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BUSINESS LAW AND LAWYERING IN THE WAKE OF COVID-19

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Joan MacLeod Heminway†

Gray Buchanan Martin‡

[W]hat we as lawyers have learned from the COVID-19 pandemic is that the legal profession was largely ill-prepared for this catastrophe. We have weathered natural disasters. We have endured earthquakes and wildfires. We have withstood economic booms and busts. But we have never experienced a simultaneous onslaught of disease, quarantine, scarcity, travel restrictions, mass unemployment, and the forced closure of courts and businesses. Most did not foresee the length and severity of the crisis.¹

The public arrival of COVID-19 (the novel coronavirus 2019) in the United States in early 2020 brought with it many social, political, and economic dislocations and pressures. These changes and stresses included and fostered adjustments in business law and the work of business lawyers. This Article draws attention to these COVID-19 transformations as a socio-legal reflection on business lawyering, the provision of legal services in business settings, and professional responsibility in business law practice. While business law practitioners, like other lawyers, may have been ill-prepared for pandemic lawyering, we have seen them rise to the occasion to provide valuable services, gain and refresh knowledge and skills, and evolve their business operations. These changes have brought

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¹ Justin E. D. Daily, Reed T. Aljian, *Adapting Your Business to the Covid-19 Pandemic and Other Tragedies*, ORANGE CNTY. LAW., July 2020, at 34.

with them various professional responsibility and ethical challenges, all of which are ongoing at the time this is being written.

Business lawyering—the profession and craft of representing business ventures and their promoters and constituents—is influenced by individual client affairs, industry considerations, and broader systemic concerns. The year 2020 and the emergence of a highly contagious and intransigent virus will not easily be forgotten for the impact on all three of these influences on business law and the activities and decision-making of business lawyers in the United States and around the globe. Client businesses were disrupted in innumerable ways, from government-mandated business shutdowns to adaptations in product mix and business models. Distilleries used their alcohol to produce hand sanitizers,² and auto manufacturers made ventilators.³ Unemployment soared to new heights,⁴ and public health concerns interacted (and sometimes clashed) with conceptions of individual liberty.⁵

² See, e.g., Kellen Browning, *Distilleries Raced to Make Hand Sanitizer for the Pandemic. No Longer.*, N.Y. TIMES (Aug. 4, 2020), <https://www.nytimes.com/2020/08/04/business/distilleries-hand-sanitizer-pandemic.html>; Emily Heil, *Distilleries Helped Out by Making Hand Sanitizer. Now They've Been Threatened with Unexpected FDA Fees.*, WASH. POST (Dec. 31, 2020), <https://www.washingtonpost.com/food/2020/12/31/distilleries-helped-out-by-making-hand-sanitizer-now-theyve-been-hit-by-unexpected-fda-fees/>.

³ See, e.g., Reed Albergotti & Faiz Siddiqui, *Ford and GM Are Undertaking a Warlike Effort to Produce Ventilators. It May Fall Short and Come Too Late.*, WASH. POST (Apr. 4, 2020), <https://www.washingtonpost.com/business/2020/04/04/ventilators-coronavirus-ford-gm/>; Brad Templeton, *Car Companies Are Making Ventilators, But Ventilator Companies, Hackers And CPAP Companies Are Working Harder*, FORBES (Apr. 20, 2020), <https://www.forbes.com/sites/bradtempleton/2020/04/20/car-companies-are-making-ventilators-but-ventilator-companies-hackers-and-cpap-companies-are-working-harder/?sh=946a05b7ec75>.

⁴ See GENE FALK ET AL., UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC: IN BRIEF, CONG. RES. SERV. R46554 (Jan. 12, 2021), at 2 (“[T]he unemployment rate increased from 3.5% in February 2020 to 4.4% in March 2020, peaked at 14.8% in April, and then fell to 6.7% in December. The peak represents the quickest month-over-month increase in unemployment rates and the highest overall unemployment rate since the CPS data started being collected in 1948.” (footnotes omitted)) (available at <https://fas.org/sgp/crs/misc/R46554.pdf>).

⁵ See, e.g., Brett Milano, *Restricting Civil Liberties Amid the COVID-19 Pandemic*, HARV. L. TODAY (Mar. 21, 2020), <https://today.law.harvard.edu/restricting-civil-liberties-amid-the-covid-19-pandemic/>; *We the People: Civil Liberties and COVID-19*, NAT'L CONST. CTR. (Apr. 2, 2020), <https://constitutioncenter.org/interactive-constitution/podcast/civil-liberties-and-covid-19> (podcast recording and transcript).

These dislocations in the undertakings of client firms, commercial sectors, and public life have had many identifiable effects on business law and lawyering. Business law issues became trendy in the news and academia, as well as in client affairs and law practice. On March 30, 2020, about two weeks into our public recognition that COVID-19 was a more serious problem in the United States than we had originally thought, one of us wrote a short blog post commenting on business law's popularity.

COVID-19's effects on financings and M&A, as well as contracts more generally . . . , the rapid adoption of the Coronavirus Act, Relief, and Economic Security Act, a/k/a the "CARES Act" . . . , and the President's invocation of the Defense Production Act have me feeling like I am drinking business law water out of a fire hose this past week. Anyone else feeling that way? Whew!⁶

The spring of 2020 was an intense time for us all, and for business lawyers, emergent business law issues were a part of that overall climate.

This Article isolates three specific areas for attention. First, the Article notes and comments on several legal issues affecting businesses (drawing from, among other regulatory frameworks, contract, business associations, and federal securities law) that achieved new or renewed prominence as business firms adjusted to the pandemic. Those attentive to the application of these areas of the law understand that *force majeure* clauses, emergency bylaws, and annual shareholder meetings, for instance, garnered fresh and focused attention. In addition, the application of war-time commercial regulation to aspects of business logistics for some firms (from sourcing to manufacturing to distribution) added a novel dimension to business law practice for lawyers representing those firms. Insurance questions also emerged as salient business law concerns, given the significant business disruptions caused by COVID-19.

Next, the Article identifies and categorizes ways in which law firms and law practice responded to challenges generated by or in the pandemic. Perhaps most remarkable in this regard is the seemingly ubiquitous advent of dedicated COVID-19 web pages on law firm websites and the development of specialized legal technology applications. However, it also bears noting that stay-at-home orders and general prudence have kept

⁶ Joan Heminway, *When Your Former Students Make You Proud . . . And Make You Laugh*, BUS. L. PROF. BLOG (Mar. 30, 2020), https://lawprofessors.typepad.com/business_law/2020/03/when-your-former-students-make-you-proud-and-make-you-laugh.html.

business lawyers, like so many others, out of their traditional workplaces. Other practice changes follow from those workplace changes.

Finally, the Article focuses in closely on the ways in which principles of professional responsibility and professional ethics (more broadly) interact with identified disruptions and alterations in law and law practice. Competence remains a critical core professional responsibility that requires attention, but aspects of lawyering and the lawyer-client relationship in the pandemic also put stress on confidentiality obligations and offer many additional challenges relating to the business lawyer's professional obligations. No doubt as the pandemic devolves, additional professional responsibility issues will manifest themselves.

The reflections and observations shared in this Article are neither unique nor exhaustive. They merely represent a sampling. However, they offer both a cultural snapshot of the business law field in a period of marked transitions and food for thought for individual lawyers as they plan for and navigate the practice of business law moving forward.

I. EMERGENT BUSINESS LAW ISSUES IN THE PANDEMIC

It did not take long after COVID-19 took hold of our world for the pandemic to impact businesses, industries, and socio-economic affairs in the United States. As these impacts were felt, lawyers and law professors assumed front-line positions in the resulting legal questions facing, among others, businesses and their management. Although, with even a small amount of hindsight (all we have at the time this is being written), some of the dominant legal questions that emerged were predictable, others were more novel.

