

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

15 **STATEMENT OF FACTS**

16 In response to the COVID-19 pandemic, many lawyers and legal staff have worked remotely
17 over the last year. Based on a law firm's productivity and cost-savings during this time, a law
18 firm ("Law Firm") decides that it would like to continue to provide its lawyers and staff with the
19 flexibility to work remotely post-pandemic and plans to move to a smaller, shared office space.
20 Law Firm plans to implement a hybrid work environment to provide its lawyers and staff with
21 the flexibility to work remotely and in the physical office when necessary. It plans to rent a
22 "WeWork" shared workspace for its new physical office. Law Firm wants to know what ethical
23 obligations arise for Law Firm and its lawyers as a result of this anticipated transition in its
24 working environment.

25 **INTRODUCTION**

26 In response to advances in technology, the California wildfires, the COVID-19 pandemic, and
27 other disasters, more and more lawyers are working remotely. No California Rule of
28 Professional Conduct specifically addresses lawyers who practice remotely. Rather, the same
29 rules of professional conduct that apply to attorneys practicing in traditional law firm offices
30 apply to attorneys practicing remotely.¹ The application of the rules, however, raises unique
31 issues for lawyers working remotely. This opinion will focus on the primary rules that may be
32 implicated by a lawyer's remote legal practice. While this opinion presents hypothetical facts to
33 provide one common example, the ethical obligations discussed herein would apply to lawyers
34 who work remotely regardless of the underlying reasons or whether a traditional, physical
35 office space remains available.

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

DISCUSSION

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

Because more lawyers and staff will be working remotely, Law Firm needs to ensure that the technology it uses to facilitate remote practice is consistent with applicable ethical obligations, including the duty of confidentiality. Many of our prior ethics opinions emphasize that lawyers must take reasonable measures to safeguard confidential client information when using technology to transmit and store confidential client information.² Law Firm may use third-party cloud providers to store or backup confidential client files or other technology solution vendors to facilitate remote practice. In doing so, Law Firm's lawyers should investigate and monitor third-party providers, limit access to confidential information, and obtain written assurances from the provider concerning data security and the handling of breaches of confidentiality.³ If a lawyer is not able to evaluate the security of the technology used, the lawyer must seek additional information, or consult with someone who possesses the requisite knowledge to ensure compliance with the lawyer's duties of competence and confidentiality.⁴

When working from a "home office," lawyers should implement reasonable measures to safeguard confidential client information, particularly as other household members may share or have access to a home computer or laptop. For instance, lawyers should create separate accounts for any other household members that use the computer and segregate any client and personal data. Other security measures include implementing two-factor authentication, strong passwords and auto logoff after the computer is inactive. To the extent physical files are used, lawyers should ensure that they are stored and disposed of securely. Lawyers should also disable the listening capability of smart speakers, virtual assistants or other listening-enabled devices unless needed to assist with legal services.⁵ The duty to implement reasonable measures should be tailored to each remote working environment (e.g., kitchen/dining room office or backyard) and account for the presence of third parties, such as household members, neighbors, learning pod friends, and repair workers.

In addition to ensuring that confidential client data is secure in "home offices," lawyers should also remind clients (many of whom may also be working remotely) to follow stringent confidentiality practices in their remote working environments. As many mediations, hearings

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; see also ABA Formal Opn. 498 at 3 (recommending that lawyers carefully review "the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.").

⁴ *Id.*

⁵ ABA Formal Ethics Opn. 498 at 6.

and depositions are now virtual, lawyers should counsel clients about the need to mute their microphones and engage in separate, private communications with the attorney to avoid compromising confidential or attorney-client privileged information. Similarly, in using videoconferencing, such as Zoom or Microsoft Teams, for confidential attorney-client meetings, passwords or PINs should be required for all participants.⁶

Because Law Firm will be moving to a smaller, shared office space, Law Firm will also need to implement measures to ensure that confidential client files (hard copy and electronic) are securely stored and not accessible by third parties sharing the office space. The Committee and multiple other bar associations have issued ethics opinions describing in more detail lawyers' ethical obligations relating to shared office space, including protecting confidential client information, avoiding client confusion regarding the nature of the relationship among lawyers who share office space, and avoiding conflicts of interest.⁷

2. Duty of Competence, Rule 1.1

California recently amended Rule 1.1 to incorporate a version of Comment [8] to ABA Model Rule 1.1, which is commonly referred to as a lawyer's "duty of technology competence."⁸ Our prior ethics opinions also explain a lawyer's duty of technology competence.⁹ The duty of technology competence applies to multiple aspects of a lawyer's practice, such as those involving electronic discovery, social media, law practice management, virtual law offices, and remote practice. The ABA Standing Committee on Ethics and Professional Responsibility declined to endorse strict rules relating to a lawyer's duty of technology competence but adopted a "reasonable efforts standard" and "fact-specific approach" based on the ABA Cybersecurity Handbook.¹⁰ Our Committee agrees that this reasonableness standard applies to a lawyer's duty of technology competence.¹¹

⁶ See also Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Opn. 2020-300 (2020) (describing best practices for videoconferencing); 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/?slreturn=20210116193958>.

