

**STATE BAR OF NEW MEXICO
ETHICS ADVISORY COMMITTEE
FORMAL ETHICS ADVISORY OPINION**

FORMAL OPINION: 2024-001

TOPIC: Practicing Law “Virtually¹”

RULES IMPLICATED: Rules 16-101, 16-103, 16-104, 16-106, 16-501, 16-503, 16-505, 16-701 and 16-804 NMRA (2021).

DATE ISSUED: January 17, 2024

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QUESTION PRESENTED:

May a lawyer licensed in New Mexico practice in New Mexico through technology while physically located in another state or country?

SUMMARY ANSWER:

- Under the New Mexico Rules of Professional Conduct, yes, they may; however, if such practice violates the rules of the jurisdiction in which the lawyer is physically located, this would also be a violation of the New Mexico Rules.

- As practicing remotely raises additional issues under the New Mexico Rules of Professional Conduct, those are highlighted here as well.

¹ Virtual practice is defined as the use of technology to practice law beyond a traditional brick-and-mortar, face-to-face, in-person law firm or law practice.

ANALYSIS:

The ABA aptly describes an ever-increasing scenario, sped up by choice and necessity during COVID:

“Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer’s residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice.” ABA Formal Opinion 495 (2020).

In general, lawyers do not have to live in the state in which they are licensed, and admission to practice cannot be restricted to state residents. *See Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). Thus, virtually or remotely practicing in the state in which you are licensed is permitted, regardless of where you are physically located. Ethics opinions that have addressed the issue agree. For example, Utah Ethics Opinion 19-03 (2019) answered the question of “what interest does the Utah State Bar have in regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah?” with “none.” Maine Ethics Opinion 189 (2005) came to the same conclusion, explaining:

Where the lawyer’s practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction.

However, lawyers do face restrictions in the places in which they are physically located. Rule 16-505 NMRA, Unauthorized Practice of Law; Multijurisdictional Practice of Law, guides virtual practice both within New Mexico as well as from outside New Mexico for New Mexico lawyers. In relevant part, the Rule explains:

A. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

....

D. A lawyer who is not admitted to practice in this jurisdiction shall not
(1) except as authorized by the Rules of Professional Conduct or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Part D, which mirrors provisions in the majority of other states (and are based on ABA Model Rule 5.5), forbids a lawyer from “representing” they are admitted to practice in a jurisdiction where they are not. Combined with Part A, which prohibits a New Mexico lawyer from violating the rules of another jurisdiction, a New Mexico lawyer practicing remotely from another jurisdiction must be mindful of not making such representations in that jurisdiction. This rule is broadly interpreted to prohibit various forms of representations, including the establishment of a physical office, use of a local mailing address, and advertising legal services in the non-licensed jurisdiction. Such actions could mislead the public or clients into believing that the lawyer is authorized to practice law in that state.

Therefore, while a New Mexico lawyer may practice in New Mexico while physically located elsewhere, they must be abundantly cautious about their actions in the other state:

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law ***and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction.***

ABA Formal Opinion 495 (2020) (emphasis added); *see also* Maine Ethics Opinion 189 (2005) (which noted that remote practice is allowed by out-of-state lawyers where the lawyer has not “established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine”).

While it may be more convenient for a New Mexico lawyer to have an office and address in the state in which they are living, as opposed to New Mexico, if they are not licensed in that other state, they must ensure they are not violating the rules in that state. Such a violation would, in turn, be a breach of Rule 16-505(A) NMRA, which mandates compliance with the regulations of the legal profession in any jurisdiction where a lawyer practices.² Rules 16-701 and 16-804(C) NMRA would also be violated if a New Mexico lawyer intentionally, or inadvertently “represents” that they are licensed to practice in a jurisdiction in which they are not. These rules direct that “[a] lawyer shall not make, elicit, or endorse a false or misleading communication about the lawyer or the lawyer's services,” Rule 16-701 NMRA, and shall not “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Rule 16-804(C) NMRA.

