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California State Bar Issues Interim Ethics Opinion RE: Remote Work

On July 30, 2021, the California State Bar Standing Committee on Professional Responsibility and Conduct (COPRAC) tentatively approved Proposed Formal Opinion Interim No. 20-0004, which considers this question: “What are a California lawyer’s ethical duties when working remotely in response to the COVID-19 pandemic or another disaster situation?”

The opinion interprets rules 1.1, 1.3, 1.4, 1.6, 5.1–5.3, and 5.5 of the Rules of Professional Conduct of the State Bar of California (CRPC); Business and Professions Code sections 6068(e) and 6125, et seq. Essentially, the opinion states that 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 the relevant rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision.

In the past, COPRAC and the ABA have issued ethics opinions concerning duties when working remotely, particularly with respect to the use of technology. (See, 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); 2020-203 (addressing attorney’s ethical obligations regarding data breaches); see also ABA Formal Opn. Nos. 477R (2017) and 483 (2018). Drawing on the guidance from these past opinions, COPRAC addresses in this opinion the emerging trend of a “hybrid” law office in which staff and lawyers regularly work from a home office and the firm’s physical office is a rented, shared space.

With respect to confidentiality, the opinion states: “When working from a ‘home office,’ lawyers should implement reasonable measures to safeguard confidential client information, particularly as other household members may share or have access to a home computer or laptop. For instance, lawyers should create separate accounts for any other household members who use the computer. Other reasonable security measures include implementing two-factor authentication, strong passwords and auto-logout after the computer is inactive.” Physical files should be stored and disposed of securely. Disabling the listening capability of smart speakers and virtual assistants is recommended. And of course, client files and other confidential information should be stored securely in the shared physical office space.

The opinion reminds lawyers that the duty of competence includes technological competence, as discussed in prior COPRAC and ABA opinions. The opinion states further: “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.”

The opinion also acknowledged that the duty of competence includes the “mental, emotional, and physical ability reasonably necessary for the performance” of legal services. Thus, in the context of the pandemic and other disaster scenarios, “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.”

With respect to the duty to communicate, the opinion states: “When using electronic forms of communication, the lawyer should ensure that the client is receiving and understanding the information exchanged. 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.”

Supervisory duties under CRPC 5.1-5.3 are not diminished in a remote working environment. Implementation of policies and procedures is paramount in order to ensure that the firm’s attorneys are complying with ethical obligations and staff are properly supervised. However, the opinion provides critical and specific guidance tailored to the emerging trend of “hybrid” working arrangements. For example: “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.”

Unfortunately, the opinion does not provide significant guidance for out-of-state lawyers on how to avoid the unauthorized practice of law while practicing remotely “in” California. “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.” Lawyers are increasingly working remotely “in” one state while sitting in another, including California. Several other State Bar Associations and the ABA have issued more guidance on this issue. (See, Florida State Bar Advisory Opinion SC20-1220; ABA Formal Opinion 495; D.C. Opinion No. 24-20)

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