Perhaps the most unique legal issues arising out of the pandemic relate to the government's use of the Defense Production Act (the "DPA"),⁷ a federal law that celebrated its 70th anniversary in 2020.

The Defense Production Act of 1950, in a sweeping delegation of power, authorizes the president, if he finds it "necessary or appropriate to promote the national defense," to establish, *inter alia*, a priorities and allocations program. The president is to use the power so conferred to meet military requirements "promptly and effectively," without "undue" disruption of production for civilian uses, and "within the framework, as

⁷ 50 U.S.C. app. §§ 2061–2170.

far as practicable, of the American system of competitive enterprise.”⁸

By its name and genesis, the DPA is Korean War era legislation that exists to assure the production of weapons and military resources. It was not known to be a hot topic in twenty-first century corporate boardrooms and C-suites across the United States, as a general matter.

Yet, in the middle of March 2020, the President issued an executive order delegating authority under the DPA to the Secretary of Health and Human Services to:

determine, in consultation with the Secretary of Commerce and the heads of other executive departments and agencies as appropriate, the proper nationwide priorities and allocation of all health and medical resources, including controlling the distribution of such materials (including applicable services) in the civilian market, for responding to the spread of COVID-19 within the United States.⁹

The invocation of the DPA in this context became a hot news item.¹⁰

A series of memoranda and statements followed in relatively rapid succession, some mentioning the names of specific businesses (including certain high-profile, well-known firms) and health and medical resources (including ventilators and personal protective equipment.¹¹ Immediately,

⁸ *The Defense Production Act: Choice as to Allocations*, 51 COLUM. L. REV. 350, 350–51 (1951) (footnotes omitted).

⁹ *Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19*, Exec. Order 13,909, 85 Fed. Reg. 16,227 (Mar. 18, 2020).

¹⁰ See, e.g., Priscilla Alvarez et al., *What is the Defense Production Act?*, CNN (Mar. 24, 2020), <https://www.cnn.com/2020/03/24/politics/defense-production-act-coronavirus/index.html>; Zolan Kanno-Youngs & Ana Swanson, *Wartime Production Law Has Been Used Routinely, but Not With Coronavirus*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/31/us/politics/coronavirus-defense-production-act.html>; Amber Phillips, *What is the Defense Production Act and Why is Trump So Resistant to Using It to Help Hospitals?*, WASH. POST (Mar. 24, 2020), <https://www.washingtonpost.com/politics/2020/03/19/defense-production-act-trump-coronavirus/>.

¹¹ See, e.g., Memorandum on Order Under the Defense Production Act Regarding 3M Company (Apr. 2, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/>; Memorandum on Order Under the Defense Production Act Regarding the Purchase of Ventilators (Apr. 2, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-order-defense-production-act-regarding-purchase-ventilators/>;

on short notice, lawyers were responding to the call for advice on the DPA and the extent of the President's authority under it. Although some lawyers—notably, government contract lawyers—were certainly aware that the DPA existed and could be used to alter domestic private production to address and adjust production allocations outside the military context,¹² many general business law practitioners were undoubtedly unaware of the breadth of coverage of the DPA, if they knew about the DPA at all. The pandemic has put business lawyers on notice that they must be aware of it and know how to address it with corporate boards and other business entity managers.¹³

Business lawyers also have gotten a great review of at least one aspect of first-year contracts courtesy of COVID-19. The search for and interpretation of *force majeure* clauses consumed the time and practice of business lawyers starting in the spring of 2020.¹⁴ The absence of *force majeure* clauses (or their deficiency in specific circumstances) forced those practicing business law to review and enhance their expertise in the common law contract doctrines of impossibility, impracticability, and

Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use (Apr. 3, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-allocating-certain-scarce-threatened-health-medical-resources-domestic-use/>; Statement from the President Regarding the Defense Production Act (Apr. 3, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-regarding-defense-production-act-3/>; see also Joan Heminway, *The Defense Production Act?*, BUS. L. PROF. BLOG (Apr. 6, 2020), https://lawprofessors.typepad.com/business_law/2020/04/the-defense-production-act.html.

¹² See, e.g., J. Michael Littlejohn, *Using All the King's Horses for Homeland Security: Implementing the Defense Production Act for Disaster Relief and Critical Infrastructure Protection*, 36 PUB. CONT. L.J. 1, 2 (2006) (“Based on legislative changes in 1994, the Defense Production Act of 1950 and the Defense Priorities and Allocations System (DPAS) apply to disaster relief and, based on changes in 2003, also can be implemented for ‘critical infrastructure protection and restoration’ whether the infrastructure is owned by federal, state, local, or private concerns.” (footnotes omitted)).

¹³ See Jennifer Williams-Alvarez, *DPA Forces New Unknowns for Boards to ‘Triage’*, AGENDA (Apr. 27, 2020), <https://www.agendaweek.com/c/2724033/333283> (copy on file with authors).

¹⁴ See, e.g., Peter A. Biagetti, *“Fuss” Majere: Lessons from the Early Outbreak of Covid v. Contract Cases*, NAT’L L. REV. (Apr. 24, 2020), <https://www.natlawreview.com/article/fuss-majere-lessons-early-outbreak-covid-v-contract-cases>; Travis S. Hunter & Renée Mosley Delcollo, *Is the Force Majere With You?*, AM. BAR ASS’N. (July 6, 2020), <https://www.americanbar.org/groups/litigation/committees/commercial-business/articles/2020/is-the-force-majere-with-you-coronavirus-contracts/>.

frustration of purpose.¹⁵ In mergers and acquisitions and other corporate finance practice, material adverse change and material adverse effect clauses have received attention for similar reasons.¹⁶

Emergency corporate bylaws also gained renewed attention in the business law community in the spring of 2020, along with other corporate governance issues.¹⁷ The possibility that a board of directors may not be able to meet physically—or even through conference call or video—stimulated interest in emergency bylaws.¹⁸ Corporate boards added or tuned up their emergency bylaw provisions under the guidance of their legal counsel if that was deemed necessary or desirable.¹⁹ The lawful conduct of virtual annual meetings of shareholders, at a time when some annual meetings already had been noticed as physical meetings, also created notable board activity guided by legal advice.²⁰ Federal securities regulation—in the form of proxy regulation—as well as state business entity law was implicated in this advice, causing the U.S. Securities and

¹⁵ See *id.*

¹⁶ See, e.g., Todd H. Bartels, *COVID-19 and Material Adverse Effect Clauses in Acquisition Agreements*, NAT'L L. REV. (July 14 2020), <https://www.natlawreview.com/article/covid-19-and-material-adverse-effect-clauses-acquisition-agreements>; Gail Weinstein et al., *COVID-19 as a Material Adverse Effect (MAC) Under M&A and Financing Agreements*, HARV. L. SCH. FORUM CORP. GOV. (Apr. 4, 2020), <https://corpgov.law.harvard.edu/2020/04/04/covid-19-as-a-material-adverse-effect-mac-under-ma-and-financing-agreements/>.

¹⁷ See, e.g., Keith Paul Bishop, *When Is An Emergency An Emergency For Purposes of Emergency Bylaws?*, NAT'L L. REV. (Mar. 23, 2020), <https://www.natlawreview.com/article/when-emergency-emergency-purposes-emergency-bylaws>.

¹⁸ See, e.g., *Should Your Corporation Have Emergency Bylaws?*, JDSUPRA (Apr. 23, 2020), <https://www.jdsupra.com/legalnews/should-your-corporation-have-emergency-47585/>.

¹⁹ See, e.g., Daniel Rice, *Companies Adopt Emergency Bylaws Spurred by COVID-19*, THOMSON REUTERS (May 22, 2020), <https://blogs.thomsonreuters.com/answeron/companies-adopt-emergency-bylaws-spurred-by-covid-19/>; Jennifer Williams-Alvarez, *Boards Adopt Emergency Bylaws for Critical Flexibility*, AGENDA (Apr. 22, 2020), <https://www.agendaweek.com/c/2727513/333613> (copy on file with authors).

