

1 THE STATE BAR OF CALIFORNIA
2 STANDING COMMITTEE ON
3 PROFESSIONAL RESPONSIBILITY AND CONDUCT
4 FORMAL OPINION INTERIM NO. 20-0004
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7 **ISSUES:** What are a California lawyer's ethical duties when working remotely?

8 **DIGEST:** Remote practice does not alter a lawyer's ethical duties under the California
9 Rules of Professional Conduct and the State Bar Act. Managerial lawyers must
10 implement reasonable measures, policies, and practices to ensure continued
11 compliance with these rules in a remote working environment, with a particular
12 focus on the duties of confidentiality, technology competence, communication,
13 and supervision.

14 **AUTHORITIES**

15 **INTERPRETED:** Rules 1.1, 1.3, 1.4, 1.6, 5.1–5.3, and 5.5 of the Rules of Professional Conduct of
16 the State Bar of California.¹

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

18 Business and Professions Code sections 6125 et seq.

19
20 **STATEMENT OF FACTS**

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

29
30 **INTRODUCTION**

31 In response to advances in technology, the California wildfires, the COVID-19 pandemic, and other
32 disasters, more and more lawyers are working remotely. No California Rule of Professional Conduct
33 specifically addresses lawyers who practice remotely. Rather, the same rules of professional conduct
34 that apply to attorneys practicing in traditional law firm offices apply to attorneys practicing remotely.²
35 The application of the rules, however, raises unique issues for lawyers working remotely.³ This opinion

¹ Unless otherwise indicated, all references to "rules" in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

² See also, Cal. State Bar Formal Opn. No. 2012-184 (discussing lawyers' ethical obligations when practicing in a virtual law office).

³ Many of these same issues are likewise implicated by lawyers who practice in virtual law offices. See, *id.*

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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 Firm⁴ 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.⁵ 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 managerial and supervisory lawyers must engage in reasonable efforts to ensure that these vendors' conduct is compatible with the lawyers' ethical obligations.⁶ Reasonable measures could include investigating the provider's reputation, history, security and backup measures; limiting access to confidential information; carefully reviewing the terms of service to ensure they contain adequate provisions concerning data security and the handling of breaches of confidentiality; and periodically reviewing and monitoring providers' policies, practices and procedures to ensure that they remain compatible the lawyers' ethical obligations.⁷ 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.⁸

When working from home, lawyers must 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 could create separate accounts for any other household

⁴ Rule 1.0.1(c) defines "law firm" as "a law partnership; a professional law corporation; a lawyer acting as a sole proprietorship; an association authorized to practice law; or lawyers employed in a legal services organization or in the legal department, division or office of a corporation, of a government organization, or of another organization." "Law Firm" is used in this opinion as shorthand with reference to the responsibilities of the Law Firm's managerial lawyers. The Rules regulate the conduct of lawyers, rather than law firms, through professional discipline. See, Rule 1.0(a).

⁵ 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).

⁶ Rule 5.3(a)-(b).

⁷ For additional factors to consider in vetting and overseeing cloud providers, see Cal. State Bar Formal Opn. No. 2012-184; ABA Formal Opn. No. 498 (2021) at 3; Illinois State Bar Ass'n Professional Conduct Advisory Opn. 16-06; New York State Bar Ass'n Committee on Professional Ethics Opn. 842; Pennsylvania Bar Ass'n Committee on Legal Ethics and Professional Responsibility Opn. 2011-200.

⁸ *Id.*

members who use the computer. Other reasonable security measures could include implementing two-factor authentication, strong passwords and auto-logout after the computer is inactive. To the extent physical files are used, lawyers must ensure that they are stored and disposed of securely. Lawyers could disable the listening capability of smart speakers, virtual assistants or other listening-enabled devices unless needed to assist with legal services.⁹ This opinion does not intend to set forth specific mandatory specific measures as technology and associated risks are continually evolving and the reasonableness of security measures will depend upon multiple factors, including the client's instructions or needs, the sensitivity of the information, and the remote working environment (e.g., kitchen/dining room office or backyard) and the presence of third parties, such as household members, neighbors, and repair workers. The failure to implement reasonable security measures may jeopardize the duty of confidentiality or the attorney-client privilege.¹⁰

In addition to ensuring that confidential client data is secure in home working environments, lawyers should remind clients who are working remotely to follow stringent confidentiality practices in their own remote working environments.

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.¹¹

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."¹² Our prior ethics opinions also explain a lawyer's duty of technology competence.¹³ 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

⁹ ABA Formal Opn. No. 498 (2021) at 6.

¹⁰ See, e.g., Cal. Formal Opn. No. 2010-179 at 6; ABA Formal Opn. 498 at 5; ABA Formal Opinion 477R at 8.

¹¹ 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.

¹² 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.").

¹³ See, Cal. State Bar Formal Opn. Nos. 2010-179; 2012-184; and 2015-193.

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on the ABA Cybersecurity Handbook.¹⁴ Our committee agrees that this reasonableness standard applies to a lawyer’s duty of technology competence.¹⁵

Law Firm must 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 must also regularly back up files to ensure reasonable access in the event of a data loss.¹⁶

Lawyers must also stay abreast of relevant 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.

In addition, a lawyer’s duty of competence includes the “mental, emotional, and physical ability reasonably necessary for the performance” of legal services.¹⁷ 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. Similarly, the remote working environment itself may also affect a lawyer’s mental or emotional health.¹⁸ The duty to render competent legal services is not generally excused under these circumstances.¹⁹ Lawyers must take reasonable measures to ensure that they are able to provide competent legal services to their clients even in the event of a disaster. One way of doing so is to plan in advance to ensure that competent representation may still be rendered to clients in the event that a disaster adversely affects a lawyer’s ability to render competent and diligent legal services.²⁰

3. Duty of Communication, Rule 1.4

While working remotely, lawyers may increasingly communicate with prospective or current clients via a secure website portal, email, or other form of online communications, instead of in-person meetings. 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

¹⁴ ABA Formal Opn. No. 477R (2017) at 4.

¹⁵ See, Cal. State Bar Formal Opn. Nos. 2020-203 at 5; 2010-179 at 2–6.

