

STATE OF MINNESOTA
IN SUPREME COURT
ADM10-8005



**ORDER REGARDING PROPOSED AMENDMENTS
TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT**

The Minnesota State Bar Association (MSBA) filed a petition proposing amendments to Rules 1.6 and 5.5 of the Minnesota Rules of Professional Conduct and the comments to those rules. We opened a public comment period and held a public hearing on the proposed amendments on January 15, 2019.

After thorough consideration of the proposed amendments and the public comments, and for the reasons explained below, we grant the petition in part and deny the petition in part. Specifically, we agree that limited amendments to Rule 5.5 are appropriate to ensure that Minnesota lawyers are not disadvantaged in the practice of law; we therefore grant the petition to the extent that it requests amendments to certain provisions of that rule. We also make additional amendments to Rule 5.5 that were not proposed in the MSBA's petition. We deny the petition with respect to the proposed amendments to Rule 1.6, and with respect to any other proposed amendments to Rule 5.5.

Because we have adopted only some of the proposed changes and made other amendments to Rule 5.5 that were not reflected in the petition, the MSBA's proposed amendments to the comments to the rules do not reflect the changes to the rules made in this order. Those proposed comments are therefore not part of this order. If the MSBA or the Lawyers Professional Responsibility Board believe that the comments to Rule 5.5

should be amended in light of the amendments we have adopted, they may jointly submit such proposed comments on or before June 14, 2019. As with other rule amendments, comments are included with the rules for convenience and will not reflect court approval or adoption.

IT IS HEREBY ORDERED THAT:

1. The petition of the Minnesota State Bar Association to amend Rules 1.6 and 5.5 of the Minnesota Rules of Professional Conduct is granted in part and denied in part. The rules are amended effective as of July 1, 2019.

2. By June 14, 2019, the Minnesota State Bar Association and the Lawyers Professional Responsibility Board may jointly file with the Clerk of the Appellate Courts proposed comments to the rules as amended by this order.

Dated: May 3, 2019

BY THE COURT:



Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

ADM10-8005

MEMORANDUM

PER CURIAM.

The Minnesota State Bar Association (MSBA) filed a petition proposing amendments to Rules 1.6(b) and 5.5 of the Minnesota Rules of Professional Conduct. The MSBA's petition asks that we amend Rule 1.6(b) to clarify when lawyers may respond to public accusations of alleged wrongdoing made by a client or former client by revealing confidential client information. With respect to Rule 5.5, the MSBA's petition asks us to expand the rule to better reflect the practice areas that are "reasonably related" to a lawyer's field of practice and the current realities of the interstate practice of law.

We opened a public comment period on the MSBA's proposed amendments. Several comments were received, and representatives of the MSBA, the Office of Lawyers Professional Responsibility, and the Lawyers Professional Responsibility Board spoke at the public hearing on the MSBA's petition. After careful consideration of the proposed amendments and the public comments, we decline to make any amendments to Rule 1.6 of the Minnesota Rules of Professional Conduct. With respect to Rule 5.5, we adopt some, though not all, of the proposed amendments, and adopt additional amendments not proposed in the MSBA's petition. We take these steps for the following reasons.

First, Rule 1.6 prohibits a lawyer from "knowingly reveal[ing] information relating to the representation of a client" other than in the circumstances defined in the Rule. Minn.

R. Prof. Conduct 1.6(a). Rule 1.6(b) identifies those circumstances. As relevant here, the rule permits a lawyer to disclose information relating to the client “to establish [the lawyer’s] claim or defense . . . in an actual or potential controversy between the lawyer and the client,” in a “civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved,” or “to respond in any proceeding to allegations by the client concerning the lawyer’s representation of the client.” Minn. R. Prof. Conduct 1.6(b)(8). The MSBA’s proposed amendment would expand these circumstances by authorizing a lawyer to disclose confidential client information in response to a client’s specific, serious allegation of the lawyer’s misconduct made *outside* of a legal proceeding. The proposed amendment, the MSBA explains, will clarify existing ambiguity in the rule regarding when an “actual or potential controversy” between the lawyer and a client might arise that would allow the lawyer to disclose confidential client information. The MSBA asserts that these changes are needed because of the prevalence of online rating services for lawyers and social media comments by former clients.

