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PAUL J. HARTMAN
STATE AND LOCAL TAX FORUM

VANDERBILT UNIVERSITY LAW SCHOOL

ETHICS AND MULTIJURISDICTIONAL PRACTICE IN A REMOTE ENVIRONMENT

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OBJECTIVES

- Review multijurisdictional practice requirements
- Evaluate recent guidance on MJP requirements for working remotely
- Apply MJP requirements to hypothetical ethics scenarios
- Understand MJP limitations on pre-litigation SALT practice
- Recognize MJP requirements for SALT litigation practice

AGENDA

- Review ethical obligations of SALT practitioners engaged in multijurisdictional practice (MJP) during pandemic
- Consider recent guidance from bar associations concerning remote work rules
- Focus on IPT Code of Ethics, Uniform Accountancy Act and ABA Model Rules (and select state laws)

HISTORY

- Territorial practice
 - *E.g.*, NYS required practicing attorneys to be state residents since at least 1862; ruled unconstitutional in 1981
- Emergence of MJP
 - Trans-border practice
 - Uniform Accountancy Act (1998): “substantial equivalency” fosters interstate practice by eliminating “artificial barriers”
 - ABA MJP report (2002): *Client Representation in the 21st Century*
 - ABA SALT Committee Multistate Tax Practice Task Force

HISTORY (cont'd)

- Artificial barriers still exist for lawyers – *e.g.*, NY State
 - Judiciary Law 470 (1909): nonresident lawyer admitted to practice in NY must maintain a physical law office in NY State
 - Caselaw: virtual office is not sufficient
 - *Schoenefeld v. NY*, 821 F.3d 273 (2d Cir. 2016): Does not violate Privileges and Immunities Clause of U.S. Constitution
- AB 5895/SB 700 (2021): would repeal Judiciary Law 470
 - Passed Senate; pending in Assembly

ETHICS RULES

- Institute for Professionals in Taxation Code of Ethics
<http://www.ipt.org/learncenter.asp?id=178410&page=29>
- American Institute of CPAs Statements on Standards for Tax Services
<http://www.aicpa.org/Research/Standards/Tax/Pages/default.aspx>
- American Bar Association Model Rules of Professional Conduct
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

DUTY OF COMPETENCY

- ***Always*** applies
- IPT Code of Ethics Preamble – obligation for competence of work
- Accountants – UAA: assure public of reasonable competence
- Attorneys – ABA MR 1.1: Duty to provide competent representation – legal knowledge, skill, thoroughness and preparation necessary for the representation
 - May have duty to inform client that attorney not licensed in foreign jurisdiction if representation occurs primarily there and requires knowledge of that law: ABA MR 5.5, comment 20 + MR 1.4(b)

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Ethical Scenario #1

Anne, a North Dakota-licensed IP attorney, is working from her North Dakota home due to COVID restrictions. Her North Dakota-based client, Ace Software, asks Anne a series of questions regarding compliance with South Dakota's *Wayfair* law. May Anne ethically answer those questions?

- A. Yes, because she is authorized to practice law in North Dakota.
- B. No, because she is not authorized to practice South Dakota law.
- C. Only if she can competently do so.

CERTIFIED PUBLIC ACCOUNTANTS

- State law regulation of practice of public accountancy
 - Assure “minimum competence of practitioners”
- UAA: Joint model act of AICPA + NASBA
 - Substantial majority of states follow key terms
 - Enhance interstate reciprocity and practice across state lines
 - Remove artificial barriers to interstate practice and mobility of CPAs

Ethical Scenario #2

I have a CPA license in my home state and have clients in other states that currently have new mobility laws. Must I have a CPA license in each state?

A. Yes.

B. No.

CERTIFIED PUBLIC ACCOUNTANTS

- UAA (cont'd)
 - “Substantial Equivalency” – education, examination & experience requirements are comparable on a state or individual CPA level
 - Reciprocity & practice privileges w/o addt’l licensure, except principal place of business
 - Freely practice across state lines
 - “No notice, no fee and no escape”
 - Subject to regulation for professional conduct, even if performing services that non-licensee may perform

Ethical Scenario #3

I have recently moved and have been trying to get a reciprocal license in my new home state. I have an active license in the state that I moved from. Under UAA mobility do I need a new license in the state in which I am now residing and working?

A. Yes

B. No

Ethical Scenario #4

I am a CPA, a full-time telecommuter, and I recently moved to a different state. My office and license are both in the state where I previously lived. All my work is done through the office in the state where I previously resided. Under the new mobility laws in which state do I need to hold a license?

