LEGAL ETHICS UPDATE FOR THE PUBLIC LAWYER

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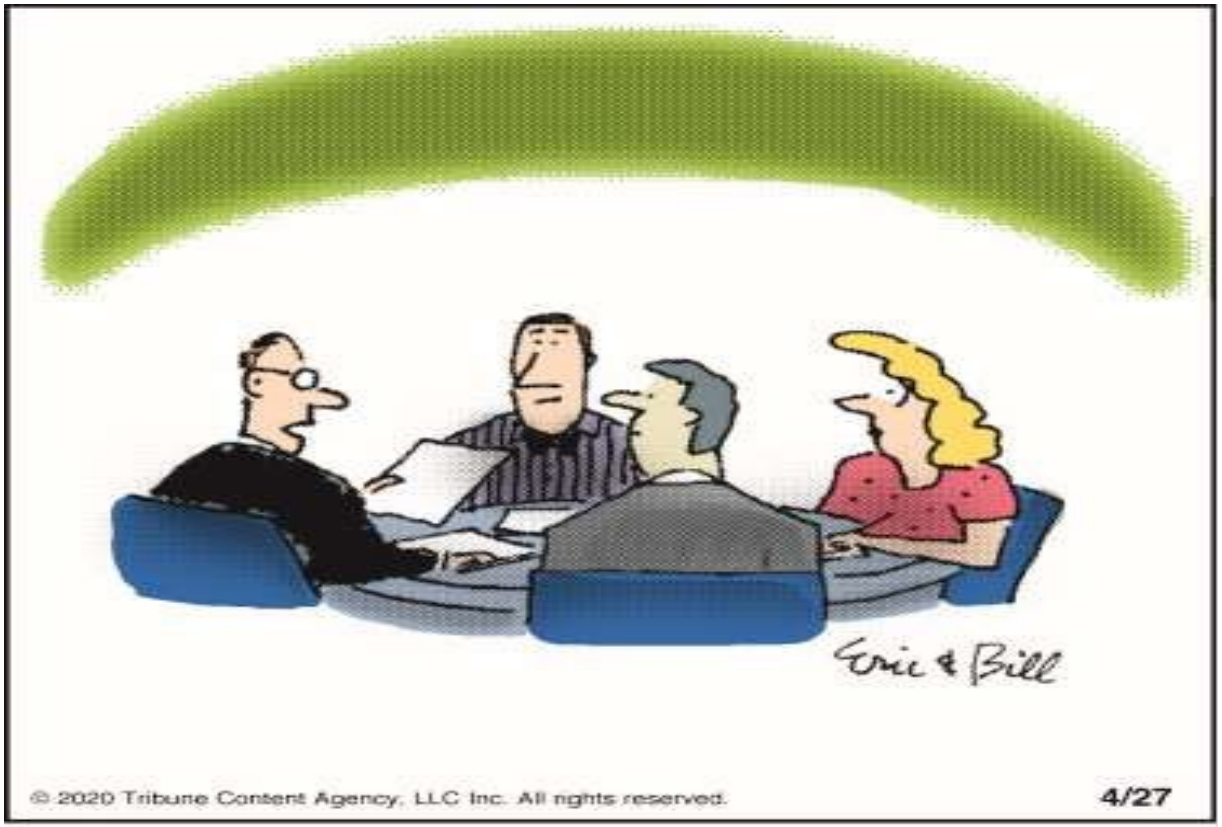


"We could try honesty as a policy, but we'd need approval from our legal department."

A. Officer of the Court

- We are "the representative not of the ordinary party to the controversy, but of the sovereignty whose obligations to govern impartially is as compelling as its obligations to govern at all; and whose interest to the controversy is not that it shall win a case, but justice shall be done." (*Berger v. United States*, 295 U.S. 78 (1935)).

- We are responsible for the "fair administration of justice." (*Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (2019)).

- The Model Rules of Professional Conduct do not mention the word "zealous" as an attribute but use it in the context of recognizing that "overzealous advocacy" has been held to violate the rules on being an "Advocate". See Model Rules 3.1 – 3.9.

- Rule 8.4 prohibits a lawyer from engaging in "conduct that is prejudicial to the administration of justice".

- One's duties to the client are subject to an overriding obligation "to the orderly administration of justice." (*People v. Chong,* 76 Cal.App.4th 232, 243 (1999); *Finton Constr., Inc. v. Bidna & Keys, APLC,* 238 Cal.App.4th 200, 204 (2015).



