

**HEADLINE: Proposed Formal Opinion Interim No. 20-0004 (Ethical Obligations When Working Remotely)**

**SUBHEAD: The State Bar seeks public comment on Proposed Formal Opinion Interim No. 20-0004 (Ethical Obligations When Working Remotely).**

**Deadline: November 12, 2021**

**Background**

The State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) is charged with the task of issuing advisory opinions on the ethical propriety of hypothetical attorney conduct. In accordance with applicable State Bar policy and procedure, the committee shall publish proposed formal opinions for public comment (See, State Bar Board of Trustee Resolutions July 1979 and December 2004. See also, Board of Trustee Resolution November 2016).

On May 10, 2018, the California Supreme Court issued an order approving 69 new Rules of Professional Conduct, which went into effect on November 1, 2018. Information about the new rules is available [here](#). Proposed Formal Opinion Interim No. 20-0004 interprets the new Rules of Professional Conduct.

**Discussion/Proposal**

Proposed Formal Opinion Interim No. 20-0004 considers:

What are a California lawyer's ethical duties when working remotely in response to the COVID-19 pandemic or another disaster situation?

The opinion interprets rules 1.1, 1.3, 1.4, 1.6, 5.1–5.3, and 5.5 of the Rules of Professional Conduct of the State Bar of California; Business and Professions Code sections 6068(e) and 6125, et seq.

The opinion digest states: Remote practice does not alter a lawyer's ethical duties under the California Rules of Professional Conduct and the State Bar Act. Lawyers and law firms should implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision.

At its July 30, 2021, meeting, and in accordance with their procedures, COPRAC tentatively approved Proposed Formal Opinion Interim No. 20-0004 for a 90-day public comment distribution.

**Any fiscal/personnel impact**

None

**Background material**

Proposed Formal Opinion Interim No. 20-0004

**Source**

State Bar Standing Committee on Professional Responsibility and Conduct

**Deadline**

November 12, 2021

**Direct comments to**

Comments should be submitted using the [online Public Comment Form](#). The online form allows you to input your comments directly and can also be used to upload your comment letter and/or other attachments.

**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
FORMAL OPINION INTERIM NO. 20-0004**

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

**DIGEST:** Remote practice does not alter a lawyer’s ethical duties under the California Rules of Professional Conduct and the State Bar Act. Lawyers and law firms should implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision.

**AUTHORITIES**

**INTERPRETED:** Rules 1.1, 1.3, 1.4, 1.6, 5.1–5.3, and 5.5 of the Rules of Professional Conduct of the State Bar of California.<sup>1</sup>

Business and Professions Code section 6068, subdivision (e).

Business and Professions Code sections 6125 et seq.

**STATEMENT OF FACTS**

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

**INTRODUCTION**

In response to advances in technology, the California wildfires, the COVID-19 pandemic, and other disasters, more and more lawyers are working remotely. No California Rule of Professional Conduct specifically addresses lawyers who practice remotely. Rather, the same rules of professional conduct that apply to attorneys practicing in traditional law firm offices apply to attorneys practicing remotely.<sup>2</sup> The application of the rules, however, raises unique issues for lawyers working remotely. This opinion will focus on the primary rules that may be implicated by a lawyer’s remote legal practice. While this

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<sup>1</sup> Unless otherwise indicated, all references to “rules” in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

<sup>2</sup> See also, Cal. State Bar Formal Opn. No. 2012-184.

opinion presents hypothetical facts to provide one common example, the ethical obligations discussed herein would apply to lawyers who work remotely regardless of the underlying reasons or whether a traditional, physical office space remains available.

## DISCUSSION

### 1. Duty of Confidentiality, Rule 1.6; Business and Professions Code Section 6068, Subdivision (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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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 who use the computer. Other reasonable security measures include implementing two-factor authentication, strong passwords and auto-logout 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 consider disabling the listening capability of smart speakers, virtual assistants or other listening-enabled devices unless needed to assist with legal services.<sup>6</sup> 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, and repair workers.

In addition to ensuring that confidential client data is secure in "home offices," lawyers should also remind clients who are working remotely to follow stringent confidentiality practices in their remote working environments. For virtual mediations, hearings, and depositions, lawyers should counsel clients

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<sup>3</sup> See, e.g., Cal. State Bar Formal Opn. Nos. 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. Nos. 477R (2017) and 483 (2018).

