Remote practice, “invisible lawyers,” and UPL

By Clare Pastore

There’s nothing like a crisis to accelerate the speed of change. Over the past few decades, the legal profession has been gradually adapting to technological and societal change in a variety of ways, including by the advent of electronic filing, the virtual abandonment of facsimile communications, the ubiquity of email, and the adoption of electronic discovery rules, among many others. But change was kicked into overdrive beginning in March 2020 with the COVID shutdown of virtually all in-person legal work. Suddenly lawyers, like many Americans, had to learn to pivot to “virtual” or “remote” work. Moreover, even as the pandemic recedes, predictions are that remote work is here to stay. A recent national survey of lawyers found that over half of the responding firms planned to allows lawyers to work remotely full-time even after the pandemic, and 70% said that part-time remote work would be permitted.[1]

Remote work for lawyers raises a host of ethical issues, such as how to ensure confidentiality, adequate client communication, and adequate supervision of junior lawyers and paraprofessionals, among others. Another issue that has received significant recent attention from several states’ Supreme Courts, bar authorities, and ethics committees is what licensing rules do or should govern the remote practice of law. All states limit the “practice of law” within their jurisdiction to lawyers licensed there, and forbid the unauthorized practice of law. But is a lawyer sitting in a state always “practicing law” there? If a California lawyer works remotely from her Montana vacation home, is she in violating California or Montana’s rules regarding unauthorized practice? Likewise, if a Nevada lawyer comes to her Palm Springs home for a long-term stay, can she continue to serve her Nevada clients virtually without a California license? The answers aren’t always clear.

ABA Model Rule of Professional Conduct (“Model Rule”) 5.5a, and its California counterpart, California Rule of Professional Conduct (“CRPC”) 5.5, use slightly different language, but both state that a lawyer admitted in the jurisdiction shall not “practice law in a jurisdiction” where doing so would violate that jurisdiction’s regulations. Both rules go on to mandate that unadmitted lawyers must not establish an office “or other systematic and continuous presence” in the jurisdiction[2] nor “hold out to the public or otherwise represent that the lawyer is admitted” (unless authorized under another provision such as those regarding temporary practice).[3]

The ABA Standing Committee on Ethics and Professional Responsibility weighed in helpfully on the application of MR 5.5 to remote practice in Formal Opinion 495, issued in December 2020, nearly a year into the pandemic.[4] Noting that the purpose of licensing and limitations on practice is to “protect[] the public against rendition of legal services by unqualified persons,” the Committee determined that “[a] local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in

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[1] Mycase 2021 Legal Industry Report, “Lessons Learned From the Pandemic” (2021) (available at https://info.mycase.com/rs/196-INY-394/images/MyCase_2021-Industry-Report.pdf).
[2] MR 5.5(b)(1), CRPC 5.5(b)(1).
[3] MR 5.5(b)(2), CRPC 5.5(b)(2).
[4] The opinion is available here: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf

which that lawyer is licensed. . . ." Therefore, the opinion concludes that unless the jurisdiction where the lawyer is actually residing prohibits it, "a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed, . . . even from a physical location where the lawyer is not licensed."

The opinion goes on to discuss the meaning of the prohibition on the "establish[ment] of an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law," and concludes that an office is not "established" by the lawyer 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." Likewise, the opinion finds that a lawyer who neither practices the law of the local jurisdiction nor holds herself out as doing so does not establish a systematic and continuous presence in that jurisdiction. The concluding paragraph of the opinion holds that the public protection purpose of Model Rule 5.5 "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." (emphasis in original).

Ethics committees or rule drafters in over a dozen jurisdictions have come to the same conclusion.[5] In some jurisdictions, clarifying changes to rules of conduct have been proposed or adopted.[6] No state has taken a contrary position. Clearly, a consensus is emerging that common sense and the nature of the modern world require more than a mechanical application of geographical boundaries, and that no purpose is served by policing lawyers' choices of where to sit while they serve clients in and for the jurisdictions in which they are licensed.[7]

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[5] *See* Delaware State Bar Association Committee on Professional Ethics Formal Opinion 2021-1 (July 9, 2021), District of Columbia Court of Appeals Committee on Unauthorized Practice of Law Opinion 24-20 (March 23, 2020), Supreme Court of Florida SC20-1220 (May 20, 2021), Maine Professional Ethics Commission Opinion #189 (Nov. 15, 2005), New Jersey Committee on the Unauthorized Practice of Law and Advisory Committee on Professional Ethics Joint Opinion (Oct. 6, 2021), New York County Lawyers' Association Committee on Professional Ethics Opinion 754 (August 11, 2020), Ohio Rule of Prof. Conduct 5.5(d)(4) (effective September 1, 2021), Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Joint Formal Opinion 2021-100 (2021), Utah Ethics Advisory Opinion Committee Opinion No. 19-03 (May 14, 2019), Virginia Legal Ethics Opinion 1896 (2022).

