

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20160204

Proposed Amendments to North Dakota Rules of Professional Conduct 5.5 and North Dakota Admission to Practice Rule 3 Regarding Practice by Foreign Lawyers

[¶ 1] On May 25, 2016, the Joint Committee on Attorney Standards submitted a petition to amend North Dakota Rules of Professional Conduct 5.5 regarding the unauthorized practice of law - foreign lawyers, and North Dakota Admission to Practice Rule 3 regarding the pro hac vice admission of foreign lawyers. The proposal is 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

[¶ 2] **ORDERED**, that the proposed amendments to North Dakota Rules of Professional Conduct 5.5 and North Dakota Admission to Practice Rule 3 are ADOPTED effective October 1, 2016.

[¶ 3] The Supreme Court of the State of North Dakota convened the 1st day of September, 2016, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Carol Ronning Kapsner, the Honorable Daniel J. Crothers and the Honorable Lisa Fair McEvers, Justices, directing the Clerk of the Supreme Court to enter the above order.



Penny Miller
Clerk

North Dakota Supreme Court

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 United States jurisdiction or in a foreign jurisdiction 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; and when the lawyer is a foreign lawyer and the services require advice on the law of this or another U.S. jurisdiction or of the United States, provided that the advice must be

based upon the advice of a lawyer who is duly licensed and authorized by this jurisdiction to provide the advice, 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.

(f) For purposes of paragraph (c), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

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 comply with 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. Paragraph (c)(1) also creates a safe harbor when legal services are performed by a foreign lawyer and require advice on the law of other jurisdictions. To decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, a foreign lawyer authorized to provide legal services under paragraph (c)(1) must base the advice on the advice of a lawyer licensed 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.

Rule 5.5 amended effective 03/01/05, 08/01/06, 05/01/12, 03//01/16, 10/01/16

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, 08/06/04, 09/16/11, 12/09/11, 09/13/13, 12/06/13, 09/12/14; 02/26/16; 04/29/16.

Rule 3. Pro Hac Vice Admission and Registration of Nonresident Lawyers

A. Pro Hac Vice Admission - Generally. Pro hac vice admission is required for all nonresident lawyers admitted and licensed to practice law in another state or the District of Columbia, but not licensed in North Dakota, and who engage in the practice of law in this state by appearing, either in person, by signing pleadings, or by being designated as counsel in actions filed in state courts, administrative agencies, or tribunals.

1. Filing Requirements.

a. A nonresident lawyer may occasionally be permitted to appear as counsel in an action in a trial court of this state or before an administrative agency or tribunal in this state if the lawyer first:

(1) designates an associate lawyer admitted and licensed to practice law in this state;

(2) files a motion requesting permission to appear and an affidavit in support of the motion with the clerk of the trial court, the hearing officer of the administrative agency matter, or the presiding officer of the tribunal;

(3) files a copy of the motion and affidavit with the State Board of Law Examiners at the same time they are filed with the appropriate individual identified in Section A(1)(a)(2);

(4) remits to the State Board of Law Examiners the fee required for an lawyer who has been licensed in this state for five years or more or certifies the lawyer has paid the fee to the State Board of Law Examiners during that calendar year; and

(5) obtains permission from the court, hearing officer, or presiding officer.

b. In the affidavit in support of the motion requesting permission to appear in a North Dakota action, the nonresident lawyer must state:

(1) the jurisdictions in which the lawyer is admitted to practice law and the number of years admitted;

(2) whether the lawyer is presently subject to a disciplinary proceeding in any jurisdiction;

(3) whether the lawyer is under any restriction or probation in the practice of law in any jurisdiction in which the lawyer is licensed;

(4) whether the lawyer is now or has ever been suspended or disbarred from a court

in any jurisdiction;

(5) the number of North Dakota actions in which the nonresident lawyer has appeared during the prior three years, and whether the lawyer has ever registered under this rule;

(6) the address, telephone number and e-mail address for the lawyer; and

(7) that the required fee has been remitted to the State Board of Law Examiners.

2. The motion requesting permission to appear must be filed no later than 45 days after service of the pleading, motion, or other paper.

3. Names and Appearances. The name and address of the associate lawyer must be shown on all papers served and filed. The associate lawyer shall appear personally and, unless excused by the court, hearing officer, or presiding officer, remain in attendance with the nonresident lawyer in all appearances before the court, administrative agency, or tribunal.

4. Frequency of Motions. Separate permission is required for each action in which a nonresident lawyer appears in a North Dakota state court proceeding, before an administrative agency, or before another tribunal in the state.

