

LEGAL ETHICS OPINION 1896

OUT-OF-STATE LAWYERS
WORKING REMOTELY IN
VIRGINIA

In Legal Ethics Opinion 1856 (approved by the Supreme Court of Virginia November 2, 2016), the committee addressed several questions about multijurisdictional practice under Rule of Professional Conduct 5.5; specifically, what types of practice foreign lawyers may engage in while located in Virginia. This opinion reiterates that guidance to conclude that a foreign lawyer may work remotely in Virginia (from home or otherwise), for any length of time, with or without an emergency justification to do so, as long as the work done involves the practice of the law of the foreign lawyer’s licensing jurisdiction or exclusively federal law that does not require Virginia licensure. The foreign lawyer must avoid holding out or implying licensure in Virginia but otherwise may have a public presence in Virginia and is not required to be “invisible” within the state.

The COVID-19 pandemic brought a renewed focus on work from home/remote work, and several states issued ethics opinions addressing the permissible scope of practice for out-of-state lawyers working outside their licensing jurisdiction. Many of those opinions limit the lawyer’s ability to engage in this practice to emergency situations like the COVID-19 pandemic, and/or require that the lawyer be “invisible” in the jurisdiction where they are not licensed. For example, DC UPL Opinion 24-20 (2020) concludes that:

an attorney who is not a member of the District of Columbia bar may practice law from the attorney’s residence in the District of Columbia under the “incidental and temporary practice” exception of Rule 49(c)(13) if the attorney (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a District of Columbia address in any business document or otherwise holding out as authorized to practice law in the District of Columbia, and (4) does not regularly conduct in-person meetings with clients or third parties in the District of Columbia.

ABA Formal Opinion 495 (2020) holds that practice from another jurisdiction would generally be permissible under Model Rule 5.5, “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.” See *also* Pennsylvania Bar Association and Philadelphia Bar Association Joint Formal Opinion 2021-100 (2021) (endorsing conclusion of ABA Formal Opinion 495). *But see* Wisconsin Formal Ethics Opinion EF-21-02 (2021) (concluding that an out-of-state lawyer may represent clients from his licensing jurisdiction from a private location in Wisconsin, but must not establish a public office or solicit Wisconsin business unless authorized by law); Utah Ethics Opinion 19-03 (2019) (“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? And the answer is the same – none.”)

The committee endorses the position expressed by the Utah State Bar and agrees that Virginia has no interest in restricting the practice of a lawyer whose only connection to Virginia is a physical location within the state. As the committee concluded in LEO 1856, Rule 5.5 and other applicable law leads to only one conclusion:

Foreign lawyers who limit their practice exclusively to federal practices in which admission to the Virginia State Bar is not required may maintain an office or practice systematically and continuously in Virginia. Likewise, if their practice is limited to matters involving the law of the state or country in which they are admitted to practice, foreign lawyers may practice in Virginia on a systematic and continuous basis.

To specifically extend this application of the rule to remote work, a lawyer who is not licensed in Virginia may work from a location in Virginia on a continuous and systematic basis, as long as that practice is limited to exclusively federal law and/or the law of the lawyer’s licensing jurisdiction, regardless of the reason for being in Virginia. The out-of-state lawyer must comply with Rules 5.5(d)(3) and 7.1 and UPL opinion 196 (2006) by disclosing that the lawyer is not licensed to practice in Virginia when disclosure is necessary to avoid the misleading implication that the lawyer is authorized to practice in Virginia. The lawyer may engage in temporary and occasional practice in Virginia as permitted by Rule 5.5(d)(4) and LEO 1856.