
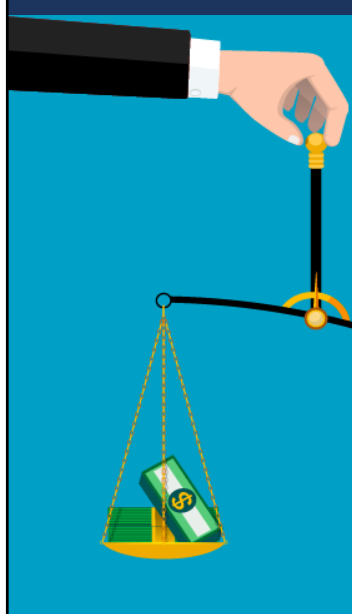



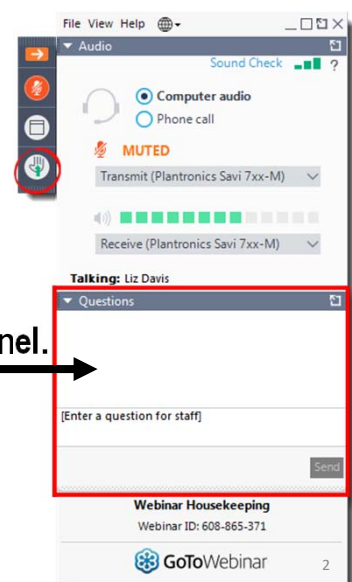
# Ethics for Equipment Finance Lawyers in the COVID-19 Era



## Housekeeping

 Today's web seminar is being recorded.

All questions should be submitted via the Questions Panel.

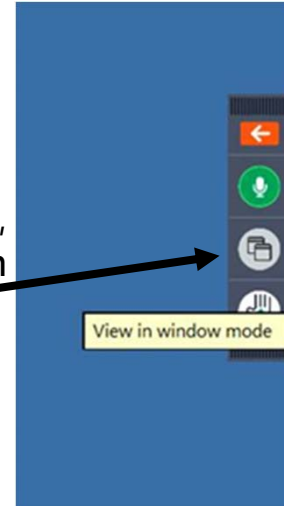


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## Polling

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On your attendee control panel, the 2<sup>nd</sup> button will convert your screen



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## Goals of today's presentation

- Changes brought about by COVID-19
- What are the ethical obligations governing practice, including confidential information belonging to clients?
- What practical advice should lawyers consider to protect yourself?
- Bonus: These adjustments/changes may positively impact how we practice law in the future.



## Roadmap for this webinar

1. Using technology and keeping client information confidential
2. Supervision by remote control
3. Relocating physically, but practicing virtually
4. Litigation-focused ethical issues
5. Data breach obligations
6. Practical tips and tricks for satisfying your ethical obligations



# COVID-19

- External factor
- Business continuity typically involves redundancy for floods, natural disasters and the like
- The virus sent many of us home overnight for a sustained period of time to practice law remotely
- How do we practice in that environment and take care of client obligations?



1. Using technology and keeping client information confidential

Rule 1.1 – Competence

Rule 1.6 – Confidentiality of information

## Challenges/Issues Arising from Technology

- Who is communicating in new ways with clients?
  - (Email, of course) but what about text messages, cell phones?
  - Remote access/VPN
  - Cloud storage, e.g. Google apps, Office 365, etc.
  - Video meetings – Zoom, Teams/Skype, Google Meet, etc.
  - Teleconference tools
- Security and Confidentiality



## ABA Model Rule 1.1

### Rule 1.1: Competence

#### Client-Lawyer Relationship

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

#### Maintaining Competence

[8] 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.



## ABA Standing Committee on Ethics and Professional Responsibility Formal Op. 477R (May 22, 2017)

- A lawyer generally may transmit information relating to representation of a client over the internet without violating the Model Rules of Professional conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access.
- However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

## Recognizing the evolution of communications and need to “keep up”

- “For example, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure”
- “However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications.”

## Evolving meaning of “reasonable cybersecurity”

- As a practical matter, with lightning advances in technology, what is considered reasonable cybersecurity today, may evolve over time. Therefore, lawyers should periodically assess whether their policies and procedures regarding electronically-stored information are consistent with current technology.

