

Ethics Tips For Attorneys Telecommuting Across State Lines

By **John Schmidt and Michael Seaman** (March 4, 2021, 5:48 PM EST)

It's no secret that the pandemic and various government shutdowns have forced major changes on the practice of law.

It was almost a year ago when bar journals began publishing articles on judges cautioning counsel against inappropriate attire during virtual court conferences. The country also experienced increased demand for video cameras, microphones, larger or double monitors, headsets and earbuds. And now, thankfully, business attire for court, from the waist up at least, appears to have endured.

As courts reopened and attorneys became more comfortable with virtual conferences, the issue of telecommuting across state lines raises additional questions, such as the unauthorized practice of law.

When telecommuting from a residence across state lines, in a jurisdiction where you are not admitted, do you run the risk of being accused of engaging in unauthorized practice of law in your home office? The answer, according to a recent American Bar Association ethics opinion, is no, subject to certain qualifications. Thus, out-of-state work-from-home attorneys need to pay attention to some of these qualifications.

For the vast majority of states, the operative rule for the telecommuting interstate attorney is, or is based on, ABA Model Rules of Professional Conduct Rule 5.5: "Unauthorized Practice of Law; Multijurisdictional Practice of Law," which states:

Law Firms and Associations

(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) (E)xcept 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



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(2) (H)old 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:

...

(4) ... arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.[1]

Recent Guidance From the ABA

On Dec. 16, 2020, the ABA's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 495, with guidance on cross-border telecommuting. The committee determined that an attorney may remotely practice law of the jurisdictions in which the attorney is licensed, while physically present in a jurisdiction in which the attorney is not admitted, if:

(T)he local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and 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.[2]

The committee added that information provided on websites, letterhead, business cards or advertising would be indicia of whether the attorney is holding out as improperly practicing law in the jurisdiction.[3]

These issues have arisen in the past, and while certain state bar associations have addressed the issue, surprisingly, many other states have not.

Recent Florida Guidance

Rule 4-5.5(b) of the Rules Regulating the Florida Bar in large part mirrors ABA Model Rule 5.5(b). It's important to examine exactly what is considered the practice of law. The Supreme Court of Florida provides a robust, and generally applicable, definition in *Florida Bar v. Sperry*:

It is generally understood that the performance of services in representing another before the courts is the practice of law. But the practice of law also includes the giving of legal advice and counsel to others as to their rights and obligations under the law and preparation of legal instruments, including contracts, by which legal rights are either obtained, secured or given away, although such matters may not then or ever be the subject of proceedings in a court.[4]

In a proposed advisory opinion dated Aug. 17, 2020, the Florida Bar Standing Committee on the Unlicensed Practice of Law considered whether an out-of-state attorney engaged in unauthorized practice of law by working on non-Florida matters remotely from his Florida home.[5]

The attorney was licensed in other jurisdictions, but not Florida, and his professional office was his firm's business address in New Jersey — all of which was reflected on his letterhead, website and business cards.[6] The attorney had no public professional presence in Florida, did not represent Florida clients,

did not work on issues involving Florida courts or property, would not advise on Florida law and was not soliciting Florida clients.[7]

Focusing on the fact that the attorney was not providing legal services to Florida clients and did not impact the legal interests of Floridians, the committee concluded that the attorney had not established a regular presence in Florida for the practice of law.[8] It was not considered to be the unlicensed practice of law when working remotely from Florida on matters that did not concern Florida law.[9]

Guidance or Lack Thereof From Other States

Many attorneys licensed to practice in, for instance, New York, likely telecommute from homes in New Jersey, Pennsylvania, Connecticut and Massachusetts. Despite this, these states provide little to no guidance on this matter, either through advisory opinions or amendments to their rules of professional conduct.

The Utah State Bar's Ethics Advisory Opinion Committee, in an opinion issued May 14, 2019, concluded that the Utah Rules of Professional Conduct did not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed, even if the out-of-state attorney does so from the attorney's residence in Utah.[10]

The committee concluded that Utah has no interest in regulating an out-of-state attorney's practice for out-of-state-clients simply because the attorney has a private home in Utah.[11]

In November 2005, the Professional Ethics Commission of Maine issued Opinion No. 189, analyzing a scenario where an attorney was admitted to practice in a foreign state but resided in Maine and was a member of a Maine law firm.

The attorney's letterhead indicated that he was not licensed to practice in Maine, and the attorney would provide legal services to clients on non-Maine matters.[12] The commission, distinguishing this from an out-of-state attorney portrayed to be practicing law in Maine, determined that the attorney may continue to practice law in Maine so long as the attorney's practice is limited to non-Maine matters.[13]

In March 2020, the Washington, D.C., Court of Appeals Committee on Unauthorized Practice of Law issued Opinion 24-20. The committee opined that 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 of Rule 49(c)(13) 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 holds 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.[14]

While this analysis is in line with that of other states' and the ABA's guidance, it should be noted that it is

limited to telework due to the COVID-19 pandemic.[15]

Four jurisdictions have amended their own rules of professional conduct to authorize attorneys admitted elsewhere to practice law remotely on matters not involving local law or clients.

