

Remote Work: Points for Practitioners to Consider

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Some Webinar Pointers

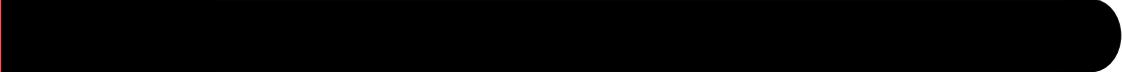
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Introduction

Remote Work is Popular



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- “A ...national survey sponsored by the American Bar Association shows most lawyers want the option to work from home...”
(<https://www.americanbar.org/news/abanews/aba-news-archives/2022/09/aba-survey-lawyers-remote-work/>) Here are some other findings from the study:
 - “...remote options are especially important to young lawyers, 44% of whom said they would leave their jobs for a greater ability to work remotely.”
 - “The vast majority (87%) said their workplace allows lawyers to work remotely. About 30% of lawyers work from home almost all the time. Another 30% work in the office nearly 100% of the time.”
 - “Most lawyers reported that working remotely or on a hybrid basis has not adversely impacted the quality of their work, productivity or billable hours. This is particularly true for women lawyers, 56% of whom said that remote or hybrid working increased their ability to balance work and family obligations.”
- The growing prevalence and importance of remote work will mean practitioners need to consider the ethical rules of the states they are working from, even if not licensed to practice in those states.

ABA Ethics Opinion 495

**Addressing Ethics of
Remote Work**



Addressing the ABA's Viewpoint

- ABA Formal Opinion 495 “Lawyers Working Remotely,” released in 2020, discusses the ABA’s opinion on whether attorneys can ethically practice remotely from a jurisdiction where they are not licensed.
- As remote work expands this potential ethical issue will be raised more often. Further, more older lawyers may wish to reduce in-office hours but continue to practice. The instances in which lawyers will be practicing in a state where a second home is located and in which the practitioner may not be licensed are likely to increase for this demographic.
- https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-495.pdf

Two-Step Analysis

- There is a multi-step process to determine what is acceptable.
- Opinion 495 concludes that *“Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.”*
- So, when engaging in remote work, you might confirm that whatever circumstances your **#1** situation involves reasonably fit within the permissible parameters of Opinion 495. Some of these are discussed below.
- The opinion goes on to state: *“this Committee will not opine whether working remotely by practicing the law of one’s licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction.”* Thus, it may also be prudent to **#2** confirm what the laws in the jurisdiction in which you are working, but not licensed, provide.

Advertising, Business Cards, and Holding Out Test

- ABA Opinion 495 states: *“Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the 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...”*
- With the mobility that technology/virtual practice affords, lawyers will commonly work on a case for their firm in a jurisdiction where they are licensed, from a home or vacation home located in a jurisdiction where they are not licensed.

No Legal Services in Local Jurisdiction

- Opinion 495 continues by noting: #3 “...*and do not provide or offer to provide legal services in the local jurisdiction*...”
- If you participate in web meetings from that Remote Work State is that equivalent to providing legal services in the local jurisdiction? Maybe not, but even this is not without issue as explained below.
- It would seem that if the lawyer’s firm rents an office in the Remote Work State that increases the risk of being characterized as providing services in the Remote Work State thus violating Opinion 495.
- What is the difference between a lawyer maintaining a designated room in their home as a regular home office versus a separate physical office rented in an office building?
- At what point might the quantum of connections rise to the level of the lawyer being deemed to be providing legal services from the Remote Work State jurisdiction?
- Is there a number or frequency of web meetings from or into a jurisdiction that may rise to the level of holding oneself out as practicing in that jurisdiction?

What Establishes a “Local Office”?

- Opinion 495 states: “A local office is not “established” within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address **does not appear on letterhead, business cards, websites, or other indicia of a lawyer’s presence.**” Under this framework renting an office in the Remote Work State if it is used privately without any indication of practicing in that jurisdiction may pass muster under Opinion 495, but may still raise issues depending on local state law. What if the lawyer has an automatic away email message that states: “I will be on vacation in State X but will respond to all email and be available for consultation, but with a delay.” Does that communication change the analysis?
- Opinion 495 states: “Likewise it does not “establish” a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. **The lawyer’s physical presence in the local jurisdiction is incidental; it is not for the practice of law...**” What is “incidental?” If a lawyer is “semi-retired” and spends 8 months a year working part time on most work days from a vacation or second home in a Remote Work State, is that “incidental?”

Firm Letterhead, Emails, Websites

- Opinion 495 further suggests that “*Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.*”
- Does that suggest that even if an office is rented in the lawyer’s Remote Work State for them to work remotely from, so long as the office is not listed on a letterhead, business card or advertising, then it is not deemed to be a local presence?
- Is the listing of a physical office address an appropriate determinative factor in the modern era of practice? If the entire client relationship is handled via web meetings, telephone and email, how relevant today is a physical office “address”?
- Consider the comment above about whether an automatic email rule might unintentionally taint the attorney’s status.

