

June 2023 WSBA *Bar News Ethics & the Law* Column

Here & There: Remote Work in Washington and Beyond

By Mark J. Fucile
Fucile & Reising LLP

One of the most significant continuing impacts of the Covid-19 Pandemic on the legal profession is *where* lawyers practice. For many, the pre-Pandemic routine of working Monday through Friday in a “brick and mortar” office has been permanently upended. For some, “hybrid” models are now the norm—with lawyers and staff working part of the week in traditional office space and part in home or other non-traditional offices.¹ For others, the change has been more dramatic—eliminating traditional offices altogether and working solely from home or non-traditional spaces. In some instances, these “virtual” offices are located in jurisdictions in which the lawyers are licensed. In others, however, the lawyers are practicing “remotely” to their licensed jurisdictions from locations in which they are not licensed.

This last scenario came into sharper focus during the Pandemic. Some lawyers “telecommuted” before the Pandemic, but anecdotal evidence suggests their numbers were relatively few.² During the Pandemic, however, remote work became more common. As we emerge from the Pandemic, many lawyers remain interested in continuing to work remotely.

Remote work, however, fell into a regulatory “gray area.” On one hand, lawyers working remotely are typically practicing from home offices solely to their

licensed jurisdictions through email, mobile telephone and video conferencing. On the other, ABA Model Rule 5.5(b) and its state counterparts—including Washington RPC 5.5(b)—prohibit lawyers from engaging in the unauthorized practice of law (“UPL” in the vernacular) by either establishing an office or holding themselves out to the public as admitted to practice in a jurisdiction in which they are not licensed. To address this ambiguity, the ABA in late 2020 issued an ethics opinion discussing remote work—Formal Opinion 495. The ABA concluded that lawyers in the typical remote work scenario noted above did not violate Model Rule 5.5(b) because they were practicing solely to their licensed jurisdictions and were not holding themselves out to the public as being admitted in the jurisdiction in which they were physically located. Washington has now followed with an advisory opinion that largely tracks ABA Formal Opinion 495.

The Washington opinion amended an earlier opinion addressing “virtual” practice generally—WSBA Advisory Opinion 201601. As used in the amended WSBA advisory opinion and its ABA counterpart, “remote” work is defined generally as the practice of law to a lawyer’s licensed jurisdiction through technologies such as email, mobile telephone and video conferencing while physically located in a jurisdiction in which the lawyer is not licensed. We’ll use

Page 3

that same definition here. In this column, we'll survey unauthorized practice issues for both out-of-state lawyers working remotely from Washington and for Washington lawyers working remotely from out-of-state.

Before we do, four qualifiers are in order.

First, we'll focus on situations where the lawyer involved does not plan to become licensed in the state in which the lawyer is physically located and is solely doing work through electronic means to jurisdictions in which the lawyer is either licensed or is otherwise authorized to practice.³

Second, we'll focus on situations that are "permanent" in the sense that the lawyer has moved to a new location for an extended period. Therefore, we will not discuss forms of temporary authorized practice—such as *pro hac vice* admission in a court proceeding—that are available for more transient circumstances in both Washington and elsewhere.⁴

Third, although we'll focus on UPL, practicing remotely can trigger other risk management considerations ranging from electronic security to supervision. WSBA Advisory Opinion 201601 and ABA Formal Opinion 498 (2021) survey "virtual" practice issues generally.⁵ Other substantive legal areas, such as employment, workers compensation and tax law, may also come into play depending on the circumstances.

Fourth, we'll focus on individual lawyers rather than law firms. That said, law firms authorizing remote work have critical risk management interests regarding the lawyers and staff involved.⁶ As the leading national treatise on law firm civil liability put it: "A law firm, of course, is liable for the conduct of its principals and employees."⁷ This simple precept applies whether law firm personnel are in the same "brick and mortar" office or working remotely around the country.⁸ Similarly, remote work issues cross practices and law firm or legal department size.⁹

Here

As amended, WSBA Advisory Opinion 201601 concludes that out-of-state lawyers are generally permitted to practice remotely in Washington as long as they limit their work to their licensed jurisdictions and do not hold themselves out as available to practice in Washington. The amended Washington opinion quotes ABA Formal Opinion 495 approvingly on what constitutes "establishing" an office and "holding out" to the public as used in Model Rule 5.5(b) and its Washington counterpart:

"A local office is not 'established' within the meaning of [RPC 5.5(b)] 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 . . . If the lawyer's

website, letterhead, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer services in the local jurisdiction, the lawyer has not 'held out' as prohibited the rule."¹⁰

To underscore the prohibition on "establishing" an office and "holding out" to the public, the Washington opinion is framed from the perspective of lawyer practicing from a home office who is "invisible as a lawyer" even if, for example, the lawyer's firm has an office in Washington.¹¹ The Washington opinion also counsels lawyers to review any applicable law in their licensed jurisdictions that might limit or otherwise prohibit them from practicing remotely from Washington.¹²