The Lawyers Professional Responsibility Board (LPRB)¹ agrees that eliminating the phrase “actual or potential controversy” would clarify that the fundamental principle of confidentiality in the lawyer-client relationship limits authorized disclosures to two possibilities: actual or potential litigation, and disciplinary proceedings. Apart from this clarification opportunity, however, the LPRB opposes the proposed amendment, asserting that the disclosure that would be permitted is overly broad and unnecessary.

¹ The LPRB’s comments were submitted jointly with the Director of the Office of Lawyers Professional Responsibility.

We recognize that a “controversy” could be read broadly to encompass any sort of dispute. But, recognizing that confidentiality is a fundamental tenet of the lawyer-client relationship, we have recognized that the disclosure of client confidences is appropriate in only “narrow circumstances.” *See, e.g., Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 232–33 (Minn. 2010) (Magnuson, C.J., concurring) (describing the “relationship of trust and confidence” between a lawyer and client). As it stands now, Rule 1.6(b) authorizes a lawyer’s disclosure of client confidences in the context of certain controversies or proceedings. We are sympathetic to the possibility that underlies this proposed amendment: a lawyer may need to defend the lawyer’s professional reputation from false accusations, made on social media, of serious misconduct. But based on the information available to us, we do not see a need at this time to expand Rule 1.6(b)(8), at least in the form of the amendments the MSBA proposes.

The MSBA’s petition does not establish that additional clarity in the rule is needed because lawyers are routinely, or wrongly, disclosing confidential client information in response to a client’s public comments about the lawyer; or that lawyers are unable to fully or fairly respond to a client’s public comments because the current language of the rule unduly constrains those responses. Further, the MSBA acknowledges that, even if its proposed amendments were adopted, lawyers would not be authorized to disclose confidential client information in all circumstances as a response to a client’s public comments about the lawyer. Finally, the proposed amendment would introduce an additional exception to the otherwise general rule of client confidentiality, which could have unforeseen impacts on the relationship between a lawyer and client. Thus, we see no

substantial benefit to the proposed amendments to Rule 1.6(b), and we therefore decline to amend the rule.

Next, we consider the proposed amendments to Rule 5.5 of the Minnesota Rules of Professional Conduct, which addresses the unauthorized practice of law and the authorized, multijurisdictional, practice of law. Rule 5.5 prohibits a lawyer from “practic[ing] law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” Minn. R. Prof. Conduct 5.5(a). But, a lawyer who is “admitted to practice in Minnesota does not violate this rule” by practicing law in another jurisdiction if a lawyer who is *not* admitted to practice law in Minnesota is allowed to engage in that practice under Rule 5.5(c)–(d). *See* Minn. R. Prof. Conduct 5.5(a). Rule 5.5 also imposes two restrictions on non-Minnesota lawyers²: they cannot open an office or have a “systematic and continuous presence” in Minnesota, except as permitted by “these rules or other law,” and cannot “represent that they are admitted to practice law in this jurisdiction.” Minn. R. Prof. Conduct 5.5(b). Several exceptions, however, allow non-Minnesota lawyers to practice in Minnesota “on a temporary basis,” including in a transactional matter that is “reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice,” Minn. R. Prof. Conduct 5.5(c)(4); or continuously, if federal or Minnesota law authorizes the lawyer to do so. Minn. R. Prof. Conduct 5.5(d).

The MSBA proposes amendments to Rule 5.5(c)(4) to better define the areas of practice that might be “reasonably related” to a lawyer’s existing practice of law and, therefore, fall within the scope of authorized temporary practice in this jurisdiction. In

² A non-Minnesota lawyer is a lawyer admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction.

addition, the MSBA proposes amendments to expand the category of matters under Rule 5.5(d) in which a non-Minnesota lawyer could continuously provide legal services in Minnesota, as well as a new provision, Rule 5.5(e), to “better reflect the realities of modern interstate practice of law.”

