presence in the jurisdiction, or hold themselves out to the public or otherwise suggest that they are authorized to practice law there.

#### *a. Attorneys Licensed and Working in Maryland While Living in Other Jurisdictions*

Lawyers practicing virtually may want to telecommute; in other words, they might wish to have an office in one jurisdiction while regularly working from another location that is situated in a jurisdiction in which they are not permitted to practice law. At least one court in Maryland has determined that

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this is generally permissible. See *In re Application of Carlton*, 708 F. Supp. 2d 524 (D. Md. 2010).

The court in *Carlton* ruled that if a lawyer has an office and is admitted to practice in the jurisdiction where the office is located, the lawyer may work from another location even if they are not admitted to practice in their “home” jurisdiction. In determining that the telecommuting lawyer in *Carlton* was not engaging in the unauthorized practice of law, the court noted that her correspondence was directed to her office in Maryland, she did not meet clients at her home, use her home address for correspondence, or advertise her home office in any way.

*b. Attorneys Licensed in Other Jurisdictions While Living and Working in Maryland*

While *Carlton* allowed a scenario where a lawyer had a home office outside of the jurisdiction in which she principally practiced, courts in Maryland have rejected the converse scenario. See *Ramirez v. England*, 320 F. Supp. 2d 368 (D. Md. 2004); *In re Zeno*, 850 F. Supp. 2d 546 (D. Md. 2011). The *Ramirez* court found that a lawyer who is a member of the Mississippi Bar but not the Maryland Bar engaged in the unauthorized practice of law when she practiced out of a home office in Maryland.

In its decision, the court noted that the lawyer’s letterhead set forth a Maryland address, without indicating she was not a member of the Maryland Bar. Similarly, the *Zeno* court found that a lawyer whose principal place of practice is in a jurisdiction in which they are not admitted engages in the unauthorized practice of law even if the lawyer is admitted in the jurisdiction where they reside.

There are some scenarios in which attorneys are permitted to practice outside of the jurisdictions in which they are licensed, including working as in-house counsel, *pro hac* vice admission, temporary and incidental practice, alternative dispute resolution proceedings, and in association with local counsel. Rule 19-305.5 also prohibits Maryland attorneys from aiding other people in the unauthorized practice of law, so if no exemption applies and an attorney believes a colleague is engaging in practice in Maryland in violation of the Rules, they may be in violation of the Rules as well by continuing to work with them.

*c. Practicing Before Federal Courts and Agencies*

Rules regarding the appearance and conduct of attorneys practicing before federal government agencies may preempt state rules pertaining to the unauthorized practice of law. For example, a lawyer admitted to a state bar and registered to practice before the U.S. Patent and Trademark Office (the Office) can practice before the Office from any state. See *Sperry v. Florida*, 373 U.S. 379 (1963), in which the Court ruled that Florida had no authority to

regulate the conduct of a Florida-based patent agent registered to practice before the Office. Notably, the federal practice exemption does not apply to all types of federal practice or attorneys whose practice includes both federal and state matters. In other words, a New Jersey attorney registered to practice before the Office is not permitted to handle state court cases from an office in Maryland.

An attorney attempting to limit a virtual practice to a discrete area of federal law may encounter obstacles, however. For example, in *Kennedy v. Bar Ass'n*, 561 A.2d 200 (Md. 1989), the court noted that a lawyer who constrained his legal representation of clients to matters before the jurisdictions in which he was admitted to practice, thereby drawing a line of demarcation as to issues he could discuss when advising clients, could not adequately serve them. In *Kennedy*, the attorney, who was licensed in Washington, D.C., had an office in Maryland from which he practiced exclusively in federal court.

While the court refrained from stating it was impossible for the attorney to maintain a principal office in Maryland exclusively for engaging in a practice before the federal court in Maryland and the courts in the District of Columbia, it was not feasible from a practical standpoint. The court further explained that the lawyer would be engaging in the practice of law in Maryland when evaluating whether he could represent clients and advising potential clients of their legal rights, and as he was not admitted in Maryland, such acts constituted the unauthorized practice of law.