**"We've got to draw the line on unethical behavior.
But draw it in pencil."**

B. Effective Ethical Screens

California Lawyers Assn. Formal Ethics Opinion No. 2021-1

- ABA Model Rules 1.10 and 1.11
- County Counsel's Office Ethical Screen Policy (May 2021)
- Steps necessary to implement an effective ethical screen:
  - timely imposition of the screen
  - prohibitions of communications across the screen
  - notice to affected clients
  - limiting access by the screened person to the screened matter's file
  - operational separation of personnel.



C. State Bar Standing Committee on Professional Responsibility and Conduct

- Formal Opinion No. 2021-206 – Colleague Impairment (5/20/21)
  - A lawyer's impairment does not excuse compliance with rules and State Bar Act
  - Opinion has been in the works since 2014

- Can also trigger obligations for impaired lawyer, subordinates, supervisors, and other colleagues who know of the impaired lawyer's conduct (See ABA Model Rules 5.1 and 5.2)
    - Subordinate lawyers are obligated to ignore instructions from an impaired superior if it means protecting a client's interests or otherwise complying with ethics rules
    - Affirmative remedial action required; reporting not enough
    - The required scope of each lawyer's action depends upon the nature of the client's representation, the severity of the impaired lawyer's unethical conduct, the nature of the impairment, the harm to the client, the size of the law office and resources available, and each lawyer's position within the law office.

D. Lawyer's Behaving Badly (Hall of Shame)



Good sportsmanship in the courtroom.

1. Civility
   a. *Martinez v. O'Hara*, 32 Cal.App.5th 853, 855 (2019)*

      - In an appellate brief, a lawyer referred to a ruling of the female judicial officer as "succubustic" ("a succubus is defined as a demon assuming female form")

**ABA Model Rules 3.5 and 8.4*

- 8/11/20 – disciplinary charges filed against the lawyer in State Bar Court
- Published by Court of Appeal "*to make the point that gender bias by an attorney appealing before us will not be tolerated, period*"
- Lawyer sued State Bar in federal court arguing the charges violate his First Amendment rights; Federal Court judge denied request for injunction to halt State Bar disciplinary proceedings
- Lawyer argued that the rule, which states that it is a lawyer's duty to maintain "the respect due to the courts of justice and judicial officers" is overly broad and that the use of the term "succubistic" is protected by the First Amendment
- State Bar judge agreed that the term was constitutionally protected but recommended that he be suspended for one year, with execution stayed, and placed on probation for one year subject to conditions. Including, a 30-day suspension of his bar license for other insults and a perceived lack of remorse

b. *Briganti v. Chow*, 42 Cal.App.5th 504 (2019)*

- Lawyer characterized the trial court judge as "attractive, hard-working, brilliant, young, and politically well-connected"
- Published by the Court of Appeal "to draw attention to our concluding note on civility, sexism, and persuasive brief writing"
- The court pointed out that:

> "*Moreover, as judicial officers, we can and should take steps to help reduce incivility, including gender–based incivility. One method is by calling gendered incivility out for what it is and insisting it not be repeated. In a more extreme case we would be obliged to report the offending lawyer to the California State Bar*."

**ABA Model Rules 3.5 and 8.4*

c. Karton v. ARI Design & Construction, Inc., 61 Cal.App.5th 734 (2021)*

- Called opposing counsel a liar and accused him of witness tampering
- Reduction of attorney's fee request from $300,000 to $90,000 due to attorney's incivility in the litigation and for having over-litigated the case.
- The Court pointed out that:

  "Excellent lawyers deserve higher fees, and excellent lawyers are civil. Sound logic and bitter experience support these points.

**ABA Model Rules 3.4, 3.5, and 8.4*

"*Civility is an ethical component of professionalism. Civility is desirable in litigation, not only because it is ethically required for its own sake, but also because it is socially advantageous: it lowers the costs of dispute resolution. The American legal profession exists to help people resolve disputes cheaply, swiftly, fairly, and justly. Incivility between counsel is sand in the gears*.

Incivility can rankle relations and thereby increase the friction, extent, and cost of litigation. Calling opposing counsel a liar, for instance, can invite destructive reciprocity and generate needless controversies. Seasoning a disagreement with avoidable irritants can turn a minor conflict into a costly and protracted war. All those human hours, which could have been put to socially productive uses, instead are devoted to the unnecessary war and are lost forever. *All sides lose, as does the justice system, which must supervise the hostilities*."