- A. The state where your office and license are located
- B. Your new state of residence
- C. It depends on the state law

LAWYERS

- Each state regulates ‘practice of law’ within its borders
 - Definition varies by state
 - Admitted vs. authorized practice
- ABA Model Rule 5.5
 - ~47 states have adopted in some form since 2002:
 - Verbatim; or
 - Jurisdiction-specific modifications

MODEL RULE 5.5 – *General Rule*

- Lawyer shall not practice law in another jurisdiction in violation of that jurisdiction's regulation of legal profession
- Unless admitted to practice here, shall not:
 - Establish office “or other systematic and continuous presence” for practice of law; or
 - Hold out to public or otherwise represent that lawyer admitted to practice here

Ethical Scenario #5

Raymond, a New York based attorney, agrees to help his in-laws, who reside in Minnesota, in connection with a dispute they are having with their homeowner's association. In an effort to resolve the matter, Raymond sends a number of emails and has a number of discussions with the attorney representing the homeowner's association. All of Raymond's communications are made while he is in New York. Under Minnesota's version of Rule 5.5 has Raymond practiced law in Minnesota?

A. Yes.

B. No.

MODEL RULE 5.5 – 4 *Exceptions*

- Lawyer in good standing in another jurisdiction may provide legal services on ***temporary*** basis here if:
 - Associate local lawyer who actively participates in matter;
 - Services reasonably related to pending or potential proceeding in this or another jurisdiction if authorized by law or order to appear;
 - Services reasonably related to alternative dispute resolution proceeding arising out of practice in admitted jurisdiction and not requiring *pro hac vice* admission; or

MODEL RULE 5.5 – 4 *Exceptions* (cont'd)

- Arise out of or *reasonably related to lawyer's practice in jurisdiction where admitted*
- These four exceptions deemed not to create unreasonable risk to clients, courts or public
- Exceptions form safe harbor for MJP
 - Fact that conduct not identified in MR does not imply that conduct is/is not authorized

MODEL RULE 5.5 (cont'd)

- Lawyer in good standing in another jurisdiction may provide legal services through an office or “other systematic and continuous presence” here if:
 - Services provided to lawyer’s ***employer or affiliates*** and do not require *pro hac vice* admission; or
 - Services authorized by federal or other law or rule
- If employee-lawyer establishes office or other systematic presence for purposes of rendering legal services to ***employer***, may be subject to registration and other requirements (*e.g.*, client security fund assessments, mandatory CLE, etc.)

MODEL RULE 5.5 COMMENTS (cont'd)

- Lawyer may only practice law where authorized:
 - Admitted to practice on regular basis; or
 - Authorized by court rule, order or law to practice for limited purpose/restricted basis
- Other than as authorized by law or rule, non-admitted lawyer violates MR 5.5 if establishes office or other ***systematic and continuous presence*** here for practice of law
[*more on this later!*]

MODEL RULE 5.5 COMMENTS (cont'd)

- Presence may be systematic and continuous even if lawyer *not physically present* here
- No single test to determine whether lawyer's services are provided on a "temporary basis"
 - Services may be "temporary" even though provided on a recurring basis or for an extended period of time (*e.g.*, single lengthy negotiation or litigation)

MODEL RULE 5.5 COMMENTS (cont'd)

- ‘Reasonably related to lawyer’s practice in jurisdiction where admitted’:
 - Client previously represented by lawyer
 - Client resides in or has substantial contacts with jurisdiction where lawyer admitted
 - Matter has significant connection with jurisdiction where lawyer admitted
 - Significant aspects of lawyer’s work conducted in jurisdiction where admitted

MODEL RULE 5.5 COMMENTS (cont'd)

- Significant aspect of matter involves law of jurisdiction where lawyer admitted
- Client's business or legal issues involve multiple jurisdictions
- Services draw on lawyer's "recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, *nationally-uniform*, foreign, or international law"

MODEL RULE 5.5 COMMENTS (cont'd)

- Lawyer subject to discipline both where practices law (authorized or otherwise) and where admitted to practice
- Authorization to practice in foreign jurisdiction does not authorize advertising legal services there

MJP RULES IN A PANDEMIC

- ABA article: *Unauthorized Practice of Law: Rule 5.5 in the Age of COVID-19 and Beyond* (8/12/20)©
- <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2020/unauthorized-practice-of-law-rule-55-in-the-age-of-covid-19-and-beyond/>
- Notes uncertainty, nuanced application of rules

ABA ETHICS OPINION 495 (12/16/20): LAWYERS WORKING REMOTELY

- May remotely practice law of jurisdiction where licensed (or other state or federal law as permitted by MR 5.5(c) or (d)), if
 - Remote jurisdiction doesn't consider that UPL;
 - Do not hold self out as licensed in remote jurisdiction;
 - Do not advertise or hold self out as having office in remote jurisdiction; and
 - Do not provide or offer to provide legal services in remote jurisdiction

