NORTH CAROLINA BANKING INSTITUTE

Volume 27 | Issue 1 Article 8

3-1-2023

Unauthorized Practice of Law Issues for Banking Lawyers

David J. Burge

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DAVID J. BURGE*

Commercial bank loans and other banking transactions have become increasingly multi-jurisdictional, even virtual, as our nation's economy evolves in that technology-driven direction. Yet the practice of law remains a state-regulated institution, usually governed by the state supreme court or other highest appellate court of the lawyer's home state.[1] As deals—and lawyers—tend to cross state lines with increasing regularity, banking lawyers need to consider the unauthorized practice of law (UPL) issues raised by this increasingly complex world. This article will address three situations. The first is the fairly common situation in which a lawyer is asked to close a commercial loan secured by collateral, including real property, located in another state. The second is the more recent phenomenon of the lawyer who has relocated across state lines to work from a primary or vacation home or other remote location temporarily but continues to practice out of the law firm or corporate office in the state in which the lawyer was originally based and in which the lawyer is licensed. The last is a bank general counsel's or law department's specific UPL obligation if they are licensed in a state other than the state of their current corporate office.

I. CLOSING A LOAN SECURED BY COLLATERAL LOCATED IN ANOTHER STATE

Litigators have the advantage of seeking *pro hac vice* admissions when they have an out-of-state case, but transactional lawyers have no corresponding mechanism. They do, however, have some very good guidance from American Bar Association Model Rule 5.5, adopted in 2002. Rule 5.5 provides in pertinent part:

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* David J. Burge is a Partner in the Real Estate Practice at Smith, Gambrell & Russell, LLP, Atlanta, Ga. All opinions expressed in this article are solely his.

1. *See, e.g.*, 27 N.C. ADMIN. CODE 8.1 (2023); STATE BAR OF GA. R. 2-101 (2022).

> (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.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> > (1) except as authorized by these Rules 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.
>
> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> > (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; . . . .
> >
> > (4) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.[2]

In the first scenario, a regular firm client asks its lawyer to close a commercial loan in another state in which the lawyer is not licensed. This lender client may have transactions in many states and values its lawyer's expertise and familiarity with its business. Many lenders also like to limit the number of lawyers they use to ensure the quality and consistency of the legal work they receive. Rule 5.5(c) provides two mechanisms to take on this representation.

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2. MODEL RULES OF PRO. CONDUCT R. 5.5 (AM. BAR ASS'N 2020) [hereinafter MODEL RULES].

First, the primary lawyer may retain local counsel, which is permitted, and arguably encouraged, in subsection (c)(1) of Rule 5.5.[3] This is the traditional method to address this UPL issue and remains common practice, especially in larger transactions. It is important to note Rule 5.5(c)(1) requires a local counsel who "actively participates in the matter." At a minimum, the local counsel needs to be provided with all relevant documents and transaction terms and be given an opportunity to comment on issues of concern. In very large transactions, both the borrower and the lender may retain separate local counsel, although there is often fee pressure to retain just one local counsel for the deal, who also may provide any required local counsel legal opinions. This one local counsel "for the deal" situation may raise client conflict, loyalty, and confidentiality issues that have to be managed, but is common practice nonetheless.

Retaining local counsel raises the costs of a transaction and may result in client push back, especially when the borrower is charged with paying all legal fees of its lender.[4] It is possible to mitigate the need for or expense of local counsel by several strategies. First, many lenders require their loan documents be governed by the law of their home jurisdiction.[5] This is especially true of New York-based lenders.[6] If the contractual terms of the loan, including usury,[7] are governed by the lender's home state law, that leaves the creation, perfection, and enforcement of the mortgage lien to the law of the collateral jurisdiction and the perfection, the effect of perfection, and the priority of security interests in personal property to the applicable state law provided in

3. MODEL RULES R. 5.5(c)(1).

4. *See Ask CFPB*, CONSUMER FIN. PROT. BUREAU (Sept. 8, 2020), https://www.consumerfinance.gov/ask-cfpb/what-fees-or-charges-are-paid-when-closing-on-a-mortgage-and-who-pays-them-en-1845 [https://perma.cc/BE2S-RVZ9]; Phillip B. Dye Jr., *Attorney Fees Provisions & Promissory Notes*, 44 LA. L. REV. 831 (1984); *see also* GA. CODE. § 13-1-11 (2022) (codifying the validity and enforcement of obligations to pay attorney's fees upon notes or other evidence of indebtedness).

