

MEMORANDUM

TO: Members of the Representative Assembly

FROM: Victoria Kremski, Counsel to the Unauthorized Practice of Law Committee

RE: Proposed Pro Hac Vice Rule/Multi Jurisdictional Practice

DATE: August 2, 2005

General Background

On November 14, 2003, the SBM Representative Assembly recommended that the Supreme Court adopt proposed Michigan Rule of Professional Conduct 5.5. Proposed MRPC 5.5 sets forth the conditions under which out-of-state attorneys may temporarily provide legal services in Michigan, without being admitted as a member of the Bar.¹ (For purposes of this memo, “out-of-state” attorneys refers only to attorneys licensed to practice in another state or territory of the U.S. but not in Michigan.) This rule, along with Michigan Rule of Professional Conduct 8.5, which the Assembly also approved at the November, 2003 meeting, endorsed the adoption of multijurisdictional practice in Michigan.

As of this date, twenty-three states have adopted some form of multijurisdictional practice. Several states have entered into regional multi-state compacts whereby admission to one state automatically grants admission to the others. (Idaho, Oregon & Washington and New Hampshire, Vermont and Maine.) It is anticipated that the majority of states will eventually adopt some form of multijurisdictional practice.

¹ Proposed Michigan Rule of Professional Conduct 5.5 would govern out-of-state lawyers providing legal services in Michigan on a temporary basis in litigation, alternative dispute resolution and administrative law matters. In addition, the rule also indicates that out-of-state attorneys may provide legal services in Michigan on a temporary basis, not related to a pending or potential proceeding, 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.

Pro Hac Vice Rule

One rule directly impacted by the implementation of multijurisdictional practice in Michigan is the current rule addressing “pro hac vice” practice. The current rule permits merely filing a motion with a local tribunal and provides no means by which that tribunal can readily inquire into the extent to which the out-of-state lawyer has previously appeared pro hac vice in other courts – nor is a local tribunal equipped to devote resources to investigating the current status of the out-of-state lawyer’s license or disciplinary history elsewhere. Further, should the out-of-state lawyer, once admitted, engage in conduct that would subject a Michigan lawyer to discipline, the local tribunal’s remedies are limited to contempt and revocation of the granting of permission to appear in the case.

Responding to these concerns shared by many states, the American Bar Association adopted a Model Rule on Pro Hac Vice Admission. The State Bar of Michigan Unauthorized Practice of Law Committee then drafted a proposed pro hac vice rule for adoption in Michigan.

At its April 16, 2005 meeting, the Representative Assembly considered the proposed pro hac vice rule drafted by the Unauthorized Practice of Law Committee. The proposed rule was based upon the ABA Model Rule but included additional provisions specific to Michigan and consistent with Michigan practice.

The Assembly voted “yes” on four principal policy questions:

- (1) Whether the disciplinary rules should be amended to grant jurisdiction over out-of-state attorneys to the Attorney Grievance Commission and the Attorney Discipline Board;
- (2) Whether the proposed pro hac vice rule should require an out-of-state attorney to affiliate with an active member of the State Bar of Michigan who appears of record in the proceeding;
- (3) Whether the proposed pro hac vice rule should contain a provision defining temporary practice for

out-of-state attorneys as “no more than three separate representations within a 365-day period;”

- (4) Whether the pro hac vice rule should require the out-of-state attorney to cover the administrative costs incurred by the State Bar of Michigan to monitor compliance.

The Representative Assembly requested that State Bar staff incorporate into the rule the positions taken by the Representative Assembly, along with other suggestions and comments made by the Representative Assembly, and bring the proposed rule back to the September meeting for endorsement in concept.

The attached revised rule incorporates each of the tenets sought by the Representative Assembly. The revised rule also incorporates certain informal suggestions made by a few individual Representative Assembly members to State Bar staff at the April meeting. Subsequent to the April meeting, staff continued to track, review and research the proposed pro hac vice rules in other states to determine if there are any procedural and technical issues that may not be addressed in the proposed Michigan rule. If valid issues were identified, appropriate modifications were made to the proposed rule.

