

The Law Firm of the Future – What Will “Return to Work” Look Like?

International Association of Defense Counsel

2022 Mid-Year Meeting

I. What a Long, Strange Trip It’s Been: Reflections On The COVID-19 Pandemic and Navigating The Return To In- Person Work

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The COVID-19 Journey

What a long strange trip it’s been.¹ Those iconic song lyrics aptly describe the events of the past two years as the world has navigated the COVID-19 pandemic. Few law firm or business leaders could have predicted the global health crisis that began unfolding across the world in early 2020 or its impact on the workforce.

The Pandemic and the Workplace - Where We’ve Been So Far

On January 20, 2020, the first COVID-19 case in the United States case was confirmed by the Centers for Disease Control and Prevention.² Seven weeks later, on March 11, 2020, the World Health Organization declared a global pandemic. On March 13, 2020, the President of the United States declared a national emergency, and within days the U.S. began to shut down, beginning

¹ Lyrics from “Truckin” (Jerry Garcia, Robert Hunter, Phil Lesh, Bob Weir).

² Centers for Disease Control and Prevention (2021), *COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>. All date references within this paragraph, not otherwise referenced, can be attributed to this source.

with the closure of public schools in New York City and restaurants and bars in Ohio on March 15, 2020. Four days later, on March 19, 2020, California became the first state in the United States to issue a mandatory stay-at-home order with the states of Illinois and New Jersey quickly following suit. By April 13, 2020, most U.S. states had reported widespread cases of COVID-19, and by May 1, 2020, 42 states and territories had issued mandatory stay-at-home orders.³ Within the course of three months, the world as we knew it had changed in ways most of us had never imagined.

Faced with uncertainty, many businesses began the painful process of furloughing or laying off employees. By May 9, 2020 the U.S. unemployment rate reached 14.7%, the worst rate since the Great Depression.⁴ Many of those lucky enough to keep their jobs were sent home to work. Almost overnight millions of employees simultaneously began telecommuting.

Working from home brought challenges. Creating an immediate home office while keeping up with assignments proved difficult for some. Employment issues from timekeeping to expense reimbursement arose. With many schools and childcare facilities closed, some employees found themselves taking on additional roles as teachers or childcare providers, impacting performance or causing burnout.

As workers grew more accustomed to telecommuting, the pandemic raged on. By May 28, 2020, The United States COVID-19 death toll surpassed 100,000, a number that doubled by September 22, 2020, tripled by December 14, 2020 and quadrupled by January 18, 2021.⁵ Thousands of employees became sick and others were exposed to the virus or left to care for others, requiring self-isolation or quarantine. Employers raised questions about leaves of absence and pay.

Workers who were not sent home or who returned to in-person work were often asked to report symptoms to avoid the spread of the virus, raising issues of the appropriateness of health inquiries and medical confidentiality. Employers and legislatures debated mask-mandates. With the arrival of vaccines, the first of which was approved for Emergency Use Authorization on December 11, 2020, the debate shifted to vaccine mandates.

For some businesses and law firms, office and worksite closures were relatively short-lived, and the return to in-person work began. Georgia, Alaska and Oklahoma, for example, began to partially reopen their states on April 24, 2020.⁶ In other states, such as California and New York, restrictions remained in place much longer and working from home continued. Over time, many businesses, including law firms, developed a hybrid workplace model, with employees

³ Centers for Disease Control and Prevention (September 4, 2020), *Morbidity and Mortality Weekly Report*, Vol. 69, No. 35, <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6935-H.pdf>.

⁴ Centers for Disease Control and Prevention (2021), *COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.

⁵ Centers for Disease Control and Prevention (2021), *COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.

⁶ Centers for Disease Control and Prevention (2021), *COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.

working part-time in the office and part-time at home. The evolution of the workplace had begun.

COVID-19 Workplace Rules and Regulations

Even before the first stay-at-home orders were issued, the United States Congress created laws providing relief to workers and businesses impacted by the pandemic. On March 14, 2020, the Families First Coronavirus Response Act (“FFCRA”), which included the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act was enacted.⁷ Effective April 1, 2020 and applying to employers with fewer than 500 employees, the FFCRA provided federal benefits to employees affected by the COVID-19 pandemic, providing for leave with partial pay for reasons related to school and daycare closures and COVID-19 illness or exposure. The FFCRA covered the costs of the paid leave by providing refundable tax credits. That act expired on December 31, 2020, but employers that voluntarily chose to provide paid sick or family leave to employees could continue to receive refundable tax credits for costs related to providing leave through March 31, 2021.