*See also, Attorney Grievance Comm'n of Md. v. Harris-Smith*, 737 A.2d 567 (Md. 1999) (in which the court issued a thirty day suspension for a Pennsylvania lawyer who claimed to work exclusively in bankruptcy law in Maryland and whose letterhead listed the Maryland office without explaining the limitation on her license); *Attorney Grievance Comm'n v. Ambe*, 38 A.3d 390 (Md. 2012) (in which the court reprimanded a New York lawyer for representing immigration clients in Maryland in non-immigration matters).

## 2. Protecting Client Confidentiality

*The Maryland Attorneys' Rules of Professional Conduct require practicing attorneys to protect their clients' privacy.*

Maryland Attorneys' Rules of Professional Conduct 19-301.6

- (a) An attorney shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by section (b) of this Rule.
- (b) An attorney may reveal information relating to the representation of a client to the extent the attorney reasonably believes necessary:
  - 1) to prevent reasonably certain death or substantial bodily harm;
  - 2) to prevent the client from committing a crime or fraud that is

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reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the attorney’s services;

3) 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 attorney’s services;

4) to secure legal advice about the attorney’s compliance with these Rules, a court order or other law;

5) to establish a claim or defense on behalf of the attorney in a controversy between the attorney and the client, to establish a defense to a criminal charge, civil claim, or disciplinary complaint against the attorney based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the attorney’s representation of the client; or

6) to comply with these Rules, a court order or other law.

*a. Maintaining Client Confidences While Working Virtually*

*A virtual law practice that depends solely on the Internet for client communication and uses cloud storage for client documents and files may impose specific due diligence obligations with respect to confidentiality.<sup>1</sup>*

Physical limitations created by a virtual practice do not relax the ethical obligation to protect client confidences. To safeguard the attorney-client privilege and meet the duty to maintain confidentiality, a lawyer practicing virtually should ensure that client-related information, including information shared over video conferencing platforms, is not overheard by third parties or by others in the lawyer’s household. It is also recommended that attorneys practicing from home offices disable the listening capability of any “smart” devices prior to communicating about confidential client matters.

Lawyers practicing virtually should also ensure that no one else can view or access client files or information by adopting a clean screen or clean desk policy when they are not working. In other words, they should lock their computers or log off when they leave their desks for an extended period of time, and put away any documents, notes, or memory sticks that contain sensitive client information at the end of each day. Similarly, lawyers working virtually should make reasonable efforts to ensure that people in their households who are not associated with their law practice do not have access to their clients’ documents or information. The American Bar Association also recommends<sup>2</sup> that attorneys and staff members take measures to ensure client information remains protected, such as employing strong passwords, updating software regularly, and preventing unauthorized access of client information on devices used by family members or other people in their household.

<sup>1</sup> [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-498.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf).

<sup>2</sup> [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-498.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf).

### *b. The Risk of Disclosure Via Blogging and Online Commentary*

*Lawyers who maintain an online presence via blogs or social media must take care not to reveal information related to the representation of a client unless they are authorized to do so by the client or a provision of the Rules of Professional Conduct.*

Lawyers comment on legal issues in numerous formats, including online articles, website posts, blogs, podcasts, webinars, online videos, and social media outlets. They also make public remarks in online informational videos such as webinars and podcasts. Lawyers who discuss legal topics in public forums must comply with the Maryland Rules of Professional Conduct, including the Rules regarding confidentiality of information relating to the representation of a client. Specifically, Rule 19-301.6 dictates that a lawyer must maintain the confidentiality of information relating to the representation of a client, unless that client has given informed consent to the disclosure, the disclosure is impliedly authorized to carry out the representation, or the disclosure is permitted by Rule 19-301.6 (b).

The American Bar Association published a formal opinion<sup>3</sup> stating that Model Rule 1.6, which is virtually identical to Rule 19-301.6 “applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” In other words, the scope of protection provided by the confidentiality rules is far greater than that afforded by the attorney-client privilege.

<sup>3</sup> [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_opinion\\_480.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_480.authcheckdam.pdf).

Thus, unless an exception under Rule 19-301.6(b) applies, Rule 19-301.6(a) bars attorneys from commenting online or in any public forum regarding information related to a representation. Notably, the duty of confidentiality applies despite the fact that information is contained in a public record, such as a court order. Thus, it broadly covers information related to representation regardless of the source or the fact that other parties may be aware of or able to access the information.