² While most jurisdictions’ rules are similar, whatever the applicable jurisdiction’s rules state is dispositive. For example, if practicing via Zoom in New Mexico (or any outside state) is not allowed by the rules of the jurisdiction in which you are physically located, then that would also be a violation of the New Mexico Rules.

The best practice for New Mexico lawyers residing in other states is to maintain a New Mexico mailing address and have that mail checked or forwarded, thus avoiding any implication of unauthorized practice in the state of residence. Furthermore, all representations, such as a website or letterhead, should clearly indicate the lawyer’s jurisdictional limits. This approach aligns with the guidance provided in ABA Formal Opinion 495 (2020), which advises lawyers on the ethical considerations in virtual practice, emphasizing the importance of clear and accurate representation of one’s licensing status.

Additional Considerations for Virtual Practice

In addition to ensuring that they are not engaged in the unlicensed or unauthorized practice of law, and that they are not misrepresenting their licensure status to the public, lawyers using technology to practice virtually must remain cognizant of their duties under the New Mexico Rules of Professional Conduct, including but not limited to their duties of competence, communication, and confidentiality.³ Additionally, lawyers must ensure that any supervised lawyers or staff are likewise compliant with the ethical duties implicated by a virtual practice. *See* ABA Formal Opinion 498 (2021). California recently issued a formal opinion regarding these identical issues, stating that “[m]anagerial lawyers must implement reasonable measures, policies, and practices to ensure continued compliance with these rules in a remote working environment, with a particular focus on the duties of confidentiality, technology competence, communication, and supervision.” State Bar of California, Formal Opinion 2023-208.

These duties in New Mexico encompass several rules, including:

Competence, Rule 16-101 NMRA. A lawyer is required to provide competent representation to clients. This means that the lawyer must have the requisite legal knowledge, skill, thoroughness, and preparation to undertake the representation. Maintaining competence includes keeping abreast of the changes in the law, including the benefits and risks associated with using relevant technology. *See* Rule 16-101 NMRA at Comment [9]. Thus, lawyers must be sufficiently proficient with, and have an understanding of, any technology used in the virtual practice of law to maintain their required competence. This includes case management software, time and billing software, electronic file technology, virtual meeting platforms, and any other technology used in the virtual practice. This may require the lawyer to, among other things, pursue continuing legal or related technology education to maintain the appropriate level of skill.

Communication: Rule 16-104 NMRA. Whether meeting face-to-face or via a virtual platform, a lawyer is obligated to reasonably communicate and consult with clients. This includes an obligation to keep the client informed about the client’s matter, respond to requests for information, and obtain the client’s consent on decisions affecting the client’s objectives and outcome. A lawyer is, therefore, required to take reasonable steps to use communication

³ Although not a Rule of Professional Conduct, nonresident counsel licensed in New Mexico should also be cognizant of Rule of Civil Procedure 1-089.1(B) NMRA which provides that a court may require nonresident counsel licensed in New Mexico to associate resident New Mexico counsel in connection with proceedings before the court.

platforms accessible by the client whereby the lawyer can confidentially communicate with a client if the communication will take place virtually.

Confidentiality: Rule 16-106 NMRA. “A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.” See Rule 16-106 NMRA at Comment [4]. This prohibition applies to both direct disclosures by a lawyer and disclosures that do not themselves reveal confidences, but which could reasonably lead to the discovery of such confidences. *Id.* at Comment [6]. The use of technology in the practice of law carries with it a number of risks that client confidences could be compromised.

First, whether using email, a virtual meeting platform, a client communication portal, or any other technology whereby client confidences will be transmitted over the internet, lawyers must ensure that reasonable steps are taken to prevent access to such transmissions and the underlying documents and information. This includes considering whether communications can or should be made virtually. Some discussions, communications, and the provision of some documents may be better accomplished in person, such as the provision of sensitive medical or financial information to or from the lawyer. Further, for any communication taking place virtually, the lawyer should consider whether the communication is or should be encrypted. While routine email communications may not need to be encrypted, provided that the client is the only one with confidential, secure access to the communication, communications that may include sensitive information or documents, such as medical records, social security numbers, financial information, and similar items may require encryption. For all hardware and software used in virtual communications, the lawyer should make sure that both the lawyer and the client are using strong passwords, robust computer firewalls, and anti-virus software, and both the lawyer and the client should pay close attention to the location of where the communication is taking place to prevent a third-party from overhearing, viewing, or accessing the communication.

