

Advisory Opinion: 201601

Year Issued: 2016 and 2022 Amendments

RPC(s): RPC 1.1, 1.6, 1.7, 1.9, 1.10, 1.15A, 1.15B, 1.18, 5.1, 5.2, 5.3, 5.5, 5.10, 7.1, 8.4, 8.5

Subject: Ethical Practices of the Virtual or Hybrid Law Office¹

Many lawyers are choosing to do some or all their work remotely, from home or other remote locations. Advances in the reliability and accessibility of on-line resources, cloud computing, video conferencing, and email services have allowed the development of the virtual law office, by which the lawyer does not maintain a physical office. The COVID-19 pandemic accelerated this trend, causing many lawyers to work remotely (virtually), or to split their time between a traditional office and a remote office (a hybrid office).²

Although this modern business model may appear radically different from the traditional brick and mortar law office model, the underlying principles of an ethical law practice remain the same. The core duties of diligence, loyalty, and confidentiality apply whether the office is virtual or physical. For the most part, the Rules of Professional Conduct (RPC) apply no differently in the virtual office context. However, there are areas that raise special considerations in the virtual law office.

Below we first address whether a Washington licensed lawyer needs a physical address. We then discuss ethical considerations for lawyers who practice remotely from outside of their state of licensure. We then summarize some of the ethical issues lawyers with virtual law practices may face.

I. Requirement for Physical Office Address

A. General Requirements

There is no requirement that WSBA members have a physical office address. Section III(C)(1) of the Bylaws of the Washington State Bar Association (WSBA) requires that each member furnish both a “physical residence address” and a “principal office address.” The physical residential address is used to determine the member’s district for Board of Governors elections. The Bylaws do not require that a principal office address be a physical address. However, Section

¹ This opinion has been updated from its previous version to reflect 2021 amendments to Title 7 of the Washington Rules of Professional Conduct, emerging considerations in virtual practice, and insight on remote legal practice from A.B.A. Formal Ethics Opinion 498 (March 10, 2021), *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-498.pdf (last visited November 18, 2021).

² See Mark J. Fucile, *New Normal: Risk Management for ‘Hybrid’ Offices*, Washington State Bar News, Dec. 2021/Jan. 2022 at 16, <https://wabarnews.org/2021/12/07/new-normal-risk-management-for-hybrid-offices/>

III(C)(3) requires an active member residing out of Washington to file with the WSBA the name and physical street address of a designated resident agent within Washington State.

Similarly, Admission and Practice Rule (APR) 13(b) requires a lawyer to advise the WSBA of a “current mailing address” and to update that address within 10 days of any change. Nothing in that rule indicates the mailing address must be a physical address.

General Rule (GR) 30 permits courts to require service by email. If a lawyer is handling litigation in a jurisdiction that has not adopted such a requirement, the lawyer might wish to serve opposing counsel through hand delivery. The Civil Rules (CR) do not require that a lawyer provide an address for hand delivery. Rather, CR 5(b)(1) provides that if the person to be served has no office, service by delivery may be made by “leaving it at his dwelling house with a person of suitable age and discretion then residing therein.” Service, of course, also may be made by mail. Particularly in jurisdictions where it is customary to serve pleadings by hand delivery, providing the opposing counsel with a physical address to do so (such as a business service center) may mean that the lawyer will get the pleadings considerably faster. If a lawyer does not want to provide opposing counsel with an address for hand delivery, we suggest that the lawyer seek an agreement to have pleadings served by email instead, as permitted under GR 30(b)(4). This opinion does not address opposing counsel’s options in the event service by hand delivery is desired, but the Washington lawyer does not agree to a physical address or alternate means of delivery.

B. Address in Advertisements

Under RPC 7.1, “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” Therefore, a lawyer working virtually may use a post office box, private mailbox, or a business service center as an office address in advertisements, so long as that information is accurate and not misleading. *See* RPC 7.1 cmt. [6]. An address listed in an advertisement may be misleading if a reader would wrongly assume that the lawyer will be available in a particular location. For example, it may be misleading for an out-of-state lawyer to list a Seattle address in an advertisement if the lawyer will not be available to meet in Seattle. However, if the advertisement discloses that the lawyer is not available for in-person meetings in Seattle, the advertisement may not be misleading. *See* also Section III-C below.

A law firm with offices in multiple jurisdictions may establish and maintain an office in Washington even if some of the firm’s lawyers are not admitted in Washington. To avoid misleading the public, however, when identifying lawyers as practicing in a multi-jurisdictional office, the firm should indicate the jurisdictional limitations of lawyers not licensed to practice in a jurisdiction where the office is located. RPC 7.1 & cmt. [14]; RPC 5.5(f) & cmt. [22].