<sup>4</sup> See, Cal. State Bar Formal Opn. No. 2012-184; see also ABA Formal Opn. No. 498 (2021) 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").

<sup>5</sup> *Id.*

<sup>6</sup> ABA Formal Opn. No. 498 (2021) at 6.

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, when using videoconferencing for confidential attorney-client meetings, lawyers should consider requiring passwords or PINs for participants.<sup>7</sup>

Because Law Firm will be moving to a smaller, shared office space, Law Firm will also need to implement reasonable 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 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.<sup>8</sup>

## **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."<sup>9</sup> Our prior ethics opinions also explain a lawyer's duty of technology competence.<sup>10</sup> 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.<sup>11</sup> Our committee agrees that this reasonableness standard applies to a lawyer's duty of technology competence.<sup>12</sup>

Law Firm should ensure that its technology solutions are sufficient to permit lawyers to reasonably access client files while working remotely. It is a good practice to require that files are saved to a centralized, secure case management system. Law Firm should also regularly back up files to ensure reasonable access in the event of a data loss.<sup>13</sup>

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<sup>7</sup> See also, Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Opn. No. 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>.

<sup>8</sup> See, e.g., Cal. State Bar Formal Opn. No. 1997-150; Colorado Bar Ass'n Ethics Opn. No. 89 (revised and reissued on March 12, 2018); NYSBA Ethics Opn. No. 939 (2012); see also California Rule of Professional Conduct 7.1 and 7.5.

<sup>9</sup> 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.").

<sup>10</sup> See, Cal. State Bar Formal Opn. Nos. 2010-179; 2012-184; and 2015-193.

<sup>11</sup> ABA Formal Opn. No. 477R (2017) at 4.

<sup>12</sup> See, Cal. State Bar Formal Opn. Nos. 2020-203 at 5; 2010-179 at 2–6.

<sup>13</sup> ABA Formal Opn. No. 498 (2021) at 5.

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.<sup>14</sup>

In addition, a lawyer's duty of competence includes the "mental, emotional, and physical ability reasonably necessary for the performance" of legal services.<sup>15</sup> The health, personal (e.g., school closures, childcare, or other family responsibilities), or financial impacts of pandemics 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.<sup>16</sup> 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.<sup>17</sup>

### **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 form of online communications. In communicating with prospective clients, Law Firm should take reasonable steps to avoid forming unintended attorney-client relationships, such as including disclaimers on its website 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.<sup>18</sup>

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 . . ."<sup>19</sup> A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>20</sup> When using electronic forms of communication, the lawyer should ensure that the client is receiving and understanding the information

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<sup>14</sup> 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) and 7.4.

<sup>15</sup> Rule 1.1(b)(ii).

<sup>16</sup> *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [213 Cal.Rptr. 236] (decided under former rules)

<sup>17</sup> Rules 1.1 and 1.3; ABA Formal Opn. No. 482 ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust.").

<sup>18</sup> See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

<sup>19</sup> Rule 1.4(a)(2)–(3).

<sup>20</sup> Rule 1.4(b).

exchanged.<sup>21</sup> In certain circumstances, phone conferences or video-conferences may be needed. Even if litigation matters are delayed because of an emergency or another disaster, lawyers should continue to maintain communications with clients regarding the case status and any significant updates.

Lawyers should also ensure their continued ability to communicate with clients during an emergency and exchange alternative contact information.<sup>22</sup> It is a good practice to communicate with clients regarding their schedules and availability, which may be altered during an emergency, to 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 impacts the lawyer's ability to represent clients, the lawyer needs to communicate with clients about the impact on the lawyer's representation to permit a client to make an informed decision regarding the representation.<sup>23</sup>

#### **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 ensure compliance by other lawyers with the Rules of Professional Conduct and the State Bar Act. Second, a subordinate lawyer has an independent duty to comply with the rules and cannot simply follow the instruction of the lawyer's supervisor.<sup>24</sup> 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.<sup>25</sup> 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."<sup>26</sup>

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. 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 and training, to ensure the security of remote access and that the conduct of its lawyers and non-lawyers comply with the Rules of Professional Conduct.

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<sup>21</sup> See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

<sup>22</sup> See, ABA Formal Opn. No. 482 at 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.").

