

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

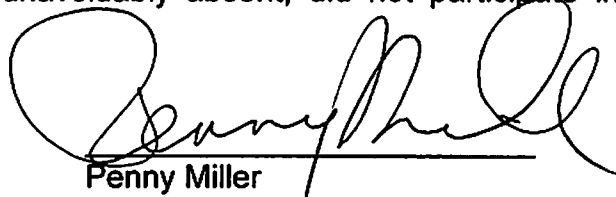
ORDER OF ADOPTION
Supreme Court No. 20120109

**Proposed Rule 3.2, Admission to Practice Rules, Regarding Provision of
Legal Services Following Determination of Major Disaster and Proposed
Amendment to Comment Section of Rule 5.5, North Dakota Rules of
Professional Conduct, Regarding the Unauthorized Practice of Law**

The Joint Committee on Attorney Standards submitted a petition to adopt a proposed rule regarding provision of legal services following determination of a major disaster, and amendments to the Comment section of Rule 5.5 of the North Dakota Rules of Professional Conduct. The proposed Amendments are available at <http://www.ndcourts.gov/Court/Notices/Notices.htm>. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court considered the matter, and

ORDERED, that Rule 3.2, Admission to Practice Rules, Regarding Provision of Legal Services Following Determination of Major Disaster and the amendments to North Dakota Rules of Professional Conduct 5.5, are ADOPTED effective May 1, 2012.

The Supreme Court of the State of North Dakota convened this 11th day of April, 2012, with the Honorable Gerald W. VandeWalle, Chief Justice, the Honorable Mary Muehlen Maring, the Honorable Carol Ronning Kapsner and the Honorable Daniel J. Crothers, Justices, directing the Clerk of the Supreme Court to enter the above order. The Honorable Dale V. Sandstrom, being unavoidably absent, did not participate in the decision.



Penny Miller
Clerk

North Dakota Supreme Court

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

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

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

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

C. Temporary practice in this jurisdiction following major disaster in another jurisdiction. Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out

of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

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

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

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

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

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

Comment

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

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

[3] Section B permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency caused by a major disaster, notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services under this Rule include probation, inactive status, disability inactive status or a non-disciplinary

administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being “in good standing,” and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services under this Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, this court may instead designate another specific organization through which these legal services may be rendered. Under Section B, an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction under that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under N.D.R. Prof. 5.5(b).

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of the other jurisdiction determined by the Supreme Court to have suffered a major disaster, and whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under Section C to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction.

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

The authority provided under Section C ends 60 days after the Supreme Court makes the determination with regard to an affected jurisdiction.

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

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

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

Reference: Minutes of the Joint Committee on Attorney Standards on 09/16/11, 12/09/11,

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RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

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

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

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

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

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

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

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

(c) A lawyer admitted to practice in another jurisdiction but not in this jurisdiction, who

establishes an office or whose presence is other than temporary in this jurisdiction does not engage in the unauthorized practice of law in this jurisdiction when:

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

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

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

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

Comment

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

[2] There are occasions when out-of state lawyers perform services in this state on a temporary basis under circumstances that do not create a significant risk of harm to clients, the courts, or the public. Paragraph (b) identifies five situations in which the out-of-state lawyer may perform services in this state without fear of violating this Rule. By creating these five specific "safe harbors" for multijurisdictional practice, this Rule does not address the question of whether other conduct constitutes the unauthorized practice of law. The fact that conduct is not specifically included or described in this Rule is not intended to imply that such conduct is the unauthorized practice of law. Nothing in this Rule is intended to authorize a lawyer to establish

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

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

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

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

[6] Paragraph (b)(4) requires the out-of-state lawyer to associate with a duly licensed

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

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

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

[9] Paragraph (c)(1) creates a safe harbor for in-house corporate counsel or other employed lawyers who establish an office or other permanent presence in the state, provided they comply with the registration rules under Admission to Practice R.3. If the out-of state lawyer is

not eligible for registration under Rule 3, this safe harbor would not apply and the lawyer must seek licensure in this jurisdiction.

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

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

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

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

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