Unauthorized practice is not merely a regulatory problem.¹³ The seminal case nationally on unauthorized practice by lawyers, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), involved a dispute over \$1 million in legal fees in which the California Supreme Court held that a law firm's fee agreement was unenforceable to the extent it involved services rendered in California by the firm's lawyers who were not authorized to practice there. Although Washington does not have a precise equivalent to *Birbrower*, the Washington Supreme Court has held in other contexts that fee agreements violating the RPCs are unenforceable on public policy grounds.¹⁴

Albeit an unpublished decision involving a nonlawyer practicing law, the Court of Appeals in *Teagle v. Zak*, 2000 WL 320683 at *3 (Wn. App. Mar. 28, 2000) (unpublished), used this logic in concluding that a contract for legal services provided by a person not authorized to practice law in Washington was unenforceable.

There

Washington RPC 8.5(a) reflects the Washington Supreme Court's disciplinary authority over Washington lawyers regardless of their location. Under Washington RPC 5.5, however, the question of what constitutes unauthorized practice is generally determined by the law of the jurisdiction in which it occurs.¹⁵ Accordingly, Washington lawyers practicing remotely while physically located in another state in which they are not licensed need to look primarily to the law of that jurisdiction rather than Washington to determine whether their practice is permitted or not.

WSBA Advisory Opinion 201601 puts it this way:

A remote Washington-licensed lawyer . . . may not establish or advertise a physical presence outside of the home to practice law in the remote jurisdiction unless that physical presence is otherwise authorized by the remote jurisdiction.¹⁶

Page 7

Regionally, Oregon recently took a generally similar approach to Washington in OSB Formal Opinion 2022-200 (2022). The Oregon opinion permits remote work there as long as the lawyers involved practice solely to their licensed jurisdictions and do not hold themselves out as being available to handle Oregon matters. As I write this, neither Alaska nor Idaho have spoken directly to remote work.¹⁷

Beyond the Northwest, the jurisdictions addressing remote work have taken a variety of roads that arrive at the same general place as Washington. This divergence of approaches, however, means the “answer” for any given jurisdiction will not necessarily be in the same place and requires lawyers to carefully survey authority in the location they are interested in practicing remotely. Many, like Pennsylvania, have issued state or local ethics opinions.¹⁸ Some, like the District of Columbia, have addressed remote work through special UPL committees.¹⁹ Others, such as New Jersey, have issued joint opinions from state ethics and UPL committees.²⁰ Still others, such as Arizona and New York, have amended their RPCs or practice rules.²¹

Even in those jurisdictions that permit remote work, subtle but potentially significant nuances remain. The Oregon opinion, for example, does not distinguish between home and commercial office space as long as the lawyers

involved do not solicit Oregon work or hold themselves out as available to do so. By contrast, Utah only permits remote work from a “private residence.”²² An out-of-state lawyer working remotely in Oregon, therefore, could practice in space outside the lawyer’s home as long as it is not advertised as a “law office.” The same lawyer in Utah, however, could only work from the lawyer’s home.²³ This difference stems from varying interpretations of what it means to “establish an office” and “hold out to the public” in state versions ABA Model Rule 5.5(b) that generally classifies both as UPL if the lawyer involved is not licensed in the location involved. As noted earlier, ABA Formal Opinion 495 concluded that “[a] local office is not ‘established’ within the meaning of the rule . . . [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 the lawyer’s presence.”²⁴ Virginia, citing the ABA opinion, noted: “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.”²⁵ As the Utah opinion illustrates, however, not all jurisdictions have taken this approach.²⁶ Lawyers exploring remote work in a particular location, therefore, need to carefully evaluate both whether remote work is permitted and, if so, any practical limits imposed.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of 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 the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and is a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* 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.

¹ See generally Mark J. Fucile, *New Normal: Risk Management for 'Hybrid' Offices*, 76, No. 1 Washington State Bar News 16 (Dec. 2021/Jan. 2022) (surveying law firm risk management issues in hybrid work models).

² See, e.g., *In re Application of Carlton*, 708 F. Supp.2d 524 (D. Md. 2010) (discussing a lawyer physically located in Massachusetts who "telecommuted" to an office in Washington, DC).

³ Washington Admission and Practice Rules 3(c) and 3(d) address, respectively, admission in Washington by motion and by Uniform Bar Exam score transfer. APR 8(f), in turn, authorizes a limited license for in-house counsel admitted elsewhere who are employed in Washington. Washington RPC 5.5(d)(2) addresses practice in Washington exclusively in federal forums or other circumstances authorized by federal law.

⁴ Washington RPC 5.5(c) authorizes temporary practice in Washington matters by out-of-state lawyers in specifically delineated situations. Washington RPC 5.5(d)(1) authorizes temporary practice by in-house counsel in Washington. Washington APR 8(b) regulates *pro hac vice* admission by out-of-state lawyers in Washington court proceedings. The Washington RPC 5.5 is patterned generally on its ABA Model Rule counterpart.

