

1 **THE STATE BAR OF CALIFORNIA**
2 **STANDING COMMITTEE ON**
3 **PROFESSIONAL RESPONSIBILITY AND CONDUCT**
4 **DRAFT FORMAL OPINION INTERIM NO. 20-0004**
5 **ETHICAL OBLIGATIONS WHEN WORKING REMOTELY**
6
7

8 **ISSUES:** What are a California lawyer's ethical duties when working remotely in
9 response to the COVID-19 pandemic or other disaster situation?

10 **DIGEST:**

11 **AUTHORITIES:**

12 **INTERPRETED:** California Rules of Professional Conduct 1.1, 1.3, 1.4, 1.6, 5.1-5.3, 5.5;
13 Bus. & Prof. C. §§ 6068(e), 6125-6133.

14 ***INTRODUCTION***

15 In response to advances in technology, the California wildfires and the COVID-19
16 pandemic, many lawyers are working remotely. No California Rule of Professional Conduct
17 specifically addresses lawyers who practice remotely. Rather, the same rules of professional
18 conduct that apply to attorneys practicing in traditional law firm offices apply to attorneys
19 practicing remotely.¹ The application of the rules, however, raises unique issues for lawyers
20 working remotely. This opinion will focus on the primary rules that may be implicated by a
21 lawyer's remote legal practice.

22 ***DISCUSSION***

23 1. *Duty of Confidentiality, Rule 1.6; Bus. & Prof. C. § 6068(e)*
24

25 Many of our prior ethics opinions emphasize that lawyers must take reasonable measures
26 to safeguard confidential client information when using technology to transmit and store
27 confidential client information.² Lawyers may use third-party cloud providers to store or backup
28 confidential client files or other technology solution vendors to facilitate their remote practice.
29 In doing so, they should investigate and monitor third-party providers, limit access to
30 confidential information, and obtain written assurances from the provider concerning data
31 security and the handling of breaches of confidentiality.³ If a lawyer is not able to evaluate the
32 security of the technology used, the lawyer must seek additional information, or consult with

¹ See also Cal. State Bar Formal Opn. 2012-184.

² See, e.g., 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.

³ See Cal. State Bar Formal Opn. 2012-184.

33 someone who possesses the requisite knowledge to ensure compliance with the lawyer's duties of
34 competence and confidentiality.⁴

35
36 When working from a "home office," lawyers should implement reasonable measures to
37 safeguard confidential client information, particularly as other household members may share or
38 have access to a home computer or laptop. For instance, lawyers should create separate accounts
39 for any other household members that use the computer and segregate any client and personal
40 data. Other security measures include implementing two-factor authentication, strong passwords
41 and auto logoff after the computer is inactive. To the extent physical files are used, lawyers
42 should ensure that they are stored and disposed of securely. The duty to implement reasonable
43 measures should be tailored to each remote working environment (e.g., kitchen/dining room
44 office or backyard) and account for the presence of third parties, such as household members,
45 neighbors, learning pod friends, and repair workers.

46
47 In addition to ensuring that confidential client data is secure in "home offices," lawyers
48 should also remind clients (many of whom may also be working remotely) to follow stringent
49 confidentiality practices in their remote working environments. As many mediations, hearings
50 and depositions are now virtual, lawyers should counsel clients about the need to mute their
51 microphones and engage in separate, private communications with the attorney to avoid
52 compromising confidential or attorney-client privileged information. Similarly, in using
53 videoconferencing, such as Zoom or Microsoft Teams, for confidential attorney-client meetings,
54 passwords or PINs should be required for all participants.⁵

55 56 2. *Duty of Competence, Rule 1.1 and Duty of Supervision*

57
58 Comment [8] to ABA Model Rule 1.1 is commonly referred to as a lawyer's "duty of
59 technology competence." California did not adopt this comment in its amended Rules of
60 Professional Conduct, but our prior ethics opinions explain a lawyer's duty of technology
61 competence.⁶ The duty of technology competence applies to multiple aspects of a lawyer's
62 practice, such as those involving electronic discovery, social media, law practice management,
63 virtual law offices, and remote practice. The ABA Standing Committee on Ethics and
64 Professional Responsibility declined to endorse strict rules relating to a lawyer's duty of
65 technology competence, but adopted a "reasonable efforts standard" and "fact-specific approach"
66 based on the ABA Cybersecurity Handbook.⁷ Our Committee agrees that this reasonableness
67 standard applies to a lawyer's duty of technology competence.⁸ Lawyers should also stay abreast