2. The Duty to Maintain the Respect Due to the Courts of Justice and Judicial Officers*

- *Rose v. Superior Court*, 140 Cal.App.418, 425 (1934): a sneering, sarcastic and contemptuous tone alone can constitute contempt

- *Gillen v. Municipal Court*, 37 Cal.App.2d 428, 431 (1940): tone and manner in which words are spoken is relevant to contempt

- *Lazzarotto v. Atchison, TSFR*, 157 Cal.App.2d 455, 462 (1958): rancorous epithets and statements impugning the trial court are highly improper and unpersuasive

- *People v. Jeong, 2013 WL 98604:* "although vigorous advocacy is always welcome, "the briefing was disrespectful in the extreme." Lawyer called the trial court rulings "preposterous" and "bizarre" and took other shots at the judge. Court of Appeal struck an entire 14-page argument from the opening brief.

**ABA Model Rules 3.5 and 8.2*

- *Davis v. TWC Dealer Group, Inc.*, 41 Cal.App.5th 662 (2019)*
  - Multiple serious violations of Rule 3.3 (candor toward the tribunal), yet no discipline
  - Brief omitted 38 lines of a 47-line arbitration paragraph at center of dispute in an attempt to mislead the court
  - *After court asked the parties to address a specific, newly decided California Supreme Court case, attorneys failed to address the case and denied knowledge of the case at oral argument – problem: the same attorneys had argued and lost the case at the Supreme Court! Oops!*

**ABA Model Rules 3.3 and 8.4*

- *In re Paul M. Mahoney on Contempt, 65 Cal.App.5th 376 (2021)**
  - Attorney held in criminal contempt and fined $2,000 for insinuating that a panel of 4th District Court of Appeal Justices might be in the pocket of the Irvine Co. and had turned a blind eye to the shenanigans of disgraced California mass tort lawyer Thomas V. Girardi.

Court directed that:

  - Copy of judgment of contempt be forwarded to the State Bar
  - "In short, rather than attempt to convince the court its reasoning was faulty, you indulged in an unprofessional rant that impugned the integrity of the court…."
  - Attorney claimed that the court 'indiscriminately screwed' his client
  - The opinion states: "*This kind of over-the-top, anything goes, devil-take-the-hindmost rhetoric has to stop*."

**ABA Model Rules 3.5, 8.2, and 8.4*

- *The opinion concluded by saying:*

"We publish this decision as a cautionary tale. The timbre of our time has become unfortunately aggressive and disrespectful. Language addressed to opposing counsel and courts has lurched off the path of discourse and into the ditch of abuse. This isn't who we are. We are professionals."

- *Falcon Brands Inc. v. Mousavi & Lee, LLP,* No. G059477, 2022 WL 246851 (Cal. Ct. App. Jan. 27, 2022)*

  - "Lawyers argue for a living. Some do more than argue. They lace their settlement demands with threats. When does such activity cross the line and become professional misconduct? That is the fundamental question presented in this case."

  - "We reverse as to the first cause of action for extortion because we conclude Mousavi's e-mail settlement demands, when considered in context, were not protected speech in light of the Supreme Court's ruling in *Flatley v. Mauro* (2006) 39 Cal.4th 299. Rather, Mousavi's escalating series of threats ultimately transformed what had been legitimate demands into something else: extortion."

**ABA Model Rules 3.4 and 8.4*

- "Mousavi's $490,000 settlement demand, as explained in her October 8 e-mail correspondence, was for unpaid wages, commissions, and related expenses. The demand was unrelated to any alleged criminal conduct. Thus, to paraphrase *Flatley*, Mousavi's threat to disclose criminal activity entirely unrelated to her client's damage claim "'exceeded the limits of respondent's representation of his client' . . . . (*State v. Harrington*, *supra*, 260 A.2d at p. 699 [attorney's veiled threat to have his client in a divorce action inform on her husband to the Internal Revenue Service and Bureau of Immigration and Naturalization supports attorney's conviction of extortion].)" (*Flatley*, *supra*, 39 Cal.4th at pp. 330-331.)"

