

Attention general counsel: UPL and you

Earlier this year, the Ohio Supreme Court publicly disciplined the general counsel of a large corporation for the unauthorized practice of law.¹ This GC was licensed to practice law in Ohio, but joined the law department of a Florida-based corporation and moved to Florida in 2009. He did not, however, become licensed in Florida, where he maintained his office, and allowed his Ohio license to lapse in 2011, due to failure to remain current with CLE obligations.

In 2015, a former employee reported the GC to the Florida bar's unauthorized practice of law division and to the Ohio disciplinary office, both of which commenced investigations. The GC applied for and received a "House Counsel" authorization to practice in Florida, which then closed its investigation. But Ohio's disciplinary counsel charged the GC with the unauthorized practice of law in Florida from 2009 to 2015, and the Ohio Supreme Court ultimately suspended the GC for two years, with the suspension stayed provided the GC committed no further misconduct.²



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What about Minnesota?

Minnesota's unauthorized practice of law rule is similar to Ohio's. A lawyer who is not admitted in Minnesota cannot "establish an office or other systematic and continuous presence" in Minnesota for the practice of law, or "hold out to the public or otherwise represent that the lawyer is admitted to practice law" here.³ Minnesota law makes it a misdemeanor for anyone other than a member of the Minnesota

bar to "give legal advice or counsel" or to perform legal services for someone else.⁴ While many GCs or other in-house counsel perform non-legal functions, most also engage in the practice of law.

There is no exception in the ethics rule in Minnesota for in-house counsel.⁵ Minnesota's Rules for Admission to the Bar provide that "[a] lawyer licensed in another jurisdiction shall not practice law in Minnesota as house counsel unless he or she is admitted to practice in Minnesota."⁶ If you or members of your in-house legal team have an office or other systematic and continuous presence in Minnesota and engage in the practice of law here, you should be licensed in Minnesota. (The lone exception is discussed below.) Importantly, GCs and other in-house managing attorneys also have an ethical obligation to ensure that the lawyers they supervise comply with the rules of professional conduct.⁷ You may be in good standing in Minnesota, but do you know about the members of your legal team?

The exception

While there are a number of circumstances where a lawyer can "temporarily" practice in Minnesota,⁸ there is also an exception in Rule 5.5(d), MRPC, for legal services an attorney is "authorized to provide by federal law." The comment to this provision provides that "Paragraph (d) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation, or judicial precedent."⁹

This rule, recognizing the concept of federal supremacy, arose from a 1963 U.S. Supreme Court decision involving non-lawyer patent agents.¹⁰ While jurisdictions may vary in their implementation of this rule, the focus is often on the existence of authorizing federal regulation that allows an attorney or non-attorney to practice before federal agencies, such as the United States Patent and Trademark Office, the Internal Revenue Service, or the U.S. Citizenship and Immigration Service.¹¹ The most common example is that of an immigration lawyer not licensed in Minnesota

but licensed in another jurisdiction, who may have an immigration-only law practice in Minnesota because all matters are before a regulatory authority that accepts any state's license.

What if you are not licensed in Minnesota?

There are several ways for in-house counsel admitted in another jurisdiction to apply in Minnesota. Generally, the Board of Law Examiners recommends that lawyers qualifying under Rule 7A (Admission without Examination based on Years of Practice) apply under that rule as it provides the lawyer with the most flexibility.¹² Lawyers who do not have the requisite practice under Rule 7A may apply under Rule 6 (Admission by Examination), Rule 9 (Admission by Temporary House Counsel License), or Rule 10 (Admission by House Counsel License), provided the lawyer meets the qualifications for those rules.¹³ The process for admission under Rules 7A, 9, and 10 generally takes two to six months, depending on how thorough the lawyer is when submitting the initial application, whether there are any serious issues in the lawyer's background, and how quickly the lawyer responds to requests from the Board office for additional information.¹⁴

Importantly, if a lawyer admitted under Rule 10 (House Counsel) changes employment, the lawyer has an obligation to notify the Lawyer Registration Office and the Board of Law Examiners within 10 days of employment termination, and the lawyer may no longer practice law in Minnesota.¹⁵

Lawyers who have been employed in Minnesota for a period of time prior to applying for a license will be asked by the Board staff to describe the actions the lawyer has taken to avoid the unauthorized practice of law in Minnesota. Additionally, if the lawyer needs time to qualify for admission without examination, the lawyer will need to provide an explanation as to how the lawyer meets the requirement that the practice be "performed in a jurisdiction in which the applicant is admitted, or performed in a jurisdiction that permits the practice by a lawyer not admitted in that jurisdiction."¹⁶

Conclusion

Please help us spread the word by sharing this article with any general counsel or in-house lawyers you know. If a general counsel or any member of an in-house team offices in Minnesota, chances are they need to be licensed here. If your team is located in multiple states, please take a moment to understand each state's particular licensing and unauthorized practice of law rules. No one wants to mistakenly engage in the unauthorized practice of law. Questions about Minnesota's rules may be directed to the Board of Law Examiners at 651-297-1857 or the OLPR at 651-296-3952. ▲

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Notes

¹ *Disciplinary Counsel v. Maciak*, 153 Ohio St.3d 185, 2018-Ohio-544, 102 N.E.3d 485 (2018).

² This GC was more fortunate than another Ohio in-house "chief legal officer," who was suspended in 2014 for two years. See *Disciplinary Counsel v. Troller*, 138 Ohio St.3d, 2014-Ohio-60, 6 N.E.3d 1138 (2014).

³ Rule 5.5(b)(1) and (b)(2), Minnesota Rules of Professional Conduct (MRPC). See also Rule 5.5(a), MRPC (prohibiting a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction).

⁴ Minn. Stat. §481.02, subd. 1 (2018); Minn. Stat. §481.02, subd. 8 (2018).

⁵ Note, there is such an in-house exception in the ABA Model Rules. See ABA Rule 5.5(d)(1). In the model rules, there is an exception for in-house counsel who work solely for one employer. This portion of the UPL model rule was

not adopted in Minnesota.

⁶ Rule 10(A), Minnesota Rules for Admission to the Bar.

⁷ Rule 5.1(b), MRPC ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules of Professional Conduct.")

⁸ See Susan Humiston, "Multijurisdictional Practice and UPL Risk," Bench & Bar (October 2016), at lprb.mncourts.gov/articles (discussing the exceptions for "temporary" practice found in Rule 5.5(c), MRPC).

⁹ Rule 5.5(d), Comment [16], MRPC.

¹⁰ *Sperry v. Florida State Bar*, 373 U.S. 379 (1963) (holding that a state may not sanction a non-lawyer patent agent for the unauthorized practice of law where the patent agent's work before the USPTO was authorized by federal regulation).

¹¹ See Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of*

Lawyering (4th ed.) §49-13 at 49-40 ("Most importantly, the mere existence of a body of federal law does not create a federal right to practice that law free of all state UPL restrictions.")

¹² Rule 7A, Minnesota Rules for Admission to the Bar.

¹³ Lawyers licensed by a non-U.S. jurisdiction working for a corporation may also apply for a Foreign Legal Consultant License and provide representation to the corporation under Rule 11E(2).

¹⁴ Additional information is available on the Board's website at www.ble.mn.gov.

¹⁵ The "house counsel" license can be reissued at the director's discretion if the lawyer applies for re-issuance within 90 days and continues to meet the requirements under Rule 10. If the lawyer no longer works in a house counsel position, the lawyer must re-apply to the bar under another rule.

¹⁶ Rule 7A(2), Minnesota Rules for Admission to the Bar.