

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

ISSUE: What are a California lawyer’s ethical duties when working remotely?

DIGEST: Remote practice does not alter a lawyer’s ethical duties under the California Rules of Professional Conduct and the State Bar Act. Managerial lawyers must 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

A law firm (“Law Firm”) decides that it would like to provide its lawyers and staff with the flexibility to work remotely and plans to move to a smaller, shared office space. Law Firm plans to implement a hybrid work environment to provide its lawyers and staff with the flexibility to work remotely and in the physical office when necessary. It plans to rent shared workspace for its new physical office. Law Firm wants to know what ethical obligations arise for Law Firm and its lawyers as a result of this anticipated transition to its working environment.

INTRODUCTION

In response to advances in technology, the California wildfires, the COVID-19 pandemic, and other circumstances, more and more lawyers are working remotely. 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 issues for lawyers working remotely.³ 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

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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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 this committee's 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 that 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 with the lawyers' ethical obligations.⁷ If a lawyer is unable 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 if other household members share or have access to a home computer,

⁴ Rule 1.0.1(c) defines a "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 in reference to the responsibilities of 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 Ethics 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 pp. 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; and Pennsylvania Bar Ass'n Committee on Legal Ethics and Professional Responsibility Opn. 2011-200 at pp. 8-11. While beyond the scope of this ethics opinion, it would also be prudent for lawyers 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 p. 9.

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laptop, or printer.⁹ Reasonable security measures might include creating separate accounts for household members, implementing two-factor authentication, strong passwords, and automatic logging off when the computer becomes inactive, and disabling the listening capability of smart speakers, virtual assistants, or other listening-enabled devices unless needed to assist with legal services.¹⁰ To the extent physical files are used, lawyers must ensure that they are stored and disposed of securely. This opinion does not intend to set forth specific mandatory 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, 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.¹¹

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. This committee and several bar associations have issued ethics opinions addressing 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.¹²

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."¹³ Our prior ethics opinions also explain a lawyer's duty of technology competence.¹⁴ 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.¹⁵ This committee agrees that this reasonableness standard applies to a lawyer's duty of technology competence.¹⁶

⁹ This duty applies to other remote situations, such as lawyers working from airports, hotels or coffeeshops. See, Cal. State Bar Formal Opn. No. 2010-179.

¹⁰ ABA Formal Ethics Opn. No. 498 (2021) at p. 6.

¹¹ See, e.g., Cal. State Bar Formal Opn. No. 2010-179 at p. 6; ABA Formal Ethics Opn. 498 at p. 5; ABA Formal Ethics Opn. 477R at p. 8.

¹² 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.

¹³ 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.").

¹⁴ See Cal. State Bar Formal Opn. Nos. 2010-179; 2012-184; and 2015-193.

¹⁵ ABA Formal Ethics Opn. No. 477R (2017) at p. 4.

¹⁶ See, Cal. State Bar Formal Opn. Nos. 2020-203 at p. 5; 2010-179 at pp. 2-6.

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Law Firm must ensure that its technology solutions are sufficient to permit lawyers to reasonably access client files while working remotely. Requiring files to be saved to a centralized, secure case management system may help ensure reasonable access, for instance, if local files are lost or corrupted. Law Firm must also regularly back up files to ensure reasonable access in the event of data loss.¹⁷

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.¹⁸ 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.¹⁹ The duty to render competent legal services is not excused under these circumstances.²⁰ 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.²¹

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 authority to act on the client's behalf.²²

¹⁷ ABA Formal Ethics Opn. No. 498 (2021) at p. 5.

¹⁸ Rule 1.1(b)(ii).

¹⁹ 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>; and 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/>.

²⁰ *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [213 Cal.Rptr. 236] (decided under former rules).

²¹ Rules 1.1 and 1.3; ABA Formal Ethics 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.").

²² See, Cal. State Bar Formal Opn. No. 2012-184 at p. 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).

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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”²³ A lawyer must also “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²⁴ When using electronic forms of communication, the lawyer must ensure that the client is receiving and understanding the information exchanged.²⁵ In certain circumstances, teleconferences or videoconferences 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 status of the case and any significant updates.²⁶

Exchanging alternative contact information with clients will help ensure lawyer’s continued ability to communicate with clients during an emergency.²⁷ Confirming schedules and availability with clients, which may be altered during an emergency, may help 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.²⁸

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.²⁹ 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.³⁰ In addition, lawyers with managerial authority in a law firm “shall make reasonable efforts to ensure that the firm has in effect

²³ Rule 1.4(a)(2)–(3).

²⁴ Rule 1.4(b).

²⁵ See, Cal. State Bar Formal Opn. No. 2012-184 at p. 5.

²⁶ 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.”).