<sup>23</sup> Rule 1.4(b); see also Oregon State Bar Coronavirus Response: Legal Ethics FAQ (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).

<sup>24</sup> Rule 5.2.

<sup>25</sup> Rule 5.3(b), Comment.

<sup>26</sup> Rule 5.3(a).

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 Firm should implement “Bring Your Own Device” (BYOD) policies that require lawyers and staff to maintain the confidentiality of firm and client data on personal devices. Reasonable BYOD practices include security 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.<sup>27</sup> 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.<sup>28</sup>

As noted above, Law Firm should also implement policies and procedures for disaster and succession planning, and data breaches.<sup>29</sup> 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, it is a good practice to use video conferencing for important trainings or meetings.

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.<sup>30</sup>

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<sup>27</sup> For additional suggested BYOD practices, see ABA Formal Opinion 498 (2021) 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>.

<sup>28</sup> See rule 5.1(a) (“A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.”).

<sup>29</sup> ABA Formal Opn. No. 482 (describing lawyers’ ethical obligations relating to disasters); ABA Formal Opn. No. 483 (describing lawyer’s ethical obligations relating to data breach or cyber-attack); Cal. State Bar Formal Opn. No. 2020-203 (same).

<sup>30</sup> See, e.g., ABA Formal Opn. No. 498 (2021) at 7; Cal. State Bar Formal Opn. No. 2010-179 at 4–5; New York State Bar Association Ethics Opn. No. 842; Oregon State Bar Ethics Opn. No. 2011-188 (revised 2015).



## 5. **Unauthorized Practice of Law, Rule 5.5 and Business and Professions Code Sections 6125–6133**<sup>31</sup>

The committee recognizes that lawyers working remotely may temporarily or permanently relocate to another state where the lawyer is not licensed to practice law. 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 other state bar ethics committees have issued opinions regarding unauthorized practice of law considerations for attorneys remotely practicing 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.<sup>32</sup>

Lawyers not licensed in California who are working remotely in California should consult rule 5.5(b), California Rules of Court 9.40–9.48, Business and Professions Code sections 6125 et seq. and relevant authorities regarding multijurisdictional practice and the unauthorized practice of law.<sup>33</sup>

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<sup>31</sup> This committee does not opine on issues of unauthorized practice of law, including whether a particular conduct or activity constitutes the unauthorized practice of law.

<sup>32</sup> See, e.g., ABA Formal Ethics Opn. No. 495 at 3–4 (“[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 Opn. No. 24-20 (2020) at 3 (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. No. FAO #2019-4, Out-of-State Attorney Working Remotely From Florida Home (2020) (approved by the Supreme Court of Florida on May 20, 2021) (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 Opn. No. 19-03 (2019) at 1 (“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.”).

<sup>33</sup> See, *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct.* (1998) 17 Cal.4th 119, 128–129 [70 Cal.Rptr.2d 304] (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 [76 Cal.Rptr.2d 922] (“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.”).

## CONCLUSION

Lawyers may ethically practice remotely under the California Rules of Professional Conduct and the State Bar Act, provided they continue to comply with these rules, including the duties of confidentiality, competence, communication, and supervision. Lawyers should implement reasonable measures to ensure compliance that are tailored to the relevant circumstances and remote working environment.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.

***[Publisher's Note:** Internet resources cited in this opinion were last accessed by staff on August 10, 2021. Copy of these resources are on file with the State Bar's Office of Professional Competence.]*

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Joshua R. Furman

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**City**

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**State**

California

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**Email address**

[jrf@furmanlawyers.com](mailto:jrf@furmanlawyers.com)

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The State Bar's guidance on confidential client information stored in computer systems continues to lack specific guidance on the most basic software tool for maintaining confidences: encryption. While prior guidance (Opn. 2010-179) observes the need to be technologically agnostic to mitigate premature obsolescence of the ethical opinions, the concept of encryption itself is not dependent on a particular tool or product, but has been a mainstay of information technology for over 20 years (and much longer in some fields).

Encryption has been, and remains, the single most effective means of maintaining information security, particularly in the area of cloud computing that most remote work depends upon. There are many different ways of dealing with encryption technology, but any guidance concerning client information in a cloud environment must emphasize the need for end-to-end encryption of files stored online. This is the only means of ensuring that cloud data is not accessible by third parties, including the entities hosting the data.

