

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. Create separate accounts if other household members use the computer
 - 2. Segregate client and personal data
 - 3. Two factor authentication
 - 4. Strong passwords
 - 5. Encryption
 - 6. Data backup measures
 - 7. Logging off when you leave computer/set to auto logoff after inactive
 - 8. Secure data storage and destruction
- C. The duty to implement reasonable measures should be tailored to remote working situation (e.g., kitchen or bedroom office, shared computer).
 - 1. Presence of third parties outside the representation, such as household members, learning pod friends, repair workers, and need to safeguard confidential client data
 - 2. Remind clients of need to follow stringent practices

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3. Taking confidential client calls outside where neighbors can overhear
4. Security of Zoom meetings with clients?
5. Engaging in attorney-client privileged communications during virtual mediations, hearings or depositions
 - (a) Avoid hot mic
 - (b) Counsel clients regarding need to mute mic and to engage in separate, private communications with attorney

III. Duty of Competence, Rule 1.1

- A. Duty of “technology competence.”
- B. Potential interference with physical, mental or emotional ability to competently perform legal services due to COVID-19 related health or financial impacts
- C. Performing competently in an emergency situation
- D. Holding oneself out as a COVID-19 "expert," advising clients on developing COVID-19 regulations and laws and drafting COVID-compliant policies. See also Rule 7.1(a).
- E. New court rules and procedures relating to COVID-19
- F. 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
- B. An attorney's heavy workload does not exclude the duty to diligently handle a client's matter. See *Lopez v. Larson* (1979) 91 Cal.App.383, 400 ("An attorney owes an obligation not only to his client but also to the courts and the justice system not to undertake legal representation in matters unless he has adequate time to pursue the matter with reasonable diligence."); *Garlow v. State Bar* (1988) 44 Cal.3d 689, 711, n. 13 ("heavy caseload" does not excuse inability to perform services competently and diligently).

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

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- C. Ensure continued ability to communicate with client and exchange alternative contact information. *See* ABA Formal Opn. 483 at pp. 2-3.
- D. Ensure adequacy of alternative means of communications with clients
- E. Promptly return emails and calls and ensure clients (whose schedules may be altered due to COVID-19 impacts) have adequate time to review draft responses to discovery and pleadings
- F. Even if litigation matters are delayed, maintain communications with clients regarding current status and any updates
- G. 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
 - 1. Provide necessary tools and equipment for remote work, e.g., computers, Internet access etc.
 - 2. Ensure security of remote access
- 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.
- F. Centralized case management system
- G. Maintaining regular communications with colleagues and overseeing work of associates, paralegals and staff

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

- A. Changes in technology facilitating remote work

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- B. Temporary relocation to another state where lawyer is not admitted due to COVID-19
- C. Unauthorized practice of law issues may exist under these circumstances, but the Committee is not authorized by the State Bar to issue an ethics opinion regarding the unauthorized practice of law.
 - 1. California licensed lawyers practicing California law remotely in another state where they are not licensed should consult the multijurisdictional practice and unauthorized practice of law rules and authorities of the state where they are physically present. *See* Rule 5.5(a)(1). The ABA and some state bar ethics committees have issued opinions regarding unauthorized practice of law considerations for attorneys practicing remotely the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted due to COVID-19 or other circumstances. *See, e.g.,* ABA Formal Ethics Opn. 495 ("[I]n the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized."); D.C. Court of Appeals Opinion 24-20 (2020) (concluding 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."); 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) (finding 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); 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.").

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2. Lawyers not licensed in California who are working remotely in California should consult California Rule 5.5(b), California Rules of Court 9.40-9.48, Bus. & Prof. C. §§ 6125-6133 and relevant authorities regarding multijurisdictional practice and the unauthorized practice of law. *See 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.”).

VIII. Disaster and Succession Planning

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

IX. Civility

- A. Civility Oath: “In addition to the language required by Business and Professions Code section 6067, the oath to be taken by every person on admission to practice law is to conclude with the following: ‘As an officer of the court, I will strive to conduct myself at all times with dignity, courtesy, and integrity.’” CRC 9.7.
- B. State Bar and local court guidelines
- C. 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. ABA Ethics Opinion 495
- B. 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.
- C. New York County Lawyers Ass’n Formal Opn. 754-2020

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