²⁷ See, ABA Formal Ethics Opn. No. 482 at pp. 2–3 (“To be able to reach clients following a disaster, lawyers should maintain, or be able to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible.”).

²⁸ 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).

²⁹ Rule 5.2.

³⁰ Rule 5.3(b), Comment.

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measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."³¹

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. As an example, 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.³² 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.³³

Managerial lawyers and lawyers overseeing nonlawyers or other lawyers must maintain regular communications to oversee their work. 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 videoconferencing 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.³⁴

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. Pursuant to a directive of the State Bar Board Committee on Education and Competence (now, the Board of Trustees), this committee may not

³¹ Rule 5.3(a).

³² For additional suggested BYOD practices, see ABA Formal Ethics Opn. No. 498 (2021) at p. 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>.

³³ 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.").

³⁴ See, e.g., ABA Formal Ethics Opn. No. 498 (2021) at p. 7; Cal. State Bar Formal Opn. No. 2010-179 at pp. 4–5; New York State Bar Ass'n Ethics Opn. No. 842; Oregon State Bar Ethics Opn. No. 2011-188 (revised 2015).

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opine on issues of unauthorized practice of law, including whether a particular conduct or activity constitutes the unauthorized practice of law. [We should discuss whether to provide any reasons for the directive as it is unclear, but it appears to be based on federal antitrust concerns that the Board believed could be implicated by opining on UPL.] 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.³⁵ 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.³⁶

³⁵ See, rule 5.5(a)(1).

³⁶ See, e.g., ABA Formal Ethics Opn. No. 495 at pp. 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 p. 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, *Fla. Bar re Advisory Opinion—Out-of-State Attorney Working Remotely from Fla. Home*, 318 So.3d 538 (Fla. 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 p. 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.”).

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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.³⁷

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 February 25, 2022. Copy of these resources are on file with the State Bar's Office of Professional Competence.]

³⁷ 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.”).

REDLINE

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

ISSUES~~ISSUE~~:

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DIGEST:

Remote practice does not alter a lawyer's ethical duties under the California Rules of Professional Conduct and the State Bar Act. Managerial lawyers must 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

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DISCUSSION

1. **Duty of Confidentiality, Rule 1.6; Business and Professions Code Section 6068, Subdivision (e)**

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laptop, or printer.⁹ Reasonable security measures might include creating separate accounts for household members, implementing two-factor authentication, strong passwords, and automatic logging off when the computer becomes inactive, and disabling the listening capability of smart speakers, virtual assistants, or other listening-enabled devices unless needed to assist with legal services.¹⁰ To the extent physical files are used, lawyers must ensure that they are stored and disposed of securely. This opinion does not intend to set forth specific mandatory 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, 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.¹¹

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⁹ This duty applies to other remote situations, [such as lawyers working from airports, hotels or coffeeshops](#). See, Cal. State Bar Formal Opn. No. 2010-179.

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¹¹ See, e.g., Cal. State Bar Formal Opn. No. 2010-179 at p. 6; ABA Formal Ethics Opn. 498 at p. 5; ABA Formal Ethics Opn. 477R at p. 8.

¹² 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.

¹³ 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.").

¹⁴ See Cal. State Bar Formal Opn. Nos. 2010-179; 2012-184; and 2015-193.

¹⁵ ABA Formal Ethics Opn. No. 477R (2017) at p. 4.

¹⁶ See, Cal. State Bar Formal Opn. Nos. 2020-203 at p. 5; 2010-179 at pp. 2-6.

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Law Firm must ensure that its technology solutions are sufficient to permit lawyers to reasonably access client files while working remotely. Requiring files to be saved to a centralized, secure case management system may help ensure reasonable access, for instance, if local files are lost or corrupted. Law Firm must also regularly back up files to ensure reasonable access in the event of data loss.¹⁷

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.¹⁸ 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.¹⁹ The duty to render competent legal services is not ~~generally~~ excused under these circumstances.²⁰ 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.²¹

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 authority to act on the client's behalf.²²

¹⁷ ABA Formal Ethics Opn. No. 498 (2021) at p. 5.

¹⁸ Rule 1.1(b)(ii).

¹⁹ 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>; and 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/>.

²⁰ *Smith v. State Bar* (1985) 38 Cal.3d 525, 540 [213 Cal.Rptr. 236] (decided under former rules).

²¹ Rules 1.1 and 1.3; ABA Formal Ethics 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.").

²² See, Cal. State Bar Formal Opn. No. 2012-184 at p. 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).