²⁰ See, e.g., Douglas K. Chia, *Key Takeaways and Best Practices from Virtual Shareholders Meetings in 2020*, HARV. L. SCH. FORUM CORP. GOV. (July 2, 2020), <https://corpgov.law.harvard.edu/2020/07/02/key-takeaways-and-best-practices-from-virtual-shareholders-meetings-in-2020/>; Alexandra Clark Layfield, *How to Hold a Virtual Annual Meeting During the COVID-19 Pandemic*, NAT'L L. REV. (Apr. 1, 2020), <https://www.natlawreview.com/article/how-to-hold-virtual-annual-meeting-during-covid-19-pandemic>.

Exchange Commission to publish guidance.²¹ As has been true for so many things in the COVID-19 era, technology was a key driver of advice on corporate governance solutions, with law firms posting guidance on their websites.²²

In general, business lawyers got inventive in bringing legal claims of many kinds. A federal district court case recently decided in Tennessee, *Nashville Underground, LLC v. AMCO Insurance Company*,²³ offers a notable example involving the interpretation of a business interruption insurance policy. The plaintiff in the action, a Nashville bar, restaurant, and entertainment venue, claimed coverage under the food contamination endorsement in its business interruption insurance policy for the damages suffered when it was forced to close its doors by governmental orders issued in March 2020 in response to the COVID-19 pandemic. The insurer denied coverage. The court held for the defendant insurer on its motion to dismiss for failure to state a claim, finding the contract language unambiguous. The court's conclusion in its opinion noted sympathy, in spite of the outcome.

Like many Americans, the undersigned can sympathize with Plaintiff and so many of our other small to medium-sized businesses that seem to have borne much of the brunt of the effects of the COVID-19 pandemic. One could understand if Plaintiff (or anyone else) lamented that it simply is not right that this should be the case. But it also is not right, or lawful, for a business's insurer to be on the hook for coverage it simply did not contractually commit to provide. Presumably like a myriad of other enterprises throughout this nation, Plaintiff in retrospect perhaps would have bargained for broader coverage but simply did not foresee such need before the unprecedented

²¹ *Staff Guidance for Conducting Shareholder Meetings in Light of COVID-19 Concerns*, SEC, <https://www.sec.gov/ocr/staff-guidance-conducting-annual-meetings-light-covid-19-concerns> (last updated Apr. 7, 2020).

²² See, e.g., *COVID-19 Coronavirus: Corporate Governance*, DECHERT LLP, <https://www.dechert.com/knowledge/hot-topic/coronavirus-business-impact/covid-19-coronavirus--corporate-governance.html> (last visited Apr. 10, 2021); *Key Governance Action Items in Response to COVID-19*, GIBSON, DUNN & CRUTCHER LLP (Apr. 7, 2020), <https://www.gibsondunn.com/key-governance-action-items-in-response-to-covid-19/>. This guidance may be seen as a form of content marketing. See *infra* notes 47–56 and accompanying text.

²³ *Nashville Underground, LLC v. AMCO Insurance Company*, No. 3:20-cv-00426, 2021 WL 826754 (M.D. Tenn. Mar. 4, 2021)

pandemic conditions arose in 2020. Accordingly, Plaintiff was unfortunately left without the coverage it now asks this Court to find in an insurance policy that simply does not provide it.²⁴

Sympathy notwithstanding, cases of this kind are decided on the basis of specific contract language. Although overall insurers tend to be winning in these contract interpretation battles, insureds are prevailing in some cases, at least in pretrial and summary judgment motion battles.²⁵

The examples provided here are but a few of those that could be highlighted to date during the COVID-19 pandemic. Through their advice, business lawyers have proven themselves useful in responding to the questions, opportunism, and misfortunes of their clients. Early in the pandemic, patterns emerged relating to business opportunities and disruptions and the corresponding need for targeted legal advice. It was a time for creative business lawyers to pivot and innovate.

II. INNOVATIONS IN BUSINESS LAW PRACTICE IN THE PANDEMIC

While lawyers are good at many things, innovating is not usually one of them. This is because lawyers are trained to follow precedent (in the form of judicial opinions and transactional documents) and spend their days inside the boundaries of statutes, agency regulations and guidance, and court decisions.²⁶ Constantly working within a given set of boundaries may not stimulate innovative thinking. Moreover, lawyers tend to be more skeptical than the average population, making them quick to focus on the

²⁴ *Id.* at *11.

²⁵ See, e.g., Kenneth M. Gorenberg & Scott N. Godes, *Update on Business Interruption Insurance Claims for COVID-19 Losses*, NAT'L L. REV. (Oct. 29, 2020), <https://www.natlawreview.com/article/update-business-interruption-insurance-claims-covid-19-losses>; Richard D. Porotsky Jr., *Recent Federal Cases in the N.D. Ohio Split on COVID-19 Business Interruption Insurance Coverage*, NAT'L L. REV. (Jan. 26, 2021), <https://www.natlawreview.com/article/recent-federal-cases-nd-ohio-split-covid-19-business-interruption-insurance-coverage>; Jim Sams, *Judge Rules in Favor of 3 Policyholders With COVID-19 Claims in Consolidated Case*, CLAIMS J. (Feb. 21, 2021), <https://www.claimsjournal.com/news/national/2021/02/24/302197.htm>.

²⁶ Kenneth A. Grady, *Make Your Practice Innovative and Efficient*, WYO. LAW., Aug. 2015, at 18, 19; see also Eric Mankin, *Innovation in Practice: Why It's So Hard*, LAW PRAC., Dec. 2006, at 42, 42–43 (“The structure of the law itself retards innovation because the law is based on precedent—and, quite naturally, this concern for precedent transfers to the management of law practices. Thus, the most common question a would-be firm innovator faces is ‘Who is already doing this?’ If similar firms have not adopted a new approach, then the law firm will not want to try it.”).

difficulty in every opportunity and more resistant to change.²⁷ These common traits create barriers to innovation within the legal profession as a whole.

Yet, the unique circumstances surrounding COVID-19 have shoved the legal services sector toward greater operational and technological advance. The stay-at-home orders brought about by the pandemic have made the use of technology requisite to communications with colleagues and clients, and law offices have had no choice but to innovate. Although under ordinary circumstances lawyers tend to innovate in response to a slow push to adapt caused by competition within relevant legal services sectors, the pandemic is forcing lawyers and law offices (including, but not limited to, private firms) to innovate more rapidly and broadly in order to survive in their client service missions. In this part, although we focus attention on innovations emanating from and impacting business lawyers, many of our observations apply also to law practice writ large.

The first and most obvious change caused by COVID-19 and quarantine orders has been that lawyers began working from home. While the work-from-home movement was already taking off in many sectors prior to COVID-19, the legal sector had been slow to adopt this working model.²⁸ Leaving aside multijurisdictional practice challenges,²⁹ lawyer

²⁷ Erik L. Mazzone, *The Innovation Imperative: Adapt or Die?*, LAW PRAC., July–Aug 2013, at 28, 31.

²⁸ See Katie Buchanan, *A New Era for the Law Firm*, LAW PRAC. TODAY (June 15, 2020), <https://www.lawpracticetoday.org/article/new-era-law-firm/>.