II. Remote Practice from Outside of State of Licensure

A. Washington-Licensed Lawyers Practicing Remotely

Lawyers increasingly are practicing law remotely not only from a physical office, but also from outside their state of licensure. For example, a lawyer who is licensed only in Washington may

practice from a home office in Oregon, Idaho, or another jurisdiction. The COVID-19 pandemic amplified the need for and interest of lawyers to work from a home that may not be located in their state of licensure. Many lawyers may continue to pursue this practice model after the pandemic subsides.

This opinion is generally limited to Washington’s interest in regulating Washington lawyers who practice remotely in another jurisdiction. A Washington lawyer’s practice that creates a professional footprint in more than one jurisdiction potentially may subject the lawyer to discipline in each jurisdiction. *See* RPC 8.5. Washington lawyers who practice remotely in another jurisdiction therefore should confirm that their presence in the other jurisdiction does not violate that jurisdiction’s definition of the unauthorized practice of law. A Washington lawyer practicing remotely in another jurisdiction also should investigate and comply with local business and tax regulations and any other applicable laws, an issue that exceeds the scope of this opinion.

A lawyer licensed in Washington may practice remotely from a jurisdiction outside of Washington without committing an unauthorized practice of law violation, only if allowed by the other jurisdiction. RPC 5.5, which regulates the unauthorized practice of law, is largely adopted from American Bar Association (“A.B.A.”) Model Rule of Professional Conduct 5.5, which most other states also have adopted. A lawyer’s remote practice from a jurisdiction in which the lawyer is not licensed implicates Washington RPC and A.B.A. Model Rule 5.5(b), which both provide that a lawyer who is not admitted in a jurisdiction shall not “establish an office or other systematic and continuous presence in [the] jurisdiction for the practice of law,” or “hold [the lawyer] out to the public or otherwise represent that the lawyer is admitted to practice in [the] jurisdiction.”

In late 2020, the A.B.A. issued Formal Ethics Opinion 495 to address whether remote practice from a jurisdiction where a lawyer is not licensed violates Model Rule 5.5.³ A.B.A. Opinion 495 takes the position that “a lawyer may practice law authorized by the lawyer’s licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer’s presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.”⁴ A.B.A. Opinion 495 further clarifies activities that do *not* constitute unauthorized practice in a remote jurisdiction:

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, website, 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

³ *See* A.B.A. Formal Ethics Opinion 495 (December 16, 2020) (“A.B.A. Opinion 495”), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf (last visited March 10, 2021).

⁴ *See* A.B.A. Opinion 495, at 3-4.

address in the local jurisdiction, and do not offer services in the local jurisdiction, the lawyer has not “held out” as prohibited by the rule.

A number of jurisdictions have issued ethics opinions that track or expressly adopt A.B.A. Opinion 495.⁵ This Washington opinion agrees with this emerging but consensus view that a state does not have a substantial interest in prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is authorized solely because the lawyer is practicing from a home office in another jurisdiction. A Washington-licensed lawyer therefore generally does not violate RPC 5.5 by practicing from a home that is remote from Washington if the lawyer adheres to the guidelines that are enumerated in A.B.A. Opinion 495.

A remote Washington-licensed lawyer, however, 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. Nor may the remote Washington-licensed lawyer explicitly or implicitly communicate that the lawyer is authorized to practice law in that jurisdiction, such as by assisting a local client with a legal matter that is limited to the remote jurisdiction.⁶

A lawyer practicing remotely whose multi-jurisdiction law firm has an office in the remote jurisdiction should ensure that communications such as the firm website, advertising, and letterhead do not imply that the remote lawyer is authorized to practice law in that jurisdiction. The key principle for permissible remote practice is that “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.”⁷ When a remote Washington-licensed lawyer complies with these limitations, the lawyer’s use of a virtual communication platform such as Zoom to hold meetings from home or to appear in a judicial proceeding in a jurisdiction in which the lawyer is authorized to practice presumptively does not establish a law practice in the remote jurisdiction.

