ZOOMING INTO A MALPRACTICE SUIT: UPDATING THE MODEL RULES OF PROFESSIONAL CONDUCT IN RESPONSE TO SOCIALLY DISTANCED LAWYERING

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I. INTRODUCTION

The COVID-19 pandemic completely altered the global economy and the functioning of "normal" life when governments around the world imposed shutdowns and issued stay-at-home orders.[1] From court closures to working from home, the methods of how and where attorneys are able to practice law has fundamentally changed at a rapid pace.[2] One of the largest changes in the legal profession has been the reliance on videoconferencing platforms and the continuing discussion for the continued use of these platforms when offering legal services.[3] Because these platforms are being used on such an unprecedented scale, lawyers must be fully aware of the ethical implications of their conduct when practicing remotely.[4]

Videoconferencing has raised numerous ethical issues in light of its new popularity.[5] Because of these concerns, The American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules) become relevant in the videoconferencing context. Videoconferencing raises two specific ethical concerns for lawyers and law firms: (1) the ability of an attorney to maintain confidentiality, which is essential in projecting a positive image of the legal profession, and (2) an attorney's ability to use technology competently throughout the course of the attorney-client relationship. In the past, the ABA attempted to address advances in technology with its Ethics

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1. Grace Hauck, *'Stay Home, Stay Healthy': These states have ordered residents to avoid nonessential travel amid coronavirus*, USA TODAY (Mar. 29, 2020, 5:59 PM), https://www.usatoday.com/story/news/nation/2020/03/21/coronavirus-lockdown-orders-shelter-place-stay-home-state-list/2891193001/ (stating that by the end of March 2020, at least 26 states had issued stay-at-home-orders requiring all people to avoid nonessential outings, gatherings, and to stay inside as much as possible).

2. Benjamin Dynkin, *Professional Responsibility in the Age of Zoom*, N.Y. L.J. (June 15, 2020, 10:30 AM), https://www.law.com/newyorklawjournal/2020/06/15/professional-responsibility-in-the-age-of-zoom/?slreturn=20201001145405.

3. Ellen Rosen, *The Zoom boom: How videoconferencing tools are changing the legal profession*, ABA J. (June 3, 2020, 8:00 AM CDT), https://www.abajournal.com/web/article/ethics-videoconferencing-tools-are-changing-the-legal-profession (explaining that Zoom grew from 10 million to 200 million users from December 2019 to April 2020, and its stock price more than doubled). Microsoft Teams saw an increase from 20 million daily active users to 44 million. Jordan Novet, *Microsoft Says Teams Communication App Has Reached 44 Million Daily Users*, CNBC (Mar. 19 2020, 11:50 AM), https://www.cnbc.com/2020/03/18/microsoft-teams-app-reaches-44-million-daily-users.html#:~:text=21%202020.&text=Microsoft's%20Texas%20service%20for%20calling,and%20its%closet%20competitor%2C%20Slack. Skype also reached 40 million daily users in March 2020, a 70% increase in daily users from the previous month. Dan Thorp-Lancaster, *Skype Sees Bump to 40 Million Daily Users, Big Increase in Calling Minutes*, WINDOWS CENTRAL (Mar. 30, 2020), https://www.windowscentral.com/skype-sees-bump-40-million-daily-users-big-increase-calling-minutes.

4. *See* Dynkin, *supra* note 2.

5. *Id.*

20/20 Commission.[6] However, it was unable to adequately address the risks associated with technology in the practice of law.[7]

The ABA should be proactive in revising the Model Rules to better assist attorneys in the digital age.[8] This Comment proposes the addition of several new comments under the attorney's duty of competence and confidentiality that would bridge the gap left by the Commission because attorneys need meaningful guidance in order to actually uphold ethical standards.[9] These proposals attempt to incorporate language involving virtual communications—like videoconferencing—into the Model Rules. Given the inevitability of reliance on technology in the legal profession,[10] as well as the technological vulnerabilities of the legal profession,[11] this subject is only going to become more pertinent.

This Comment will proceed in four parts. Part II gives an overview of the hastened transition to reliance on videoconferencing platforms within the legal profession. Then it will discuss the various security and privacy concerns that reliance on videoconferencing creates for lawyers and law firms. Part III then gives an overview of the historical development of the Model Rules that traditionally govern attorney conduct, specifically focusing on the attorney's duty to maintain confidentiality as well as the attorney's duty to provide competent representation. It then analyzes how the Model Rules have routinely fallen short in providing adequate guidance to attorneys in their practice, as well as how varying states have attempted to grapple with interpreting vague rule language.

Next, Part IV of this Comment discusses the need for changes to the Model Rules because of the lack of meaningful guidance provided by state ethics opinions and the ABA. It starts by explaining that the existing language in the comments to the Model Rules is outdated, vague, and does not adequately account for virtual communications. This leaves attorneys and courts with little-to-no guidance when lawyers that practice remotely violate ethical standards. Part IV then analyzes why state ethics opinions are not the optimal solution to interpreting ethical rules. Finally, Part V of this comment proposes that the ABA should adopt new comments to the Model Rules so that the rules can adequately guide attorneys who continue to utilize

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6. *ABA President Carolyn B. Lamm Creates Ethics Commission to Address Technology*, AMERICAN BAR ASSOCIATION (Aug. 4, 2009), https://americanbarassociation.wordpress.com/2009/08/04/aba-president-carolyn-b-lamm-creates-ethics-commission-to-address-technology-and-global-practice-challenges-facing-u-s-lawyers/.

7. *See infra* Part III.B (discussing the ABA's attempt to provide guidance to attorneys who utilize technology).

8. *See infra* Part IV (explaining the benefits of the ABA making proactive changes to the Model Rules).

9. *See infra* Part IV.A (discussing the benefits of more meaningful guidance and why that guidance is needed).

10. *See infra* Part II.A (discussing the response from the legal profession to the COVID-19 pandemic).

11. *See infra* Part II.B (discussing videoconferencing security concerns for lawyers).

videoconferencing platforms following the pandemic or in any future scenario in which lawyers and law firms who do not normally utilize videoconferencing platforms may once again have few alternatives.

II. DISTANCE LAWYERING AND THE GLOBAL PANDEMIC

The COVID-19 pandemic has called further attention to an evolving and complex issue in the legal profession: lawyers and technology use.[12] Because many lawyers had to rely on videoconferencing software in order to stay afloat, the safety and privacy issues that arise with virtual communication have been given heightened attention.[13] This Section gives background on the hastened transition to relying on videoconferencing platforms and how this reliance is accompanied by very real privacy concerns for lawyers and law firms. Part A briefly addresses the COVID-19 pandemic and the stay-at-home orders that spurred the popularity of videoconferencing platforms. Part B then outlines why the legal profession is particularly at risk when using these platforms, as well as how exactly lawyers and law firms can see the reliance on virtual communication as potentially threatening their ability to maintain strict confidentiality in their practice.

A. The Transition to Virtual Practice

During the COVID-19 pandemic, lawyers had to address the critical issue of how to continue everyday communication with their clients and coworkers that traditionally take place in a face-to-face setting when in-person meetings are either not allowed or not encouraged.[14] By May 2020, forty-two states and territories had issued mandatory stay-at-home orders.[15] Videoconferencing platforms such as Zoom, Microsoft Teams, and Skype became some of the most relied on communication platforms in the wake of this abrupt transition to distance lawyering.[16] Of these, Zoom has seen the most success reporting a record 300 million daily participants in virtual meetings.[17]

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12. *See* Dynkin, *supra* note 2.

13. *See id.*

14. *See id.*

15. AMANDA MORELAND, ET AL., *TIMING OF STATE AND TERRITORIAL COVID-19 STAY-AT-HOME ORDERS AND CHANGES IN POPULATION MOVEMENT—UNITED STATES, MARCH 1–MAY 31, 2020*, MMWR MORB. MORTAL WKLY. REP. 30, 1198–1203 (2020). These orders affected 73% of U.S. counties. *Id.* Based on location services from mobile devices, mandatory stay-at-home orders correlate with a higher median percentage of working from home in 97.6% of U.S. counties that issued these orders. *Id.*

16. Nicole Bunker-Henderson & Cole Hutchison, *Mark, Will You Keep My Client's Secret?*, 2020 STATE BAR OF TEX. ADVANCED ADMIN. L. (2020).

17. Natalie Sherman, *Zoom Sees Sales Boom Amid Pandemic*, BBC NEWS (June 2, 2020), https://www.bbc.com/news/business-52884782.

Courts are not particularly against the use of videoconferencing platforms in order to proceed with the practice of law.[18] On March 31, 2020, the federal judiciary released an order that authorized video and audio conferencing systems during the pandemic.[19] The order states that "[i]n order to address health and safety concerns in federal courthouses and courtrooms, the Judicial Conference of the United States has temporarily approved the use of video and teleconferencing for certain criminal proceedings and access via teleconferencing for civil proceedings during the COVID-19 national emergency."[20]

B. Security Concerns with Videoconferencing Platforms

To understand the ongoing debate surrounding a lawyer's ethical duties regarding technology and virtual communication, it is important to understand why the legal profession is vulnerable to cyberattacks.[21] Because lawyers and law firms are typically in control of valuable client information, lawyers and law firms become ideal targets for cyberattacks.[22] In the last decade, there has been a notable increase in the number of cyberattacks on law firms.[23] According to an ABA-conducted survey, 60% of attorneys had experienced a significant security breach in their practice.[24] Of those surveyed, nearly half stated that their firms had no plan in place to protect from or address a security breach.[25]

Videoconferencing systems are proven to easily fall victim to a cyber-attack.[26] Similar to how in-home cameras can give a cyber attacker a bird's eye view into the home, commonly-used videoconferencing equipment can give hackers a digital view of the workplace where highly sensitive and confidential conversations may take place.[27] For example, one hacker drafted a script to detect as many vulnerable videoconference systems as possible.[28] He ended up infiltrating more than five-thousand videoconference systems in law firms, pharmaceutical companies, oil refineries, and medical centers.[29]

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18. *United States Courts: Judiciary Authorizes Video/Audio Access During COVID-19 Pandemic*, UNITED STATES COURTS (Mar. 31, 2020), https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic.

