



EPISODE #19

UPL issues and teleworking from out of state

Total run time: 8:14 minutes

Terri: Like many of you, we've been working remotely these days. In fact, we're recording this episode from our homes. Due to the COVID-19 pandemic, many lawyers have been working from vacation homes or even from their parents' home—and sometimes from jurisdictions where they are not licensed. Today, we'll explore how the rules about unauthorized practice of law apply to that situation. I'm Terri Garland and you're listening to The Portable Ethics Lawyer, At Home Edition.

To walk us through the issues, we're joined by Mary Beth Robinson, Senior Vice President of the ALAS Loss Prevention Department. Hi, Mary Beth.

Mary Beth: Hi, Terri.

Terri: Mary Beth, what kinds of issues arise when lawyers work remotely from out of state?

Mary Beth: Well first, just let me say to those lawyers working from your high school bedroom in your parents' home—I'm sorry. This too shall pass.

But let's get to the issue. As you mentioned, Terri, many lawyers currently are working remotely in states where they're not licensed. This could constitute the unauthorized practice of law—but as long as lawyers don't hold themselves out as admitted in those states and they follow certain practices, we think the risk is fairly low. That being said, lawyers need to proceed carefully and follow the rules.

So, let's start with the applicable rule—always a good place to begin. ABA Model Rule 5.5, which most states have adopted to some extent, says that a lawyer can't "establish an office or other systematic and continuous presence . . . for the practice of law" in a jurisdiction where the lawyer isn't admitted. The rule also says, though, that under

certain circumstances the lawyer can “provide legal services on a temporary basis” there.

Terri: Sounds like “temporary basis” is the magic language, but what does it mean?

Mary Beth: Well, Rule 5.5 (c) sets out four criteria—but, as I’m sure you can guess, there is nothing about a pandemic in the rule. The comments of the Rule note that there’s no single test to determine if a lawyer is practicing on a temporary basis. They do say that services can be temporary even if the lawyer provides them in the jurisdiction for an extended period of time—but they cite as an example a lawyer representing a client in a lengthy negotiation or litigation. Again, I’m pretty confident the ABA did not contemplate a pandemic when they added the temporary basis exception.

Terri: Right, I doubt they saw this coming. What about ethics opinions? Do they provide any guidance?

Mary Beth: They do and there’ve been a few opinions in the last several months. Listeners can find them on the landing page for this podcast, which is accessible to everyone through the ALAS website. Most recently, the Florida Bar Standing Committee on UPL released a proposed advisory opinion. That opinion came out just last month. The facts in the case are helpful—so if you’d indulge me, Terri, I’d like to walk through them.

Terri: Yes, of course.

Mary Beth: So, in this case, the petitioner was an IP lawyer licensed in New York, New Jersey, and before the USPTO. He had moved to Florida and started working with a New Jersey law firm that had no offices in Florida. The lawyer would do most of his work from his home in Florida on his PC, which was connected to the firm’s network. He wouldn’t represent any Florida clients and wouldn’t solicit any potential Florida clients. Neither he nor his firm would advertise that he was working from Florida, and the firm’s letterhead and website and his business cards (I guess people still use those) would only list the firm’s New Jersey address—and would identify him as licensed only in New York, New Jersey, and with the PTO. All of his contact information would be

associated with the New Jersey office, including the office address, his email address, and his office phone (which would be routed to his cell phone). Finally, he wouldn't give any advice on Florida law and he wouldn't work on any matters that involved Florida courts or property.

Terri: So, the lawyer wasn't practicing remotely on a temporary basis—this was a permanent move, right?

Mary Beth: That's right.

Terri: What did the Committee think about that?

Mary Beth: It said it was clear that the lawyer would not be establishing a regular presence in Florida for the practice of law—he'd just be living there. All indications were that the petitioner's practice of law was in New Jersey, not Florida—and there was no attempt by him or his firm to create a public presence in Florida. The Committee also made clear that it was not interested in regulating the lawyer's practice for his out-of-state clients simply because he had a home in Florida.

It also acknowledged the current pandemic and specifically referenced the increased role technology plays in the practice of law these days.

Terri: Are there any other opinions we should know about?

Mary Beth: There are. The Florida Bar Opinion cites a Utah Ethics Advisory Committee Opinion from last year. In that case, the Committee said that a lawyer who has a residence in Utah, but isn't licensed there, can practice law for clients from the state where the lawyer is licensed as long as the lawyer doesn't solicit Utah clients and doesn't establish a public office in Utah. Also, earlier this year in March, the D.C. Court of Appeals' Committee on UPL announced that a lawyer who is not a member of the D.C. Bar but lives in D.C. can practice law from their residence there under the temporary practice exception under four conditions: first, the lawyer practices at home due to the COVID-19 pandemic; second, the lawyer maintains a law office in a jurisdiction where she is admitted to practice; third, the lawyer avoids using a D.C. address in any business document or otherwise holds herself out as authorized to

practice law in the District; and finally, she does not regularly conduct in-person meetings with clients or third parties in the District.

Terri: Thanks. That's helpful.

Mary Beth: It is helpful, it is. But actually, let me just add one more helpful opinion—the Oregon Supreme Court recently ruled that a lawyer is authorized to practice law on a temporary basis in Oregon pending his admission to the Oregon Bar.

Terri: What about disciplinary proceedings? Have you seen any against lawyers who are practicing remotely from out of state during the pandemic?

Mary Beth: We're not aware of any, but that doesn't mean it can't happen. So again, lawyers need to proceed carefully.

Terri: Does ALAS have any guidance or tips for how to do that?

Mary Beth: Sure, we do. First, any lawyer who wants to temporarily work remotely from a jurisdiction where they're not licensed should let their firm's general counsel or loss prevention partner know. The firm and the lawyer should look closely at the rules of the jurisdiction where the lawyer wants to work remotely—and follow those rules. Find out if there are certain specific restrictions or, as with the District of Columbia, any limited exceptions. You also may want to seek guidance on an anonymous basis from ethics advisory authorities in the jurisdiction where the lawyer will be working remotely.

Also, avoid meeting with or soliciting clients in the state where you're temporarily working. Forward your office phone to your cell phone if necessary and, of course, continue to work on the firm's network and use your firm email for all business. The key here is that lawyers should not in any way hold themselves out as being admitted to practice law in the jurisdiction where they're not licensed.

Terri: Thanks very much, Mary Beth.

Mary Beth: Thank you, Terri. It was great to talk to you.

Terri: I hope we can do it in person soon. Until next time, I'm Terri Garland, and this is the Portable Ethics Lawyer, At Home Edition.

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