*Ethics in the COVID-19 Pandemic, State Bar of Michigan (2020)*

## Pa. Bar Op. 2020-300, Rule 1.1 Competence

- Lawyers must “evaluate, obtain and utilize the technology necessary to assure that their communications remain confidential.”
- Obligation to understand the risks and benefits of technology, which this Committee and numerous other similar committees believe includes the obligation to understand or to take reasonable measures to use appropriate technology to protect the confidentiality of communications in both physical and electronic form.

## Rule 1.6 Confidentiality of Information

Rule 1.6 ("Confidentiality of Information") states in relevant part:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
- ...
- (d) 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.
- Comment 26 states the "lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

## NY State Bar, Social Distance Lawyering

Caution regarding mixing the personal/professional:

- Cautioned against storing or transferring client confidential data outside a firm's secure environment and on unapproved personal cloud service accounts or personal devices that are not secure.
- Ensure personal devices are segregated with separate passwords to restrict access by family members (and if possible, encryption when not in use).
- Law firm IT departments should keep a watchful eye on remote access to monitor any irregularities, keep better logs of network activity to identify any threats and perform random "stress tests" on existing security protocols to detect any vulnerabilities.





## ABA Standing Committee on Ethics and Prof. Responsibility Formal Op. 482 (Sept. 19, 2018)

- The Rules of Professional Conduct apply to lawyers affected by disasters.
- By proper advance preparation and planning and taking advantage of available technology during recovery efforts, lawyers can reduce their risk of violating the Rules of Professional Conduct after a disaster.



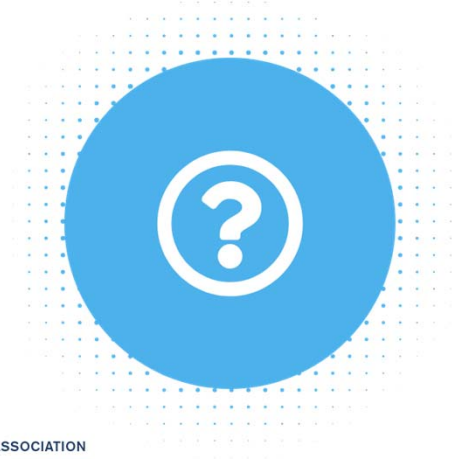
Image: <http://www.businessofgovernment.org/blog/disaster-management-and-complex-emergencies-digital-age-blog-series>

## Guidance on ethical responsibilities when a disaster threatens and after it occurs

- **Communication with clients** – Need to understand how to reach clients; need to understand lawyer's availability to reach clients
  - Reminder of obligations under Rule 1.1 to keep abreast of technology relevant to law practice and under 1.6 to prevent disclosure of client information.
- **Functioning without paper files**
- **Litigation** – Remain aware of court deadlines and extension due to the disaster (R. 1.1/Competence and R. 1.3/diligence)
- **Access to funds being held in trust** – ensuring another trusted signatory has access to trust account in the event of lawyer illness/death; wind-up of practice.
- **After disaster** – Considering ability to continue representation.
  - Jurisdictional practice rules related to temporary relocation, etc. (R. 5.5)
  - Loss of files; accounting records

## Audience Poll

Does your organization have a policy about the use of smart devices in the work-at-home environment?



## Video Conferencing – Protecting confidentiality

- **ABA Opinion:**

- Lawyers should retain consultants to ensure that client matters are handled appropriately and securely, and should not only be aware of “Zoom bombing,” but also careful not to engage in confidential conversations while devices like Alexa and Google Homes are plugged in or within range as they are susceptible to hacking.

*(Five Pointers for Practicing in a Pandemic, published on the ABA website, Margaret Monihan Toohey (April 8, 2020).)*

- **Wisconsin Bar Guidance:**

- Understand the need for computer security, have basic knowledge of video conferencing and its implications, recognize the importance of using a video conference provider that implements appropriate security measures, and carefully review and comprehend the terms of use and service agreement.

*(Videoconferencing and COVID-19: Zooming in on our Ethical Obligations, published on the State of Wisconsin Bar website, Aviva Meridian Kaiser, Ethics Counsel with the State Bar of Wisconsin (April 7, 2020).)*



## Restricting family access

- To ensure that others, including family members, do not have access to client information, lawyers should safeguard their computers, tablets and phones with password protection, and if they use cloud computing technology, they must understand that technology and how it may impact confidential client information. It emphasized that this obligation applies whether legal work is done in the office or from home.

