

Outline for Ethics Opinion Re: Ethical Obligations When Working Remotely

I. Factual Background and Introduction

- A. COVID-19 shutdowns and wildfires in California have forced many attorneys and staff to work remotely.
- B. Working remotely does not change a lawyer's ethical obligations. *See also* Cal. State Bar Formal Opn. 2012-184. The application of the rules, however, raises unique issues.

II. Duty of Confidentiality, Rule 1.6; Bus. & Prof. C. § 6068(e)

- A. Reference to prior COPRAC opinions re: use of technology and virtual law offices. *See* Cal. State Bar Formal Opns. 2010-179 (addressing attorney's ethical duties of confidentiality and competence when using technology to transmit or store confidential client information); 2012-184 (addressing attorney's ethical obligation when practicing in a virtual law firms); 2015-193 (addressing attorney's ethical duties concerning e-discovery and referencing Comment [8] to ABA Model Rule 1.1); 2020-203 (addressing attorney's ethical obligations regarding data breaches); *see also* ABA Formal Opn. 477R, 483.
- B. Duty to implement reasonable measures, including cybersecurity measures:
1. Segregate client and personal data
 2. Two factor authentication
 3. Strong passwords
 4. Encryption
 5. Data backup measures

III. Duty of Competence, Rule 1.1

- A. Duty of "technology competence."
- B. New court rules and procedures relating to COVID-19
- C. Remote court appearances and hearings

IV. Duty of Diligence, Rule 1.3

- A. Avoiding undue delay of client's matter caused by COVID-19 related impacts on lawyer's ability to represent client

V. Duty of Communication, Rule 1.4

- A. Ensure communications with potential clients do not result in unintended formation of an attorney-client relationship. *See* Rule 1.18.
- B. Screening for conflicts of interest
- C. Ensure continued ability to communicate with client and provide alternative contact information. *See* ABA Formal Opn. 483 at pp. 2-3.
- D. Ensure adequacy of alternative means of communications with clients
- E. If lawyer develops COVID-19 and it impacts lawyer’s ability to represent clients, the lawyer needs to communicate with clients about how the illness may impact lawyer’s representation to permit a client to make an informed decision regarding the representation. Rule 1.4(b); *see also* Coronavirus Response: Legal Ethics FAQ, Oregon Bar (2020) (providing detailed guidance on communications with clients relating to potential impacts of COVID-19 on representation, including manner of meetings, delay, assistance from another attorney, the continued ability to provide competent, diligent representation and the potential need to withdraw).

VI. Duty of Supervision, Rules 5.1-5.3

- A. Technology support for remote working by legal and non-legal staff
- B. Confidentiality and cybersecurity policies
- C. Training, monitoring and enforcement
- D. Maintenance of remote client files and documents
- E. Safekeeping client funds, Rule 1.15.

VII. Unauthorized Practice of Law; Multijurisdictional Practice of Law, Rule 5.5; Bus. & Prof. C. §§ 6125-6133

- A. Changes in technology facilitating remote work
- B. Temporary relocation to another state where lawyer is not admitted due to COVID-19
- C. Minnesota, North Carolina, Arizona, and New Hampshire already allow lawyers to practice there if they are licensed elsewhere as long that they disclose that they are not licensed to practice in that state.
- D. D.C. Court of Appeals Opinion 24-20 (2020) concluded that the “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.”

E. Florida Bar Standing Committee on the Unlicensed Practice of Law Proposed Advisory Opn. FAO #2019-4, Out-of-State Attorney Working Remotely From Florida Home (August 17, 2020) found that a New Jersey lawyer physically working from his home in Florida exclusively on federal intellectual property matters for his New Jersey law firm is not committing UPL in Florida as long as he does not hold himself or his firm out to the public as having a Florida presence, does not give advice about Florida law, and provides no legal services to Florida residents. Available at www.floridabar.org/rules/upl/upl003/.

1. The briefing period ended and the proposed advisory opinion is pending final Supreme Court of Florida action

F. Utah Ethics Advisory Committee Opinion 19-03 (2019) ("The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business."), available at <https://www.utahbar.org/wp-content/uploads/2019/05/19-03.pdf>.

G. *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct.* (1998) 17 Cal.4th 119, 128-129 (stating that “one may practice law in [California] in violation of Section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means.”); *In re Estate of Condon* (1998) 65 Cal.App.4th 1138, 1145-1146 (“In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders.”).