²⁹ Well before (and extending into) the COVID-19 pandemic, legal work performed over the Internet has generated significant discussion and consternation in professional responsibility circles. See, e.g., *Lawyers Working Remotely*, ABA Formal Op. 20-495 (Dec. 16, 2020) (“[I]n a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic.”); Joan MacLeod Heminway, *Business Lawyering in the Crowdfunding Era*, 3 AM. U. BUS. L. REV. 149, 169–70 (2014) (noting, with respect to lawyering in connection with Internet-based crowdfunding, that “[p]rofessional responsibility rules on the unauthorized practice of law typically focus on where the lawyer is practicing law In this context, it may not be easy to determine exactly where law is being practiced”); James W. Jones et. al., *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 134–35 (2017) (“To date, only two states, Arizona and New Hampshire, have expressly recognized that it is not the unauthorized practice of law to practice law remotely—i.e., digitally—when sitting in the state but actually using technology to practice in another jurisdiction where the lawyer is licensed and in good

resistance to remote work has been attributed in large part to the perceived relationship-based nature of lawyering and the perception that at least some clients expect to meet with their legal counsel in well-appointed offices.³⁰ But along came COVID-19, and lawyers could no longer avoid the pull of the work-from-home movement. If lawyers wanted to bill hours, they were going to have to work from home.

As lawyers began working from home, law offices were forced to enhance their technological resources and capabilities to meet the needs of the firm and to confront the technological challenges associated with such developments. Issues around laptop-versus-desktop use, home Wi-Fi capacity and security, and virtual private networks emerged as pressing problems to address.³¹ Lawyers, like everyone else in the world, began using videoconferencing and telecommunication platforms such as Zoom

standing.”). Addressing remote law practice during the pandemic specifically, one group of commentators offered the following assessment under New York’s rules of professional conduct:

Working remotely can mean different things to different New York lawyers. Some are remote lawyering during the pandemic without having left their New York residences while others have moved (temporarily) to another home in-state or out-of-state where they are not licensed or admitted to practice. New York lawyers who have relocated to another state due to the COVID-19 outbreak should be careful not to engage in the unauthorized practice of law in violation of N.Y. Rule 5.5. . . . [L]awyers who have relocated should determine whether they can serve clients in their home jurisdiction. In some states, it may be against the rules to practice remotely on behalf of home state clients. Further, lawyers should not assume that ABA Model Rule 5.5(c), which allows temporary multijurisdictional practice, will apply in a particular jurisdiction and should consider consulting qualified counsel in their temporary jurisdiction to ascertain whether major-disaster provisions are in effect and whether any local rules or requirements may impact their ability to practice.

Devika Kewalramani et. al., *Social Distance Lawyering: How Close Is Your Ethical Compliance?*, N.Y. ST. B.J. (Aug. 2020), at 35, 38.

³⁰ See, e.g., Leigh McMullan Abramson, *Do Lawyers Need Offices Anymore?*, THE ATLANTIC (Oct. 9, 2015), <https://www.theatlantic.com/business/archive/2015/10/do-lawyers-need-offices-anymore/409417/>; William Vogeler, *Myths About Lawyers Working From Home*, FINDLAW (May 17, 2017), <https://blogs.findlaw.com/strategist/2017/05/myths-about-lawyers-working-from-home.html>.

³¹ SHARON D. NELSON ET AL., CORONAVIRUS: TECH ISSUES FOR LAWYERS WORKING AT HOME (available at <https://senseient.com/wp-content/uploads/Coronavirus-Tech-Issues-for-Lawyers-Working-at-Home.pdf>).

to meet with clients, colleagues, and the courts on a regular basis, rather than in specific circumstances.³² Lawyers adapted to the work-from-home model not by choice, but out of necessity.

Law firms also had to address security concerns that arise as a result of remote working. Malware infections, hacking, and other challenges are more difficult to prevent once workers are no longer regularly connected to a law office's computer network.³³ Firms with appropriate cybersecurity systems in place had to ramp up their availability to cover more workers; those without appropriate security technologies needed to acquire and implement them on an urgent basis.

Moreover, communication complications became manifest, and the need to address them holistically became important. "In a remote working world, everyone's delegation/supervision/feedback skills must be even better—more frequent, more clear and more realistic—than usual."³⁴ For example, in a private firm, a practice group leader may need to intentionally ask how an individual is doing because the leader can no longer gauge this based on their interaction with the individual in the office.³⁵ Junior lawyers in office settings must be more transparent and realistic about their own constraints as their home environments change.³⁶ It has also become more important for junior lawyers to take clear

³² See Robert Storage, *Best Practices: 5 Tips From Judges, Lawyers on Using Zoom*, AM. LAW. (Apr. 7, 2020), <https://www.law.com/ctlawtribune/2020/04/07/best-practices-8-tips-from-judges-lawyers-on-using-zoom/>.

³³ *Experts Warn Lawyers of Cyber Risks to Remote Work*, AM. BAR ASS'N. (Mar. 29, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/03/cyber-risks-to-working-remote-b/>; Victoria Hudgins, *Don't Get Cocky: Firms May Not Be Prepared for Long-Term Remote Work* (May 7, 2020), <https://www.law.com/legaltechnews/2020/05/07/dont-get-cocky-firms-may-not-be-prepared-for-long-term-remote-work/?slreturn=20200911160242>.

³⁴ Lauren Krasnow, *What Lessons Lawyers Can Learn From Week One of Working From Home*, AM. LAW. (Mar. 21, 2020), <https://www.law.com/americanlawyer/2020/03/21/what-lessons-lawyers-can-learn-from-week-one-of-working-from-home/>.

³⁵ See *id.* The pandemic and quarantine have created a childcare crisis that is affecting many working parents. Lawyers are no exception to this problem. Firms should make an effort to reach out to working parents, start a dialogue about the struggles they are facing and provide additional support mechanisms to them. If firms overlook this crisis, they risk losing talent they have worked hard to retain. Whitney Beard & Malini Nangia, *Call It a Crisis: Law Firms Need to Quickly Respond to Needs of Working Parents*, AM. LAW. (Aug. 12, 2020) <https://www.law.com/americanlawyer/2020/08/12/call-it-a-crisis-law-firms-need-to-quickly-respond-to-needs-of-working-parents/>.

³⁶ Beard & Nangia, *supra* note 35.

ownership of the work they are doing so that senior lawyers, whose focus is on more directly helping clients navigate the issues arising, can more easily monitor who is working on what and keep track of the status of projects.³⁷ Before the pandemic, communication challenges of the kinds mentioned here may have been barriers to lawyers working from home. Now, lawyers have no choice but to overcome them.

While the work-from-home movement has presented new challenges surrounding security and communication, it has also produced some positive effects. Working from home often creates a more relaxed work environment that has been shown to lead to more creativity.³⁸ Additionally, lawyers are enjoying the benefits of having no commute.³⁹ Many lawyers have liked working from home so much that they hope to continue to do so once the pandemic is over.⁴⁰ It remains to be seen whether law firms will allow them to continue to do so in a post-pandemic world.

COVID-19 has also changed how lawyers share information with other lawyers. As noted *supra* Part I, a number of business law issues arose or became prominent as a result of COVID-19, and these issues affected a wide swath of the business world at the same time. Law offices began to see an abundance of overlapping client requests.⁴¹ This created an incentive for lawyers to buy into platforms that streamline the way attorneys share information.⁴² Private law firms have tried to implement such systems in the past, only to face resistance from lawyers who failed to see value in these systems.⁴³ The circumstances presented by COVID-19 create an environment in which lawyers—especially business lawyers in large office settings—can now see the value of using a knowledge management system that helps reduce the time they spend duplicating the efforts of others.⁴⁴

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Brenda Sapino Jeffreys, *Legal Professionals Want to Keep Working From Home, but Will That Last?*, AM. LAW. (June 11, 2020), <https://www.law.com/americanlawyer/2020/06/11/legal-professionals-want-to-keep-working-from-home-but-will-that-last/>.