In an era when data mining for commercial exploitation through demographic and advertising data sales is a primary driver of many online hosting markets, the overbroad guidance that attorneys “should investigate and monitor third-party providers” is inadequate to explain what the attorney should be looking for when reviewing

providers' terms of service. (As a side note, it is also unreasonable to expect that solo and small firm practitioners will obtain "written assurances" from any such providers beyond the terms of service.) Attorneys must be vigilant for any terms or privacy statements that allow the host to access the content of data. Attorneys must also ensure that hosts cannot access client confidences by encryption of data both in transmission (which is the only time most cloud data is encrypted) and, critically, while resident on host servers.

I do note that the VLO opinion (Opn. 2012-184) referenced in this opinion does suggest that encrypting data is a factor that may make a VLO practice ethically compliant. However, that opinion also fails to explain why encryption is vital to maintaining client confidences, and whether the encryption protocols include stored data, not just transmission.

With some additional explanation (perhaps in footnote 4) concerning the primacy of encryption in a data confidentiality regime, and the reasons why cloud computing poses additional risks to confidentiality of client data, I would support the opinion. Thank you for taking the time to review this comment and for your work on this matter.

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**THE STATE BAR OF CALIFORNIA  
STANDING COMMITTEE ON  
PROFESSIONAL RESPONSIBILITY AND CONDUCT  
FORMAL OPINION INTERIM NO. 20-0004**

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

**DIGEST:** Remote practice does not alter a lawyer’s ethical duties under the California Rules of Professional Conduct and the State Bar Act. Lawyers and law firms should implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision.

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**STATEMENT OF FACTS**

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

**INTRODUCTION**

In response to advances in technology, the California wildfires, the COVID-19 pandemic, and other disasters, more and more lawyers are working remotely. No California Rule of Professional Conduct specifically addresses lawyers who practice remotely. Rather, the same rules of professional conduct that apply to attorneys practicing in traditional law firm offices apply to attorneys practicing remotely.<sup>2</sup> The application of the rules, however, raises unique

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issues for lawyers working remotely. This opinion will focus on the primary rules that may be implicated by a lawyer's remote legal practice. While this opinion presents hypothetical facts to provide one common example, the ethical obligations discussed herein would apply to lawyers who work remotely regardless of the underlying reasons or whether a traditional, physical office space remains available.

## DISCUSSION

### 1. Duty of Confidentiality, Rule 1.6; Business and Professions Code Section 6068, Subdivision (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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

When working from a ~~"home office,"~~ home, 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 who use the computer. Other reasonable security measures include implementing two-factor authentication, strong passwords and auto-logout 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 consider disabling the listening capability of smart speakers, virtual assistants or other listening-enabled devices unless needed to assist with legal services.<sup>6</sup> The duty to implement reasonable measures should be tailored to each remote

**Commented [ED1]:** In big firms, "home office" usually refers to the office where the firm is headquartered.

<sup>3</sup> See, e.g., Cal. State Bar Formal Opn. Nos. 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. Nos. 477R (2017) and 483 (2018).

<sup>4</sup> See, Cal. State Bar Formal Opn. No. 2012-184; see also ABA Formal Opn. No. 498 (2021) 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").

<sup>5</sup> *Id.*

<sup>6</sup> ABA Formal Opn. No. 498 (2021) at 6.

working environment (e.g., kitchen/dining room office or backyard) and account for the presence of third parties, such as household members, neighbors, and repair workers.

In addition to ensuring that confidential client data is secure in ~~“home offices,”~~ home working environments, lawyers should ~~also~~ remind clients who are working remotely to follow stringent confidentiality practices in their own remote working environments. For virtual mediations, hearings, and depositions, 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, when using videoconferencing for confidential attorney-client meetings, lawyers should consider requiring passwords or PINs for participants.<sup>7</sup>

Because Law Firm will be moving to a smaller, shared office space, Law Firm will also need to implement reasonable 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 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.<sup>8</sup>

## **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.”<sup>9</sup> Our prior ethics opinions also explain a lawyer’s duty of technology competence.<sup>10</sup> 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.<sup>11</sup> Our committee agrees that this reasonableness standard applies to a lawyer’s duty

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<sup>7</sup> See also, Pennsylvania Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Opn. No. 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>.