The LPRB asserts that Rule 5.5, in its current form, works well because it provides lawyers with the necessary degree of flexibility to engage in the practice of law on behalf of clients. The LPRB agrees, however, that some limited amendments to the rule would be appropriate, to allow lawyers to represent family members in Minnesota, and to allow a non-Minnesota lawyer to provide legal services in Minnesota that exclusively involve the law of another jurisdiction in which the lawyer is licensed to practice law. Apart from these limited changes, the LPRB opposes the MSBA’s proposed amendments.

Turning first to Rule 5.5(d), the MSBA proposes new language that will allow non-Minnesota lawyers to continue to practice the law of the lawyer’s home jurisdiction when the lawyer has physically re-located to Minnesota, if the lawyer discloses to the client “that the lawyer is not licensed to practice in Minnesota.”³ The LPRB supports these amendments because they include a client-disclosure requirement.

The MSBA’s proposed amendments are consistent with the current exemption in Rule 5.5(d), which allows a non-Minnesota lawyer to continuously practice law here in limited areas (i.e., federal law). We agree with the MSBA and the LPRB that this extension of the scope of authorized practice in Minnesota poses little risk to the public because the

³ The MSBA proposed additional amendments to Rule 5.5(b) to reflect these changes in Rule 5.5(d).

lawyer has already demonstrated the competence required to practice the law of the other jurisdiction by reason of that jurisdiction's decision to admit the lawyer to the practice of law.⁴ We also agree that the proposed notice requirement is an important component of this extension, because it ensures that clients are aware of or understand the jurisdictional limits on the lawyer's authority to practice law. Finally, to ensure completeness in the scope of the authorized exemption in Rule 5.5(d), we include "tribal law" within this amendment.

We turn next to the proposed amendment to Rule 5.5(c)(4). This rule authorizes the temporary, as opposed to continuous, practice of law in Minnesota without being admitted to the Minnesota bar if the services provided are "reasonably related to the lawyer's practice" in another jurisdiction. The MSBA proposes an amendment to clarify the meaning of "reasonably related" services, by defining that phrase as including "services which are within the lawyer's regular field or fields of practice in a jurisdiction in which the lawyer is licensed to practice law."

⁴ Arizona, New Hampshire, and North Carolina have adopted similar rules. *See* Ariz. R. Prof. Conduct 5.5(d) (stating that a non-Arizona lawyer "may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law"); N.H. R. Prof. Conduct 5.5(d) (stating that a non-New Hampshire lawyer "may provide legal services" in New Hampshire "that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction or . . . relate solely to the law of a jurisdiction in which the lawyer is admitted"); N.C. R. Prof. Conduct 5.5(d)(2) (stating that a non-North Carolina attorney may provide "services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or . . . services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction").

The LPRB opposes this proposed amendment, primarily out of concern that the exception would effectively swallow the rule that prohibits the unauthorized practice of law.

The MSBA's proposed amendment responds to the invitation we extended in *In re Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016). There, we held that a Colorado lawyer engaged in the unauthorized practice of law in Minnesota by representing relatives on a matter in Minnesota that we concluded was unrelated to the lawyer's Colorado practice. *Id.* at 668–69. We declined to read the “reasonably related” exception in Rule 5.5(c)(4) in a way that would erase the “general prohibition on the unauthorized practice of law.” *Id.* at 669 n.4. We suggested, however, that different language in the rule may be needed if our reading of that language unnecessarily restricted the ability of lawyers to meet client needs. *Id.* at 666 n.1.

