



## Newsletters

### A Multistate Analysis of the Ethical Rules Governing Attorneys Working Remotely

May 2023

The COVID-19 pandemic, along with government stay-at-home orders, required millions of professionals to work from home, including attorneys. However, as the pandemic comes to an end, many attorneys wish to continue to work from home. In response, law firms across the country now offer a flexible working environment, with many settling on a hybrid working schedule and some offering fully remote positions.

However, remote work poses unique issues for managing personnel and supervising attorneys. Careful attention must be paid to the applicable rules of professional conduct regarding where the attorney lives and works to ensure that the attorney fully complies with these rules. This article offers insights into some of the major ethical concerns presented by remote legal work. It then provides some advice to supervising attorneys in order to avoid violating applicable ethics rules.

#### I. Ethical Considerations of Remote Work

##### A. Whether Remote Work Constitutes the Unauthorized Practice of Law

Managing partners' most crucial consideration regarding remote work should be whether the practice would be viewed as the unauthorized practice of law (UPL). Attorneys not licensed by a governing state cannot practice law in that state. Accordingly, the following questions arise: If a lawyer is licensed to practice law by state A but lives in state B, would the lawyer violate the UPL rule of state B when the lawyer works remotely from home on matters exclusively dealing with state A?

ABA Model Rule 5.5 on Unauthorized Practice of Law and Multijurisdictional Practice of Law sets forth the rules to follow for a lawyer to practice remotely "on a temporary basis" in a jurisdiction where he or she is not licensed, provided that the legal services:

1. are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
2. are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or

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- reasonably expects to be so authorized;
3. are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
  4. are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Unfortunately, the ABA has not provided guidance on what practicing remotely "on a temporary basis" means. Nonetheless, the ABA addressed this issue in part during the peak of the pandemic in ABA Formal Opinion 495. That opinion concluded that lawyers do not violate Model Rule 5.5 by "remotely practice[ing] the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted," so long as (1) they do not hold themselves out as being licensed to practice in the local jurisdiction and (2) the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law.

As applied to the hypothetical stated above, the lawyer licensed in state A could ethically practice the law of state A remotely from state B as long as state B has adopted a version of ABA Model Rule 5.5. Importantly, managing partners should know the applicable UPL rules of the jurisdictions *in which their attorneys are living and practicing* as these rules determine whether the attorney can legally practice remotely. Below is the current standing on this issue among several states.

## 1. States That Explicitly Allow Remote Practice

Over the last few years, there has been a trend in which states have amended their UPL rules and now explicitly allow remote work within their jurisdictions. Connecticut, for example, does not consider it to be UPL when a lawyer is physically present in the state and "remotely engages in the practice of law as authorized under the laws of another United States jurisdiction in which that lawyer is admitted." Similarly, New York Rule 523.5 provides that a lawyer not admitted in New York but admitted on another state "may practice law from . . . permanent residence . . . in this State to the same extent that such lawyer is permitted to practice law in the jurisdiction(s) where the lawyer is duly admitted or authorized." By way of commentary, Hawaii allows lawyers who are not authorized to practice law in Hawaii to "lawfully remotely practice the law of the jurisdictions in which they are permitted to practice . . . while they are physically present in Hawaii." Similarly, comment 4 of South Carolina's Rule 5.5 provides: "A lawyer admitted in another jurisdiction does not establish an office or other systematic presence in this jurisdiction for the practice of law by engaging in remote work in this jurisdiction, provided the lawyer's legal services are limited to services the lawyer is authorized to perform by a jurisdiction in which the lawyer is admitted[.]"

Many states that expressly allow remote practice have done so by issuing advisory opinions. California, Michigan, Utah, Virginia, Wisconsin, and New Jersey have issued opinions that directly authorize an unlicensed attorney living in their jurisdictions to practice the law of their licensed jurisdiction. Similarly, other states have issued opinions allowing attorneys licensed in their jurisdiction to work remotely on matters arising in their jurisdiction, even if the attorneys live in another state where they are not licensed. These states include Delaware, Illinois, and Pennsylvania.