ABA ETHICS OP. 495 (CONT'D)

- Cannot have local contact information in remote jurisdiction on website, letterhead, business card, advertising or the like
- Must remain “invisible *as a lawyer*” in remote jurisdiction
 - Interprets “systematic and continuous presence ... for the practice of law” prohibition in MR 5.5(b)(1) to mean practice of law of the remote jurisdiction, not practice of law generally

ABA ETHICS OP. 495 (CONT'D)

- Notes that “handful of state opinions” have addressed the issue & agree
 - Cites ME (2005) & UT (2019)
- Concludes that “temporary” exception in MR 5.5(c)(4) may “vary significantly based on the need to address the pandemic”
 - Comment [6]: No single definition of what is “temporary” and may include services provided on recurring basis for extended period of time
 - Regardless of whether for purposes of government-mandated safety measures

Ethical Scenario #6

Due to work-from-home orders issued during the COVID-19 pandemic, Susan, a New Jersey-licensed attorney, works from her New York vacation home, where she is not licensed to practice. Under ABA Ethics Opinion 495, Susan may practice New Jersey law (or state or federal law as otherwise permitted), so long as:

- A. Such practice is not UPL in New York
- B. Susan does not hold herself out as licensed to practice in New York
- C. Susan does not advertise or hold herself out as having an office in New York
- D. Susan does not provide or offer to provide legal services in New York
- E. All of the above

Ethical Scenario #7

ABA Advisory Opinion 495 requires that an attorney remain _____ when working remotely from a jurisdiction where the attorney is not licensed:

- A. Invisible to everyone but the cat
- B. Cloaked
- C. Under a Cone of Silence
- D. Invisible as a lawyer
- E. Undetectable to passersby

UTAH ETHICS ADV. OP. 19-03 (5/14/19)

- Atty licensed and in good standing in another state establishing home in UT does not commit UPL by practicing law for clients in state where licensed, so long as:
 - Does not solicit UT clients
 - Does not establish a public office in UT
- Like ABA Op. 495, interprets “systematic and continuous presence ... for the practice of law” to apply to practice of UT law, not practice of law generally

UTAH ETHICS ADV. OP. 19-03 (CONT'D)

- Found no case where atty was disciplined for practicing law out of a private residence for out-of-state clients located in jurisdiction where atty licensed
 - Secondary source commentaries concur
- ‘What interest does UT Bar have in regulating out-of-state atty’s practice for out-of-state clients simply because he has a private home in UT?’
 - ‘None.’

Ethical Scenario #8

Juan, a California-licensed attorney, moves to Utah seeking fresh air and open spaces due to the pandemic. He continues to represent his California-based clients from his new home. Juan decides to expand his practice by soliciting Utah clients that have California legal matters. Under Utah Advisory Opinion 19-03, is Juan's conduct ethical?

- A. Yes.
- B. No.

FLORIDA ADVISORY OPINION 2019-4 (5/20/21)

- Approved by Florida Supreme Court (Case No. SC20-1220)
- NJ atty working remotely from FL home for NJ-based firm, practicing exclusively on federal IP matters, would not be engaged in UPL, provided that:
 - Does not practice, or advise clients on, FL law
 - Does not solicit FL clients
 - Does not create a public presence or profile in FL as an atty (*e.g.*, no holding out or advertising of his presence in FL)

FLORIDA ADV. OP 2019-4 (CONT'D)

- Aligns with UT Adv. Op. 19-03: So long as atty does not establish office or public presence in FL for practice of law, FL would have no interest that warrants regulating atty's practice for out-of-state clients simply because he has a home in FL
- Like ME and UT, would allow practice of law in licensed jurisdiction from permanent residence in non-licensed jurisdiction, subject to restrictions on "holding out" office or public presence

Ethical Scenario #9

Jane, a Missouri-licensed attorney, tires of the St. Louis winters and moves to sunny Florida. She continues to represent clients on Missouri legal matters from her new beachside home. To help her clients locate her, Jane includes a statement on her law firm's website that she is "working remotely from her Florida-based home office." Under Florida Advisory Opinion 2019-4, is Jane's conduct ethical?

- A. Yes.
- B. No.