On the heels of the FFCRA, on March 25, 2020, Congress enacted the Coronavirus Aid, Relief and Economic Security Act legislation (“CARES Act”), providing over \$2 trillion of relief designed to ease some of the economic hardship caused by the COVID-19 outbreak. The CARES Act created unemployment programs, incentives to employers for employee retention, and loans to small businesses through the Small Business Administration.

Nearly a year after the CARES Act was enacted, on March 11, 2021, the American Rescue Plan of 2021 (“ARPA”) was signed into law, extending tax credits through September 30, 2021 to employers that voluntarily provided FFCRA paid sick or paid family leave and expanded the reasons for leave. That law extended certain unemployment benefits under ARPA through September 6, 2021 and certain tax credits through the end of 2021.

While Congress was focusing on economic relief to businesses and workers, federal agencies were focusing on the protection of workers within those businesses. Before the first COVID-19 case was confirmed in the U.S., the CDC began publishing information about the novel coronavirus on its website.⁸ On January 17, 2020, that agency began screening for the coronavirus passengers arriving on flights from certain international locations. In April 2020, the CDC began issuing guidance. Its recommendations, factsheets and toolkits for workplaces followed, covering topics from symptom checking, to physical distancing, and mask wearing, to cleaning, disinfecting, and ventilating, and later vaccinations, testing and contact tracing. Much of that guidance was targeted at specific industries. CDC guidance changed periodically as the pandemic ebbed and flowed.

Another federal agency, the Equal Employment Opportunity Commission (“EEOC”), responsible for enforcing federal employment discrimination laws, was active early on in issuing guidance about the pandemic. That agency had experience with global pandemics having issued guidance in 2009 about pandemic preparedness in the workplace following the spread of the

⁷ The FFCRA provided for exemptions for small employers with fewer than 50 employees.

⁸ Centers for Disease Control and Prevention (2021), *COVID-19 Timeline*, <https://www.cdc.gov/museum/timeline/covid19.html>.

H1N1 virus.⁹ In March 2020, the EEOC began issuing guidance related to COVID-19.¹⁰ With multiple updates since that time, EEOC guidance covers a vast array of anti-discrimination issues as related to COVID-19 including disability inquiries, reasonable accommodations, furloughs and layoffs, caregiver and family responsibilities, and vaccinations.

The United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”), which sets and enforces protective workplace safety and health standards, was also involved on the COVID-19 front, issuing initial guidance on January 29, 2021.¹¹ That guidance focused on mitigating and preventing the spread of COVID-19 in the workplace, with information on vaccinations, physical distancing, face coverings, cleaning, disinfecting and ventilating, educating and training worker, and preventing retaliation.

On June 21, 2021, OSHA published temporary emergency standards related to healthcare workers.¹² On November 5, 2021, that agency took broader action, issuing temporary emergency standards that mandated vaccines and testing for employers of more than 100 employees. Lawsuits followed, challenging the standards, leaving employers in limbo as the disputes make their way through the courts.¹³ COVID-19 protocols for federal contractors and subcontractors have also been issued¹⁴, which are also subject to legal challenges.

COVID-19 workplace rules are not limited to the federal level. Throughout the pandemic, many states have enacted their own rules and regulations. Businesses with employees in California and New York, for example, were inundated with COVID-19-related legislation, executive orders, and health and safety regulations.¹⁵ Some cities, countries and local governments have enacted their own separate rules and regulations governing the workplace during the pandemic. Workplace rules and regulations, in constant flux, have proven challenging for even the most vigilant employers, especially those with employees in multiple jurisdictions.

Where we are today and what an employer is required to do to plan for the return of its workforce to in-person work depends on where those workers are located. All employers are required to provide a safe work environment for their workers. In some jurisdictions, however, employers must comply with strict protocols, such as mask mandates, cleaning and ventilating protocols, and train workers as well as plan for COVID-19 exposures and response. The rules and regulations continue to evolve as the pandemic marches on. The only constant seems to be

⁹ Equal Employment Opportunity Commission, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*.