- *Thomas v. Tenneco Packaging Co., Inc*., 293 F.3d 1306 (2002)*

  - "As our extensive citation to the five documents in Part 1 shows, the documents are saturated with invective directed at opposing counsel. For instance, the five documents … are pervaded with rude, demeaning remarks about opposing counsel's physical traits and demeanor. Additionally, the documents … contain attacks upon the fitness of opposing counsel as a member of the bar, and they contain statements that can only be construed as thinly veiled physical threats."

  - "*In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system*."

**ABA Model Rules 3.4 and 8.4*

- *In re Cordova–Gonzalez*, 996 F.2d 1334, 1336 (1st Cir.1993) (per curiam) (upholding disbarment of attorney from practicing before district court, as well as disbarring attorney from practicing before the court of appeals, in part because attorney made "vitriolic and, as far as the record shows, unfounded personal assaults" upon the judge and opposing counsel in the pleadings).

- *Lee v. American Eagle Airlines, Inc.*, 93 F.Supp.2d 1322, 1325 (S.D.Fla.2000) (reducing attorney's fees award to two plaintiff's attorneys in part because of belligerent comments directed at opposing counsel, such as by calling the counsel a "Second Rate Loser").

- *United States v. Kouri–Perez*, 8 F.Supp.2d 133 (D.P.R.1998) (reprimanding and fining defense attorney who, among other things, filed motion papers containing accusations that the Assistant United States Attorney was the granddaughter of a former Dominican Republic dictator).

- *In re Plaza Hotel Corp.*, 111 B.R. 882 (Bankr.E.D.Cal.1990) (disqualifying attorney from representing debtor in part because attorney made sexist comments to attorney representing the United States trustee).

- *Attorney Grievance Comm'n v. Alison*, 317 Md. 523, 565 A.2d 660, 664 (Md.1989) (suspending attorney whose misconduct included referring to opposing counsel's argument as “particularly absurd” and who referred to the attorney as a “son of a bitch”).

- *Mullaney v. Aude*, 126 Md.App. 639, 730 A.2d 759 (Md.Ct.Spec.App.1999) (holding that protective order could be issued and attorney's fees awarded based on sexist comments made by one attorney to another during deposition).

- *In re Williams*, 414 N.W.2d 394 (Minn.1987) (per curiam) (upholding public reprimand of attorney who, among other things, made an anti-semitic comment to opposing counsel during a pretrial deposition).

- *In re Vincenti*, 114 N.J. 275, 554 A.2d 470 (N.J.1989) (per curiam) (suspending attorney whose misconduct included challenging opposing counsel to a fight and who made profane and racist remarks about opposing counsel).

- *In re Eisenberg*, 144 Wis.2d 284, 423 N.W.2d 867, 870 (Wis.1988) (per curiam) (suspending attorney from practice in part for calling prosecutor, among other things, a "dummy" and stating to the prosecutor, "[Y]ou don't even know what you are talking about or what you are doing in this courtroom").

- *In re First City Bancorporation of Texas Inc.*, 282 F.3d 864 (2002)*

  - "After listening to the oral arguments of the parties and closely examining the record, we conclude that the sanctioned lawyer in this case … was appropriately sanctioned by the bankruptcy court. His attitude and remarks toward opposing attorneys, opposing parties, and the bankruptcy court were—to understate his conduct—obnoxious.

  - Although incivility in and of itself is call for concern, what is most disconcerting here is the rationale he gives for his behavior. *He asserts that his deplorable and wholly unprofessional conduct helps him recover more money for his clients. Unremorsefully and brazenly, he contends that his egregious behavior serves him well in settlement negotiations and is therefore appropriate*."

**ABA Model Rules 3.3, 3.4, and 8.4*

- “Some of the other statements made by the lawyer during the bankruptcy proceeding—noted by both the district court and the bankruptcy court—are the following: • He characterized other attorneys, including an Assistant United States Attorney, as (1) a “stooge”; (2) a “puppet”; (3) a “weak pussyfooting ‘deadhead’ ” who “had been ‘dead’ mentally for ten years”; (4) “various incompetents”; (5) “inept”; (6) “clunks”; (7) “falling all over themselves, and wasting endless hours”; (8) “a bunch of starving slobs”; and (6) an “underling who graduated from a 29th-tier law school.””

- He called the chairman of First City a “hayseed” and a “washed-up has been,” and he also called other First City directors “scoundrels.”

- He referred to the work of other attorneys as “garbage” that demonstrated “legal incompetence” while involving “ludicrous additional time and expense.”