5. *See* UNIF. COM. CODE §1-301(a) (AM. L. INST. & UNIF. L. COMM'N 2022) (providing that when a transaction bears a reasonable relationship to a state, the parties may select the law of that state to govern their rights and duties) [hereinafter U.C.C.].

6. *See* N.Y. GEN. OBLIG. LAW § 5-1401 (2022) (providing that parties to contracts with value over $250,000 may elect application of New York law regardless of the transaction's relation to the State of New York).

7. National and state banks may contractually export their state's usury laws under 12 U.S.C. § 85 and 12 U.S.C. § 1831(d), respectively. Non-bank lenders do not enjoy this statutory right, but often still attempt to stipulate the applicable state usury law by contractual agreement with their borrowers.

Article 9 of the Uniform Commercial Code, often the state where the borrower is located.[8] Second, many nationwide lenders, including Fannie Mae, Freddie Mac, the large national banks and insurance companies, and large securitized loan originators, have created libraries of mortgage and other collateral documents adapted specifically for each state.[9] Here, much of the local counsel work has been done ahead of time. Finally, the national title companies, although not authorized to practice law, are a ready resource for state-specific information on mortgage recordabilty, filing fees, mortgage and transfer taxes, escrow customs, and legal descriptions.

Even with these strategies, local counsel still has a duty of competent representation. As noted in the very first ABA Model Rule, Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires *the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*"[10] Although an out-of-state lawyer may be able to create and record a valid mortgage or UCC financing statement, the lawyer may miss some important nuances a local practitioner would know. For example, in states with one-action rules or other anti-deficiency restrictions governing mortgage foreclosures, state law advice may be critical to the lender's right to secure a deficiency after a foreclosure or pursue any guarantors.[11]

The second option, which is not exclusive to retaining local counsel, is to take the representation under subsection (c)(4) because the loan closings "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[12] This rule would clearly apply to a lawyer who performs loan closings

8. *See* U.C.C. § 1-301(c) (providing that the parties may not select the law covering perfection, the effect of perfection or nonperfection, or priority of security interests); § 9-301(1) (providing that the state where the borrower is located governs perfection, the effect of perfection or nonperfection, and priority when the lender is perfecting by filing a financing statement), and § 9-307 (establishing the location of a debtor).

9. *See, e.g.*, *Loan Documents*, FED. NAT'L MORTG. ASS'N, https://multifamily.fanniemae.com/communications-documents-forms/loan-documents (last visited Jan. 28, 2023) [https://perma.cc/9DUU-5ED7] (providing library of Fannie Mae's multistate mortgage loan forms).

10. MODEL RULES R. 1.1 (emphasis added).

11. *See, e.g.*, GA. CODE § 44-14-161 (2022) (describing mortgage foreclosure confirmation process required to pursue a deficiency); CAL. CIV. PROC. CODE § 726 (2022) (providing California's one-action rule).

12. MODEL RULES R. 5.5(c)(4).

for a regular lender client located in the lawyer's home state but is willing to make loans in whatever jurisdiction its customers are doing business.

A more challenging situation is if the lender is not located in the lawyer's home state. National lenders like Fannie Mae, Freddie Mac, and some conduit and SBA loan originators like to retain firms with specific expertise to close their loans on a national or regional basis.[13] The law firm's expertise in this type of loan should create a basis to claim the closing does "arise out of or [is] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

The ABA Commentary to Rule 5.5(c)(4) acknowledges the challenges and ambiguity of determining whether out-of-state matters "arise out of or are reasonably related to the lawyer's practice," and provides guidance on these factors to consider in making this determination:

- whether the lawyer's client has been "previously represented by the lawyer";
- whether the lawyer's client resides in or has "substantial contacts with the jurisdiction in which the lawyer is admitted";
- whether the matter, "although involving other jurisdictions, may have a significant connection" with the jurisdiction in which the lawyer is admitted;
- whether "significant aspects of the lawyer's work" will "be conducted" in the jurisdiction in which the lawyer is admitted;
- whether "a significant aspect of the matter may involve the law" of the jurisdiction in which the lawyer is admitted;
- whether "the client's activities or the legal issues involve multiple jurisdictions" and the client is seeking the lawyer's services to assess the merits of opportunities available in each jurisdiction; and
- whether "the services may draw on the lawyer's recognized expertise developed through the regular practice of law on

13. *See, e.g.*, FED. NAT'L MORTG. ASS'N, MULTIFAMILY SELLING & SERVING GUIDE § 710 (2023), https://mfguide.fanniemae.com/node/9556 [https://perma.cc/RDT2-XHEH] (last visited Jan. 28, 2023).

> behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law."[14]

Addressing the UPL issue under Rule 5.5(c)(4) does not absolve the lawyer of the competence issues noted above. The out-of-state lawyer is still charged to competently address any issue a local lawyer would address. ABA Rule 1.1 on competent representation and possessing the required legal knowledge always applies.[15]

A final hurdle to consider is in Rule 5.5(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."[16] Each state has the authority to define the practice of law within its jurisdiction, so the out-of-state lawyer needs to understand the specific UPL rules of that other jurisdiction before working on matters arising in that state. Acceptable behavior in one state may be prohibited, or even criminal, in another state. Two well known cases from the Carolinas are illustrative. First, in 2002, a North Carolina grand jury indicted two Georgia lawyers who represented a North Carolina college in an internal investigation in North Carolina.[17] This matter, however, took place before the adoption of Rule 5.5(c) in North Carolina[18] and involved work for a new North Carolina client, not an existing home client of the two Georgia lawyers. Also, an internal governance dispute at the client

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14. MODEL RULES R. 5.5 cmt. 14 (providing guidance on R. 5.5(c)(4)).

15. *See* MODEL RULES R. 1.1.

16. MODEL RULES R. 5.5(a) (emphasis added).

17. *State Regulation of Unauthorized Practice of Law in Arbitration and Mediation: The Trend Toward Permitting Multijurisdictional Practice in ADR*, BLOOMBERG L. (Sept. 14, 2010), https://news.bloomberglaw.com/us-law-week/state-regulation-of-unauthorized-practice-of-law-in-arbitration-and-mediation-the-trend-toward-permitting-multijurisdictional-practice-in-adr [https://perma.cc/L9DN-HM4Y].

18. The North Carolina version of R. 5.5(c) provides as follows:

(c) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and: . . . .

(2) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and the lawyer's services are not services for which pro hac vice admission is required; . . . .

(4) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation and the lawyer is admitted pro hac vice or the lawyer's services are not services for which pro hac vice admission is required.

27 N.C. ADMIN. CODE R. 5.5(c) (2023).

may have prompted the charges,[19] and its practical application may be limited to its specific circumstances. Given the rise of Charlotte as a national banking center, North Carolina now appears more accommodating to out-of-state lawyers and now allows duly licensed out-of-state lawyers from a state with bar license comity with North Carolina who move to their firm's North Carolina office to practice while their bar application is pending.[20] Second, in 2010, the South Carolina Court of Appeals stated in *Wachovia Bank, N.A. v. Coffey*,[21] perhaps in dicta, that a mortgage lender could not foreclose a South Carolina mortgage drafted for a South Carolina mortgagee by a non-lawyer in violation of the state's UPL rules because foreclosure is an equitable remedy and the lender had "unclean hands" for being part of the UPL violation.[22] Significantly, no in-state or out-of-state lawyer apparently was involved in preparing the *Coffey* mortgage, so Rule 5.5(c) does not directly apply.[23] Both decisions, however, illustrate the need to carefully consult local UPL laws and rules.

II. ATTORNEY LOCATED OUT-OF-STATE FOR AN INDEFINITE PERIOD OF TIME

A more recent issue arises when the lawyer is located out-of-state for an indefinite period of time. The advance of internet, cellular, and Wi-Fi connections means lawyers are never really away from the office and can readily work from their primary residence or from a

19. *Ga. Lawyers Indicated for Advising N.C. College*, LEGAL READER (April 7, 2004), https://www.legalreader.com/200447ga-lawyers-indicted-for-advising-nc-college-html/ [https://perma.cc/44WT-VP6Q].

20. N.C. ADMIN. CODE R. 5.5(e) (2023).

21. 698 S.E.2d 244 (S.C. Ct. App. 2010), *aff'd on other grounds*, 698 S.E.2d 244 (S.C. 2013).

22. 698 S.E.2d 247–48; *see also* Jane Hawthorne Merrill, *Multijurisdictional Practice of Law under the Revised South Carolina Rules of Professional Conduct*, 57 S.C. L. REV. 549 (2006). *But see* Nathan M. Crystal, *Change Is in the Air*, 32 S.C. LAW. 15 (2020).