19. *Id.*

20. *Id.*

21. Natasha Babazadeh, *Legal Ethics and Cybersecurity: Managing Client Confidentiality in the Digital Age*, 7 J.L. & CYBER WARFARE 85, 88 (2018–2019).

22. *See id.* at 90–93.

23. *Id.* at 87.

24. Melissa Maleske, *1 in 4 Law Firms are Victims of a Data Breach*, LAW360 (Sept. 22, 2015, 7:16 PM), https://www.law360.com/articles/705657/1-in-4-law-firms-are-victims-of-a-data-breach.

25. *Id.*

26. MARC GOODMAN, FUTURE CRIMES: INSIDE THE DIGITAL UNDERGROUND AND THE BATTLE FOR OUR CONNECTED WORLD 324 (1st ed. 2016).

27. *Id.*

28. *Id.* at 324–25.

29. *Id.*

The live video feeds that the hacker was able to infiltrate included: a meeting between a lawyer and a prison inmate, the operating room at a university medical center, a financial corporation's confidential venture capital meeting, and the Goldman Sachs boardroom.[30] Because many of the videoconference systems that are employed in the workplace have very few security protocols in place "hackers can just remotely dial in and boot up the cameras and speakerphones to spy on you and your company."[31]

Individual "smart" devices used for virtual communication also pose a threat to client confidentiality.[32] This is especially true when professionals are working from home.[33] Brands of Smart TVs, such as Samsung, have been found to also have a multitude of security vulnerabilities.[34] Because these smart devices typically come with pre-loaded apps, cameras, and microphones, hackers have been able to remotely access Skype conversations through Smart TVs, snap photographs of participants, and watch virtual conversations.[35]

Eavesdropping is not the only concern for attorneys. "Zoombombing" is another potential problem for lawyers and law firms.[36] Zoombombing is when uninvited guests or hackers enter virtual meetings and typically display graphic or offensive content on the screens of members in the meeting.[37] Such instances have ranged from the hijacking of a virtual synagogue service by hackers that sent anti-Semitic sentiments to attendees,[38] to virtual court hearings,[39] to a British government cabinet meeting.[40] Because these perpetrators are typically hard to identify, there is usually no way to determine who has intercepted a meeting attendee's confidential information.[41]

As the popularity of videoconferencing platforms, like Zoom, skyrockets, security concerns regarding the privacy of videoconferencing

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30. *Id.* at 325.

31. *Id.*

32. *Id.* at 319.

33. *Id.*

34. *Id.*

35. *Id.*

36. Taylor Lorenz & Davey Alba, *'Zoombombing' Becomes a Dangerous Organized Effort*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/03/technology/zoom-harassment-abuse-racism-fbi-warning.html. An independent analysis by the New York Times found that thousands of online users had organized to share meeting passwords to public and private meetings in order to create chaos. *Id.*

37. *See* Bunker-Henderson & Hutchison, *supra* note 16.

38. Jane Wakefield, *Coronavirus: Racist 'Zoombombing' at Virtual Synagogue*, BBC NEWS (Apr. 1, 2020), https://www.bbc.com/news/technology-52105209.

39. Caroline Hill, *Story of the week: Twitter Hack Hearing Hit by Zoombombers*, LEGAL INSIDER (Aug. 7, 2020), https://legaltechnology.com/story-of-the-week-twitter-hack-hearing-hit-by-zoombombers/. A Florida bond hearing where Zoombombers interrupted the meeting by playing loud music and pornographic video. *Id.*

40. Johannes Wiggenn, *The Impact of COVID-19 on Cyber Crime and State-Sponsored Cyber Activities*, 391 KONRAD ADENAUER STIFTUNG 5 (2020).

41. *See* Lorenz & Alba, *supra* note 36.

platforms also grow.[42] In its now-revised privacy policy, Zoom claimed that it used end-to-end encryption, meaning that only individuals within the Zoom call are able to read or see the transmitted information.[43] However, the platform came under fire in April 2020 for misrepresenting these security levels and data protection measures within its privacy policy.[44] As a result, certain government organizations, such as the German Ministry of Foreign Affairs, have banned the use of Zoom by staff on their mobile devices.[45] A class action complaint was filed against Zoom on April 13, alleging that Zoom had been eavesdropping on users' meetings, disclosing users' identities to third parties, and falsely representing the safeguards provided to users in order to keep communications confidential.[46] An analysis of Zoom's privacy policy further highlights the reasoning for privacy and security concerns.[47] Not only does Zoom claim the right to collect user data such as contact information, physical location information, and webpage search activity, the platform also collects information and data from the meetings themselves.[48]

The security concerns that arise with videoconferencing platforms are less problematic when the platforms are used for general communication and interaction, and Zoom itself acknowledges that using videoconferencing platforms to communicate highly sensitive information is a risk.[49] Lawyers are prescribed with an ethical and statutory duty that requires strict confidentiality.[50] If their private conversations are invaded, there are arguably much more serious consequences. While there is no ethical rule that specifically addresses videoconferencing, Model Rule 1.1,[51] the duty to provide competent representation, and Model Rule 1.6,[52] which requires that an attorney keeps client information confidential, are particularly relevant for attorneys attempting to provide legal services at a distance.

III. LEGAL ETHICS AND THE MODEL RULES OF PROFESSIONAL CONDUCT

The current Model Rules of Professional Conduct were drafted by the Commission on Evaluation of Professional Standards (Kutak Commission)[53]

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. Hurvitz v. Zoom Video Commc'ns, Inc., No. 2:20-cv-3400 (C.D. Cal. Filed Apr. 13, 2020).
47. *See Zoom Privacy Policy*, ZOOM (Aug. 2020), https://zoom.us/privacy/.
48. *Id.*
49. *Id.*
50. MODEL RULES OF PRO. CONDUCT, Preface (AM. BAR. ASS'N 1983).
51. MODEL RULES OF PRO. CONDUCT r. 1.1.
52. MODEL RULES OF PRO. CONDUCT r. 1.6(c).
53. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N, Discussion Draft 1980) [hereinafter Discussion Draft] Robert J. Kutak of Omaha, Nebraska, served as the Chairman for the Commission on Evaluation of Professional Standards from 1977 to 1983. *Id.*

and then adopted by the American Bar Association House of Delegates in 1983 (House of Delegates).[54] The 1983 rules are preceded by the 1969 Model Code of Professional Responsibility, as well as the 1908 Canons of Professional Ethics.[55] These publications have served as professional standards and models of the law governing lawyers for the last century.[56]

The original 32 Canons sought to guide attorneys so that their conduct and the overall impression of the legal profession was approved of by the general public.[57] However, these Canons fell short in that they did not give enough guidance that could extend beyond the language contained in their text.[58] Not only did many of the Canons overlap, but they avoided language that enabled disciplinary enforcement.[59] In 1969, the American Bar Association published the Model Code of Professional Responsibility as a means to update the ethical guidance for those in the legal profession.[60] The Code was made up of three parts: Canons, Ethical Considerations, and Disciplinary Rules.[61]

However, increasing inquiries for meaningful guidance regarding professionally responsible conduct led to the reconsideration of the language of the Model Code.[62] In 1977, the Kutak Commission determined that mere amendments to the Model Code would not be sufficient to address modern requirements of the legal profession, and therefore presented its recommended solution to the bar as the Model Rules of Professional Conduct.[63] The current Model Rules are comprised of fifty-five rules, which are divided into eight separate sections that address the client-lawyer relationship, the lawyer's duties as an advocate, public service duties, as well as maintaining the integrity of the legal profession.[64] However, given the modern developments in technology and the shift to a virtual practice, we

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54. *Model Rules of Professional Conduct, About the Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/ (last visited Apr. 12, 2021).

55. *Id.*

56. MODEL RULES OF PRO. CONDUCT, Preface.

57. ABA CANNONS OF PRO. ETHICS, Preamble (1908).

58. MODEL CODE OF PRO. RESP., Preface [5] (AM. BAR ASS'N 1980).

59. *Id.*

60. *Id.* (the Code was meant to be adopted as "an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules").

61. MODEL CODE OF PRO. RESP. Preliminary statement. The Canons were meant to express basic standards of professional conduct that the general public could expect from lawyers. *Id.* The Ethical Considerations were aspirational in character, and were designed as a set of goals for members of the legal profession to strive for or look to for guidance. *Id.* The Disciplinary Rules were the only section mandatory in character. *Id.* The rules describe the minimum level of conduct that a lawyer can embody before being subject to discipline. *Id.*

62. *See* Discussion Draft, *supra* note 53, at 4 (discussing how the growing cultural change and evolution of ethical thought of the 1970s contributed to the call for revisions to the Model Code).

63. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N, Proposed Final Draft 1981).

64. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 1983).

must revisit and analyze the relevant rules that are criticized for falling short in meeting their objectives.[65]

A. The Model Rules Implicated by Virtual Practice

The Model Rules have been amended to account for changes in technology in the past.[66] In 2009, the ABA organized the Commission on Ethics 20/20 (the Commission).[67] The Commission began to review the Model Rules in the context of technological advancements and the evolution of legal practice.[68] The process for reviewing the Model Rules included open meetings, comment periods, drafting periods, hearings, and other methods of discussion.[69] In 2012, at the recommendation of the Commission and in an effort to keep up to date in an increasingly technological world, the House of Delegates adopted several revisions to the Model Rules.[70] Most importantly, this included proposals to the commentary under Model Rules 1.1 and 1.6.[71]

1. Model Rule 1.1—Competence

Adopted in 1983, Model Rule 1.1 establishes: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[72] In 2012, the House of Delegates adopted Comment [8], which established the Duty of Technology Competence and directed lawyers to be competent with technology affecting their practice.[73] The comment reads:

> To 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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[74]

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65. ABA COMM'N ON ETHICS 20/20, *ABA Comm'n on Ethics Introduction and Overview*, AM. BAR ASS'N (Aug. 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introdution_and_overview_report.pdf [https://perma.cc/M3MZ-YRJN].

66. *Id.*

67. *Id.*

68. ABA COMM'N ON ETHICS 20/20, *About the Commission*, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on--ethics-20-20/.

69. *See* ABA COMM'N ON ETHICS 20/20, *supra* note 65 (discussing the process of review for the Model Rules).

70. *Id.*

71. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 37–44 (Art Garwin ed., 2013) [hereinafter LEGISLATIVE HISTORY].

72. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

73. MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. [8].

74. *Id.*

Prior to the actual adoption of Comment [8], it was clear that Commission members were concerned with the evolution of the practice of law during the digital age, as well as the use of technology in providing competent representation to clients.[75] The Commission explained that the entry into the digital age required a comment that commanded lawyers to understand basic features of relevant technology, such as using email or creating an electronic document.[76] ABA representatives attempted to reassure attorneys that evolving technologies should not be intimidating, but it is undeniable that the practice of law has forever been changed by the digital world.[77] Currently, thirty-eight states have adopted this Duty of Technology Competence.[78]

The Commission added the word "relevant" to the final version of Comment [8] in order to limit the requirement for technology competence to only extend to "relevant technology."[79] The Commission has provided no guidance on why the term was included and also provides no interpretation for the meaning of the word. Commentary from attorneys expressed concern over Comment [8] and its relationship to confidentiality, with some stating that the Commission should consider providing additional guidance to assist attorneys.[80]

Further skepticism surrounding the vagueness of the language of the comment was expressed prior to its adoption, with members of the legal community vocalizing that absent clearer wording or guidance, it may be better to abandon the duty of technology competence within the Model Rules altogether.[81] The Attorneys' Liability Assurance Society, Inc. (ALAS), a risk retention group, raised concerns during the drafting process that not only does the language of the comment not prescribe any new obligations for lawyers, it provides no clarity regarding a lawyer's obligations when utilizing

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75. ABA COMM'N ON ETHICS 20/20, *Minutes of Meeting on October 15, 2010*, at 7, https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20101510_minutes.authcheckdam.pdf [https://perma.cc/G3R5-AEBD] (last visited Mar. 20, 2021) [hereinafter *Meeting Minutes*].

76. ABA COMM'N ON ETHICS 20/20, *Report to the House of Delegates*, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf (last visited Mar. 20, 2021).

77. James Podgers, *The Fundamentals: Lawyers Struggle to Reconcile New Technology With Traditional Ethics Rules*, ABA J. (Nov. 1, 2014), https://www.abajournal.com/magazine/article/the_fundamentals_lawyers_struggle_to_reconcile_new_technology_with_traditio.

78. MODEL RULES OF PROF. CONDUCT r. 1.1 cmt. [8]. The states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

79. *Id.*

80. *See Meeting Minutes*, *supra* note 75, at 7.

81. Letter from Robert A. Creamer, Illinois Attorney, to Jamie S. Gorelick and Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20 (Nov. 29, 2011).

technology.[82] The group further examined that the language in Comment [8] "provides no guidance on the level of knowledge a lawyer should maintain to discharge the obligation to 'keep abreast of . . . the benefits and risks associated with technology.'"[83] These concerns surrounding technological incompetence were prevalent throughout the adoption process.[84] The fear that technology incompetence could lead to confidentiality breaches shows how the attorney's competence and confidentiality duties go hand-in-hand, especially in the context of technology dependence.

2. Model Rule 1.6(c)—Confidentiality

A lawyer's duty to maintain a client's confidentiality sets the profession apart from all others. The duty of confidentiality encompasses much more than simply not revealing a client's secrets.[85] A lawyer is required to ensure that nobody else reveals a client's secrets as well.[86] The Commission also proposed the adoption of Model Rule 1.6(c) after holes in the ethics rules failed to adequately account for new emerging technologies.[87] Model Rule 1.6(c) states that: "A lawyer shall make *reasonable efforts* to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[88]

What constitutes reasonable efforts to prevent inadvertent or unauthorized disclosure? While Model Rule 1.6(c) officially sets forth a lawyer's responsibility to protect confidential client information, additional guidance is still needed.[89] In 2010, the ABA drafted an open letter to lawyers seeking insight and opinions to determine what guidance the ABA could provide legal professionals who sought to "ensure that their use of technology complies with their ethical obligations to protect clients' confidential information."[90]

The Commission then drafted Comment [18] to accompany Model Rule 1.6(c) with the intent to offer some form of guidance to attorneys.[91] The comment states:

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82. Letter from Alan F. Rothschild Jr., Chair, ABA Section of Real Property, Trust and Estate Law, to Jamie S. Gorelick and Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20 (Aug. 15, 2011).

83. *Id.* at 2 (alteration in original).

84. *Id.*

85. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

86. *Id.*

87. Letter from ABA Comm'n on Ethics 20/20 Working Group on the Implications of New Technologies, to ABA Entities, Courts, Bar Associations, Law Schools, Individuals, and Entities at 2 (Sept. 20, 2010) [hereinafter Ethics 20/20 Letter].

88. MODEL RULES OF PRO. CONDUCT r. 1.6(c) (emphasis added).

89. *Id.*

90. *See* Ethics 20/20 Letter, *supra* note 87.

91. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. [18].

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made *reasonable efforts* to prevent the access or disclosure.[92]

The comment also provides a list of factors that attorneys can look to in order to decipher what "reasonable efforts" could possibly mean under Model Rule 1.6(c):

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].[93]

However, the comments that accompany the respective rules are not authoritative.[94] The factors listed in Comment [18] do not add obligations to the rules or assign an additional duty to a legal professional.[95] The language of Comment [18] is merely the afforded guide for interpretation.[96] As a result, the language of Model Rule 1.6(c) and Comment [18] are vague and fall short in providing the guidance that attorneys seek when analyzing their own conduct. The adoption of Model Rule 1.6(c) by the states has been slightly

92. *Id.* (emphasis added).
93. *Id.*
94. MODEL RULES OF PRO. CONDUCT, Preamble & Scope [14].
95. *Id.*
96. MODEL RULES OF PRO. CONDUCT, Preamble & Scope [21].

less popular than Rule 1.1.[97] Additionally, almost every state has its own unique variation of Rule 1.6 in its entirety.[98]

B. When Ethics Rules Do Not Mean What They Say

Ethics opinions and advisory opinions are a method of regulating attorney conduct by addressing specific issues or behaviors that raise questions about the legal profession.[99] The ABA delegated the Standing Committee on Ethics and Professional Responsibility with the duty of interpreting the professional standards drafted by the ABA, recommending amendments to the Model Rules, and issuing ethics opinions that guide lawyers through the language of the Model Rules. [100] In addition, individual state bar associations issue their own ethics opinions to guide lawyers in their specific jurisdictions.[101]

Attorneys must frequently attempt to determine the true meaning of Model Rule terminology by turning to ethics opinions.[102] These ethics opinions are not binding authority in any jurisdiction and are meant to be the persuasive authority and policy of the ABA.[103] In fact, ABA Formal Ethics Opinions seemingly promote the ABA Ethics Committee's "view of what the rules *should* say or were *meant* to say" instead of setting forth "a straightforward exercise of [statutory] interpretation."[104]

While formal opinions can offer beneficial guidance to legal professionals, very few have addressed technology, fewer have addressed technology in depth, and almost none have addressed videoconferencing.[105] Issued in 2017, Formal Opinion 477 is the primary source of guidance for attorneys seeking to interpret technology competence and protecting client

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97. *Variations of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N (Jan. 2, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf. The states that have adopted the same or substantially similar language as Model Rule 1.6(c) are Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

98. *Id.*

99. *See Ethics Opinions*, STATE BAR OF CAL., www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/opinions (last visited Mar. 13, 2021).

100. PRO. CONDUCT, Preface.

101. Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 318 (2002) (stating that "[a]t their best, state and local ethics opinions guide practicing lawyers through what some commentators call the 'ethics minefield'").

102. *See Ethics Opinions*, GEORGETOWN L. LIBR., https://guides.ll.georgetown.edu/c.php?g=270948&p=1808368 (last updated Mar. 12, 2021).