¹⁶ ABA Formal Opn. No. 498 (2021) at 5.

¹⁷ Rule 1.1(b)(ii).

¹⁸ See, e.g., ABA Commission of Lawyers Assistance Program, January 2021 Update: https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession/; California Lawyers Assistance Program: <https://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>; Patrick Smith, *As Remote Work Brings Isolation, How Can Firms Keep Lawyers in the Fold?*: <https://www.law.com/americanlawyer/2020/03/31/as-remote-work-brings-isolation-how-can-firms-keep-lawyers-in-the-fold/>.

¹⁹ *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [213 Cal.Rptr. 236] (decided under former rules)

²⁰ 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.”).

authority to act on the client’s behalf.²¹ Prospective clients should be advised about the firm’s hybrid structure to the extent material to the representation, such as where the firm’s lawyers may not be able to meet with the client in person.

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”²² A lawyer must also “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²³ When using electronic forms of communication, the lawyer must ensure that the client is receiving and understanding the information exchanged.²⁴ 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 must continue to maintain communications with clients regarding the case status and any significant updates.²⁵

To ensure their continued ability to communicate with clients during an emergency, lawyers could exchange alternative contact information.²⁶ It is also 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 adversely affects the lawyer’s ability to represent clients, the lawyer must communicate with clients about the effect on the lawyer’s representation to permit a client to make an informed decision regarding the representation.²⁷

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

²¹ See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

²² Rule 1.4(a)(2)–(3).

²³ Rule 1.4(b).

²⁴ See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

²⁵ See also Rule 1.3(b) (“reasonable diligence” requires that “a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.”).

²⁶ 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.”).

²⁷ 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).

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supervisor.²⁸ 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.²⁹ 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."³⁰

Under the facts presented, Law Firm must ensure that it provides appropriate tools and equipment, technology support, training, and monitoring to its lawyers and staff. Managerial lawyers could 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 must implement reasonable remote policies and practices, such as 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. It is a good practice to 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 could 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 could 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.³¹ Managerial lawyers are 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.³²

Managerial lawyers and lawyers overseeing non-legal staff must 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.

²⁸ Rule 5.2.

²⁹ Rule 5.3(b), Comment.

³⁰ Rule 5.3(a).

³¹ 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>.

³² 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.").

Finally, as described above in connection with the duty of confidentiality, lawyers must adequately vet 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.³³

5. Unauthorized Practice of Law, Rule 5.5 and Business and Professions Code Sections 6125–6133

The committee recognizes that lawyers working remotely may temporarily or permanently relocate to another state where the lawyer is not licensed to practice law. 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. 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 and local 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.³⁴

³³ 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 Ass'n Ethics Opn. No. 842; Oregon State Bar Ethics Opn. No. 2011-188 (revised 2015).

³⁴ 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.”); Delaware State Bar Ass’n Committee on Professional Ethics Opn. 2021-1 (concluding that “lawyers licensed in Delaware . . . may ethically engage in the practice of Delaware law, for clients with Delaware matters, while physically present in another jurisdiction in which they are not admitted” unless prohibited by the law of the other jurisdiction; lawyers may not hold themselves out as being licensed to practice in the other jurisdiction and may not advertise or otherwise hold themselves out as having an office in the other jurisdiction); Florida Bar Standing Committee on the Unauthorized 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); New Jersey Committee on the Unauthorized Practice of Law Opn. 59 and Advisory Committee on Professional Ethics Opn. 742 (October 6, 2021) (non-New Jersey-licensed lawyers may practice out-of-state law from New Jersey, provided they do not maintain a “continuous and systematic presence” in New Jersey or hold themselves out as being available for the practice of law in New Jersey); 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.”); Bar Ass’n of San Francisco Ethics Opn. 2021-1 (“A lawyer who is not licensed in California, and who does not advertise or

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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.³⁵

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 must 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.]

otherwise hold himself or herself out as a licensed California lawyer, does not establish an office or other systematic or continuous presence for the practice of law in California, and does not represent a California person or entity, but is merely physically present in California while using modern technology to remotely practice law in compliance with the rules of the jurisdiction where the lawyer is licensed, should not be held in violation of California's Unauthorized Practice of Law ("UPL") rule and laws, specifically California Rules of Professional Conduct ("CRPC") Rule 5.5, or the State Bar Act, Business & Professions ("B&P") Code §§6125-6126.").

³⁵ 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.").

Ethical Obligations While Working Remotely Draft Opinion-Public Comments

- **Hubley** requests clarification re: Section 5 on unauthorized practice of law (“UPL”) and proposes revisions in attachment.
 - We are not authorized to opine on UPL.
- **Watson** also seeks guidance re: UPL in response to wildfires.
- **Eaton** suggests redlined edits that are primarily stylistic and one typo.
 - Revised to address some proposed edits.
- **Furman** asks for additional guidance re: data encryption in response to risks in cloud computing and use of third-party providers. Suggests language be added to footnote 4.
 - This seems unnecessary given the context and reference to multiple opinions on this subject for additional guidance.
- **BASF Legal Ethics Committee**
 - Suggests addressing consequences of a breach of confidentiality as a result of technological incompetence and lack of due diligence or the failure to implement reasonable measures. The opinion should state that the Law Firm's lawyers need to understand the impact of an inadvertent disclosure due to inadequate security measures on the client and the client's matter, such as waiver of confidentiality and the attorney-client privilege. See Cal. Formal Opn. No. 2010-179 at 6; see also ABA Model Rule 1.6 (Duty of Confidentiality), Cmt. [19]; ABA Formal Opinion 477R (Securing Communication of Protected Client Information) at 8.
 - Incorporated.
 - States that mental health effects – both the positive and negative – derived from a remote practice itself and not just from pandemics and other disasters, should be noted.
 - Incorporated and added reference to sources noted below.
 - The Duty of Supervision section on pages 5 and 6 should state that supervisory duties of managerial lawyers include the development and implementation of policies and procedures that promote wellness among associates and staff (Rule 5.1).
 - This seems more like a best practice than rule requirement. We should discuss.
 - The opinion should provide references to mental health resources and select articles that bring attention to this issue. See, e.g., ABA Commission of Lawyers Assistance Program, January 2021 Update:
https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession/; California Lawyers Assistance Program:
<https://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance->

Program; Patrick Smith, *As Remote Work Brings Isolation, How Can Firms Keep Lawyers in the Fold?*: <https://www.law.com/americanlawyer/2020/03/31/as-remote-work-brings-isolation-how-can-firms-keep-lawyers-in-the-fold/>.