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”²³ A lawyer must also “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”²⁴ When using electronic forms of communication, the lawyer must ensure that the client is receiving and understanding the information exchanged.²⁵ In certain circumstances, teleconferences or videoconferences 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 status of the case and any significant updates.²⁶

Exchanging alternative contact information with clients will help ensure lawyer’s continued ability to communicate with clients during an emergency.²⁷ Confirming schedules and availability with clients, which may be altered during an emergency, may help 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.²⁸

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.²⁹ 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.³⁰ In addition, lawyers with managerial authority in a law firm “shall make reasonable efforts to ensure that the firm has in effect

²³ Rule 1.4(a)(2)–(3).

²⁴ Rule 1.4(b).

²⁵ See, Cal. State Bar Formal Opn. No. 2012-184 at p. 5.

²⁶ 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.”).

²⁷ See, ABA Formal Ethics Opn. No. 482 at pp. 2–3 (“To be able to reach clients following a disaster, lawyers should maintain, or be able to create on short notice, electronic or paper lists of current clients and their contact information. This information should be stored in a manner that is easily accessible.”).

²⁸ 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).

²⁹ Rule 5.2.

³⁰ Rule 5.3(b), Comment.

measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."³¹

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. As an example, 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.³² 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.³³

Managerial lawyers and lawyers overseeing nonlawyers or other lawyers must maintain regular communications to oversee their work. 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 videoconferencing 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.³⁴

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~~Pursuant to a directive of the State Bar Board Committee on Education and Competence (now, the Board of Trustees), this committee

³¹ Rule 5.3(a).

³² For additional suggested BYOD practices, see ABA Formal Ethics Opn. No. 498 (2021) at p. 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>.

³³ 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.").

³⁴ See, e.g., ABA Formal Ethics Opn. No. 498 (2021) at p. 7; Cal. State Bar Formal Opn. No. 2010-179 at pp. 4–5; New York State Bar Ass'n Ethics Opn. No. 842; Oregon State Bar Ethics Opn. No. 2011-188 (revised 2015).

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~~does~~may not opine on issues of unauthorized practice of law, including whether a particular conduct or activity constitutes the unauthorized practice of law. [We should discuss whether to provide any reasons for the directive as it is unclear, but it appears to be based on federal antitrust concerns that the Board believed could be implicated by opining on UPL.] 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.³⁵ 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.³⁶

³⁵ See, rule 5.5(a)(1).

³⁶ See, e.g., ABA Formal Ethics Opn. No. 495 at pp. 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 p. 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 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), [*Fla. Bar re Advisory Opinion—Out-of-State Attorney Working Remotely from Fla. Home*, 318 So.3d 538 \(Fla. 2021\)](#)) (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 p. 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.”).

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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.³⁷

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 February 25, 2022. Copy of these resources are on file with the State Bar's Office of Professional Competence.]

³⁷ 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 Round Two

- **Long** opposed because of technical demands/pressure on her solo practice from home and lack of technology skills.
 - As draft opinion states at page 2: “If a lawyer is unable 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.”
- **Browne** seeks guidance on UPL and asks us to consider Florida opinion.
 - We may not opine on UPL per State Bar policy and Florida opinion and many other UPL opinions are already referenced in footnote 36. We included additional citation for Florida opinion.
- **Anonymous** opposes recommendation to disable smart speakers as unrealistic given their ubiquitous use.
 - We previously discussed this and decided to keep in as one of several examples of a reasonable security measures lawyers might implement and included reference to ABA opinion.
- **Bassi** provides lengthy complaint about lawyers acting as private judges during pandemic.
 - This comment seems misplaced and focused on specific State Bar complaints.
- **Hoffman** comments concern proposed trust account amendments.
- **Orange County Bar Association (OCBA) Professionalism and Ethics Committee.**
 - Suggests we expand on UPL analysis, including explaining why COPRAC does not opine on this issue and providing examples of factors attorneys should consider, such as holding yourself out or temporal restrictions.
 - We should discuss whether to explain why we do not opine on UPL.
 - Providing factors to consider would exceed our intended scope. We have already referenced many other opinions for guidance in footnote 36 and parentheticals note relevant factors.
 - Recommends we provide examples of “other remote situations” in footnote 9.
 - Incorporated.
 - Recommends we delete references to disasters , such as on page 4 at end of Section 2 to avoid misunderstanding that opinion does not apply to all remote situations.

- The use of disasters here relates to duty of competence and staying abreast of relevant court rules that may be issued in response to disasters or pandemics; however, the issue presented, digest, conclusion and body are not limited to disasters.
- Recommends we suggest use of passwords for virtual meetings as a security measure on pages 2-3.
 - We tried to avoid providing too many practice pointers. For virtual meetings, other security measures may also be used such as the use of a “waiting room,” restricting access etc. and depends on platform used.
- On page 4, recommends we delete term “generally” before “excused under these circumstances.”
 - Incorporated as this seems unnecessary.