

No. _____

IN THE

Supreme Court of the State of Montana

**IN RE: PETITION TO REVISE THE
MONTANA RULES OF PROFESSIONAL CONDUCT
BY ADOPTING RULE 5.5(d)(1)
OF THE MODEL RULES OF PROFESSIONAL CONDUCT**

**MONTANA PETROLEUM ASSOCIATION'S
PETITION TO REVISE THE
MONTANA RULES OF PROFESSIONAL CONDUCT**

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IN RE: PETITION TO REVISE)	
THE MONTANA RULES OF)	
PROFESSIONAL CONDUCT)	Montana Petroleum Association's
BY ADOPTING RULE 5.5(d)(1))	Petition to Revise the Montana Rules
OF THE MODEL RULES OF)	of Professional Conduct
PROFESSIONAL CONDUCT)	

Montana Petroleum Association ("MPA") hereby petitions the Montana Supreme Court to revise the Montana Rules of Professional Conduct ("MRPC" or "Montana Rules") by adopting Rule 5.5(d)(1) of the Model Rules of Professional Conduct (2002) ("Model Rules") to ensure that an attorney functioning as in-house counsel is not engaged in the unauthorized practice of law when working on behalf of his or her employer on Montana legal questions.

I. FACTUAL BACKGROUND

MPA is a non-profit, membership, trade association. Affidavit of Colby Branch ("Branch Aff.") ¶ 4. MPA represents its members on technical, legislative, and regulatory issues that may affect their interests. *Id.* at ¶ 5. MPA has approximately 180 member companies, which pay annual membership dues and are actively engaged in the oil and gas industry in Montana and North America. *Id.* at ¶ 6. Members include oil and natural gas producers, gathering and pipeline companies, petroleum refineries, service providers, and consultants. *Id.*

In general, MPA members have operations in Montana, but the headquarters offices for the member organizations are generally outside of Montana. *Id.* A number of MPA members employ lawyers as part of an Office of General Counsel (“OGC”) within their organizations. *Id.* at ¶ 7. MPA member companies utilize in-house counsel to work on different legal issues in a number of states. *Id.* It is frequently the case that these in-house lawyers maintain offices on company premises outside of Montana and do not have OGC office space in Montana. *Id.* at ¶ 8. For some companies, in-house lawyers based outside of Montana come to Montana periodically to confer on legal issues specific to Montana law with employees engaged in Montana operations. *Id.* It is rare that in-house counsel working on Montana legal issues are focused exclusively on legal issues arising in Montana operations. *Id.* at ¶ 10.

In-house counsel work exclusively for a particular company and its affiliates. *Id.* at ¶ 11. An in-house lawyer for a company operating in Montana does not represent individuals or business entities other than the one employing the in-house lawyer. *Id.* In-house counsel do not hold themselves out to the public for hire. *Id.* Companies utilize in-house counsel who (1) are not members of the Montana Bar, (2) work outside of the State of Montana for a majority of their work hours in an average month on matters not in litigation, and (3) dedicate a small percentage of their work hours to Montana-specific legal issues. *Id.* at ¶ 9. The

individual company which employs an attorney who is not a member of the Montana Bar has internalized the risk of poor or incompetent practice by the in-house lawyer. *Id.* at ¶ 11. The public is not at risk if an in-house lawyer has not passed the Montana Bar examination and become an active member of the Montana Bar. *Id.*

II. LANGUAGE OF THE CURRENT RULE AND THE PROPOSED RULE

In its current form, Rule 5.5 of the MRPC proscribes lawyers from certain conduct which constitutes the unauthorized practice of law. It states:

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Based upon the arguments set forth below, MPA petitions the Court to amend the Montana Rules by adding the language from Model Rule 5.5(d)(1) to Montana Rule 5.5 and restructuring it as follows:

Rule 5.5: Unauthorized Practice of Law [PROPOSED]

- (a) A lawyer shall not:
 - (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
 - (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
- (b) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission.

III. AUTHORITY FOR THE COURT TO MODIFY THE RULE

Pursuant to Article VII, section 2, clause 3 of the 1972 Montana Constitution, the Montana Supreme Court is authorized to make rules governing the conduct of the members of the State Bar. This provision gives the Court “exclusive authority to promulgate such rules.” *Matter of Petition of McCabe and Zemen*, 168 Mont. 334, 339, 544 P.2d 825, 828 (1975).

IV. BACKGROUND RELEVANT TO THE PROPOSED RULE CHANGE

Model Rule 5.5(d) was drafted by the American Bar Association (“ABA”) and, after a lengthy process of consideration and revision, adopted as part of the

Model Rules. Montana has not adopted the subsection of Model Rule 5.5 specifically aimed at multijurisdictional practice. In particular, Model Rule 5.5(d) addresses in-house counsel and allows for a practitioner providing legal services exclusively to one client as an employee to practice with certain restrictions in a state for its employer although not a member of that state's bar.