*Ethics During COVID-19, Florida Bar (April 8, 2020)*



Image: <https://www.t-mobile.com/devices/family-devices>

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## Keeping information confidential: "Reasonable Precautions"

- Whether the client communication occurs via email, text message, phone call, chat, or online conferencing, they must remain confidential, and lawyers should take reasonable precautions to prevent unauthorized persons from intercepting and reading such communications. (Pa.)
- Lawyers should dedicate a private area where they can communicate with clients out of earshot from Amazon's Alexa, Google devices or other smart devices, which may record private conversations. (Pa.)
- Lawyers' reasonable efforts to prevent disclosure or access to client data must be proportionate to the risks presented by the technology involved, the type of practice and the individual needs of a particular client. (Wisc.)



Image credit: <https://www.creativebusinessinc.com/blog-index/2019/7/6/does-your-company-take-confidentiality-and-trade-secrets-seriously>

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## 2. Supervision by Remote Control

*Even though lawyers may not be working in a traditional office setting right now, the duty to supervise remains in effect. A partner in a law firm must make efforts to ensure that all lawyers in the firm conform to the Rules of Professional Conduct. In addition, **any lawyer** having direct supervisory authority over a **nonlawyer** must ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.*

— *Ethics in the COVID-19 Pandemic*,  
State Bar of Michigan (2020)



## Audience Poll

How often have you checked in with paralegals, legal assistants, etc.?



## How can lawyers effectively supervise other lawyers and non-lawyers remotely?



## What ethics rules apply?

- Rule 5.1 — “Responsibilities of Partners, Managers, and Supervisory Lawyers”
- Rule 5.3 — “Responsibilities Regarding Nonlawyer Assistance”
- Lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect requirements that any staff, consultants or other entities that have or may have access to confidential client information or data comply with the Rules of Professional Conduct.

## Who has this duty?

- The rule covers not only to a managing partner, but extends to all members of a partnership or association and all shareholders.
- *Not only Partners/Managers — the responsibilities also apply to anyone having direct supervisory authority over another lawyer.*
- Even though the rule mentions “law firm” it covers other forms of legal organizations beyond law firms.
- Attorneys included would be the head of a practice group, in-house counsel, government attorney, pro bono attorney, or public type of law office.



## Which nonlawyers are covered?

- Rule 5.3 extends the same responsibilities to nonlawyers who are employed, retained, or associated with the lawyer.
- This covers secretaries, paralegals, investigators, law clerks, law students, document management providers, and other third-party vendors that assist the lawyer in the rendition of legal services.



## What is your responsibility?

- If you have direct supervisory or managerial authority over another lawyer or nonlawyer personnel, you have an ethical obligation regarding those individuals, whether or not they are employed by your organization.
- If you are supervising a lawyer:
  - you must take reasonable efforts to ensure their conduct “conforms” to the Model Rules under Rule 5.1(b).
- If you are supervising a non-lawyer:
  - you must take reasonable efforts to ensure their conduct is “compatible with” the Model Rules under Rule 5.3(a).



## Different types of responsibilities

- For those in a management or ownership role, the responsibility is to establish measures **[internal policies and practices]** reasonably tailored to “assure” that the lawyers and nonlawyers in the organization comply or are compatible with the ethics rules.
- For direct supervisors, the responsibility is to make reasonable efforts to ensure that the lawyer’s conduct complies with the ethics rules and the nonlawyer’s conduct is compatible with the lawyer’s ethics.





## How do you meet your supervisory responsibilities?

- Generally, you should implement policies and procedures that address these areas for both lawyers and non-lawyers:
  - conflicts;
  - deadlines and diligence;
  - communication;
  - accounting for client funds and property;
  - confidential information;
  - marketing procedures/practices;
  - security of technology;
  - the unauthorized practice of law;
  - lawyer impairment;
  - reporting violations; and
  - harassment and discrimination.



## Obligation to supervise remains despite COVID

- Supervisory lawyers should keep track of important dates and deadlines, provide inexperienced lawyers with supervision, have resources available to resolve ethical problems, account for client funds and property, and make sure that there are procedures in place to detect conflicts of interests.

(Michigan, Florida, Pennsylvania)





## Stay Connected

- Attorneys should stay connected to their staff and to other lawyers using the same tools they would use to stay connected with clients.
- These communications should be frequent.
- Maintain a database of contact information for all office personnel.

