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ABA Issues New Ethics Opinion on Remote Working

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The pandemic has forced many lawyers to work remotely. In some instances, that simply means working out of a home office in the same city that the lawyer's firm is based. In others, however, lawyers have been working from second homes in states in which they are not licensed to practice law. The ABA recently addressed this latter aspect of remote work in a new ethics opinion—Formal Opinion 495, issued on December 16.

ABA Model Rule of Professional Conduct 5.5(a) prohibits a lawyer from engaging in the unauthorized practice of law in a jurisdiction in which the lawyer is not actively licensed or one of the temporary authorizations in the rule does not apply. ABA Model Rule 5.5(b), in turn, prohibits a lawyer who is not authorized to practice law in a given jurisdiction from establishing “an office or other systematic and continuous presence” or “holding[ing] out to the public or otherwise represent that the lawyer is admitted to practice” there. Both provisions have been adopted widely in varying forms throughout the country.

ABA Formal Opinion 495 notes that what constitutes the “practice of law” is controlled by state law and is not uniform nationally. Interpreting the ABA Model Rules, however, the new ABA opinion finds that—absent state law to the contrary—simply working remotely from a second home in another state in which

the lawyer is not licensed does not violate Model Rules 5.5(a) or 5.5(b) as long as lawyers do not hold themselves out as being licensed in that jurisdiction or otherwise implying that through, for example, listing their local address on letterhead or in advertising.

ABA Formal Opinion 495 is narrowly tailored in the sense that any given scenario will turn largely on how individual states define the practice of law in this context. Some, such as Arizona by rule amendment (Arizona Ethics Rule 5.5(b)) and Florida by advisory opinion (Florida Bar Standing Committee on Unauthorized Practice of Law Advisory Op. 2019-4 (2020)) have concluded that remote work is permitted as long as lawyers do not hold themselves out as practicing locally.

Formal Opinion 495 is, nonetheless, a useful clarification. Many states do not have specific rules or advisory opinions on point and the ABA opinion provides a clear analytical lens. The opinion will also likely continue to resonate beyond the pandemic as many lawyers continue to use technology to work remotely on at least an occasional basis.

Beyond the licensing issue that lies at the heart of Formal Opinion 495, it is important to note that the opinion does not address the technology—such as cloud computing and secure communications—that makes remote work possible

for lawyers. WSBA Advisory Opinions 201601 (2016) and 2215 (2012) discuss ethical and law firm risk management considerations of, respectively, virtual practice generally and cloud computing specifically. Both are available on the WSBA's web site. ABA Formal Opinion 477R, in turn, focuses on confidentiality issues in electronic communication and data transmission. Both Formal Opinions 495 and 477R are available on the ABA's web site.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms and legal departments throughout the Northwest on professional responsibility and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is a member of the Oregon State Bar Legal Ethics Committee and the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.