23. The South Carolina version of R. 5.5(c) provides:

(c) A lawyer admitted in another United States jurisdiction, and not debarred, disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; . . . .

(4) arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.

S.C. APP. CT. RULES R. 407: RULES OF PROF. CONDUCT R. 5.5(c) (2022).

second home in a mountain, beach, resort, or more rural location. Moreover, COVID-19 restrictions have prompted many lawyers to relocate to their homes or temporary residences located in other jurisdictions, potentially triggering UPL considerations.

Although Model Rule 5.5(c)(4) helps some, it does not provide a clear answer. Does a lawyer's temporary presence out-of-state "arise out of or [is] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice?" With the ready access to internet and cell phones, the case can well be made that a lawyer's physical location always "arise[s] out of or [is] reasonably related to the lawyer's practice."[24] Clients expect prompt answers to their questions wherever the lawyer may be located. Even before COVID-19, lawyers regularly had to respond to client issues and inquiries while on vacation or business travel in another jurisdiction. Those interruptions, although often ill-timed and annoying, were never considered UPL violations and were considered simply part of the job of a lawyer. So does it make a difference if the lawyer is away from the office for several weeks instead of just one week? Logic would suggest not.

If the lawyer is working from a jurisdiction other than the one in which the lawyer is licensed, ABA Rule 5.5(b) provides some clear guidance. Under Rule 5.5(b): "A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, e*stablish 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.*"[25]

Thus, the lawyer must work through the lawyer's regular law office, keep the regular law office listed in all communications, not solicit or accept business from clients in the temporary location, not claim the remote location as an official firm office, or otherwise claim to be admitted as a lawyer in that jurisdiction. Simple steps such as keeping the lawyer's regular law office address on all emails, documents, and correspondence and using the firm's email address exclusively are important. Personal cell phone use is probably not an issue, because cell phones are commonly used even when lawyers are in their main office, but there needs to be some means to forward or

24. MODEL RULES R. 5.5(c)(4).
25. MODEL RULES R. 5.5(b) (emphasis added).

promptly respond to calls made to the lawyer's office telephone. Administrative functions such as file openings, billing, and accounting should be managed through the firm's office just as if the lawyer was physically present. It is, however, important to be candid with clients on the lawyer's actual physical location if it can affect the response or turnaround times to the client's matters or the lawyer's availability for meetings. Of course, if the lawyer elects to leave the firm and work from a primary or vacation home as a solo practitioner, the bar admission rules of the jurisdiction of that residence would be triggered.

If the lawyer's remote location is in a jurisdiction where the lawyer's firm also maintains an office, the lawyer needs to be careful not to give the impression that the lawyer is licensed in the state where that office is located. Use of that other office on more than an occasional basis can give the impression the lawyer is licensed to practice in the state of that office. The lawyer would be in an UPL situation unless the lawyer becomes licensed in that second jurisdiction. An example might be if a lawyer from the New York office of a large multi-state law firm is working from a beach condominium on the Florida Gulf Coast and the firm also has a satellite office miles away in Miami. This lawyer needs to keep the lawyer's affiliation solely with the New York office and not give the impression the lawyer is part of the firm's Miami team.

This commonsense approach to working remotely was validated in a recent ABA advisory opinion and in state bar UPL opinions from the popular vacation home destinations of Utah, Florida, and Georgia, and the commuter rich state of New Jersey. In 2020, the ABA Standing Committee on Ethics and Professional Responsibility published the leading advisory opinion on this subject.[26] After reviewing the purposes and policies of Rule 5.5, it 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 Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized

26. ABA Comm. on Ethics and Pro. Resp., Formal Op. 495 (2020).

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.[27]

Crucial to the Committee's opinion to permit this practice is that the lawyer must "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."[28] The ABA Committee aimed to protect the public and saw no such threat from remote work by lawyers if the lawyer does not create an inference of licensure in that remote location.

The Utah Bar Ethics Advisory Opinion Committee echoed this focus on protecting the public in its 2019 advisory opinion.[29] The Utah Committee was asked to answer this question: "If an individual licensed as an active attorney in another state and in good standing in that state" were to establish a home in Utah but practice law for clients from the state where that attorney is licensed, "neither soliciting Utah clients nor establishing a public office in Utah, does the attorney violate the ethical prohibition against the unauthorized practice of law?"[30] After reviewing the Utah version of Rule 5.5 and an Ohio Supreme Court case[31] in some detail, it reached this unambiguous conclusion: "The question posed here is just as clear as the question before the Ohio Supreme Court: 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."[32] It also noted that "a perusal of various other authorities uncovers no case in which an attorney was disciplined for living in a state where he was not licensed while continuing to practice law for clients from the state where he was licensed."[33]

Lawyers preferring the beach over a ski resort will find solace in a 2021 Florida Supreme Court case[34] in which the court approved an

27. *Id*. at 3.