¹⁰Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*.

¹¹ Occupational Safety and Health Administration, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*.

¹² 29 CFR 1910, Subpart U.

¹³ 86 Fed. Reg. 61402.

¹⁴ Executive Order 14042.

¹⁵ As one example, the California Occupational and Safety Administration (“Cal-OSHA”) issued Temporary Emergency Standards, requiring employers create detailed site-specific COVID-19 prevention plans, mandating masks for the unvaccinated, requiring engineering and administrative protocols, as well as requiring policies, procedures and trainings.

that COVID-19 remains with us, requiring business leaders to stay abreast of workplace requirements at the federal, state and local levels.

Considering Attitudes In Returning To In-Person Work

Legal compliance is not the only issue keeping businesses and law firm leaders up at night. As the pandemic moves gradually to endemic and businesses look ahead to bringing employees back to the workplace, attitudes play an important role.

Employers have long worried about the lack of face-to-face meetings and limited social interactions during the pandemic. Without return to in-person work, they fear that onboarding new employees, training, mentoring, team building, and innovation will suffer. The loss of workplace culture and low morale are two common concerns.

Yet many workers are reluctant to return to in-person work. In one survey conducted in the summer of 2021, one third of respondents said their return to work had a negative impact on their mental health and almost half of those who had not yet returned anticipated negative mental health impacts.¹⁶ Even with vaccination rates climbing, some employees voice safety concerns, including contracting COVID-19 and the risk of transmitting it to unvaccinated or at-risk children and loved ones.¹⁷ Fears extend to using public transportation, exposure to unvaccinated colleagues and break-through infections. Others employees have grown comfortable with the work-from-home routine. Waking to a later alarm, eliminating a commute, associated cost savings, and new found personal time can be difficult to relinquish. New work-from-home habits may be difficult to break. Even those eager to return may find it difficult to go forward with full gusto. Throw in the possibility that the workplaces may not seem as vibrant as it once did, and the task of re-energizing the workforce become more challenging.

Simple Steps for Moving Forward

Given these realities, what can businesses do to coax employees to return? First, a return to in-person work takes clear planning. Every employer, not just those in states with stringent regulation, should consider preparing a clear and thoughtful reopening plan, or updating an old one, to include current guidelines on COVID-19 prevention as well as prompt and appropriate response to exposure. Include stringent cleaning and disinfecting protocol as well as improved ventilation. Communicate reopening plans to employees helps alleviate potential fears.

Second, consider starting slowly. Ease the transition through staggered returns, or a hybrid approach, allowing for partial continued telecommuting. While fair and equal treatment of employees is important, allow for flexibility as well. Take into account employee mental health and be compassionate. Listen and remain open-minded.

Third, consider measured incentives. Some employers, recognizing fears about exposure on public transportation, now provide for commuter expense reimbursement, at least on a temporary

¹⁶ McKinsey Consumer Health Insights (June 14, 2021).

¹⁷ McKinsey Consumer Health Insights (June 14, 2021).

basis. Other employers provide complimentary on-site meals, both convenient and a cost benefit for employees.

Finally, find ways to re-establish connections once employees start returning in force. Asking employees to lunch or sharing a coffee break promote team-building and can boost morale. Taking simple steps to prepare for the return to more in-person work and demonstrating compassion may go a long way in bringing employees back through the office doors.

Looking back, law firms and businesses may marvel in the achievement of staying afloat in such turbulent times. Reflecting on the aftermath of the COVID-19 storm helps us move forward to cultivate the workplace of the future. Staying tuned in to employee attitudes while keeping abreast of ever-changing workplace rules will remain important in the months to come. Businesses and law firms that are willing to evolve are more likely to persevere and thrive. It may not have been a trip we intended to take, but everyone has learned a lot along the way. Indeed, what a long strange trip it's been. May the journey forward be shorter and smooth.

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II. ETHICAL AND PRACTICE MANAGEMENT ISSUES

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A. Introduction

Despite the general hesitance of lawyers and law firms to adopt technology, before the COVID-19 pandemic began, it was already changing and shaping consumer behavior and client expectations, as well as where (think virtual firms) and how (think artificial intelligence) law is practiced. Technology was also already playing a leading role in the movement to improve access to justice. In came the COVID-19 pandemic, which forcibly and necessarily accelerated the pace of technological change, requiring an almost overnight move to remote work environments. Most larger firms, with greater resources dedicated to technology, were better prepared than sole practices.