⁴¹ Frank Ready, *COVID-19 Pushed Legal Toward Tech, Remote Work. There May Be No Going Back*, AM. LAW. (Apr. 7, 2020), <https://www.law.com/legaltechnews/2020/04/07/covid-19-pushed-legal-towards-tech-remote-work-there-may-be-no-going-back/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

The pandemic also has led to innovations in lawyer advertising. In 1977, the Supreme Court invalidated the longtime ban on lawyer advertising on First Amendment grounds in *Bates v. State Bar of Arizona*.⁴⁵ This opened the door to legal advertising. Lawyers first began publishing advertisements in newspapers and on billboards, then on television, and later on the Internet.⁴⁶

Recently, law firms have turned to content marketing instead of solely relying on traditional advertisements. Content marketing is a “strategic marketing approach focused on creating and distributing valuable, relevant, and consistent content to attract and retain a clearly defined audience—and, ultimately, to drive profitable [client] action.”⁴⁷ This type of marketing can take the form of blogs, videos, podcasts, webinars, live virtual events, press releases, client memos, or newsletters. Content marketing allows firms to gain the exposure they want and need, while also allowing them to demonstrate their knowledge on a topic and thus build a stronger reputation.⁴⁸

Content marketing has advantages over regular advertising that have been accentuated by COVID-19. Generally, people dislike (and may distrust) advertisements and have a more positive impression of content that is presented in another format.⁴⁹ Because a lawyer’s reputation is so valuable, it can be important for business lawyers and business law offices to adopt a somewhat refined approach to their advertising strategies. This is especially true during a time of crisis when there is a greater risk of

⁴⁵ See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

⁴⁶ *Top 10 innovations in legal practice*, ABA J., <https://www.abajournal.com/gallery/10-techinnovations/> (last visited Mar. 24, 2021).

⁴⁷ *What Is Content Marketing?*, CONTENT MARKETING INSTIT., <https://contentmarketinginstitute.com/what-is-content-marketing/>. More simply, content marketing has been described as “[t]he act of teaching and problem-solving so as to earn buyer trust.” MARCUS SHERIDAN, *THEY ASK YOU ANSWER: A REVOLUTIONARY APPROACH TO INBOUND SALES, CONTENT MARKETING, AND TODAY’S DIGITAL CONSUMER* 23 (2017). General Electric pioneered content marketing with its “GE Reports,” an online magazine about science, tech, and innovation produced by General Electric itself. ALEXANDER JUTKOWITZ, *THE STRATEGIC STORYTELLER: CONTENT MARKETING IN THE AGE OF THE EDUCATED CONSUMER* 103 (2017).

⁴⁸ See JUTKOWITZ, *supra* note 47.

⁴⁹ Tiffany Hsu, *The Advertising Industry Has a Problem: People Hate Ads*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/business/media/advertising-industry-research.html?auth=login-email&login=email>; Robert Jellison, *4 Reasons Why Your Law Firm Needs a Blog*, COMPOSE.LY (Aug. 22, 2018), <https://compose.ly/strategy/4-reasons-why-your-law-firm-needs-a-blog/>.

being perceived as trying to take advantage of vulnerable individuals and entities.⁵⁰ By producing content as opposed to generic advertisements, lawyers are more likely to be seen as trying to help members of the public as opposed to take advantage of them. Thus, content marketing can help lawyers create or maintain a more positive reputation through the crisis.

Content marketing is also typically more cost-effective than running regular hard-copy or online advertisements.⁵¹ One study found that content marketing costs 62% less than traditional marketing and generates over three times as many leads as traditional marketing.⁵² The content that is published by firms is often written by lawyers within the firm at little additional cost to the firm. Once posted, the articles may remain online in perpetuity and continue to act as an advertisement for years to come. A traditional print-based or Internet advertisement on the other hand, will almost always require that the firm pay other parties to create, print or host, and distribute the advertisement. Moreover, that advertisement will only survive for a limited period of time. During COVID-19, when law firms are tightening their budgets, content marketing proves to be a great way to save money while continuing to advertise effectively.

Considering all of the benefits of content marketing during the pandemic, it is no surprise that law firms have ramped up their content marketing efforts.⁵³ Many firms took their content marketing to a new level this year by creating COVID-19 hubs on their websites. These hubs serve as a centralized location for all of the firm's articles, public memoranda,

⁵⁰ One firm was criticized in the early stages of the pandemic for running a television advertisement focused on victims of COVID-19. See Chris Dickerson, *Law Firms Criticized for Advertising Services During Coronavirus Pandemic*, W.V. REC. (Apr. 29, 2020), <https://wvrecord.com/stories/534593393-law-firms-criticized-for-advertising-services-during-coronavirus-pandemic>.

⁵¹ See Heidi Cohen, *Why Content Marketing Is More Cost Effective Than Digital Advertising*, ACTIONABLE MARKETING GUIDE (Sep. 20, 2012), <https://heidicohen.com/why-content-marketing-is-more-effective-than-digital-advertising-research/>.

⁵² *A Guide to Marketing Genius: Content Marketing*, DEMAND METRIC, <https://www.demandmetric.com/content/content-marketing-infographic> (last visited Mar. 29, 2021).

⁵³ See generally Patrick Smith, *COVID Pushed Firms to Overhaul How They Connect With Clients. They Aren't Going Back.*, AM. LAW. (Nov. 29, 2020), <https://www.law.com/americanlawyer/2020/11/29/covid-pushed-firms-to-overhaul-how-they-connect-with-clients-they-arent-going-back/> (“Clients faced myriad business issues revolving around COVID-19, including how to handle various federal and state financial assistance packages, employment law issues and even how to conduct business. But most firms recognized these issues, creating a glut of content and forcing creativity.”).

and other legal news on COVID-19 related issues, many (if not most) of which are business law issues. The organization of articles on these hubs makes it easier for website visitors to access the targeted information pertaining to their unique circumstances or needs. During the height of the pandemic, many firms even directed website visitors to their COVID-19 hub upon arrival to the firm website. These hubs have benefited firms in various ways.

First, the hubs may increase a law firm's visibility on the Internet. The Google algorithm rewards websites that post quality content that interests readers.⁵⁴ During the pandemic, firms can take advantage of this algorithm by publishing articles that address the numerous legal issues brought to the business forefront by COVID-19, including those mentioned *supra* Part I. As people search for answers to their legal questions, they will likely find themselves reading an article on one of these COVID-19 hubs. With all of the COVID-19 issues organized in one place, website visitors are likely to be drawn to read other articles that relate to the particular issue they are facing. This increases the time the user is spending on the website and signals to Google that the information being accessed by the user is helpful to them. Thus, Google will recommend the website to others facing similar situations, and accordingly, the firm's visibility will increase.

The abundance of information on the COVID-19 hubs also helps demonstrate that the law firm is a legal authority on COVID-19-related issues and has people monitoring the ever-changing business law landscape that generates and responds to those issues.⁵⁵ The firm's reputation is further enhanced when the content in the articles provides true value to readers.⁵⁶ Having a reputation as a leader in addressing COVID-19 issues in business law can increase the likelihood that potential clients will respond to the content marketing and reach out with questions about a specific issue. This strengthened reputation can also bolster a

⁵⁴ See Joe Dysart, *Marketing Via Content the Power of Feature Articles*, ARIZ. ATT'Y, Feb. 2014, at 34; see also Neil Patel, *How to Create Better Content For Your Customers*, NEILPATEL, <https://neilpatel.com/blog/content-creation-how-to-create-better-content-for-your-customers/> (discussing the intricacies of creating content that people are looking for).

⁵⁵ Nancy Rapp, *Incorporating COVID-19 Into Your SEO Content*, PAPER STREET (Apr. 8, 2020), <https://www.paperstreet.com/blog/add-coronavirus-content-law-firm-website/>.

⁵⁶ *Marketing & Practice Management Tips for Law Firms During COVID-19*, SCORPION (Apr. 3, 2020), <https://www.scorpion.co/law-firms/webinars/marketing-practice-management-tips-for-law-firms/>.

current client's confidence in the firm's ability to guide them through the storm and result in referrals by these existing clients to new clients.