The American Bar Association also stated that an attorney cannot avoid violating Rule 1.6(a) by couching public commentary as a “hypothetical” if there is a reasonable chance that another person could determine the client’s identity or the situation in question based on the information included in the hypothetical. As such, lawyers using hypotheticals must take care to structure them so there is no chance of revealing their clients’ identities.

### *c. Ethical Constraints on Trial Publicity and Other Statements*

*An attorney’s public commentary may also implicate duties imposed by other Rules, like Rules 19-303.5 (Impartiality and Decorum of the Tribunal) and 19-303.6 (Trial Publicity).*

Rule 19-303.5 provides,

(a) A lawyer shall not:

- 1) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law;
- 2) before the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with anyone known to the lawyer to be on the list from which the jurors will be selected for the trial of the case;
- 3) during the trial of a case with which the lawyer is connected, communicate outside the course of official proceedings with any member of the jury;
- 4) during the trial of a case with which the lawyer is not connected, communicate outside the course of official proceedings with any member of the jury about the case;
- 5) after discharge of a jury from further consideration of a case with which the lawyer is connected, ask questions of or make comments to a member of that jury that are calculated to harass or embarrass the juror or to influence the juror's actions in future jury service;
- 6) conduct a vexatious or harassing investigation of any juror or prospective juror;
- 7) communicate ex parte about an adversary proceeding with the judge or other official before whom the proceeding is pending, except as permitted by law; or
- 8) discuss with a judge potential employment of the judge if the lawyer or a firm with which the lawyer is associated has a matter that is pending before the judge; or
- 9) engage in conduct intended to disrupt a tribunal.

(b) A lawyer who has knowledge of any violation of section (a) of this Rule, any improper conduct by a juror or prospective juror, or any improper conduct by another towards a juror or prospective juror, shall report it promptly to the court or other appropriate authority.

Rule 19-303.5 largely prohibits attorneys from trying to influence or communicate with jurors, prospective jurors, judges, or other officials about pending cases. While commenting about a case online with the client's consent may be acceptable in some situations, lawyers should be careful not to breach the limitations imposed by Rule 19-303.5.

Attorneys engaged in an investigation or litigation of a case are also subject to Rule 19-303.6, which provides:

(a) An attorney who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the attorney knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding section (a) of this Rule, an attorney may state:

- 1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- 2) information contained in a public record;
- 3) that an investigation of a matter is in progress;
- 4) the scheduling or result of any step in litigation;
- 5) a request for assistance in obtaining evidence and information necessary thereto;
- 6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- 7) in a criminal case, in addition to subsections (b)(1) through (6) of this Rule:

- A. the identity, residence, occupation and family status of the accused;
- B. if the accused has not been apprehended, information necessary to aid in apprehension of that person;
- C. the fact, time and place of arrest; and
- D. the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding section (a) of this Rule, an attorney may make a statement that a reasonable attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the attorney or the attorney's client. A statement made pursuant to this section shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No attorney associated in a firm or government agency with an attorney subject to section (a) of this Rule shall make a statement prohibited by section (a) of this Rule.

As such, if a lawyer makes a comment online about an investigation or ongoing litigation of a matter made by a lawyer, it may also violate Rule 19-303.6, if it is substantially likely to prejudice a proceeding or does not otherwise fall under an exception.

#### **d. Responding to Online Criticism**

*Many attorneys are the target of negative reviews and online criticism. While they may be tempted to respond or defend their reputation, doing so runs the risk of disclosing client information or committing an ethical violation. The primary ethical consideration when responding to an online review is upholding the duty of confidentiality.*

Comment [5] of Rule 19-301.6 states, “[e]xcept to the extent that the client’s instructions or special circumstances limit that authority, an attorney is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation.”

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<sup>4</sup> [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-496.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-496.pdf).

The ABA has stated<sup>4</sup> that a client or former client's negative online comments do not create "implied authorization" for the lawyer to disclose confidential information in response to the online criticism because that is not required to carry out the representation, and it is likely that the Maryland courts would rule similarly. Thus, a negative comment online, in and of itself, is unlikely to rise to the level of permitting the attorney to disclose information relating to representation of a client pursuant to Rule 19-301.6(b).