<sup>8</sup> See, e.g., Cal. State Bar Formal Opn. No. 1997-150; Colorado Bar Ass’n Ethics Opn. No. 89 (revised and reissued on March 12, 2018); NYSBA Ethics Opn. No. 939 (2012); see also California Rule of Professional Conduct 7.1 and 7.5.

<sup>9</sup> 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.”).

<sup>10</sup> See, Cal. State Bar Formal Opn. Nos. 2010-179; 2012-184; and 2015-193.

<sup>11</sup> ABA Formal Opn. No. 477R (2017) at 4.

of technology competence for the purpose of discipline under the Rules of Professional Conduct.<sup>12</sup>

Law Firm should ensure that its technology solutions are sufficient to permit lawyers to reasonably access client files while working remotely. It is a good practice to require that files are saved to a centralized, secure case management system. Law Firm should also regularly back up files to ensure reasonable access in the event of a data loss.<sup>13</sup>

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.<sup>14</sup>

In addition, a lawyer's duty of competence includes the "mental, emotional, and physical ability reasonably necessary for the performance" of legal services.<sup>15</sup> The health, personal (e.g., school closures, childcare, or other family responsibilities), or financial impacts of pandemics 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.<sup>16</sup> 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.<sup>17</sup>

### 3. Duty of Communication, Rule 1.4

~~While working remotely, more~~ Lawyers working remotely increasingly may communicate with prospective or current clients via a secure website portal, email, or other form of online communications. In communicating with prospective clients, Law Firm should take reasonable steps to avoid forming unintended attorney-client relationships, such as including disclaimers on its website 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

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<sup>12</sup> See, Cal. State Bar Formal Opn. Nos. 2020-203 at 5; 2010-179 at 2–6.

<sup>13</sup> ABA Formal Opn. No. 498 (2021) at 5.

<sup>14</sup> 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) and 7.4.

<sup>15</sup> Rule 1.1(b)(ii).

<sup>16</sup> *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [213 Cal.Rptr. 236] (decided under former rules)

<sup>17</sup> Rules 1.1 and 1.3; ABA Formal Opn. No. 482 ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust.").



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.<sup>18</sup>

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 . . . ."<sup>19</sup> A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."<sup>20</sup> When using electronic forms of communication, the lawyer should ensure that the client is receiving and understanding the information exchanged.<sup>21</sup> In certain circumstances, phone conferences or video-conferences may be needed. Even if litigation matters are delayed because of an emergency or another disaster, lawyers should continue to maintain communications with clients regarding the case status and any significant updates.

Lawyers should also ensure their continued ability to communicate with clients during an emergency and exchange alternative contact information.<sup>22</sup> It is a good practice to communicate with clients regarding their schedules and availability, which may be altered during an emergency, to 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 impacts the lawyer's ability to represent clients, the A~~ lawyer needs to communicate with clients about the impact any illness or emergency has on the lawyer's representation, including the lawyer's mental, emotional, or physical ability to handle the representation, to permit a client to make an informed decision regarding the representation.<sup>23</sup>

#### **4. Duty of Supervision, Rules 5.1–5.3**

<sup>18</sup> See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

<sup>19</sup> Rule 1.4(a)(2)–(3).

<sup>20</sup> Rule 1.4(b).

<sup>21</sup> See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

<sup>22</sup> See, ABA Formal Opn. No. 482 at 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.").

<sup>23</sup> Rule 1.4(b); see also Oregon State Bar Coronavirus Response: Legal Ethics FAQ (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).

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 ensure compliance by other lawyers with the Rules of Professional Conduct and the State Bar Act. Second, a subordinate lawyer has an independent duty to comply with the rules and cannot simply follow the instruction of the lawyer's supervisor.<sup>24</sup> 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.<sup>25</sup> 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."<sup>26</sup>

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. 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 and training, to ensure the security of remote access and that the conduct of its lawyers and non-lawyers ~~complies~~ with the Rules of Professional Conduct.

**Commented [ED2]:** The subject of this clause is 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 Firm should implement "Bring Your Own Device" (BYOD) policies that require lawyers and staff to maintain the confidentiality of firm and client data on personal devices. Reasonable BYOD practices include security 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.<sup>27</sup> 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

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<sup>24</sup> Rule 5.2.