When the ABA adopted the change to Rule 5.5(d) of the Model Rules in 2002, a statement of the basis for the modification accompanied the rule package.

The ABA explained the need for the change in the Model Rules as follows:

Permit a lawyer employed by an organizational entity (e.g. an in-house corporate lawyer or a government lawyer), admitted in another United States jurisdiction, to provide legal services in a jurisdiction in which the lawyer is not admitted, other than representations for which *pro hac vice* admission is required, on behalf of the employer, an affiliated entity (i.e., an entity controlling, controlled by, or under common control with, the lawyer's organizational employer). This proposed provision would authorize the employed lawyer to give advice to the employer-client or assist in transactions on the employer-client's behalf in jurisdictions where the lawyer does not maintain an office. This provision would not apply, however, to appearances in judicial and agency proceedings that are subject to *pro hac vice* provisions; to participate in such proceedings, out-of-state employed lawyers, like other out-of-state lawyers, would be required to seek and obtain admission *pro hac vice*.

This proposed provision reflects well-accepted contemporary law practice. Corporations and similar entities with ongoing and recurring legal issues have an interest in retaining in-house lawyers to provide legal assistance with respect to those matters, wherever they arise. In recent years, in-house corporate lawyers' work has grown increasingly national and global along with the business of corporate clients. The organization's interest in being provided legal services in an efficient, cost-effective and competent manner by a lawyer in

whom it reposes confidence is furthered by permitting an organization to employ a lawyer to assist it with recurring matters. From a regulatory perspective, a lawyer who is employed to represent an organization on an ongoing basis poses less of a risk to the client and the public than a lawyer retained by an individual on a one-time basis, since, as the California report observed, an in-house attorney is “under the constant scrutiny of his or her employer.”¹

The proposed provision would allow an out-of-state lawyer to work permanently from the office of a corporate, government or other organizational employer. This is consistent with the explicit understanding in many jurisdictions.²

The Montana Bar supported adoption of subsection (d) of Rule 5.5 as a modification to the Montana Rules as part of a recommendation to this Court to adopt the ABA’s recommended language for Model Rule 5.5 in its entirety. On April 25, 2003, the State Bar of Montana, together with its Ethics Committee, petitioned this Court to revise the Montana Rules (the “2003 Petition”). *See* Petition in Support of Revision of the Montana Rules of Professional Conduct, *In re: Revising the Montana Rules of Professional Conduct*, No. 03-264 (Mont. Apr. 25, 2003). As part of a comprehensive set of revisions to Montana’s Rules of Professional Conduct, the Bar requested an amendment to Rule 5.5, which would have internalized the 5.5 Model Rule language into the Montana Rules. *Id.* at 10.³

¹ Citing to California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002) at 28, <http://www.abanet.org/cpr/mjp/comm2 csca.pdf>.

² *See* Exhibit A.

³ The version of Rule 5.5 proposed in the 2003 Petition was not adopted by the ABA as part of the Model Rules. Instead, it was a draft of Rule 5.5 developed by

On May 23, 2003, this Court issued an order inviting the bench and bar and any interested persons to file written comments, suggestions, or criticisms with the Clerk of Court regarding the proposed revisions. Order, *In re: Revising the Montana Rules of Professional Conduct*, No. 03-264 (Mont. Feb. 17, 2004). After considering each of the proposed revisions and comments, the Court accepted most, but not all, of the revisions. *Id.* Notably, the Court deferred consideration of the proposed revisions to Rule 5.5. *Id.* at 1. (“we are deferring consideration of the proposed revisions of Rule 5.5 on the unauthorized practice of law . . . until the comment period has run on the State Bar’s petition for proposed revisions to the Rules which would – if adopted – establish multijurisdictional practice in

the ABA Ethics 2000 Commission, which was included in Report 401, filed for the August 2001 ABA Annual Meeting. *See* Center for Professional Responsibility American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005*, 615-16 (2006). However, this version of the rule was not debated because the ABA determined that the Commission on Multijurisdictional Practice (“MJP Commission”) should be the entity to make recommended revisions to Rule 5.5. *Id.*

As part of the processing of revising Rule 5.5, the MJP Commission invited testimony and written submissions by state and local bar associations. The MJP Commission also solicited the views and experiences of law firms, government, and in-house corporate law offices and individuals. The recommended amendment was included in Report 201(B), and was adopted as proposed at the August 2002 ABA Annual Meeting. *See* Report 201(B), ABA Commission on Multijurisdictional Practice Report to the House of Delegates, attached hereto as Exhibit A. MPA is proposing that Montana adopt Model Rule 5.5(d) as drafted by the MJP Commission and adopted by the ABA in August, 2002.