Second, lawyers practicing virtually are often doing so in proximity to a home or office virtual assistant device. These virtual assistant devices have access to microphones and the ability to record conversations, even if only to determine whether to enact a user’s commands. Unless the virtual assistant device is being actively used in a task related to the practice of law that does not involve client confidences, a lawyer should disable the listening and recording capability of such devices when working on or communicating client matters. Otherwise, the lawyer risks exposing client confidences either directly or via a third-party hacking into the lawyer’s system or internet connection. Lawyers should also routinely change passwords and use strong passwords for any virtual assistant and other device connected to the internet.

Third, lawyers should be cautious when using personal devices, such as personal computers, tablets, and smartphones to store files and communicate with clients. Such devices may be subject to inspection at U.S. Border crossings, and are at risk of revealing client confidences if lost, left unattended, hacked, or infected with malware or virus software, and not otherwise secured by strong passwords and two-factor authentication.

Fourth, increasingly lawyers are using cloud storage to file and backup files and other documents, data, and information, including client documents and information. While the use of

cloud storage is both convenient and economical, lawyers must take reasonable steps to ensure client confidences are protected. These steps include ensuring that data is transmitted to the cloud service provider only by encrypted transmission and ensuring that the cloud service provider:

- Explicitly agrees that it has no ownership or security interest in the data and has an enforceable obligation to preserve security;
- Explicitly agrees that all data stored will be encrypted and only the lawyer or law firm can decrypt the data; i.e., no employee or agent of the service provider can decrypt or access and decrypt data transmitted by the lawyer;
- Will notify the lawyer if requested to produce data to a third party, and provide the lawyer with the ability to respond to the request before the provider produces the requested information;
- Has firewalls, anti-malware, anti-virus software, and other technology built to withstand a reasonably foreseeable attempt to infiltrate, compromise, access, or corrupt data, and periodically tests such software and conducts penetration testing;
- Includes in its “Terms of Service” or “Service Level Agreement” an agreement about how confidential client information will be handled;
- Provides the lawyer with the right to audit the provider’s security procedures and to obtain copies of any security audits performed;
- Will host/store the lawyer’s or law firm’s data on servers located in the United States, or, by agreement with the lawyer or law firm, in a jurisdiction outside the United States but only if the lawyer or law firm determines and agrees that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are at least as rigorous as those of the United States;
- Provides a method for the lawyer or law firm to immediately retrieve at any time;
- Provides a method for the lawyer or law firm to retrieve all stored data without the provider retaining any copies if the lawyer terminates the use of the service or the service provider goes out of business;
- Provides security for data centers and offers storage sites in multiple locations for backup purposes.

Supervision: Rules 16-501 NMRA and 16-503 NMRA. A lawyer must also be mindful of their supervisory responsibilities when engaging in virtual practice. This includes ensuring that any supervised lawyers or non-lawyer assistants are aware of and comply with the ethical standards applicable to virtual practice, particularly those relating to confidentiality, competence, and unauthorized practice of law. Supervisors must take reasonable steps to ensure that their subordinates' conduct is consistent with the professional obligations of the lawyer, including providing adequate training and guidance on the use of technology and virtual communication tools.

CONCLUSION:

In summary, while a lawyer licensed in New Mexico can practice law virtually while physically located in another state or country, they must ensure that their practice does not violate the rules of the jurisdiction where they are physically present. Furthermore, virtual

practice necessitates additional considerations regarding competency, communication, confidentiality, and supervision. Lawyers must be vigilant in using technology responsibly and ethically, safeguarding client information, and adhering to the ethical standards of both the New Mexico jurisdiction and the jurisdiction in which they are physically located.