

Update to Rule 1.5

A lawyer may include in the lawyer's engagement agreement a provision in which the client agrees to pay the lawyer's hourly rate for non-legal services (for example, testimony as a fact witness) that may be compelled by and ancillary to the lawyer's legal representation. S.C. Bar EOA #23-01. An earlier opinion advised that the lawyer may charge a reasonable hourly rate for such services, but that opinion did not address the legal issue of whether the client was obligated to pay for such services. S.C. Bar EOA #97-42.

Update to Rule 5.5

The Supreme Court has adopted a limited rejection of the "butt-in-the-seat" rule, which is an aspect of the concept of the unauthorized practice of law. Under this rule a lawyer is treated as practicing law from the physical location where the lawyer renders services even if the services are performed remotely and involve the law of a jurisdiction where the lawyer is authorized to practice. See Nathan M. Crystal, *Change is in the Air*, 32 S.C. Lawyer 15 (2020) (discussing the rule).

Under the Court's modification a lawyer does establish an office or engage in systematic presence for the practice of law in South Carolina if the lawyer engages in remote work in South Carolina provided the lawyer's services are limited to ones that the lawyer is authorized to perform by the jurisdiction where the lawyer is admitted to practice and the lawyer does not hold himself out as a South Carolina lawyer or admitted to practice in South Carolina. The Court adopted the following addition to comment 4 of SCRPC 5.5.

A lawyer admitted in another jurisdiction does not establish an office or other systematic presence in this jurisdiction for the practice of law by engaging in remote work in this jurisdiction, provided the lawyer's legal services are limited to services the lawyer is authorized to perform by a jurisdiction in which the lawyer is admitted, and the lawyer does not state, imply, or hold out to the public that the lawyer is a South Carolina lawyer or is admitted to practice law in South Carolina.

The butt-in-the-seat rule is obviously outmoded in the post-pandemic technologically-oriented world in which lawyers now practice. However, some questions may arise about the application of the new comment. The new comment clearly allows a lawyer vacationing in South Carolina to perform remote services for clients involving the jurisdiction where the lawyer is admitted to practice so long as the lawyer does not engage in any "holding out" as a South Carolina lawyer or admitted to practice in South Carolina. Would the rule allow a lawyer who is admitted to practice in another jurisdiction to move to South Carolina permanently and do only remote work here? It seems so since the rule does not have a time limit or a residence test. Moreover, other parts of Rule 5.5 specifically refer to temporary practice while this comment does not. Could such a permanent remote lawyer have an actual office (to get away from

home, for example) where the lawyer only performs remote services? This method of practice in South Carolina seems proper if the lawyer's work is limited to remote services and there is no "holding out." Could the lawyer meet clients from the lawyer's home state at this office? The answer is "No." In this case the lawyer would not be performing remote services. Instead, the lawyer should conference with the client through Zoom or other remote conferencing platform, or travel to meet with the client in the lawyer's home jurisdiction. Suppose the lawyer works for a firm that has an office in South Carolina, can the lawyer go into the office but only practice remotely? The answer is probably yes, but with some uncertainty. If the lawyer does nothing but remote practice, that is probably in compliance with the rule, but suppose the lawyer meets with other members of the firm to discuss legal matters? If the discussions are limited to the law of the jurisdiction where the lawyer is admitted to practice, that is probably permissible; similarly discussion of firm business matters should also be permissible since that is not practicing law. Participation in meetings with clients or South Carolina lawyers would not be proper. Suppose a lawyer has been hired by a South Carolina firm, has moved to the state, and is in the process of seeking bar admission. Could the lawyer continue to handle matters remotely in his former jurisdiction of practice and residence? Probably so if the "go into the office" reasoning above is correct. Could this same lawyer do a combination of work – remote work for clients in the lawyer's former jurisdiction and legal work for South Carolina clients under the supervision of a member of the firm (a South Carolina lawyer) until the lawyer is admitted to practice in South Carolina. So long as the lawyer complies with the dual requirements for remote working and work under the supervision of a South Carolina lawyer, this combination is probably ethically permissible but the combination increases the risk of a disciplinary complaint/inquiry, which may slow up the bar admission process. Finally, it should be noted that the new comment only deals with the part of Rule 5.5 that prohibits a lawyer not admitted to practice in South Carolina from opening an office or having a systematic presence in the state for the practice of law. The comment does not limit the ability of an out-of-state lawyer to practice temporarily in South Carolina under one of the subdivisions of Rule 5.5(c). In addition, the comment would not affect the ability of lawyer not admitted in South Carolina to open an office in South Carolina and provide legal services to the lawyer's employer or its affiliates or when authorized by federal law, for example, immigration practice. See SCRPC 5.5(d).