When addressing the issue, the ABA stated that only subparagraph (b)(5), which is the same as Rule 19-301.6(b)(5), is implicated, and opined that none of the exceptions under that provision applied. Specifically, the ABA noted that criticism in an online forum is not a "proceeding," nor is responding to such criticism necessary "to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved." While, if needed, an attorney may respond directly to the individual making such a statement to defend against a criminal charge or civil claim, they are not permitted to make public statements online that breach confidentiality solely to defend themselves.

Finally, the ABA concluded that negative reviews alone do not constitute controversies between the client and attorney within the meaning of the rule and therefore do not allow for the disclosure of confidential client information. While the Maryland courts have not addressed this precise issue, numerous other states have, and the majority have concluded that a client posting criticism online does not rise to the level of controversy that would permit an attorney to disclose confidential information in responding.

Attorneys who are the subject of negative reviews and comments online are not without recourse, however. They can request that the owner of the website or search engine remove the post in question. They are not permitted to disclose client information but may indicate the post is inaccurate, invite the person to contact them directly, or if the person is not a current or former client, may indicate as such. They can also indicate that the Rules of Professional Conduct prohibit them from responding as they would like. The best tactic in many situations, though, is not to respond, as any response may just increase the attention on the original post. Attorneys can also address the issue offline by communicating directly with the individual who posted the criticism.

Attorneys should be mindful of the obligations of the profession when posting any comments online, regardless of whether it is in response to criticism or addresses an unrelated issue, as such posts can result in significant ramifications. For example, the Maryland Court of Appeals has reprimanded attorneys as a direct result of their online activity. Specifically, it suspended two lawyers who worked for the federal government from the privilege of practicing law for 90 days because they used their work email accounts to transmit inappropriate and offensive statements that demonstrated "bias or prejudice based upon race, sex, ... national origin, ... sexual orientation[,] or

socioeconomic status,” Maryland Attorneys’ Rules of Professional Conduct 19-308.4(e) (Bias or Prejudice). *Atty. Griev. Comm’n of Md. v. Markey*, 230 A.3d 942 (Md. 2020).

The Court previously published an opinion deriding statements a Bar applicant made on the Internet that used vulgar and inflammatory language as well. See *In re Gjini*, 141 A.3d 16 (Md. 2016). While the *Gjini* Court ultimately denied the applicant admission to the Bar for his failure to disclose certain information, it considered whether his online commentary should prevent him from practicing law in Maryland.

### 3. Competence

*The American Bar Association recently amended<sup>5</sup> Model Rule of Professional Conduct 1.1 to add a comment stating that competent lawyers must keep abreast of the risks and benefits associated with the use of technology in the practice of law. While Maryland has not yet adopted the aforementioned comment, it is clear that attorneys need to adjust their practices to adapt to technological advances.*

Pursuant to Maryland Attorneys’ Rule of Professional Conduct 19-301.1, “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” This requires, in part, preparation for scenarios that threaten the ability to offer adequate representation.

#### *a. Meeting deadlines*

The challenges of practicing law virtually will not free an attorney of the duty to meet deadlines or other obligations. Further, an attorney’s personal inconvenience is not grounds for abandoning the duty of diligent representation. As such, if a lawyer’s Internet connection is down it will not excuse an absent or delayed response to client communications. Additionally, lawyers who engage in virtual practice must check whether they received paper mail at a physical location on a regular basis, and should have a process in place to process any mail received, to avoid unwittingly missing pleadings or documents that require a timely response.

#### *b. Filing online*

Lawyers working virtually must make sure they can receive and submit pleadings that are filed electronically and other court documents, the same as they would when working in a physical office. As with other aspects of working virtually, technical issues are not a valid excuse for filing delays or missed deadlines.

#### *c. Cybersecurity*

Computer hacking and ransomware attacks targeting attorneys were on the rise even before the pandemic forced many to work from home. With so many

<sup>5</sup> [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120808\\_house\\_action\\_compilation\\_redline\\_105a-f.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf).

<sup>6</sup> [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba\\_formal\\_op\\_483.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_op_483.pdf).

people working from home, though, opportunities for bad actors to access law firm technology, or to shut it down completely, have increased significantly. A home-based network is substantially more likely to contain malware than an office network, and many personal devices used to connect to law firms remotely are already infected, a dangerous scenario even for well protected office systems. A potential for an ethics violation occurs when a lawyer doesn't undertake reasonable efforts to avoid data loss or to detect cyber-intrusion and that lack of reasonable effort causes the breach. It is important, therefore, that attorneys practicing virtually understand the ethical and business implications of these threats, and how to address them.<sup>6</sup>

All of an attorney's or firm's computers, servers, networking hardware, phone systems, etc. should be on an uninterruptible power supply, which protects against power surges, dirty electricity, and outages, and allows for the proper shutdown of devices. Additionally, software configurations of all network devices should be backed up and stored in a secure location and lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly. Lawyers should also employ measures to monitor technology, resources connected to the Internet, external data sources and external vendors providing data services.

