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Avoiding Unauthorized Practice Of Law In Remote Work

By **Lauren Snyder and Amy Richardson** (August 4, 2021, 4:03 PM EDT)

The COVID-19 pandemic has been transformative for many of us. We spent countless hours at home, did all types of lawyering remotely and learned how to work in nontraditional settings.

After well over a year, the world appears to be reopening once again. And while many of us are excited to see our colleagues or step into a courthouse, the practice of law will not look the same for everyone.

For some of us, we may face the dreaded morning commute three days a week as opposed to five. But for many of us, it will mean telecommuting from a different state or working remotely on a more permanent basis.

Indeed, as the Wall Street Journal points out, many people fled large cities to find more space,[1] and "more than seven million households moved to a different county" in 2020.[2]

This shift in how and where lawyers practice as the world reopens raises several questions: Will states' unauthorized practice of law rules permit this seemingly new type of lawyering? Do lawyers need to become members of the bar in the jurisdictions in which they live? What should lawyers be mindful of, and how can lawyers do their best not to run afoul of their home state's UPL rules?

Each state has UPL rules that protect the public from unqualified lawyers who are not authorized to practice there. These rules are fairly complex, and the nuances vary quite a bit.

Here, we offer some general information about how best to approach the question of whether you are complying with the rules.

We urge you, however, to learn and think critically about the rules of the states in which you are located and have an office.

Ultimately, you may need to become a member of the bar in your home jurisdiction if that jurisdiction does not allow for permanent remote practice by nonadmitted lawyers.

If you are admitted where you are living and working, then there are no UPL issues. If not, research the UPL rules, advisory opinions and case law of the jurisdiction in which you are living.

We provide examples of relevant rules, advisory opinions and case law below:

Rules

The American Bar Association's Model Rule of Professional Conduct 5.5 is the rule governing unauthorized practice of law.

Most states have some version of this rule. Many states also have supplemental rules or statutes.



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Comments to the State Bar of California's Rule 5.5, for example, point the reader to the state's Business & Professions Code, Section 6125, which prohibits the practice of law without an active bar license and includes penalties for this conduct, as well as California's Rules of Court, which govern, for example, pro hac vice admission and registered in-house counsel.

Further, some jurisdictions, like the District of Columbia, have a very succinct version of the rule but then have a long supplemental rule. The District of Columbia Bar Association's Rule 5.5 simply prohibits the practice of law where it violates the regulation of the legal profession or assists someone who is not authorized to practice in the district.[3]

The District of Columbia Court of Appeals' Rule 49, however, is incredibly detailed and helpful. For example, it has specific information about what constitutes the practice of law and explains the numerous exceptions to the prohibition of unauthorized practice.[4]

Importantly, Rule 49(c)(13)'s exception allows foreign lawyers to practice in the District of Columbia on an incidental and temporary basis. This is the exception that forms the basis for the District of Columbia Court of Appeals' advisory opinion, explained in more detail below, which was issued in light of the COVID-19 pandemic.

The New York State Bar Association's Rule 5.5 is similar to that of Washington, D.C., in that it simply prohibits the practice of law where it violates regulation of the legal profession or aids a nonlawyer in the unauthorized practice of law.[5]

And, like Washington, D.C., New York has a separate law, its Judiciary Law, Sections 478 and 484, which governs unauthorized practice.

Judiciary Law Section 478 specifically governs "[p]racticing or appearing as attorney-at-law without being admitted and registered" and provides that no attorney shall appear in a New York court or hold herself out as being entitled to practice in New York unless admitted. As such, attorneys living in New York but not admitted to practice in the state should be cautious of this law and avoid giving any impression that they can legally practice in this jurisdiction.

ABA Model Rule 5.5 and most states prohibit a lawyer from establishing an office or systematic and continuous presence in a state if they are not admitted there.[6]

Some states do allow this, though. The North Carolina State Bar, for example, provides that a lawyer admitted in another jurisdiction may establish an office or other systematic and continuous presence in North Carolina if their services are

limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.[7]

What that means is a New York lawyer could establish an office in North Carolina so long as he limited his practice to federal law or New York law. He could not, however, also take on a North Carolina case without running afoul of the rule.

Advisory Opinions

The ABA Standing Committee on Ethics and Professional Responsibility issued Opinion 495 on Dec. 16, 2020.