- Incorporated per above.
- In section 3 (Duty of Communication), the opinion should state that prospective clients should be advised about the firm's hybrid structure to the extent material to the representation, such as where the firm's lawyers may not be able to meet with the client in person.
 - Incorporated.
- Lawyers should discuss with the client whether the client has specific confidentiality requirements to assess whether the firm's existing security measures are adequate.
 - This seems equally true for traditional law firm environments and not unique to remote practice. We should discuss.
- The last paragraph of section 3 states, "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." Opinion should also state: if circumstances exist that present grounds for mandatory or permissive termination under Cal. Rules of Prof. Conduct, Rule 1.16(a) or (b), the lawyer must, before terminating the representation, "take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e) [return of client file upon request and return of unearned fees]."
 - Again, this seems to be basic requirement relating to all withdrawals and not unique to remote practice.
- Recommends opinion apply UPL analysis to the facts or at least reference BASF's recent ethics opinion that specifically addresses this issue, San Francisco Bar Ass'n Form. Opn. 2021-1: <https://www.sfbar.org/wp-content/uploads/2021/08/BASF-Ethics-Opinion-re-UPLMJP-8.2.21-Final-002.pdf>.
 - We are not authorized to opine on UPL but added a reference to BASF opinion.
- **OCBA Professionalism and Ethics Committee**
 - Recommends opine on UPL given increased interest in remote work.
 - Recommends Section 5 be expanded to identify specific issues attorneys should consider, such as disclosure to client when attorney moves out-of-state during engagement, whether out-of-state practice is temporary or permanent, and residence requirement for in-house counsel under CRC 9.46(c)(7).

- This seems to go too far given our limitations, and we have referenced the CRC generally in the opinion. I don't suggest we provide further detail or guidance on only CRC 9.46.
- Recommends include brief discussion of duty of diligence.
 - It doesn't seem necessary to devote a section to this duty as it pertains to remote practice, but I noted in a footnote to the duty of communication section where it appears applicable.
- Notes typo and incorrect link.
 - Fixed typo but link in footnote 29 works fine for me.
- **California Lawyers Association (CLA)**
 - The issue presented appears to be narrower than the opinion's discussion, which is not limited to duties when working remotely "in response to the Covid-19 pandemic or other disaster situation." Because remote practice may continue in the long-run CLA recommends that the issue not be limited to "disaster" situations and that footnote 14 be removed.
 - Agreed, we broadened in our prior COPRAC meeting edits, but I further revised the issue paragraph and removed footnote 14, which is no longer as applicable as it was when the opinion was initially drafted.
 - Concerned re: use of "should" where rules require that a lawyer must do something. For example, the digest provides that "[l]awyers and law firms should implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote environment." However, under the Rules, managerial lawyers **must** "make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these rules and the State Bar Act," CRPC 5.1, and that the "conduct [of nonlawyers] is compatible with the professional obligations of the lawyer," CRPC 5.3. "Should" is aspirational, not mandatory. Examples of the use of "should" are found in the first sixth lines of the second full paragraph of page 2, the first line of the last paragraph on p.3, the first line of the first paragraph on p.4, and first sentence of the second paragraph of section 4, we believe "must" needs to replace "should."
 - Modified in these locations, but in one instance, I disagree that the examples provided are mandatory so revised accordingly.
 - Recommends the use of "could" instead of "should" for practice pointers/aspirational conduct.
 - Incorporated.
 - Recommends we provide additional questions that lawyers could ask cloud vendors to vet them and provides presentation slides with suggested long list of questions.

- Footnotes five and six of our draft ethics opinion already reference ethics opinions focused on the use of cloud providers, so it seems unnecessary to go into this level of detail in this opinion. However, I provided some more context for these opinions in footnote five and added reference to a couple of other ethics opinions, rather than referencing the slides CLA noted.
- Recommends that where the opinion first includes a reference to something the “law firm” must do, a footnote be added that explains what is meant by that usage. In other words, the obligations are on the managerial lawyers or shareholders of firm. This footnote could also remind readers that the definition of “firm or law firm” in CRPC 1.0.1(c) includes a solo practice.
 - Incorporated.
- Recommends that we focus on insights or changes from Cal. State Bar Ethics Opn. 2012-184 or note if concerns remain the same.
 - Noted this following our first reference to this Virtual Law Office (“VLO”) opinion.
- Recommends we review to confirm if recommendations are specific to remote practice, such as portions of the section on duty of communication.
 - Revised duty of communication section to make connection clearer.
- Recommends provide additional clarity regarding duties concerning cloud providers. Would any such duty be different when an established provider such as Amazon, Microsoft or DropBox is involved as opposed to a newly- created startup? Does a solo practitioner have the same “leverage” to obtain written assurances as would a big law firm or a Fortune 500 corporation’s law department? We believe that if COPRAC is suggesting that more than just reviewing a provider terms of service is required, then it would be more helpful to suggest specific and realistic guidance on what a lawyer should do to satisfy the lawyer’s duty to 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.” Again, suggests COPRAC provide examples of questions to ask provider.
 - Provided more detailed guidance, including explaining what was intended by investigating, monitoring, and obtaining written assurances. Also, changed to “could include” to clarify that these are just examples. Did not provide additional detail re: small versus large firm or established versus newer provider, given overall reasonableness standard and reference to other opinions focused on use of cloud computing.
- Recommends we remove portions CLA considers unrelated to remote practice.
 - Removed as these two sentences were focused on obligations in response to COVID-19 pandemic and disasters, which we have now broadened to focus more on remote practice.