#### **4. Communicating with Clients in a Virtual Practice**

*Maryland lawyers practicing virtually must employ reasonable efforts to keep their clients abreast of the status of their cases and to respond to requests for information in a timely manner.*

Maryland Attorneys' Rule of Professional Conduct 19-301.4 establishes an attorney's obligations with regards to communication, stating:

- a) An attorney shall:
  - 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 19-301.0 (f) (1.0), is required by these Rules;
  - 2) keep the client reasonably informed about the status of the matter;
  - 3) promptly comply with reasonable requests for information; and
  - 4) consult with the client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Maryland Attorneys' Rules of Professional Conduct or other law.
- b) An attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Many attorneys use social media sites, like Facebook, Twitter, Instagram, and LinkedIn to advertise and communicate with clients and potential clients. Indeed, many professionals use social media as their primary means of communication. Some attorneys communicate with clients via text messages as well. Pursuant to Rule 19-301.4, when choosing among the various methods

of communication, such as mail, phone, text, social media, and video calls, lawyers must consider their clients' ability to effectively utilize technology. Further, people often use informal language and abbreviations when using social media or texting, which can lead to confusion and misunderstanding. Such communication also raises concerns regarding the security of the transmission, particularly with regards to protecting the attorney client privilege. It can also be difficult to confirm if a party received a message, and people may miss critical information. As such, it is generally better to avoid communicating with clients via social media or text.

## 5. Upholding the Duty of Supervision While Practicing Virtually

*Lawyers who oversee the work of assistants, paralegals, or subordinate attorneys must provide adequate instruction and supervision, which can be challenging when working virtually.*

Maryland Attorneys' Rules of Professional Conduct impose a duty of supervision on certain attorneys. Specifically, Rule 19-305.1 provides:

- a) A partner in a law firm, and an attorney who individually or together with other attorneys 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 attorneys in the firm conform to the Maryland Attorneys' Rules of Professional Conduct.
- b) An attorney having direct supervisory authority over another attorney shall make reasonable efforts to ensure that the other attorney conforms to the Maryland Attorneys' Rules of Professional Conduct.
- c) An attorney shall be responsible for another attorney's violation of the Maryland Attorneys' Rules of Professional Conduct if:
  - 1) the attorney orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - 2) the attorney is a partner or has comparable managerial authority in the law firm in which the other attorney practices, or has direct supervisory authority over the other attorney, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 19-305.3 states:

With respect to a non-attorney employed or retained by or associated with an attorney:

- a) a partner, and an attorney who individually or together with other attorneys 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 attorney;

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b) an attorney having direct supervisory authority over the non-attorney shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the attorney;

c) an attorney shall be responsible for conduct of such a person that would be a violation of the Maryland Attorneys' Rules of Professional Conduct if engaged in by an attorney if:

A. the attorney orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

B. the attorney 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 knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; and

d) an attorney who employs or retains the services of a non-attorney who (1) was formerly admitted to the practice of law in any jurisdiction and (2) has been and remains disbarred, suspended, or placed on inactive status because of incapacity shall comply with the following requirements:

A. all law-related activities of the formerly admitted attorney shall be (i) performed from an office that is staffed on a full-time basis by a supervising attorney and (ii) conducted under the direct supervision of the supervising attorney, who shall be responsible for ensuring that the formerly admitted attorney complies with the requirements of this Rule.

B. the attorney shall take reasonable steps to ensure that the formerly admitted attorney does not:

i. represent himself or herself to be an attorney;

ii. render legal consultation or advice to a client or prospective client;

iii. appear on behalf of or represent a client in any judicial, administrative, legislative, or alternative dispute resolution proceeding;

iv. appear on behalf of or represent a client at a deposition or in any other discovery matter;

v. negotiate or transact any matter on behalf of a client with third parties;

vi. receive funds from or on behalf of a client or disburse funds to or on behalf of a client; or

vii. perform any law-related activity for (a) a law firm or attorney with whom the formerly admitted attorney was associated when the acts that resulted in the disbarment or suspension occurred or (b) any client who was previously represented by the formerly admitted attorney.

