

DRAFT

BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

FORMAL ETHICS OPINION 2022-F-168

The Board of Professional Responsibility has been requested to issue a Formal Ethics Opinion regarding the following question: “Whether a lawyer who resides and is domiciled outside of Tennessee, who is working remotely as full-time, in-house counsel for an organization that has its principal place of business in Tennessee (and offices in other states), who is admitted to the practice of law only in a jurisdiction other than Tennessee, and who is not registered as in-house counsel in Tennessee is engaging in the unauthorized practice of law. In other words, do such circumstances themselves establish a ‘systematic and continuous presence’ in Tennessee for the practice of law as in-house counsel.”

OPINION

A lawyer who resides and is domiciled outside of Tennessee, who is working remotely as full-time, in-house counsel for an organization that has its principal place of business in Tennessee (and offices in other states), who is admitted to the practice of law only in a jurisdiction other than Tennessee, and who is not registered as in-house counsel in Tennessee is not engaging in the unauthorized practice of law because these circumstances alone do not establish a “systematic and continuous presence in Tennessee for the practice of law” as in-house counsel unless the lawyer is actually practicing Tennessee law or engaging in other conduct that would evidence an indicia of a presence in Tennessee for the practice of law.

DISCUSSION

“Virtual and remote practice by lawyers is now well established and growing, and the Board has experienced a significant increase in registration applications for in-house counsel by lawyers who reside and are domiciled in other states but are working remotely for companies that have their principal place of business or satellite offices in Tennessee.”¹ Technology has made it possible for an in-house lawyer to practice virtually in a jurisdiction where the lawyer is licensed even though the organizational client may be physically located in a different jurisdiction where the lawyer is not licensed.

¹ Revised Request for Formal Ethics Opinion, Tennessee Board of Law Examiners, Page 2, April 13, 2022.

Under Tenn. Sup. Ct. R. 7 (“Rule 7”), Section 10.01 (a), “[a] lawyer who is admitted to the practice of law in another U.S. jurisdiction or is a foreign lawyer who is employed as a lawyer by an organization, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, and who has a systematic and continuous presence in this jurisdiction pursuant to Tenn. Sup. Ct. R. 8 (“Rule 8”), RPC 5.5(d)(1)², shall register as in-house counsel within 180 days of the commencement of employment as a lawyer...”

On March 14, 2022 the Tennessee Supreme Court entered an Order that set forth the following: “The widespread use of employees working remotely has created uncertainty concerning when a lawyer has established a ‘systematic and continuous presence’ in Tennessee for the purposes of Tenn. Sup. Ct. R. 8, RPC 5.5(d)(1) and the registration requirements of Tenn. Sup. Ct. R. 7, Section 10.01(a). Until this uncertainty is resolved, the Board of Law Examiners is hereby granted discretion to waive the late fee imposed by Tenn. Sup. Ct. R. 7, Section 10.01(h) for registration by lawyers working remotely for a Tennessee company and to approve the registration of a lawyer working as in-house counsel without determining when the lawyer established a ‘presence’ in Tennessee. *See* Tenn. Sup. Ct. R.7, Section 10.01(a), (h). A lawyer approved for registration shall be deemed registered as if the application to register as in-house counsel had been timely filed. This order granting the Board of Law Examiners limited wavier discretion under section 10.01(h) will take effect immediately and will remain in effect until further order of this Court.”

Numerous questions have arisen due to extensive remote practice by in-house counsel:

- “Is a lawyer who is admitted to the practice of law in another jurisdiction and who is working remotely for a company located in Tennessee required to register as in-house counsel?”
- “Other than a physical presence, what conduct or circumstances constitute a systematic and continuous presence in this jurisdiction?”
- “If a lawyer is working remotely as in-house counsel for a company that has its principal place of business or a satellite office in Tennessee, and the company is the lawyer’s only employer and so only ‘client’, but the lawyer is not practicing Tennessee law, is the lawyer required to register as in-house counsel?”

² Tenn. Sup. Ct. R. 8, RPC 5.5(d) provides: “(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates and are not service for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction. (3) A lawyer providing legal services pursuant to paragraph (d)(1) is subject registration pursuant to Tenn. Sup. Ct. R. 7, Section 10.01, and may be subject to other requirements, including assessments for client protection funds and mandatory continuing legal education. Failure to register in a timely manner may preclude the lawyer from later seeking admission in this jurisdiction.”

- “If a lawyer is working remotely as in-house counsel for a company that has its principal place of business or a satellite office in Tennessee, is such employment alone sufficient to find a systematic and continuous presence in this jurisdiction? If so, what if the lawyer is not practicing Tennessee law?”
- “What if the company has a presence in Tennessee via an office or offices, but it is headquartered in another jurisdiction? Would a lawyer’s remote work as in-house counsel constitute a systematic and continuous presence in this jurisdiction?”

“Systematic and continuous presence” is not defined in either Supreme Court Rule 7 or Rule 8. Comment [4] to Rule 8, RPC 5.5 indicates that a lawyer’s physical presence in Tennessee is not required for there to be a “systematic and continuous presence.”

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

The American Bar Association issued Formal Ethics Opinion 495 in December 2020, which provides guidance for a lawyer who is remotely practicing law of the jurisdiction or jurisdictions in which the lawyer is licensed while the lawyer is physically present in another jurisdiction in which the lawyer is not admitted to practice.

