



IN-HOUSE COUNSEL AND UNAUTHORIZED PRACTICE

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Amendments dealing with the unauthorized practice of law are among the most significant changes in the recent amendments to the Minnesota Rules of Professional Conduct. These changes were based primarily upon recommendations of the ABA's Multi-Jurisdictional Practice (MJP) Commission and were intended to address the outdated unauthorized practice of law regulations which often frustrated the needs of multi-state clients.¹ Generally, lawyers not licensed in Minnesota are still prohibited from establishing an office or maintaining a systematic or continuous presence in the state.² The MJP recommendations defining circumstances in which lawyers not admitted in Minnesota can temporarily practice in this state were adopted in their entirety. These circumstances include associating with local counsel, services rendered in reasonable expectation of being admitted *pro hac vice*, and services related to the lawyer's practice in his or her own state that do not require *pro hac vice* admission in Minnesota.³ As an adjunct to the temporary practice exceptions afforded to lawyers not admitted in Minnesota, Rule 8.5, MRPC, was amended to provide that a lawyer not admitted here is nonetheless subject to Minnesota's lawyer disciplinary authority if the lawyer provides or offers legal services in Minnesota.

HOUSE COUNSEL NOT EXEMPT

Although the MJP Commission also recommended that in-house counsel services be exempted from the unauthorized practice of law prohibition, Minnesota declined to follow this recommendation.⁴ The rationale underlying exclusion of the in-house counsel exemption was that

exceptions should not be created for lawyers who establish a continuous presence in Minnesota and advise clients concerning state law. In addition, many services typically provided by in-house counsel fall squarely within the existing state law definition of unauthorized practice⁵ and Minnesota's unauthorized practice of law statute does not contain among its "permitted actions" an exception for services provided by a lawyer not admitted in Minnesota to the lawyer's employer or its affiliates.⁶

Although, the MSBA Task Force recommended deviating from the MJP scheme by eliminating the in-house counsel exemption, it also noted that that existing rules of the Minnesota Board of Law Examiners ("BLE") sometimes made admission difficult for lawyers employed in Minnesota and assigned to perform services for their employers. More specifically, the BLE requirements for admission without bar examination often created unique impediments for lawyers employed in an in-house counsel capacity. Consequently, the Task Force's recommendation was predicated upon the expectation that the BLE would make changes to the admission rules to facilitate the admission of in-house lawyers who are admitted elsewhere. In response, changes to facilitate the admission of in-house lawyers were approved by the Minnesota Supreme Court in August 2004.

Prior to these changes, in-house counsel seeking reciprocal admission to the Minnesota bar often faced one of two obstacles. First, Rule 7A of the BLE's rules used to provide that in-house counsel applicants were eligible for admission without examination only if they had been engaged in the practice of law as in-house counsel or in other types of law practice for five of the seven years immediately preceding the application. Because large organizations often assign and reassign lawyers between the organization's general counsel department and other departments or positions not requiring the practice of law, the "five of seven" requirement sometimes proved to be an impediment for these lawyers.

A second obstacle involved the requirement in Rule 7A that the five of

seven years of in-house counsel practice occur in the jurisdiction in which the lawyer was licensed. Historically, many states, including Minnesota, have not actively investigated or prosecuted in-house counsel for the unauthorized practice of law where the lawyer was licensed in another jurisdiction. One rationale is that those who employ in-house counsel tend to be sophisticated users of legal services and are in a position to make their own determinations about counsel's competency and character and fitness. For these reasons and others, a number of in-house lawyers have continued to engage in the practice of law as in-house counsel in a number of states, including Minnesota, even though they are not licensed there. Under old Rule 7A, this type of "unauthorized practice" did not fulfill the "five of seven" requirement, making these lawyers ineligible for admission to the Minnesota bar unless they completed the bar examination.⁷

HOUSE COUNSEL ADMISSION

Several changes were made to facilitate easier admission for in-house lawyers without having to take the bar exam. First, a new House Counsel license was expanded for lawyers who desire only limited admission to the Minnesota bar in order to represent their organizational employer for an indefinite period of time. The new House Counsel license authorizes the lawyer to represent the employer in all legal matters, including court proceedings. House Counsel licenses stay in force for the duration of the lawyer's employment with the employer for which House Counsel admission was obtained and may be reissued within 90 days at the

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PROFESSIONAL RESPONSIBILITY

discretion of the BLE Director if the license expires due to termination of the lawyer's employment.⁸

The preexisting practice requirements for admission without examination have been relaxed for lawyers seeking a House Counsel license. Instead of meeting the traditional "five of the past seven years" legal practice requirement, House Counsel applicants need only demonstrate that they have been engaged in the practice of law in three of the preceding five years. More importantly, however, any practice as in-house counsel during this period will qualify, even if the lawyer was not licensed in the jurisdiction where she practiced as in-house counsel. This essentially qualifies lawyers licensed elsewhere who are or have recently practiced as in-house counsel in Minnesota to use their heretofore "unauthorized practice" as the basis for obtaining a House Counsel license.

