

Unauthorized practice of law in the era of remote lawyering

During the COVID-19 pandemic, law firms are permitting their lawyers to work remotely even when a return to the office is possible and practicable. One of the main professional responsibility concerns about these arrangements is the risk of falling afoul of the rules governing the unauthorized practice of law (“UPL”).

That this problem even exists is a throwback to the historic premise that the regulation of who may practice law is based on the lawyer’s physical location, embodied in the states’ systems of lawyer regulation. ABA Model Rule 5.5, adopted with variations and a patchwork of exceptions in almost every state¹, restricts lawyers from engaging in the practice of law when they are physically located in a state where they are not licensed or admitted. The potential for engaging in UPL, already a problem in the pre-pandemic era, is exacerbated by the new remote practice culture. Even before the pandemic, this byzantine, state-by-state system of regulation sometimes posed potentially serious restrictions on the freedom of clients to choose lawyers to act for them on a nationwide basis.²

Two recent state court decisions highlight the inherent contradiction between the theoretical reach of UPL regulation despite the obvious and necessary – and inevitable – universality of the practice of law across state lines. In *In re Charges of Unprofessional Conduct in Panel File No. 39302*, a Colorado-admitted lawyer exchanged approximately two dozen emails with a Minnesota lawyer. See 884 N.W.2d 661, 664-65 (Minn. 2016). Notably, the Colorado lawyer was never physically present in Minnesota. The Minnesota Supreme Court upheld the professional discipline in Minnesota of the Colorado lawyer, holding that “engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota.” *Id.* at 663.

1. A significant exception is for temporary practice, adopted in varying forms in most states either in Rule 5.5 or in a separate statute. This article does not address whether certain forms of remote working could fall within this exception. An example of a situation where remote working was found to be temporary practice where the lawyer was working solely on matters relating to the jurisdiction in which she was admitted while awaiting admission can be found in *In re Jones*, 156 Ohio St.3d 1, 123 N.E.3d 877 (2018).

2. A recent law review article, co-authored by Clyde & Co Of Counsel Anthony Davis, put the problem with this regulatory structure succinctly as follows:

Whatever the justifications of such a system at a time when the fastest means of communication was on the back of a horse and when almost all legal matters were ‘local’ by nature and impact, they are no longer persuasive in a nationwide market where lawyers’ services routinely have impacts across state lines and where information moves at the speed of light.

Similarly, in *Ohio State Bar Assn. v. Klosk*, a lawyer, who was not licensed to practice law in Ohio, and his law firm, which did not have another member of the firm admitted in Ohio, represented an Ohio resident in debtor-creditor negotiations with creditor's Ohio counsel. 155 Ohio St. 3d 420, 2018-Ohio-4864, 122 N.E.3d 107 (2018). The lawyer sent a single letter to creditor's counsel, on behalf of the Ohio debtor. *Id.* at 421. In its decision, the Ohio Supreme Court disregarded the debtor's signed power of attorney, not to mention Ohio's adoption of a temporary practice rule (see note 1 above), and found that the lawyer's conduct constituted the unauthorized practice of law. The court enjoined the debtor's representation and imposed a USD 2,000 civil penalty against the lawyer and the law firm.

These cases show how some courts refuse to recognize the realities of law practice in the digital age and make less and less sense, even before the advent of the pandemic. In today's world, where so many lawyers are working remotely, this parochial approach to lawyer regulation makes no sense at all.

As illustrated below, some states have made explicit moves to address – and to permit – the practice of remote lawyering.

- Recently, the Florida Bar Standing Committee on the Unauthorized Practice of Law issued an advisory opinion concluding that it is not UPL for an out-of-state licensed lawyer to practice remotely from a location in Florida, provided there is no holding out by the lawyer of a Florida office or law practice. Notably, this opinion is not limited to the circumstances of the pandemic. Florida Advisory Opinion #2019-4³
- On March 23, 2020, the District of Columbia Court of Appeals Committee on UPL determined that lawyers who live in the District and are not licensed there, but normally practice from an office outside the District, may telecommute during the COVID-19 pandemic. Opinion No. 24-20
- In May 2019, the Utah Ethics Advisory Opinion Committee, in Opinion No. 19-03, opined that an individual licensed in another state who establishes a home in Utah and practices law for clients from the state where the attorney is licensed and who neither solicits Utah clients nor establishes a public office in Utah is not engaged in the unauthorized practice of law

3. Pursuant to the Rules regulating the Florida Bar, this proposed advisory opinion is scheduled to be filed for approval by the Supreme Court of Florida on or around August 17, 2020.