- Recommends that the opinion specify what kind of shared office space the firm is using in the example. “Shared office space” can mean a number of things (e.g., a “WeWork” environment, a law firm establishing a “hoteling” environment for its own lawyers [i.e., where firm lawyers have no assigned office space], or a traditional shared office space environment as described in COPRAC Opinion 1997-150).
 - No changes made. We had initially used “WeWork,” but removed in response to comments by COPRAC members that the opinion should not be limited to a particular type of shared working environment, especially given that “WeWork” or other shared working environments may continue to change. The ethical obligations we discuss would apply to all shared working environments.
- Recommends the opinion address the ethical issues involved in transporting materials and equipment between home and office.
 - No changes made. Transporting materials between home and office is not unique to remote work environment other than the fact that quantity may be larger.
- Recommends that we clarify that managerial lawyers are ultimately responsible for the Firm’s remote policies and procedures, even if delegate daily monitoring and enforcement.
 - The paragraph CLA references does not suggest otherwise and does not address delegating responsibility. Changed “should be” to “are” in case this caused confusion.
- The statement regarding disaster and succession planning appears misplaced and recommends this sentence be deleted or moved.
 - Deleted as this statement related more to impacts of COVID-19, pandemics and disasters and this opinion is now focused on remote practice.
- Questions feasibility of obtaining employee consent to remote locking or wiping of personal phones and believe resources in footnote adequately address BYOD issues. Recommends delete this portion of the BYOD discussion.
 - Done in connection with above edit although remote locking and wiping is addressed in ABA and other ethics opinions.
- **Los Angeles County Bar Association Professional Responsibility and Ethics Committee**
 - Believes multiple sections of the opinion are “unremarkable” based on other opinions addressing these topics and recommends we focus on UPL and that we amend UPL rule to incorporate remote practice.

- The UPL issue is a consistent recommendation from many individuals and bar associations. We should discuss at our next meeting and make it clearer in our opinion that we are not authorized to opine on this issue.

From: noreply@fs16.formsite.com on behalf of [Formsite](#)
To: [Tuft, Andrew](#)
Subject: 20-0004 - Public Comment Form Result #14057508
Date: Thursday, August 12, 2021 11:22:54 AM

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**Commenting on
behalf of an
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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.

**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.¹

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~~ 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.² The application of the rules, however, raises unique

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

² See also, Cal. State Bar Formal Opn. No. 2012-184.

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.³ 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.⁴ 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.⁵

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.⁶ 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.

³ 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).

⁴ 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").

⁵ *Id.*

⁶ 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.⁷

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.⁸

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

⁷ 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>.

⁸ 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.

⁹ 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.”).

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

¹¹ ABA Formal Opn. No. 477R (2017) at 4.

of technology competence for the purpose of discipline under the Rules of Professional Conduct.¹²

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.¹³

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.¹⁴

In addition, a lawyer's duty of competence includes the "mental, emotional, and physical ability reasonably necessary for the performance" of legal services.¹⁵ 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.¹⁶ 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.¹⁷

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

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

¹³ ABA Formal Opn. No. 498 (2021) at 5.

¹⁴ 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.

¹⁵ Rule 1.1(b)(ii).

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

¹⁷ 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.¹⁸

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"¹⁹ A lawyer must also "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."²⁰ When using electronic forms of communication, the lawyer should ensure that the client is receiving and understanding the information exchanged.²¹ 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.²² 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.²³

4. Duty of Supervision, Rules 5.1–5.3

¹⁸ See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

¹⁹ Rule 1.4(a)(2)–(3).

²⁰ Rule 1.4(b).

²¹ See, Cal. State Bar Formal Opn. No. 2012-184 at 5.

²² 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.").

²³ 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.²⁴ 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.²⁵ 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.”²⁶

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.²⁷ 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

²⁴ Rule 5.2.

²⁵ Rule 5.3(b), Comment.

²⁶ Rule 5.3(a).

²⁷ 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.²⁸

As noted above, Law Firm should also implement policies and procedures for disaster and succession planning, and data breaches.²⁹ 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.³⁰

5. Unauthorized Practice of Law, Rule 5.5 and Business and Professions Code Sections 6125– 6133³¹

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

²⁸ 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.").

²⁹ 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).

³⁰ 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).

³¹ 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.³²

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.³³

³² 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.”).

³³ 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	caledattorney@gmail.com
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>

From: noreply@fs16.formsite.com on behalf of [Formsite](#)
To: [Tuft, Andrew](#)
Subject: 20-0004 - Public Comment Form Result #14121582
Date: Tuesday, September 7, 2021 1:28:52 PM
Attachments: [f-120-86-14121582_JOEN2dkP_CA_Ethics_Suggested_edits_to_Section_5.pdf](#)

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Commenting on behalf of an organization	No
Name	Jessica Hubley
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State	California
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From the choices below, we ask that you indicate your position. (This is a required field.)	Support if Modified
ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.	<p>I support the findings of this proposed formal opinion except with respect to Section 5, for which I respectfully request further detail and clarification.</p> <p>This section 5, as drafted, suggests that attorneys who have moved, whether temporarily or permanently, in light of the COVID pandemic do not violate ethics rules of the CA Bar, but does not so state clearly and unequivocally. The section's citation, footnote 32, seems to include a selections of both ABA guidance and other state opinions that confuse, rather than clarify, what elements of a representation or practice would constitute a violation of California rules. For example, if I am located temporarily in Georgia and represent a CA corporation whose CEO is also a resident of Georgia, it is not clear whether the CEO's residence in Georgia, as opposed any other non-California state, would create a violation of California rules. It is understandable that this Committee is unable to opine on the rules of other jurisdictions. It would be more helpful to CA practitioners to know with certainty whether representing any particular type of client while working remotely constitutes a violation of the California rules, or what criteria they must meet to work remotely on matters which they could properly represent</p>

if located in a CA office to satisfy those rules, while leaving them the burden of researching the rules applicable to the local jurisdiction. The difference in construction would merely be "remote practice under a CA license is allowed if [the attorney accurately represents licensure, etc]." I would also appreciate clarification of the effect of establishing formal residency in another state for purposes of voting, etc on this analysis. The attached suggested edits are intended to cover both requests.