- He described an executive compensation plan approved by the bankruptcy court as a "*bribe*."

- "The bankruptcy court found that the lawyer's "egregious, obnoxious, and insulting behavior ... constituted an unwarranted imposition upon and an affront to [the bankruptcy court] and the parties and practitioners who have appeared in this bankruptcy that should not have to be endured in the future." Accordingly, the bankruptcy court imposed a monetary sanction of $22,500 and *barred Greenfield from practicing in the bankruptcy courts of the Northern District of Texas unless he first obtained written permission from the court*."

*7/13/21 Report of Court-Appointed Investigator Edward M. Robbins re: Class Action Settlement with LADWP**

- "Evidence supports a finding that the city directed and assisted in the city suing itself with a sham lawsuit."

- Staff attorneys "violated the ethical rules against dishonesty, deceit, and collusion and violated their ethical duties to the court in violation of Rules of Professional Conduct."

- In October of 2020, Superior Court judge ordered the city to pay a *$2.5 million fine for a "serious abuse of discovery by the city and its counsel" - actions that merited "considerable sanctions*."

- Post-script: *Chief Deputy City Attorney pleaded guilty to one count of aiding and abetting extortion after the LADWP GM pleaded guilty to bribery. DWP hires outside counsel in place of City Attorney's Office*.

**ABA Model Rules 3.3, 3.4, and 8.4*

JUDGE WANTS FOUL-MOUTHED LAWYER DISBARRED (12/17/19)

- Federal Court judge promised to do all he could do to get lawyer disbarred
- Lawyer send a string of expletive-laden emails and threats to opposing counsel
- Lawyer was fired shortly after his clients were made aware of messages he sent, including the name of one of the wives of one of the opposing attorneys and their home address in his invectives
- One example: "The demand is now 302 million. Pay up fuck-face."
- State Bar license still active – no discipline noted.





"We need to draw the line on unethical behavior. But let's draw it with an Etch-a-Sketch and don't be afraid to shake it a little."

E. Ethical Principles for the Public Lawyer*

1. As a lawyer representing a public agency, the city/county attorney and all members of the office must promote the rule of law and the public's trust in city/county government by providing representation that helps create a culture of compliance with ethical and legal obligations. (Rules 1.1, 1.3, 1.4 and 2.1)

2. The city/county attorney must earn client trust through quality legal advice and the manner in which the lawyer represents the city/county's interests. (Rules 1.1, 1.3, 1.4 and 2.1)

* Adapted from Ethical Principles for City Attorneys (2005) published by City Attorneys' Department of the League of California Cities.

3. The city/county attorney must provide legal advice in a manner that avoids the appearance that the advice is based on political alignment or partisanship, which can undermine client trust. (Rule 2.1)

4. The city/county attorney must conduct himself/herself at all times in a professional and dignified manner, interacting with all elected officials, city/county staff and members of the public with courtesy and respect. (Rule 8.4)

5. The city/county attorney's obligation is to understand the city/county's policy goals and provide objective legal advice that outlines the legally defensible options available to the city/county for achieving those objectives. (Rules 1.4 and 2.1)