103. Publications, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/ (last visited Mar. 20, 2021).

104. Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 334 (1996) (emphasis in original).

105. Cheryl B. Preston, *Lawyers' Abuse of Technology*, 103 CORNELL L. REV. 879, 888 (2018).

confidentiality.[106] It primarily interprets the language of Comment [8] in accordance with the language of Model Rule 1.6.[107]

1. Interpreting Competence

Formal Opinion 477 showed that the ABA recognized technology's domination within the legal profession long before the COVID-19 pandemic and subsequent reliance on videoconferencing platforms.[108] The opinion noted the intersection of a lawyer's duty to remain competent regarding technology, as well as a lawyer's obligation to employ reasonable efforts to protect confidential information pertaining to the representation of a client.[109] To date, this is the only ABA formal opinion that actually mentions technology competence.[110]

As for judicial interpretation regarding a lawyer's duty to be competent, courts have established that the essence of competence is to be adequately prepared and thorough when pursuing a matter for a client.[111] A Delaware court also established that self-professed technology incompetence is never an excuse.[112] In that case, a lawyer failed to produce an accurate spreadsheet of computer database entries requested during discovery.[113] The attorney confessed to the court: "I am not computer literate. I have not found presence in the cybernetic revolution. I need a secretary to help me turn on the computer. This was out of my bailiwick."[114] Before the court issued discovery sanctions and ordered counsel to pay any reasonable expenses—including attorney's fees—the court discussed that the attorney's conduct was adverse to both the state and Model Rules, indicating that the attorney was likely unaware of his duty to be competent with technology.[115]

2. Interpreting Confidentiality

An attorney's duty to maintain client confidentiality has received significantly more interpretation than technology competence.[116]

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106. ABA Comm. on Ethics & Pro. Resp., Formal Op. 477 (2017) [hereinafter Formal Opinion 477].

107. *Id.*

108. *Id.* (noting "today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients").

109. *Id.*

110. *Id.*

111. Att'y Grievance Comm'n v. Blair, 102 A.3d 786 (Md. 2014) (noting that the attorney's failure to properly advise his client demonstrated a lack of competence).

112. *See* James v. Nat'l Fin. LLC, No. CV 8931-VCL, 2014 WL 6845560 (Del. Ch. Dec. 5, 2014).

113. *Id.* at *12.

114. *Id.*

115. *Id.*

116. *See infra* notes 117–41 and accompanying text (discussing interpretations of the duty to maintain client confidentiality).

Traditionally, ABA guidelines allowed for the transmission of information relating to the representation of a client via electronic communication.[117] In 1999, unencrypted email was deemed as an acceptable form of communication that afforded an attorney with a "reasonable expectation of privacy . . . despite some risk of interception and disclosure."[118]

This guidance was unchanged until the publication of Formal Opinion 477—largely inspired by the vagueness of Model Rule 1.6's Comment [18].[119] The Opinion attempts to discuss the comment's multifactor approach and analyze what reasonable steps an attorney can employ when using a given medium for electronic communication.[120] The factors involve "[u]nderstanding the nature of the threat,"[121] "[u]nderstand[ing] [h]ow [c]lient [c]onfidential [i]nformation is [t]ransmitted and [w]here [i]t [i]s [s]tored,"[122] "[u]nderstanding and [u]sing [r]easonable [e]lectronic [s]ecurity [m]easures,"[123] "[d]etermin[ing] [h]ow [e]lectronic [c]ommunications [a]bout [c]lient [m]atters [s]hould [b]e [p]rotected,"[124] "[l]abeling [c]lient [c]onfidential [i]nformation,"[125] "[t]raining [l]awyers and [n]onlawyer [a]ssistants in [t]echnology and [i]nformation [s]ecurity,"[126] and "[c]onducting [d]ue [d]iligence on [v]endors [p]roviding of [c]ommunication [t]echnology."[127]

Before the most recent update of the Model Rules and the subsequent publication of Formal Opinion 477, attorneys had difficulty locating guidance that discussed Model Rule 1.6.[128] In one Michigan case, an attorney was reviewing thirteen boxes of documents that were produced by opposing counsel.[129] The jurisdiction had established precedent that relied on an ABA Formal Opinion, which prescribed an attorney's ethical obligations upon receiving an inadvertent disclosure.[130] It appears as if the attorney was unaware of this precedent, did not seek out the formal opinion, and instead the attorney discussed with his colleagues whether or not the disclosure was inadvertent or not.[131] The attorney and his colleagues determined that it was not inadvertent because "the documents were intentionally produced by

117. ABA Comm. on Ethics & Pro. Resp., Formal Op. 99-413 (1999) (discussing the use of email in connection with preserving confidentiality).

118. *Id.*

119. *See* Formal Opinion 477, *supra* note 106.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See* Holland v. Gordy Co., Nos. 231183-85, 2003 WL 1985800 (Mich. Ct. App. Apr. 29, 2003).

129. *Id.* at *1.

130. *Id.* at *7 (citing Resol. Tr. Corp. v. First of Am. Bank, 868 F. Supp. 217, 220–21 (W.D. Mich. 1994)).

131. *Id.* at *1, n.8.

defendants."[132] Notably, the court considered the difference in the ABA's interpretation and the state of Michigan's interpretation of the Model Rules in two different ethics opinions.[133]

As technology develops, states have attempted to inform legal professionals that they still have a continuing duty to reasonably protect client information.[134] California and Arizona have both issued formal opinions that remind attorneys of this duty, as well as the duty to review technology safeguards and risks associated with technology.[135] Texas has also issued an ethics opinion that has provided more specific examples of reasonable precautions that lawyers can adopt to protect client confidentiality—in the context of cloud-based technology—by advising attorneys to generally understand how the technology works, review the terms of service of the relevant provider, analyze the protections within the technology, consider additional measures such as encryption in order to protect data, research whether providers are known to be susceptible to hacking, and adopt training programs for lawyers and staff dealing with protection of electronic information.[136]

Pennsylvania's Bar Association went further and specifically addressed different methods of modern electronic communication, like videoconferencing.[137] The state published a formal opinion that mandates that attorneys and their staff have a duty to use reasonable precautions when using such technology.[138] Interestingly, while the Pennsylvania Bar Association declined to make specific recommendations, it provided an extensive list of "best practices" for attorneys to incorporate into virtual practice.[139] The list includes instructions for encryption, requiring private networks, prohibiting the use of Amazon Alexa or Google voice assistants, and limiting the amount of information that should be communicated through electronic means.[140] The Pennsylvania Bar further recited a list of instructions from the Federal Bureau of Investigation that address issues with videoconferencing during the pandemic.[141]

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132. *Id.*

133. *See Resol. Tr. Corp.*, 868 F. Supp. at 219–20 (discussing how an ABA formal opinion cited and disagreed with the Michigan ethics opinion).

134. *See* State Bar of Arizona, Formal Opinion No. 04 (2009) (advocating that "[a]s technology advances over time, a periodic review of the reasonability of security precautions may be necessary"); State Bar of California, Formal Opinion No. 179 (2010) (stating that "[b]ecause of the evolving nature of technology and differences in security features that are available, the attorney must ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps").

135. *Id.*

136. State Bar of Texas, Formal Opinion No. 680 (2018).

137. State Bar of Pennsylvania, Formal Opinion No. 300 (2020).

138. *Id.*

139. *Id.*

140. *Id.* at 8.

141. *Id.* at 12 (stating that the provided instructions are: "[D]o not make meetings public; Require a meeting password or use other features that control the admittance of guests; Do not share a link to a

IV. RESPONDING TO THE NEW NORMAL: MODERNIZING THE RULES OF PROFESSIONAL CONDUCT

The ABA is in the best position to eliminate possible ambiguities in the Model Rules and proscribe the ethical obligations of an attorney using videoconferencing platforms or using technology for remote practice.[142] Traditionally, state ethics codes were fairly diverse.[143] It is difficult for an attorney to find guidance when the range of conduct that an attorney may, must, or may not engage in varies across the board.[144] As stated earlier, almost every state has adopted a different variation of Model Rule 1.6(c).[145] This raises significant issues for attorneys that practice in multiple states and who could be subject to professional discipline in multiple states.[146] This further reaffirms the argument that the ABA should formulate more helpful language within the Model Rules in order to encourage individual states to adopt that uniform language within their respective ethics codes.[147]

The Model Rules are meant to advance the ethical standards and professional responsibilities of lawyers.[148] However, even in light of the changes made by the 20/20 Ethics Committee, the language contained in the rules and its respective comments is far too vague and does not adequately account for recent technological dependency in the practice of law.[149] As one attorney stated: "All the rules that the legal profession relies on to instruct lawyer behavior were forged before the emergence of twenty-first century technology. The rule book for this young century has not been written yet . . . ."[150] When the boundaries of legal ethics are not well defined, lawyers are inclined to push those ill-defined boundaries.[151] Incorporating relevant

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teleconference on an unrestricted publicly available social media post; Provide the meeting link directly to specific people; Manage screensharing options. For example, many of these services allow the host to change screensharing to 'Host Only;' [and] [e]nsure users are using the updated version of remote access/meeting applications").

142. Mitchell James Kendrick, *A Shot in the Dark: The Need to Clearly Define a Lawyer's Obligations Upon the Intentional Receipt of Documents from an Anonymous Third Party*, 123 PENN ST. L. REV. 753, 776 (2019) (stating that a revision to the Model Rules is the best way to guide states with varying rules).