Relatedly, the concept of "holding out an office in the state" is outdated. Many attorneys, and especially younger, transactional, and technology attorneys, no longer have an office with its own phone line, open hours, conference rooms, etc. (a "Traditional Office"), and may never use one. This introduces confusion where one's "office" is a room in the home, and one's work phone is your personal cell phone. Attorneys from less-privileged and marginalized backgrounds are much more likely to be in this latter type of office situation, using personal devices (which should nonetheless be subject to confidentiality and security constraints).

Historic and model rules contemplate a Traditional Office, which might communicate to the public that an attorney is licensed to practice in the jurisdiction where the office is located. Few remote offices present this risk. Yet, attorneys will often answer the question "where are you working from" by describing their physical location. Section 5 and Footnote 32 raise confusion about whether such a statement about where you are working would be tantamount to "establishing a public office." This may be further confused if law practice revenues are used to cover costs of the facility, such as rent and utilities, which would be a proper business expense in connection with a dedicated home office space under California law for employees or sole proprietors under most circumstances.

Finally, for lawyers licensed in another jurisdiction working remotely from California, it would be helpful to clarify Business and Professions Code 6125 et seq.'s requirement that a lawyer without a CA license does not represent that they are entitled to practice law. If the goal is accurately conveying to the public what your license status is, this should be interpreted as a prohibition on representing that they are licensed to practice law in California, as opposed to a prohibition on making an accurate representation that they are licensed as a lawyer elsewhere.

I attach a proposed edit to the text of Section 5 for consideration, but welcome any changes the Committee may consider in light of the above concerns. Thank you for your consideration.

may upload your comment as an attachment. Only one attachment will be accepted per comment submission. We accept the following file types: text (.txt), Microsoft Word (.doc), WordPerfect (.wpd), Rich Text Format (.rtf) and Adobe Acrobat PDF (.pdf). We do not accept any other file types. Please DO NOT submit scanned documents. Files must be less than 4 megabytes in size.

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October 22, 2021

VIA ATTACHMENT TO ONLINE FORM

Angela Marlaud
The State Bar of California
Standing Committee on Professional Responsibility and Conduct
Office of Professional Competence
150 Howard Street
San Francisco, CA 94105

Re: BASF COMMENTS ON PROPOSED FORMAL OPINION INTERIM
NO. 20-0004

Dear COPRAC Members:

This letter is being submitted on behalf of the Bar Association of San Francisco's ("BASF") Legal Ethics Committee ("Committee") to provide comments on Proposed Formal Opinion Interim No. 20-0004 by the California State Bar's Committee on Professional Responsibility and Conduct ("COPRAC"), entitled "Ethical Obligations While Working Remotely." Thank you for providing guidance on this issue. We respectfully submit the following comments and recommendations, which reflect the thoughts of our Committee as reviewed and approved by the BASF board.

The first section regarding the Duty of Confidentiality provides detailed guidance on how lawyers and firms can maintain client confidentiality in a remote practice. We suggest adding a brief discussion of the consequences of a breach of confidentiality as a result of technological incompetence and lack of due diligence. The opinion states: "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." It goes on to discuss examples of reasonable security measures. However, it does not address the risks resulting from the failure to research and implement such measures. The opinion should state that the Law Firm's lawyers need to understand the impact of an inadvertent disclosure due to inadequate security measures on the client and the client's matter, such as waiver of confidentiality and the attorney-client privilege. In that regard, although Cal. Formal Opn. No. 2010-179 is generally referenced as one of several COPRAC technology opinions, it should be specifically cited for this point. *See also*, ABA

Model Rule 1.6 (Duty of Confidentiality), Comment [19]; ABA Formal Opinion 477R (Securing Communication of Protected Client Information) (also cited at fn. 11 under Duty of Competence section).

The first full paragraph of page 4, concerning the Duty of Competence (Rule 1.1), addresses the intangible financial and mental health effects of "pandemics and other disasters," which catalyzed the growing shift to remote law practices. However, although a remote practice appears to create more flexibility to facilitate a work/life balance, the remote environment itself can also be isolating, especially for lawyers who lack established relationships and mentorships, such as newly licensed lawyers and lateral hires. Thus, we suggest three revisions: First, the mental health effects – both the positive and negative – derived from a remote practice itself and not just from pandemics and other disasters, should be noted. Second, the Duty of Supervision section on pages 5 and 6 should state that supervisorial duties of managerial lawyers include the development and implementation of policies and procedures that promote wellness among associates and staff (Rule 5.1). Third, the opinion should provide references to mental health resources and select articles that bring attention to this issue. *See e.g.*, ABA Commission of Lawyers Assistance Programs, January 2021 Update:

https://www.americanbar.org/groups/lawyer_assistance/well-being-in-the-legal-profession/; California Lawyers Assistance Program: <https://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program>; Patrick Smith, *As Remote Work Brings Isolation, How Can Firms Keep Lawyers in the Fold?*: <https://www.law.com/americanlawyer/2020/03/31/as-remote-work-brings-isolation-how-can-firms-keep-lawyers-in-the-fold/>.

With respect to section 3 (Duty of Communication), we suggest that the opinion state that prospective clients should be advised about the firm's hybrid structure to the extent material to the representation, such as where the firm's lawyers may not be able to meet with the client in person, as applicable. Lawyers may discuss with the client whether the client has particular confidentiality requirements to assess whether the firm's existing security measures are adequate.

The last paragraph of section 3 states, "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." We recommend additional guidance: if circumstances exist that present grounds for mandatory or permissive termination under Cal. Rules of Prof. Conduct, Rule 1.16(a) or (b), the lawyer must, before terminating the representation, "take reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel, and complying with paragraph (e) [return of client file upon request and return of unearned fees]."

Finally, section 5 concerns the unauthorized practice of law, stating in part: "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." We urge the Committee to analyze application of the cited rules to a relevant scenario: an out-of-state lawyer who works from a home office located in California for clients who are located in the lawyer's licensing jurisdiction or for California clients seeking legal services in that jurisdiction. In the


absence of such analysis, we request that the Committee reference BASF's recent ethics opinion that specifically addresses this issue, San Francisco Bar Ass'n Form.Opn. 2021-1:

[https://www.sfbar.org/wp-content/uploads/2021/08/BASF-Ethics-Opinion-re-UPLMJP- 8.2.21-Final-002.pdf](https://www.sfbar.org/wp-content/uploads/2021/08/BASF-Ethics-Opinion-re-UPLMJP-8.2.21-Final-002.pdf)

Thank you for your consideration.

