

ABA Approves Remote Practice, But Questions Remain

By **Deepika Ravi, Lauren Snyder and Hilary Gerzhoy** (January 12, 2021)

On Dec. 16, 2020, the American Bar Association's Standing Committee on Ethics and Professional Responsibility published ABA Opinion 495, which holds that a lawyer can practice law while physically outside the jurisdiction in which she is licensed to practice, provided she follow "specific parameters."^[1]



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In particular, 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.^[2]

In doing so, the opinion recognizes the reality of many lawyers' experience even pre-pandemic: In a world of virtual file sharing, cloud-based storage, email communication and videoconference meetings, occasional remote practice is the new normal. But what are the boundaries?



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ABA condones the practice many states have authorized.

ABA Opinion 495, "Lawyers Working Remotely," sanctions what many lawyers have been doing since the COVID-19 pandemic hit in March last year.

It holds that living and working in a different state from the state in which you are licensed to practice — provided you don't establish an office or advertise your services in the state in which you are not licensed — does not run afoul of ABA Model Rule 5.5(a), which prohibits lawyers from engaging in the unauthorized practice of law.^[3] This is true so long as the newfound local jurisdiction in which you are working does not deem your activity to constitute the unauthorized practice of law.^[4]



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The opinion adds helpful color on existing law opining on the contours of remote practice.

A decade ago, the U.S. District Court for the District of Maryland considered whether a Maryland-barred attorney employed by a District of Columbia law firm, who lived in and worked from Massachusetts, had violated the prohibition on the unauthorized practice of law.^[5] The attorney's D.C. firm allowed her to telecommute from Massachusetts where she had relocated for personal reasons.

The Maryland district court found the attorney to be compliant with the rules because she did not practice Massachusetts law, represent any clients based in Massachusetts or with claims in Massachusetts, or hold herself out as a Massachusetts lawyer. And while she used rented office space in Massachusetts for some time, she used that office only to practice law in D.C. and before the Maryland district court and the U.S. Court of Federal Claims.

The vast majority of states have language either identical or functionally equivalent to Model Rule 5.5.^[6] Even where the language differs significantly, it tends to suggest that remote work is permissible.^[7]

To the extent states look to ABA opinions for guidance on how to interpret their state's rules governing the unauthorized practice of law — and they most likely do based on the language they've adopted — they, too, should hold that temporary relocation does not constitute the unauthorized practice of law.

However, as with all rules of professional conduct, a lawyer must look to the relevant rule and opinions in her jurisdiction to determine the precise contours of allowable out-of-state practice. ABA opinions are persuasive, but not binding, authority on states.

Remote work does not, by itself, endanger the public from unqualified lawyers.

In explicitly permitting remote work, the ABA committee emphasized that Model Rule 5.5(a)'s purpose — to protect the public from unlicensed and unqualified practitioners of law — "is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed." [8]

In other words, California has an interest in ensuring the competence of California-licensed lawyers, but it does not have an interest in prohibiting New York-licensed lawyers from practicing New York law while enjoying a more pandemic-friendly California climate.

How can attorneys comply with ABA Opinion 495?

The opinion provides a notable caveat: California has no dog in the New York-lawyer-in-California fight so long as that New York lawyer is "for all intents and purposes invisible as a lawyer" to California. [9] But what does it mean to be "invisible"? Is the committee advising lawyers to be cagey about where they live?

The opinion holds that compliance with Model Rule 5.5 prohibits you from "establish[ing]" a 'local office' in a state in which you are not licensed to practice. [10] That means you cannot "hold out to the public an address in the local jurisdiction as an office." [11] But what does that look like in practice?

The opinion is clear about what you cannot do: You cannot include your local office address on "websites, letterhead, business cards, or advertising" materials, or "offer to provide legal services in the local jurisdiction." [12] Noting your jurisdictional limitations on any marketing materials will help to ensure compliance with Model Rule 5.5. [13]

But what can you do? For example, does the opinion allow you to rent office space in your local jurisdiction? If so, what name do you put on the front door? If you put your firm name on the door, your California neighbor might understandably think you are holding yourself out as a California lawyer, thus running afoul of Model Rule 5.5.

Unfortunately, the opinion does not explain how a lawyer is to remain "invisible as a lawyer" in practice. Until the committee clarifies what a lawyer can do while remaining invisible to ensure compliance with Model Rule 5.5, those temporarily relocated New York lawyers should face the Zoom camera away from that Yosemite view.