143. Joy, *supra* note 101 at 324–25.

144. *Id.* at 331.

145. *See Variations of the ABA Model Rules of Professional Conduct*, *supra* note 71.

146. *See* Hellman, *supra* note 104, at 327 (stating that most states have extensively revised its rules, and the variation of these rules continue to grow "both in number and significance").

147. *Id.* at 328 (noting that the ABA and its ethics opinions can have an influence on the drafting of state rules).

148. *See* MODEL RULES OF PRO. CONDUCT, Preamble & Scope (AM. BAR ASS'N 1983).

149. Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1531 (2018).

150. Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 264 (2011).

151. *See* Kendrick, *supra* note 142, at 774 (explaining how a lack of defined rules can cause lawyers to push ethical boundaries).

guidance into the comments of the Model Rules would promote compliance with the ABA's expectations for legal professionals.

This Section outlines specifically why changes to the commentary in the Model Rules are necessary. First, Part A discusses the practicality of attempting to interpret the Model Rules under the current guidance provided and concludes that amending the commentary to the rules is the best approach for the ABA to assist attorneys.[152] Next, Part B discusses the problems with ethics and advisory opinions. Their lack of uniformity and prominence compared to the Model Rules highlights why the ABA should hesitate to rely on them in order to prescribe ethical conduct.[153] Finally, Part C cautions that technology dependency is not going to disappear anytime soon.[154] While the COVID-19 pandemic certainly forced the practice of law to adapt, these changes are likely here to stay. Therefore, it would be in the best interest of the legal profession if the ABA adapts to address concerns within the profession as well.

A. Updating the Model Rules

Significant changes in the practice of law necessitate revisions to The Rules of Professional Conduct.[155] The adoption of Model Rule 1.1 Comment [8] and Model Rule 1.6 Comment [18] came as a result of technological advancements and their incorporation into the practice of law.[156] Attorneys are now faced with not just technological changes, but technological *dependency*.[157] The Rules have historically taken a one-size-fits-all approach to the regulation and management of a lawyer's conduct.[158] While it would be unreasonable to amend the Model Rules frequently to reflect minor changes in the practice of law, it is important for the Model Rules to be revised in certain circumstances "so they can continue to inform and guide lawyers' actual practice and avoid becoming antiquated."[159] Significant advances in technology and its integration into the practice of law have spurred changes to the Model Rules in the past[160] and the transition to an increasingly remote practice conducted over videoconferencing platforms and the risk of unauthorized disclosure of client information associated with

152. *See* discussion *infra* Part IV.A (discussing the benefits of more meaningful guidance).

153. *See* discussion *infra* Part IV.B (discussing the shortcomings of ethics opinions).

154. *See* discussion *infra* Part IV.C (explaining that rules related to videoconferencing are unlikely to appear in the near future).

155. *See* Legislative History, *supra* note 71.

156. *Id.*

157. *See supra* Part II.A (explaining work-from-home orders and the effect they had on the practice of law).

158. Eli Wald, *Legal Ethics' Next Frontier: Lawyers and Cybersecurity*, 19 CHAP. L. REV. 501, 526 (2016).

159. *Id.*

160. *See* Legislative History, *supra* note 71.

this transition is a modern circumstance that necessitates an update to the Model Rules.[161]

In order for the Model Rules to effectively convey the conduct that lawyers should adhere to, as well as the expectations of the ABA, the rules must outline the boundaries of that conduct with clarity.[162] If an attorney is unable to find a helpful source of guidance for professional conduct, it is less likely that attorneys will meet the ABA's expectations.[163] As seen in *Holland v. Gordy Co.*, the state's professional conduct rules—which modeled the ABA Model Rules—were silent regarding inadvertent disclosure.[164] This case highlights the argument that professional conduct rules should "say what they mean and mean what they say."[165] When the Model Rules are left with vague language, they have a lesser impact and that impact is even more difficult to predict.[166] If "the Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless," what standards actually govern a lawyer's conduct?[167]

There is also very little judicial authority that meaningfully interprets the language of the Model Rules.[168] Lawyers might frequently find themselves questioning the application of an ethics rule to a certain situation not found in any reported case.[169] Attorneys also risk being subject to discipline when they are forced to interpret their own ethical obligations because the Model Rules fall short.[170] Absent guiding authority or clear language, the Model Rules have historically gone unenforced.[171] Language such as "reasonable efforts" and "reasonably necessary" are just a few examples of the vague language riddled throughout the Model Rules.[172]

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161. *See supra* Part II (explaining the mandatory transition to virtual practice and why security concerns arose with this transition).

162. *See* Kendrick, *supra* note 142, at 768 (showing how clear boundaries will prevent confusion around ethical conduct).

163. *See* Holland v. Gordy Co., No. 231183–85, 2003 WL 1985800, at *7 (Mich. Ct. App. Apr. 29, 2003).

164. *Id.* (stating that Michigan draws its professional conduct rules from the ABA Model Rules).

165. Paula Schaefer, *The Future of Inadvertent Disclosure: The Lingering Need to Revise Professional Conduct Rules*, 69 MD. L. REV. 195, 242 (2010).

166. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 642 (1981).

167. *Id.*

168. *See* Kendrick, *supra* note 142, at 769 (discussing the difficulties and inconsistencies that result when courts attempt to interpret rule language).

169. *See* Abel, *supra* note 166, at 642 (exhibiting a complication that could arise without clear boundaries).

170. *See* Resol. Tr. Corp. v. First of Am. Bank, 868 F. Supp. 217 (W.D. Mich. 1994) (where the court explained that the attorney was unaware of a relevant ethics opinion, and the attorney's research and other steps led him to the wrong conclusion regarding his ethical obligations).

171. *See* Abel, *supra* note 166, at 648 (noting that lawyer misconduct "is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light").

172. MODEL RULES OF PRO. CONDUCT r. 1.6(c) (AM. BAR ASS'N 1983).

It is more dangerous for the legal profession to be governed by rules that are considerably vague compared to rules that are clear and specific.[173] Vague rules that do not adequately provide attorneys with guidance can lead to increased conflict when it comes to the interpretation of these rules.[174] Ethics rules are a restraint on how attorneys advocate for their clients.[175] Therefore, additions or amendments to the Model Rules should be drafted carefully so that they are able to remain flexible for future interpretation while still providing attorneys with guidance.[176]

Because the Model Rules cannot provide an exhaustive list of ethical rules, the rules and guidance that are provided should be clear. Vague and ambiguous language within the Model Rules of Professional Conduct induce proper criticism which "sparks a demand for clear and enforceable rules."[177] By providing more specific guidance in the commentary under the Model Rules discussed in this Comment, the ABA would craft a more useful guideline that serves as a national framework for lawyers and law firms that have seen their practice transition almost entirely to rely on videoconferencing and virtual communication.[178]

B. Pitfalls of Ethics Opinions

An anticipated criticism of this proposal is that ethics opinions are sufficient to guide attorney conduct. Ethics opinions addressing the duty of technological competence are not a sufficient solution to the holes in the Model Rules. Not only do different jurisdictions give conflicting advice, these opinions will be simply advisory in many jurisdictions and therefore will not shield a lawyer from discipline.[179] The majority of systems that produce these opinions have been noted as biased, unorganized, and propelled by self-interest.[180] "In a majority of states, bar committee volunteers without any special training or expertise draft the ethics opinions."[181]

Furthermore, lawyers typically do not consult ethics opinions for assistance with technology use unless there is a considerable risk associated

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173. Katy Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 GEO. J. LEGAL ETHICS 853, 868 (2017).

174. *Id.*

175. *Id.*

176. *Id.*

177. Reed Elizabeth Loder, *Tighter Rules of Professional Conduct: Saltwater for Thirst*, 1 GEO. J. LEGAL ETHICS 311, 323 (1987).

178. *See* Brandon Michael Meyers, *Addressing the Boundaries of the Legal Profession's Monopoly Through a Model Definition of the Practice of Law*, 40 J. LEGAL PRO. 321 (2016).

179. *See supra* Part III.B (discussing the inconsistencies in ethics opinions).

180. Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 319 (2002).

181. *Id.*

with the technology.[182] The conduct of the lawyers in *Holland*, discussed earlier in this Comment,[183] shows how attorneys do not think to consult ethics opinions. Even when attorneys are aware of the existence of particular ethics opinions, they are typically unaware of their contents and therefore have little awareness of their implications.[184]

Ethics opinions also fall short because the opinions do not address technology competence in appropriate depth. Cloud computing is disproportionately covered in state ethics opinions compared to any other type of technology.[185] In fact, twenty-one states have addressed the use of the cloud for storage of client information, with some states issuing multiple opinions for guidance.[186] Considering that the ABA maintains that specifying reasonable steps for lawyers to adopt under any given set of facts is "beyond the scope of an ethics opinion," it is not likely that lawyers will find much meaningful guidance here.[187]

The ABA has certainly succeeded in making the rules of professional conduct more uniform from state to state overall. However, these state ethics rules and associated various opinions are still "too general and superficial to provide meaningful guidance" about the urgent ethical issues that lawyers are faced with in virtual practice.[188] If a professional conduct rule is able to articulate sufficient guidance regarding an attorney's ethical obligations, attorneys would not need to conduct extensive research when they are concerned with rule interpretation regarding technology and preserving confidentiality.[189] The role of ethics opinions should not be entirely disregarded because they are looked to by courts, states, and attorneys in order to resolve ethical disputes.[190] However, courts can also determine state ethics opinions that conflict with ABA opinions on the same subject are not controlling.[191] Therefore, the opinions' lack of binding authority renders them inferior to a revision of the Model Rules.[192] Because states typically adhere to the rules set by the ABA and adopt them as their own, the ABA should take the initiative to update the Model Rules so that unintended

182. *See* Preston, *supra* note 105, at 888 (showing how ethics opinions are not often considered in technological dilemmas).

