

VIRGINIA:

**IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND**

**IN THE MATTER OF
PROPOSED LEGAL ETHICS OPINION 1896**

PETITION OF THE VIRGINIA STATE BAR
VSB 21-5

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of proposed Legal Ethics Opinion 1896, Out-of-State Lawyers Working Remotely in Virginia, as set forth below. The proposed opinion was approved by a unanimous vote of the Council of the Virginia State Bar on October 29, 2021 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics has proposed Legal Ethics Opinion 1896. This draft opinion addresses the remote work questions sparked by the COVID-19 pandemic and discusses opinions on the question from other states and the ABA while reinforcing the conclusion from LEO 1856 that a foreign lawyer may maintain a continuous and systematic presence in Virginia as long as the lawyer is

engaged in the practice of law of their licensing jurisdiction and/or exclusively federal law that does not require Virginia licensure. While the foreign lawyer does not have to remain “invisible” within Virginia, they cannot hold out as authorized to practice law in Virginia and must appropriately disclose their status. The opinion also clarifies that this conclusion is not limited to COVID-19 or other emergency situations that require working from home because this conduct is authorized by Rule 5.5 regardless of the reason for being located in Virginia.

The proposed opinion is included below in Section III.

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed opinion at its meeting on June 24, 2021 (Appendix, Page 3). The Virginia State Bar issued a publication release dated June 29, 2021, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 4). Notice of the proposed opinion was also published in the *Virginia Lawyer*, Vol. 70, page 56 (Appendix, Page 6), in the Bar’s July 2021 newsletter (Appendix, Page 7), on the Bar’s website on the “Actions on Rule Changes and Legal Ethics Opinions” page (Appendix, Page 11) and on the Bar’s “News and Information” page on June 29, 2021 (Appendix, Page 13).

When the proposed opinion was released for public comment, four comments were received, from Ryan Brown (Appendix, Page 15), Suzan Herskowitz (Appendix, Page 16), an unsigned comment from marmarrich@aol.com (Appendix, Page 18), and a “no comment” letter from Leo Rogers on behalf of the Local Government Attorneys (Appendix, Page 17). The committee made no changes to the opinion based on the comments.

III. Proposed Opinion

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 Op. 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.

IV. Conclusion

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and Rules of Professional Conduct are promulgated and implemented. The proposed opinion was developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the Bar requests that the Court approve proposed LEO 1896 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

A handwritten signature in cursive script, appearing to read "Jay B. Myerson".

Jay B. Myerson, President

A handwritten signature in cursive script, appearing to read "Karen A. Gould".

Karen A. Gould, Executive Director

Dated this 5th day of November, 2021.