RULES CONCERNING THE STATE BAR OF MICHIGAN

(Based upon the ABA Model Rule – Pro Hac Vice)

Proposed Rule 18 - Pro Hac Vice Temporary Practice

I. Permission to Appear in Pending Litigation before a Court or Agency

A. Definitions

1. An out-of-state lawyer is a person who is not admitted to practice law in this State but who is admitted in another state or territory of the United States or the District of Columbia and is not disbarred or suspended from practice in any jurisdiction.
2. A client is a person or entity that the out-of-state lawyer is retained to represent before the out-of-state lawyer's performance of services in this state, who has retained the out-of-state lawyer to render legal services, before the out-of-state lawyer's performance of services in this State.
3. An alternative dispute resolution ("ADR") proceeding includes all types of alternative dispute resolution, including, without limitation, arbitration or mediation, whether arranged by the parties or otherwise.
4. "Regular practice" means performing legal services in no more than three cases within a 365- day period.
5. "Court" means a state court or state agency or tribunal from which an appeal may be taken to a state court.

B. Eligibility to Appear

An out-of-state lawyer is eligible to appear pro hac vice if that lawyer:

1. lawfully practices solely on behalf of the lawyer's employer and its commonly owned organizational affiliates; or
2. neither resides nor is regularly employed at an office in this State;
or

3. resides in this State but (i) lawfully practices from offices in another state and (ii) practices no more than temporarily in this State, whether pursuant to appearance pro hac vice or in other lawful ways.

C. Authority of Court or Agency to Permit Appearance by Out-of-State Lawyer

1. Court proceeding. A court of this State may, in its discretion, permit an eligible out-of-state lawyer to appear pro hac vice as counsel in a proceeding pending before the court, pursuant to this Rule;

2. Administrative Agency Proceeding.
If practice before an agency of this State is limited to lawyers, the agency may, using the same standards and procedures as a Michigan court, pursuant to this Rule, permit an eligible out-of-state lawyer to appear pro hac vice as counsel in a proceeding pending before the agency;

3. This rule does not apply to an agency proceeding or an alternative dispute resolution where non-lawyers are permitted to represent third parties. The question of whether non-lawyers may represent clients in agency proceedings or alternative dispute resolutions is a matter of Michigan and federal law, where applicable, and is not solely determined by the rules of the particular agency;

4. This Rule applies to all court-annexed ADR proceedings;

5. This Rule does not govern proceedings before a federal court or agency located in this State unless that body adopts or incorporates this Rule.

D. Association with a Michigan Lawyer

1. The out-of-state lawyer shall associate with a Michigan lawyer and timely inform the Michigan lawyer of all proposed actions in the proceeding;

2. Michigan Lawyer's Duties. When an out-of-state lawyer appears for a client in a proceeding pending in this State, either in the role of

co-counsel of record with the Michigan lawyer, or in an advisory or consultative role, the Michigan lawyer [who is co-counsel or counsel of record for that client in the proceeding] remains responsible to the client and responsible for the conduct of the proceeding before the court or agency. It is the duty of the Michigan lawyer to advise the client of the Michigan lawyer's independent judgment on proposed actions in the proceeding if that judgment differs from that of the out-of-state lawyer.

E. Application Procedure

1. Motion and Verified Application. The Michigan lawyer shall file a motion with the court, moving for the pro hac vice appearance of the out-of-state lawyer as co-counsel of record with the Michigan lawyer in the matter. An eligible out-of-state lawyer seeking to appear pro hac vice in a proceeding pending in this State shall file a verified application with the court where the litigation is filed and with the State Bar of Michigan, at the same time as the Michigan lawyer files the motion with the court. If an application fee is required by section I.G of this Rule, the fee must accompany the application filed with the State Bar of Michigan. A copy of the motion and application shall be served on all parties who have appeared in the case. The application filed with the State Bar of Michigan shall include proof of service. Failure to pay the motion fee to the local court and the application fee to the State Bar of Michigan shall result in denial of the application. On or after 21 days from the date of service of the motion and application, the court has the discretion to grant or deny the application summarily if there is no opposition filed;

2. Objection to Application. The State Bar of Michigan, or a party to the proceeding, may file an objection to the motion or seek the court's imposition of conditions to its being granted. The State Bar of Michigan or objecting party must file with its objection a verified pleading containing information establishing a factual basis for the objection. The State Bar of Michigan or objecting party may seek denial of the motion or modification of it. If the motion has already been granted, the State Bar of Michigan or objecting party may move that the pro hac vice permission be withdrawn;

3. Standard for Pro Hac Vice Permission. The courts and agencies of this State have discretion to grant applications for permission to appear pro hac vice to an out-of-state lawyer. An application

ordinarily should be granted unless the court or agency finds any of the following:

- a. the permission may be detrimental to the prompt, fair and efficient administration of justice;
- b. the permission may be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent;
- c. one or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk; or
- d. the applicant has engaged in regular practice in this State.

