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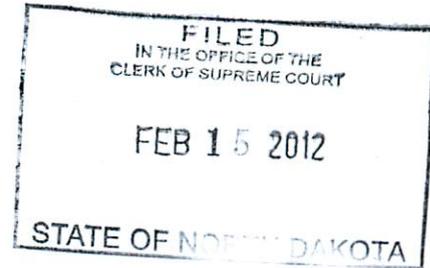
Joint Committee on Attorney Standards

20120109

North Dakota Supreme Court
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Hon. Michael G. Sturdevant, Chair
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February 2, 2012



Honorable Gerald W. VandcWalle
Chief Justice
North Dakota Supreme Court
600 E. Boulevard Ave
Bismarck, ND 58505-0530

Re: Proposed Admission to Practice Rule - Legal Services Following a Major Disaster

Dear Chief Justice VandcWalle:

Following a referral to it by the Supreme Court, the Joint Committee on Attorney Standards recently completed discussion and review of the ABA Model Rule on Provision of Legal Services Following Determination of Major Disaster. The model rule resulted from a study process initiated by the ABA in 2006 following the devastation caused by Hurricanes Katrina and Rita. The ABA Task Force that developed the model rule emphasized in its report the importance of a rule "that would allow out-of-state-lawyers to provide pro bono legal services in an affected jurisdiction and lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction". During its review of the model rule the Joint Committee was informed of a multi-faceted effort by the Supreme Court to put in place measures to support a more proactive response to disasters that may affect provision of legal services in the state. The Joint Committee proposes adoption of the ABA model rule as new Admission to Practice Rule 3.2, which could be an asset in this effort.

The proposed rule would establish a framework within which an out-of-state lawyer in good standing could temporarily provide pro bono legal services to residents within the state who are affected by a major disaster. The rule would also permit an out-of-state lawyer whose home jurisdiction is affected by a major disaster to temporarily practice law and provide legal services to clients in the lawyer's home jurisdiction. The ability to practice law under the rule would arise only after a determination by the Supreme Court that a major disaster has occurred in this or another jurisdiction. The proposed rule is accompanied by a proposed amendment to Rule 5.5 of the Rules of Professional Conduct to add Comment [13] to provide a cross-reference to the new rule.

The Joint Committee approved the proposed new rule and amendment to Rule 5.5 for submission to the Supreme Court pending review and comment by the Board of Governors. The Board has reviewed the proposed amendments and voted to neither support nor oppose the proposed new rule and related amendments.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael G. Sturdevant".

Michael G. Sturdevant, Chair
Joint Committee on Attorney Standards

MGS/
cc: Penny Miller, Clerk of the Supreme Court
Jim Ganje

PROPOSED RULE , ADMISSION TO PRACTICE RULES

1 **Rule 3.2. Provision of Legal Services Following Determination of Major Disaster**

2 **A. Determination of existence of major disaster.** For purposes of this Rule, the Supreme Court
3 shall determine when an emergency affecting the justice system, as a result of a natural or other
4 major disaster, has occurred in:

- 5 1. this jurisdiction and whether the emergency caused by the major disaster affects
6 the entirety or only a part of this jurisdiction, or
7 2. another jurisdiction but only after such a determination and its geographical scope
8 have been made by the highest court of that jurisdiction. The authority to engage in
9 the temporary practice of law in this jurisdiction under Section C extends only to
10 lawyers who principally practice in the area of the other jurisdiction determined to
11 have suffered a major disaster causing an emergency affecting the justice system and
12 the provision of legal services.

13 **B. Temporary practice in this jurisdiction following major disaster.** Following the determination
14 under Section A of an emergency affecting the justice system in this jurisdiction , or a determination
15 that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are
16 in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required
17 to help provide such assistance, a lawyer authorized to practice law in another United States
18 jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any
19 jurisdiction, may provide legal services in this jurisdiction on a temporary basis. The legal services
20 must be provided on a pro bono basis without compensation, expectation of compensation or other
21 direct or indirect pecuniary gain to the lawyer. The legal services must be assigned and supervised
22 through the State Bar Association of North Dakota, a pro bono program or legal services program,
23 or through another organization specifically designated by the Supreme Court.