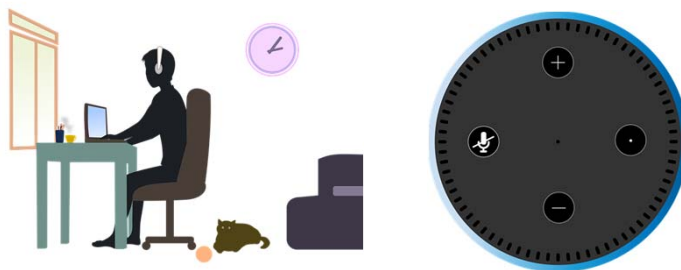


## Maintain, Update and Enforce Policies

- Supervisory lawyers must ensure that non-lawyers are provided with the necessary ***assistance, instructions and supervision*** concerning the ethical aspects of their work, especially to protect client confidences and to avoid accidental straying into the unauthorized practice of law. (Michigan Guidance)
- Lawyers should ensure that their firms have appropriate policies requiring staff, consultants or other third parties to restrict use and disclosure of confidential client information to which they may have access. (Pennsylvania Opinion)

## Make sure the home environment is safe

- Ensure that all firm personnel have an appropriate remote work environment and access to technology capable of protecting client confidential information.
- Train all lawyers and non-lawyer personnel in the effective use of remote networking technologies.



## 3. Relocating physically but practicing virtually

- Be mindful of jurisdiction-specific rules related to practice across state lines.
- Rule 5.5
  - Lawyers 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.
- D.C. Court of Appeals Opinion 24-20 (2020) ("D.C. Opinion")
  - Analyzed the potential dangers of teleworking from home and its implications on the unauthorized practice of law during the COVID-19 pandemic.
  - "Incidental and temporary practice" exception under D.C. Court of Appeals Rule 49(c)(13) permitted an attorney who is not licensed in D.C. to practice law from their residence located in D.C., as long as the attorney "(1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a D.C. address in any business document or otherwise holding out as authorized to practice law in D.C., and (4) does not regularly conduct in-person meetings with clients or third parties in D.C."

## Florida Bar Proposed Advisory Opinion #2019-4

If a practitioner who establishes a residence in Florida and continues to provide legal work to out-of-state clients from his private Florida residence, on matters not concerning Florida law, and does not establish a public presence or profile in Florida as an attorney, then the practitioner is not engaged in unlicensed practice of law.

## Utah Ethics Advisory Opinion Committee Opinion No. 19-03

If an individual licensed as an active attorney in another state and in good standing in that state establishes a home in Utah and practices law from his private location for clients from the state where the attorney is licensed, neither soliciting Utah clients nor establishing a public office in Utah, then the out-of-state attorney is not in violation of the prohibition against the unauthorized practice of law.

## Quick References

- State Implementation of ABA Model Rule 5.5
  - [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/quick\\_guide\\_5\\_5.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.pdf)
  - [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/recommendations.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.pdf)
  - [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission-on-multijurisdictional-practice/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/)

## 4. Litigation Ethical Considerations

- "Part of being a competent, diligent lawyer is remaining aware of current events." RPC 1.1, 1.3.  
(Oregon State Bar, *Coronavirus Response: Legal Ethics FAQ*, Oregon Bar (2020).)
- Regularly review information and updates provided by courts at state and local level, federal courts, etc.
- Under ABA Model Rule 1.4, lawyers must keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information.



## Impact on court systems

- Tolling statutes of limitations
- Delaying court proceedings
- Limiting court operations
- Technology-driven appearances
  - Remember Rule 1.1 (Competence)



## Deadlines and calendars



- Have an emergency plan to access calendars and stay on top of client matters, hearings, closings, or appointments, to collect packages and regular mail, to retrieve voicemail, e-files, and e-portals, to manage attorney trust accounts, and to monitor court and administrative office closures and how they may impact client matters, filing deadlines and hearing dates.

(Florida Guidance)

## Court decisions – Missed deadlines

- Mayfield v Morris: 2020 WL [3832962](#) (US District Court, D. New Mexico): the Court ruled that working from home due to COVID-19 did not relieve counsel of the duty to meet court deadlines. Counsel asserted that due to the COVID-19 pandemic he was required to "work from a temporary table in his living room...at the same time [as] his wife" and that "the stress of trying to protect his family... made it impossible to meet all of the...deadlines...imposed prior to the coronavirus pandemic".
- Harris v Hill: 2020 WL [2792983](#) (US District Court, E.D. California): the Court ruled that the COVID-19 public health crisis significantly impacted deadlines and provided additional time for counsel to file opposition to a Motion to Dismiss. In its reasoning, the Court noted that the deadline at issue was not statutory or jurisdictional, but was set by the Court within its discretion.

