

FILE NO. ADM10-8005

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition to Amend the
Minnesota Rules of Professional Conduct.

**COMMENTS REGARDING THE
MINNESOTA STATE BAR
ASSOCIATION PETITION TO AMEND
RULE 5.5, MINNESOTA RULES OF
PROFESSIONAL CONDUCT**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE
STATE OF MINNESOTA:

The Lawyers Professional Responsibility Board (LPRB) and the Director of the Office of Lawyers Professional Responsibility (Director) submit these comments regarding the Minnesota State Bar Association (MSBA) proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct (MRPC). The LPRB and the Director support in part and oppose in part the proposed changes as more fully set forth herein.

INTRODUCTION

1. The LPRB is a Board established by this Court to oversee the lawyer discipline system. Rule 3(c), Rules on Lawyers Professional Responsibility (RLPR). The Director is appointed by this Court to administer the lawyer discipline system. Rule 5(b), RLPR.

2. The LPRB embodies a wide diversity of viewpoints reflecting not only the bar, but the public as a whole. The LPRB is comprised of 23 members, nine of whom are non-lawyers. Rule 4(a)(2), RLPR. The non-lawyers include a former naval officer, an education specialist, a retired police sergeant, a public speaking instructor, a business management consultant specializing in alternative dispute resolution, a computer forensics expert, a retired corporate executive, and a retired county human

services director. *See*

<http://lprb.mncourts.gov/AboutUs/Pages/LawyersBoardDirectory.aspx>.

3. The lawyer members of the LPRB also reflect a diversity of practice. Six of the lawyer members are nominated by the MSBA. Rule 4(a)(2), RLPR. Some are sole practitioners, some are in small firms, some are in medium firms, and some are in large firms. Some are from the Twin Cities metropolitan area, others are from out-state Minnesota. These lawyers encompass a variety of areas of practice including complex civil litigation, criminal defense, family law, business transactions, professional review matters, insurance defense, law firm ethics counsel, criminal prosecution, intellectual property, estate planning and immigration law.

4. This Court has the exclusive and inherent power and duty to administer justice and adopt rules of practice and procedure before the courts of this state and to establish standards for regulating the legal profession. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05.

5. This Court has adopted the MRPC to establish standards of conduct for lawyers licensed to practice law in the State of Minnesota. This Court has amended the MRPC from time-to-time for good cause shown.

BACKGROUND

6. The LPRB's position with respect to the proposed Rule 5.5, MRPC, amendments was approved by the LPRB at its September 8, 2017, meeting. The MSBA General Assembly approved its proposed amendments to Rule 5.5, MRPC, at its April 20, 2018, meeting. The LPRB and the Director join in recommending certain changes proposed by the MSBA, and believe others are not in the public interest.

7. Rule 5.5, MRPC, with certain exceptions, prohibits a lawyer not authorized to practice law in this state from doing so. The changes supported by the LPRB and the Director would expand certain exceptions.

8. Rule 5.5, MRPC, in its current form works well. It allows lawyers the flexibility necessary for their practices while respecting the authority of each state to regulate the profession within its borders. Only rarely is a non-Minnesota lawyer disciplined for engaging in the practice of law in violation of Rule 5.5, MRPC. The disciplines for violations of this rule tend to occur because a Minnesota lawyer is practicing (a) after being suspended or disbarred, (b) while suspended for failing to pay the lawyer registration fee, or (c) while on CLE-restricted status.

PROPOSED AMENDMENTS TO RULE 5.5(b) AND (d), MRPC.

9. The MSBA proposes to amend Rule 5.5(b) and (d), MRPC, as follows:

(b) A lawyer who is not admitted to practice in ~~this jurisdiction~~ Minnesota 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 Minnesota law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Minnesota that ~~are services that the lawyer is authorized to provide by~~ exclusively involve federal law or the other law of this another jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota.

10. The LPRB agrees with this proposal. The genesis of this proposal is to allow a lawyer who practices law in another state and moves to Minnesota to continue serving the lawyer's clients in the state in which the lawyer is licensed. Situations when this can occur include when a spouse has a job transfer, or a lawyer moves to be closer

to family. The goal of this proposed change is to allow the lawyer while physically in Minnesota to do what the lawyer was doing in the lawyer's home state.

11. The LPRB and the Director believe that the disclosure requirement serves an important function, namely, to ensure that a person hiring a lawyer understands the jurisdictional limitations on the lawyer's practice. Often, people assume that a lawyer physically present in a jurisdiction is licensed to practice in that jurisdiction. Ensuring clients understand that the lawyer nevertheless has limitations on the law the lawyer may practice is important.

12. The rule as initially proposed by the MSBA and presented to the LPRB did not contain this important element. Thus, when the LPRB considered this amendment, the LPRB's focus was to ensure the proposed rule contained a notice requirement, as the proposed rule now does.