24 **C. Temporary practice in this jurisdiction following major disaster in another jurisdiction.**
25 Following the determination of a major disaster in another United States jurisdiction, a lawyer who

1 is authorized to practice law and who principally practices in that affected jurisdiction, and who is
2 not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may
3 provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out
4 of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other
5 jurisdiction, where the major disaster occurred.

6 **D. Duration of authority for temporary practice.** The authority to practice law in this jurisdiction
7 granted under Section B ends when the Supreme Court determines the conditions caused by the
8 major disaster in this jurisdiction have ended except that a lawyer then representing clients in this
9 jurisdiction is authorized to continue the provision of legal services for such time as is reasonably
10 necessary to complete the representation, but the lawyer shall not thereafter accept new clients. The
11 authority to practice law in this jurisdiction granted under Section C ends 60 days after the Supreme
12 Court declares that the conditions caused by the major disaster in the affected jurisdiction have
13 ended.

14 **E. Court appearances.** The authority granted by this Rule does not include appearances in court
15 except:

- 16 1. under Admission to Practice R.3, Section A, and, if such authority is granted, the
17 fee imposed under Admission to Practice R. 3, Section A(1)(a)(4) is waived; or
- 18 2. if the Supreme Court, in any determination made under Section A, grants blanket
19 permission to appear in all or designated courts of this jurisdiction to lawyers
20 providing legal services under Section B. If such an authorization is included, the fee
21 imposed under Admission to Practice R. 3, Section A(1)(a)(4) is waived.

22 **F. Disciplinary authority and registration requirement.** Lawyers providing legal services in this
23 jurisdiction under Section B or C are subject to the Supreme Court's disciplinary authority as
24 provided in N.D.R. Prof. Conduct 8.5. Lawyers providing legal services in this jurisdiction under
25 Section B or C shall, within 30 days from the commencement of the provision of legal services, file
26 a registration statement with the State Board of Law Examiners in a form prescribed by the Board.
27 Any lawyer who provides legal services under this Rule is not engaged in the unlawful practice of
28 law in this jurisdiction.

1 **G. Notification to clients.** Lawyers authorized to practice law in another United States jurisdiction
2 who provide legal services under this Rule shall inform clients in this jurisdiction of the jurisdiction
3 in which they are authorized to practice law, any limits of that authorization, and that they are not
4 authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state
5 or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

6 **Comment**

7 [1] A major disaster in this or another jurisdiction may cause an emergency affecting the
8 justice system with respect to the provision of legal services for a sustained period of time interfering
9 with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent
10 clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may
11 need to provide legal services to their clients, on a temporary basis, from an office outside their home
12 jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of
13 the affected jurisdiction who have unmet legal needs as a result of the disaster or, though
14 independent of the disaster, whose legal needs temporarily are unmet because of disruption to the
15 practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal
16 services either by traveling to the affected jurisdiction or from their own offices or both, provided
17 the legal services are provided on a pro bono basis through an authorized not-for-profit entity or
18 another organization specifically designated by the Supreme Court. A major disaster includes, for
19 example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event
20 caused by terrorists or acts of war.

21 [2] Under Section A(1), the Supreme Court determines whether a major disaster causing an
22 emergency affecting the justice system has occurred in this jurisdiction, or in a part of this
23 jurisdiction, for purposes of triggering Section B of this Rule. The Supreme Court may, for example,
24 determine that the entirety of this jurisdiction has suffered a disruption in the provision of legal
25 services or that only certain areas have suffered such an event. The authority granted under Section
26 B extends only to lawyers authorized to practice law and not disbarred, suspended from practice or
27 otherwise restricted from practice in any other manner in any other jurisdiction.

1 [3] Section B permits lawyers authorized to practice law in an unaffected jurisdiction, and
2 not disbarred, suspended from practice or otherwise restricted from practicing law in any other
3 manner in any other jurisdiction, to provide pro bono legal services to residents of the affected
4 jurisdiction following determination of an emergency caused by a major disaster, notwithstanding
5 that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions
6 on a lawyer's license to practice law that would prohibit that lawyer from providing legal services
7 under this Rule include probation, inactive status, disability inactive status or a non-disciplinary
8 administrative suspension for failure to complete continuing legal education or other requirements.
9 Lawyers on probation may be subject to monitoring and specific limitations on their practices.
10 Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good
11 standing," and lawyers on disability inactive status are not permitted to practice law. Public
12 protection warrants exclusion of these lawyers from the authority to provide legal services as defined
13 in this Rule. Lawyers permitted to provide legal services under this Rule must do so without fee or
14 other compensation, or expectation thereof. Their service must be provided through an established
15 not-for-profit organization that is authorized to provide legal services either in its own name or that
16 provides representation of clients through employed or cooperating lawyers. Alternatively, this court
17 may instead designate another specific organization through which these legal services may be
18 rendered. Under Section B, an emeritus lawyer from another United State jurisdiction may provide
19 pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer
20 is authorized to provide pro bono legal services in that jurisdiction under that jurisdiction's emeritus
21 or pro bono practice rule. Lawyers may also be authorized to provide legal services in this
22 jurisdiction on a temporary basis under N.D.R. Prof. 5.5(b).