The rapid move to remote work environments also raised ethical issues¹⁸ that were not originally contemplated by the American Bar Association Model Rules of Professional Conduct (“Model Rules”) as written, primarily because the Model Rules are premised on: 1) lawyers practicing in a physical office with other lawyers and staff located in the state in which they were licensed to practice; and 2) the primary method of interaction with clients being in-person. Office was not contemplated as being in an office in a different state than in which the lawyer was licensed and practiced, nor was it contemplated as being a spare bedroom or kitchen table that could be easily accessed by others in the household. Client interactions were not contemplated as being primarily digitally based, such as via Zoom, Microsoft Teams or Skype, but primarily through more traditional methods, such as in-office visits, physical letters, and telephone calls.

Lawyers were already required to have a business continuity plan to ensure that ethical responsibilities regarding competence, diligence and communication were fulfilled in the fact of a disaster.¹⁹ However, the effect of the pandemic was much broader in geographic and temporal scope than a typical disaster, and as a result necessitated interpretations of the Model Rules through a different lens. When we emerge from the pandemic, technological competence will continue to be essential for virtual, remote and hybrid practices and the future of the practice of law. In fact, maintaining some degree of technological competence is already required.²⁰

Due to length restrictions, this article focuses on confidentiality, supervision, and the unauthorized practice of law, as well as addresses a few correlated legal malpractice concerns and provides best practices that may help avoid ethical violations and malpractice claims.

B. Confidentiality

Prior to the pandemic, the ethical obligation of confidentiality²¹ had already been significantly impacted by technology, which not only increased efficiencies, frequency of communication and

¹⁸ Model Rules implicated by pandemic-accelerated move to remote work environments include those regarding competence, communication, confidentiality, diligence, supervision, and the unauthorized practice of law.

¹⁹ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters) and ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021) (discussing virtual practices).

²⁰ ABA Model Rules of Professional Conduct R. 1.1 cmt. [8] states that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. . . .”

²¹ ABA Model Rules of Professional Conduct R. 1.6(c) provides that a lawyer “shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client.” Comment [18] further requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access and disclosure. In addition to the model rule, various state and federal laws and regulations may also govern client data privacy and security.

Confidentiality under the Rules of Professional Conduct is broader and different than the attorney-client privilege and work-product doctrine, both of which are concepts of evidentiary law that apply in judicial proceedings. Sue Michermerhuizen, [Confidentiality, Privilege: A Basic Value in Two Different Application](#), Center for Professional Liability (May 2007). Despite the differences, the best practices to minimize the risk of inadvertent and

client convenience, but also the risk of inadvertent or unauthorized disclosure of confidential client information.

Wisconsin Formal Ethics Opinion EF-21-02: Working Remotely (2021), offers detailed guidance on cybersecurity practices and procedures that may help lawyers ensure that they are fulfilling ethical obligations.²² A few of the practices identified include requiring strong passwords, multi-factor authentication, encryption, avoiding use of public or unsecured WIFI and immediately installing software updates.²³ Likewise, Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Formal Opinion 2020-300 (2020) offers a number best practices to utilize when working and communicating remotely, including a prohibition on the use of smart devices in locations where client-related conversations may occur and requiring employees to have client-related conversations only in locations where they cannot be overheard by persons who are not authorized to hear the information.²⁴

While having cyber liability insurance will not insulate you from ethical violations or legal malpractice claims, best practices also point toward a firm carrying coverage since it can provide protection against certain costs and expenses not typically covered under a lawyers professional liability policy, such as IT forensics, reputational damage, business interruption, ransomware payments, credit monitoring, and fines, penalties and/or sanctions. Underwriters of this specialized line of business also typically better understand cyber risk management, how to respond to a bad actor, forensics, the public relations side of a breach, breach notification requirements and cyber claims handling. Additionally, the underwriting process for cyber liability carriers has evolved and may help a firm identify weaknesses in its cyber and data privacy and protection practices, policies, and procedures.