## Health of lawyer or client impacting representation

- UT Response analyzed how the health of lawyers may impact their ability to competently and diligently represent their clients.
  - Lawyers may have to consider withdrawal in the event that a client will be harmed by delay or if they will be unable to adequately prepare for the client's matter.
- OR Response concluded that in the event that lawyers become impaired, incapacitated or die, they must arrange to safeguard clients' interests, including withdrawal if needed, or retain another lawyer to take over the matter with client consent.
- MI Guidance recommended that lawyers should find out from their clients who their power of attorney or legal representative is, should the client become ill or otherwise unable to communicate with their lawyers.



## Lawyers Should Be Cognizant of Their Obligation to Act with Civility

- The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued a statement on civility which the PA Opinion adopted.

*"[W]e urge all lawyers to liberally exercise every professional courtesy and/or discretionary authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk. Accordingly, we remind lawyers that the Guidelines for Civility in Litigation ... **require that lawyers grant reasonable requests for extensions and other accommodations.**"*

- Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations.
- **Caveat:** Consistent with California Rule of Professional Conduct 1.2(a), lawyers should also consult with their clients to seek authorization to extend such extensions or to stipulate to continuances in instances where the clients' authorization or consent may be required.

## Courts taking note of lack of civility



**Defendant in a federal court action filed an emergency motion for a protective order concerning a corporate representative deposition.**

- Judge stated: "We are living in an unprecedented situation. Nevertheless, the lawyers in this case have been exchanging snippy emails over the past two weeks over the scheduling of a corporate representative deposition. Moreover, defense counsel certified that this routine discovery dust-up is so important that it merits "emergency" status. **No, it doesn't.**"
- **"If all the issues we are currently facing were to be organized on a ladder of importance, this deposition-scheduling dispute would not even reach the bottom rung of a 10-rung ladder."**
- "So the deposition will not be taken next week. Life will go on. But the Undersigned will be requiring counsel for both sides to appear for a hearing at some point, even if they work out the rescheduled date for the corporate deposition. That hearing will require the attorneys to explain their behavior in context of the far-more-important issues this Court (and the entire world) is facing."

## 5. Ethical Obligations related to data breach

Remember that in light of the increased use of technology, potential for breach remains.



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## ABA Standing Committee on Ethics and Prof. Responsibility Formal Op. 483 (Oct. 17, 2018)

### • Data Breach Obligations and Monitoring

- A lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.
- Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation."
- When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

### • Ethics rules require concerning data breaches and cybersecurity incidents:

- Duty to monitor for data breach
- Duty to respond to data breach and restore systems.



## Obligation to provide notice of data breach

- Due to record retention requirements of Model Rule 1.15, information compromised by the data breach may belong or relate to the representation of a current client or former client.
- Current Client
  - Rule 1.4(a)(3) provides that a lawyer must “keep the client reasonably informed about the status of the matter.”
  - Rule 1.4(b) provides: “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”
  - Under these provisions, an obligation exists for a lawyer to communicate with current clients about a data breach.
- Former client
  - Model Rule 1.9(c) requires that “A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.”
  - Clients can make an informed waiver of the protections in Rule 1.9.
  - Rule 1.16(d) also has been interpreted as permitting lawyers to establish appropriate data destruction policies to avoid retaining client files and property indefinitely.
  - Best practice: Reach agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client’s electronic information that is in the lawyer’s possession.

## 6. Practical tips and tricks for satisfying your ethical obligations

- How can lawyers meet their obligation of competence while preserving client confidentiality?
- The following outline some reasonable precautions that attorneys should consider using to meet their ethical obligations.