While the opinion is ambiguous about how a lawyer is supposed to remain invisible in her new temporary home, it is clear that the content of her practice can remain unchanged. A temporarily relocated New York-licensed lawyer can practice while being physically present

in California just as she would were she back in New York.

For example, if a New York lawyer were working on a matter for a Pennsylvania client whose matter was governed by Delaware law, she could continue to do so while in California so long as that practice was permitted under the New York rules. Such work would constitute "engag[ing] in practicing law as authorized by [her] licensing jurisdiction." [14]

The opinion clearly states that a lawyer may practice from home — or other remote location — whatever laws the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. [15]

What happens when the pandemic is over?

The opinion emphasizes that compliance with Model Rule 5.5 means one's remote work arrangement is temporary. [16] Model Rule 5.5(c) already includes a carveout for out-of-state living and lawyering by permitting a lawyer to practice in a jurisdiction in which he or she is not barred on a "temporary basis." [17] But "temporary" is not defined and, according to the committee, "could vary significantly." [18]

Washington, D.C., is the only jurisdiction to provide blanket permission for out-of-state attorneys to work remotely from the district during the COVID-19 pandemic under the temporary-practice exception. [19] Other jurisdictions, when confronted with the issue before the pandemic, have held that attorneys who work from a location in that jurisdiction but only serve clients located elsewhere, do not violate Rule 5.5 in that jurisdiction. [20]

So, what happens when the pandemic is over? The opinion specifically calls out that "temporary" relocation will depend on the "need to address the pandemic." [21] Opinion 495 suggests that if that New York lawyer falls in love with California, she will have to get admitted to the California bar if she wants to permanently relocate.

So don't get too comfortable in your new home unless you're ready to apply for admission to the bar. And don't hang up a shingle while you're there.

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[1] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020).

[2] *Id.* at 2.

[3] See Model Rules of Prof'l Conduct r. 5.5(a) (Am. Bar Ass'n 2018) ("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.").

[4] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 at 3-4 (2020).

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

[6] Compare Model Rules of Prof'l Conduct r. 5.5 (b)-(c) with e.g., Ala. Rules of Prof'l Conduct r. 5.5 (b)-(d), Ark. Rules of Prof'l Conduct r. 5.5(b)-(c), Conn. Rules of Prof'l Conduct r. 5.5(b)-(c), Del. Rules of Prof'l Conduct r. 5.5(b)-(c), Ill. Rules of Prof'l Conduct r. 5(b)-(c), Ind. Rules of Prof'l Conduct r. 5.5(b)-(c), Iowa Rules of Prof'l Conduct r. 32:5.5(b)-(c), Mich. Rules of Prof'l Conduct r. 5.5(b)-(c), Neb. Rules of Prof'l Conduct § 3-505.5(b)-(c), Ohio Rules of Prof'l Conduct r. 5.5(b)-(c), and Wash. Rules of Prof'l Conduct r. 5.5(b)-(c).

[7] See, e.g., D.C. Rules of Prof'l Conduct r. 5.5 ("A lawyer shall not: (a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."). But see D.C. App. R. 49(c)(13) (allowing incidental and temporary practice), D.C. Comm. on Unauthorized Practice of Law, Op. 24-20 (2020) (authorizing remote work from the District during the COVID-19 pandemic).

[8] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020) at 3; see also Model Rules of Prof'l Conduct r. 5.5(a) cmt. (Am. Bar Ass'n 2018).

[9] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020) at 3.

[10] Id. at 2.

[11] Id.

[12] Id. at 2-3.

[13] Id. at 3.

[14] Id. at 1.

[15] Id. at 2.

[16] Id.

[17] See Model Rules of Prof'l Conduct r. 5.5(c)(4) (Am. Bar Ass'n 2018) ("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.").

[18] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 at 3.

[19] D.C. UPL Op. 24-20 (2020).

[20] See, e.g., Maine Ethics Op. 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."); Virginia LEO 1856 (2011) ("foreign lawyers who are licensed to practice in other U.S. jurisdictions and based in the multi-jurisdictional law firm in Virginia would not be engaging

in unauthorized practice of law in violation of Rule 5.5 so long as they limited their practice to the law of the jurisdiction/s where they are licensed"); Utah Advisory Op. 19-03 (2019) ("The Utah Rules of Professional Conduct do 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 his private location in Utah.").

[21] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 at 3.