C. Supervision

The duty of supervision imposed by Model Rules 5.1 and 5.3 requires that lawyers make reasonable efforts to ensure that subordinate lawyers and non-lawyer staff comply with the Rules of Professional Conduct. These Rules require lawyers with managerial authority to “make reasonable efforts to ensure that the firm has in effect requirements that any staff, consultants or other entities that have or may have access to confidential client information or data comply with

unauthorized disclosure are also applicable to protecting against inadvertent or unauthorized waiver of the attorney-client privilege and work-product doctrine.

²² The ethics opinion lists specific cybersecurity practices, as well as policies and procedures. The comments to ABA Model Rule 1.1 state that maintaining competence requires a lawyer to stay abreast of changes in the law and it is practice, including the benefits and risks associated with relevant technology. Model Rules of Professional Conduct R. 1.1 cmt. [8].

²³ Please consult the Rules of Professional Conduct and related ethics opinions for the jurisdictions in which you practice and are physically located. Rules and interpretations vary by jurisdiction.

²⁴ The committee notes that failure to comply with the best practices does not necessarily constitute a violation of the Rules of Professional Conduct, but compliance with those or similar recommendations constitutes “reasonable conduct” as envisioned by the Rules.

the Rules of Professional Conduct with regard to data access . . . and that any discussions regarding client-related matters are done confidentially.”²⁵ There is no doubt that the remote work made discharging this ethical duty much more challenging.

From a legal malpractice perspective, failure to properly supervise subordinate lawyers was a common legal malpractice concern and allegation before the pandemic. Failure to supervise and train staff were also common pre-pandemic allegations. The restricted physical interaction associated with remote work has only made supervision more difficult and heightened ethical and malpractice concerns. In addition to supervision, inclusivity, mentoring, collaboration, and communication have also become more challenging. Remote work has also made it more difficult to maintain firm culture. The measures discussed in the section above regarding inclusivity are also relevant to ensuring compliance with the ethical duty of supervision, as are written, practices, policies, and procedures. In addition to adopting written practices, policies and procedures, all attorneys, and especially staff, should receive thorough and effective training. Having written policies and procedures does no good if lawyers and staff are not educated about them and trained to follow them.

D. Unauthorized Practice of Law

At the onset, it is worth noting that many lawyers professional liability insurance policies do not cover claims arising out of the unauthorized or unlicensed practice of law. We strongly suggest that you read your policy and consult your carrier or agent/broker with questions about coverage.

The unauthorized practice of law falls under Model Rule 5.5.²⁶ Virtual practices in general and remote work during the pandemic naturally raised issues about the unauthorized practice of law as more lawyers were working from jurisdictions in which they were not licensed. This trend will continue irrespective of whether the pandemic ends.

The issue of the unauthorized practice of law and lawyers working remotely was recently addressed by ABA Formal Opinion 495.²⁷ According to the Committee on Professional Ethics and Responsibility, the purpose of Model Rule 5.5 is “to protect the public from unlicensed and unqualified practitioners of law, and is not served by prohibiting a lawyer from practicing the

²⁵ Pennsylvania Bar Association Committee of Legal Ethics and Professional Responsibility Formal Opinion 2020-300 (Ethical Obligations for Lawyers Working Remotely).

²⁶ ABA Model Rule of Prof'l Conduct, R. 5.5(a) provides that “[a] lawyer shall not practice law in a jurisdiction in violation of the legal profession in that jurisdiction, or assist another in doing so.” R. 5.5(b)(1) and (2) prohibits a lawyer who is not admitted in a jurisdiction from establishing an office or other systematic and continuous presence in the jurisdiction for the practice of law or holding out to the public or otherwise representing that the lawyer practices in the jurisdiction.

²⁷ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020) (discussing lawyers working remotely). “Lawyers may remotely practice the law of the jurisdiction 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, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction.”

law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located.”²⁸ A more in-depth discussion of the opinion provides further guidance.

Under Model Rule 5.5(b)(1), a lawyer cannot establish an office or other systematic and continuous presence in a jurisdiction in which the lawyer is not licensed for the purpose of practicing law. Understanding how an office or presence is “established” and what makes a presence “systematic and continuous” are essential to understanding the Model Rule:

A local office is not ‘established’ within the meaning of the rule by the lawyer working in a local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on any letterhead, business cards, websites, or other indicia of a lawyer’s presence. Likewise it does not ‘establish’ a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. . . Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or systematic and continuous presence in the local jurisdiction for the practice of law.²⁹

The foregoing provides sound practice and risk management advice with respect to how to avoid “establishing” an office or systematic and continuous presence. In short, do not do anything that might create a perception (whether reasonable or not) that you are practicing in a jurisdiction in which you are not licensed or otherwise admitted.