C. the attorney, the supervising attorney, and the formerly admitted attorney shall file jointly with Bar Counsel (i) a notice of employment identifying the supervising attorney and the formerly admitted

attorney and listing each jurisdiction in which the formerly admitted attorney has been disbarred, suspended, or placed on inactive status because of incapacity; and (ii) a copy of an executed written agreement between the attorney, the supervising attorney, and the formerly admitted attorney that sets forth the duties of the formerly admitted attorney and includes an undertaking to comply with requests by Bar Counsel for proof of compliance with the terms of the agreement and this Rule...

Essentially, Rules 19-305.1 and 19-305.3 require lawyers to exercise supervisory authority over subordinate lawyers and non-legal staff, respectively, to ensure that they comply with the applicable ethics rules when working.

In part, this means that they must instruct the people they supervise of their duty to safeguard client data, and take the measures necessary to ensure they do not disclose confidential information, either inadvertently or intentionally, which includes providing any necessary training. Similarly, lawyers should make sure that any outside vendors they employ have practices in place to protect client confidentiality.

Supervising attorneys must also confirm that their staff and attorneys comply with their ethical and professional obligations. While lawyers practicing virtually do not interact with the people they supervise in person, they should nonetheless communicate with them as often as they would in a physical office, either via videoconferencing sessions, telephone calls, or emails.

## **6. Advertising Considerations for Attorneys Engaged in Virtual Practice**

*Attorneys soliciting clients online or advertising a virtual practice should be careful not to make misleading statements in violation of Maryland Attorneys' Rule of Professional Conduct 19-307.1.*

Rule 19-307.1 provides:

An attorney shall not make a false or misleading communication about the attorney or the attorney's services. A communication is false or misleading if it:

- a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- b) is likely to create an unjustified expectation about results the attorney can achieve, or states or implies that the attorney can achieve results by means that violate the Maryland Attorneys' Rules of Professional Conduct or other law; or
- c) compares the attorney's services with other attorneys' services, unless the comparison can be factually substantiated.

An attorney that has a purely virtual practice may make misleading statements by advertising that they have an office. The Maryland courts have not ruled on this issue, while decisions in other jurisdictions are split. See *In re Sriskandarajah*, 2012 WL 3783101 (Va. Disc. Op. 2012) (it is misleading to advertise six Virginia law offices when all but one were unstaffed locations for meetings.). *But see NY City Bar Formal Op.* 2019-2 (a New York attorney may use the street address of a virtual law office located in New York as the lawyer's 'principal law office address' for advertising principal law office).

<sup>7</sup> <https://www.msba.org/ethics-opinions/whether-a-lawyer-can-pay-a-fee-to-an-online-legal-directory-for-increased-visibility-throughout-the-website-including-on-other-lawyers-profile-pages>.

The Maryland State Bar Association Committee on Ethics has noted<sup>7</sup> that the online legal advertising model may raise additional concerns under the Rules. Some online directories include testimonials, ratings, or peer reviews, which would implicate Maryland Attorneys' Rules of Professional Conduct 19-307.1 through 19-307.5. Lawyers who advertise on an online directory remain responsible for ensuring that their profiles and advertisements are truthful, not misleading, create no false expectations, and otherwise adhere to the Rules.

## C. Practical Considerations in a Virtual Work Environment

### 1. Remote Proceedings

#### *a. Depositions*

There are practical tips attorneys should consider when taking depositions remotely. They should advise opposing counsel that the deposition will be conducted remotely and ensure that all parties have the technological resources needed to participate. Deposition notices should also state that the deposition will be conducted via video, and if possible, should include the link that will be used for the deposition.

An attorney should also ensure that the deponent has access to a tablet or computer that has video and audio capabilities and is compatible with the required software, and a good Internet connection. It is wise to conduct a test run before the deposition with the court reporter and deponent, to make sure there are no technical issues. Attorneys should make sure that the platform they use allows them to record the deposition, and advise the court reporter that they want the deposition recorded as well.