[6] *See, e.g.*, Supreme Court of Florida, "In re Amendments to Rule Regulating the Florida Bar 4-5.5," (February 17, 2022) (amending a comment to Florida's version of Rule 5.5 to state that "a lawyer licensed in another United States jurisdiction does not have a regular presence in Florida for the practice of law when the lawyer works remotely while physically located in Florida for an extended period of time if the lawyer works exclusively on non-Florida matters, and neither the lawyer nor any firm employing the lawyer hold out to the public as having a Florida presence.") *See also* New York State Bar Association Committee on Professional Ethics, "Proposed Amendment to New York Court of Appeals Part 523 Rules for the Temporary Practice of Law in New York" (2021 WL 462623 (2021) (proposing amendment to clarify that "lawyers who practice law outside New York State do not engage in the practice of law in this State solely by virtue of physically working remotely from their homes in this State"); Ohio Rules of Prof. Cond., Rule 5.5(d)(4) and comment 22 (allowing attorney licensed in another state to practice law of that jurisdiction while working remotely from Ohio).

[7] The Utah opinion goes further than the others, concluding that the Due Process Clause and Privileges [or] Immunities Clause of the Fourteenth Amendment, as well as the Privileges and Immunities Clause of Article IV of the U.S. Constitution would be implicated by punishing an out of state lawyer, unlicensed in Utah, for residing within Utah while serving out of state clients. Utah Ethics Advisory Opinion Committee, Opinion No. 19-03 (May 14, 2019) at 8.

The situation may not be quite so simple in California, however. Our state's prohibition on unauthorized practice is not embodied solely in the Rules of Professional Conduct, but also in the State Bar Act, Business & Professions Code Section 6125, which states, "No person shall practice law in California unless the person is an active licensee of the State Bar." Section 6126 makes unauthorized practice of law a misdemeanor. Our Supreme Court interpreted Section 6125 and the terms "practice law" and "in California" in the notorious *Birbrower* case in 1998,[8] holding that a New York firm, without lawyers licensed to practice in California, violated Section 6125 when it performed legal services in California (primarily settlement negotiations and preparation for arbitration), for a California-based client in a dispute over a contract that contained a California choice of law clause. Because of the violation, the Court held that the fee agreement, under which the Birbrower firm was owed over $1 million, was unlawful and unenforceable as to the firm's California work. The case provoked a firestorm of criticism and was legislatively overruled as to out of state lawyers' work on arbitration a few years later.[9] Its analysis of the meaning of "practice law" and "in California" remains, however. At a minimum, this means that any amendment to or interpretation of the CRPC must be consistent with *Birbrower*'s definitions.

Aspects of the case can be cited in support of both a broad and a narrow interpretation of Rule 5.5. For example, those fearing that *Birbrower* may impede a mere rule clarification permitting remote lawyering point to the decision's harsh result, as well as the Court's strict interpretation of Section 6125 and its rejection of all of the law firm's arguments regarding how to interpret the statute. These included the claims that a pro hac vice rule should be implied for arbitration, that Section 6125 shouldn't apply to out of state *attorneys* at all (only laypeople), that application of Section 6125 to these circumstances did not further the public protection rationale for the statute, that Section 6125 should not apply to arbitration at all, and that applying Section 6125 to this circumstance undermined the public interest in efficiency. The court rejected all of these arguments, noting that they should be directed to the Legislature and not the Court.[10] The Court also cautioned that "[w]e must decide each case on its individual facts."[11]

Those who claim *Birbrower* supports an interpretation of the UPL statute more in line with other states' views and modern practice cite the Court's acknowledgment that "the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters. . . ."[12] They note as well that the case focused only on the activities of out of state lawyers *serving California clients*, which is categorically different than the situation of out of state lawyers sitting in California but serving clients in jurisdictions where they are licensed. The Supreme Court said in *Birbrower* that "the primary inquiry [in assessing a possible violation of Section 6125] is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing

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[8] Birbrower, Montalbano, Condon & Frank, P.C., v. Superior Court, 17 Cal. 4th 119 (1998).
[9] *See* former Code of Civil Procedure § 1284.4 (allowing out of state attorneys to appear *pro hac vice* in arbitrations). In 2007, the State Bar adopted its Multijurisdictional Practice Rules (found here: https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-the-State-Bar/Title-3-Programs-and-Services) encompassing this arbitration provision as well as provisions for other categories of permissible non-California attorney practice such as registered military spouses, registered legal aid attorneys, and registered in-house counsel. *See also* California Rules of Court, Rules 9.40-9.49.1.
[10] 17 Cal. 4th at 131-135.
[11] 17 Cal. 4th at 128-29.
[12] 17 Cal. 4th at 129.

relationship *with the California client* that included legal duties and obligations."[13] The Bar Association of San Francisco took this view of *Birbrower* in a recent ethics opinion, citing the case extensively and concluding that an out of state lawyer who resides in California but practices law remotely in the jurisdiction of licensure (and for clients in that jurisdiction) does not violate Rule 5.5.[14]

The public protection rationale of Rule 5.5 and Section 6125, as explained in *Birbrower*, certainly seem to support the common-sense conclusion that lawyers licensed elsewhere, and serving clients there, pose no risk to the California public or courts by conducting that remote practice from our state. Time will tell whether common sense prevails.

[13] 17 Cal. 4th at 128 (emphasis added).

[14] Bar Association of San Francisco, Opinion 2021-1 (August 2021) at 6.