The opinion holds that a lawyer can live in State A while practicing consistent with her State B license, so long as she does not establish a local office or a systematic and continuous presence in State A or hold out a presence or availability to perform legal services in State A.[8]

The opinion is clear that you cannot include your local office on "websites, letterhead, business cards, or advertising" material, or "offer to provide legal services in the local jurisdiction." [9]

There are limits to this opinion for lawyers practicing in a different state on a more permanent basis.

The ABA notes that the permissible length of a temporary relocation will depend on the "need to address the pandemic." [10]

The District of Columbia and Florida are two examples of jurisdictions that issued opinions during the pandemic.

On March 23, 2020, the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law issued an opinion that held as follows:

[A]n 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 ... Rule 49(c)(13) if the attorney is practicing from home due to the COVID-19 pandemic; maintains a law office in a jurisdiction where the attorney is admitted to practice; 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 does not regularly conduct in-person meetings with clients or third parties in the District of Columbia. [11]

On May 20, the Florida Supreme Court approved an advisory opinion that found an out-of-state licensed attorney working remotely from his Florida home for his out-of-state law firm on federal intellectual property rights matters (and not Florida law), who does not "hav[e] or creat[e] a public presence or profile in Florida as an attorney," would not be engaged in the unlicensed practice of law. [12]

Unlike Washington, D.C., Florida did not issue its opinion in response to the pandemic; instead, it was in response to the attorney's request for an advisory opinion.

Case Law

In 2010, the U.S. District Court for the District of Maryland found in *In re: Carlton* that a lawyer who has an office outside of Maryland and is admitted to practice in the jurisdiction where the office is located can work from home in the state, even if she is not admitted there. [13]

This telecommuting lawyer not admitted in Maryland cannot, however, meet clients at her home, use her home address for correspondence or advertise her home office in any way. [14] She must have an office in the jurisdiction where she is admitted, and all correspondence should be directed to that address. [15]

In Maryland, the reverse is not allowed. In other words, a lawyer who has her primary office in a jurisdiction where she is not admitted engages in UPL even if she is admitted in Maryland, where she lives. [16]

Until you are certain working remotely is not UPL, do not hold yourself out as practicing in that state — e.g., avoid meeting with clients at your home, having official documents mailed to your home, making any representations about practicing in that state, etc.

Further, review ABA Opinion 498, which was issued by the ABA Standing Committee on Ethics and Professional Responsibility on March 10, acknowledging that the rules allow virtual practice and describes best practices for compliance. [17] These best practices include topics such as virtual supervision of employees and disabling smart speakers and other listening-enabled devices.

Conclusion

As we transition to working remotely full time or in a more hybrid setting (e.g., working from home several days a week), be mindful of your home jurisdiction's UPL rules.

If you are not admitted in the jurisdiction where you live, research the rules of that jurisdiction to make sure you are not running afoul of them.

Start with ABA Rule of Professional Conduct 5.5 and look at supporting rules, opinions and case law.

And do not hold yourself out as practicing in that jurisdiction unless you are certain you are allowed

to do so. You may need to become a member of that jurisdiction's bar before you can do that.

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[1] Yan Wu and Luis Melgar, Americans Up and Moved During the Pandemic. Here's Where They Went., Wall St. J., <https://www.wsj.com/articles/americans-up-and-moved-during-the-pandemic-heres-where-they-went-11620734566> (May 11, 2021, 9:16 AM).

[2] Id.

[3] D.C. R. Prof. Conduct 5.5.

[4] D.C. App. R. 49(b)(2), (c).

[5] N.Y. R. Prof. Conduct 5.5

[6] Model Rules of Pro. Conduct r. 5.5.

[7] N.C. Gen. Stat. Ann. § 2-5.5(d)(2) (West 2021).

[8] ABA Comm. on Ethics & Pro. Resp., Formal Op. 495 (2020).

[9] Id. at 2-3.

[10] Id. at 3.


[11] D.C. UPL Op. 24-20.

[12] The Fla. Bar re: Advisory Opinion–Out-of-State Attorney Working Remotely from Fla. Home, SC20-1220 (Fla. 2021).

[13] *In re Application of Carlton* , 708 F. Supp. 2d 524 (D. Md. 2010).

[14] Id.

[15] Id.

[16] *In re Zeno* , 850 F. Supp. 2d 546 (D. Md. 2011).

[17] ABA Comm. on Ethics & Pro. Resp., Formal Op. 498 (2021).

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