23 [4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the
24 area of the other jurisdiction determined by the Supreme Court to have suffered a major disaster, and
25 whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from
26 practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are
27 authorized under Section C to provide legal services on a temporary basis in this jurisdiction. Those
28 legal services must arise out of and be reasonably related to the lawyer's practice of law in the

1 affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another
2 jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction.

3 [5] Emergency conditions created by major disasters end, and when they do, the authority
4 provided under Sections B and C also ends with appropriate notice to enable lawyers to plan and to
5 complete pending legal matters. Under Section D, the Supreme Court determines when those
6 conditions end for purposes of this Rule. The authority granted under Section B ends upon such
7 determination except that lawyers assisting residents of this jurisdiction under Section B may
8 continue to do so for such longer period as is reasonably necessary to complete the representation.
9 The authority provided under Section C ends 60 days after the Supreme Court makes the
10 determination with regard to an affected jurisdiction.

11 [6] Sections B and C do not authorize lawyers to appear in the courts of this jurisdiction.
12 Court appearances are subject to pro hac vice admission requirements under Admission to Practice
13 R. 3, Section A. The Supreme Court may, in a determination made under Section E(2), include
14 authorization for lawyers who provide legal services in this jurisdiction under Section B to appear
15 in all or designated courts of this jurisdiction without need for pro hac vice admission. If such an
16 authorization is included, the admission fee imposed under Admission to Practice R. 3, Section
17 (1)(a)(4) is waived. A lawyer who has appeared in the courts of this jurisdiction under Section E may
18 continue to appear in any such matter notwithstanding a declaration under Section D that the
19 conditions created by major disaster have ended. Withdrawal from a court appearance is subject to
20 N.D.R. Prof. Conduct 1.16.

21 [7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United
22 States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that
23 person's ability to provide legal services under this Rule.

24 [8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether
25 any lawyer seeking to practice in this jurisdiction under Section B or C of this Rule is disbarred,
26 suspended from practice or otherwise subject to a public disciplinary sanction that would restrict the
27 lawyer's ability to practice law in any other jurisdiction.

28 *Reference:* Minutes of the Joint Committee on Attorney Standards on 09/16/11, 12/09/11,
29 _____.

PROPOSED AMENDMENTS: NEW COMMENT [13] REGARDING LEGAL SERVICES FOLLOWING DETERMINATION OF A DISASTER

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

1
2 (a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation
3 of the legal profession in that jurisdiction.

4 (b) A lawyer admitted to practice in another jurisdiction and not in this jurisdiction who
5 performs legal services in this jurisdiction on a temporary basis does not engage in the unauthorized
6 practice of law in this jurisdiction when:

7 (1) the lawyer who is an employee of a client, acts on the client's behalf, or on behalf
8 of the client's commonly owned affiliates, except for work for which pro hac vice
9 admission or registration under Admission to Practice R.3 is required;

10 (2) the lawyer acts with respect to a matter that arises out of the lawyer's
11 representation of a client in a jurisdiction in which the lawyer is admitted to practice,
12 except for work for which pro hac vice admission or registration under Admission
13 to Practice R.3 is required;

14 (3) with respect to matters for which registration or pro hac vice admission is
15 available under Admission to Practice R.3, the lawyer is authorized to represent a
16 client or is preparing for a matter in which the lawyer reasonably expects to be so
17 authorized;

18 (4) with respect to matters, transactions or proceedings pending in or substantially
19 related to this jurisdiction and for which pro hac vice admission is not available
20 under Admission to Practice R.3, the lawyer is associated in the matter, transaction
21 or proceeding with a lawyer admitted to practice in this jurisdiction who actively
22 participates in the representation of the client in the matter, transaction or proceeding;

23 or

24 (5) the lawyer performs a service that may be performed by a person without a
25 license to practice law or without other authorization from a federal, state or local

1 governmental body.

