

# AI & THE LEGAL PROFESSION

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# CALIFORNIA RULE OF PROFESSIONAL CONDUCT RULE 1.1(A): COMPETENCE (MAR. 22, 2021)

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- “A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.”
- Comment 1: “duty to keep abreast of the changes in the law and its practice, including the **benefits** and **risks** associated with relevant technology”



# TECHNOLOGY COMPETENCE

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- Be able to operate technology used in practice of law
- Stay abreast of advances and additional technologies
- Understand security risks and how to mitigate them



## OTHER RULES IMPLICATED AND AFFECTED

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- Rule 1.6 – Confidential Client Information (CCI)
  - Business & Professions Code § 6068(e)(1): duty of lawyer “to maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”
  - Make reasonable efforts to prevent inadvertent or unauthorized disclosure of or unauthorized access to CCI



## OTHER RULES IMPLICATED AND AFFECTED

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- Rules 5.1, 5.2, 5.3 – Supervision of Attorneys & Non-Attorneys
  - Policies, procedures, training re: use of reasonably secure methods of electronic communications with clients
  - Instruct, supervise re: reasonable measures for access to and storage of those communications
  - Ensure policies implemented and kept up-to-date



## OTHER RULES IMPLICATED AND AFFECTED

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- Rule 1.4 comment 2 and Rule 1.16(e)(1): attorney may send by “electronic means” documents to client upon client’s request or upon termination of representation
- Rule 4.4 and Rule 1.0.1(n): notification requirements for material inadvertently produced via email
- Rule 7.2(a): email, social media post can be “advertisement”
- Rule 7.5 and comment: logos and website domains can be “communication” that is “false and misleading”



# COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT (COPRAC) FORMAL OPINIONS

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- 2005-168: Websites and Confidentiality
- 2007-174: Electronic Version of Client Files
- 2010-179: Transmitting and Storing Confidential Information
- 2012-184: Virtual Law Office
- 2012-186: Social Networking
- 2013-188: Confidential Information and Unsolicited Emails
- 2015-193: ESI and Discovery Requests
- 2016-196: Attorney Blogging
- 2020-203: Data Breaches



# COPRAC FORMAL OP. 2010-179: TRANSMITTING & STORING CONFIDENTIAL INFORMATION

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- Issue: using technology that is susceptible to unauthorized access to transmit or store confidential client information (CCI)
- Scenario: attorney uses a work-issued laptop to do legal research for client at a coffee shop and uses its public wireless Internet connection



# COPRAC FORMAL OP. 2010-179: TRANSMITTING & STORING CONFIDENTIAL INFORMATION

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- Whether attorney violates duties of confidentiality and competence depends on:
  - Level of security of the technology, including whether reasonable precautions can be taken to increase security
  - Legal ramifications to malicious actor
  - Degree of sensitivity of information
  - Possible impact on client of inadvertent disclosure
  - Urgency of situation
  - Client's instructions and circumstances



# COPRAC FORMAL OP. 2010-179: TRANSMITTING & STORING CONFIDENTIAL INFORMATION

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- Attorney risks violating duties of confidentiality and competence by using public wireless connection if she does not also take precautions (*i.e.*, encryption, hotspot, VPN)
- Avoid public WiFi
- Or notify client of risks and seek informed consent to use it



# COPRAC FORMAL OP. 2020-203: DATA BREACHES

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- Issue: attorney's ethical obligations re: unauthorized access of electronically stored confidential client information
- Four scenarios:
  - A. Laptop stolen, immediately remotely locked down and wiped clean
  - B. Smartphone with 4-character passcode left at restaurant recovered the next day with no indication of access
  - C. Firm paid ransomware demand and regained access to data; no CCI accessed and no matters negatively impacted by delay
  - D. Attorney logged onto fake network at coffee shop; malicious actor accessed files on laptop related to client's patents



# COPRAC FORMAL OP. 2020-203: DATA BREACHES

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- Duty of disclosure [Rule 1.4(a)(3) and Bus. Prof. Code § 6068(m)]: must keep clients “reasonably informed about **significant developments**”
  - Misappropriation, destruction, or compromise of CCI
  - Data breach that significantly impairs lawyer’s ability to provide legal services



# COPRAC FORMAL OP. 2020-203: DATA BREACHES

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- Data breach response plan
  - Monitor for data breaches
  - When breach is suspected or detected, “act reasonably and promptly to stop the breach and mitigate [resulting] damage.”
  - Investigate and determine what happened—
    - Which clients affected
    - Amount and sensitivity of CCI involved
    - Likelihood that information has been/will be misused
- Get help from an expert in cybersecurity and data privacy



Questions?  
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