# DELAWARE STATE BAR ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS

#### FORMAL OPINION 2021-1 July 9, 2021

This opinion ("Opinion") is merely advisory and is not binding on any attorney, court, or any other tribunal.

#### **Nature of the Inquiry**

Members of the Delaware State Bar Association have asked the Committee on Professional Ethics ("the Committee") to address whether an attorney licensed in Delaware may practice Delaware law while working remotely from another jurisdiction in which the lawyer is not licensed, such as from a home office, without engaging in the unauthorized practice of law in violation of Rule 5.5(a) of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC"). This Opinion addresses only the application of Rule 5.5(a) of the DLRPC.

#### **Conclusion**

The Committee concludes that lawyers licensed in Delaware (the "licensing jurisdiction") may ethically engage in the practice of Delaware law, for clients with Delaware matters, while physically present in another jurisdiction in which they are not admitted ("local jurisdiction") unless a statute, rule, case law, or opinion of the local jurisdiction prohibits the conduct, provided that such lawyers may not hold themselves out as being licensed to practice in the local jurisdiction and may not advertise or otherwise hold themselves out as having an office in the local jurisdiction, or provide or offer to provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

## **Background**

In light of the COVID-19 pandemic, it has been increasingly common for lawyers to practice remotely. The emergency restrictions that the Governor of the State of Delaware and the Chief Justice of the Delaware Supreme Court have imposed have led many Delaware law offices to require their lawyers and staff to work from home over the past year or more. Lawyers who are working remotely have sought clarification as to whether and under what conditions they may work remotely on

matters of Delaware law, from other jurisdictions, without engaging in the unauthorized practice of law in violation of Rule 5.5(a) of the DLRPC.

#### **Discussion**

The American Bar Association Standing Committee on Ethics and Professional Responsibility addressed this issue in Formal Opinion 495, Lawyers Working Remotely (December 16, 2020). The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, together with the Philadelphia Bar Association Professional Guidance Committee, adopted the reasoning and conclusion of the ABA Formal Opinion 495 in a joint opinion, Ethical Considerations for Lawyers Practicing Law from Physical Locations Where They Are Not Licensed, Joint-Formal Opinion 2021-100 (March 2, 2021).

ABA Formal Opinion 495, as well as the Pennsylvania and Philadelphia Bar Associations' Joint Formal Opinion 2021-100, concluded that a lawyer who is admitted in one jurisdiction may practice the law of that licensing jurisdiction while working remotely in a local jurisdiction, with certain conditions. We agree with the reasoning of these opinions as set forth herein and conclude that a Delaware-licensed lawyer may practice Delaware law, for clients with Delaware matters, while in a local jurisdiction, even if not licensed in such jurisdiction, subject to the conditions discussed herein.

This Opinion does not address whether and in what circumstances a lawyer who is *not* licensed in Delaware may represent Delaware clients from an office located outside of Delaware. *See generally, In re Tonwe*, 929 A. 2d 774 (Del. 2007); *In re Nadal*, 82 A. 3d 716 (Del. 2013).

### ABA Formal Opinion 495 concluded:

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, 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. The [ABA] Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while

physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Rule 5.5 of the DLRPC is substantially similar to Model Rule 5.5. We conclude that the analysis of Model Rule 5.5 applies as well to Rule 5.5 of the DLRPC.

ABA Formal Opinion 495 addressed the question of establishing an office in a local jurisdiction in which a lawyer is not licensed as follows:

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." 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." 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 the 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 have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subject to any contrary law of the local jurisdiction in which a Delaware lawyer may be practicing remotely, the Committee adopts the reasoning above with respect to Model Rule 5.5(b)(1) as applicable to lawyers licensed in Delaware who are providing legal services remotely in a local jurisdiction.<sup>1</sup> The purpose of Rule 5.5

Rule 5.5(b)(1) states that "A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish

of the DLRPC is to protect the public from unlicensed and unqualified practitioners of law.<sup>2</sup> This purpose is not served by barring Delaware-licensed lawyers from practicing the law of Delaware, for clients with matters in Delaware, just because such lawyers are physically located in a local jurisdiction where they are not licensed, provided that the law of the local jurisdiction does not prohibit such conduct, and such lawyers do not hold themselves out publicly as a lawyer in that jurisdiction or offer to or accept representation of clients in that jurisdiction.<sup>3</sup> Finally, for the avoidance of any doubt, this Opinion does not address any applicable court or similar rule, including Delaware Supreme Court Rule 12(a) and the requirement stated therein regarding the maintenance of a *bona fide* office for the practice of law in the State of Delaware.

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." This Opinion addresses only the permissibility under Rule 5.5(a) of Delaware lawyers working remotely in a different, local jurisdiction. This Opinion does not address the permissibility under Rule 5.5(b)(1) of lawyers who are not admitted to practice in Delaware working remotely from Delaware.

Other issues of legal ethics that may be raised by remote lawyering, but are not addressed in this Opinion, include Rule 1.6 (confidential information) and Rules 5.1, 5.2 and 5.3 (supervision of attorney and non-attorney staff). *See generally*, Rule 8.4(a) (one cannot attempt to violate the DLRPC through the acts of another.)

ABA Formal Opinion 495 opines that: "[i]f a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so." We adopt that view with respect to Rule 5.5(a) of the DLRPC as well.