A mendments 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upon recommendations of the ABA's Multi-Jurisdictional Practice (MJP) Commission and were intended to address the outdated unauthorized practice of law regulations which often frustrated the needs of multi-state clients. Generally, lawyers not licensed in Minnesota are still prohibited from establishing an office or maintaining a systematic or continuous presence in the state. 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 this or her own state that do not require a pro hac vice admission in Minnesota. As an adjunct to the temporary practice exceptions, allowed to lawyers admitted in the state or the lawyer's own state, Minnesota Rule 8.05, subd. 2(b), 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 ABA's Commission also recommended that in-house counsel services be exempted from the unauthorized practice of law prohibition, Minnesota declined to follow this recommendation. The rationale underlying the 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 existing state law definition of unauthorized practice 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.

Although the Minnesota Task Force recommended deviating from the MJP scheme by eliminating the in-house counsel exemption, it also noted that requiring lawyers to "in-state counsel" sometimes made admission difficult for lawyers employed in Minnesota and assigned to perform services for their employers. More specifically, the MJP requirements for admission without bar examination often created undue impediments for lawyers employed in an in-house counsel capacity. Consequently, the Task Force's recommendation was predicated upon the expectation that the MJP 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 various obstacles. First, Rule 7A of the MJP rules used to provide that in-house counsel applicants were eligible for admission without examination only if they had not 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 those lawyers.

This 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 were continued to engage in the practice of law as in-house counsel in a number of states, including Minnesota, even though they were 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.

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 a one-year 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 lawyers 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 renewed within 90 days at the

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discretion of the ITZ Director if the license expires due to termination of the lawyer’s employment.5 The present 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 herefore "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 practice of law by anyone not licensed by the Florida Supreme Court a third-degree felony.6 Any practice as an 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 disciplinary or possibly other consequences.

Over the past several years, ethics complaints against in-house lawyers have increased. Many arise out of noncompliance or noncompetitive disputes with former employers or clients. Other allegations include improper or adverse 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 deal with counsel are ousted from the organization for misconduct. Ethical responsibilities of organizational lawyers are also changing. The Enron and WorldCom scandals and the Sarbanes Oxyes Act, causing significant changes in securities law governing publicly traded corporations. These developments in turn forced necessary "adjustments" to the ethics rule governing "organization as client."7 All of these changes have placed greater responsibility upon the lawyer who represents and advise organizations and thereby create further opportunities for allegations of noncompliance.

Jurisdictional changes arising out of MF have also expanded opportunity for unauthorized practice enforcement. Historically, lawyer discipline agencies have been resistant to exert disciplinary authority over lawyers not admitted in their jurisdiction. The recent amendment to Rule 5.5, 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.8

Finally, those who practice in 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.9 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 in other states where they are practicing as house counsel in Minnesota without a Minnesota license should immediately take advantage of the recent changes so 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’ Website at www.btle.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 10 (temporary license) or Rule 10 of the ITZ’s Rules for Admission to the Bar. 10

NOTES


2. See Rule 5.5(h), Minnesota Rules of Professional Conduct (MRPC). The addition 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).


4. ABA Rule 5.5(d) authorizes practice by lawyers lacking local license 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. § 481.22, 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 grade.

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 Rules for Admission to the Bar.

9. In addition, holders of House Counsel licenses are required to notify the BTL and the Attorney Registration Office within ten days of being terminated by the employer for whom the House Counsel admission or licensed was granted.

10. See, e.g., Jorgensen & Werne, n. 1, supra, at page 16.

11. Most states, including Minnesota, have a procedural rule that authorizes summary disciplinary proceedings based upon a disciplinary sanction imposed upon the lawyer in another state. The lawyer is typically estopped in the reciprocal proceeding from reestablishing the misconduct adjudicated in the other state. See e.g., Rule 12(d), Rules on Lawyers Professional Responsibility.

12. Paragraph [11] 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.

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