D.C COURT OF APPEALS UPL OP. 24-20 (3/23/20)

- *Teleworking from Home and the COVID-19 Pandemic*
- Unlike ME, UT and FL, which would allow *permanent* residence of non-licensed atty practicing exclusively in licensed jurisdiction, D.C. would allow only *temporary* presence during pandemic

D.C. ADV. OP. 24-20 (CONT'D)

- D.C. Rule 49(a) generally prohibits engaging in practice of law in D.C. or holding out as authorized or competent to practice in D.C., unless active member of D.C. Bar
 - Includes conduct in or from office or location within D.C.
- *Commentary*: Intended to regulate *all practice of law* within boundaries of D.C., *e.g.*, providing legal advice from office or residence in D.C., even if exclusively via electronic means for remote clients concerning laws of jurisdiction where atty licensed
 - Compare ABA, UT and FL opinions

D.C. ADV. OP. 24-20 (CONT'D)

- Exception in Rule 49(c)(13) for “incidental and temporary practice” if principal office elsewhere & authorized to practice and in good standing in another jurisdiction
- *Commentary:*
 - “Incidental” to authorized practice in remote jurisdiction depends on variety of factors
 - “Temporary” infers no absolute limit on number or length of atty’s visits to D.C. – may span several weeks or months

D.C. ADV. OP. 24-20 (CONT'D)

- *Opinion:* atty who is not member of D.C. Bar may practice law from residence in D.C. under Rule 49(c)(13) exception if:
 - Practicing from home due to pandemic;
 - Maintains office where admitted to practice;
 - Avoids using D.C. address in any business document or otherwise holding out as authorized to practice in D.C.; and
 - Does not regularly conduct in-person meetings with clients or third-parties in D.C.

Ethical Scenario #10

Jim, a Maryland-licensed attorney, is compelled by local government orders to work from his D.C. home during the pandemic. Jim is very popular with his Maryland clients, and regularly meets with them at his home office concerning their Maryland legal matters. Under D.C. Advisory Opinion 24-20, is Jim's conduct ethical?

A. Yes.

B. No.

PRE-LITIGATION REPRESENTATION

- Audits, refunds, informal protests, ruling requests
 - Qualified Representatives – capable of representing taxpayer's interests
 - CPAs – “move freely between states”
 - Attorneys - allowed per MR 5.5(c), comments 9 & 18
 - Authorized by law or informal practice of tribunal or agency
- **However**, out-of-state attorney may need *pro hac vice* admission – even if accountants and qualified representatives do not

PRE-LITIGATION – *Attorney Exceptions*

- *Pro hac vice* admission required for out-of-state attorney to appear before state revenue department:
 - IA, MS, SD
 - KS (maybe)
 - NE (contested hearings)
 - OH (UPL to negotiate with ODT if out-of-state attorney?)
 - OR (for informal conference appeals)

Ethical Scenario #11

Jack, a New York licensed attorney, represents a multistate client that has been considering whether to appeal a tax dispute to the Ohio Board of Tax Appeals (“BTA”). It comes to Jack’s attention that there is only one day left to timely file the appeal with the BTA and he has not had time to consult with local Ohio counsel. To make sure the appeal is filed timely, Jack’s client requests that he file the appeal anyway. The BTA should properly dismiss the appeal because Jack is not an Ohio licensed attorney.

- A. True
- B. False

LITIGATION

- 40 states & D.C. allow admission by motion, following adoption of ABA MR 5.5 in 2002
 - **Not** in: CA, FL, DE, HI, LA, MD, MT, NV, NJ, RI, SC
- *Pro Hac Vice* Admission
 - Requirements vary by jurisdiction
 - Associate with local counsel
 - Limited number of appearances
 - Fees to Bar and/or trial court
 - Trial court's discretion
 - When to file:
 - BTA has jurisdiction over appeal filed by attorney not authorized to practice law in OH: *NASCAR Holdings* (2017)

LITIGATION

- *Pro hac vice* admission may be required for out-of-state attorney before tax tribunal or board
 - AL, GA (exc Small Claims Division), IL, KS, KY, LA, MA, MN, MO, MT (maybe), NV, NC, OH (*NASCAR?*), OK, OR, SC, WA (if reciprocity by home state)
- *Pro hac vice* admission required for judicial proceedings
- Accountants and other qualified representatives may handle formal administrative (APA) litigation

Ethical Scenario #12

A West Virginia attorney seeking to practice on a case in Pennsylvania under a Pro Hac Vice agreement would need to do which of the following:

- A. Have a Pennsylvania attorney sign formal court documents vouching for the West Virginia attorney's good standing;
- B. Have a Pennsylvania attorney vouch for the West Virginia attorney's ability to learn and comply with WV court rules and laws;
- C. Have a Pennsylvania attorney attend any formal proceedings along with the West Virginia attorney;
- D. Receive Pennsylvania court approval for the pro hac vice admission;
- E. All of the above.

OTHER CONSIDERATIONS

- Lawyers working in Accounting or Tax Services Firms
 - Which rules apply?
- Malpractice insurance coverage for attorneys
 - Are you covered if engaged in unauthorized practice?
- Personal/firm income tax & withholding liability, unemployment tax liability in foreign jurisdiction?
- SD sales tax

For more information

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