It is important to note that the Committee did not opine on what they view as a matter of law:

[W]hether working remotely by practicing the law of one’s licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.59a) also would prohibit the lawyer from doing so.³⁰

²⁸ *Id.*

²⁹ Footnote 3 to Formal Opinion 495 provides that to “avoid confusion of clients and others who might presume that a lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as “by appointment only” or for mail delivery.

³⁰ ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 495.

Lawyers should also consult the relevant rules of professional conduct in the jurisdiction in which they are practicing, as well as the jurisdiction in which they are physically located if different than the jurisdiction in which they are practicing.

E. Summary

While the rules of professional conduct did not originally contemplate remote work or virtual environments, out of necessity both are now generally viewed more favorably. As a result, most jurisdictions now interpret the rules of professional conduct in a light more favorable to these types of work environments. However, it is important to review the rules of each potential jurisdiction (in which you practice and where you are located) to ensure that you are not breaching an ethical duty and subjecting yourself to discipline or exposing you or your firm to a legal malpractice claim. It is also important to adopt best practices, which often involves having written policies and procedures, and ensuring that attorneys and staff are trained and educated on these policies and procedures.

III. IMPACT ON DIVERSITY AND INCLUSION ISSUES

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1. *Diversity In the Legal Profession*

Understanding the status of diversity and inclusion in the legal profession is integral to a legal employer implementing and sustaining a successful diversity strategy.³¹ There are more than 1.3 million lawyers in the United States. In 2020, 37% were women and 14.6% were lawyers of color. No reliable statistics are available on the total number of LGBT lawyers in all parts of the legal profession. In the law offices

³¹ Data on representation and diversity in the legal profession is regularly collected and reported by the American Bar Association (ABA), The National Association for Law Placement (NALP), the National Association of Women Lawyers (NAWL), and the Minority Corporate Counsel Association (MCCA).

surveyed, 3.3% of the lawyers reported they were LGBT. Lawyers who report having disabilities is less than 1%. The median age for lawyers in 2020 was 47.1 years old.³²

Women and people of color are underrepresented in the profession, particularly in the most senior roles.³³ Overall demographic representation favors white male attorneys at all levels and increases as the analyses move up to Non-Equity and Equity Partners. The attrition rates for minority racial groups were two to three times higher than the attrition rates for White attorneys across roles. Approximately 70% of law firm leadership is White men, 20% White women, 7% White men, and 3% Minority women. The average percentage of LGBTQ+ firm leadership seldom rose above 5% across the leadership roles. Membership within the top 10% highest compensation group was overwhelming dominated by White males (approximately 80%) followed by White females (approximately 13%). This data underscores the significance of the disaggregation of data by race to obtain the most meaningful insights on the state of law firm diversity.

While there are many data points that should be assessed regarding law firm diversity, diverse attorney attrition and equity partner diversity tend to be primary focal points. It is estimated that 40% of the attorney departures from the top 200 firms in 2020 were female attorneys.³⁴ An analysis by legal industry data company Firm Prospect showed the percentage is consistent with results from the past three years. For 2019 and 2020, “the percentage of female attorney departures among all attorneys has remained about the same, which is around 27% for partners and 45% for the associates.”³⁵

Minority associate retention is a challenge for law firms. Minority associates are leaving law firms at higher rates and much earlier in their careers when compared with non-diverse peers.³⁶ One statistic has not changed over the past 20 years: women of color represent approximately 2% of all equity partners at large law firms.³⁷ “In a survey of U.S. law firm employees, 62% of women of color with some level of mentorship said the lack of an influential mentor was a barrier to their advancement; only 30% of white men said the same.”³⁸ One survey reports that 44% and 33%, respectively strongly agree and agree that their workplace is committed to diversity and inclusion.³⁹ On the other hand, a Minority Corporate Counsel Association survey in 2020 found that attorneys rated their organization lower on Inclusion Index factors than they did in previous years, and all ratings were lower than professional services benchmarks.⁴⁰

³² American Bar Association, Profile of the Legal Profession 2021.