⁴ *Id.*

⁵ See also Joanna Storey, *Practical Tips to Mitigate Risk When Videoconferencing*, available at <https://www.law.com/dailybusinessreview/2020/10/27/practical-tips-to-mitigate-risk-when-videoconferencing/?sreturn=20210116193958>.

⁶ 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).

⁷ ABA Formal Opn. 477R, at p. 4.

⁸ See Cal. State Bar Formal Opns. 2010-179 at __; 2015-193 at __.

of new court rules and procedures relating to COVID-19⁹ and be adequately prepared to render competent legal representation at remote court hearings and conferences.¹⁰

In addition, a lawyer's duty of competence includes the "mental, emotional, and physical ability reasonably necessary for the performance" of legal services.¹¹ The health or financial impacts of COVID-19 may interfere with a lawyer's physical, mental or emotional ability to competently perform legal services. Given the widespread COVID-19 pandemic, lawyers should plan in advance to ensure that competent representation may still be rendered to clients in the event that COVID-19 impacts a lawyer's ability to render competent and diligent legal services.¹² [Cite to ABA Formal Opinion 482 and pending COPRAC opinion re: successor planning?]

3. *Duty of Communication, Rule 1.4*

In lieu of in-person meetings and in response to the pandemic, more lawyers may communicate with prospective or current clients via a secure website portal, email or other forms of online communications. In communicating with prospective clients, lawyers should avoid forming unintended attorney-client relationships by including disclaimers on their websites or other online communications that posted information is not legal advice and that communication through the website does not create an attorney-client relationship. In addition, before entering into an engagement agreement, lawyers should obtain sufficient information from the client to screen for conflicts of interest and ensure that the party they are communicating with is the actual client or someone with authority to act on the client's behalf.¹³ Lawyers should implement "reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client."¹⁴

Lawyers also need to ensure that any alternative means of communications with clients are adequate to fulfill their duty of communication. Among other requirements, a lawyer must "reasonably consult with the client about the means by which to accomplish the client's objectives in the representation," and "keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents . . ."¹⁵ A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹⁶ When using electronic forms of communication, the lawyer should ensure that the client is receiving and understanding the information exchanged.¹⁷

⁹ See, e.g., [CITE to a few examples]

¹⁰ While not limited to remote practice, the COVID-19 pandemic has also resulted in new COVID-19 regulations that many companies must navigate. In advising clients on these evolving regulations, lawyers should be cautious about holding themselves out as a COVID-19 "experts," or drafting "COVID-compliant" policies. See also Rules 7.1(a), 7.4.

¹¹ Rule 1.1(b)(ii).

¹² Rules 1.1, 1.3.

¹³ See Cal. State Bar Formal Opn. 2012-184.

¹⁴ Rule 1.18(d).

¹⁵ Rule 1.4(a)(2)-(3).

¹⁶ Rule 1.4(b).

¹⁷ See Cal. State Bar Formal Opn. 2012-184.

In certain circumstances, phone conferences or video-conferences may be needed. Even if litigation matters are delayed as a result of the COVID-19 pandemic, lawyers should continue to maintain communications with clients regarding the case status and any updates.

Lawyers should also ensure their continued ability to communicate with clients during the COVID-19 pandemic or other emergency situation and exchange alternative contact information.¹⁸ Lawyers should further communicate with clients regarding their schedules and availability, which may be altered during a COVID-19 pandemic or emergency, and ensure that clients have sufficient time to review draft responses to discovery, pleadings and other important documents relating to the representation.

