

# REMOTE LAWYERING PROPOSAL

Amendments to Michigan Rule of Professional Conduct 5.5

## Issue

Should Michigan Rule of Professional Conduct (MRPC) 5.5 and its accompanying commentary be amended to allow lawyers to remotely practice the law of a jurisdiction in which they are licensed to practice while physically present in Michigan, even though they are not admitted to practice in Michigan, by adding the following new paragraph (d):

**(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended may remotely practice the law of the jurisdiction(s) in which the lawyer is properly licensed while physically present in the State of Michigan, if the lawyer does not hold themselves out as being licensed to practice in the State of Michigan, does not advertise or otherwise hold out as having an office in the State of Michigan, and does not provide or offer to provide legal services in the State of Michigan.**

[Subsequent paragraph re-lettered]

The proposed changes to the accompanying commentary are fully set forth in Addendum A.

## Proponent

The State Bar of Michigan Standing Committee on the Unauthorized Practice of Law

## Synopsis

With the dramatic increase in remote working, questions have arisen regarding whether lawyers who are physically present in Michigan, but who are licensed in other jurisdictions, may practice the law of their jurisdiction remotely from Michigan without engaging in the unauthorized practice of law. The proposed change to MRPC 5.5 and its accompanying commentary would expressly permit a lawyer licensed in another jurisdiction to practice the law of their jurisdiction remotely from Michigan, as long as they did not hold themselves out to the public as being licensed to practice in Michigan.

## Background

The Covid-19 pandemic has forced changes in the ways that lawyers provide services. Remote practice has become commonplace, with lawyers working from their homes, their offices, or a combination of both. Technology has made it possible for lawyers to reside, either temporarily or permanently, in one jurisdiction while practicing law in another jurisdiction (“remote lawyering”). With the onset of the pandemic, lawyers started contacting the SBM Ethics Helpline asking whether they can reside in one state while practicing the law of another state. Lawyers are concerned that they will be committing the unauthorized practice of law by engaging in remote lawyering from Michigan.

Currently, Michigan has no specific guidance that addresses remote lawyering. MRPC 5.5 addresses the unauthorized practice of law and multi-jurisdictional practice, providing that “[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.” MRPC 5.5(a). Although Rule 5.5(c) contains language with regard to the provision of temporary legal services in this jurisdiction, that section does not provide sufficient guidance on the issue of remote lawyering.

On December 16, 2020, the ABA Standing Committee on Ethics and Professional Responsibility (ABA) issued [Formal Opinion 495](#), which confronts the issue of remote lawyering, explaining the parameters under which remote work is allowed to protect the public from being misled by the lawyers’ physical presence in the jurisdiction, providing:

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction.

Opinion at 2.

The ABA explained that the purpose of Model Rule 5.5 was to protect the public from the unauthorized practice of law and reasoned that this purpose was “not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed.” Opinion at 3. In reaching this conclusion, the ABA looked to decisions of [Maine](#) and [Utah](#), jurisdictions which have addressed this question and reached similar conclusions.<sup>1</sup> In coming to its conclusion, Utah opined “what interest does the Utah State Bar have in regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none.” Opinion at 3.

As a result of this ABA Opinion, the SBM Standing Committee on the Unauthorized Practice of Law (UPL Committee) proposes a new paragraph to MRPC 5.5 to explicitly provide that remote lawyering does not constitute the unauthorized practice of law in Michigan by adding the following language that mirrors the language in ABA Formal Opinion 495:<sup>2</sup>

(d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended may remotely practice the law of the jurisdiction(s) in which the lawyer is properly licensed while physically present in the State of Michigan, if the lawyer does not hold themselves out as being licensed to practice in the State of Michigan, does not advertise or otherwise hold out as having an office in the State of

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<sup>1</sup> Washington DC as also issued an opinion regarding remote lawyering although not as comprehensive as the ABA Opinion. In Opinion 24-20 of the Opinion of the DC Commission on the Unauthorized Practice of Law, remote lawyering was permitted if it was occurring due to the pandemic.

<sup>2</sup> Michigan’s Rule 5.5 is modeled on the ABA Model Rule 5.5 and its language largely mirrors the model rule.

Michigan, and does not provide or offer to provide legal services in the State of Michigan.

In addition, the UPL Committee recommends amending the comments of MRPC 5.5, including the following guidance, similar to what is contained in Formal Opinion 495, to explain that new paragraph (d) “does not authorize lawyers who are admitted to practice in other jurisdictions to maintain local contact information (*i.e.*, contact information within the state of Michigan) on websites, letterhead, business cards, advertising, or the like.” In addition, the UPL Committee recommends adding a citation in the comments to *In re Desilets* to clarify that the proposed Paragraph (d) does not act to infringe upon any authorized practice in the federal courts. 291 F.3d. 925 (6th Cir 2002) (rejecting lower court’s holding that an attorney needed to be a member of the State Bar of Michigan to practice in the District Court of the Western District of Michigan and holding that “federal standards govern the practice [of law] before the federal bar”).