Montana”). Our research has identified no other action taken by the Court regarding Model Rule 5.5(d) since this Court’s deferral of the issue ten years ago.

The chart included as Exhibit B to this Petition shows the current Montana Rule 5.5, the version of Rule 5.5 included in the 2003 Petition, and MPA’s proposed amendment to Rule 5.5.

V. LEGAL AUTHORITY ON THE UNAUTHORIZED PRACTICE OF LAW IN MONTANA

Unless this Court grants the MPA Petition, in-house counsel for certain MPA members risk engaging in the unauthorized practice of law in Montana. As noted by this Court, “it is universally held that the practice of law is not an inherent right but a privilege subject entirely to state control.” *In re Bailey*, 50 Mont. 365, 369, 146 P. 1101, 1103 (1915) (cited with approval in *Mont. Supreme Crt. Comm. on the Unauthorized Practice of Law v. O’Neil*, 2006 MT 284, ¶ 73, 334 Mont. 311, 330, 147 P.3d 200, 213). First, Rule 5.5 of the Montana Rules prohibits a lawyer from practicing law “in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction” or from assisting “a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” This language is significant because of statutory and common law definitions of what constitutes “practicing law” in Montana.

Pursuant to Mont. Code Ann. § 37-61-201, a person practices law if that person: (1) “holds out to the public or advertises as an attorney”; (2) “appears in

any court of record or before a judicial body, referee, commission, or other officer appointed to determine any question of law or fact by a court”; or (3) “engages in the business and duties and performs acts, matters, and things that are usually done or performed by an attorney at law in the practice of that profession” If a lawyer works on legal issues involving Montana law as an employee exclusively for an employer, this definition could be interpreted to mean that an in-house attorney not admitted to the Montana Bar may be practicing law because, under subsection 3, the lawyer is engaging in the business and performing acts, matters, and things that are usually done or performed by a practicing attorney.

This Court recently reviewed the acts of a paralegal to determine whether he was engaged in the unauthorized practice of law. Although the facts are distinguishable from practice of in-house counsel, the analysis appears to be relevant to the question. The Court noted that it “has long defined the practice of law to include legal services whose product touches legal matters not immediately at issue in court.” *O’Neil*, 2006 MT 284, ¶ 82, 334 Mont. at 332-33, 147 P.3d at 215. Specifically, the *O’Neil* Court described what constitutes practicing law and what constitutes practicing before a court:

A person who makes it his business to act and who does act for and by warrant of others in legal formalities, negotiations or proceedings, practices law; and when his acts consist of advising clients touching legal matters pending or to be brought before a court of record, or in preparing pleadings or proceedings for use in a court of

record, or in appearing before a court of record, either directly or by a partner or proxy, he is practicing law in a court of record.

Id. (quoting *Bailey*, 50 Mont. at 367-68, 146 P. at 1102). In *O'Neil*, several Montana district court judges wrote the Commission on the Unauthorized Practice of Law (the "Commission") complaining that O'Neil was engaging in the unlawful practice of law. *Id.* at ¶ 11. O'Neil had advertised in the telephone book under the "Attorney" heading even though he was not licensed to practice law in the State of Montana, did not attend law school, and did not sit for the Montana Bar. *Id.* at ¶¶ 9-10. In its decision, the court noted that "[t]he unauthorized practice statutes are narrowly tailored to target only the provision of legal services in Montana by individuals who have not proven through examination and admission to the bar that they are qualified and possess a familiarity with Montana law." *Id.* at ¶ 80 (internal citations omitted).

In the district court order in *O'Neil*, the court listed five indicia of the practice of law, including: (1) the giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibilities of others; (2) selecting, drafting, and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others; (3) appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state; (4) negotiating the legal rights or

responsibilities of others; and (5) holding one's self out or advertising one's self as an attorney or non-attorney admitted to practice law in Montana. *Id.* at ¶ 87. This Court viewed favorably these criteria to describe what acts constitute the practice of law. *Id.*

Under the *O'Neil* test, an in-house attorney providing counsel on Montana-specific matters, who is not a member of the Montana Bar, may be engaged in the unauthorized practice of law with respect to at least a subset of his work. *O'Neil* stands for the provision that an attorney does not actually have to be practicing in front of a legal body to be engaged in the unauthorized practice of law. If the attorney acts in "legal formalities, negotiations or proceedings" on a Montana matter without admission to the Montana Bar, he is likely engaged in unauthorized practice. The same appears to hold true with respect to advice to his employer/client and related involvement in legal matters pending in court or those that may be brought before a court.