In addition, a few law firms with strong business transactional practices have innovated by creating specific digital applications for use in the pandemic. These apps may address client service issues or law office management of health and safety. For example, one British law firm created an app to facilitate assessing client exposure by performing preliminary contract review on a bulk basis.⁵⁷ At least two U.S. firms have created apps for use by their attorneys and staff in returning to an in-person office setting.⁵⁸

In all of these ways, business lawyers and law offices, as well as the larger legal profession, have been forced to innovate or have heard the call to innovate as a result of COVID-19. Business lawyering has been changed by these innovations. The extent to which those changes may be lasting or permanent remains to be seen.⁵⁹ However, it seems fair to say that the longer the pandemic lasts, the more likely it is that most of the pandemic-induced transformations to business lawyering will endure for the long term.

III. ATTENTIVENESS TO THE BUSINESS LAWYER'S PROFESSIONAL CONDUCT IN THE PANDEMIC

These law and lawyer-driven innovations, as well as the re-tooling of business lawyers with enhanced knowledge and skills, have been critical to the furtherance of efficacious client service in the pandemic. The existence of many disturbances in the ordinary course of business lawyering, however, may create tensions in professional responsibility and

⁵⁷ See *Travers Smith LLP Has Announced the Launch of a Force Majeure App, an Innovative Approach to Dealing with Client Requests on Force Majeure Exposure in Contracts* (Mar. 30, 2020), <https://www.traverssmith.com/knowledge/knowledge-container/travers-smith-launches-free-force-majeure-contract-review-app-for-clients/> (“The tool allows contracts to be sent in bulk to a centralised mailbox within Travers Smith, which automatically analyses the contract based on pre-defined legal rules. The tool then provides a report which will help businesses decide which contracts they should prioritise for more detailed analysis.”).

⁵⁸ See Erica Silverman, *Returning to the Office? At Some Firms, There's an App for That*, LAW.COM (Sept. 14, 2020), <https://www.law.com/thelegalintelligencer/2020/09/14/returning-to-the-office-at-some-firms-theres-an-app-for-that/>.

⁵⁹ See Smith, *supra* note 53 (“As firms have managed to make the necessary adjustments to stay in front of their clients, and in some cases get in front of new ones, the question is what will stick and what won't when things get back to normal.”).

ethics. Accordingly, as they adapt during these uncertain times, lawyers must also remember and adhere to the rules of professional responsibility and their overall ethical obligations—including by being aware of the ways in which the applied context of these rules and obligations change.

As COVID-19 started uprooting the day-to-day lives of lawyers (including business lawyers), a number of state bar associations issued broad ethical guidance to ensure that compliance with ethical standards was not lost amidst the chaos.⁶⁰ In times of uncertainty, questions and concerns—from both lawyers and clients—are amplified; therefore, it is vital that lawyers remain well-versed in their ethical obligations as COVID-19 continues to create significant uncertainty. Although there are numerous professional responsibility problems presented by COVID-19, this Article focuses primarily on the issues of competence and the preservation of confidential client information in a business law context.

On its most basic level, a profession cannot survive without competent and diligent workers. This notion holds true for the legal profession as a whole at any time, but it is especially true for transactional business lawyers attempting to navigate the challenges created by COVID-19. Unfortunately, the rules of professional responsibility can be hard to navigate for transactional business lawyers, because these rules seem to be tailored more to the daily challenges of litigators than dealmakers.⁶¹ As the pandemic progresses, novel issues of law will continue to test transactional lawyers' substantive knowledge (as noted *supra* Part I). Moreover, the rapid development of new customs and technologies (as noted *supra* Part II) will increasingly challenge these lawyers' abilities to respond to their environment, both from a business standpoint and on a personal level. Because of these changes, remaining competent through COVID-19 is one of the most important obligations a transactional business lawyer can fulfill—both for themselves and for their clients.

⁶⁰ See, e.g., James M. McCauley, *Meeting Your Ethical Responsibilities During the COVID-19 Pandemic*, VA. STATE BAR (Apr. 9, 2020), https://www.vsb.org/docs/Ethics_COVID.pdf; G. Michael Witte, *Ethical Guidance for Lawyers during COVID 19*, IND. SUP. CT. (Apr. 2, 2020), <https://www.in.gov/judiciary/files/covid19-2020-0402-ethical-guidance-lawyers.pdf>.

⁶¹ See Joan MacLeod Heminway, *Professional Responsibility in an Age of Alternative Entities, Alternative Finance, and Alternative Facts*, 19 TRANSACTIONS: TENNESSEE J. BUS. L. 227, 256 (2017) (emphasizing that the cut-and-dried rules of professional responsibility do not lend themselves to clarity in the business law context).

The generally applicable standard of conduct for attorney competence is found in Rule 1.1 of the American Bar Association's *Model Rules of Professional Conduct*. It states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁶² This rule does not offer clear guidance on its face. Business lawyers could exhaust their time and energy attempting to understand what is—and what is not—competent representation. On a rudimentary level, an unofficial benchmark for measuring competence can be described as follows:

The extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable.⁶³

This multi-faceted analysis of competence creates challenges that lawyers must address regarding their knowledge and retention of the law, their practical skills in application of the law, and their ability to navigate legal tasks not only in an intellectual manner, but also in an emotionally capable and physically capable manner. Unfortunately, a long-lasting global pandemic like the one caused by COVID-19 can create challenges to a lawyer's ability to fulfill these core components of competency.

The drafters of the *Model Rules of Professional Conduct* may have foreseen that an emergency situation—such as a pandemic—could pose challenges to competent representation of a client. Given this consideration, they provided, in part, that "[i]n an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical."⁶⁴ The drafters apparently understood that certain emergencies could create lesser known and emergent issues of law that many attorneys would not be prepared to

⁶² MODEL RULES OF PROF'L CONDUCT R. 1.1 (AM. BAR ASS'N 2018).

⁶³ Bill Winter, *Enhancing Lawyer Competence: ALI-ABA confab faces the issues*, 67 AM. BAR ASS'N J. 265, 267 (1981).

⁶⁴ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 3.

handle. Despite this comment's seemingly relaxed language regarding competence in times of crisis, transactional business lawyers should remain cautious and prepared—even during the pandemic—when taking on unfamiliar issues of law that impact their clients.

As noted *supra* Part I, a potentially unfamiliar issue of law is whether COVID-19 is an event that excuses a party from its contractual obligations—i.e. pandemic-induced *force majeure* or material adverse change. Many, if not all, competent business lawyers understand the concept of a *force majeure*. However, the language describing a *force majeure* can differ from contract to contract, and many contracts do not explicitly include language that unambiguously includes a pandemic as a triggering event. This has been troubling to lawyers and clients alike during the COVID-19 fiasco. When an event is not explicitly included in a contract as a *force majeure*, it remains difficult to discern whether the drafters of the agreement may have contemplated and purposefully addressed the risk of that event's occurrence by silence.⁶⁵ As a result, *force majeure* clauses are typically interpreted narrowly throughout the country,⁶⁶ leaving many contracting parties without hope for recourse. This is just one example of how COVID-19 has generated novel questions within a well-understood contractual issue such as *force majeure*. To be competent in giving legal advice on contracts that include *force majeure* clauses, a business lawyer must understand not only the general nature and effect of a *force majeure* clause, but also its interpretation in applied contexts in the relevant jurisdiction or jurisdictions.

Due to the fact that many contracts do not include a *force majeure* clause or do not unambiguously include a pandemic as a *force majeure*, business lawyers must remain competent and diligent in their search for alternative forms of relief for their clients' contractual disputes. For example, a business lawyer may: (1) as noted *supra* Part I, assess the applicability of the common law doctrines of impossibility, impracticability, and frustration of purpose, (2) seek to renegotiate the terms of the contract

⁶⁵ See *TEC Olmos, LLC v. Conocophillips Co.*, 555 S.W.3d 176, 184 (Tex. App. 2018).