If a lawyer develops COVID-19 and it impacts the lawyer's ability to represent clients, the lawyer needs to communicate with clients about how the illness may impact the lawyer's representation to permit a client to make an informed decision regarding the representation.¹⁹

[End of current draft, remaining sections to be completed per outline]

4. Duty of Supervision, Rules 5.1-5.3

Technology support for remote working by legal and non-legal staff
Provide necessary tools and equipment for remote work, e.g., computers, Internet access
etc.
Ensure security of remote access
Confidentiality and cybersecurity policies
Training, monitoring and enforcement
Maintenance of remote client files and documents
Safekeeping client funds, Rule 1.15.
Centralized case management system
Maintaining regular communications with colleagues and overseeing work of associates, paralegals and staff

5. Unauthorized Practice of Law, Rule 5.5 and Bus. & Prof. C. §§ 6125-6133

Changes in technology facilitating remote work
Temporary relocation to another state where lawyer is not admitted due to COVID-19

¹⁸ See ABA Formal Opn. 482 at pp. 2-3 ("To be able to reach clients following a disaster, lawyers should maintain, or be able to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible.").

¹⁹ 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).

135 Unauthorized practice of law issues may exist under these circumstances, but the
136 Committee is not authorized by the State Bar to issue an ethics opinion regarding the
137 unauthorized practice of law.

138 California licensed lawyers practicing California law remotely in another state where
139 they are not licensed should consult the multijurisdictional practice and unauthorized practice of
140 law rules and authorities of the state where they are physically present. *See* Rule 5.5(a)(1). The
141 ABA and some state bar ethics committees have issued opinions regarding unauthorized practice
142 of law considerations for attorneys practicing remotely the law of the jurisdictions in which they
143 are licensed while physically present in a jurisdiction in which they are not admitted due to
144 COVID-19 or other circumstances. *See, e.g.,* ABA Formal Ethics Opn. 495 ("[I]n the absence of
145 a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a
146 lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that
147 jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the
148 lawyer does not hold out the lawyer's presence or availability to perform legal services in the
149 local jurisdiction or actually provide legal services for matters subject to the local jurisdiction,
150 unless otherwise authorized."); D.C. Court of Appeals Opinion 24-20 (2020) (concluding that the
151 "incidental and temporary practice" exception under D.C. Court of Appeals Rule 49(c)(13)
152 permitted an attorney who is not licensed in D.C. to practice law from their residence located in
153 D.C., as long as the attorney "(1) is practicing from home due to the COVID-19 pandemic; (2)
154 maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids
155 using a D.C. address in any business document or otherwise holding out as authorized to practice
156 law in D.C., and (4) does not regularly conduct in-person meetings with clients or third parties in
157 D.C."); Florida Bar Standing Committee on the Unlicensed Practice of Law Proposed Advisory
158 Opn. FAO #2019-4, Out-of-State Attorney Working Remotely From Florida Home (August 17,
159 2020) (finding that a New Jersey lawyer physically working from his home in Florida
160 exclusively on federal intellectual property matters for his New Jersey law firm is not
161 committing UPL in Florida as long as he does not hold himself or his firm out to the public as
162 having a Florida presence, does not give advice about Florida law, and provides no legal services
163 to Florida residents); Utah Ethics Advisory Committee Opinion 19-03 (2019) ("The Utah Rules
164 of Professional Conduct do not prohibit an out-of-state attorney from representing clients from
165 the state where the attorney is licensed even if the out-of-state attorney does so from his private
166 location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the
167 out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah
168 business.").

169 Lawyers not licensed in California who are working remotely in California should
170 consult California Rule 5.5(b), California Rules of Court 9.40-9.48, Bus. & Prof. C. §§ 6125-
171 6133 and relevant authorities regarding multijurisdictional practice and the unauthorized practice
172 of law. *See Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct.* (1998) 17 Cal.4th 119,
173 128-129 (stating that "one may practice law in [California] in violation of Section 6125 although
174 not physically present here by advising a California client on California law in connection with a
175 California legal dispute by telephone, fax, computer or other modern technological means."); *In*
176 *re Estate of Condon* (1998) 65 Cal.App.4th 1138, 1145-1146 ("In the real world of 1998 we do
177 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.").

Drafter's Notes:

[SB1] Should we change to include during a pandemic or disaster? Some of the points in the outline do not relate to remote practice, but involve ethical considerations in response to other impacts of the COVID-19 pandemic.