Does Opinion 495 Comport with Current Practice?

**Points to Consider When
Meeting with Clients**

Do Email Footers List Physical Addresses?

- While purely anecdotal, consider email signatures received from colleagues, as well as in your personal life. How many emails include an individual's physical address in the email?
- Many non-legal businesses make concerted efforts to encourage their customers to seek online solutions. In addition, for individuals in non-legal professions, omitting their physical address may suggest a more national, or international, reach of their services. With modern technology, many service providers, including professionals, are not limited to state lines or any geographical constraint.
- But the analysis and decision for attorneys is different.

What is a Physical Address?

- This is a trend more law firms may choose to evaluate in the future. The question really is becoming what is an “office,” how should an “office” be defined, and with the increasing provision of legal services online (e.g., LegalZoom.com, Trust & Will, etc.) is an “office” the same consideration in a consumer’s retention of legal services that it once was?
- As to what constitutes an office, as the recent growth in office sharing arrangements where a fee is paid to a third-party company to provide access to conference space, a mail drop, and an array of other services, the law firm itself may not have any office in the traditional sense of what had constituted an office. From another lens, these third-party providers make it quite simple and inexpensive for a firm to open a new “office” in a jurisdiction where they feel that “physical” footprint may facilitate meeting local rules or attracting clients.
- From an ethics perspective, attorneys may be best advised if not required to list jurisdictions in which each attorney is licensed, and where each office is located.

Do Legal Letterhead Ethics Rules Provide Guidance on Email Format?

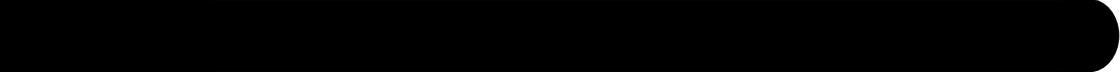
- Historically, before email, legal letterhead had been used for legal communications. The rules of professional conduct provide requirements for communication on legal letterhead in that state. Those rules may include a requirement to identify lawyers on the letterhead that are not licensed to practice in the particular state.
- Do or should different standards apply to letterhead than to email? Is listing locations of physical offices, and the states in which each attorney is licensed recommended or required for email? While this does not seem to be the norm for email, since email has largely replaced traditional letters on letterhead, what should be done?

Example: New Jersey RPC on Letterhead

- As an example, in New Jersey, N.J. Ct. R. RPC 7.5(b) states: “A law firm practicing in more than one jurisdiction may use the same law firm name in New Jersey, provided the law firm name complies with this Rule. In New Jersey, **identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the law firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey.** Where the name of an attorney not licensed to practice in this State is used in a law firm name, or where the law firm name does not include the name of a lawyer in the firm or the name of a lawyer who has ceased to be associated with the firm through death or retirement, any advertisement, letterhead **or other communication** containing the law firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.”
- Do ethics rules governing firm letterhead apply to email? If so, how?

Some State Rules on Remote Work

**Different Standards in
Many States**



General Points

- Opinion 495 provides a caveat that even if the ABA's position is that attorneys may be able to ethically work remotely, they will still be subject to the ethics rules of the Remote Work State.
- Some states have released their own ethics opinions that promulgate rules under which an attorney can work from that state without being licensed.

Maine

- Maine Ethics Opinion 189 (2005).
- *“Where the lawyer’s practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and **clients located in some other jurisdiction**. In neither case has the lawyer established a professional office in Maine, established some other **systematic and continuous presence** in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine [emphasis added].”*
- The “systemic and continuous presence” standard is found in the ethics opinions of several states and will be discussed in more detail.

New Jersey

- New Jersey Joint Opinion Committee on the Unauthorized Practice of Law Opinion 59, Advisory Committee on Professional Ethics Opinion 742, released October 6, 2021.
- ***“... A “continuous and systematic presence” in New Jersey requires an outward manifestation of physical presence, as a lawyer, in New Jersey. ... Hence, actions that merely manifest presence in New Jersey in the capacity of a private citizen or resident, and not as a lawyer, do not raise such concerns. Such outward manifestations of physical presence include, most significantly, practicing from a law office located in New Jersey...”***
- While the New Jersey opinion provides a clear statement that an attorney working from their home in New Jersey doing work relevant to their licensed state may not create an issue, it requires an analysis of whether they have created an “outward manifestation of physical presence” of their practice.

Washington D.C.