4. Out-of-state lawyers who have been disciplined or held in contempt by reason of misconduct committed while engaged in representation that is permitted by this Rule may thereafter be denied permission to appear pro hac vice under this Rule.

5. No lawyer is authorized to appear pursuant to this Rule if the lawyer:

- a. is disbarred or suspended from practice in any jurisdiction;
- b. is a member of the Michigan Bar but ineligible to practice law;
- c. has failed to provide notice to the State Bar of Michigan or pay the filing fee as required by this Rule; or
- d. is engaged in a "regular practice" as defined elsewhere in this rule.

6. Revocation of Permission. Permission to appear as counsel pro hac vice in a proceeding, once granted, may be revoked for any of the reasons listed in section I.E.3 and I.D.5 above.

F. Application

1. Required Information. An applicant shall submit a verified application containing the following:

- a. The applicant's residence and business addresses and business telephone number;
- b. The name, address and telephone number of each client sought to be represented and the caption of the case;
- c. The state(s) in which the applicant is admitted to practice law; the applicant's attorney identification number in each state; the courts before which the applicant has been admitted to practice; and the respective period(s) of admission;
- d. The states to which the applicant has applied for admission within the last five years and the result of each application;
- e. Whether the applicant has (i) been denied permission to appear pro hac vice in Michigan (ii) had pro hac vice status withdrawn in Michigan or (iii) otherwise been formally disciplined or sanctioned by any court in Michigan. The applicant should specify the nature of the allegations; the name of the authority bringing such proceedings; the caption of the proceedings, the date filed, and the nature of the findings made and action taken in connection with those proceedings;
- f. Whether any formal, written disciplinary proceeding has been brought against the applicant by a disciplinary authority in any other jurisdiction within the last five (5) years and, as to each proceeding: the nature of the allegations; the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the caption of the proceedings; and the factual findings and legal conclusions made, and discipline imposed, if any, in connection with those proceedings;
- g. Whether the applicant has been held formally in contempt or otherwise sanctioned by any court in a written order in the last five (5) years for disobedience to its rules or orders, and, if so, the nature of the allegations: the name of the court; the date of the contempt order or sanction, the caption of the proceedings, and the substance of the court's rulings (a copy of the written order or transcript of the oral rulings shall be attached to the application);

h. The name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear pro hac vice in Michigan within the preceding two years; the date of each application; and whether the motion to appear pro hac vice was granted;

i. An averment as to the applicant's familiarity with the Michigan Rules of Professional Conduct, Professional Disciplinary Proceedings Rules, local rules and court procedures of the court before which the applicant seeks to practice;

j. The name, business address and telephone number, and bar number of an active member in good standing of the State Bar of Michigan moving for the applicant's pro hac appearance. The bar member shall appear as counsel of record together with the out-of-state lawyer;

k. Any special experience, expertise, or other factor deemed to make it particularly desirable that the applicant be permitted to represent the client(s) the applicant proposes to represent in the particular cause;

l. The applicant may also include any other matters supporting permission to appear pro hac vice.

G. Application Fee

1. The first application to appear pro hac vice filed with the State Bar of Michigan by an applicant within a 365-day period must be accompanied by a non-refundable fee in an amount equal to the dues paid by an active member of the State Bar of Michigan plus the Client Protection Fund Assessment. No application fee is required for a second or third application filed within a 365-day period.

2. Exemption for Pro Bono Representation. An applicant shall not be required to pay the fee established by I.E.2 above if the applicant will not charge an attorney fee to the client(s) and is:

a. employed or associated with a pro bono project or nonprofit legal services organization in a civil case involving the client(s) of such programs; or

b. involved in a criminal case or a habeas proceeding for an indigent defendant.