5. Appeal.

a. If an lawyer desires to appear in a proceeding before a North Dakota appellate court, and the lawyer obtained permission to appear in a proceeding involving the same action in a North Dakota state trial court, administrative agency, or tribunal, the lawyer only needs to file an updated affidavit with the Clerk of the Supreme Court. An additional filing fee is not required to be remitted to the State Board of Law Examiners, unless it is a new calendar year.

b. If a lawyer desires to appear in a proceeding before a North Dakota appellate court, and the lawyer did not obtain permission to appear in a proceeding involving the same action in a North Dakota state trial court, administrative agency, or tribunal, the lawyer shall file a motion and affidavit with the Clerk of the Supreme Court requesting permission to appear. The motion, affidavit, and fee must be submitted as otherwise provided in Section A(1).

6. Alternative dispute resolution process. If a nonresident lawyer represents a client in an alternative dispute resolution process in this state, except one involving an administrative agency proceeding, the lawyer must file with the State Board of Law Examiners an affidavit containing the information required in this rule and the fee, and provide a copy to the mediator. An associate lawyer admitted and licensed to practice law in this state must also provide a letter confirming the designation as an associate and whether the arbitrator or mediator requires the associate lawyer to be present during the alternative dispute resolution process.

- a. The nonresident lawyer cannot proceed with an alternative dispute resolution process without confirmation from the State Board of Law Examiners that the lawyer has met all filing requirements of this rule.

B. Pro Hac Vice Admission - Foreign Lawyers

1. Except as otherwise provided in this Section, a foreign lawyer seeking to appear as counsel in an action in a trial court of this state or before an administrative agency or tribunal in this state must comply with the provisions of Section A. A foreign lawyer is a person admitted in a non-United States jurisdiction and who is a member of a recognized legal profession in that jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who is not disbarred, suspended or the equivalent thereof from practice in any jurisdiction.

2. A court, agency, or tribunal in this state may permit a foreign lawyer to appear with an associate lawyer in a particular proceeding pending before the court, agency, or tribunal in a defined role as a lawyer, advisor or consultant in that proceeding, provided that the associate lawyer is responsible to the client, responsible for the conduct of the proceeding, responsible for independently advising the client on the substantive law of a United States jurisdiction and procedural issued in the proceeding, and for advising the client whether the associate lawyer's judgment differs from that of the foreign lawyer.

3. In determining whether to permit a foreign lawyer to appear in a proceeding as a lawyer, advisor, or consultant, or in an advisory or consultative role, the court, hearing officer, or presiding officer shall consider any factors relating to the lawyer's possible appearance, including:

a. the legal training and experience of the foreign lawyer, including in matters similar to the matter before the court or agency;

b. to the extent to which the matter will include the application of the law of the jurisdiction in which the foreign lawyer is admitted or international law or other law with which the foreign lawyer has a demonstrated expertise;

c. the foreign lawyer's familiarity with the law of a United States jurisdiction applicable to the matter before the court or agency;

d. the extent to which the foreign lawyer's relationship and familiarity with the client or with the facts and circumstances of the matter will facilitate the fair and efficient resolution of the matter;

e. the foreign lawyer's English language ability; and

f. the extent to which it is possible to define the scope of the foreign lawyer's authority in the matter so as to facilitate its fair and efficient resolution, including by a limitation

on the foreign lawyer's authority to advise the client on the law of a United States jurisdiction except in consultation with the associate lawyer.

4. The court, agency or tribunal may limit the activities of the foreign lawyer or require further action by the associate lawyer, as appropriate, in light of considerations under paragraph 3. It may, for example, require the associate lawyer to sign all pleadings and other documents submitted to the court or to other parties or to be present at all depositions and conferences among counsel.

B C. Registration. A nonresident lawyer must register under this section if the lawyer is employed in North Dakota as in-house counsel exclusively for a corporation or its subsidiaries or affiliates, an association, or a business whose lawful activities are other than the practice of law or the provision of legal services. The lawyer must be admitted and licensed to practice law in another state or the District of Columbia, but not licensed in North Dakota, and, except for the time requirements in Rule 7A, must be otherwise qualified for admission to the practice of law in this state.

1. Registration Requirements. A lawyer must file with the State Board of Law Examiners the following:

a. An affidavit requesting permission to render legal services in North Dakota for the calendar year as in-house counsel and stating:

(1) the jurisdictions in which the lawyer is admitted to practice law and the number of years of admission, including, in addition, if the lawyer is a foreign lawyer, documents proving admission to practice law and current good standing in the foreign jurisdiction. If the documents are not in English, the lawyer shall submit with the affidavit an English translation and satisfactory proof of the accuracy of the translation;

(2) whether the lawyer is presently subject to a disciplinary proceeding in any jurisdiction;

(3) whether the lawyer is under any restriction or probation in the practice of law in any jurisdiction in which the lawyer is licensed;

(4) whether the lawyer is now or has ever been suspended or disbarred in any jurisdiction;

(5) whether the lawyer received a juris doctor or equivalent degree from a law school approved or provisionally approved for accreditation by the American Bar Association; and

(6) whether the lawyer has appeared in any North Dakota actions based on pro hac vice admission during the past three years, and how many years the lawyer previously registered under this rule.

b. With respect to a lawyer registering as in-house counsel, an affidavit from an officer, director or general counsel of the lawyer's employer in this state attesting that the registrant is employed as a lawyer exclusively for the employer, that the registrant is an individual of good moral character, and that the nature of the employment qualifies the lawyer for registration under this rule. ~~With respect to a lawyer registering to represent a client in an alternative dispute resolution process, a letter from the disciplinary authority in each jurisdiction in which the lawyer is admitted indicating the lawyer is in good standing in the jurisdiction.~~

c. The fee required for a lawyer who has been licensed in this state for five years or more.