13. The Director notes two potential issues with this proposed rule. First, it does not appear the "exclusively involve" change is necessary as it relates to federal law. Rule 5.5(d), MRPC, already provides, consistent with the model rule, that a lawyer may provide legal services "that the lawyer is authorized to provide by federal law . . ." In addition to redundancy, the proposed rule also imposes a new requirement on lawyers practicing federal law which does not currently exist. Rule 5.5(d), MRPC, does not require non-Minnesota lawyers practicing law as authorized by federal law to notify clients of the fact that they are not licensed in Minnesota.

PROPOSED NEW RULE 5.5(e), MRPC.

14. The MSBA proposes to add a new subsection (e) to Rule 5.5, MRPC, which reads:

(e) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are performed on behalf of a person

who has a family, close personal, or prior professional relationship with the lawyer.

15. The proposed rule is designed to allow a lawyer to provide legal services to people who know the lawyer well but happen to reside in other jurisdictions.

16. The LPRB and the Director agree with the MSBA's recommendation that the rule should allow a lawyer not admitted in Minnesota to perform legal services in Minnesota if the services "are performed on behalf of a person who has a family relationship with the lawyer." Presently a non-Minnesota lawyer may represent a family member or any other person in Minnesota if the representation relates or arises out of the lawyer's practice in the lawyer's home jurisdiction. This narrow additional exception will allow a non-Minnesota lawyer to represent a family member even if the representation is unrelated to their practice. This will facilitate access to justice for family members.

17. The LPRB and the Director do not agree that this additional exception should be further expanded to include persons with whom the lawyer has a "close personal" or "prior professional" relationship. The terms "prior professional" and "close personal" are vague and ambiguous. Moreover, these terms are potentially quite expansive and therefore appear to be overbroad. In considering the MSBA's proposed Rule 5.5(e), MRPC, the LPRB considered more narrowly crafted alternatives. In the end, the LPRB could not settle on any acceptable alternative language. The vagueness of the proposed language creates enforceability challenges for the LPRB and Director.

18. The breadth of this new exception as set forth in the MSBA proposal raises consumer protection concerns. The concern is whether a person hiring a lawyer who is not licensed in Minnesota to handle a Minnesota matter truly understands any limitations on the competency of that lawyer which may exist.

19. The LPRB and the Director are also concerned that this (and the additional proposed amendments discussed below) create the possibility that a Minnesota lawyer may be misled to believe other jurisdictions have similar rules, when in fact most jurisdictions do not. This could cause a Minnesota lawyer to unwittingly undertake conduct which results in the lawyer receiving discipline in another jurisdiction.

20. Another concern is that the language of the rule as drafted does not limit this exception, as most other exceptions are limited, to temporary practice or to practice not involving appearance before a tribunal or in an alternative dispute resolution proceeding. Thus, as worded, this rule appears to allow a foreign lawyer to establish a permanent presence in Minnesota to represent friends and family. This proposed rule also appears to allow a foreign lawyer to appear before a Minnesota tribunal or in a Minnesota alternative dispute resolution proceeding on behalf of a friend or relative, without becoming admitted *pro hac vice* before the tribunal.

**PROPOSED AMENDMENT TO RULE 5.5(c)(4), MRPC, AND RELATED
AMENDMENT TO THE COMMENT TO RULE 5.5, MRPC.**

21. The MSBA proposes to amend Rule 5.5(c)(4), as follows:

(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 which:

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably-related services include services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law.

22. To confirm this significant expansion to the exception, the MSBA proposal would amend Comment 14 to Rule 5.5 as follows: "In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on

behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.”

23. The LPRB and the Director oppose the MSBA’s proposed change to Rule 5.5(c)(4), MRPC, and the related proposed change to Comment 14 to Rule 5.5, MRPC. On the whole, this is the MSBA’s most dramatic proposed change, and would create an exception that swallows the rule.

24. Importantly, this proposed amendment eliminates the Comment to the rule defining reasonably-related services as those “involving a particular body of federal, nationally-uniformed, foreign, or international law.” (Rule 5.5, MRPC, Comment 14.)

25. The underlying purpose of rules against the unauthorized practice of law such as Rule 5.5, MRPC, and throughout the cases that analyze whether an attorney is engaging in the unauthorized practice of law, is the consideration that such provisions protect the Minnesota public. As the Annotated Model Rules of Professional Conduct note, “Although several concerns underlie the unauthorized-practice proscriptions, their primary purpose is to protect the public forum from the consequences of receiving legal service from unqualified persons.” Ellen Bennett, Elizabeth Cohen, Martin Whittaker, *Annotated Model Rules of Professional Conduct*, Center for Professional Responsibility American Bar Association (7th Ed. 2009), p. 472. *See also* *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) (“The prohibition against unauthorized law practice is within the state’s police power and is designed to ensure that those performing legal services do so competently”); *Fought & Co., Inc. v. Steel Engineering and Erection, Inc.*, 951 P.2d 487, 497 (Haw. 1998) (“scope of [unauthorized practice of law] statutes must be expansive enough to afford the public needed protection from incompetent legal advice . . .”).

