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Subject: Ethical Practices of the Virtual Law Office

Increasing costs of doing business, including the costs associated with physical office space, have motivated lawyers to rethink how they deliver legal services. Many lawyers are choosing to do some or all of their work remotely, from home or other remote locations. Advances in the reliability and accessibility of on-line resources, cloud computing, and email services have allowed the development of the virtual law office, in which the lawyer does not maintain a physical office at all.

Although this modern business model may appear radically different from the traditional brick and mortar law office model, the underlying principles of an ethical law practice remain the same. The core duties of diligence, loyalty, and confidentiality apply whether the office is virtual or physical. For the most part, the Rules of Professional Conduct (RPC) apply no differently in the virtual office context. However, there are areas that raise special challenges in the virtual law office. Below we address whether a lawyer needs a physical address. We then summarize some of the ethical issues lawyers with virtual law practices may face.

I. Requirement for Physical Office Address

A. General Requirements

There is no requirement that WSBA members have a physical office address. Section III(B)(1) of the Bylaws of the Washington State Bar Association (WSBA) requires that each member furnish both a "physical residence address" and a "principal office address." The physical residential address is used to determine the member's district for Board of Governors elections. The principal office address does not need to be a physical address. Similarly, Admission and Practice Rule (APR) 13(b) requires a lawyer to advise the WSBA of a "current mailing address" and to update that address within 10 days of any change. Nothing in that rule indicates the mailing address must be a physical address.

General Rule (GR) 30 permits courts to require service by email. If a lawyer is handling litigation in a jurisdiction that has not adopted such a requirement, the lawyer might wish to serve opposing counsel through hand delivery. The Civil Rules (CR) do not require that a lawyer provide an address for hand delivery. Rather, CR 5(b)(1) provides that if the person to be served has no office, service by delivery may be made by "leaving it at his dwelling house with a person of suitable age and discretion then residing therein." Service, of course, also may be made by mail. Particularly in jurisdictions where it is customary to serve pleadings by hand delivery, providing the opposing counsel with a physical address to do so (such as a business service center) may mean that the lawyer will get the pleadings considerably faster. If a lawyer does not want to provide opposing counsel with an address for hand delivery, we recommend that the lawyer seek an agreement to have pleadings served by email instead, as permitted under GR 30(b)(4).

B. Address in Advertisements

RPC 7.2(c) requires that lawyer advertisements "include the name and office address of at least one lawyer or law firm responsible for its content." Some lawyers with virtual law practices practice from home and use a post office box for mail. Others contract with business service centers that receive mail and deliveries and also make conference rooms available for meetings.

The term "office address" in RPC 7.2(c) should not be so narrowly construed to mean only the place where the lawyer is physically working. Rather, the "office address" may be the address the lawyer uses to receive mail and/or deliveries. It may also be the address where a lawyer meets in person with clients, but does not have to be.

Therefore, a lawyer who works from home is not required to include her home address on advertising. As long as it is not deceptive or misleading, the lawyer may use a post office box, private mail box, or a business service center as an office address in advertisements.

An address listed in an advertisement may be misleading if a reader would wrongly assume that the lawyer will be available in a particular location. See RPC 7.1. [n.1]. For example, it may be misleading for an out-of-state lawyer to list a Seattle address in an advertisement if the lawyer will not be available to meet in Seattle. However, if the advertisement discloses that the lawyer is not available for in-person meetings in Seattle, the advertisement may not be misleading. See also Section C below.

II. Complying with the RPCs when Using a Virtual Law Office

Lawyers practicing in a virtual law office are no less bound by the ethical duties noted above than their colleagues practicing in a physical office. The standards of ethical conduct set forth in the RPC apply to all lawyers regardless of the setting: physical or virtual. However, certain duties present special challenges to lawyers practicing in the virtual law setting, including the duties of supervision, confidentiality, avoiding misleading communication, and avoiding conflicts of interest as set forth below.

A. Supervision

The duties of supervision embodied in RPC 5.1 [n.2], 5.2 [n.3], 5.3 [n.4] and 5.10 [n.5] apply in all law offices. But staff and other lawyers in a virtual law office might not share any physical proximity to their supervising lawyer, making direct supervision more difficult. Thus a lawyer operating remotely may need to take additional measures to adequately supervise staff and other lawyers in her employ.