<sup>25</sup> Rule 5.3(b), Comment.

<sup>26</sup> Rule 5.3(a).

<sup>27</sup> For additional suggested BYOD practices, see ABA Formal Opinion 498 (2021) 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>.

with their professional duties while working remotely regardless of whether Law Firm has implemented any formal policies and procedures.<sup>28</sup>

As noted above, Law Firm should also implement policies and procedures for disaster and succession planning, and data breaches.<sup>29</sup> To facilitate Law Firm's ability to safeguard and access client files ~~in the event of following~~ 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, it is a good practice to use video conferencing for important trainings or meetings.

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.<sup>30</sup>

##### **5. Unauthorized Practice of Law, Rule 5.5 and Business and Professions Code Sections 6125– 6133<sup>31</sup>**

The committee recognizes that lawyers working remotely may temporarily or permanently relocate to another state where the lawyer is not licensed to practice law. 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 other state bar ethics committees have issued opinions regarding unauthorized practice of law considerations for attorneys remotely practicing the law of the jurisdictions in which they are

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<sup>28</sup> See rule 5.1(a) ("A lawyer shall comply with these rules and the State Bar Act notwithstanding that the lawyer acts at the direction of another lawyer or other person.").

<sup>29</sup> ABA Formal Opn. No. 482 (describing lawyers' ethical obligations relating to disasters); ABA Formal Opn. No. 483 (describing lawyer's ethical obligations relating to data breach or cyber-attack); Cal. State Bar Formal Opn. No. 2020-203 (same).

<sup>30</sup> See, e.g., ABA Formal Opn. No. 498 (2021) at 7; Cal. State Bar Formal Opn. No. 2010-179 at 4–5; New York State Bar Association Ethics Opn. No. 842; Oregon State Bar Ethics Opn. No. 2011-188 (revised 2015).

<sup>31</sup> This committee does not opine on issues of unauthorized practice of law, including whether a particular conduct or activity constitutes the unauthorized practice of law.

licensed while physically present in a jurisdiction in which they are not admitted due to COVID-19 or other circumstances.<sup>32</sup>

Lawyers not licensed in California who are working remotely in California should consult rule 5.5(b), California Rules of Court 9.40–9.48, Business and Professions Code sections 6125 et seq. and relevant authorities regarding multijurisdictional practice and the unauthorized practice of law.<sup>33</sup>

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<sup>32</sup> See, e.g., ABA Formal Ethics Opn. No. 495 at 3–4 (“[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 Opn. No. 24-20 (2020) at 3 (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. No. FAO #2019-4, Out-of-State Attorney Working Remotely From Florida Home (2020) (approved by the Supreme Court of Florida on May 20, 2021) (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 Opn. No. 19-03 (2019) at 1 (“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.”).

<sup>33</sup> See, *Birbrower, Montalbano, Condon & Frank, P.C. v. Sup. Ct.* (1998) 17 Cal.4th 119, 128–129 [70 Cal.Rptr.2d 304] (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 [76 Cal.Rptr.2d 922] (“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.”).

## CONCLUSION

Lawyers may ethically practice remotely under the California Rules of Professional Conduct and the State Bar Act, provided they continue to comply with these rules, including the duties of confidentiality, competence, communication, and supervision. Lawyers should implement reasonable measures to ensure compliance that are tailored to the relevant circumstances and remote working environment.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Trustees, any persons, or tribunals charged with regulatory responsibilities, or any licensee of the State Bar.

*[Publisher's Note: Internet resources cited in this opinion were last accessed by staff on August 10, 2021. Copy of these resources are on file with the State Bar's Office of Professional Competence.]*

## Public Comment - Proposed Opinion 20-0004

Commenting on behalf of an organization	No
Name	Molly Watson
City	Nevada City
State	California
Email address	<a href="mailto:caledattorney@gmail.com">caledattorney@gmail.com</a>
From the choices below, we ask that you indicate your position. (This is a required field.)	Support
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>My husband and I live in the forest in a fire prone area. Our home is located near the site of last year's Jones Fire and about 10 miles from this year's River Fire. To escape possible wildfire danger, we would like to have the option to move out of state where I would exclusively represent California clients remotely. My hope is that the California Bar Association will recognize wildfire danger as an ongoing emergency in California warranting remote representation by its members.</p>