



AN ATTORNEY'S ETHICAL DUTIES When Working Remotely

By Janna Trolia, Esq.

The pandemic dramatically impacted how we practice law. The practice of law was stuck in ancient, outdated ways and had not adapted for decades to the available technology. Even in early 2020, electronic service of documents was uncommon. Facsimiles were still commonplace. Many counties did not allow electronic filing. It would have been unheard of, and perhaps even malpractice, to argue a dispositive motion, such as a motion for summary judgment, without appearing in person. Many courts required in-person attendance even for Case Management Conferences.

Now, everything has changed. Unless you ask a defense attorney who could previously bill by the hour for sitting in California traffic, most attorneys would agree that the change has been for the better. Nearly every county allows for electronic filing and has implemented high-tech remote appearance video technology. Firms have changed with the times and now regularly correspond and serve documents by email. Physical paper files have been largely replaced by high-tech document management systems and cloud-based systems. Everything is more efficient and organized, which has

only benefitted both the courts and litigants.

Since the pandemic, employees have become accustomed to working from home. In an increasingly competitive job market for both attorneys and staff, many law firms find it necessary to permit employees to work remotely.

Our firm is one of those firms. Despite being a relatively large plaintiff-side firm with 7 attorneys and 10 staff members, our office is completely remote. We do not have a dedicated office. Instead, we utilize Justice HQ, a fantastic, shared workspace service

directed at plaintiff-side attorneys. With four locations in Southern California, Justice HQ has allowed us a space to meet with clients and take depositions without the expense or hassle of needing our own office. Not only has our firm saved many thousands of dollars every month in rent and related overhead, but we also have a competitive advantage over other law firms by allowing our staff to work completely remote if they wish.

The positive changes of technology and the ability to work remote is accompanied by ethical concerns and unfortunately firms have very little authority guiding those practices. Despite the unfortunate sagas of Avenatti and Girardi, the State Bar has only issued a single guidance opinion over the past two years. That opinion, CAL 2023-208, deals with the ethical obligations when working remotely.

DUTY OF CONFIDENTIALITY

Obviously, without a dedicated office, our firm does not have a hard server. Instead, we utilize a cloud-based system, which has become commonplace for many remote companies. The state bar is clear that law firms are allowed to use third-party cloud providers to store or backup confidential client files or other technology solution vendors to facilitate remote practice.

However, it is also the law firm's responsibility to ensure that the technology it uses is consistent with applicable ethical obligations, including the duty of confidentiality. Under Professional Rule of Conduct, rule 5.3(b), "a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." The state bar explained that it considers a

third-party cloud provider as a "nonlawyer" under this rule. The partners or managerial attorneys have an obligation to ensure that these cloud providers have systems in place that are compatible with the firm's confidentiality obligations.

This includes 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 provider's policies, practices, and procedures to ensure that they remain compatible with the lawyers' ethical obligations.

For many firms this is intimidating. We are attorneys, not trained IT people! Plus, we may assume that the cloud-based service we are using, many of which are very well-known and reputable, are secure. That is not enough. If the firm is unable to evaluate the security of the cloud-based technology, then the firm has an obligation to consult with someone who possesses the requisite knowledge to ensure compliance with the duty of confidentiality.

Effectively ensuring confidentiality in a remote work model goes beyond avoidance of threats of hacking or inadvertent disclosure by a cloud-based service. Even 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, laptop, or printer.

The state bar has made it clear that failing to have reasonable protections in place violates an attorney's duty of confidentiality and the attorney-client privilege. Such reasonable protections may include creating separate accounts for household

members, implementing two-factor authentication, enabling automatic logging off when the computer becomes inactive, and disabling the listening capability of smart speakers, virtual assistants, or other listening-enabled devices.

In fact, having an easily breakable password such as "Password" or "123456" on your cloud network or your home computer likely, in and of itself, would be considered an ethical violation in failing to reasonably protect clients from disclosure.

DUTY OF COMPETENCE

Professional Rule of Conduct, rule 1.1 entitled "Competence" was amended in 2021 and now includes the following comment: "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.**" (emphasis added).

Allowing client documents to be destroyed, corrupted, or overwritten without protections in place violates rule 1.1 and an attorney's obligation to maintain their client's file. The attorney must ensure that there are alternative ways to access files in the event they are lost or corrupted. The system the attorney uses also must regularly back up files to ensure reasonable access in the event of data loss.

Lastly, a law firm must make sure that its technology is suitable such that its attorneys have reasonable access to client files while working remotely. Constant or repeated technical difficulties while working remotely is unacceptable when it begins to impact the quality of that attorney's practice.

DUTY OF COMMUNICATION

Prior to the pandemic, our firm would meet every potential new client in

person in the office or at the client's home. The client signed the retainer and other documents in-person. Many of our clients were unable to use zoom, skype, or facetime. For clients with disabilities or those who lived far from our office, it was particularly inconvenient and time-consuming to travel to our office.

Now, many of our attorneys and staff meet our clients for the first time by videoconference. We send the retainer agreement through DocuSign. In-person meetings with clients are becoming more and more rare, while our ability to stay in touch via email and zoom keeps us more connected with them than ever.

Professional Rule of Conduct, rule 1.4 requires that we keep open communication with our clients. The first step is making sure that the client **is your client**. Law firms are expected to 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. While lawyers in a traditional office have this same duty, the lack of in-person communication associated with a virtual law office heightens the risk of a mistaken identity.

Lastly, while most of the world now knows how to "zoom", there are still some clients who are not up to date with the technology. When using electronic forms of communication, the lawyer must ensure that the client is receiving and understanding the information exchanged.

This is particularly true when using an App such as Slack, Line, or WhatsApp to communicate with clients.

DUTY OF SUPERVISION

The California Rules of Professional

Conduct rules 5.1-5.3 provide three separate duties as to supervision.

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.

Rule 5.2 requires that a subordinate lawyer has an independent duty to comply with the rules and cannot simply follow the instruction of the lawyer's supervisor.

Rule 5.3 (comment) requires that 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 ethical duties.

Therefore, when allowing staff and junior attorneys to work from home, the firm must still ensure that it provides appropriate tools and equipment, technology support, training, and monitoring. This includes consulting with appropriate information technology staff or implementing technology measures to ensure proper supervision.

The law firm must have policies to ensure that its staff and junior attorneys are following the duties outlined above. If staff and attorneys are allowed to work on their own devices, it is still the law firm's responsibility to take steps to ensure that those devices meet the standards of confidentiality, competence, and communication.

The state bar is clear that managerial lawyers and lawyers overseeing nonlawyers or other lawyers must maintain regular communications to oversee their work. For virtual law firms without a physical office, the

state bar highly recommends the use of videoconferencing for important trainings or meetings.

CONCLUSION

Allowing staff and attorneys to work remote has created an industry that is more streamlined and efficient with better service to our clients. Even those resistant to change have found it necessary to allow at least some remote work to stay competitive in a worker-friendly job market. However, despite its advantages, remote work has also created unique issues in relation to an attorney's ethical responsibilities. Frankly, a law firm must have a firm grasp of the technology it uses to ensure that its attorneys meet their obligations of confidentiality, competence, and communication.



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