- The District of Columbia (“DC”) was one of the first jurisdictions to release an ethics opinion after COVID, on March 23, 2020, District of Columbia Court of Appeals UPL Opinion 24-20.
- The opinion concludes: *“In view of the foregoing principles, the Committee’s opinion is that an attorney who is not a member of the District of Columbia bar may practice law from the attorney’s residence in the District of Columbia 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 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...”*

Washington D.C.

- Would the regular conduct of Zoom meetings from a DC residence rise to the level of “regularly conduct in-person meetings”?
- What if the attorney privately rents a third-party office merely because the attorney feels that for the hours they work each week they would be more productive in that environment? That is no longer the attorney’s residence so is the exception violated?
- We could not identify any subsequent ethics opinion released by the DC Bar addressing the practice of remote work. If this is the most recent opinion, now that the COVID-19 pandemic has officially ended, can attorneys continue to rely on the DC ethics opinion?

Missouri

- In Informal Opinion Number: 2024-03, adopted January 23, 2024, Missouri appears to ban all remote work unless the practitioner is licensed in Missouri as well.
- **“Subject:** *Unauthorized Practice of Law; Multijurisdictional Practice of Law...*
Question: *Lawyer is licensed in State A but lives in Missouri. Lawyer is not licensed in Missouri. Lawyer plans to work for a law firm located in State A from Lawyer’s home office in Missouri. Is Lawyer required to seek admission in Missouri? Answer:* Yes. Rule 4-5.5(b)(1) prohibits a lawyer from establishing an “office or other systematic and continuous presence in this jurisdiction for the practice of law.” That includes the practice of law of State A from Missouri. Lawyer does not meet any of the exceptions in 4-5.5(c) and is required to seek admission in Missouri. See also Informal Opinions 20030078, 980219, 980062, 980010, 970098, 960276, 960055, 940092, and 930152.”

Missouri

- The Informal Opinion references Missouri Rule 4-5.5(c), which provides rules for being admitted *pro hac vice*, using Missouri co-counsel on cases, in-house counsel, etc.
- What if the lawyer doesn't live in MO but merely vacations there for part of the year?
- What if a lawyer visits family in MO and spends several months at a time residing in an apartment they rented for that purpose? What level of connection is necessary to raise an issue?

Virginia

- Virginia Legal Ethics Opinion 1896: Out-Of-State Lawyers Working Remotely In Virginia, approved by the Supreme Court of Virginia on January 11, 2022.
- *“In Legal Ethics Opinion 1856 (approved by the Supreme Court of Virginia November 2, 2016), the committee addressed several questions about multijurisdictional practice under Rule of Professional Conduct 5.5; specifically, what types of practice foreign lawyers may engage in while located in Virginia. This opinion reiterates that guidance to conclude that a foreign lawyer may work remotely in Virginia (from home or otherwise), for any length of time, with or without an emergency justification to do so, as long as the work done involves the practice of the law of the foreign lawyer’s licensing jurisdiction or exclusively federal law that does not require Virginia licensure. The foreign lawyer must avoid holding out or implying licensure in Virginia but otherwise may have a public presence in Virginia and is not required to be “invisible” within the state.”*
- Virginia appears to provide practitioners remotely working with broader discretion to practice in the state as compared to other states. The attorney is even permitted to have a public presence in the state.

Where is the Client Located?

- While several of the state opinions refer to the same standard as ABA Opinion 495 concerning “...*held himself or herself out...*” they add two other important points.
- First, **the client served is in another jurisdiction**. So, for example, if a lawyer has a second home in Maine and works on a matter for a client in New York where the lawyer is admitted, that would seem not to raise an issue. But if the client is in Maine, a problem may be triggered.
- What if the client also has a vacation home in Maine, and is located in Maine at the time the attorney sends the communication?

What is a “Systematic And Continuous Presence”?

- The second factor raised in several state opinions discussed above may be a nettlesome issue. If an attorney licensed in State A and employed by a firm with an office and presence in State A works only from home located in State B where the attorney is not admitted, that initially may seem to be acceptable under the ABA Opinion 495 standards.
- However, if that attorney practices solely from their home the “systematic and continuous presence” criteria may be violated. But with remote work how can someone working from home not have a “systematic and continuous presence”?
- Does that mean that full time or regular remote work in any state that applies this standard may not be feasible unless the attorney is also licensed in that Remote Work state where they maintain a full-time home (or vacation home)?

Conclusion

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- While ABA Opinion 495 and the state opinions reviewed provide useful guidance with the evolution of technology and law practice it may already be difficult, even precarious, to merely apply these standards.
- In addition, as ABA Opinion 495 leaves the issue to each state, attorneys should consider reviewing whether there are any local ethics opinions in any states in which they intend to remotely practice.
- With the rapid changes in technology, societal norms, and other factors attorneys should stay abreast of journal articles and new ethics opinions addressing remote work and related issues

Additional information

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