26. When the current version of model Rule 5.5 (on which Rule 5.5, MRPC, is based) was adopted, the American Bar Association Commission on Multijurisdictional Practice Report to the House of Delegates, No. 201B (August 2002), specifically decided to take “a conservative approach, addressing those classes of conduct [set forth in the acceptance to the general rule against unauthorized practice] that do not pose unacceptable risks to the public interest.” (P.3.)

27. The rules governing the unauthorized practice of law are a patchwork across the 50 states. Many states have greater restrictions on unauthorized practice than those set forth in the Model Rules of Professional Conduct or the Minnesota Rules of Professional Conduct. Creating additional, unique exceptions can only serve to mean more deviance from uniform standards across jurisdictions and more confusion to the practicing bar as to the conduct that is, or is not, permissible.

28. The inclusion of Rule 5.5(c)(4) to the Model Rules of Professional Conduct (on which the Minnesota Rules of Professional Conduct are modeled) was to permit, on a temporary basis, transactional representative, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer’s practice in the lawyer’s home state. *See* ABA Commission on Multijurisdictional Practice Report to the House of Delegates, No. 201B (Aug. 2002). The ABA Report explains that one of the reasons for including Rule 5.5(c)(4) was to cover services that are ancillary to a particular matter in the home state: “For example, in order to conduct negotiations on behalf of a home state client or in connection with a home state matter, the lawyer may need to meet with the client and/or other parties to the transaction outside the lawyer’s home state.” (*Id.* at 7.) The report further goes on to explain that, under the exception, the public and profession would remain protected:

In such circumstances it should be sufficient to rely on the lawyer's home state as the jurisdiction with the primary responsibility to ensure the lawyer has the requisite character and fitness to practice law; the home state has a substantial interest in ensuring that all aspects of the lawyer's provision of legal services, wherever they occur, are conducted competently and professionally.

(Id.)

29. Another reason for the inclusion of Rule 5.5(c)(4) was to respect pre-existing and ongoing client-lawyer relationships by allowing a client to retain a lawyer on multiple related matters, including matters that have no connection to the home state jurisdiction. *(Id. at 7-8.)*

30. Finally, Rule 5.5(c)(4) was intended to allow legal services on a temporary basis outside a lawyer's home state by a lawyer who has developed a recognized expertise such as nationally applicable bodies of law and the client has an interest in retaining a lawyer thoroughly familiar in those areas. *(Id. at 8.)*

31. The MSBA's proposal to amend Rule 5.5(c)(4), MRPC, ignores these important policy considerations. It is not limited to pre-existing attorney-client relationships or areas of nationally uniform law. Instead, it proclaims that if a lawyer practices in an area of law in one state, the lawyer may do so in any state, regardless of the substantial differences in law and procedure that can exist from state to state.

32. The LPRB and the Director believe that maintaining the language currently in the rule and comment protects the public. The LPRB and the Director are concerned that this amendment will allow lawyers to practice in an area of law in a jurisdiction in which the lawyer knows nothing about the law. For example, a lawyer may be well-versed in an area such as family law or landlord/tenant law in the lawyer's own jurisdiction. The law in these substantive areas, however, can vary widely between different jurisdictions. The fact that a lawyer knows the substantive law in one

jurisdiction provides no assurance that the lawyer will know the substantive law, or identify the issues relevant in that area of law, in another jurisdiction. Although a person may know a lawyer and believe that lawyer is competent, the person will have no ability to assess the lawyer's ability to competently represent that person in that area of law in a different jurisdiction.

33. Additionally, in *In Re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), this Court declined the opportunity to adopt the position of the proposed rule change. Through that opinion, the Court could have defined "reasonably related" to encompass the breadth the proposed rule change envisions. This Court declined to do so. This proposed rule change appears to be an attempt to codify an interpretation of the rule that a majority of the Court refused to accept:

Instead, the dissent argues, without citing any legal support for its claim, that the subject on which an attorney has expertise does not need to be nationally uniform in order for legal services provided outside the attorney's home jurisdiction to reasonably relate to the attorney's practice in his or her home jurisdiction. We disagree. Rule 5.5(c) is an exception to the general prohibition on the unauthorized practice of law. By interpreting the exception to apply to expertise in any subject matter, the dissent allows the exception to swallow the general rule.

Id. at 699 n.4.

34. Finally, this proposed amendment does not appear to assist, in any way, Minnesota lawyers who may desire to practice on a temporary basis in another jurisdiction. Such practice would be governed by the rules of that jurisdiction. This proposed amendment primarily assists non-Minnesota lawyers coming into Minnesota, and the only assistance provided Minnesota lawyers is protection from reciprocal discipline once another state has already disciplined the lawyer for engaging in the

unauthorized practice of law. This lack of reciprocal benefit appears inequitable and therefore is troubling.

CONCLUSION

For the foregoing reasons, the Lawyers Professional Responsibility Board and the Director of the Office of Lawyers Professional Responsibility support in part and oppose in part the proposed amendments to Rule 5.5, Minnesota Rules of Professional Conduct.

Dated: November 20, 2018.

Respectfully submitted,

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