28. *Id*. at 4.

29. Utah Ethics Advisory Op. No. 19-03 (2019), https://www.utahbar.org/ethics-opinions/19-03/ [https://perma.cc/3H4T-AJPW].

30. *Id*.

31. *In re* Jones, 123 N.E.3d 877 (Ohio 2018).

32. Utah Ethics Advisory Op. No. 19-03.

33. *Id*.

34. Fla. Bar *re* Advisory Op.—Out-Of-State Att'y Working Remotely from Fla. Home, 318 So.3d 538 (Fla. 2021) (per curiam).

advisory opinion of the Florida Bar Standing Committee on the Unlicensed Practice of Law allowing a New Jersey licensed lawyer to continue his work and of counsel affiliation with his New Jersey intellectual property law firm from his Florida home. Like the Utah Ethics Committee, the Florida UPL Committee found no UPL violation:

> [I]t is the opinion of the Standing Committee that there is no interest that warrants regulating Petitioner's practice for his out-of-state clients under the circumstances described in his request simply because he has a private home in Florida . . . .
>
> It is the opinion of the Standing Committee that the Petitioner who simply establishes a residence in Florida and continues to provide legal work to out-of-state clients from his private Florida residence under the circumstances described in this request does not establish a regular presence in Florida for the practice of law. Consequently, it is the opinion of the Standing Committee that it would not be the unlicensed practice of law for Petitioner, a Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property rights (and not Florida law) and without having or creating a public presence or profile in Florida as an attorney.[35]

The Florida UPL Committee noted the increasing frequency of this situation, likely to continue even after COVID-19 abates, by quoting this prophetic testimony of a Florida lawyer, Salomé J. Zahakis:

> I believe the future, if not the present, will involve more and more attorneys and other professionals working remotely, whether from second homes or a primary residence. Technology has enabled this to occur, and this flexibility can contribute to an improved work/life balance. It is not a practice to discourage.[36]

The precedential scope of the Florida opinion may be limited somewhat, however, since it addressed a lawyer practicing only federal intellectual property law and not more general commercial law issues typically governed by state law.

For lawyers who enjoy both the mountains and the beach, the Formal Advisory Opinion Board ("FAOB") of the State Bar of Georgia has recently submitted for public comment a proposed Formal Advisory

35. *Id.* at 542.
36. *Id.*

Opinion to answer the question: "Does a lawyer admitted elsewhere but not in Georgia necessarily establish a systematic and continuous presence in Georgia for the practice of law, within the meaning of Georgia Rule of Professional Conduct 5.5, by giving advice or assistance from Georgia while physically residing in Georgia, if the lawyer does not provide any legal services in Georgia?"[37]

The Georgia FAOB reviewed the Utah, Florida, and New Jersey precedents and reached the same conclusion, while paying particular concern to the need to protect the public from a misunderstanding of the lawyer's licensure status. The FAOB opined that "[t]he lawyer does not establish a systematic and continuous presence for the practice of law in Georgia, within the meaning of Rule 5.5," if "the lawyer's Georgia activities do not include the provision of legal services in Georgia, are essentially invisible to the public, and thus do not create a risk of misleading the public about the lawyer's licensure."[38] As long the lawyer's presence in Georgia is invisible to the public, there is no UPL violation:

Because of remote technology, it is possible for a [out-of-state] Lawyer's physical location in Georgia to be essentially invisible to the public. If the [out-of-state] Lawyer practices only remotely and does not reveal their Georgia location in advertisements, on letterhead or business cards, through the use of a local phone number, or by other means, the public will never know about it. One cannot be misled by something that is imperceptible. Providing legal services in other jurisdictions in ways that are essentially invisible to the public, even on a continuous basis, does not create the risk that Rule 5.5 is intended to guard against and therefore does not violate Rule 5.5.[39]

In keeping with its emphasis on not misleading the public, the FAOB cautioned out-of-state lawyers on the importance of maintaining the "invisibility" of their presence in Georgia:

We conclude that a [out-of-state] Lawyer who practices law from Georgia, but who provides no legal services in Georgia, does not violate Rule 5.5 if the lawyer's physical location in Georgia is essentially invisible to the public. For [out-of-state] Lawyers who wish

37. State Bar of Ga. Proposed Formal Advisory Op. No. 22-1 (2022), https://www.gabar.org/newsandpublications/announcement/upload/Proposed-FAO-No-22-1.pdf [https://perma.cc/6SAR-3VM2].