## 2. States That Implicitly Allow Remote Practice

While not expressly employing the term "remote practice," most states appear to allow such practice implicitly. What all these states have in common is that they modeled the language of their UPL rule on ABA Model Rule 5.5. The Model rule provides: A lawyer admitted in another state and not disbarred may provide legal services in this jurisdiction if they "are services that the lawyer is authorized by federal or *other law*["]. The term "other law" arguably implicates the laws of another state, *i.e.*, the laws that allow a licensed attorney in state A to practice the laws of state A.



Granted, the wording of many states' UPL rules may not be the same as the ABA Model Rule 5.5, but their substance is essentially the same. All of these states implicitly permit remote practice from the state so long as the lawyer's legal services: (1) "exclusively involve . . . the law of another jurisdiction" (**Arizona**); (2) "exclusively involve . . . the law of another jurisdiction in which the lawyer is licensed to practice law" (**Minnesota**); (3) are "limited to . . . the law of the jurisdiction in which the lawyer is admitted to practice" (**North Carolina**); (4) "are services that the lawyer is authorized to provide by federal law or other law" (**Rhode Island** and **Tennessee**); "relate solely to the law of a jurisdiction in which the lawyer is admitted" (**New Hampshire**); "the lawyer is providing services that are authorized by the lawyer's licensing jurisdiction" (**Ohio**); "are services that the lawyer is authorized by federal or other law to provide in this jurisdiction" (**New Mexico**); "arise out of . . . the attorney's practice in a jurisdiction in which the attorney is admitted to practice" (**Maryland**); or "arise out of . . . the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice" (**Indiana**, and **South Dakota**).

Some of those states have issued ethics opinions regarding whether it would be ethical for an attorney living in their state who is licensed in another state to practice federal law exclusively. For instance, a Maryland opinion concluded that "[i]f the lawyer is permitted to appear before the federal agencies in accordance with federal law and the lawyer's practice is limited to those federal matters, that practice would be permitted [under] the Maryland Rules of Professional Conduct." Similarly, Florida stated that a "[p]etitioner who simply establishes a residence in Florida and continues to provide legal work to out-of-state clients from his private Florida residence [and engages in intellectual property law] does not establish a regular presence in Florida for the practice of Law." An Illinois Opinion likewise concluded that "[a]n out-of-state lawyer who is applying for admission in Illinois may work as a lawyer, from an office in Illinois, on cases in state and federal courts to which she is already admitted to practice, as long as those state and federal jurisdictions permit such practice." Lastly, a Maine opinion apparently expressed that a foreign licensed attorney could practice law in Maine so long as the attorney limits the legal practice to matters in his licensed country.

All of these opinions have the following elements in common: (1) the attorney was not licensed by the jurisdiction but was living there, (2) the attorney was allowed to practice federal law, and (3) the attorney was trying to continue to engage in a federal practice while living in the jurisdiction. A similar analysis may consequently apply to remote work for those attorneys licensed in another state who wish to continue doing the same legal job in which they are licensed while living in another state. After all, the opinions based their conclusion on the fact that some law allowed the attorney to engage in federal practice.

### 3. Other States

However, not all states have modeled their UPL rule after ABA Model Rule 5.5. Some of these states include Texas, Alabama, Colorado, and Nevada. Therefore, it cannot be implied that these states implicitly allow remote practice within their jurisdictions. As of now, none of those states have an ethics opinion addressing whether remote work would constitute UPL.

At least one state has published an ethics opinion that appears to conclude that remote work within its jurisdiction constitutes UPL. Considering whether a foreign licensed attorney could practice immigration law while in Missouri, the opinion concluded: "It would constitute the unauthorized practice of law for Attorney to provide legal advice or counseling on any area of law from an office which is located physically within the state of Missouri." Assuming Missouri considers the law from another state like federal law, this opinion may prevent non-licensed Missouri attorneys from working on matters arising from their licensed state while living in Missouri.

The good news is that there is a clear trend among states to allow remote work in their jurisdictions. After all, some courts have concluded that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." This policy would not be affected by allowing a duly licensed attorney to work on matters arising outside of their state. Moreover, most of the changes allowing remote work have occurred within the last few years. On March 15, 2023, the Supreme Court of South Carolina approved a proposed amendment to its UPL rule, which was



"intended to allow lawyers licensed in other jurisdictions to work remotely in South Carolina."