2 (c) A lawyer admitted to practice in another jurisdiction but not in this jurisdiction, who
3 establishes an office or whose presence is other than temporary in this jurisdiction does not engage
4 in the unauthorized practice of law in this jurisdiction when:

5 (1) the lawyer who is an employee of a client, acts on the client's behalf, or on behalf
6 of the client's commonly owned affiliates, and the lawyer is eligible for and has
7 complied with the lawyer registration rules under Admission to Practice R.3, or

8 (2) the lawyer renders services in this jurisdiction pursuant to other authority granted
9 by federal law or a law or Court rule of this jurisdiction.

10 (d) A lawyer who is not admitted to practice in this jurisdiction shall not represent or hold
11 out to the public that the lawyer is admitted to practice law in this jurisdiction. A lawyer who
12 practices law in this jurisdiction under paragraph(b) or (c) shall disclose in writing to the client that
13 the lawyer is not licensed in this jurisdiction.

14 (e) A lawyer shall not assist another person in the unauthorized practice of law.

15 **Comment**

16 [1] Paragraph (a) states the general rule that each state judiciary may regulate the legal
17 profession within the borders of the jurisdiction. A lawyer may regularly practice law only in a
18 jurisdiction in which the lawyer is admitted to practice. The practice of law in violation of lawyer-
19 licensing standards of another jurisdiction constitutes a violation of these Rules. This Rule does not
20 restrict the ability of lawyers authorized by federal statute or other federal law to represent the
21 interests of the United States or other persons in any jurisdiction.

22 [2] There are occasions when out-of state lawyers perform services in this state on a
23 temporary basis under circumstances that do not create a significant risk of harm to clients, the
24 courts, or the public. Paragraph (b) identifies five situations in which the out-of-state lawyer may
25 perform services in this state without fear of violating this Rule. By creating these five specific "safe
26 harbors" for multijurisdictional practice, this Rule does not address the question of whether other
27 conduct constitutes the unauthorized practice of law. The fact that conduct is not specifically
28 included or described in this Rule is not intended to imply that such conduct is the unauthorized

1 practice of law. Nothing in this Rule is intended to authorize a lawyer to establish an office or other
2 permanent presence in this jurisdiction without being admitted to practice here. In addition, nothing
3 in this Rule is intended to authorize an out-of-state lawyer to solicit clients in this jurisdiction.

4 [3] Paragraph (b)(1) permits in-house corporate counsel and governmental lawyers to
5 represent their employers and their employers' commonly-owned affiliates on a temporary basis
6 without being admitted to the bar of this state. The safe harbor in this rule does not cover
7 appearances in court or other work for which pro hac vice admission or registration is required under
8 Admission to Practice R.3.

9 [4] Paragraph (b) (2) is intended to provide broad protection to several kinds of work in this
10 jurisdiction that are related to the lawyer's work in the lawyer's home state, such as negotiations,
11 contracts, depositions and other forms of discovery, witness interviews, and meetings with clients
12 or other parties to a transaction. The Rule recognizes that it should be sufficient to rely on the
13 lawyer's jurisdiction of licensure as the jurisdiction with the primary responsibility to ensure the
14 lawyer has the requisite character and fitness to practice law. Also, the Rule recognizes that a client
15 should be able to have a single lawyer conduct all aspects of a transaction, even if the lawyer must
16 travel to other states. The safe harbor in this paragraph, however, does not cover transactions that
17 are pending in or substantially related to this state. For these state-related transactions, the out-of-
18 state lawyer is required to seek admission or to associate with a licensed North Dakota lawyer as
19 co-counsel in the representation of the client in the transaction. See paragraph (b)(4).

20 [5] Paragraph (b)(3) requires out-of-state lawyers to be admitted pro hac vice under
21 Admission to Practice R.3 to appear in all matters pending in a tribunal or administrative agency in
22 this state. This Rule provides a temporary safe harbor to a lawyer acting on a client's behalf in
23 preparatory matters before pro hac vice admission, so long as the lawyer reasonably expects to be
24 so admitted. Such preparatory work might include factual investigations and discovery in connection
25 with litigation or an administrative proceeding where the lawyer reasonably expects to be admitted
26 pro hac vice.