Arizona Rule of Professional Conduct 5.5(d) provides that an attorney admitted in another U.S. jurisdiction, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction or tribal law.[16]

Minnesota Rules of Professional Conduct Rule 5.5(d) authorizes an attorney who is admitted in another U.S. jurisdiction, and not disbarred or suspended from practice in any jurisdiction, to provide legal services in Minnesota that exclusively involve federal law, tribal law or the law of another jurisdiction in which the attorney is licensed to practice law, provided that the attorney advises his or her client that the attorney is not licensed to practice in Minnesota.[17]

Two states — New Hampshire and North Carolina — take this a step further by allowing attorneys licensed to practice in a foreign jurisdiction to establish an office or other systematic and continuous presence for the practice of law in these respective states.

The New Hampshire Rules of Professional Conduct Rule 5.5(d)(3) allows an attorney admitted outside of New Hampshire and in good standing to provide legal services through an office or other systematic and continuous presence in New Hampshire that relates solely to the law of the jurisdiction in which the attorney is admitted.[18]

Similarly, North Carolina Rules of Professional Conduct Rule 5.5(d)(2) allows attorneys admitted in another U.S. jurisdiction, and not disbarred or suspended in any jurisdiction, to establish an office or other systematic presence in North Carolina for the practice of law, so long as the attorney is authorized to practice it.[19]

Application

The ABA's recent guidance in Formal Opinion 495 is in line with existing and recent local or state bar guidance (such as Florida, Utah and Washington, D.C.) that the practice of law from an out-of-state residence does not constitute unauthorized practice of law.

ABA Formal Opinion 495 states that if a particular jurisdiction determines that an attorney working remotely while physically located in that jurisdiction constitutes unauthorized practice of law, Model Rule 5.5(a) would also prohibit the attorney from doing so.

Absent such a determination, the committee opined that an attorney may practice law remotely pursuant to the jurisdiction in which the attorney is licensed under Model Rule 5.5(c) or (d), so long as the attorney does not provide legal services, advertise or establish an office, or hold out the attorney's presence or availability to perform legal services in the jurisdiction in which the attorney is located.[20]

As discussed above, several jurisdictions already specifically authorize attorney telecommuting from their residence from a jurisdiction where they are not admitted by either rule (Minnesota, North Carolina, New Hampshire and Arizona) or opinion (Florida, Utah and Maine).

For states that have yet to make such a determination, Formal Opinion 495's guidance is particularly

applicable where the state's rules of professional conduct mirror the language of the ABA Model Rule 5.5, such as Massachusetts, Connecticut and Pennsylvania.

Attorneys telecommuting from a jurisdiction in which they are not admitted should take the following precautions to avoid the appearance that they are engaged in unauthorized practice of law in that state:

- Ensure that all letterhead, website profiles, business cards and similar materials reflect their professional address in the jurisdiction where they are admitted.
- Avoid advertising and cultivating clients located in the area in which they are residing.
- Avoid providing legal advice concerning the law of the local jurisdiction to residents thereof.
- Avoid appearing on behalf of clients before any local tribunals of any type, unless admitted pro hac vice.
- Finally, consider collateral issues, like tax deductions. Is taking the home office deduction for your out-of-state residence an adverse admission for unauthorized practice of law purposes? Is it worth the risk? Recent guidance from New York state's Department of Taxation and Finance indicates that telecommuters from out of state due to COVID-19 may face tax liabilities in both New York and the state in which they reside.[21]

Conclusion

Attorneys working remotely from out-of-state residences are likely not engaged in unauthorized practice of law, provided they do not hold themselves out as licensed to practice in those states, advertise or otherwise hold themselves out as having an office in those states, or provide or offer to provide legal services in those jurisdictions.

Attorneys should not use their home addresses for professional purposes, conduct person-to-person solicitations, provide legal advice to home-state residents on home-state law, or appear before tribunals in those jurisdictions.

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[1] Model Rules of Prof. Conduct R. 5.5.

[2] ABA Comm. on Ethics and Prof. Resp., Formal Op. 495 (Dec. 16, 2020).

[3] *Id.* at 2.

[4] 140 So. 2d 587, 591 (Fla. 1962).

[5] The Fla. Bar Standing Comm. on the Unlicensed Practice of Law, Proposed Advisory Op. 2019-4 (Aug. 17, 2020).

[6] *Id.* at 3-4.

[7] *Id.*

[8] *Id.* at 5.

[9] *Id.*

[10] Utah Ethics Advisory Op. Comm., Op. No. 19-03 (May 14, 2019).

[11] *Id.* at 1.

[12] Me. Prof. Ethics Comm., Op. No. 189 (2005).

[13] *Id.* at 5.

[14] D.C. Ct. App. Comm. on Unauthorized Practice of Law, Op. 24-20: Teleworking from Home and the COVID-19 Pandemic (Mar. 23, 2020).

[15] *Id.*

[16] Ariz. Rules Prof. Conduct ER 5.5.

[17] Minn. Rules Prof. Conduct R. 5.5(d).

[18] N.H. Rules Prof. Conduct R. 5.5(d)(3).

[19] N.C. Rules Prof. Conduct R. 5.5(d)(2).

[20] Model Rules of Prof. Conduct R. 5.5(c)-(d).

[21] Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax, N.Y.S Dep't of Tax. and Fin., at <https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting> (last visited Feb. 11, 2021).