A Washington lawyer further may be otherwise authorized to practice law in a remote jurisdiction by RPC 5.5(c) or 5.5(d). For example, a Washington lawyer may practice temporarily in a jurisdiction where the lawyer is practicing remotely to participate in an

⁵ See Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee Joint Formal Opinion 2021-100, *Ethical Considerations for Lawyers Practicing Law from Physical Locations Where They Are Not Licensed* (March 2, 2021); The Florida Bar Standing Committee on the Unlicensed Practice of Law Advisory Opinion 2019-4, *Out-of-State Attorney Working Remotely from Home* (August 17, 2020); District of Columbia Court of Appeals, Committee on Unauthorized Practice of Law, *Teleworking from Home and the COVID-19 Pandemic* (March 23, 2020); see also Carole J. Buckner, *Spotlight on Ethics: Rules of Remote Work*, California Lawyer’s Association, available at <https://calawyers.org/california-lawyers-association/spotlight-on-ethics-rules-of-remote-work/> (last visited November 15, 2021).

⁶ Cf. e.g., *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016) (admonishing Colorado lawyer under Minnesota RPC 5.5(a) for the unauthorized practice of law even though the lawyer was never physically present in Minnesota, because the lawyer negotiated by email with a Minnesota lawyer about a Minnesota judgment on behalf of Minnesota clients).

⁷ A.B.A. Opinion 495, at 3.

alternative dispute resolution proceeding that reasonably relates to the lawyer's practice in Washington. *See* RPC 5.5(c)(3). In addition, a Washington lawyer may establish an office or engage in systematic and continuous practice in a jurisdiction when that practice is authorized by federal law. *See* RPC 5.5(d)(2). But when practicing without a local license under any of these provisions, the lawyer must limit this practice to the scope that RPC 5.5 authorizes for these specified purposes.

B. Lawyers from Other Jurisdictions Practicing Remotely from Washington

Similarly, a lawyer who is licensed in another jurisdiction may practice law remotely from a location in Washington without engaging in the unauthorized or unlicensed practice of law, but only if the lawyer fully adheres to the same guidelines and restrictions on remote practice. Lawyers licensed in other jurisdictions who are considering practicing from a location in Washington should consult the rules of professional conduct from their state of licensure to determine whether such practice is allowed. *See* RPC 8.5. A lawyer from another jurisdiction who practices remotely from Washington further must comply with all applicable state and local business and tax regulations and any other applicable Washington laws, an issue that exceeds the scope of this opinion.

III. Complying with the RPCs when Using a Virtual Law Office

Lawyers practicing in a virtual law office are no less bound by their ethical duties than their colleagues practicing in a physical office. The standards of ethical conduct set forth in the RPC apply to all lawyers regardless of the setting: physical or virtual. However, certain duties present special challenges to lawyers practicing in the virtual law setting, including the duties of supervision, confidentiality, avoiding misleading communication, and avoiding conflicts of interest as set forth below.

A. Supervision

The duties of supervision embodied in RPC 5.1, 5.2, 5.3 and 5.10, apply in all law offices. But staff and other lawyers in a virtual law office might not share any physical proximity to their supervising lawyer, making direct supervision more difficult. Thus, a lawyer operating remotely may need to take additional measures to adequately supervise staff and other lawyers in his or her employ. A virtual law office often will employ services from vendors outside of the firm, such as computer cloud services, social media and other digital communication services, and document review services. A lawyer also must make reasonable efforts to ensure that these services are provided in a manner that is compatible with the lawyer's professional obligations. RPC 5.3 cmt. [3]. To ensure competent supervision of non-lawyer assistants, a lawyer should become and remain familiar with the necessary features of employed technologies, such as vendor privacy policies and security practices. RPC 1.1 cmt. [8].

Supervising lawyers must be mindful of lawyer employees' and nonlawyer assistants' use of electronic devices. Whether the devices are provided by the supervising lawyer or belong to a lawyer employee or nonlawyer staff, lawyers must take steps to ensure that the devices are securely managed, and that client information is kept confidential.

B. Confidentiality

RPC 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing additional safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients. A client may require the lawyer to implement special security measures or may give informed consent to forego security measures. RPC 1.6 cmt. [18]. Similarly, an attorney must take reasonable precautions when transmitting information relating to the client's representation. RPC 1.6 cmt. [19]. Lawyers also are responsible for assessing whether additional security precautions are required to comply with other law, such as state and federal laws that govern data privacy. RPC 1.6 cmt. [19].