H. Authority of the Attorney Grievance Commission and Attorney Discipline Board and Court: Application of Ethical Rules, Discipline, Contempt and Sanctions

1. Authority over Out-of-State Lawyer and Applicant.

a. An out-of-state lawyer submits to the authority of the Michigan courts, the Attorney Grievance Commission and the Attorney Discipline Board for the out-of-state lawyer's conduct relating in any way to the proceeding in which the out-of-state lawyer seeks to appear, whether the conduct takes place within Michigan or outside of Michigan. An applicant or out-of-state lawyer who has been granted permission to appear pro hac vice in these rules may be disciplined in the same manner as a Michigan lawyer;

b. In handling matters related to pro hac vice appearance, Michigan courts, the Attorney Grievance Commission and the Attorney Discipline Board may rely, without limitation, on the Michigan Court Rules, the Michigan Rules of Professional Conduct, the Professional Disciplinary Proceedings Rules, contempt and sanctions orders, local court rules and court policies and procedures.

2. An applicant shall become familiar with the Michigan Rules of Professional Conduct, the Professional Disciplinary Proceedings Rules, local court rules, and policies and procedures of the court in which the applicant seeks to practice.

II. Out-of-State Proceedings, Potential Michigan and Out-of-State Proceedings, and Alternative Dispute Resolution

A. Michigan Ancillary Proceeding Related to Pending Out-of-State Proceeding

In connection with a proceeding pending outside this State, an out-of-state lawyer admitted to appear in that proceeding may render legal services regarding the proceeding in Michigan.

B. Consultation by Out-of-State Lawyer

1. An out-of-state lawyer may consult in this State with a Michigan lawyer concerning the Michigan lawyer's client's pending or potential Michigan proceeding in this State;

2. At the request of a Michigan resident who is contemplating filing a proceeding or is involved in any pending proceeding, an out-of-state lawyer may consult with the Michigan resident about retaining the out-of-state lawyer in connection with the proceeding.

C. Preparation for Michigan Proceeding

On behalf of any client, the out-of-state lawyer may render legal services in this State in preparation for a potential Michigan proceeding, provided that the out-of-state lawyer reasonably believes himself or herself to be eligible for admission pro hac vice in Michigan.

D. Preparation for Out-of-State Proceeding

In connection with a potential proceeding to be filed outside this State, an out-of-state lawyer may render legal services in this State for an existing or potential Michigan client, provided that the out-of-state lawyer is admitted or reasonably believes himself or herself eligible for admission generally or to appear or be admitted pro hac vice, in the other jurisdiction.

E. Services Rendered Outside This State for Michigan Client

An out-of-state lawyer may render legal services while the lawyer is physically outside Michigan when requested by a Michigan client in connection with a potential or pending proceeding filed in or outside this State. An out-of-state lawyer must immediately seek permission to appear pro hac vice when filing a case in Michigan, regardless of whether the out-of-state lawyer anticipates having to physically appear in Michigan.

F. Alternative Dispute Resolution (“ADR Procedures”)

An out-of-state lawyer may render legal services in this State to prepare for any ADR procedure.

III. Scope

A. No Solicitation

An out-of-state lawyer rendering services in this State in compliance with this Rule, or here for other reasons, is not authorized by

anything in this Rule to hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. Nothing in this Rule authorizes out-of-state lawyers to solicit, advertise, or otherwise hold themselves out in publications as available to assist in litigation in this State.

B. Temporary Practice

An out-of-state lawyer is only eligible for permission to appear pro hac vice or to practice in another lawful way on a temporary basis. For purposes of this Rule, temporary practice means performing legal services in no more than three separate cases within a 365-day period. This limitation does not apply to an out-of-state attorney who has filed an application for admission to the State Bar of Michigan while the out-of-state attorney's application is pending.

C. Authorized Services

It is not a violation of this rule if pro hac vice permission is ultimately denied or a proceeding is not filed, provided the attorney reasonably expected to be admitted pro hac vice.

Proposed Comment:

While the language of this rule articulates a specific duty on the part of the Michigan lawyer to advise the client if his or her judgment differs from that of the out-of-state lawyer regarding proposed actions, it is a question of fact in each given case whether the Michigan lawyer's association with an out-of-state lawyer pursuant to Rule 18 establishes an attorney-client relationship with the out-of-state lawyer's client with all duties and responsibilities that relationship entails.