That opinion discusses the meaning of the words “systematic and continuous presence”. “Words in the rules, unless otherwise defined are given their ordinary meaning. ‘Establish’ means ‘to found, institute, build, or bring into being on a firm or stable basis.’³ A local office is not ‘established’ within the meaning of the rule 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, websites, or other indicia of a lawyer’s presence. Likewise, it does not ‘establish’ a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing law of the local jurisdiction nor holding out the availability to do so. The lawyer’s physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to

³ American Bar Association Formal Opinion 495, Page 2, December 16, 2020; DICTIONARY.COM, <https://www.dictionary.com/browse/establish?s=t> (last visited Dec. 14, 2020).

have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.”⁴

American Bar Association Formal Opinion 495, although not specifically addressing in-house counsel in the various situations posed in the questions set forth herein, which have arisen with regard to the registration of in-house counsel who reside and are domiciled outside of Tennessee, but who have been remotely practicing law for a company that has its principal place of business or satellite office in Tennessee, provides a basis for analyzing the issues.

- “Is a lawyer who is admitted to the practice of law in another jurisdiction and who is working remotely for a company located in Tennessee required to register as in-house counsel?”

Response: Under the American Bar Association analysis a lawyer who is admitted to the practice of law in another jurisdiction and who is working remotely for a company located in Tennessee would not have to register as in-house counsel if the lawyer was not practicing Tennessee law or holding himself/herself out as a lawyer in Tennessee by using an address in Tennessee as an office or having it appear on letterhead, business cards, websites, or other indicia of the lawyer’s presence in Tennessee.

- “Other than a physical presence, what conduct or circumstances constitute a systematic and continuous presence in this jurisdiction?”

Response: Conduct or circumstances that have been denoted as indicia of a presence for the practice of law, by the American Bar Association in its Formal Opinion 495, include information provided on websites, letterhead, business cards, or advertising without indicating the lawyer’s jurisdictional limitations. In addition, the practice of Tennessee law, whether state or federal, would constitute a systematic and continuous presence in Tennessee.

- “If a lawyer is working remotely as in-house counsel for a company that has its principal place of business or a satellite office in Tennessee, and the company is the lawyer’s only employer and so only ‘client’, but the lawyer is not practicing Tennessee law, is the lawyer required to register as in-house counsel?”

Response: “The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law.”⁵ “A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed and therefore qualified to represent clients in that jurisdiction.”⁶ Therefore, unless in-house counsel has established a systematic and continuous presence for the practice of law in Tennessee by conduct constituting indicia of such presence, there is no basis for requiring registration in Tennessee under Tenn. Sup. Ct. R. 7 Section 10.01.

- “If a lawyer is working remotely as in-house counsel for a company that has its principal place of business or a satellite office in Tennessee, is such employment alone sufficient to

⁴ American Bar Association Formal Opinion 495, Page 2, December 16, 2020.

⁵ American Bar Association Formal Opinion 495, Page 3, December 16, 2020.

⁶ American Bar Association Formal Opinion 495, Page 2, December 16, 2020.

find a systematic and continuous presence in this jurisdiction? If so, what if the lawyer is not practicing Tennessee law?”

Response: If a lawyer is working remotely as in-house counsel for a company that has its principal place of business or a satellite office in Tennessee, such employment alone is not sufficient to find a systematic and continuous presence in this jurisdiction unless the lawyer engages in the practice of Tennessee law whether state law or federal law or engages in conduct that would establish a presence in Tennessee for the practice of law.

- “What if the company has a presence in Tennessee via an office or offices, but it is headquartered in another jurisdiction? Would a lawyer’s remote work as in-house counsel constitute a systematic and continuous presence in this jurisdiction?”

Response: If a company has a presence in Tennessee via an office or offices, but it is headquartered in another jurisdiction a lawyer’s remote work as in-house counsel would not constitute a systematic and continuous presence in this jurisdiction unless the lawyer was practicing Tennessee law or engaged in conduct that would indicate a presence in Tennessee for the practice of law as set forth hereinabove.

CONCLUSION

The question of what constitutes a “systematic and continuous presence in Tennessee for the practice of law”⁷ by out of state in-house counsel is determined by whether the lawyer is actually practicing Tennessee law or engaging in other conduct that would evidence an indicia of a presence in Tennessee for the practice of law. Conduct that has been denoted as such indicia by the American Bar Association in its Formal Opinion 495 includes information provided on websites, letterhead, business cards, or advertising without indicating the lawyer’s jurisdictional limitations. Therefore, unless in-house counsel for a company located in Tennessee is actually practicing Tennessee law or engaging in other conduct that evidences an indicia of a presence in Tennessee for the practice of law, in-house counsel licensed and domiciled in another United States jurisdiction working remotely for a Tennessee company is not engaging in the unauthorized practice of law and should not have to register as in-house counsel pursuant to Tenn. Sup. Ct. R. 7, Section 10.01.

This _____ day of _____, 2022.

ETHICS COMMITTEE

Jennifer Hagerman, Chair

Jody Pickens

Floyd Bonner

APPROVED AND ADOPTED BY THE BOARD

⁷ Tenn. Sup. Ct. R. 8, RPC 5.5(b)(1).