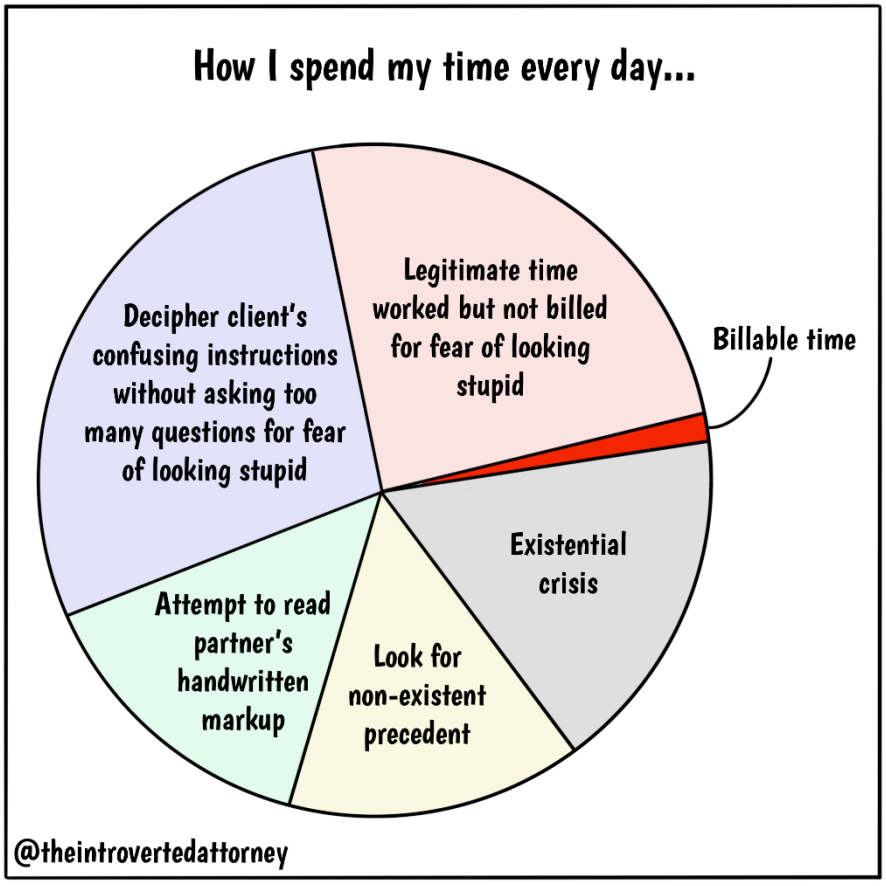
6. We are not only officers of the courts and legal system, but also a “public citizen” who through membership in the bar has assumed a “special responsibility for the quality of justice.” (Rules 3.1 – 3.5, and 8.4)

7. We must see ourselves as “the conscience of the city/county.” It is our moral and legal duty. (Rule 8.4)



Ethical Obligations While Working Remotely (The New Normal?)

- In response to tech advances, wildfires, COVID-19, and other disasters, more lawyers are working remotely.



***County Counsel "Existential Crisis" time is likely a bigger slice of the pie**

New “co-workers”… same obligations…





Ethical Obligations While Working Remotely

- No California Rule or Model Rule of Professional Conduct that specifically addresses teleworking
- Proposed Formal Opinion Interim No. 20-0004
  - "Same rules of professional conduct that apply to attorneys practicing in traditional law firms apply to attorneys practicing remotely."
  - Rules that are implicated while working remotely:
    - 1.1 – Competence*
    - 1.3 - Diligence
    - 1.4 – Communication
    - 1.6 – Confidentiality of Information
    - 5.1-5.3 – Responsibilities for Supervision of Staff
    - 5.5 - Unauthorized Practice of Law

Ethical Obligations While Working Remotely

- Proposed Formal Opinion
  - Technology used for remote work must safeguard confidential client information – including during transmission and storage
  - Implement reasonable measures to safeguard client information both electronically and physically from others in the house (separate accounts on shared devices or separate devices, auto-log off, locked physical files)
  - Disable listening capability of smart speakers
  - Consider requiring pins or passwords for access to virtual meetings
  - Remind clients working from home to "follow stringent confidentiality practices"
  - Require all files to be saved to a centralized, secure case management system that is backed up regularly
  - Ensure the client receives and understands the information exchanged when using electronic forms of communication

Ethical Obligations While Working Remotely

- Proposed Formal Opinion
  - Exchange alternative contact information with clients during an emergency to continue to maintain communications
  - Create or update BYOD policies, maintain regular communication with remote attorneys and staff, and provide appropriate tools and equipment
  - Implement policies and procedures for disaster and succession planning, and data breaches
  - Remote locking or wiping of devices in event of security breach, theft, loss of device, or departure
  - Duty to render competent legal services is not generally excused due to health, personal or financial impacts of pandemics and other disasters

Important Ethics Resources for Public Lawyers

- Practicing Ethics: A Handbook for Municipal Lawyers (2020) - practicing-ethics---a-handbook-for-municipal-lawyers-(revised-2nd-edition-2020).pdf (calcities.org)
- CLA Ethics Committee Formal Opinion No. 2021-1 - Ethics Committee Formal Opinion No. 2021-1 – California Lawyers Association (calawyers.org)
- State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2020-203 - Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2020-203 Data Breaches (ca.gov)
- State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2021-206 - CAL 2021-206 Colleague Impairment
- State Bar Standing Committee on Professional Responsibility and Conduct Proposed Formal Interim Opinion No. 20-0004 - https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000028678.pdf



ANY
QUESTIONS