⁵ See RPCs 1.6(c) (duty to protect confidential information), 5.1(b) (supervision of lawyers) and 5.3(b) (supervision of nonlawyer staff). See also WSBA Advisory Op. 2215 (2012) (cloud computing); ABA Formal Ops. 483 (2018) (cyber security), 477R (2017) (electronic data transmission), 99-413 (1999) (email security), 08-451 (2008) (outsourced services).

⁶ See generally Mark J. Fucile, *The Changing Geography of Law Practice: Law Firm Risk Management Considerations*, 84, No. 4 Defense Counsel J. 1 (Oct. 2022) (surveying law firm risks and responsibility for authorized remote work).

⁷ Ronald E. Mallen, *Legal Malpractice* 572 (rev. 2020).

⁸ See generally Restatement (Third) of the Law Governing Lawyers § 58(1) (2000) (vicarious liability); see also ABA Model Rule 5.5(a) (regulatory liability for assisting in the unauthorized practice of law); Washington RPC 5.5(a) (same).

⁹ See generally ABA, *2022 Practice Forward Report: Where Does the Legal Profession Go From Here?* (2022) (compiling survey results on practice changes—including remote work—accelerated by the Covid-19 pandemic).

¹⁰ WSBA Advisory Op. 201601 at 3-4 (amended 2022), quoting ABA Formal Op. 495 (2020) at 2.

¹¹ WSBA Advisory Op. 201601, *supra*, at 4, quoting ABA Formal Op. 495, *supra*, at 3.

¹² *Id.* at 5.

¹³ See, e.g., *In re King*, 168 Wn.2d 888, 232 P.3d 1095 (2010) (lawyer disciplined for violation of RPC 5.5); see also *State v. Yishmael*, 195 Wn.2d 155, 456 P.3d 1172 (2020) (discussing unauthorized practice as a crime under RCW 2.48.180); *Matter of Lewis*, ___ Wn.2d ___, ___ P.3d ___, 2023 WL 1457586 (Feb. 2, 2023) (assessing UPL in the context of indigent criminal defense representation under the Sixth Amendment).

¹⁴ See generally *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 85, 331 P.3d 1147 (2014) (“We have previously and repeatedly held that violations of the RPCs . . . in the formation of a contract may render that contract unenforceable as violative of public policy.”); *Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007) (“Attorney fee agreements that violate the RPCs are against public policy and unenforceable.”).

¹⁵ Washington RPC 8.5(b) governs choice-of-law and is consistent with RPC 5.5(a) in looking to the law of the jurisdiction where unauthorized practice occurs.

¹⁶ WSBA Advisory Op. 201601, *supra*, at 4.

¹⁷ Alaska addressed exclusively federal forum practice in Alaska Bar Ethics Opinion 2010-1 (2010). California published an interim opinion for public comment—Formal Opinion Interim No. 20-0004—that touches on, but does not conclusively resolve, unauthorized practice issues in the remote work context. The San Francisco Bar, however, issued an opinion—No. 2021-1 (2021)—that generally approved remote work in California by out-of-state lawyers subject to the same caveats noted in the Washington and ABA opinions.

¹⁸ See, e.g., Pennsylvania and Philadelphia Bars Joint Formal Op. 2021-100 (2021).

¹⁹ See, e.g., DC Unauthorized Practice of Law Committee Op. 24-20 (2020); see also DC Court of Appeals Rule 49, Cmt. re Rule 49(c)(13).

²⁰ See, e.g., NJ Advisory Committee on Professional Ethics Op. 742/Committee on the Unauthorized Practice of Law Op. 59 (2021).

²¹ See, e.g., Arizona ER 5.5(d); New York Temp. Prac. R. 523.5.

²² Utah State Bar Ethics Advisory Committee Op. 19-03 at 8 (2019).

²³ Although some opinions reaching this conclusion were likely colored by workplace restrictions during the Covid-19 pandemic, others like the Utah opinion preceded the pandemic. See *also* Maine Professional Ethics Commission Op. 189 (2005) (touching on remote work from a vacation or permanent home in Maine in the context of discussing what it means to “establish” an office under Maine’s version of ABA Model Rule 5.5).

²⁴ ABA Formal Op. 495, *supra*, at 2.

²⁵ Virginia Legal Ethics Op. 1896 at 1 (2022). See *also* New York Temp. Prac. R. 523.5 (while titled “work from home” the rule permits remote work from either a residence or another “location”); New Hampshire RPC 5.5(d)(3) (specifically referencing “office” in permitting remote work).

²⁶ See *also* Wisconsin State Bar Formal Op. EF 21-02 at 10 (2021) (limiting remote work to “the lawyer’s private location”).