183. *See* Holland v. Gordy Co., No. 231183–85, 2003 WL 1985800 (Mich. Ct. App. Apr. 29, 2003).

184. *See* Sharon D. Nelson & John W. Simek, *Disasters and Data Breaches: The ABA Has Spoken — But Was Anyone Listening*, 44 MONT. LAW. 20 (2019).

185. Lori D. Johnson, *Navigating Technology Competence in Transactional Practice*, 65 VILL. L. REV. 159, 176 (2020).

186. *Id.* at 175.

187. *See* Formal Opinion 477, *supra* note 106.

188. Ann Southworth, *Our Fragmented Profession*, 30 GEO J. LEGAL ETHICS 431, 436 (2017).

189. *See* Resol. Tr. Corp. v. First of Am. Bank, 868 F.Supp. 217 (W.D. Mich. 1994).

190. *See* Hellman, *supra* note 104, at 325–26.

191. *Id.* at 317.

192. *See* Joy, *supra* note 180, at 337 (stating that court rules and disclaimers typically affirm the non-binding status of ethics opinions).

consequences associated with technology misuse can be avoided as much as possible.[193]

C. No End in Sight

Lawyers should not expect to see reliance on videoconferencing and other technologies to filter out in the future. Even before the COVID-19 pandemic, there were calls to expand the use of videoconferencing in pretrial matters and in hearings as a way to be both cost and time efficient.[194] Fans of incorporating videoconferencing into the practice of law advocate that it also allows for attorneys to expand their practice by meeting with clients that are located far away.[195] One California Employment Law Letter even encouraged employers to increase the use of technologies that were employed during the COVID-19 pandemic in the workplace for the long term.[196]

The implications of the use of videoconferencing in criminal proceedings are certainly a notable concern.[197] The effects of social isolation on mental health that accompany working from home are also rising concerns.[198] However, there are studies that show that U.S. employees would like to see remote work continue following the pandemic.[199] Overworked lawyers describe remote work as a relief, with 50% of lawyers responding to a survey stating that they would like to have the option to continue working remotely in the future.[200] Given the relatively positive response to the convenience that videoconferencing provides, it is unlikely that remote work will completely cease in the future.[201] This reality is precisely why attorneys should be afforded effective guidance spelling out how to ethically adjust to the new normal.

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193. *See* Hellman, *supra* note 104, at 325 (suggesting that clarity from the ABA could prevent misconduct stemming from technology misuse).

194. Hon. Mary Russell, *Missouri Chief Justice: Future Realities Present New Challenges, Opportunities for Delivering Justice Solutions*, 70 J. MO. BAR 250, 252 (2014).

195. *Id.*

196. *See* Looking Ahead After Pandemic: Employers Likely to See Enduring Change, California Employment Law Letter (June 22, 2020).

197. Michael D. Roth, *Laissez-Faire Videoconferencing: Remote Witness Testimony and Adversarial Truth*, 48 UCLA L. REV. 185, 201 (2000) (discussing concerns with witness credibility, demeanor, and Constitutional implications of videoconferencing in trials).

198. *See* California Employment Law Letter, *supra* note 196.

199. *Id.* The survey was conducted in April 2020 by getAbstract, a company that provides abstracts of books and articles for business customers. The survey found 42.67% of respondents wanted to work remotely more of the time after the disease threat passes, while 34.96% wanted to return to their former schedule. *Id.* The report found that 12.37% of respondents said they want to work in the office more of the time, and 7.56% already worked remotely full-time. "Other" was the response for the remaining 2.44%. *Id.*

200. Jamie Hamilton, *Five Out of Ten Lawyers Want to Work from Home for Good*, ROLLONFRIDAY (June 12, 2020), https://www.rollonfriday.com/news-content/exclusive-five-out-ten-lawyers-want-work-home-good.

201. *Id.*

V. PROPOSED COMMENTS TO THE MODEL RULES

In order to protect and promote a lawyer's ability to competently protect confidential client information, the ABA should take action to address the ambiguities and confusion that surround the language in the Model Rules. By failing to take action, the ABA would fall short in providing guidance to lawyers in the wake of an unprecedented change in the practice of law. This Section proposes changes to the commentary in the Model Rules that would assist attorneys as they navigate virtual practice.[202] These simple changes will allow the Model Rules to remain relevant while still mending their shortcomings as outlined in this Comment.

A. Model Rule 1.1 Should Clarify the "Benefits and Risks" of "Relevant Technology"

Rule 1.1 regarding the duty of competence arguably prescribes one of the most important ethical duties of a lawyer.[203] However, Comment [8] to Model Rule 1.1 falls short because it requires lawyers to be competent with technology in their practice but does not provide lawyers with any sort of guidance on how to do so in order to avoid disciplinary actions or sanctions.[204] What is relevant technology? Does the duty change depending on the attorney's practice? What level of knowledge establishes that the attorney has become competent with technology? In other words, the ABA has established that attorneys have a duty to be competent with technology but does not explain this duty to any extent.[205] This is particularly important given the number of state bars that have adopted this duty and therefore the number of attorneys that are now governed by it.[206]

Not only is ABA Formal Opinion 477 the only ABA formal opinion that actually mentions technology competence, the opinion itself primarily focuses on Model Rule 1.6 and confidentiality risks associated with technology and does little to truly address competence in the modern context.[207] The ABA should take a more disciplined approach in the formulation of the Model Rules by explicitly identifying areas in which technology that fosters electronic communication increases concerns. This would also allow judges and bar associations to address new issues in the future that could possibly arise when an attorney's use or abuse of technology is called into question.[208]

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202. *See* discussion *infra* Part V.A.1 (providing amended language to Model Rules).

203. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

204. *See* Medianik, *supra* note 149, at 1514.

205. *See* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt [8].

206. *See Rule 1.1, Comment [8] Technological Competence*, *supra* note 78 (listing the states that have adopted the duty of technology competence).

207. *See* Formal Opinion 477, *supra* note 106.

208. *See* Ho, *supra* note 173, at 867.

1. The Benefits and Risks

The transition to virtual practice highlights that the requirement that lawyers be technologically competent "encompasses much more than the mastery of substantive legal skills and knowledge that once defined 'competent representation.'"[209] With no end to virtual practice in sight, as well as a call to continue working virtually following the pandemic,[210] there is an extensive list of confidentiality issues that can arise for lawyers practicing remotely and using videoconference platforms.[211] Therefore, lawyers must be aware of the functional capabilities of the technology that they are using, as well as the importance of cybersecurity measures to protect attorney-client communications.[212] To address the issues explained above, the ABA should adopt a new comment to Model Rule 1.1 to adequately remedy the shortcomings existing in Comment [8].

A new Comment [X] to Rule 1.1 should read:

> Benefits and risks of technology that lawyers should be aware of for competent representation include but are not limited to the level of security in the technology, the probability and legal ramifications of third-party intercept, possible client impact, urgency, cost for the attorney and client, and time efficiency.

The effect of this proposal would be two-fold: This proposal would allow the ABA to promote language that not only addresses current concerns regarding the shortcomings of Comment [8][213] but it would also be flexible enough to adequately address future problems that could arise with new technological incorporation into the legal practice.[214] Furthermore, because the ABA has remained silent on the application of relevant technology, it is not clear if the technology that a lawyer must become competent with is determined by the lawyer's practice, firm, industry, client, or some other

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209. John Browning, *The New Duty of Tech Competence in Texas: Staying Ethical and Competent in the Digital Age*, 89 ADVOC., Winter 2019, at 31.

210. Hon. Hélène Kazanjian, *Effective Advocacy in a "Virtual" World*, 64 BOSTON BAR J., at 3 (2020) ("In the longer term, it is possible that we will continue to handle some court business virtually for quite some time, if not forever."); Abbey Olena, *COVID-19 Ushers in the Future of Conferences*, SCIENTIST (Sep. 28, 2020), https://www.the-scientist.com/news-opinion/covid-19-ushers-in-the-future-of-conferences-67978 (discussing the benefits of virtual meetings in the future); Jennifer McGlone, *The Future of Law Is Virtual and Remote, and It's Happening Now*, LAWCHAMPS (Nov. 23, 2020), https://www.courtbuddy.com/legal-insights-blog/category/for-our-attorneys%3A-practice-tips/future-of-law-virtual-and-remote (claiming that the COVID-19 pandemic is leading attorneys and courts to embrace virtual practice moving forward).

211. *See* Browning, *supra* note 209.

212. *Id.*

213. *See supra* Part III.A.1 (elaborating on specific concerns raised by attorneys during the drafting of Comment [8]).

214. *See* Wald, *supra* note 158 (discussing concerns that updating the Model Rules to account for evolving technology could render them outdated).

controlling factor.[215] Lawyers that refuse to accept technology within their practice will have increased trouble litigating against attorneys that have not only embraced, but mastered certain technology, such as videoconferencing platforms, cloud computing, or services like websites for e-filing.