B. Confidentiality

The use by a lawyer, whether a virtual office or traditional practitioner, of online data storage maintained by a third party vendor raises a number of ethical questions because any confidential client information included in the stored data is outside of the direct control of the lawyer. WSBA Advisory Opinion 2215 (2012) addresses the lawyer's ethical obligations under RPC 1.1 [n.6], 1.6 [n.7], and 1.15A [n.8]. A lawyer intending to use online data storage should review that opinion, and be especially mindful of several important points emphasized in the opinion:

- The lawyer as part of a general duty of competence must be able to understand the technology involved sufficiently to be able to evaluate a particular vendor's security and storage systems.
- The lawyer shall be satisfied that the vendor understands, and agrees to maintain and secure stored data in conformity with, the lawyer's duty of confidentiality.
- The lawyer shall ensure that the confidentiality of all client data will be maintained, and that client documents stored online will not be lost, e.g., through the use of secure back-up storage maintained by the vendor.
- The storage agreement should give the lawyer prompt notice of non-authorized access to the stored data or other breach of security, and a means of retrieving the data if the agreement is terminated or the vendor goes out of business.
- Because data storage technology, and related threats to the security of such technology, change rapidly, the lawyer must monitor and review regularly the adequacy of the vendor's security systems.

As the opinion concludes, "A lawyer may use online data storage systems to store and back up client confidential information as long as the lawyer takes reasonable care to ensure that the information will remain confidential and the information is secure from risk of loss."

Lawyers in virtual practices may be more likely to communicate with clients by email. As discussed in WSBA Advisory Opinion 2175 (2008), lawyers may communicate with clients by email. However, if the lawyer believes there is a significant risk that a third party will access the communications, such as when the client is using an employer-provided email account, the lawyer has an obligation to advise the clients of the risks of such communication. See WSBA Adv. Op. 2217 (2012).

C. Duty to Avoid Misrepresentation

Another duty with special implications for lawyers operating virtual law offices is the duty to avoid misrepresentation. RPC 7.1, 8.4(c).[n.9]. A lawyer may not mislead others through communications that imply the existence of a physical office where none exists. Such communications may falsely imply access to the resources that a physical office provides like ready access to meeting spaces or the opportunity meet with the lawyer on a drop in basis. Unless the lawyer has arranged for such resources, she may not imply their existence. RPC 7.1.

Similarly, a lawyer may not mislead others through communications that imply the existence of a formal law firm rather than a group of individual lawyers sharing the expenses related to supporting a practice. For example, in the physical office setting, lawyers who are not associated in a firm may house their individual practices in the same building, with each practice paying its share of the overall rent and utilities for the space. These space-sharing lawyers would be prohibited from implying (e.g. via the use of letterhead or signage on the building) that they practice as single law firm. Similarly, lawyers with virtual law offices cannot state or imply on websites, social media, or elsewhere that they are part of a firm if they are not.

D. Duty to Avoid Conflicts of Interest

A robust conflicts checking system is critical to any law office, physical or virtual, in order to avoid conflicts of interest under RPC 1.7 [n.10], 1.9 [n.11], and 1.18.[n.12]. A robust conflicts checking system will include information on current and former clients, prospective clients, related parties, and adverse parties. The conflicts checking system is particularly important in a law firm where an individual firm lawyer's conflicts of interest will be imputed to the rest of the lawyers in the firm. RPC 1.10. [n.13]. In the physical office setting, physical proximity can in some circumstances provide more reliable access to the conflicts checking system. Lawyers in a virtual law practice, who most likely do not have the advantage of physical proximity, must ensure that the conflicts checking system is equally accessible to all members of the practice, lawyers and staff, and that such access is reliably maintained.

Endnotes

1. RPC 7.1 states, "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."

2. RPC 5.1 states:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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

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

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

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

3. RPC 5.2 states:

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

4. RPC 5.3 states:

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

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

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

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

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

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

5. RPC 5.10 states:

With respect to an LLLT employed or retained by or associated with a lawyer;

(a) a partner and a lawyer who individually or together with other lawyers possess 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 LLLT's conduct is compatible with the professional obligations of the lawyer and the professional obligations applicable to the LLLT directly; and

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

(c) a lawyer shall be responsible for conduct of an LLLT that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if;

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

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the LLLT is employed, or has direct supervisory authority over the LLLT, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

6. RPC 1.1 states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

7. RPC 1.6 states:

(a) A lawyer shall not reveal information relating to the 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 paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

8. Paragraph (c)(3) of RPC 1.15A states:

A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

9. RPC 8.4 states, "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."

10. RPC 1.7 provides:

(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 (following authorization from the other client to make any required disclosures).

11. RPC 1.9 provides:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

12. RPC 1.18 states in part:

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client or except as provided in paragraph (e).

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraphs (d) or (e). If a lawyer or LLLT is disqualified from representation under this paragraph or paragraph (c) of LLLT RPC 1.18, no lawyer in a firm with which that lawyer or LLLT is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)

...

13. RPC 1.10 states, with certain exceptions:

[W]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.