

Lawyers' Risk Management Newsletter

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Remote Working and the Perils of Enforcement of Rules Governing the Unauthorized Practice of Law

In this article we take a survey of ethics opinions since the start of the COVID-19 pandemic that have addressed if, and to what extent, it is permissible for attorneys to work remotely in a jurisdiction in which they are not admitted.

Last year, a December 2020 ethics opinion from the ABA Standing Committee on Ethic and Professional Responsibility, Formal Opinion 495 ("Opinion 495") examined the professional responsibility issues that are involved when an attorney remotely practices law of the jurisdiction in which they are licensed ("licensing jurisdiction") while physically present in a jurisdiction in which they are not admitted ("remote" or "local jurisdiction").

Relevant here, ABA Model Rule 5.5 states in part:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that . . . arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that . . . are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

The Opinion first explains that if a local jurisdiction has made a determination, by statute, rule, case law, or opinion, that working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) would prohibit the lawyer from doing so. Otherwise, the Opinion adds that 5.5(d)(2) will permit a lawyer to provide legal services in a local jurisdiction if such services are authorized by federal law or local law or

rule (e.g., immigration law).

If the lawyer's practice is not expressly permitted or prohibited, the Opinion concludes that lawyers may remotely practice in a local jurisdiction if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. However, lawyers would be in violation of Model Rule 5.5(b)(1) and (2) if they had local jurisdiction contact information on websites, letterhead, business cards, advertising, or the like, because the lawyers would be improperly establishing a local office or holding itself out to the public as being able to practice in the local jurisdiction.

Finally, the Opinion states that Comment 6 notes that "temporary" under Rule 5.5(c)(4) has no single definition, and "that it may include services that are provided on a recurring basis or for an extended period of time," such as temporary safety measures during the pandemic.

In sum, the lawyer should be "invisible" as a lawyer when in the local jurisdiction. In reaching the foregoing conclusions, the Opinion reasoned that the purpose of Rule 5.5 is to protect the public against the rendition of legal services by an unqualified person. Therefore, a local jurisdiction should have no interest in regulating the practice of law of the licensing jurisdiction for clients in that jurisdiction. (citing ME Op. 189 (2005) and UT Op. 19-03 (2019)).

Prior to Opinion 495 and the pandemic, Florida Bar's Advisory Opinion #2019-4 concluded that a New York and New Jersey admitted attorney that resides in Florida and practices before the United States Patent and Trademark Office is not engaged in the unauthorized practice of law. Similar to Opinion 495, the advisory opinion highlights that all contact information is associated with the New Jersey office, the attorney will not be representing or soliciting Florida

clients, and the attorney's practice will be limited to federal IP law that does not implicate Florida law.

Also before Opinion 495, D.C. Court of Appeal Opinion 24-20 was the first to respond to the COVID-19 Pandemic in March 2020, by issuing an opinion that concluded an attorney who is not a member of the D.C. bar may practice law from the attorney's residence in D.C. under the "incidental and temporary practice" exception "if the attorney (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a District of Columbia address in any business document or otherwise holding out as authorized to practice law in the District of Columbia, and (4) does not regularly conduct in-person meetings with clients or third parties in the District of Columbia."

Several state and local bar associations have subsequently adopted all or part of Opinion 495 based on its underlying rational that there is no harm to the public if the remote lawyer practices his or her licensing jurisdiction's law within the state. See DE Op. 2021-1 (2021); PA & Phila. Bar Ass'n Joint Opinion 2021-100 (2021); VA LEO 1896 (2021); WI Op. EF-21-02 (2021); see also NJ Joint Op. 59/742 (2021); Bar Ass'n S.F. Op. 2021-1 (2021).

By contrast, California's State Bar has not yet addressed the subject directly, but in proposed opinion 20-0004, a footnote was included citing to Opinion 495, the D.C., Florida, and Utah opinions referenced here. The opinion merely states lawyers working remotely in the state should consult relevant authorities regarding multijurisdictional practice and the unauthorized practice of law. However, practitioners can supplement this gap by reviewing Bar Association of San Francisco Opinion 2021-1 (2021) for a thorough analysis on California law regarding the unauthorized practice of law.

In sum, lawyers living and working remotely in a

jurisdiction that has adopted Model Rule 5.5 may soon find that the jurisdiction has adopted some variation of Opinion 495. In the meantime, lawyers need to consult the law, rules and ethics opinions in the place where they are living and working remotely in order to determine whether they are in fact engaged on a daily basis in the unauthorized practice of law.

Further information

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