2. Relevant Technology

Videoconferencing is now a permanent part of relevant technology.[216] As a result, the ABA Journal recognized that videoconferencing platforms do in fact raise significant ethical concerns for attorneys as they are incorporated into the practice of law.[217] As a result, the comments to Rule 1.1 should be updated in order to provide more clarity on what exactly could be considered a relevant technology so as to ensure that virtual communications are included.

This Comment proposes that a new Comment [Y] to Rule 1.1 should read:

> Relevant technology could include any system the lawyer uses to communicate confidential information, such as email or videoconferencing platforms; store confidential information; or provide confidential information to others. This could also include platforms for electronic legal research, as well as social networking platforms, whether the attorney chooses to use it or not.

Such a proposal would not be too narrow or specific, considering there have been suggestions that the scope of relevant technology should be narrowed to encompass law-practice-related technology that is relevant to the individual lawyer's practice.[218] This proposed language would ensure that videoconferencing is included within the scope of the type of technology that Model Rule 1.1's Comment [8] commands lawyers to be familiar with. Without such clear and concise language, lawyers may adopt the impression that the Model Rules contain no quantifiable standards and, therefore, can be ignored. Given the already negative public perception of the legal

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215. *See* Johnson, *supra* note 185, at 169.

216. *See* discussion *supra* Part IV.C (describing the likely persistence of videoconferencing in the legal field).

217. *See* Rosen, *supra* note 3. The ABA Journal is the flagship magazine of the ABA.

218. Letter from Dennis R. Honabach, Chair, to Jamie S. Gorelick and Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20, *RE: Ethics 20/20 Revised Proposals on Technology and Confidentiality and Technology and Client Development* at 6–9, Am. Bar Ass'n (Jan. 31, 2020).

profession,[219] as well as the ABA's concern with this perception,[220] "such attitudes can only enhance the already strong public suspicion of the legal profession."[221] The ABA should consider how more useful rule language can bolster confidence in the attorney's ability to competently represent clients. Clearly, the ABA has an interest in promoting trust and confidence in legal professionals by the general public.

There is no disputing that "relevant technology" will vary depending on the particular legal professional's practice and the technological sophistication associated with that practice.[222] For example, a lawyer at a large firm that specializes in patent law and represents a more technologically sophisticated range of clients is likely to embody a higher standard of technology competence than that of an attorney who may operate a solo practice in a smaller community. However, this proposed language would not exclude any sort of practice. Even lawyers that are operating in small firms are likely using some sort of electronic communication, such as email.

Whether something is a relevant technology is a sliding standard that necessarily changes as our use of technology evolves and new technologies are created.[223] However, we should not overexaggerate the rate of technological advances and assume that more specific language added to the Model Rules would be rendered obsolete in a few years.[224] Lawyers need specific instructions that "spell out exactly how to apply the current interpretations of the Model Rules to a completely new situation, as they can no longer argue that they are technologically uneducated."[225]

If other rules employ more specific language, it would not be a stretch for Model Rule 1.1 to be amended to offer more specific language as well. In fact, Model Rule 1.8, which deals with conflicts of interest between current clients is quite literally titled "Current Clients: Specific Rules."[226] Those that are apprehensive to more specific rule language because of the belief that these rules will go unenforced[227] should take note of the *James* court's lack

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219. *See* Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 134–35 (1994) (discussing the need for improvement within the legal profession and how public dissatisfaction with the practice of law stems from misconduct in the legal community).

220. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N, Proposed Final Draft 1981) (noting that aspects of the client-lawyer relationship, along with the cost of legal services, are significant concerns for clients and are some of the most prolific sources of discontent with the legal profession).

221. *Id.*

222. *See* Johnson, *supra* note 185, at 180–82 (asserting that transactional attorneys and litigators will have different levels of technology competence, and that transactional lawyers have not been quick to integrate technology into their profession).

223. Dennis Kennedy & Allison C. Shields, *Making Better Use of LinkedIn (Part 2) Business Intelligence and Technology Competence*, MICH. BAR J., Mar. 2020, at 50.

224. *See* Wald, *supra* note 158, at 550–51 (noting that "many of the currently available basic cybersecurity measures, admittedly in more primitive forms, have been available for a few decades now").

225. *See* Medianik, *supra* note 149, at 1513.

226. MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 1983).

227. *See* Loder, *supra* note 177, at 311.

of sympathy regarding technological incompetence.[228] These changes will put lawyers on notice as to what is expected of them. When courts recommend that tech-savvy lawyers should be hired or that law firms hire expert technology consultants,[229] while legal publications merely interpret the technological competence requirement as necessitating knowledge of the *basics* of technology,[230] it is no surprise that there are calls for more concise or helpful rule language.

Additionally, the guidance proposed in this Comment could help attorneys in their practice by encouraging them to plan in advance for virtual practice.[231] If lawyers struggle with adapting to technology, one can assume that clients struggle as well, especially those that may suffer from a disability or those who are not tech savvy themselves.[232] When the attorney is competent with technology, they are better equipped to assist clients that may not be as familiar with that technology.[233] This would be particularly helpful in light of the global pandemic where face-to-face meetings are either limited or not allowed.[234] If the Model Rules adapt to clearly include electronic communication, an attorney would be able to better plan ahead and assist these struggling clients by informing them about the use of videoconferencing during the course of the attorney–client relationship, as well as eliminate risks associated with failing to competently represent these clients.[235]

In addition to the adoption of Model Rule 1.1's Comment [8], as well as the adoption of more meaningful guidance in the comments as proposed here, the ABA could also adopt approaches such as that in Florida, which requires continuing legal education programs.[236] This would ensure that lawyers are knowledgeable regarding the technology that they employ in their practice.[237] For example, most lawyers probably do not know that every

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228. James v. Nat'l Fin. LLC, No. CV 8931-VCL, 2014 WL 6845560, at *12 (Del. Ch. Dec. 5, 2014) (noting that "[p]rofessed technological incompetence is not an excuse for discovery misconduct" after an attorney claimed that he was "not computer literate").

229. *Id.* (stating that "[i]f a lawyer cannot master the technology suitable for that lawyer's practice, the lawyer should . . . hire tech-savvy lawyers tasked with responsibility to keep current") (quoting Judith L. Maute, *Facing 21st Century Realities*, 32 MISS. C. L. REV. 345, 369 (2013)).

230. *See* Browning, *supra* note 209, at 242 (advising attorneys to "just understand the basics of the technology you use[] and become conversant in how it can impact your practice").

231. *See generally* Lynn Patrick Ingram, *Lawyering Through a Pandemic*, MICH. BAR J., July 2020, at 50.

232. *Id.* at 51 (discussing how one attorney advises elderly clients in advance about the functionality of videoconferencing, as well as finds ways to assist struggling clients with how to operate the technology necessary to accommodate the client).

233. *Id.*

234. *Id.*

235. *See* Formal Opinion 477, *supra* note 106.

236. *See* Fla. Bar Pro. Ethics Comm., Formal Op. 06-2 (2006) (mandating that "[t]o maintain the requisite knowledge and skill [for competent representation], a lawyer should engage in continuing study and education").

237. *Id.*

time they speak into Apple's Siri artificial intelligence agent, a recording of their voice is actually stored by the company for at least two years.[238]

The purpose of continuing legal education would be assisting lawyers and law firms that rely on videoconference platforms to get familiar with the technology and "learn how to operate it before that knowledge is applied to client representation."[239] This could include training employees in videoconferencing security measures, such as ensuring that the attorney knows how to be in control of meeting settings, sending links to meetings through encrypted email, and notifying clients of the risks associated with communication through videoconferencing.[240] Other sensible tips that CLE programs could provide lawyers and law firms regarding confidentiality risks associated with videoconferencing in remote practices could include the need for a private workspace so that client confidentiality is protected from partners, spouses, roommates, children, or any other individual that may enter the home who is not authorized to hear the information.[241] This could also include education regarding the features of smart home devices such as Amazon Echo or Google Home, which can hear and store recordings of your conversations.[242] CLE programs would also help inform attorneys on how to research and understand ethics codes and opinions in individual states, which could help address the research issues raised in *Resolution Trust* and *Holland*.[243]

B. Rule 1.6(c) Needs More Concrete Guidance Explaining the Meaning of "Reasonable Efforts"

Given the current reliance on videoconferencing platforms by lawyers, firms, and courts, the ABA should equip lawyers with enough guidance to ensure that they are able to safely use videoconferencing platforms. Additionally, this guidance should inform those in the legal profession that they should not blindly rely on videoconferencing platforms to protect client confidentiality itself.