4. See *In re Conduct of Harris*, 366 Or. 475, 476 (2020).

- Two other states, Arizona and New Hampshire, have expressly recognized that it is not the unauthorized practice of law to practice law remotely—i.e., digitally—when sitting in the state but actually using technology to practice in another jurisdiction where the lawyer is licensed and in good standing. See Arizona RPC 5.5(d); N.H. R P C 5.5(d)
- Virginia provides that lawyers licensed in another jurisdiction may practice in Virginia, “if their practice is limited to matters involving the law of the state or country in which they are admitted to practice” Legal Ethics Op. 1856 (2011). Notably, this ethics opinion does not discuss the remote working environment at the core of this article
- A federal court in Maryland previously held that a lawyer living in Massachusetts, but practicing law with a District of Columbia law firm, was not engaged in UPL in Massachusetts. *In Re Application of Carlton*, 708 F. Supp. 2d 524 (D. Maryland 2010)

Although these states are still in a minority in directly addressing the question, they point the way towards appropriate recognition of what is already pervasive practice by lawyers in every jurisdiction.⁴

Given that many of those lawyers currently sheltering in place at homes outside of their state of licensure due to the pandemic and will likely continue to work remotely when the pandemic is over, what are likely scenarios? Although enforcement of traditional UPL regulation in the states that have not yet recognized the reality of remote practice is unlikely during the pandemic, once the crisis has passed, if history is any guide, some states will assert UPL against these lawyers to protect their boundaries, and, in those states, lawyers seeking to continue to work remotely may have no choice but to apply for admission to the bar in the jurisdictions where they are actually located. Other states will move forward with the times and follow the states listed above.

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From a risk management standpoint, law firms can help to protect themselves and their lawyers by having complete and accurate knowledge of where their lawyers are actually located and practicing. The following questionnaire⁵, for example, circulated to all the lawyers in a law firm, can help identify potential UPL issues for lawyers practicing remotely from states that have not yet eliminated UPL for remote working:

1. In what states are you currently admitted to practice?
2. Are you in good standing in each state listed in answer to question 1 – including being current on MCLE and registration requirements? yes / no
3. As of today, do you reside, on a temporary or permanent basis, outside the jurisdiction where your office is located [and/or where you are admitted?] yes / no

If no, stop here. If yes:

4. In which jurisdiction do you currently reside: _____

5. Do you plan to work remotely on a regular basis from the jurisdiction where you currently reside, or where you plan to reside after the pandemic? yes / no
6. If you are not currently admitted and in good standing in each jurisdiction listed in your answer to questions 4 and, if different, 5, what steps – if any – have you taken to be admitted in each such jurisdiction?

In sum, once the present crisis subsides, it will be important for individual lawyers and their firms to determine whether or not the lawyers are in locations where they may face UPL prosecution for working in places where they are not admitted. At the same time, given the current trend of lawyers working remotely, we can hope that the trend toward recognizing and permitting remote working as being outside the purview of UPL will gain greater momentum around the country.

5. The authors are grateful to Peter Halasz, a partner and the General Counsel of Schulte Roth & Zabel LLP, for permission to use his draft as the model for the version used here.

Further information

Clyde & Co's Lawyers' Risk Management team advise and litigate on behalf of lawyers and law firms in the United States and internationally on every aspect of legal ethics and the law governing lawyers, including professional responsibility and liability; risk management; firm structure, management, and policies; mergers and other combinations; dissolutions;

disciplinary and regulatory investigations and compliance. They also provide training—including CLE—on topics in professional responsibility and liability, ethics, compliance, management, and emerging issues for lawyers and law firms.

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