

# STATE BAR ETHICS OPINIONS ON INTERNET USE AND OTHER TECHNOLOGY ISSUES

By Andrew L. Tuft<sup>1</sup>

Stanford biologist Paul R. Ehrlich is credited with saying: “To err is human, but to really foul things up you need a computer.” Over the past decade, the technology surrounding computers has changed and advanced rapidly, increasing the chance for attorneys to inadvertently “really foul things up.” The internet, social media websites, smart phones, GPS technology and various web applications have become an integral part of our daily lives. These technologies allow clients, lawyers and commerce in general to engage in countless activities in unique and efficient ways. Many practitioners often inquire how the California Rules of Professional Conduct can be applied to these types of technological advances.

The State Bar of California offers several resources to help attorneys in researching professional responsibility issues. The primary resource available to attorneys is the State Bar Ethics Hotline. The Ethics Hotline is a confidential telephone information service which refers callers to California Rules of Professional Conduct, State Bar Act sections, advisory ethics opinions, and other relevant authorities. No one on the Ethics Hotline is permitted to provide legal advice or counsel; however, attorneys are enabled to pursue a thorough analysis of the law and to make their own informed decision on how to proceed in an ethical manner. The Ethics Hotline phone number is 1-800-2ETHICS and appears on the back of each member’s bar card.

While the Ethics Hotline cannot give legal advice or counsel, there is a group of attorneys who do provide ethical advice and guidance in the form of ethics opinions. The Committee on Professional Responsibility and Conduct (often referred to as “COPRAC”) is a standing committee of the State Bar Board of Governors. COPRAC’s primary charge is the development and issuance of advisory ethics opinions to assist attorneys in understanding their professional responsibilities under the California Rules of Professional Conduct. Although not binding, the opinions have been cited in decisions of the California Supreme Court, the State Bar Court Review Department, and the Courts of Appeal. These ethics opinions can be accessed from the “Ethics” page ([www.calbar.ca.gov/ethics](http://www.calbar.ca.gov/ethics)) on the State Bar of California’s website.

Over the past ten years, COPRAC has issued several ethics opinions addressing an attorney’s duty of professional responsibility in conjunction with the use of technology. This article provides a brief review three of those opinions.

## **State Bar Formal Opn. No. 2005-168: Law Firm Websites Allowing Visitors to Submit Questions on an Electronic Form**

In State Bar of California Formal Opinion Number 2005-168, COPRAC addresses the following issue: Does a lawyer who provides electronic means on his website for visitors to submit legal questions owe a duty of confidentiality to visitors who accept that offer but whom

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the lawyer elects not to accept as clients, if the attorney disclaims formation of an attorney-client relationship and a “confidential relationship”?

The hypothetical facts of this ethics opinion describe Wife who was searching the internet for an attorney to represent her in pursuing a divorce from Husband. During her search, Wife discovers Law Firm’s website which contains an electronic form where Wife can submit her name and contact information, along with a statement of facts related to her legal problem, and any questions Wife wishes to pose to Law Firm. Wife fills out the electronic form, discloses specific details related to her pending divorce and concludes her submission by stating, “I like your website and would like you to represent me.”

Below the text box in which Wife described her case was a list of “Terms” which stated: (1) I understand and agree that I may receive a response to my inquiry from an attorney at Law Firm; (2) I agree that by submitting this inquiry, I will not be charged for the initial response; (3) I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship; and (4) I further agree that I may only retain Law Firm or any of its attorneys as my attorney by entering into a fee agreement. I understand that I will not be charged for the response to this inquiry.

Below the Terms section were two boxes, one which read “SUBMIT” and the other read “CANCEL.” Wife clicked on the “SUBMIT” button; had she clicked the “CANCEL” button, Wife’s information would not have been transmitted to Law Firm.

Upon receiving Wife’s inquiry, Law Firm discovered that Husband had already retained Law Firm to explore the possibility of a divorce from Wife. The next day, an attorney in Law Firm sent wife an email, which stated: “We regret we will be unable to accept you as a client because there is a conflict with one of our present clients. Good luck with your case.”

Based on the hypothetical facts above, may Law Firm be precluded from representing Husband as a result of Law Firm’s contact with Wife on the ground that Law Firm has obtained material confidential information related to the subject matter of the representation?

Law Firm believes that preclusion from representing Husband is improper because Law Firm did not enter into an implied-in-fact or express attorney-client relationship with Wife, and therefore no duty of confidentiality should attach. Further, Law Firm has attempted to avoid taking on a duty of confidentiality by requiring Wife to agree that (1) by submitting a question, the inquirer is not forming an attorney-client relationship or a “confidential relationship;” and (2) whatever response Law Firm provides will not constitute legal advice but, rather, “general information.”