## Avoid Using Public Internet/Free Wi-Fi



## Use Virtual Private Networks (VPNs) to Enhance Security

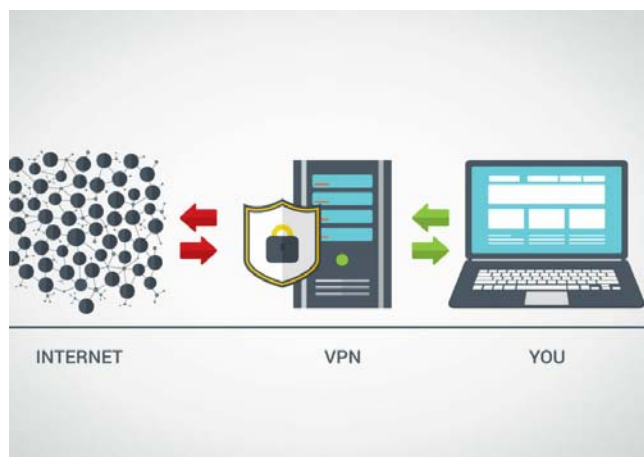


Image credit: <https://www.secplicity.org/2019/11/22/public-vpns-dont-always-make-you-any-more-secure/>

## Use Two-Factor or Multi-Factor Authentication

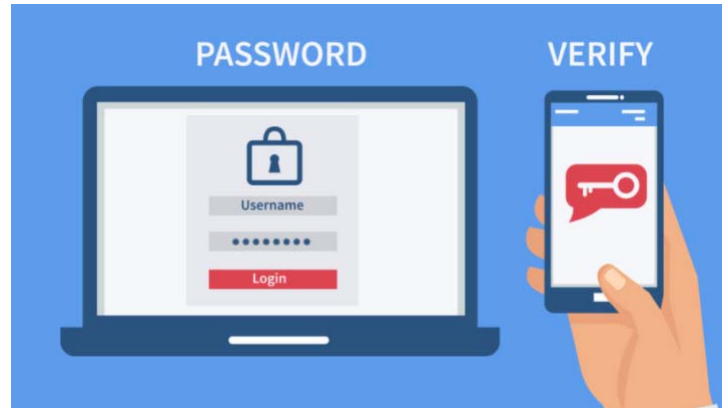


Image credit: <https://blog.malwarebytes.com/101/2018/09/two-factor-authentication-2fa-secure-seems/>

## Use Strong Passwords to Protect Your Data and Devices



**v.**

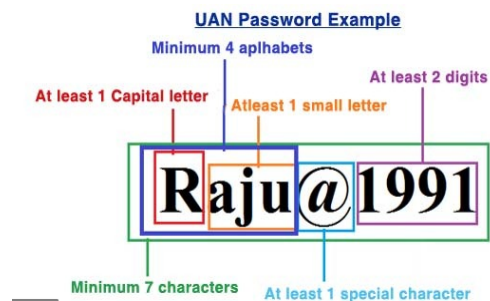


Image credits: <https://www.hrcabin.com/valid-epf-uan-password-example/>; <https://www.notebookcheck.net/123456-and-password-are-officially-2018-s-worst-passwords.381181.0.html>

## Assure that Video Conferences are Secure



Image credit: <https://www.epiphany.com/blog/best-video-conferencing-software/>

## Backup Any Data Stored Remotely



Image credit: <https://www.securitymagazine.com/articles/92740-back-up-your-cloud-data>

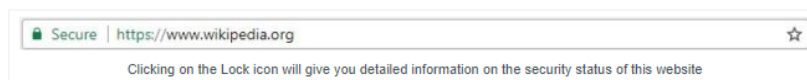
## Security is Essential for Remote Locations and Devices



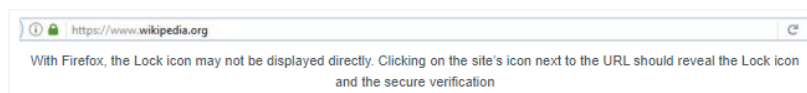
Image credit: <https://www.bestlawyers.com/article/lawyers-working-remotely-on-their-time/2031>

## Users Should Verify That Websites Have Enhanced Security

### Google Chrome



### Mozilla Firefox



### Internet Explorer

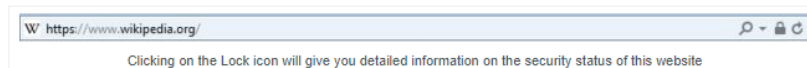


Image credit: <https://www.bu.edu/tech/support/information-security/security-for-everyone/how-to-identify-and-protect-yourself-from-an-unsafe-website/>

## Civility – Be nice!



Image credit: <https://abaforlawstudents.com/2017/02/15/civility-is-the-core-of-your-successful-career/>





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