ENFORCEMENT OF UNAUTHORIZED PRACTICE

Some states have a history of aggressive enforcement of unauthorized practice of law rules and statutes. For example, Florida recently amended its statute making the unauthorized of practice of law by anyone not licensed by the Florida Supreme Court a third-degree felony.⁹ Texas has an active Unauthorized Practice of Law Committee that investigates both nonlawyers and lawyers not licensed in Texas who engage in the practice of law. By contrast, other states, including Minnesota, have not made prosecution of unauthorized practice violations a priority. Nevertheless, recent changes and trends suggest that those who continue in-house practice in Minnesota without a Minnesota law license or House Counsel license risk discipline and possibly other consequences.

Over the past several years, ethics complaints against in-house lawyers have increased. Many arise out of employment or noncompetive disputes with former employees or officers. Other allegations include improper *ex parte* communications with employees who are represented by counsel, while still others originate as conflict-of-interest allegations when officers or other high-level employees who regularly dealt with counsel are ousted from the organization for misconduct.

Ethical responsibilities of organizational lawyers are also changing. The Enron and WorldCom scandals spawned the Sarbanes Oxley Act, causing significant changes in securities law governing publicly traded

corporations. These developments in turn forced necessary amendments to the ethics rule governing "organization as client."¹⁰ All of these changes have placed greater responsibility upon the lawyers who represent and advise organizations and thereby create further opportunities for allegations of noncompliance.

Jurisdictional changes arising out of MJP have also expanded opportunity for unauthorized practice enforcement. Historically, lawyer discipline agencies have been hesitant to exert disciplinary authority over lawyers not admitted in their jurisdiction. The recent amendment to Rule 8.5, MRPC, authorizes state agencies to exercise jurisdiction in lawyer discipline matters over attorneys not licensed in the state if they engage in the practice of law. Unlike in the past, disciplinary agencies can now legitimately proceed against lawyers not admitted in their jurisdiction and, at the conclusion of the proceeding, refer the disposition to the lawyer's licensing jurisdiction for the imposition of reciprocal discipline.¹¹

Finally, those who practice with in-house counsel who are not licensed in the jurisdiction may also be at risk for consequences. Rule 5.1, MRPC, requires partners in a law firm or those with comparable managerial authority in the law department of an enterprise to make reasonable efforts to ensure that all lawyers in the department conform to the Rules of Professional Conduct.¹² In-house lawyers having authority covered by this definition could face discipline for permitting other lawyers in the organization's law department to continue to practice law in Minnesota without being licensed.

Lawyers licensed elsewhere who are practicing as house counsel in Minnesota without a Minnesota license should immediately take advantage of the recent changes to the rules that facilitate their admission as House Counsel. Applications for a House Counsel license may be obtained online from the Board of Law Examiners' Web site at www.ble.state.mn.us. Applications for House Counsel admission require proof of good standing in other jurisdictions where the lawyer is licensed, verification of the legal employment in Minnesota for which the House Counsel license is sought, and compliance with other eligibility requirements found in Rule 4 and Rule 9 (temporary license) or Rule 10 of the BLE's Rules for Admission to the Bar. □

NOTES

1. Jorgensen, Kenneth & William J. Wernz, "New Directions in Professional Conduct: The Devil is in the Details," 62 Bench & Bar 8 (September 2005) at pages 15 and 17-18.
2. See Rule 5.5(b), Minnesota Rules of Professional Conduct (MRPC). The exception to this general rule is that a lawyer who provides only services authorized by federal law (e.g., immigration practice) may establish and maintain an office in Minnesota to provide such services. See Rule 5.5(d).
3. See, e.g., Jorgensen & Wernz, n.1, supra, at 17-18.
4. ABA Rule 5.5(d) authorizes practice by lawyers lacking local licensure but licensed in another jurisdiction if the services are provided to the lawyer's employer or its organizational affiliates and do not require pro hac vice admission.
5. See, e.g., Minn. Stat. §481.01, subd. (1), making it unlawful for any person not admitted to law practice in Minnesota, for a fee or any consideration, to give legal advice or counsel, or to perform for or furnish to another legal services.
6. See, e.g., Minn. Stat. §481.02, subd. (3).
7. The alternative to reciprocal admission or admission on motion is admission upon examination, which requires the applicant to take the bar examination and obtain a passing score.
8. The House Counsel license could only be reissued if the lawyer found in-house counsel employment with another Minnesota employer within the 90-day period. See Rule 9E, Rules for Admission to the Bar. In addition, holders of House Counsel licenses are required to notify the BLE and the Attorney Registration Office within ten days of being terminated by the employer for whom the House Counsel admission or license was granted.
9. Fla. Stat. §454.23 (October 1, 2004).
10. See, e.g., Jorgensen & Wernz, n.1, supra, at page 16.
11. Most states, including Minnesota, have a procedural rule that authorizes summary discipline proceedings based upon a disciplinary sanction imposed upon the lawyer in another state. The lawyer is typically estopped in the reciprocal proceeding from relitigating the misconduct adjudicated in the other state. See e.g. Rule 12(d), Rules on Lawyers Professional Responsibility.
12. Paragraph [1] of the comment to Rule 5.1 makes it clear that the ethical responsibilities of a partner also extend to corporate or other organizational law departments.