In response, Wife’s position is that the formation of an attorney-client relationship is not a prerequisite for a lawyer’s duty of confidentiality to attach. A lawyer may owe a duty of confidentiality to a prospective client who consults the lawyer in confidence for the purpose of retaining the lawyer. (See Cal. State Bar Formal Opn. No. 2003-161.) Therefore, although an attorney-client relationship did not arise from Wife’s consultation with Law Firm, Law Firm may still owe a duty of confidentiality to Wife.

COPRAC's opinion surmises that Wife's agreement that she would not be forming a "confidential relationship" does not, under the facts presented, mean that Wife could not still have a reasonable belief that Law Firm would keep her information confidential. The statement, "I also understand that I am not forming a confidential relationship," is potentially confusing to a lay person who may reasonably view it as a variant of her agreement that she has not yet entered into an attorney-client relationship with Law Firm. Conversely, if Law Firm had written its disclosure using a plain-language reference that Wife's submission would lack confidentiality, there would not have been a reasonable expectation of confidentiality.

In addition, COPRAC suggests Law Firm could have avoided the confidentiality issue entirely if its website requested only information from visitors necessary to perform a conflicts check before accepting further information. If Law Firm's website first requested the visitor to provide the names of all parties, children, former spouses, maiden names, etc., Law Firm could use this information to determine whether representing the visitor might create a conflict with one of its current clients, preventing Law Firm from receiving the confidential information.

COPRAC concludes that because Law Firm chose neither to make a plain-language reference to the non-confidential nature of the communications submitted via its website, nor first screen visitors for potential conflicts with existing clients, Law Firm may be disqualified from representing Husband should the court conclude that the information Wife submitted was material to the resolution of the divorce proceeding. A lawyer may avoid incurring a duty of confidentiality to visitors to the lawyer's website who disclose confidential information via the website only if the lawyer's website contains a statement in sufficiently plain language that any information submitted will not be confidential.

**State Bar Formal Opn. No. 2007-174: Release of Electronic Files  
to a Client upon Termination of Representation**

In State Bar of California Formal Opinion Number 2007-174, COPRAC discusses whether an attorney is ethically obligated, upon termination of employment, to promptly release to the client, at the client's request: (1) an electronic version of email correspondence; (2) an electronic version of the pleadings; (3) an electronic version of discovery requests and responses; (4) an electronic deposition and exhibit database; and/or (5) an electronic version of transactional documents.

In this opinion, Attorney A was originally retained by Client to represent Client in negotiating and executing an agreement with Corporation, under which Client entrusted a secret invention to Corporation for development, patenting, and commercialization in exchange for royalty payments. During the course of representation, Attorney A prepared transactional documents, including the agreement itself, using a commonly available word-processing computer program to create manipulable files, and saving such files in a readily searchable electronic document management system. During the representation, Attorney A sent and received various email correspondence.

In addition to the above transactional matter, Client also retained Attorney A in a separate matter to file and prosecute an action on Client's behalf against Landlord relating to Landlord's breach of a lease agreement. During the course of this representation, Attorney A prepared

pleadings and discovery requests and responses, using the same word-processing computer program as in the transactional matter, and preserved such files in the same readily-searchable electronic document management system. Attorney A also created an electronic database, which is searchable, containing deposition transcripts and exhibits. During this representation, Attorney A also sent and received various email correspondence.

Client has decided to terminate Attorney A's employment and to employ Attorney B instead. Client has requested that Attorney A release to Client all of Client's papers and property. Specifically, Client has requested an electronic version of the pleadings in the action against Landlord, an electronic version of the discovery requests and responses, and the electronic deposition and exhibit database. In addition, Client requested an electronic version of the transactional documents in the Corporation matter, expressing an intent to make them available to Attorney B to safeguard Client's interests with respect to Corporation's obligation to pay royalties under licensing agreements. As to each representation, Client has requested an electronic version of the email correspondence, for ease of searching its contents. In response, Attorney A has refused to release any of these items, claiming that each contain metadata reflecting confidential information belonging to other clients.

California Rule of Professional Conduct 3-700 is entitled Termination of Employment. Subparagraph (D) of the rule provides, "[s]ubject to any protective order or non-disclosure agreement," an attorney "whose employment has terminated shall . . . promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not . . ." The attorney must release client papers and property at no cost to the client. (Rule 3-700, Discussion.)

The scope of Rule 3-700(D) is conspicuous. Among "[c]lient papers and property," the rule includes specific items coming within listed categories and also any other items that are "reasonably necessary to the client's representation."