If an attorney intends to use exhibits, they must confirm that the video conferencing platform they intend to use allows them to share documents and should consider distributing the exhibits to the other parties and the court reporter before the deposition. Finally, they should adjust the instructions they provide to the deponent at the beginning of the deposition to prevent interference from third parties. This may include directing them to ask anyone other than their attorney to leave the room and to refrain from

communicating with anyone or accessing resources during the deposition, unless they are instructed to do so.

#### *b. Mediation*

Lawyers have successfully mediated cases remotely throughout the pandemic, and it is likely that remote mediation will continue long after the pandemic is over. There are certain best practices, then, that attorneys mediating remotely should employ.

Counsel should create a technology plan in the initial pre-mediation conference call with the mediator. The plan should consider the nature of the dispute, the number of parties and participants, and their locations and technological capabilities. There are numerous video conference platforms available, and attorneys should be flexible and consider a variety of technological configurations when scheduling a remote mediation.

Prior to the mediation, attorneys should explain the process to their clients and advise them of what to expect. They should also ensure that their staff and clients are comfortable with the technology being used and, if needed, have a strong Internet connection. It is prudent for them to conduct a trial run as well, to identify and address any issues with the technology that will be used. They should also provide electronic or hard copies of any documents they intend to use during the mediation to the mediator and other parties. It may be helpful to circulate a draft of the contemplated settlement agreement before the mediation.

Typically, either the mediator or one of the attorneys will “host” the remote mediation. After the opening statements, parties will separate into caucuses, and the mediator will go back and forth between them to discuss the case and hopefully facilitate a resolution. The mediator may work with each caucus, which is typically the parties and their respective attorneys, via telephone. Many attorneys and mediators choose to use video conferencing platforms to conduct remote mediation, like Zoom or Google Meet. Such platforms allow the mediator to place the caucuses into virtual breakout rooms and move easily from one caucus to another. If the parties reach an agreement, it should be memorialized during the mediation session and confirmed via email.

#### *c. Notarization*

Maryland Notaries can register to perform remote online notarizations for signers in any location as long as the Notary is physically located within the state. Parties who wish to conduct remote notarizations must have a computer with live two-way audio-video capabilities, and a secure connection to the Internet. Whatever platform they use must include identity proofing and credential analysis. They will also need to obtain remote Notary supplies, including a digital certificate containing their electronic signature, an electronic seal, and an electronic journal.

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**IF THE PARTIES REACH AN AGREEMENT, IT SHOULD BE MEMORIALIZED DURING THE MEDIATION SESSION AND CONFIRMED VIA EMAIL.**

During a remote notarization, the signer and Notary must personally appear before each other via a video-conferencing platform. The signer logs onto an approved Remote Online Notarization platform and proves their identity by passing a dynamic knowledge-based authentication assessment and an analysis of their credential document. The Notary will then ask the signer to present identification as another layer of security, and will ask the signer if they understand the implications of signing the document and if they're willing to proceed. The signer will then sign the document using an electronic signature. The Notary checks the document, completes the Notary certificate wording, attaches an electronic seal and a digital certificate containing their electronic signature. Once the notarization is complete, the Notary creates a journal entry and saves the online transaction as an audio-video recording.

All regular requirements relating to notaries remain in effect and apply to remote notarizations. For example, the notary must personally know the signatory or must have satisfactory evidence of the identity of the signatory. Anyone with a commission as a notary may continue to perform in-person notarial acts.

There is pending federal legislation called the Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2021 (the SECURE Act) that would authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce. See *Senate Bill 1625*.

#### *d. Settlements/Closing*

Subtitle 7 of Title 3 of the Real Property Article of the Maryland Code, the Maryland Uniform Real Property Electronic Recording Act, authorizes electronic recording of documents in Maryland. SimpliFile, Maryland's official e-recording platform, allows parties to conveniently and securely e-record land record documents with an expedited turnaround time. Recording fees and other related expenses are the same as with paper recordings and are paid directly through the SimpliFile system.

Not all Maryland recording offices accept all documents. For example, many jurisdictions do not allow amendments of existing documents to be e-recorded. Attorneys who wish to e-file must be familiar with the indexing requirements of the applicable jurisdiction, including the order of documents to be recorded and any supporting documents that must accompany the documents to be recorded, such as the Land Instrument Intake Sheet. If a filing is deficient in some way, the e-filer receives a message from the recording office on what is missing and/or incorrect and is given an opportunity to correct the filing. Once a document is accepted, the e-filer receives an email alert and may download the recorded document showing the book and page references directly from SimpliFile.

