

By SUSAN HUMISTON

Multijurisdictional practice and UPL risk

A recent Minnesota Supreme Court decision serves as a good reminder for Minnesota attorneys to review your practice activities to the extent they may extend beyond Minnesota to ensure you are not unintentionally engaged in the unauthorized practice of law in a state where you are not licensed. On August 31, 2016, the Minnesota Supreme Court issued a 4-3 attorney discipline decision affirming the private admonition of a Colorado lawyer for his unauthorized practice in Minnesota.¹ While the decision involved an attorney not licensed in Minnesota, a scenario not applicable to most readers of this column, it highlights the fact that there are limits on multijurisdictional practice, and reminds lawyers that it never hurts to stop and think about the application of ethics rules to your practice.

Respondent/appellant attorney is an environmental and personal injury litigator, who maintains his practice and is licensed to practice in Colorado. He agreed to represent his in-laws in a debt

collection matter in Minnesota, after his in-laws' condominium association had obtained a judgment. When respondent wrote opposing counsel advising of his representation, opposing counsel immediately asked respondent whether he was licensed in Minnesota. Respondent's response, that he was not and that he would obtain local counsel if he needed to file suit in Minnesota, appears to illustrate a common misconception among lawyers

that you only practice law in another state if you are appearing in court or are physically in the state providing legal advice. After his initial contact, respondent proceeded to negotiate a potential resolution of the debt and exchanged financial information. Settlement efforts failed and opposing counsel, a Minnesota attorney, filed an ethics complaint against respondent.

After investigation, the Office of Lawyers Professional Responsibility (Office) issued an admonition, the lowest form of private discipline reserved for rule violations that are "isolated and non-serious."² Respondent appealed this determination to a 3-person panel of the Lawyers Professional Responsibility Board (LPRB),³ which affirmed the admonition. Respondent then appealed to the Minnesota Supreme Court.⁴

The Court's rationale

The first holding of the Court rejected respondent's attempt to distance himself from the practice of law in Minnesota by arguing he practiced law regarding the matter but not in Minnesota, but Colorado, because he did not set foot in the state. The Court held, and the dissent did not disagree, that given modern technology, providing advice to Minnesota residents regarding a Minnesota matter, and negotiating with Minnesota opposing counsel, clearly constitutes the practice of law in Minnesota. "This legal dispute was not interjurisdictional; instead, it involved only Minnesota residents and a debt arising from a judgment entered by a Minnesota court."⁵ The only fact not wholly related to Minnesota was respondent's location. In this first holding, the decision is unremarkable.

Second, the majority concluded that respondent's legal practice with respect to this debt did not fall within the permissible multijurisdictional safe harbor exceptions found in the rule. Specifically, the Court held that the Rule 5.5(c)(4) exception for temporary practice that "arise out of or are reasonably related to the lawyer's practice" was inapplicable.⁶ It is this latter holding which drew three dissents.

An old ABA controversy

Lawyers admitted to practice before 2000 may remember the brouhaha that arose when the American Bar Association (ABA) initially took on the issue of permissible multijurisdictional practice, and the difficulty encountered in trying to craft a rule that balanced the interest of each state in regulating the profession and the need for freedom to practice interstate. After several years of study, the ABA proposed significant revisions to Model Rule 5.5, which Minnesota adopted in large part in 2005.⁷

The amendments added several exceptions for temporary multijurisdictional practice. The first permits temporary practice in a jurisdiction in which an attorney is not admitted if the work is undertaken with local co-counsel who actively participates in the matter.⁸ The second exception permits temporary practice if the work relates to pending or potential proceedings and the lawyer is authorized to appear or expects to be authorized to appear in the proceedings—in other words, practice that relates to a litigated or potentially litigated matter where counsel is or will likely be admitted *pro hac vice*.⁹ The third exception permits temporary practice in relation to an arbitration, mediation or other alternative dispute proceeding, as long as the subject of the ADR proceeding relates to your home jurisdiction practice and the local law does not require *pro hac vice* admission.¹⁰ The fourth exception is arguably the broadest, authorizing practice on a temporary basis, if the actions "arise out of or are reasonably related to the lawyer's practice" where the lawyer is admitted.¹¹

Here, with respect to the fourth exception, the Court concluded that advising his in-laws on a debt collection matter was not reasonably related to counsel's environmental and personal injury practice in Colorado, even where counsel had handled a few matters previously when collection issues arose collaterally. While the Court recognized the exception is broad, it was unwilling to read it so broadly that it swallowed the rule.¹² The Court's decision is in accord with the rationale for the rule



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exception described in the ABA report, namely, that Rule 5.5(c)(4) was meant to: (a) cover services that are ancillary to a particular matter in a home state; (b) respect pre-existing and ongoing client relationships such that counsel can work on multiple matters for one client, no matter where the other matters are venued, and (c) allow an attorney who has developed, through regular practice in his home state, a recognized expertise in a body of law that is applicable to the client's outstate matter.¹³

Unfortunately, respondent's commendable desire to assist family on a pro bono basis in a small matter unrelated to his primary practice resulted in private discipline, giving weight to the adage that no good deed goes unpunished.

However, there is no *de minimis* friends and family exception to Rule 5.5, nor, I would argue, should there be. Experts within the ABA worked very hard to craft a rule that facilitated interstate practice and yet was not so broad that it created regulatory risk.

I believe if attorneys reading this column review the times their practice has taken them outside the state of Minnesota, they will find that their conduct falls

safely within one of the four exceptions.¹⁴ The greatest risk that your practice will not fall within the rule arises when you step outside your area of subject matter expertise for clients who are not in the same state where you are licensed. Remember also that, while most states have adopted the model rules, including the four exceptions in Rule 5.5, many states cannot help but tinker with the rules, so do not forget to look at local versions of Rule 5.5 when you find yourself practicing temporarily in another state. As always, if you find you have questions with respect to the application of the Minnesota rules to your specific practice, call the Office for an advisory opinion at (651) 296-3952. ▲

Notes

¹ *In re Charges of Unprofessional Conduct in Panel File No. 39302*, ___ WL ___ (Minn. S. Ct. August 31, 2016).

² Rule 8(d)(2), Rules of Lawyers Professional Responsibility (RLPR).

³ Rule 8(d)(2)(iii), RLPR.

⁴ Rule 9(m), RLPR.

⁵ *In re Panel File No. 39302* at 8.

⁶ Rule 5.5(c)(4), Minnesota Rules of

Professional Conduct (MRPC); *In re Panel File No. 39302* at 13-14.

⁷ In its report supporting the amendments, the ABA felt the exceptions were broad enough to provide attorneys with the required flexibility to reach out of their home state as needed but not too broad to create an "unreasonable regulatory risk," while acknowledging that the rule change did not "eliminate all uncertainty regarding interstate practice." ABA Report to the House of Delegates, No. 201B (Aug. 2002) at 1, 2.

⁸ Rule 5.5(c)(1), MRPC.

⁹ Rule 5.5(c)(2), MRPC.

¹⁰ Rule 5.5(c)(3), MRPC.

¹¹ Rule 5.5(c)(4), MRPC.

¹² *In re Panel File No. 39302* at 13-14, fn 4.

¹³ ABA Report No. 201 at 7-8.

¹⁴ Note also that lawyers with a practice focused on federal law may practice in Minnesota without being admitted in Minnesota on either a temporary or permanent basis, as well as in any other jurisdiction that has adopted Model Rule 5.5(d). See, e.g., Rule 5.5(d), MRPC.