⁷ See, e.g., Cal. State Bar Formal Opn. 1997-150; Colorado Bar Ass'n Ethics Opn. 89 (revised and reissued on March 12, 2018); NYSBA Ethics Opn. 939 (2012); see also Rules 7.1, 7.5.

⁸ Rule 1.1 (effective March 22, 2021), Cmt. [1] ("The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.").

⁹ 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).

¹⁰ ABA Formal Opn. 477R, at p. 4.

¹¹ See Cal. State Bar Formal Opns. 2010-179 at __; 2015-193 at __.

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Law Firm should ensure that its technology solutions are sufficient to permit lawyers to reasonably access client files while working remotely. It should also ensure that files are saved to a centralized, secure case management system and that backup files are maintained. Lawyers should not save confidential client files locally or mingle personal and confidential client data.

Lawyers should also stay abreast of new court rules and procedures relating to COVID-19 and other disasters, including the closure or limited hours of courts, and be adequately prepared to render competent legal representation at remote court hearings and conferences.¹²

In addition, a lawyer's duty of competence includes the "mental, emotional, and physical ability reasonably necessary for the performance" of legal services.¹³ The health, personal (e.g., school closures, childcare, or other family responsibilities), or financial impacts of COVID-19 and other disasters may interfere with a lawyer's physical, mental, or emotional ability to competently perform legal services. The duty to render competent legal services is not generally excused under these circumstances.¹⁴ Lawyers should plan in advance to ensure that competent representation may still be rendered to clients in the event that a disaster impacts a lawyer's ability to render competent and diligent legal services.¹⁵

3. Duty of Communication, Rule 1.4

While working remotely, 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, Law Firm should avoid forming unintended attorney-client relationships by including disclaimers on its 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.¹⁶ Lawyers should implement "reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to represent the prospective client."¹⁷

¹² 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.

¹³ Rule 1.1(b)(ii).

¹⁴ *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 (decided under former rules)

¹⁵ Rules 1.1, 1.3; ABA Formal Opn. 482 ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust."); [pending COPRAC opinion re: successor planning?].

¹⁶ *See* Cal. State Bar Formal Opn. 2012-184.

¹⁷ Rule 1.18(d).

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" ¹⁸ A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ¹⁹ When using electronic forms of communication, the lawyer should ensure that the client is receiving and understanding the information exchanged. ²⁰ In certain circumstances, phone conferences or video-conferences may be needed. Even if litigation matters are delayed because of the COVID-19 pandemic or another disaster, 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 an emergency situation and exchange alternative contact information. ²¹ Lawyers should further communicate with clients regarding their schedules and availability, which may be altered during an emergency, and ensure that clients have sufficient time to review draft responses to discovery, pleadings and other important documents relating to the representation.

If an emergency or illness, such as COVID-19, impacts the lawyer's ability to represent clients, the lawyer needs to communicate with clients about how the impact on the lawyer's representation to permit a client to make an informed decision regarding the representation. ²²

4. Duty of Supervision, Rules 5.1-5.3

California's rules relating to the duty of supervision reflect three separate sets of duties. First, Rule 5.1 requires managerial and supervisory lawyers to make reasonable efforts to assure compliance by other lawyers with the Rules of Professional Conduct and the State Bar Act. A managerial or supervisory lawyer will be vicariously responsible for another lawyer's violation if "(1) the lawyer orders or, with knowledge of the relevant facts and of the specific conduct, ratifies the conduct involved; or (2) the lawyer, individually or together with other lawyers, possesses managerial authority in the law firm in which the other lawyer practices, or has direct

¹⁸ Rule 1.4(a)(2)-(3).

¹⁹ Rule 1.4(b).

²⁰ See Cal. State Bar Formal Opn. 2012-184.

²¹ 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.").

²² 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).

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supervisory authority over the other lawyer, whether or not a member or employee of the same law firm, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”²³

Second, a subordinate lawyer has an independent duty to comply with the rules and cannot simply follow the instruction of the lawyer’s supervisor.²⁴ Although a subordinate lawyer is not in violation if the lawyer acts in accordance with a supervisory lawyer’s “reasonable resolution of an arguable question of professional duty,” “[i]f the subordinate lawyer believes that the supervisor’s proposed resolution of the question of professional duty would result in a violation of these rules or the State Bar Act, the subordinate is obligated to communicate his or her professional judgment regarding the matter to the supervisory lawyer.”²⁵

Third, lawyers responsible for managing non-lawyer staff are responsible for implementing reasonable steps to ensure that the conduct of non-lawyer staff, including independent contractors, is consistent with the lawyer’s duties under the Rules of Professional Conduct.²⁶ Lawyers supervising non-lawyers are responsible for conduct of nonlawyers that violates the Rules, if the lawyer orders or ratifies the conduct or learns of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.²⁷ In addition, lawyers with managerial authority in a law firm “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.”²⁸

Under the facts presented, Law Firm should ensure that it provides appropriate tools and equipment, technology support, training and monitoring to its lawyers and staff. Among other measures, a centralized case management system should be used to maintain remote client files and documents. Managerial lawyers should consult with appropriate information technology staff or consultants in implementing technology measures to assist with Law Firm’s remote practice.

