

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.
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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 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

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 at 3-4; ; 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 at 8-11. While beyond the scope of this ethics opinion, it would also be prudent for lawyer to consider applicable privacy laws, particularly if data are hosted outside of the United States. See ABA Model Rule 1.6, Cmt. [18]; Pennsylvania Bar Ass'n Committee on Legal Ethics and Professional Responsibility Opn. 2011-200 at 9.

⁸ *Id.*

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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, it is advisable to 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 must ensure that they are stored and disposed of securely. It is advisable to 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, it is also advisable to 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.").

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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. [Banola Cmt: Based on discussion at our last meeting, I recommend we remove this sentence which was added based on BASF LEC recommendation. This is another best practice, but I don't believe it clearly falls within the duty of communication and depends on the circumstances.]

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, it is advisable to 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

²¹ See, Cal. State Bar Formal Opn. No. 2012-184 at 5 (explaining that while lawyers in a traditional office environment have this same duty, the lack of in-person communication in connection with a virtual law office may make it more difficult for lawyers to make this determination, thus potentially requiring extra measures).

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).

4. Duty of Supervision, Rules 5.1–5.3

California’s rules relating to the duty of supervision reflect three separate sets of duties. First, rule 5.1 requires managerial and supervisory lawyers to make reasonable efforts to ensure compliance by other lawyers with the Rules of Professional Conduct and the State Bar Act. Second, a subordinate lawyer has an independent duty to comply with the rules and cannot simply follow the instruction of the lawyer’s supervisor.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, it is advisable for Law Firm to 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.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-lawyers or other lawyers must maintain regular communications to oversee their work. Because Law Firm is maintaining a physical office, in-person

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.”).

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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 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.

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196 Lawyers not licensed in California who are working remotely in California should consult rule 5.5(b),
197 California Rules of Court 9.40–9.48, Business and Professions Code sections 6125 et seq. and relevant
198 authorities regarding multijurisdictional practice and the unauthorized practice of law.³⁵

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CONCLUSION

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

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

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

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 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.”).