⁶⁶ Colin C. Holley, *A Closer Look At The Coronavirus Pandemic As A Force Majeure Event*, AM. BAR ASS'N (Mar. 31, 2020), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/committee-newsletters/closer_look_coronavirus_pandemic/.

or implement a tolling agreement,⁶⁷ or (3) diligently monitor updates in government actions and decisional law that may strengthen the client's position in a *force majeure* lawsuit. Business lawyers must also remain diligent in representing new and future clients by including explicit pandemic protection language in the *force majeure* clauses that they draft going forward. The pandemic experience has been instructive; business lawyers now understand that this language will protect clients' interests in the event of another viral outbreak similar to COVID-19.

Additionally, it should not be overlooked that an attorney's professional competence includes more than just the ability to understand and apply the law for their clients. Perhaps one of the most important components of being a competent practitioner is being emotionally and physically capable of managing the stress that comes from unforeseen events, including pandemics. A study conducted by the American Society of Addiction Medicine indicated that, from a sample of 12,825 licensed, practicing attorneys, 61.1% reported experiencing anxiety, and 45.7% reported experiencing depression at some point during their legal careers.⁶⁸ These large percentages may reflect at least in part the rigorous professional standards that lawyers are held to even in the absence of a pandemic.⁶⁹ COVID-19 only adds to this problem. Lawyers have been removed from their offices, their work allocations have been thrown into disarray, and their future flow of business remains uncertain.

Given the relatively high levels of anxiety and depression among lawyers, it is imperative that attorneys take care of their mental health in times of great stress. Ensuring that business lawyers can remain focused on helping their clients without the added pressures of logistically uprooting their entire client service operations positively impacts attorney well-being and is the first step in relieving mental stress and anxiety

⁶⁷ See, e.g., Jonathan C. Lipson & Norman M. Powell, *Model Standstill/Tolling Agreement*, BUS. L. TODAY, <https://businesslawtoday.org/wp-content/uploads/2020/04/without-annotations.html> (last visited Mar. 29, 2021) (sharing a unique alternative to breach-of-contract litigation that will protect and preserve future business relationships during a pandemic).

⁶⁸ Patrick R. Krill et al., *The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MED. 46, 50 (2016).

⁶⁹ See generally Leslie A. Gordon, *How Lawyers Can Avoid Burnout and Debilitating Anxiety*, ABA J. (July 1, 2015, 6:00 AM), https://www.abajournal.com/magazine/article/how_lawyers_can_avoid_burnout_and_debilitating_anxiety (examining how a culture of workplace perfectionism and inadequate institutional support within the legal profession can create a lack of wellness among practitioners).

throughout a time of adversity—like that created by COVID-19. To achieve this step, business lawyers must put a plan in place (or implement a pre-existing plan) for themselves or their firms to soften the chaotic transition that COVID-19 is creating. This plan should be “a written document that describes how a firm intends to continue carrying out critical business processes in the event of a disaster.”⁷⁰ A plan of this kind—if properly drafted—prioritizes clients by assigning attorneys specific client contacts to which they will reach out, delegates in advance employee responsibilities in the event remote work is necessary, and decides when and where to relocate their workplace or office.⁷¹ Having these preparations in place will ensure continuity for small and large law firms alike, and being on top of operations and in communication with clients during a disaster will demonstrate competence and value to those in need of legal advice. Measures of this kind can save business lawyers time and energy that could be devoted to solving clients’ legal issues. This, in turn, will reduce added pressures brought on by pandemic.

Not to be forgotten, physical competence is just as vital as mental competence when navigating this viral pandemic. There is still much to be learned about the physical effects of COVID-19 on the human body, but one thing that is well established is that this virus harms people with underlying health conditions at a much higher rate than those without.⁷² Members of the legal profession (including business lawyers) are not exempt from these underlying health conditions, especially in light of the fact that the demanding schedules of private firm attorneys tend to create less opportunity for physical exercise.⁷³ The legal profession has higher rates of overweight professionals than most other professional

⁷⁰ STEPHEN N. ZACK, AM. BAR ASS’N SPECIAL COMM. ON DISASTER RESPONSE AND PREPAREDNESS, *SURVIVING A DISASTER: A LAWYER’S GUIDE TO DISASTER PLANNING* (2011) (available at https://www.americanbar.org/content/dam/aba/administrative/disaster/surviving_a_disaster_a_lawyers_guide_to_disaster_planning.pdf).

⁷¹ *See id.*

⁷² *People With Certain Medical Conditions*, CTR. DISEASE CONTROL & PREVENTION (Aug. 14, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html.

⁷³ *See* Sofia Lingos, *2019 Lawyer Well-Being*, AM. BAR. ASS’N. (Dec. 18, 2019), https://www.americanbar.org/groups/law_practice/publications/techreport/abatechreport2019/wellbeing19/.

occupations.⁷⁴ The combination of occupational stress and a lack of exercise can lead to health problems such as heart disease, hypertension, and high blood pressure.⁷⁵ These health problems constitute underlying conditions that leave an individual more susceptible to harm from COVID-19. As business lawyers navigate the daily challenges that come from a viral pandemic, it is imperative that they remain cautious. Adhering to guidelines produced by the Centers for Disease Control and Prevention⁷⁶ with regard to social distancing and other viral transmission precautions will allow attorneys to continue to minimize their risk of contracting COVID-19 as they go about their daily lives and help to ensure the physical competence required for their practice. Additionally, the increasing opportunity for inoculation will continue to minimize the risk of COVID-19 exposure, and certain states are now providing vaccine priority to attorneys.⁷⁷ Staying up to date about your state's vaccination priorities—and which priority group you may fall into—is a great way to determine whether you are eligible to receive the vaccine, which will allow

⁷⁴ See Kevin Fine, *Good and Healthy—It's My Responsibility, as a Lawyer, to be Both*, DAVIS MILES MCGUIRE GARDNER (Feb. 28, 2019), <https://www.davismiles.com/good-and-healthy-its-my-responsibility-as-a-lawyer-to-be-both/>.

⁷⁵ David J. Bilinsky, *Lawyers and Heart Disease*, BARTALK (Oct. 2016), <https://www.cbabc.org/BarTalk/Articles/2016/October/Columns/Lawyers-and-Heart-Disease>; see Patrick J. Schiltz, *On Being A Happy, Healthy, and Ethical Member Of An Unhappy, Unhealthy, And Unethical Profession*, 52 VAND. L. REV. 871, 880 (1999).

⁷⁶ *Protect Yourself*, CTR. DISEASE CONTROL AND PREVENTION (July 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

⁷⁷ See, e.g., Minn. Dept. of Health, *Minnesota Guidance for Allocating and Prioritizing COVID-19 Vaccine—Phases 1b, 1c, 2* (Mar. 10, 2021), <https://www.health.state.mn.us/diseases/coronavirus/vaccine/phase1b1c2.pdf>; Md. State Bar Assoc., *MSBA Contends All Attorneys Now Eligible for Vaccination Priority (Group 1B or 1C) Per State's Latest Guidance* (Mar. 12, 2021), <https://www.msba.org/msba-contentends-all-attorneys-now-eligible-for-vaccination-priority-group-1b-or-1c-per-states-latest-guidance/>. In late December of 2020, the Centers for Disease Control and Prevention recommended vaccine priority for those involved in providing legal services. See *The Advisory Committee on Immunization Practices' Updated Interim Recommendation for Allocation of COVID-19 Vaccine—United States, December 2020*, CTR. DISEASE CONTROL & PREVENTION (Dec. 22, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm695152e2.htm?s_cid=mm695152e2_w (“Essential worker sectors recommended for vaccination in Phase 1c include those in transportation and logistics, water and wastewater, food service, shelter and housing (e.g., construction), finance (e.g., bank tellers), information technology and communications, energy, legal, media, public safety (e.g., engineers), and public health workers.”).

you to remain physically healthy and competent in your continued representation of clients.