38. *Id*. at 1.

39. *Id*. at 3.

to practice from Georgia, such invisibility provides a safe harbor from Rule 5.5. This opinion does not purport, however, to provide guidance beyond that. To whatever extent [out-of-state] Lawyers allow their presence in Georgia to be known, they have left the safe harbor. They run the risk that they may be found to have established a continuous and systematic presence in Georgia for the practice of law. Whether that is so will require analysis of the particular facts to determine whether the lawyer has created circumstances under which a reasonable member of the public might be misled about the lawyer's licensure.[40]

Is there a warning here from the FAOB not to mention the location of the lawyer's Georgia home or even allude to any Georgia golf games or fishing trips when talking to clients? Perhaps so. But what is the lawyer to say if the client unexpectedly needs to send original documents by overnight express courier to meet a critical deadline or requests an immediate in person meeting? Although the FAOB did not state this, perhaps they would have a different view of a lawyer talking to a long-standing client or a well-known opposing counsel than they would for one talking to a new client. The risk of misunderstanding might be different in those various situations, although the FAOB made it clear the risk remains with the lawyer, not the client.

The New Jersey Committee on the Unauthorized Practice of Law and Advisory Committee on Professional Ethics followed a similar analysis in 2021 for New York and Philadelphia lawyers working from their suburban homes, but allowed the out-of-state lawyers to make known their physical presence in New Jersey so long as it is disclosed as a residence, not a law office:

Non-New Jersey licensed lawyers may practice out-of-state law from inside New Jersey provided they do not maintain a "continuous and systematic presence" in New Jersey by practicing law from a New Jersey office or otherwise holding themselves out as being available for the practice of law in New Jersey. A "continuous and systematic presence" in New Jersey requires an outward manifestation of physical presence, as a lawyer, in New Jersey . . . . *Hence, actions that merely*

40. *Id.* at 4.

manifest presence in New Jersey in the capacity of a private citizen or resident, and not as a lawyer, do not raise such concerns.[41]

Prohibited actions would include "any advertisement or similar communication stating that the non-New Jersey licensed lawyer engages in a legal practice in New Jersey;" any "advertisement or similar communication referring to a location in New Jersey for the purpose of meeting with clients or potential clients;" any "advertisement or similar communication stating that mail or deliveries to

the lawyer should be directed to a New Jersey location;" and "otherwise holding oneself out as available to practice law in New Jersey."[42]

All of these bar ethics committees echoed a common theme: the remote lawyer must not act like a locally licensed lawyer, must not create the appearance of separate law office operating at their residence, and must at all times demonstrate to the public a continued and ongoing connection with the lawyer's home office. Some states discourage even mentioning the lawyer's out-of-state location, while others sanction the disclosure of this information with appropriate caveats. One important ethical caution to all attorneys working remotely for any duration is to assure the protection of client confidentiality under Model Rule 1.6.[43] The lawyer needs to assure adequate security protections for confidential conversations, data, and documents at these remote locations, whether on the internet, in paper, or on a cell phone.[44] The lawyer also needs to consider contingency plans if voice or data communication is interrupted. A client will likely take a dim view of a

41. Joint Op. of the N.J. Comm. on the Unauthorized Prac. of L. (Op. 59) & N.J. Advisory Comm. on Prof. Ethics (Op. 742) (2021) (emphasis added), https://www.njcourts.gov/sites/default/files/notices/2021/10/n211007c.pdf [https://perma.cc/4PGF-8DZY].

42. *Id.* at 3.