H. Opinion concluding that working remotely under specified conditions does not constitute UPL would not raise antitrust concerns. *See Surety Title Insur. Agency v. Virginia State Bar*, 431 F.Supp.298 (E.D. Va. 1977) (finding Virginia State Bar’s advisory opinion that title company would engage in UPL should it issue title insurance policies based upon title examinations performed by lay employees was anti-competitive in violation of the Sherman Antitrust Act); *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015) (concluding that because the Board was made up of market participants, the Board could only claim state action immunity from federal anti-trust actions

(re: cease and desist letters to non-dentists re: teeth whitening services) if the Board were subject to active supervision by the State); *Compare TIKD Services LLC, v. The Florida Bar*, 11th Cir. Court of Appeals Case No. 1:17-cv-24103, available at <https://www.abajournal.com/files/FlaBarDismissalMotion.pdf>.

1. Are we limited to merely noting UPL issues may exist, referring to relevant authorities and stating that we are not authorized by the State Bar to opine on UPL? This does not provide lawyers with the guidance they need, particularly during this unprecedented time.
2. Prior State Bar policy and resolution is from 1991 and significant changes in the practice of law have occurred since that date.
3. Other State Bar opinions since 1991 have issued opinions that certain activities would not constitute UPL.
4. Antitrust opinions are distinguishable.
5. Would state action immunity apply as well?

VIII. Disaster and Succession Planning

- A. ABA Formal Opinion 482
- B. Pending COPRAC Opinion

IX. Civility

- A. State Bar and local court guidelines
- B. Statements by the Bar Association of San Francisco Legal Ethics Committee and the Los Angeles County Bar Association Professional Responsibility and Ethics Committee

X. Relevant Authorities to Consider

- A. Pennsylvania Bar Ass'n Ethics Formal Opn. 2020-300
 1. This opinion tends to reiterate guidance provided in prior opinions regarding technological competence and confidentiality and then gives best practices.
- B. New York County Lawyers Ass'n Formal Opn. 754-2020
 1. Addresses ethical obligations if all or most of legal and non-legal staff must work remotely.
 2. The opinion initially concludes that the Rules do not prohibit a law firm from operating 100% remotely as long as firms have a New York address

- 137 that can be identified as its principal law office address in compliance with
138 New York Rule 7.1(h). *See* New York City Bar Ass’n Formal Ethics Opn.
139 2019-2.
- 140 3. Discusses duty of competence with a focus on litigation best practices,
141 including preparing a witness for a remote deposition
- 142 C. Ethics in the COVID-19 Pandemic, State Bar of Michigan (2020), available at
143 <https://www.michbar.org/opinions/ethics/COVID-19>.
- 144 D. Ethics during COVID-19, The Florida Bar Ethics and Advertising Staff (April 8,
145 2020), available at [https://www.floridabar.org/the-florida-bar-news/ethics-during-](https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/)
146 [covid-19/](https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/).
- 147 E. Utah Bar Coronavirus Response: Ethical Considerations during a Coronavirus
148 (COVID-19) Outbreak, Utah State Bar (2020).
- 149 F. NYSBA article, available at [https://nysba.org/social-distance-lawyering-how-](https://nysba.org/social-distance-lawyering-how-close-is-your-ethical-compliance/#_edn6)
150 [close-is-your-ethical-compliance/#_edn6](https://nysba.org/social-distance-lawyering-how-close-is-your-ethical-compliance/#_edn6)
- 151 G. State Bar of California posted guidance for attorneys impacted by the California
152 wildfires and provided a helpful checklist, including maintaining offsite case
153 calendars, case lists, accounting records and computer files. *Regulatory*
154 *Information for Attorneys Impacted by California Wildfires*, available at:
155 [http://www.calbar.ca.gov/Public/Need-Legal-Help/Free-Legal-Help/Attorneys-](http://www.calbar.ca.gov/Public/Need-Legal-Help/Free-Legal-Help/Attorneys-Impacted-by-the-California-Fires)
156 [Impacted-by-the-California-Fires](http://www.calbar.ca.gov/Public/Need-Legal-Help/Free-Legal-Help/Attorneys-Impacted-by-the-California-Fires).