Given the policies behind UPL rules, technological advances, and the nature of the legal practice, remote work will likely be expressly allowed in nearly every jurisdiction in the future. But until that happens, attorneys should inform themselves of the applicable UPL rules in the state they reside in and recognize that not all states allow it.

## II. Advice for Managing Personnel and Supervising Attorneys

ABA Model Rule 5.1(a) requires supervising attorneys to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Hence, managing attorneys have an ethical responsibility to ensure the ethical issues identified above are addressed if any attorneys at their firm work remotely. But how can lawyers effectively supervise other lawyers remotely? Below is some advice to follow.

### A. Know Where Your Attorneys Are Living

The first thing managing attorneys should do if they have attorneys working remotely is know where their attorneys reside. You should have a list of every attorney at your firm that identifies where they live. The list should be continuously updated and require attorneys to take affirmative steps to inform management whenever they change residence to another state. This is important for two reasons. First, ABA Rule 8.5 provides that lawyers are subject to the disciplinary authority of the jurisdiction(s) they are licensed in and of the jurisdiction(s) where they are offering legal services, regardless of whether they are licensed in that jurisdiction. Thus, knowing where your attorneys reside is important as they could also be bound to the ethical rules of that state. And second, knowing where your attorneys are located is essential to know whether such jurisdiction allows remote legal practice.

### B. Read and Understand the Applicable UPL Rules on the Applicable Jurisdiction

Every state has different rules regarding whether remote work would constitute UPL. Therefore, managing attorneys must know whether remote work is authorized in a particular jurisdiction and the conditions for those states that allow remote work.

Even the states that explicitly allow remote work have conditions and limitations. For example, Ohio allows remote practice so long as the unlicensed attorney does not solicit clients in the state. Managing personnel must inform their remote practitioners living in Ohio to abstain from soliciting clients in the state. Other states put limitations on referral fees involving an unlicensed remote practitioner. So attorneys living in those states should not take any fees whenever they refer a client to a licensed attorney in that jurisdiction.

New Jersey prevents its remote practitioners from maintaining a "continuous and systematic presence" in the state. This would prevent attorneys from expressing "an outward manifestation of physical presence, as a lawyer, in New Jersey." Similarly, New York requires that attorneys not hold themselves as being licensed in their jurisdiction. An attorney could comply with New Jersey and New York requirements by simple disclaimers. For instance, an attorney licensed in state X and living in state Y would be compliant by informing the public that they are "only admitted in state X" and showing that their practice location is "in state X." Consequently, the managing attorney must make sure that those disclaimers appear on the remote practitioner's business cards, firm website bios, email signature blocks, etc.

Of course, there are more limitations than the four identified above. Some states have no limitations, while others have many. It is for this reason that managing partners must carefully read the applicable UPL rules of each state where their attorneys are working remotely. Only with such practices can they ensure a remote attorney is practicing the law ethically.



It is important for supervising attorneys to stay informed of the changes to the UPL provisions in each state where it has lawyers living and practicing and, in particular, whether each jurisdiction has adopted a version of Model Rule 5.5. Certain bar organizations, including the Association of Professional Responsibility Lawyers (APRL), have submitted proposals to the ABA to make its rules on remote practice more consistent throughout the country, and these proposals remain under consideration by the ABA.

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Model Rules of Prof'l Conduct R. 5.5 (2019).

Model Rules of Prof'l Conduct R. 5.5 (2019).

[ABA Formal Opinion 495 \(December 2020\)](#).

Conn. Rules of Prof'l Conduct 5.5(f).

NY CLS Rules Ct App § 523.5.

Haw. R. Prof. Cond. 5.5, comment 3.

S.C. Rules of Prof'l Conduct R. 5.5, comment 4.

[San Francisco Opinion 2021-1 \(August 2021\)](#) (“For the lawyer who is licensed to practice law in a jurisdiction other than California, but who is residing in California while remotely practicing law as authorized by the lawyer’s out-of-state law license, the lawyer will not be in violation of CRPC Rule 5.5(b)[.]”).

[Michigan Ethic Opinion RI-382 \(December 2021\)](#) (“An out-of-state attorney physically located in Michigan, but practicing the law exclusively of a jurisdiction in which the out-of-state attorney is licensed, does not violate Rule 5.5.”).