The use by a lawyer, whether a virtual office or traditional practitioner, of online data storage maintained by a third-party vendor raises a number of ethical questions because any confidential client information included in the stored data is outside of the direct control of the lawyer. WSBA Advisory Opinion 2215 (2012) addresses the lawyer's ethical obligations under RPC 1.1, 1.6, and 1.15A. A lawyer intending to use online data storage should review that opinion, and be especially mindful of several important points emphasized in the opinion:

- The lawyer as part of a general duty of competence must be able to understand the technology involved sufficiently to be able to evaluate a particular vendor's security and storage systems.
- The lawyer shall be satisfied that the vendor understands and agrees to maintain and secure stored data in conformity with, the lawyer's duty of confidentiality.
- The lawyer shall ensure that the confidentiality of all client data will be maintained, and that client documents stored online will not be lost, e.g., that the vendor will maintain secure back-up storage.
- The storage agreement should give the lawyer prompt notice of non-authorized access to the stored data or other breach of security, and a means of retrieving the data if the agreement is terminated or the vendor goes out of business.
- Because data storage technology, and related threats to the security of such technology, change rapidly, the lawyer must monitor and review regularly the adequacy of the vendor's security systems.

As the opinion concludes, "A lawyer may use online data storage systems to store and back up client confidential information as long as the lawyer takes reasonable care to ensure that the information will remain confidential and the information is secure from risk of loss."

Lawyers in virtual practices may be more likely to communicate with clients by email. As discussed in WSBA Advisory Opinion 2175 (2008), lawyers may communicate with clients by email. However, if the lawyer believes there is a significant risk that a third party will access the communications, such as when the client is using an employer-provided email account, the lawyer has an obligation to advise the clients of the risks of such communication. See WSBA Adv. Op. 2217 (2012).

C. Duty to Avoid Misrepresentation

Another duty with special implications for lawyers operating virtual law offices is the duty to avoid misrepresentation. RPC 7.1, 8.4(c). As discussed above, a lawyer may not mislead others through communications that imply the existence of a physical office where none exists. Such communications may falsely imply access to the resources that a physical office provides like ready access to meeting spaces or the opportunity meet with the lawyer on a drop-in basis. Unless the lawyer has arranged for such resources, the lawyer may not imply their existence. RPC 7.1.

Similarly, a lawyer may not mislead others through communications that imply the existence of a formal law firm rather than a group of individual lawyers sharing the expenses related to supporting a practice. For example, in the physical office setting, lawyers who are not associated in a firm may house their individual practices in the same building, with each practice paying its share of the overall rent and utilities for the space. These space-sharing lawyers would be prohibited from implying (e.g., via the use of letterhead or signage on the building) that they practice as single law firm. Similarly, lawyers with virtual law offices cannot state or imply on websites, social media, or elsewhere that they are part of a firm if they are not. RPC 7.1 cmt. [13].

D. Duty to Avoid Conflicts of Interest

A robust conflict checking system is critical to any law office, physical or virtual, to avoid conflicts of interest under RPC 1.6, 1.7, 1.9, and 1.18. A robust conflict checking system will include information on current and former clients, prospective clients, related parties, and adverse parties. The conflict checking system is particularly important in a law firm where an individual firm lawyer's conflicts of interest will be imputed to the rest of the lawyers in the firm. RPC 1.10. In the physical office setting, physical proximity can in some circumstances provide more reliable access to the conflict checking system. Lawyers in a virtual law practice, who most likely do not have the advantage of physical proximity, must ensure that the conflict checking system is equally accessible to all members of the practice, lawyers, and staff, and that such access is reliably maintained.

Lawyers also should take care in the electronic transmission of client information to detect conflicts of interest when the lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved, a brief summary of the general issues involved, and information about whether the

matter has terminated, such disclosures made only after substantive discussions regarding the new relationship. RPC 1.6(b)(7) & cmt. [13].

IV Other Considerations Regarding the Virtual Law Office

Lawyers practicing virtually must comply with all applicable trust account rules. For example, Washington lawyers under RPC 1.15A cmt. [19] are required to keep trust accounts only with those financial institutions authorized by the Legal Foundation of Washington. A lawyer who holds property while acting solely in a fiduciary capacity, may be subject to the requirements of statute or other law outside of the State of Washington. *See* RPC 1.15A cmt. [3].

Another practical consideration is the Washington lawyer practicing virtually from outside of Washington, must maintain trust account records under RPC 1.15B, and be able to make records available for review or audit by the client or Office of Disciplinary Counsel. *See, e.g.*, ELC 15.1 (random examination of books and records).

Lawyers practicing virtually still need to make and maintain a plan to process paper mail; docket correspondence and communications; and direct or redirect clients, prospective clients or other individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office, on how to contact the attorney. If a lawyer will not be available at a physical office address, there should be signage and/or online instructions that the lawyer is available by appointment only and/or that the posted physical office address is for mail deliveries only.

Finally, although e-filing systems have become more prevalent, attorneys who practice from a virtual office must still be able to file and receive pleadings and other court documents that are not in electronic form.