The proposed amendments to MRPC 5.5 and its accompanying commentary would clarify that attorneys licensed in other jurisdictions may work remotely from Michigan, while continuing to protect the public from the unauthorized practice of law by preventing unlicensed lawyers from holding out as being licensed in the jurisdiction or advertising their services in the State of Michigan.

### **Opposition**

None known at this time.

### **Prior Action by the Representative Assembly**

None.

### **Fiscal and Staffing Impact on State Bar of Michigan**

None.

### **STATE BAR OF MICHIGAN POSITION**

By vote of the Representative Assembly on April 24, 2021:

Should the Representative Assembly adopt the above resolution to amend MRPC 5.5 and its accompanying commentary to allow lawyers to remotely practice the law of a jurisdiction in which they are licensed to practice while physically present in Michigan, even though they are not admitted to practice in Michigan, as set forth in Addendum A?

- (a) YES
- (b) NO
- (c) ABSTAIN

## ADDENDUM A: REMOTE LAWYERING PROPOSAL

### 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.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) except as authorized by law or these rules, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide temporary legal services in this jurisdiction that:
  - (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 to appear in such 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 covered by paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended may remotely practice the law of the jurisdiction(s) in which the lawyer is properly licensed while physically present in the State of Michigan, if the lawyer does not hold themselves out as being licensed to practice in the State of Michigan, does not advertise or otherwise hold out as having an office in the State of Michigan, and does not provide or offer to provide legal services in the State of Michigan.**

- ~~(d)~~**(e)** A lawyer admitted in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that:
  - (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
  - (2) are services that the lawyer is authorized by law to provide in this jurisdiction.

**Comment:** A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by law, order, or court rule to practice for a limited purpose or on a restricted basis. See,

for example, MCR 8.126, which permits, under certain circumstances, the temporary admission to the bar of a person who is licensed to practice law in another jurisdiction; ~~and~~ Rule 5(E) of the Rules for the Board of Law Examiners, which permits a lawyer who is admitted to practice in a foreign country to practice in Michigan as a special legal consultant, without examination, provided certain conditions are met; ~~and~~ *In re Desilets*, 291 F3d 925 (6th Cir 2002) which permits federal practice and patent law. Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule 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. A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

There are occasions on which a lawyer admitted to practice in another jurisdiction of the United States and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of clients, the public, or the courts. Paragraph (c) identifies four such circumstances.

The fact that conduct is not so identified does not indicate whether the conduct is authorized. With the exception of paragraphs ~~(de)(1)~~ and ~~(de)(2)~~, this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted here to practice generally.

There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and, therefore, may be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Paragraphs (c), ~~and~~ (d), ~~and~~ (e) apply to lawyers who are admitted to practice law in any jurisdiction of the United States, including the District of Columbia and any state, territory, or commonwealth. The word "admitted" in paragraphs (c), ~~and~~ (d), ~~and~~ (e) contemplates that the lawyer is authorized to practice and is in good standing to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice because, for example, the lawyer is on inactive status or is suspended for nonpayment of dues.

Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client. Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice, such as MCR 8.126, or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a law or court rule of this jurisdiction requires that a lawyer who is not admitted to practice in this jurisdiction obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice under MCR 8.126. Examples of such conduct include meetings with a client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage temporarily in this jurisdiction in conduct related to pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction, provided that those services are in or are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and 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. The lawyer, however, must obtain admission pro hac vice under MCR 8.126 in the case of a court-annexed arbitration or mediation, or otherwise if required by court rule or law.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not covered by paragraphs (c)(2) or (c)(3). These services include both legal services and services performed by nonlawyers that would be considered the practice of law if performed by lawyers.

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors indicate such a relationship. The lawyer's client previously may have been represented by the lawyer or may reside in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work may be conducted in that jurisdiction or a significant aspect

of the matter may involve the law of that jurisdiction. The necessary relationship may arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of the corporation's lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise, as developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

**Paragraph (d) does not authorize lawyers who are admitted to practice in other jurisdictions to maintain local contact information (i.e., contact information within the state of Michigan) on websites, letterhead, business cards, advertising, or the like.**

Paragraph ~~(d)~~ **(e)** identifies two circumstances in which a lawyer who is admitted to practice in another jurisdiction of the United States and is not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as to provide legal services on a temporary basis. Except as provided in paragraphs ~~(e)~~(1) and ~~(e)~~(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

Paragraph ~~(e)~~(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. This paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Paragraph ~~(e)~~(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by statute, court rule, executive regulation, or judicial precedent.

A lawyer who practices law in this jurisdiction is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c), ~~or~~ (d), ~~or~~ **(e)** may be required to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such disclosure may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

Paragraphs (c), ~~and~~ (d), ~~and~~ **(e)** do not authorize lawyers who are admitted to practice in other jurisdictions to advertise legal services to prospective clients in this jurisdiction. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.