³³ See e.g., the 2019 NAWL Survey on Retention and Promotion of Women in Law Firms; 2018 Vault/MCCA Law Firm Diversity Survey.

³⁴ “COVID-19 Hasn’t Forced An Exodus of Women from BigLaw”, by Xiumei Dong, Law360, February 25, 2021.

³⁵ Id.

³⁶ “Keeping the Keepers IV”, September 2020 report by The National Association For Law Placement and Major, Lindsey & Africa. The survey data was from more than 800 law firms between 2012 and 2018 for more than 20,000 associate departures.

³⁷ “Left Out and Left Behind, The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color”, Destiny Peery, Paulette Brown, and Eileen Letts, American Bar Association Commission on Women in the Profession, 2020 (“Left Out and Left Behind”).

³⁸ Deepali Bagati, Women of Color in U.S. Law Firms, Catalyst (2009). Only 7 percent of companies set representation targets for gender and race combined, which means too many companies aren’t setting specific goals around advancing Black women.” LeanIn.Org, The State of Black Women in Corporate America, 2020

³⁹ Lawyer Satisfaction Survey, Law360 Pulse, July 2021. The survey conducted from April 8 to May 14, 2021 received 1,128 responses.

⁴⁰ “Leading Through Crisis,” Minority Corporate Counsel Association and Russell Reynolds Associates (2020).

One of the American Bar Association's four goals for its mission is to eliminate bias and enhance diversity in the legal profession.⁴¹ ABA Resolution 113 encourages corporate clients to use a Model Diversity Survey in procuring and evaluating legal service providers. The purpose of the survey is to serve as the standard for law firms' reporting of their diversity metrics to corporate clients.

The ABA issued its first report analyzing the Model Diversity Survey data in February 2021.⁴² The seven results are:

FINDING 1

Firm leadership overwhelmingly consisted of White men relative to White women and racial, LGBTQ+, and disability minorities of any gender identity.

FINDING 2

Growth ratio calculations (*i.e.*, Hires+ Promotions/Attrition) suggests that representation of minority groups (racial, identity, LGBTQ+, disability) is growing at the bottom levels of Associates, but is declining at the higher levels of Non-Equity and Equity Partners.

FINDING 3

Attrition rates were substantially larger for non-White attorneys (*e.g.*, nearly three times larger for African-American/Black and Hispanic/Latino attorneys) relative to White attorneys.

FINDING 4

The percentage of White Associates promoted to Equity Partner was slightly higher than the percentage of White Associates promoted to Non-Equity Partner, whereas the associates of all other racial groups displayed larger percentages for promotion to Non-Equity Partner. This pattern was also evident in the differences between male and female Associates. The percentage of male Associates promoted to Equity Partner was slightly higher than the percentage of male Associates promoted to Non-Equity Partner, whereas this pattern was reversed for female Associates.

FINDING 5

Minority males and females consistently ranged between 0% to 2% of the top 10% highest paid attorneys in law firms.

FINDING 6

LGBTQ+, Disability, and the racial categories of Pacific Islander & Native American/Indigenous, are largely missing from law firms or underreported in firm demographics, hiring, promotions, attrition, and compensation. Most frequently, the average percentages were at or near zero for most of the analyses.

FINDING 7

Firm size matters. Even within the same year, there were considerable fluctuations between firm sizes. Some of these fluctuations made sense as in larger average percentages were often reported among firms with 1 to 20 attorneys. Because the relatively fewer numbers in these firms, any demographic group is likely to make up a higher proportion, often resulting in extreme percentages for a given firm. There were

⁴¹ Under ABA Goal III, diversity is considered race/ethnicity, gender, LGBTQ+ status and disability status.

⁴² 2020 ABA Model Diversity Survey, American Bar Association Commission on Racial and Ethnic Diversity in the Profession report. The data provided is average percentages for approximately 197 firms in 2017, 372 firms in 2018 and 276 firms in 2019. The primary foci of data reporting is race, identity, LGBTQ+ and disability statuses.

also some fluctuations between firm sizes within a given year that was not readily explainable.