Respectfully,

BASF LEGAL ETHICS COMMITTEE

By: 
Dianne Jackson McLean, Chair
Carl W. Chamberlin, Vice Chair



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November 10, 2021

Office of Professional Competence, Planning and Development
State Bar of California
180 Howard Street
San Francisco, California 94105-1639

Re: Proposed Formal Opinion Interim No. 20-0004

Dear Sir/Madam:

The Orange County Bar Association (OCBA) respectfully submits the following comments concerning Proposed Formal Opinion Interim No. 20-0004.

Founded over 100 Years ago, the OCBA has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors made up of practitioners from large and small firms, with varied civil and criminal practices, of different ethnic backgrounds and political learnings, has approved these comments prepared by the Professionalism and Ethics Committee.

We appreciate that COPRAC has taken the time to provide thoughtful guidance regarding remote working. We agree with much of the analysis and offer the following comments.

First, as a general matter, given the increased interest among attorneys regarding remote work, the Committee may wish to consider whether a revision to Rule 5.5 is appropriate to provide further and more complete guidance.

With respect to the proposed opinion, we believe that Section 5, regarding “Unauthorized Practice of Law, Rule 5.5, and Business and Professions Code Sections 6125-6133,” should be expanded significantly. Many practitioners are interested in the ability of California-licensed lawyers to practice in jurisdictions in which they are not licensed. The discussion in Section 5 appears too short, given the high level of interest in that particular topic. Indeed, the relative brevity of the Section may make it seem as if the subject and its related ethical considerations are not important, or nuanced.

We understand that the Committee does not opine on issues regarding the unauthorized practice of law. The Committee may wish to reevaluate whether it should continue to constrain its ethics opinions in this area given the opportunity to provide more definitive guidance to practitioners on this

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issue. The current approach leaves practitioners to look to local or out of state opinions, which vary.

In any event, we also believe that this section would be more helpful if it identified specific issues for attorneys to consider. For example, depending on the nature of legal services being provided, it may be important, if not required, for an attorney to disclose to the client that the attorney has moved to another State during the course of the engagement. That may be particularly true if the client originally hired the attorney based on geographic location or perceived familiarity with a community, property, or local Court practice. As another example, the Committee may want to note that the permanence of any practice out of State should be considered: i.e., that practicing law in another State on a temporary basis, such as calling in for a hearing while on vacation in another State, may raise different issues than when an attorney has permanently moved from California to another State, yet intends to continue to serve California clients. The Committee also may want to note that California Rule of Court 9.46 requires that an in-house counsel who does work for a California company must “reside” in California. *See* Cal. R. Ct. 9.46(c)(7). We also suggest that the proposed Opinion include a brief discussion of the duty of diligence, Rule 1.3, in connection with remote working. The Opinion’s discussions of the duty of communication (Rule 1.4) and duty of competence (1.1) are helpful, and in the same vein, it could be valuable to remind the community that while remotely working, attorneys remain bound to act with reasonable diligence in representing clients and not neglect or disregard their matters.

In footnote 14, “experts” should be changed to the singular “expert.”

In footnote 27, the link to the cited article does not work.

Thank you for your consideration of our comments and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read "Larisa Dinsmoor", with a stylized, flowing script.

Larisa Dinsmoor
2021 President
Orange County Bar Association

November 11, 2021

Justin Fields, Chair
Committee on Professional Responsibility and Conduct (COPRAC)
State Bar of California
180 Howard Street
San Francisco, CA 94105

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

Dear Mr. Fields and members of COPRAC:

On behalf of the California Lawyers Association Ethics Committee (CLAEC) and in response to the State Bar of California's request for public comment, we respectfully submit this letter regarding Interim Opinion 20-0004. CLAEC appreciates the opportunity to provide comment on this proposed opinion. While we agree with the timeliness of the proposed opinion, we have some comments and suggestions, which we have numbered for ease of reference.

1. The issue presented appears to be narrower than the opinion, i.e., the discussion is not limited to duties when working remotely "in response to the Covid-19 pandemic or other disaster situation." See also the Conclusion of the opinion. In light of the experiences of the last year and a half, we believe remote practice will remain, at least to some degree, a common workplace strategy. We recommend that the issue not be limited to "disaster" situations and better reflect the interim opinion's breadth. Footnote 14 would then seem out of place in this opinion.

2. One thread that runs throughout this opinion that concerns us is the use of "should" in circumstances where the rules require that a lawyer must do something. For example, the digest provides that "[l]awyers and law firms should implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote environment." However, under the Rules, managerial lawyers **must** "make reasonable* efforts to ensure that the firm* has in effect measures giving reasonable* assurance that all lawyers in the firm* comply with these rules and the State Bar Act," CRPC 5.1, and that the "conduct [of nonlawyers] is compatible with the professional obligations of the lawyer," CRPC 5.3. "Should" is aspirational, not mandatory. Examples of the use of "should" are found in the first sixth lines of the second full paragraph of page 2, the first line of the last paragraph on p.3, the first line of the first paragraph on

p.4, and first sentence of the second paragraph of section 4, we believe “must” needs to replace “should.”

a. If COPRAC wants to propose aspirational behavior, we suggest that the word “could” be used instead of “should” to avoid the impression of creating a new standard for compliance with the rules. For example, the long fourth sentence in the first full paragraph on page 2 (“In doing so ...”) includes a laundry list of things a lawyer “should” do with respect to a cloud service provider, which includes “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.” We believe “could” should replace “should” in this sentence so as not to suggest this list is a standard for lawyers’ conduct. Please also refer to our Comment 5, below.

b. We note that the first full paragraph on page 2 also states: “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.” We believe further guidance will assist lawyers in complying with this obligation and suggest that COPRAC provide examples of the types of questions lawyers could ask, noting that any particular question or list of questions is not viewed as something that “must” be asked. (See, e.g., list of questions at <http://www.ediscoverycalifornia.com/31ShortCloudQuestions.pdf>)

c. We also recommend substituting “could” for “should” in line 3 of the second full paragraph on page 2 (“For instance, lawyers could ...”) and putting “could” between “measures” and “include” in line 4 of that paragraph (“Other reasonable measures could include ...”) The last sentence of the second full paragraph on p.4 uses the word “should” when the import of the paragraph is that lawyers *must* competently provide legal services even in a disaster situation. We recommend revising the last sentence along the following lines:

Lawyers must take reasonable measures to ensure that they are able to provide competent legal services to their clients even in the event of a disaster. One way of doing this is to ~~should~~ formulate a plan in advance to ensure that competent representation may still be rendered to clients in the event that a disaster ~~impacts~~ adversely affects a lawyer’s ability to render competent and diligent legal services.