The language of Model Rule 1.6(c) is vague on its face and does little to clarify an attorney's ethical obligations regarding client confidentiality when transmitting any form of electronic communication.[244] Such "reasonableness" language does little to help guide attorneys because the standard of reasonableness has "little meaning without interpretive

238. *See* GOODMAN, *supra* note 26, at 65.
239. *See* Medianik, *supra* note 149, at 1525.
240. Toby Rothschild, *Ethical Issues in Working Remotely*, ORANGE CNTY. L., Aug. 2020, at 51.
241. *Id.*
242. *Id.*
243. *See* Resol. Tr. Corp., 868 F. Supp. 217, 219–20 (W.D. Mich. 1994); *see also* Holland v. Gordy Co., No. 231183-85, 2003 WL 1985800 (Mich. Ct. App. Apr. 29, 2003)
244. *See supra* Part III.B.2 (explaining the shortcomings of Model Rule 1.6 and its comments).

guidance."[245] Rule 1.0 attempts to bridge this gap by defining "reasonable," "reasonable belief," and "reasonably should know," but the rule still does not clarify "reasonable efforts."[246] These shallow terms arguably keep the Model Rules relevant due to the terms' vagueness, but Rule 1.6 is an ethical rule meant to guide attorneys in their practice so that they do not engage in conduct that would breach confidentiality.[247] Therefore, attorneys must be able to actually apply this rule for it to be relevant.[248]

1. Challenges with Interpreting Reasonable Efforts

The lack of meaningful guidance under Model Rule 1.6 and its comments has not gone unnoticed.[249] Attorneys have called for more details on how exactly to safeguard client confidences, as well as encouraging the ABA to at least adopt language that promotes the use of encryption as a security measure that would reasonably protect confidential client information.[250] Currently, the most relevant guidance offered by the ABA merely advises that lawyers must "constantly analyze" their electronic communications under the Comment [18] factors to determine if they are acting reasonably or not.[251]

Comment [18] falls short for several reasons. Not only does the comment fail to suggest that lawyers and law firms adopt appropriate training protocols, but it also fails to offer any meaningful interpretive guidance or examples in the manner in which other areas of the Model Rules do. For example, Model Rule 5.1 Comment [2] provides that a firm should "make reasonable efforts to establish internal policies and procedures" and then provides a list of examples of policies that legal professionals can employ.[252] The commentary to Rule 1.6 should follow the format of the commentary to Model Rule 5.1 Comment [2] and provide more specific guidance regarding what encompasses reasonable efforts.[253] Under the current language of the rule, a lawyer's interpretation of what is reasonable currently depends on that

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245. Myles G. Taylor, *Seeing Clearly - Interpreting Model Rule 1.6(c) for Attorney Use of Cloud Computing Technology*, 45 MCGEORGE L. REV. 835, 850 (2014).

246. MODEL RULES OF PRO. CONDUCT r. 1.0 (AM. BAR ASS'N 1983).

247. *See* Taylor, *supra* note 245, at 849.

248. *Id.*

249. *See supra* Part III.B.2 (discussing the concern among legal professionals regarding the adoption of Model Rule 1.6(c) and its comments due to its confusing language).

250. David G. Ries, *Comments on ABA Commission on Ethics 20/20 Initial Draft Proposals – Technology and Confidentiality*, AM. BAR ASS'N (July 22, 2011), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110714_technologyandconfidentiality_comments_all.pdf.

251. *See* Formal Opinion 477, *supra* note 106, at 5.

252. *See* MODEL RULES OF PRO. CONDUCT r. 5.1 cmt. [2] (AM. BAR ASS'N 1983). The list of policies includes "those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised." *Id.*

253. *See id.*

lawyer's personal awareness of the risks, as well as their awareness of the multitudes of readily adoptable security practices.[254] Because Model Rule 1.1 fails to address these risks,[255] there is considerable room for an attorney to violate these rules.

Attorneys that adopt new technology practices but do not necessarily understand the technology, as well as attorneys that use newer technology, such as videoconferencing in their practice, but do not prioritize a deeper understanding of that technology, would certainly benefit from concise language that guides their conduct.[256] These individuals likely do not understand the legal consequences of their actions on client confidentiality.[257] Attorneys do not need to become technology experts nor do they need to acquire insider-level knowledge on videoconferencing platforms or other forms of electronic communication.[258] It is imperative that the comments to Rule 1.6 encompass this reality while still promoting the lawyer's duty of confidentiality.

2. Proposing Reasonable Efforts

A proposed new comment should suggest that "reasonable efforts" could include basic security measures, the notion that law firms should adopt appropriate training protocols, and adopting encrypted wireless network systems that transmit client information. Another particular method that should be suggested as a reasonable effort to protect confidential client information that is communicated through a videoconferencing service is the requirement for lawyers to become aware of the privacy policies of online platforms.[259] This would ensure that lawyers are knowledgeable about which platforms attempt to shed themselves of liability when information is mishandled.[260] Zoom is an example of an electronic platform that absolves itself of any liability in its privacy policy.[261]

A new Comment [X] to Rule 1.6 should read:

> Reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a

254. *See* Preston, *supra* note 105, at 925.

255. *See supra* Part IV.A.1 (explaining how the duty to be competent with technology falls short in failing to explain what benefits or risks an attorney should potentially be aware of in order to best advocate for their client).

256. *See* Taylor, *supra* note 245, at 855–56.

257. *Id.*

258. *Id.* at 856.

259. *See* Preston, *supra* note 105, at 928.

260. *Id.*

261. *See* Zoom Privacy Policy, *supra* note 47 (stating "we are not responsible for circumvention of any security measures contained on the [s]ervices. You should be cautious . . . [of any] information you choose to share when using the [s]ervices"). The enforceability of these privacy policies is outside the scope of this Comment.

> client could include the adoption of technology training protocol for firm lawyers and staff, appropriate for the size and practice of the firm, periodic review of security precautions, encrypted wireless network systems, working with IT professionals, drafting policies regarding company devices, and reading privacy policies and terms of service agreements to understand a device or a piece of software. For example, when using a method of virtual communication, such as videoconferencing, a lawyer should be aware of the level of security associated with the communication software before transmitting sensitive information, as well as the provider's responsibilities in the case that any security measures are circumvented by a third party.

There are several benefits that would arise with this proposed language. Primarily, it would provide a starting point for attorneys who find little to no interpretive guidance under Comment [18]. Next, lawyers who would not particularly consider themselves experts in technology would certainly be benefited by language that recommends seeking professional advice or assistance from IT professionals. This language would also provide clarity for lawyers regarding the ethical boundaries of videoconferencing and electronic communication to promote the best possible outcome for the client. The need for more secure wireless systems, as well as technology training protocol, certainly became more apparent as lawyers and law firms shifted to relying almost entirely on videoconferencing platforms as a way to continue practicing.[262] This proposed revision would also establish that there is a continuing duty to review safeguards as technology develops.

Language calling for the adoption of a training protocol is not a new concept to the Model Rules. Model Rule 1.7 Comment [3] explicitly states that in order to determine whether a conflict of interest exists, "a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice."[263] This language resulted in essentially all law firms adopting a conflict-checking software in order to identify a potential conflict of interest.[264] If this language is appropriate in the conflict of interest context, it should not be considered too specific to apply to Model Rule 1.6(c) as well.

It would not be too daunting for the ABA to suggest the use of secure internet access methods, the implementation of firewalls, the adoption of anti-Malware, AntiSpyWare, or Antivirus software, and routinely updating communication software in order to safeguard client confidential information on devices that transmits or stores such information. ABA Opinion 477 has acknowledged such options and has deemed them as "routinely accessible and reasonably affordable or free."[265] The Opinion certainly serves as a

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262. *See supra* Part II (discussing the ease at which electronic devices can be corrupted).
263. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. [3] (AM. BAR ASS'N 1983).
264. *See* Wald, *supra* note 158, at 529.
265. *See* Formal Opinion 477, *supra* note 106, at 7.

starting point for training lawyers. However, it still offers no concrete standards or guidance other than the factors test in Comment [18].[266]

The proposed changes discussed in this Comment are certainly feasible. The adoption of new comments in the Model Rules are much simpler than adopting an entirely new rule. Drafting a new rule could take years, and the comments are already incorporated into the existing Model Rules. Even so, the argument that implementing these amendments would take too much time is not compelling because the Model Rules are the most effective way to regulate attorney conduct.[267] Failure for the legal profession to regulate itself or to claim that self-regulation is too time consuming could potentially lead to the loss of the self-regulation privilege.[268] Most importantly, these proposed additions would benefit lawyers by providing additional guidance in an area of legal ethics that has been criticized as being confusing and vague.[269]

VI. CONCLUSION

Attorneys have had to make considerable adaptations due to the COVID-19 pandemic and the increasing integration of technology into the practice of law. Increased reliance on videoconferencing platforms for communications have allowed attorneys to still meet with clients in an efficient manner and for courts to continue proceeding during ongoing shutdowns.[270] However, there are still considerable risks associated with videoconferencing due to sinister attacks and human error.[271]

The Model Rules have induced criticism in the legal profession for not providing adequate guidance to attorneys, especially in the context of modern technology. Considering the ABA's interest in addressing the use of new technology,[272] as well as the dependency on videoconferencing in modern practice,[273] it is important for the Model Rules to sufficiently inform attorneys how to competently use videoconferencing platforms, as well as how an attorney can reasonably act in order to safeguard client confidentiality. In order to provide proper ethical guidance for the legal profession, the rules that govern attorney conduct must be clear so that lawyers actually know how to apply these rules in their practice. This suggests that the ABA should adopt new commentary to the Model Rules in order to address these issues. Adding helpful comments to the Model Rules would place videoconferencing

266. *See* Preston, *supra* note 105, at 879.

267. *See* Wald, *supra* note 158, at 531.

268. *Id.*

269. *See supra* Part III.B (discussing attorney concerns regarding vague rule language).

270. *See supra* Part II.A (discussing the transition to distance lawyering).

271. *See supra* Part II.B (discussing the cyber threats that attorneys face when working remotely).

272. *See supra* Part IV.A (outlining the benefits of updating the Model Rules and adopting helpful commentary in order to address changes in technology).

273. *See supra* Part IV.C (discussing the inevitable integration of technology into the practice of law).

platforms within the scope of Model Rules 1.1 and 1.6, as well as provide attorneys with helpful ethical standards that would remain relevant in the future.