43. MODEL RULES R. Rule 1.6.

44. *See* Brodie D. Erwin and Michael L. Matula, *COVID-19 & Cyber Security: Protecting Trade Secrets and Confidential Information During the Telework Boom*, NAT'L L. REV (May 21, 2020), https://www.natlawreview.com/article/covid-19-cyber-security-protecting-trade-secrets-and-confidential-information-during [https://perma.cc/HB6S-4P7B]; Todd Presnell, *"Dogs Can't Waive the Privilege" and Other Privilege Tips for Working Remotely*, PRESNELL ON PRIVILEGES (March 18, 2020), https://presnellonprivileges.com/2020/03/18/dogs-dont-destroy-the-privilege-and-other-privilege-hygiene-tips-for-working-remotely/ [https://perma.cc/UA2E-6TWX]; Paul Bennett, *COVID-19: Confidentiality and Working from Home*, LAW SOC'Y GAZETTE (May 21, 2020), https://www.lawsociety.org.uk/topics/blogs/covid-19-confidentiality-and-working-from-home [https://perma.cc/G2YU-G5BX].

missed filing deadline or delayed closing because of an internet blackout at its lawyer's vacation home. While law offices are not immune from such interruptions, they are far more frequent in residential internet networks, especially in remote locations.

III. THE IN-HOUSE LAWYER WORKING AT CORPORATE HEADQUARTERS

For those banking lawyers who take their practice in-house to a corporate law department, Rule 5.5(d)[45] removes the "invisibility" requirement found in Rule 5.5(c) and offers some additional safe harbors as long as (i) the lawyers are duly licensed and in good standing in at least one jurisdiction[46] and (ii) their practice is limited to the legal work of their employer and its affiliates:

> (d) A lawyer admitted in another United States 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 services for which the forum requires *pro hac vice* admission; . . . or
> >
> > (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.[47]

There is no requirement of "invisibility" in Rule 5.5(d), and a "systematic and continuous presence" is allowed for both office and remote legal work because the in-house lawyer has only one corporate or corporate family client that presumably knows its law department's

45. MODEL RULES R. 5.5(d).

46. For the purposes of R. 5.5(d), the in-house lawyer must "be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority" or "the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction]." MODEL RULES R. 5.5(e).

47. MODEL RULES R. 5.5(d) (emphasis added).

legal credentials, and the risks of misleading the public are not present. Versions of Rule 5.5(d) are in effect in North Carolina[48] and South Carolina,[49] each of which is home to significant in-house banking and finance corporate legal departments. This specific exemption is targeted to lawyers with an in-house regulatory, corporate, or commercial practice; if the in-house lawyer appears before a tribunal, the lawyer must follow that tribunal's admission rules and regulations. The in-house lawyer is also reminded of the need to retain local counsel when dealing with unfamiliar issues of local law.[50] The obligations under ABA Rule 1.1 and Rule 5.5(a) on competent representation, possessing the required legal knowledge, and adhering to other states' applicable UPL rules apply equally to in-house and private practice attorneys.[51]

Most states have enacted some form of Rule 5.5, although the exact text may vary. It provides an excellent vehicle for lawyers to keep their practice going when their life, their career or just the deal takes

48. The North Carolina version of R. 5.5(d) is:
(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and:
(1) the lawyer provides legal services to the lawyer's employer or its organizational affiliates; the services are not services for which pro hac vice admission is required; and, when the services are performed by a foreign lawyer and require advice on the law of this or another US jurisdiction or of the United States, such advice is based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
(2) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.
27 N.C. ADMIN. CODE R. 5.5(d) (2023).

49. The South Carolina version of R. 5.5(d) provides:
(d) A lawyer admitted in another United States jurisdiction, and not debarred, disbarred or suspended from practice in any jurisdiction, may provide legal services, including 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 services 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.
S.C. APP. CT. RULES R. 407: RULES OF PROF. CONDUCT R. 5.5(d) (2022).

50. MODEL RULES R. 1.1; R. 5.5(a).

51. MODEL RULES R. 5.5(d) applies to the UPL issues arising from the in-house attorney's work for the bank in the state of the attorney's bank office or home office. As noted above, a separate UPL analysis needs to be made under R. 5.5(c) and any other applicable state UPL rules of each specific transaction handled by that attorney for the state(s) in which the transaction or specific collateral is located.

them out of town. The commonsense results provided by Rule 5.5 allow freedom of movement for attorneys without sacrificing protections for the public by providing sound guidance and safe harbor behavior. Attorneys closing loans with collateral located outside their state of licensure, however, may still have a more difficult row to hoe as they ensure that they provide cost-effective services to their client without running afoul of ethical rules or UPL issues. Navigating these issues will likely continue until a more global solution—like streamlined law license reciprocity procedures or national interstate law license recognition—is undertaken.