27 [6] Paragraph (b)(4) requires the out-of-state lawyer to associate with a duly licensed local
28 lawyer for all transactions that are pending in or substantially related to this jurisdiction and for

1 which pro hac vice admission is not available. The Rule recognizes that association with a lawyer
2 licensed in this jurisdiction is likely to protect the interests of both clients and the public. The local
3 lawyer may not serve merely as a conduit for the out-of-state lawyer, but must actively participate
4 in and share actual responsibility for the representation of the client in the matter. If the licensed
5 lawyer's involvement is merely pro forma, then both lawyers are subject to discipline under this
6 Rule.

7 [7] Paragraph (b)(5) allows an out-of-state lawyer to perform services that a person who is
8 not a lawyer may perform without a law license or other authorization from a federal, state, or local
9 governmental body, e.g., in private alternative dispute resolution contexts, a non-lawyer may serve
10 as a mediator or arbitrator. In some administrative proceedings, a non-lawyer is permitted by law
11 to appear on behalf of a party. The Rule assumes that the public is adequately protected in these
12 instances by the over-arching provisions of Rule 8.5, which subjects all lawyers performing any
13 services in this jurisdiction to the Rules of Professional Conduct. If, for example, an out-of-state
14 lawyer performing as a neutral engages in conduct in violation of these Rules, the lawyer could be
15 disciplined for the misconduct, even if serving as the neutral was not the unauthorized practice of
16 law under this Rule. It should be noted that whereas an out-of-state lawyer who represents a client
17 in ADR proceedings pending in another jurisdiction would be covered by the safe harbor in this
18 Rule, an out-of-state lawyer who represents a client in an ADR proceeding *in* North Dakota must
19 register under Admission to Practice R.3. See paragraph (b)(3).

20 [8] Paragraph (c) creates two categories of allowable multijurisdictional practice for out-of-
21 state lawyers who establish an office or other permanent presence in the state: 1) in-house counsel
22 who comply with registration rules, and 2) lawyers performing services pursuant to federal or state
23 law or court rule.

24 [9] Paragraph (c)(1) creates a safe harbor for in-house corporate counsel or other employed
25 lawyers who establish an office or other permanent presence in the state, provided they comply with
26 the registration rules under Admission to Practice R.3. If the out-of state lawyer is not eligible for
27 registration under Rule 3, this safe harbor would not apply and the lawyer must seek licensure in this
28 jurisdiction.

1 [10] Paragraph (c) (2) permits out-of-state-lawyers to provide legal services in this state when
2 authorized to do so by federal law or state law or court rule.

3 [11] Lawyers who are not licensed to practice law in this jurisdiction must not represent or
4 hold themselves out to the public as licensed to practice law in this jurisdiction. Paragraph (d)
5 requires out-of-state lawyers practicing law in North Dakota under one of the safe harbors in
6 paragraphs (b) and (c) to disclose in writing to their clients that they are not licensed in this state.

7 [12] Limiting the practice of law to members of the bar protects the public from unqualified
8 persons performing legal services. Paragraph (e) does not prohibit a lawyer from employing the
9 services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the
10 delegated work and retains responsibility for it. See Rule 5.3. Lawyers may also provide
11 professional advice and instruction to nonlawyers whose employment requires knowledge of law;
12 for example, claims adjusters, employees of financial or commercial institutions, social workers,
13 accountants and employees of government agencies. Lawyers may assist independent nonlawyers
14 authorized by law to provide particular legal services, for example, paraprofessionals authorized to
15 provide some kinds of legal services. In addition, a lawyer may counsel nonlawyers who wish to
16 represent themselves.

17 [13] Lawyers desiring to provide pro bono legal services on a temporary basis in a
18 jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized
19 to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily
20 in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult
21 Admission to Practice R. 3.2.

22 *Reference:* Minutes of the Professional Conduct Subcommittee of the Attorney Standards
23 Committee on 11/08/85 and 01/31/86; Minutes of the Joint Committee on Attorney Standards on
24 06/24/03, 09/25/03, 11/14/03, 04/16/04, and 08/06/04, 09/16/11, 12/09/11, _____.