We cannot conclude, however, that a “regular field” of practice is any more specific than determining whether a matter is “reasonably related” to the lawyer's practice. Nothing in the term “field” tells us, or practitioners, whether the lawyer's practice is broad, such as real estate law, or a narrow subset of a broad area of law, such as landlord-tenant disputes or retail-lease negotiations. In other words, we can no better define the “field” than we can the “regular” areas of practice. In this respect, the LPRB's concerns are justified: the proposed amendment could effectively erase the prohibition on the unauthorized practice of law.

On the other hand, we believe that our central concern—public confidence in lawyer competency, *see* Minn. R. Prof. Conduct 5.5 cmt. 2 (noting that limits on a lawyer's authorized practice of law “protect[] the public against rendition of legal services by

unqualified persons”)—can be met with language that clarifies the scope of “reasonably related” legal services through slightly narrower language. *Id.*, cmt. 5 (noting that a lawyer “may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts”). As the comment to Rule 5.5 acknowledges, a number of factors may be relevant to determining whether the offered legal services are “reasonably related” to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. *See id.*, cmt. 14. For purposes of the temporary practice of law in Minnesota, and bearing in mind our concern for competency, we conclude that “reasonably related” legal services encompass “services that are within the lawyer’s recognized expertise in an area of law” that the lawyer has developed through the “regular practice of law.” We therefore adopt this language as the amendment to Rule 5.5(c)(4).

Finally, we consider the MSBA’s proposed amendment to add a new provision, Rule 5.5(e), to authorize the continuous practice of law in Minnesota by a non-Minnesota lawyer acting on behalf of a person with whom the lawyer has “a family, close personal, or prior professional relationship.” The MSBA urges us to adopt this amendment because it will allow family and client relationships, existing or former, to take priority over geographic restrictions on a lawyer’s practice.

The LPRB agrees that lawyers should be allowed to represent family members on a temporary basis, but asserts that the other categories of representation—those with a “close personal” relationship to the lawyer or a “prior professional relationship”—are both broad and ambiguous.

Apart from family relationships, we conclude that the proposed amendment introduces unnecessary confusion in determining the boundaries of the authorized practice of law. At the outset, we note that no other state has adopted a rule that authorizes the continuous practice of law in a jurisdiction based purely on the existence of any relationship between the lawyer and client, and unrelated to the area of practice at issue. Next, the ambiguities in the proposed “relationship” language pose problems. Nothing in the language of the MSBA’s proposed amendment tells us (or lawyers) when a “close” relationship arises, how to distinguish between a relationship that is “close” and one that is not, and whether a prior “professional” relationship must have involved an attorney-client relationship or merely any professional relationship.

We also do not see a need for an amendment of this breadth, given that a non-Minnesota lawyer who has a need to practice law in Minnesota has other routes to this authority. For example, the lawyer may practice law in Minnesota temporarily by associating with a Minnesota lawyer. *See* Minn. R. Prof. Conduct 5.5(c)(1). Or, a lawyer could be admitted to the practice in Minnesota without taking a bar exam. *See, e.g.*, Rules 6E, 6J, Rules for Admission to the Bar (allowing a lawyer to be admitted to the Minnesota bar based on a passing score on a Uniform Bar Exam); Rule 7A, Rules for Admission to the Bar (allowing admission to the bar based on years of practice).

Thus, with the exception of an amendment in Rule 5.5(c)(4) to permit the temporary practice of law in Minnesota on behalf of a non-Minnesota lawyer’s family members, we decline to adopt this amendment.

AMENDMENTS TO THE MINNESOTA RULES OF PROFESSIONAL CONDUCT

In the following amendments, deletions are indicated by a line drawn through the words and additions by a line drawn under the words.

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5 (c) and (d) for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in ~~this jurisdiction~~ Minnesota shall not:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law ~~in this jurisdiction~~.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and involve the representation of a family member or arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably related services include services that are within the lawyer's recognized expertise in an area of law, developed through the regular practice of law in that area in a jurisdiction in which the lawyer is licensed to practice law.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Minnesota

that are services that the lawyer is authorized to provide by exclusively involve federal law, tribal law or the other law of another this jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client's that the lawyer is not licensed to practice in Minnesota.