However, the rule was drafted before email and searchable electronic databases were being used by the legal profession. Attorney A may take the position that because the rule does not specifically discuss email, or electronic databases, Attorney A is not obligated under Rule 3-700(D) to release them to Client.

COPRAC points out that the rule clearly states an attorney is obligated to release "*all* the client papers and property." There is no distinction based on the *form* of any item, whether electronic or non-electronic. COPRAC reasons that "client papers and property" is not a static concept, but one whose content will change depending upon the circumstances, including items in electronic form as well as non-electronic form. (See, State Bar Formal Opinion No. 1994-134.)

Therefore, COPRAC reasons that Client's request for an electronic version of email correspondence and pleadings falls expressly under Rule 3-700(D)(1)'s listed categories of "correspondence" and "pleadings." Similarly, electronic versions of deposition and exhibit databases come under the expressly listed categories of "deposition transcripts" and "exhibits"

by implication, “inasmuch as deposition and exhibit databases, by definition, contain deposition transcripts and exhibits.”

However, Rule 3-700(D) does not contain an express reference to discovery requests and responses nor transactional documents. Nonetheless, COPRAC points out that these items fall under the category of items that are “reasonably necessary to the client’s representation.” (Rule 3-700(D)(1).) An item is reasonably necessary to the client’s representation if it is “generated during the representation’ for continuing use therein.” (See, State Bar Formal Opinion No. 1992-127.) Discovery requests and responses satisfy this definition of “reasonably necessary” since they may give rise to further discovery actions. In addition, they may be used as exhibits to motions and as exhibits at trial in the future. Transactional documents satisfy this definition as well because they may be used for monitoring performance under the original agreement with Corporation as well as any related agreement between the parties to that transaction and third persons who subsequently become involved.

COPRAC concludes that, upon termination of employment, an attorney is obligated under Rule 3-700(D)(1) to release to a client, at the request of the client: (1) an electronic version of email correspondence; (2) electronic versions of the pleadings; (3) electronic versions of discovery requests and responses; (4) electronic deposition and exhibit databases; and (5) electronic versions of transactional documents. COPRAC points out, however, that whenever an attorney is obligated to release items in electronic form, the attorney is not obligated to release them in any other application than the application in which the attorney possesses them (e.g. Word (.doc) instead of WordPerfect (.wpd)). COPRAC reasons this is because the attorney’s obligation is to *release* the items, not to *create* them or to *change* their format.

How should Attorney A reconcile the duty to release all of the electronic documents discussed above with the concern that each of the electronic items in question contains metadata reflecting confidential information belonging to other clients? In general, metadata refers to information describing the history, tracking, or management of an electronic document, which may include changes that were made to a document, a short summary of the document and other document properties. Attorney A is obligated under Business and Professions Code section 6068(e)(1) to protect each client’s confidential information. Therefore, Attorney A would have to take reasonable steps to scrub any metadata reflecting confidential information belonging to other clients from any of the electronic items before releasing them to Client.

### **State Bar Formal Opn. No. 2010-179: Use of Computer Technology to Transmit or Store Client Information**

In State Bar of California Formal Opinion Number 2010-179, COPRAC analyzes whether an attorney violates the duties of confidentiality and competence he owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third persons.

The hypothetical facts describe Attorney who is an associate at a law firm. The law firm provides a laptop computer for Attorney’s use on client and firm matters and includes software necessary to his practice. The firm has informed Attorney that the computer is subject to the law firm’s access as a matter of course for routine maintenance and also for monitoring to ensure that

the computer and software are not used in violation of the law firm's computer and Internet-use policy. Unauthorized access by employees or unauthorized use of the data obtained during the course of such maintenance or monitoring is expressly prohibited. Attorney's supervisor is also permitted access to Attorney's computer to review the substance of his work and related communications.

Client has asked for Attorney's advice on a matter. Attorney takes his laptop computer to a local coffee shop and accesses a public wireless Internet connection to conduct legal research on the matter and to send emails to Client. He also takes his laptop computer home to conduct the research and to send emails to Client using his personal wireless Internet system.

Because almost every attorney uses some form of technology in the practice of law, attorneys are faced with an ongoing responsibility of evaluating the level of security of the technology they use. COPRAC states that its opinion is intended to set forth the general analysis an attorney should undertake when considering whether to use a particular form of technology.

### *1. Duty of Confidentiality*

Under Business and Professions Code section 6068(e)(1) attorneys have an express duty "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her own client." (See also, California Rule of Professional Conduct 3-100 – Confidential Information of a Client.) There are very few exceptions to the duty of confidentiality. The discussion section following Rule 3-100 states a "member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law."