COVID-19 can lead to extended infirmity and, in some cases, hospitalization. The time spent recovering from this illness can leave business lawyers unable to meet the needs of clients, including those with time-sensitive transactions. It is wise for every business lawyer to designate someone within the office as a successor in the event that attorney becomes ill and is unable to manage client affairs for an extended period of time. Sole practitioners should also consider putting succession plans in place. This may be as simple as assigning a trusted individual to manage the practice in case that attorney falls ill and is unable to manage ongoing client matters. While it is true that COVID-19 does not impact everyone in the same way, business lawyers must remain overly cautious with regard to their physical health and overly prepared with regard to client service succession planning in order to ensure that they competently meet their clients' needs throughout the pandemic.

Despite the hurdles that COVID-19 has created for business lawyers, modern technological advancements allowed the legal profession to respond efficiently and successfully to the mandated stay-at-home orders in the early stages of the outbreak. Based on a survey published by the U.S. Census Bureau, 87% of U.S. households had a computer by 2015.⁷⁸ This means that almost all lawyers have the opportunity to remain connected to their work without ever having to set foot in their physical office. The proliferation of laptop computers, in particular, has enabled the transitions to working from home identified *supra* Part II. While that has been welcome during the pandemic, there are related issues of professional responsibility and ethics that cannot be overlooked.

In particular, the standard for competence also applies to a lawyer's use of technology. Comment 8 to Rule 1.1 of the *Model Rules of Professional Conduct* states, in part, that "[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology"⁷⁹ Even as late as this year, new technologies have allowed business lawyers flourish in imperfect circumstances; yet, in spite of this, bar associations historically have been skeptical about the introduction of new technology

⁷⁸ Alexandra G. Ah Loy, *The Attorney's Ethical Duty to Maintain Technological Competence*, 89 OKLA. BAR J. 10 (Dec. 2018).

⁷⁹ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (AM. BAR ASS'N 2018).

into the legal profession.⁸⁰ However, these technological advancements must be monitored, scrutinized, and (in appropriate instances) employed to ensure that lawyers continue to uphold their ethical obligations.

Moreover, as noted *supra* Part II, In today's technological environment, the need to meet "face-to-face" with clients, staff, and other attorneys can be fulfilled through online communication platforms such as Zoom, one among a number of popular videoconferencing services that creates a virtual meeting accessible through computers, tablets, and even smartphones. These virtual channels of communication have exploded into the legal sector in the pandemic era. Even state Supreme Courts have used Zoom to hear oral arguments.⁸¹ The obvious attraction to this online format is the ability to meet "face-to-face" with clients and others about matters involving legal representation while minimizing the risk of contracting COVID-19. In some situations, digital platforms allow attorneys to continue taking on new clients without risking exposure. Overall, this creates the potential for a win-win situation. But business lawyers need to be mindful of their ethical obligations to their clients while using these virtual meeting applications, because a lack of technological competence can lead to breaches of ethical duties.

One significant concern is the threat to confidential client information. A failure to comply with some professional conduct rules may cause no harm to a client.⁸² However, Rule 1.6 of the *Model Rules of Professional Conduct*, governing confidentiality, is not one of them; a business lawyer's failure to comply with their confidentiality obligation to a client can cause the client harm. Model Rule 1.6 clearly states that "a lawyer shall not reveal information relating to the representation of a client unless client gives informed consent."⁸³ The rule further provides that an attorney "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information

⁸⁰ See, e.g., S.C. Ethics Op. 94-27 (1995) (explaining the early skepticism surrounding email communications and their capacity to protect confidential client information); Cal. Bar Ethics Op. 2010-179; N.Y. Bar Ethics Op. 842 (2010) (examining the hesitancy to accept cloud-computing technologies as an appropriate safeguard of confidential information).

⁸¹ See, e.g., Gary Blankenship, *Supreme Court Holds First Virtual Oral Arguments*, THE FLA. BAR (May 12, 2020), <https://www.floridabar.org/the-florida-bar-news/supreme-court-holds-first-virtual-oral-arguments/>.

⁸² See, e.g., MODEL RULES OF PROF'L CONDUCT RR. 5.1, 6.1, 8.2.

⁸³ MODEL RULES OF PROF'L CONDUCT R. 1.6.

relating to the representation of a client,”⁸⁴ therefore, exposing information that an attorney has been tasked with safeguarding—even if done inadvertently—can amount to professional responsibility violation that compromises a client’s privacy and affairs. Such an exposure of sensitive information is the antithesis of competent representation as a fiduciary, and the implementation of new technologies—such as virtual meeting applications—creates new opportunities for inadvertent unethical disclosure.

In the early months of COVID-19 when law firms were trying to remain calm and in contact with their clients, the number of meetings taking place via Zoom increased dramatically. That increase in popularity also led to internet hackers attempting to take advantage of the platform’s novice security measures.⁸⁵ Thankfully, there have been no reports of these hackers stealing data or planting malware.⁸⁶ Nonetheless, a confidentiality issue arose because third parties were entering client meetings undetected and became privy to all information discussed within that particular meeting. This threat, if not properly addressed, would tend to limit the utility and use of a form of communication that many business lawyers have found quite useful during this pandemic.

State ethics commissions and boards may issue opinions surrounding the use of virtual meeting software. Perhaps skepticism will be warranted, or perhaps cautiousness will be blown out of proportion. Despite Zoom’s assurances that its software is now relatively well protected from a privacy standpoint, business lawyers must remain cautious and take all reasonable steps to secure confidential information obtained in virtual meetings. These precautions can include using a password to protect meeting rooms, locking the meeting once all anticipated members have joined, and avoiding the use of file sharing through the virtual meeting application.⁸⁷ Above all, lawyers would benefit from researching and reviewing the privacy measures of each virtual meeting provider they use to ensure that

⁸⁴ *Id.*

⁸⁵ See Eric Hamilton, *Zoom Hacking is on the Rise: Here’s What You Need To Do To Be Secure*, TECH TIMES (May 12, 2020), <https://www.techtimes.com/articles/249572/20200512/zoom-hacking-is-on-the-rise-heres-what-you-need-to-do-to-be-secure.htm>.

⁸⁶ See *id.*

⁸⁷ Charlie Osborne, *Zoom Security: Your Meetings Will be Safe and Secure if You Do These 10 Things*, ZDNET (Apr. 22, 2020), <https://www.zdnet.com/article/make-sure-your-zoom-meetings-are-safe-by-doing-these-10-things/>.

reasonable measures have been taken to protect a client's information from unethical disclosure.

IV. CONCLUSION

We have observed many changes to businesses in the United States and around the world since the COVID-19 pandemic's dangers first became apparent in the spring of 2020. Some of those changes have been driven by the virus itself; some have been driven by governmental mandates and business realities in the wake of the recognition of the pandemic's dangers to human life and well-being. Regardless, businesses and the individuals that manage and work for them, have had to adapt to new and evolving circumstances in the months since that time.

As a result, business lawyers—who, like other lawyers, were not fully prepared for systemic changes of the magnitude seen in the COVID-19 era—have been required to respond as a matter of substantive law, professional practice, and professional conduct. This Article documents all three phenomena in brief but relevant part and makes limited, initial observations about each. We hope that, as the pandemic continues to have effects on business law and business lawyering, our documentation of these aspects of business law and business lawyering will both serve as a touchstone for the development of business lawyering and offer business lawyers an opportunity for reflection on their activities and conduct during a time of rapid change.

We also hope that, with the advent and increased use of effective vaccines against COVID-19, this pandemic will soon be over. No doubt both the changes to business lawyering and the lessons learned from the many substantive, practical, and ethical challenges that have arisen in the wake of COVID-19 will survive the pandemic in some form. This offers some comfort. While the thought of another systemic global crisis is unappealing at best, what we have experienced and learned will no doubt be useful in maneuvering and surviving through whatever the future may bring.