In addition, managerial lawyers at Law Firm should implement reasonable remote policies and practices, including confidentiality and cybersecurity policies, to ensure the security of remote access and that the conduct of its lawyers and non-lawyers comply with the Rules of Professional Conduct. Managerial lawyers should also carefully review the terms of any client guidelines for outside counsel, which may require specific confidentiality practices and cybersecurity insurance. To the extent Law Firm permits lawyers to use their own devices while working remotely, Law Firms should implement “Bring Your Own Device” or “BYOD” policies

²³ Rule 5.1(c).

²⁴ Rule 5.2.

²⁵ Rule 5.2(b), Comment.

²⁶ Rule 5.3(b), Comment.

²⁷ Rule 5.3(c).

²⁸ Rule 5.3(a).

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that require lawyers and staff to maintain the confidentiality of firm and client data on personal devices, including implementing protective measures such as password, anti-virus, firewall and encryption, prohibiting highly confidential information and trade secrets from being copied and saved on devices, and creating separate server and access controls for sensitive data.²⁹

Managerial lawyers should be responsible for enforcing Law Firm's remote policies and procedures and regularly updating them to keep pace with advances in technology. In addition, all lawyers, including associates, who are working remotely must implement reasonable measures to comply with their professional duties while working remotely regardless of whether Law Firm has implemented any formal policies and procedures.

As noted above, Law Firm should also implement policies and procedures for disaster and succession planning, and data breaches.³⁰ To facilitate Law Firm's ability to safeguard and access client files in the event of a disaster or data breach, BYOD policies should include employees' consent to remote locking or wiping in the event of security breach, theft, loss of device, or employee departure.

Managerial lawyers and lawyers overseeing non-legal staff should maintain regular communications to oversee the work of associates, paralegals, staff, and independent contractors. Because Law Firm is maintaining a physical office, in-person trainings or meetings may assist in confirming that everyone is receiving and understanding the directions and guidance being provided. For law firms that decide to transition to "virtual only" environments, video conferencing should be used to help ensure compliance with the Rules of Professional Conduct.

Finally, as described above in connection with the duty of confidentiality, lawyers should adequately investigate outside vendors and contractors and oversee their work to ensure it is consistent with the lawyer's ethical obligations. Written nondisclosure or confidentiality agreements may be appropriate for certain vendors as well as procedures to maintain reasonable access and control of client data.³¹

²⁹ For additional suggested BYOD practices, see ABA Formal Opinion 498 at page 7. The Association of Corporate Counsel has also published resources for BYOD policies. See, e.g., Daniel B. Garrie, Senior Managing Partner, Law & Forensics LLC, *Top Ten Tips for Managing the "Bring Your Own Device to the Workplace" Environment*, available at <https://www.acc.com/resource-library/top-ten-tips-managing-bring-your-own-device-workplace-environment>.

³⁰ ABA Formal Opn. 482 (describing lawyers' ethical obligations relating to disasters); ABA Formal Opn. 483 (describing lawyer's ethical obligations relating to data breach or cyber-attack); Cal. State Bar Formal Opn. 2020-203 (same)

³¹ See also ABA Formal Opn. 498 at 7; [insert cites to ethics opinions re: cloud computing].

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

212 The Committee recognizes that lawyers working remotely may temporarily or permanently
213 relocate to another state where the lawyer is not licensed to practice law. The Committee is
214 not authorized by the State Bar to issue an ethics opinion regarding the “unauthorized practice
215 of law” under these circumstances.

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217 California licensed lawyers practicing California law remotely in another state where they are
218 not licensed should consult the multijurisdictional practice and unauthorized practice of law
219 rules and authorities of the state where they are physically present. See Rule 5.5(a)(1). The
220 ABA and some other state bar ethics committees have issued opinions regarding unauthorized
221 practice of law considerations for attorneys practicing remotely the law of the jurisdictions in
222 which they are licensed while physically present in a jurisdiction in which they are not admitted
223 due to COVID-19 or other circumstances.³²

224 Lawyers not licensed in California who are working remotely in California should consult
225 California Rule 5.5(b), California Rules of Court 9.40-9.48, Bus. & Prof. C. §§ 6125-6133 and
226 relevant authorities regarding multijurisdictional practice and the unauthorized practice of
227 law.³³

³² 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.”).

³³ 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

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CONCLUSION

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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.").