

## CROSS-BORDER PRACTICE

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Attorneys staffing the advisory opinion service at the Office of Lawyers Professional Responsibility frequently are asked whether, or in what circumstances, an attorney from another state and not licensed in Minnesota may represent a client in Minnesota. Sometimes the call comes from an out-of-state lawyer who wishes to provide such services; sometimes it's a local attorney questioning the activities of an out-of-state attorney who is already involved in a legal matter in Minnesota. Ironically, neither caller should be provided a response: the advisory opinion service is available only to Minnesota licensed attorneys, and opinions are not provided about a third person's conduct (only the caller's).

Not infrequently our staff confronts a similar question: whether a Minnesota attorney may handle a matter in a state in which she is not licensed, such as in Wisconsin. Again, the advisory attorney cannot definitively answer that question, since it involves application of the other state's professional responsibility rules or statutes, which our office cannot do. Although our advisory attorneys always will try to provide whatever assistance they can, answers to these questions may not be available through the advisory opinion service. Thus, a quick reminder on the basic rules applicable to cross-border practice, or what is also called MJP (multijurisdictional practice), is in order.<sup>Ftn 1</sup>

### **Rule 5.5 – MJP**

Rule 5.5, Minnesota Rules of Professional Conduct (MRPC) is entitled "Unauthorized Practice of Law" and also "Multijurisdictional Practice of Law." Both parts of the rule bear comment here. As to the first two questions above, Rule 5.5(c) and (d) set out the services that an out-of-state attorney may properly provide in Minnesota without engaging in the unauthorized practice of law (UPL). These sections provide that an attorney admitted in another jurisdiction, and not disbarred or suspended from

practice,<sup>Ftn 2</sup> may provide legal services in Minnesota on a temporary basis if the services 1) are in association with a Minnesota attorney who actively participates in the matter (such as what is usually referred to as *pro hac vice* admission); 2) are reasonably related to a proceeding before a tribunal and the lawyer reasonably *expects* to be authorized (allowing some services to be performed in Minnesota even before *pro hac vice* admission is obtained); 3) are reasonably related to a pending or potential ADR proceeding, if the ADR proceeding arises out of the lawyer's practice in a jurisdiction in which he is licensed and the rules of the proceeding do not require *pro hac vice* admission; 4) are not one of the above proceedings yet are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted; or 5) are services the lawyer is authorized to provide by federal law or other law (such as immigration law).

Although these provisions may sound somewhat arcane, in fact most can be easily applied. As indicated, appearing in a court proceeding still requires association with a local lawyer or obtaining *pro hac vice* approval just as it always has, and thus requires a local attorney who is willing to be held responsible for the out-of-state lawyer's conduct.<sup>Ftn 3</sup> Some steps may be taken in such a proceeding before the admission is obtained, which may be particularly applicable in Minnesota state court matters, where substantial discovery and negotiations may be undertaken without the matter having yet been filed with the district court.

The most expansive provision is the "catch all" that at first blush appears to allow pretty much any legal services by an out-of-state lawyer if related to her practice in her home jurisdiction. That may, for example, allow a Chicago attorney to represent his Chicago real estate developer client in a commercial land purchase negotiation in Minnesota. It does not, however, allow that same Chicago lawyer to represent a Minneapolis resident who is buying homestead property in Burnsville, a purely Minnesota transaction. Thus, although the ability to engage in cross-border practice has been substantially expanded under Rule 5.5, it is not an unlimited right. There remain some restrictions on cross-border practice!

### **Rule 5.5 – UPL**

The other advisory question, concerning a Minnesota lawyer's ability to practice in another state, is answered by the first part of Rule 5.5 as an issue of unauthorized practice. In particular, Rule 5.5(a) states the general principle that a [Minnesota] lawyer shall not practice law in another jurisdiction unless the lawyer is authorized to do so. That much is obvious. The rule then goes on to state that a lawyer admitted in Minnesota does not violate the rule by engaging in a service in another state if that same service provided by an out-of-state lawyer in Minnesota would not violate Rule 5.5(c) or

(d), discussed above. While this safe harbor aspect of the rule is completely logical for disciplinary enforcement purposes in Minnesota, lawyers must remember that it is not the end of the discussion. This section may not be relied upon as a defense should the other jurisdiction's courts or disciplinary authority determine that the conduct was in violation of that jurisdiction's rules. Unauthorized practice may run afoul of state criminal statutes as well.

Two final areas of inquiry as to unauthorized practice involve an out-of-state attorney's "systematic and continuous presence" in the state, and if a complaint arises over an attorney's representation, what rules apply to the conduct? Rule 5.5(b) prohibits a lawyer not licensed in Minnesota from establishing an office or other "systematic and continuous presence" here for the purpose of practicing law. What constitutes a "systematic and continuous presence"? Since the phrase obviously lends itself to differing interpretations, answering this question has at times been problematic. An attorney permitted to appear in a major federal litigation matter in Minnesota certainly may rent an extended-stay hotel suite in which to reside for the duration of the trial. Our office has opined that a newly hired out-of-state attorney, who has applied for admission in Minnesota and is awaiting confirmation of her admission, may begin practicing based upon her other state license (for a reasonable period of time). Beyond such statements, application of the rule can be very fact-specific. The ABA Ethics 20/20 Commission<sup>Ftn 4</sup> has indicated that clarification on this point is on its agenda for the coming year.

### **Choice of Law**

A related topic is the choice-of-law question. Rule 8.5, MRPC, sets out both the parameters of Minnesota's disciplinary authority and also which jurisdiction's law should apply to allegations of misconduct. Obviously, Minnesota lawyers are subject to the jurisdiction of the Minnesota Supreme Court and the OLPR, and this authority covers conduct by a Minnesota lawyer regardless of where the conduct occurs. Attorneys not licensed in Minnesota who commit misconduct while providing (or offering to provide) legal services in Minnesota are subject to discipline here as well. Thus, lawyers may be subject to the disciplinary authority of two or more jurisdictions for the same conduct.

As to which jurisdiction's professional rules will apply in analyzing misconduct, Rule 8.5 states essentially that any misconduct in connection with a matter before a tribunal is controlled by the rules of the jurisdiction in which the tribunal is located. Other misconduct is controlled by the rules of the jurisdiction where the conduct

occurred unless the predominant effect of the conduct will take place in another jurisdiction.

#### Notes

1 The LPRB website has a section on cross-border practice, setting out various rules and statutes.

2 The rule states that if the lawyer is disbarred or suspended in *any* jurisdiction, he may not provide services in Minnesota. Imagine an attorney licensed in two states other than Minnesota: the lawyer is suspended in the first state, but the second state does not reciprocally suspend her. Under the language of the rule she cannot use her valid, active license in state #2 to provide services in Minnesota under Rule 5.5(c) and (d), MRPC.

3 Minnesota state courts no longer use the term "*pro hac vice*;" see Rule 5 of the General Rules of Practice for the District Courts. For requirements of the Minnesota federal district court, see LR83.5(d).

4 See Cole, "ABA Ethics 20/20: First Results," *Bench & Bar of Minnesota*, October 2012.