[Utah Ethics Opinion 19-03 \(2019\)](#) (“[W]hat interest does the Utah State Bar have in regulating an out-of state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none.”).

[Virginia Legal Ethics Opinion 1896 \(January 2022\)](#) (“[A] lawyer who is not licensed in Virginia may work from a location in Virginia on a continuous and systematic basis, as long as that practice is limited to exclusively federal law and/or the law of the lawyer’s licensing jurisdiction, regardless of the reason for being in Virginia.”).

[Wisconsin Formal Ethics Opinion EF-21-02 \(January 2021\)](#) (“[W]e conclude that the Rule does not prohibit an out-of-state lawyer from representing clients from the state where the attorney is licensed even if the out-of-state lawyer does so from the lawyer’s private location in Wisconsin.”).

[New Jersey Professional Ethics Opinion 742 \(October 2021\)](#) (Non-New Jersey licensed lawyers may practice out-of-state law from inside New Jersey provided they do not maintain a “continuous and systematic presence” in New Jersey).

[Delaware Formal Opinion 2021-1 \(July 9, 2021\)](#) (“[L]awyers licensed in Delaware . . . may ethically engage in the practice of Delaware law, for clients with Delaware matters, while physically present in another jurisdiction in which they are not admitted[.]”).

[Illinois Advisory Opinion 22-03 \(October 2022\)](#) (“It does not violate the Illinois Rules of Professional Conduct for an Illinois licensed lawyer to practice Illinois law from a geographic location outside of Illinois where the Illinois lawyer is not licensed.”).

[Pennsylvania Advisory Opinion 2021-100 \(March 2021\)](#) (“Lawyers licensed in Pennsylvania may ethically engage in the remote practice of law for clients with Pennsylvania matters while being physically present in a jurisdiction in which they are not admitted.”).

ABA Model Rule of Professional Conduct 5.5(d)(2).



Ariz. Rules of Prof'l Conduct R. 5.5(d).

Minn. Rules of Prof'l Conduct R. 5.5(d).

N.C. Rules of Prof'l Conduct R. 5.5(d)(2).

R.I. Sup. Ct. Art. V, Rule 5.5(d)(2); Tenn. R. Sup. Ct. 5.5(d)(2).

N.H. Rules of Prof'l Conduct Rule 5.5(d)(3).

Ohio Prof. Cond. Rule 5.5(d)(4).

N.M. R. Prof'l. Cond. 16-505.F(4).

Md. Rule 19-305.5(d)(2).

Ind. R. Prof'l. Cond. 5.5(d)(4); S.D. Codified Laws § 16-18-Appx., Rule 5.5(c)(4).

[Maryland Ethic Opinion 2016-05 \(May 2016\)](#).

[Florida Advisory Opinion 2019-4 \(August 2020\)](#).

[Illinois Advisory Opinion 2020-08 \(October 2020\)](#)

Contrary to the other opinions discussed, Maine was skeptical that an foreign licensed attorney would only practice the law from their jurisdiction. See [Maine Opinion #189 \(November 2005\)](#) ("The real question is whether despite this, B's practice extends outside the strict boundaries of any 'federal law' exception to unauthorized practice. If so, then B is engaging in the unauthorized practice of law.").

Tex. R. Disc. Prof'l. Cond. 5.05.

Alabama Rules of Professional Conduct R. 5.5(d).

Colorado Rules of Professional Conduct R.5.5.

Nev. R. Prof. Cond. 5.5.

[Missouri Opinion Number: 970098](#).

See, e.g., *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980).

[In re Amendment to Rule 5.5, South Carolina Rules of Professional Conduct, Rule 407, South Carolina Appellate Court Rules, Appellate Case No. 2022-001182 \(2023\)](#).

ABA Model Rule of Professional Conduct 5.1(a).

ABA Model Rule of Professional Conduct 8.5(a).

Ohio Prof. Cond. Rule 5.5(d)(4)(i).

See, e.g., [Michigan Ethic Opinion RI-382 \(December 2021\)](#).

[New Jersey Professional Ethics Opinion 742 \(October 2021\)](#).

NY CLS Rules Ct App § 523.5(b).