Please note that we have suggested changing “impacts” to “adversely affects” in the above sentence, and we would recommend the same in the second full

paragraph on p.5, because this wording is consistent with the Rules, which often use the word “affects” but nowhere suggests that conduct must have an “impact” to trigger a duty on the part of a lawyer.

3. We recognize that when COPRAC states a “law firm” must (or should) do something, it is really a shorthand description of the responsibilities of the managerial partners or shareholders in the firm, as California has not adopted the concept of law firm discipline. However, not all California lawyers will understand that distinction. We recommend that where the opinion first includes a reference to something the “law firm” must do, a footnote be added that explains what is meant by that usage. This footnote could also remind readers that the definition of “firm or law firm” in CRPC 1.0.1(c) includes a solo practice.

4. Footnote 2 and the discussion cites to Formal Opn. 2012-184, which covers much of the same ground as this opinion. We wonder if it might be better for this opinion to focus on any new insights or changes from that opinion. If the concerns remain the same, then perhaps the opinion could so state. Also, we suggest the committee review this opinion to consider whether its recommendations are specific to remote practice. For instance, in the last paragraph on p.4 (“Lawyers also need to ensure ...”), it is not evident why the duties regarding communication in a remote working environment are any different from the duties when a lawyer is working in an office and communicating by phone, email or video conference with a client. Perhaps the paragraph can be started by stating “[Just as when working in the office,](#) lawyers need to ensure” See also the last line on p.4, we do not see that an electronic communication would create any greater need to ensure the client is “understanding” the communication.

5. In addition to our general concerns regarding the use of “should” set forth in Comment 2.a, above, we also question the substance of what COPRAC is recommending that lawyers do with respect to cloud service providers. What does “investigate and monitor” entail? What do you mean by “written assurances”? We question whether a provider would likely be willing to permit its business to be investigated or monitored by a law firm’s lawyers. Is it likely that such a provider would be willing to provide “written assurances” beyond what might be found in its terms of service? We recommend that COPRAC revisit these statements and provide specific guidance regarding how a lawyer is expected to “investigate and monitor” the services of a cloud service provider. Would any such duty be different when an established provider such as Amazon, Microsoft or DropBox is involved as opposed to a newly-created startup? Does a solo practitioner have the same “leverage” to obtain written assurances as would a big law firm or a Fortune 500 corporation’s law department? We believe that if COPRAC is suggesting that more than just reviewing a provider terms of

service is required, then it would be more helpful to suggest specific and realistic guidance on what a lawyer should do to satisfy the lawyer's duty to 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." Perhaps COPRAC can suggest questions that might be asked of the provider as we observe in paragraph 2.b, above.

6. We believe there are several items in the opinion that are unrelated to its topic and request that COPRAC consider removing them so as not to distract the reader. We identified as unrelated the third paragraph on p.2 that carries over onto p. 3 ("In addition to ensuring ...") and the scenario described in the second sentence on p.3 regarding online hearings, mediations and arbitrations.

a. Should COPRAC decide to retain its discussion of online hearings, mediations and arbitrations, we recommend that it clarify precisely the issue that it is addressing on pages 2-3. One way of doing this would be as follows:

~~For~~ Often during in-person ~~virtual~~ mediations, hearings, and depositions, clients and lawyers will engage in a confidential sidebar discussion out of the hearing of the other participants. When such proceedings are virtual and lawyer and client are in separate locations, such sidebars can present special challenges. Prior to the proceeding, lawyers should discuss with clients how they will communicate privately during an online hearing and should ~~counsel~~ remind their clients about the need to mute their microphones ~~and~~ when engage—engaging in separate, private communications with the attorney to avoid compromising confidential or attorney-client privileged information.

7. The opinion does not specify what kind of shared office space the firm is using in the example. "Shared office space" can mean a number of things (e.g., a "WeWork" environment, a law firm establishing a "hoteling" environment for its own lawyers [i.e., where firm lawyers have no assigned office space], or a traditional shared office space environment as described in COPRAC Opinion 1997-150). We recommend that COPRAC specify which kind of space is intended. We also recommend that the opinion address the ethical issues involved in transporting materials and equipment between home and office.

8. Regarding the discussion on managerial lawyers' duties in the first paragraph on page 6 (the fourth paragraph of the section), we believe that managerial lawyers are ultimately responsible for the Firm's remote policies and procedures. Although the managerial lawyers might delegate the day-to-day monitoring and

enforcement of the policy, we are not aware of any authority that would permit them to delegate ultimate responsibility for it. We ask COPRAC to consider including such a clarification.

9. There is no continuity between the first sentence of the second paragraph on p. 6 (“As noted above, Law Firm ...”) and the discussion that comes before and after it. It is unclear to us why this statement regarding disaster and succession planning appears in the midst of a discussion of a BYOD policy. We recommend that this sentence be deleted or placed in a footnote and inserted elsewhere in the opinion. However, we could not find any previous discussion of succession planning in this opinion.

10. Regarding the BYOD policies, which we would consider moving to a footnote, we have concerns regarding “employees’ consent” to “remote locking or wiping in the event of security breach, theft, loss of device, or employee departure.” We question the feasibility of obtaining employees’ consent to the firm’s “remote locking or wiping” of their personal phones. We believe that the resources cited in footnote 27 adequately address this issue, and we recommend deleting this BYOD discussion.

Thank you for your consideration.