## 2. Maintaining Communication with Client and Employees While Practicing Virtually<sup>8</sup>

### *a. Mail and Email*

Even if a practice is entirely virtual, attorneys should have a business address where they can receive mail and packages. It is prudent for lawyers to avoid using their home address, even if they work from home, to keep their business and personal lives separate. There are multiple options attorneys can employ to receive business mail: they can obtain a P.O. box or a virtual mailbox, or rent a shared space where they can receive mail. They can also use electronic services to send and receive mail.

Lawyers who previously used email programs that rely on local servers should consider switching to cloud-based technology, so that they can access their email from any location. They should also make sure their email is encrypted to keep communications secure.

### *b. Telephone services*

A firm's success in getting and keeping clients depends, in part, on their accessibility and responsiveness. Additionally, people appreciate being able to talk to a live person rather than having to leave a message. Thus, attorneys practicing virtually may also need to hire a virtual receptionist or phone answering service to ensure their calls are answered during business hours.

## 3. Managing Client and Employee Expectations

Whether they are opening a virtual practice or shifting from a traditional law firm environment to remote work, attorneys should communicate their policies and procedures to their clients, and inform them as to what to expect with regards to communication and meetings. Attorneys should also ensure that their websites and letterhead indicate that their practice is virtual.

Firms shifting to virtual practice or allowing their staff and attorneys to work remotely should establish clear guidelines and expectations. For example, they can define what hours people are expected to work and set forth what measures employees should take to safeguard client confidentiality and security. They can also ask employees to dress professionally when on-camera and maintain prompt communication with clients. Additionally, they should direct employees to work on firm-owned computers and to limit those devices for work use, or have clear policies for those that choose to use their own devices.

## 4. Transitioning to a Paperless Office

Many attorneys working virtually operate paperless offices. Therefore, they will likely need scanners so that they can scan any hard copies of pleadings, discovery, and other materials. They should also make sure they have a secure

<sup>8</sup> For a more in-depth discussion on starting a virtual practice, MSBA members can access *An Office Without Walls™ a Pocket Guide* produced by the MSBA and written by MSBA member Sahmra Stevenson, Esq., here: <https://www.msba.org/product/office-without-walls-pocket-guide>.

<sup>9</sup> The ethical duties triggered by a data breach are the topic of discussion in the MSBA's Legal Summit Series: Headless Chickens and Zombie Data: Your Ethical Obligations for Disasters and Data Breaches, available here: <https://www.msba.org/product/headless-chickens-and-zombie-data-your-ethical-obligations-for-disasters-and-data-breaches>.

electronic or online storage system, like the cloud, or an external hard drive, so that their documents are secure even if their computers fail.

## 5. Software

Perhaps the most important component of a virtual practice is a strong Internet connection. Attorneys who work from home offices rely on the Internet to communicate with clients and colleagues and store and access case information, and therefore, must ensure their Internet does not drop off at important times. Generally, broadband Internet connections are sufficient if they have adequate speeds.

Attorneys and firms practicing virtually can use case management software to ensure that their teams stay on track and meet their targets and deadlines. They can also use such software to measure any changes in performance, track revenue, and identify areas for improvement. Case management software helps to organize contacts, client information, and case documents as well. They might also want to use a remote-access virtual private network (VPN), to access case information on a private network, such as a firm network, from a home office.

Security is important for attorneys engaging in virtual practice. As such, they should implement systems to protect their networks from malware, hackers, or other issues that may impact the security and privacy of their data.<sup>9</sup>

Accounting software allows virtual firms to keep track of billable hours, generate invoices, and manage trust and operating accounts, while avoiding the mistakes and delays that often occur with handwritten timesheets and ledgers.

## 6. Maintaining Professionalism

Being able to enjoy the comforts of home while working is one of the benefits of practicing virtually, but attorneys working from home should still maintain their professionalism. For example, if they are appearing for a remote hearing, mediation, or deposition, they should dress and groom themselves as if they would when appearing in person. If possible, they should also make sure their background is clean and devoid of personal effects and that they have a quiet space where they can be free from distractions to conduct remote proceedings.