2. Frequency of Registration. Registration is required for each calendar year in which a nonresident lawyer provides legal services in this state as provided in this rule and N.D.R. Prof. Conduct 5.5.

3. Continuing Legal Education Requirements. Each nonresident lawyer who is registered as in-house counsel under this section must complete not fewer than 45 hours of approved coursework in Continuing Legal Education during each three-year period the lawyer is registered and must file a report as provided in the North Dakota Rules for Continuing Legal Education.

4. Limitation on Registration. A nonresident lawyer may provide legal services under this rule for five years or until the lawyer becomes eligible for admission based on practice as provided by Rule 7A, whichever is earlier. After that time, the lawyer must apply for and be admitted to the practice of law in North Dakota to provide any legal services in this state.

5. Automatic Termination of Registration. Permission to render legal services based on registration expires at the end of each calendar year, if employment by the employer filing the affidavit required by this rule is terminated, or if the nonresident lawyer becomes eligible for admission under Rule 7A.

6. Pro Hac Vice Admission Separate. If a nonresident lawyer registered as in-house counsel under this section desires to appear, either in person, by signing pleadings, or by being designated as counsel in actions filed in courts, administrative agencies, or other tribunals in this state, a separate motion for pro hac vice admission is required under this rule. However, a separate fee is not required, provided in-house counsel has registered under this rule.

E-D. Ineligibility for Pro Hac Vice Admission or Registration. A nonresident lawyer who is currently under suspension, disbarment, or license restriction in any jurisdiction is not eligible for pro hac vice admission or registration under this rule.

E. For purposes of this Rule, a “foreign lawyer” is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Ð.F. Use of Fees. Fees collected by the State Board of Law Examiners under this rule must be distributed in the manner provided for the distribution of license fees under N.D.C.C. Section 27-12-04.

EXPLANATORY NOTE

Rule 3 was amended, effective March 1, 2005, to incorporate N.D.R.Ct. 11.1, with modifications, and provide for pro hac vice admission for all adjudicative proceedings and for registration of in-house counsel.

Section A(6) was added effective October 1, 2016, to provide for non-resident lawyers to participate in an alternative dispute resolution process under the filing requirements for pro hac vice admission.

This rule is not limited to an appearance in a North Dakota state court action.

Under this rule, an appearance is not limited to actual physical presence in a court action. A lawyer also makes an appearance by signing or otherwise being designated as counsel on a pleading, motion, or other paper served or filed in an action venued in a North Dakota state court, administrative agency, or other tribunal.

Section A(2) of this rule requires a motion for permission to appear to be filed within 45 days of service of a pleading, motion, or other paper. If an action is commenced by service, a lawyer should be aware that the action must be filed before the lawyer moves for permission to appear. If the action settles before it is filed, a motion requesting permission to appear does not need to be filed.

New Section B was adopted, effective October 1, 2016, to provide procedures for pro hac vice admission of foreign lawyers.

Section B was amended and adopted as Section C, effective October 1, 2016, to include registration provisions applicable to foreign lawyers.

New Section E was adopted, effective October 1, 2016, to provide a definition related to pro hac vice admission and registration of foreign lawyers.

A lawyer seeking to take a deposition within the state of North Dakota for an action pending in another jurisdiction must comply with N.D.R. Prof. Conduct 5.5.

SOURCES: Joint Procedure Committee Minutes of May 6-7, 1999, pages 2-7; January 28-29, 1999, pages 13-16; November 7-8, 1991, page 6; October 25-26, 1990, page 19; June 21, 1984, pages 1-2; Joint Committee on Attorney Standards Minutes of June 24, 2003, pgs. 5-8; September 25, 2003, pgs. 2-8; November 14, 2003, pgs. 2-6; February 27, 2004, pgs. 3-5; April 16, 2004, pgs. 1-6; June 13, 2012, page. 11; February 26, 2016; and April 29, 2016.

CROSS REFERENCE: N.D.R. Prof. Conduct 5.5.

SUPERSEDED: N.D.R. Ct. 11.1.

[Amended effective March 1, 2000; amended effective March 1, 2005; April 1, 2013; October 1, 2016.]