Sincerely,



Alison Buchanan, Chair
California Lawyers Association Ethics
Committee



LOS ANGELES COUNTY BAR ASSOCIATION

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Telephone: 213.627.2727 | www.lacba.org

November 12, 2021

Justin Fields
Chair, Standing Committee on
Professional Responsibility and Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Formal Opinion 20-0004
[Ethical Duties When Working Remotely]

Dear Mr. Fields and Members of the Committee:

The Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association appreciates the opportunity to submit the following comments on proposed Opinion No. 20-0004 (Ethical Duties When Working Remotely).

The Committee begins by referring to the fact that many lawyers began working remotely in response to the COVID-19 pandemic. Very many of those lawyers continue working remotely, and a number of those have made temporary remote offices into permanent ones.

We think the greatest ethical danger placed before lawyers who work remotely is inadvertently engaging in the unauthorized practice of law (UPL). Lawyers who work remotely must be cognizant of California's rules as well as the rules of the jurisdiction in which the remote work is being performed. Moreover, the rules of both jurisdictions apply regardless of whether lawyers work remotely because of the consequences of a disaster, or otherwise.

The opinion reaches UPL, however, only at the end of its discussion; and the Committee's primary admonition is to consult the UPL rules of the state where the lawyer is physically present. The opinion's conclusion, that lawyers may ethically practice remotely so long as they continue to comply with the California rules, is unremarkable.

The first four parts of the Discussion, before reaching remote work and the risk of UPL, review rules regarding confidentiality, competence, communication, and supervision. The Discussion begins by referring to the Committee's many prior ethics opinions, and then gives specific advice relative to lawyers working in home offices and sharing computers with other family members. Later, the opinion advises law firms to maintain confidentiality by implementing "Bring Your Own Device" (BYOD) policies for lawyers working remotely.

We think it unnecessary for the opinion on remote work to review prior ethics opinions or discuss broad concepts such as whether a duty of reasonableness applies to a lawyer's duty of technology competence. Likewise as to giving advice on BYOD policies. A large number of BYOD opinions have been published over the past ten years, because BYOD policies are a concern for nearly every employer.

We think the opinion would be more helpful if UPL in connection with remote work and the opinions from other jurisdictions on that subject, including those that this Committee advises be consulted, were made central to the opinion.¹

We suggest, as per the other states' opinions on these subjects, that 20-0004 not be limited to issues related to ethical duties when working remotely in response to a

¹In Footnote 32, the Committee describes remote work opinions from the ABA, the District of Columbia, Utah, and Florida. In addition, the Delaware State Bar Association Committee on Professional Ethics concludes (in Form. Op. 2021-1) that Delaware-licensed lawyers may practice Delaware law, and work on Delaware matters, while present in another jurisdiction in which they are not admitted, unless prohibited by law of that other jurisdiction. Delaware lawyers may not hold themselves out as being licensed to practice in, and may not advertise in the other jurisdiction. (The Delaware opinion's genesis was also the COVID-19 pandemic, however its application is not limited to disasters or emergencies.)

New Jersey's Committee on the Unauthorized Practice of Law and Advisory Committee on Professional Conduct issued a joint opinion October 6, 2021, *permitting non-New Jersey-licensed lawyers to practice out-of-state law* from inside New Jersey, provided they do not maintain a "continuous and systematic presence" in New Jersey or hold themselves out as being available for the practice of law in New Jersey. (Lawyers who simply work remotely in New Jersey without exhibiting "outward physical manifestations" of their presence are not considered to have a "continuous and systematic presence" in New Jersey for UPL purposes.)

New York permits attorneys licensed there, "whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state," so long as the non-resident attorneys maintain physical offices within New York. *Schoenefeld v. State*, 29 N.E.3d 230, 25 N.Y.3d 22 (N.Y. 2015).

Also, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility issued its Formal Opinion 2020-300, "Ethical Obligations for Lawyers Working Remotely." This is a comprehensive opinion concluding attorneys must be extra cognizant of how work gets done remotely, how they secure their systems, securely access and transmit data, and prevent computer viruses and other cybersecurity risks. It concludes: "Although the pandemic created an unprecedented situation, the guidance provided applies equally to attorneys or persons performing client legal work on behalf of attorneys when the work is performed at home or at other locations outside of outside of their physical offices, including when performed at virtual law offices."

disaster. The same considerations apply to all such remote work, disaster-driven or otherwise.

California's Rule 5.5 forbids lawyers licensed here from violating other jurisdictions' regulations, and lawyers not licensed here from violating ours, but no guidance is provided in either case. (*Pro hac vice* status for repeated remote work is typically disallowed.) We think it is time that California's Rule 5.5 be amended to specify remote work guidance not just for California lawyers, but also for lawyers licensed elsewhere when they live in or visit California.

The Bar Association of San Francisco opines (in its Op. 2021-1) that a lawyer licensed in a state other than California, who does not advertise or otherwise hold himself or herself out as a licensed California lawyer, does not establish an office here, and does not represent a California person or entity, "but is merely physically present in California while using modern technology to remotely practice law in compliance with the rules of the jurisdiction where the lawyer is licensed," should not be held to be engaged in UPL. Rule 5.5 should make it clear that a California licensed attorney practicing out of the state would not be engaging in UPL under these same conditions.

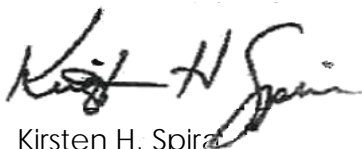
The ABA Standing Committee on Ethics and Responsibility is considering changing Model Rule 5.5, according to its chair, Lynda Shely, which could open up remote work for lawyers on a national scale.

Ohio has already amended its Rule 5.5 to allow for remote practice. As of September 2021, lawyers admitted to practice law in other states have been expressly permitted to practice law from Ohio, so long as they don't solicit or accept clients for representation in Ohio, hold themselves out as being licensed in Ohio, or otherwise violate Ohio law.

California lawyers need to know if they may practice remotely from states that have not issued any ethics opinions on these topics, and lawyers *not* licensed in California need guidance for working while living or vacationing here.

Thank you for the opportunity to comment on the proposed formal opinion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kirsten H. Spira". The signature is fluid and cursive, with the first name "Kirsten" being more prominent.

Kirsten H. Spira
Chair

Professional Responsibility and Ethics Committee