Section 952 of the California Evidence Code defines "confidential communication between client and lawyer" for purposes of application of the attorney-client privilege, and it includes disclosure to third persons "to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." Although the duty to preserve confidential client information is broader in scope than the attorney-client privilege, the underlying principle in analyzing whether a breach of confidence has occurred is similar: if the transmission of information through a third party is reasonably necessary for the purposes of the representation, the transmission should not be deemed to have destroyed the confidentiality of the information. In addition, section 917(b) of the California Evidence Code states, "[a] communication . . . does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication."

### *2. Duty of Competence*

The manner in which an attorney chooses to safeguard confidential client information is governed by the duty of competence. Determining whether a third party has the ability to access and use confidential client information in a manner that is unauthorized or without consent must be considered in conjunction with this duty.

The duty of competence is governed by California Rule of Professional Conduct 3-110. Rule 3-110(A) prohibits the intentional, reckless or repeated failure to perform legal services with competence. Under Rule 3-110(B) “competence” may apply to an attorney’s diligence and learning and skill when handling matters for clients. In addition, the duty of competence also applies to an attorney’s “duty to supervise the work of subordinate and non-attorney employees or agents.” (Discussion to Rule 3-110.)

Currently, California is not an ABA Model Rules state. However, the ABA Model Rules may be consulted for guidance of an attorney’s ethical duty, particularly in areas where there is no direct authority in California, so long as the Model Rules do not conflict with California public policy. (*City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4<sup>th</sup> 839, 852; and California Rule of Professional Conduct 1-100(A).) COPRAC cites to Comments [16] and [17] of ABA Model Rule 1.6, which state, among other things: (1) a lawyer must act competently to safeguard confidential client information from inadvertent or unauthorized disclosure by the lawyer or others who are subject to the lawyer’s supervision; and (2) when transmitting a communication that includes confidential client information, the lawyer must take reasonable precautions to avoid receipt of the information by unintended parties.

Thus, in order to act competently, an attorney must take appropriate steps to make sure that both secrets and privileged information belonging to a client remain confidential and that the attorney’s handling of this type of information does not result in a waiver of any privilege or protections.

Taking the above authorities under consideration, COPRAC lists and discusses in detail various factors an attorney should consider before using a specific technology. (This article lists these factors. For COPRAC’s complete analysis, see the full text of State Bar Formal Opinion 2010-179.) In brief, the factors identified by COPRAC are:

1. The level of security afforded by the use of a particular technology, including whether reasonable precautions may be taken when using the technology to increase the level of security;
2. The legal ramifications to a third party who intercepts, accesses or exceeds authorized use of another person’s electronic information;
3. The degree of sensitivity of the information. The greater the sensitivity of the information, the less risk an attorney should take with technology;
4. The possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product;
5. The urgency of the situation; and
6. Client instructions and circumstances.

After applying these factors to the hypothetical, COPRAC concludes that Attorney would not violate his duties of confidentiality and competence to Client by using the laptop computer. This is because the individuals who are permitted access to the Attorney’s computer are only those individuals who are authorized to perform required tasks. Nonetheless, Attorney is responsible for ensuring that those individuals who have access to the laptop are properly instructed about the duties pertaining to client confidentiality and are supervised appropriately, pursuant to Rule 3-110. Furthermore, Attorney’s supervisor’s access to Attorney’s laptop would

be permissible due to her duty to supervise Attorney in accordance with Rule 3-110 and her own fiduciary duty to preserve Client's secrets.

Regarding Attorney's decision to use a public wireless connection, COPRAC concludes that due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the public wireless connection at the coffee shop to work on Client's matter unless he takes proper precautions. Such precautions may include using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Attorney would need to evaluate the sensitivity of the matter and determine whether or not to avoid using the public wireless connection entirely. Finally, Attorney may need to seek consent from Client to use a public wireless connection after informing Client of the associated risks, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections.

With respect to Attorney's personal wireless system at home, COPRAC determines that Attorney would not violate his duties of confidentiality and competence if Attorney configures his wireless system with appropriate security features. If not, Attorney may need to inform Client of the risks involved and receive informed consent, similar to the situation involving the public wireless connection.

### **Conclusion**

Emerging technologies and resources may create some degree of ambiguity on how to apply the California Rules of Professional Conduct, especially where the rules don't refer expressly to new technologies. It is important to recognize that even though something is new in terms of technology, the rules are flexible enough to be applied in a variety of situations. As demonstrated in each of the three advisory opinions summarized above, as well as in examples beyond this article, if an attorney errs on the side of caution and chooses to apply sound risk management, the practitioner likely will avoid egregious professional responsibility violations. In contrast, an attorney who reviews the rules and dismisses them because they don't contain buzz words such as "wifi" or "metadata" is a practitioner who is on track to really foul things up.

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