2. *Diversity, Equity and Inclusion During the Pandemic*

The ABA conducted a national survey of ABA members about pandemic and post-pandemic law practice in September to October 2020.⁴³ There were more than 4,200 respondents. The survey asked specific questions about diversity initiatives in corporate law departments and law firms: (a) what diversity, equity and inclusion (DEI) strategies and tools are being used; (b) has this past year's increased public awareness of racial and social injustice affected the use of certain strategies, and (c) is it more likely that lawyers are discussing issues of racial justice today than a year ago.

A. Race and Ethnicity Initiatives

The vast majority of lawyers in firms and corporations report either the same level of activity or increased DEI strategies compared to a year ago. The greatest increase was around unconscious bias training. Lawyers of color are more likely than White lawyers to be aware of the DEI strategies that are used in their workplace. White lawyers were significantly more likely to report that these strategies had increased during the past year. Of the approximately 36% of respondents who work in places where an accountability tool is used, more than half of them report the use of tools with performance metrics. Regarding conversations with colleagues about racial justice, 60% of respondents reported that they had conversations more or much more often, with more than one-third reporting the conversations were easier or much easier this year compared to a year ago. Some 51% reported the ease of the conversations was about the same. There were no strong differences between White lawyers and lawyers of color, or between those in leadership positions or other members.

B. Gender Initiatives

A 2019 ABA study found firm leaders and male partners believe their firms do well in advancing experienced women, but those women disagree.⁴⁴ In firms and corporations, programs for advancing gender diversity either stayed the same or increased, with unconscious bias training showing the greatest increase. There were significant increases for strategies focused on increasing the number of women lawyers in leadership roles. Approximately two-thirds of participants stated that they did not know of the use gender accountability tools to assess diversity and inclusion strategies for women lawyers.

⁴³ *“Practicing Law in the Pandemic and Moving Forward, Results and Best Practices from a Nationwide Survey of the Legal Profession.”* See Practice Forward Website, ambar.org/practiceforward

⁴⁴ *“Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice”* (2019).

C. Stress and Diverse Attorneys

The results from the ABA survey show that women experience stress at work on account of their gender. 52% of women reported feeling stress at work on account of their gender, with 16% feeling stress very often or almost all the time. By comparison, less than 10% of males report stress at work on account of their gender, with only 3% feeling stress very often or almost all the time.

Stress at work because of race or ethnicity is significantly higher for lawyers of color. 7% of White lawyers report stress at work at least sometimes on account of their race compared to 47% of lawyers of color. Black lawyers are more likely to experience stress at work on account of race very often or almost all the at 34% compared to Asian lawyers at 12% and Hispanic lawyers at 5%.

The 2019 ABA study found that 63% of women reported they were perceived as less committed to their careers, compared to 2% of men.⁴⁵ A 2020 ABA report for a study on women of color lawyers practicing for 15+ years recommended that law firms improve access to effective, engaged mentors and sponsors.⁴⁶ The pandemic has exacerbated inequalities in the profession.⁴⁷

3. *Best Practices Forward*

The ABA Practice Forward report recommends data-based best practices for legal employers and attorneys listed below drawn from the survey data.

⁴⁵ *“Walking Out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice”* (2019).

⁴⁶ *“Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color”* (2020).

⁴⁷ *“Pandemic Worsens Career Barriers For Marginalized Attorneys”*, by Anna Sanders, Law360, February 23, 2021.

A. Best Practices Forward For Employers

1. Insist on leadership that is engaged, transparent and accountable.
2. Make decisions which will have a real impact on diversity, equity, and inclusion.
3. Have frequent, transparent and empathetic communications.
4. Create clear written policies about work expectations.
5. Take the long view about retaining lawyers through part-time and flex-time policies.
6. Use metrics to measure the success of policies, practices, and efforts to implement change in the workplace.
7. Reassess compensation systems.
8. Provide greater parental resources and support.
9. Strengthen wellness and mental health programs.
10. Provide excellent technical and administrative support for remote work.

B. Best Practices Forward For Individual Attorneys

1. Set realistic expectations for yourself and others around you.
2. Negotiate boundaries at work and at home.
3. Know when to ask for support.
4. Stay visible with clients, parents, and other lawyers in the firm, and in the legal community.
5. Be pro-active about your career.
6. Take care of yourself.
7. Volunteer.

The Report concludes that “[w]ith creativity, strong leadership and laser focus, we can all lead the profession to more inclusive, diverse and flexible workplaces.”