Further support for the conclusion that the typical work performed by in-house counsel may be considered to be the unauthorized practice of law is drawn from cases analyzing whether utilization of certain forms to effectuate real estate transactions constitutes the practice of law. In *Pulse v. North American Land Title Comp. of Mont.*, 218 Mont. 275, 707 P.2d 1105 (1985), this Court found that a bank which had prepared a purchase agreement, mortgage, and deed of trust in

conjunction with a transaction was not practicing law because it had simply filled in blanks on a standard form. The Court instituted a three-part test in finding that the bank had not practiced law: (1) the real estate instruments must be prepared only incident to transactions in which the maker is interested; (2) the instruments must be prepared without a separate charge; and (3) the preparation must not go beyond the filling in of blank forms. *Id.* at 282. If all three elements are met, as they were in *Pulse*, then the institution is not engaged in the unauthorized practice of law. *Id.* However, *Pulse* was later cited for this exact opposite proposition - - that filling in blanks on a preprinted form *does* constitute the practice of law. *See, e.g., In re Ellison*, 230 B.R. 426 (Bankr. Mont. 1999); *In re Rankin*, 320 B.R. 171 (Bankr. Mont. 2005). Consequently, it seems clear that even pro forma activity may constitute practicing law.

VI. IN-HOUSE COUNSEL CANNOT UTILIZE THE CURRENT *PRO HAC VICE* RULES TO ELIMINATE CONCERNS REGARDING THE UNAUTHORIZED PRACTICE OF LAW

The Montana *pro hac vice* rules do not offer a viable avenue for an in-house attorney who is a member of another bar to obtain a limited admission to practice for his or her employer in Montana. Montana's *pro hac vice* rules are a vehicle for lawyers who are members of other bars to gain admission to participate in a specific state court case or contested case before a state agency. A practitioner or the practitioner's firm may be granted admission *pro hac vice* twice for purposes of

representing a client before an administrative body or a court. *See* Amended Rules for Admission to the Bar of Montana, Rule IV. *Id.*

Montana's rule on *pro hac vice* admissions is designed to allow non-Montana lawyers to participate in litigation or contested cases before state agencies. A majority of the work performed by MPA members with in-house counsel is on matters not in litigation. Branch Aff. at ¶ 7. Montana's rules do not allow an in-house lawyer to be admitted *pro hac vice* to advise her client on Montana law outside of the litigation context.

VII. PRECEDENT FOR MODIFYING MRPC 5.5 AS REQUESTED BY MPA

This Court has granted two petitions for limited admission to the Montana Bar from general counsels (Heather H. Grahame, the General Counsel for NorthWestern Energy, and Jerome Anthony Patterson, Jr., the Chief Administrative Officer for Northwest Healthcare Corporation) based in Montana and working for companies with all of the operations or a significant percentage of the total operations in Montana. Ms. Grahame and Mr. Patterson made arguments on facts which are consistent with the arguments made by MPA in support of this Petition.

In her petition, Ms. Grahame asserted that her work, “. . . does not put the public at risk because I am not and will not be engaged in the private practice of law. I do not now and do not intend in the future to hold myself out to the public

for hire Rather than hold myself out to the public for hire, I have one client, NorthWestern Energy, a sophisticated corporation that is well-situated to assess the quality of my legal work and my judgment.” *In re Grahame*, PR 06-422, Petition for Waiver of Montana State Bar Admission Rule III.C, 8 (Mar. 30, 2011). In the Order granting the Petition, this Court relied upon “Grahame’s extensive specialized experience, her request to practice for only one client, and the client’s consent.” *In re Grahame*, PR 06-0422, Order, 2 (Apr. 12, 2011). Patterson made similar arguments. *In re Patterson*, Petition, PR 06-0422, ¶¶ 6, 7 (October 5, 2011). This Court granted his Petition and stated, “Patterson would provide legal services solely to Northwest Healthcare Corporation and its owned and controlled affiliated. He would not represent any of these entities in court, and has no intention of engaging in the private practice of laws in Montana. . . . Given Patterson’s extensive specialized experience and his intention to engage in the limited practice described herein,” *In re Patterson*, PR 06-0422, Order, 2 (October 25, 2011)

This Court has allowed in-house counsel to provide their employers with advice on Montana law without requiring them to become members of the Montana Bar. Although Ms. Grahame and Mr. Patterson are based in Montana, the same arguments set forth in support of their petitions are equally persuasive here.

VIII. ADVANTAGES OF AMENDING RULE 5.5

Any in-house counsel who advises a national or international entity regarding Montana-specific legal issues risks engaging in the unauthorized practice of law in this jurisdiction. Requiring in-house counsel for a business entity to take the bar in every state where his or her employer does business would be extremely burdensome.

As noted by the ABA in Report 201(B), Model Rule 5.5(d) would allow in-house counsel to provide advice to the employer-client or assist in transactions on the employer-client's behalf in jurisdictions where the lawyer does not maintain an office even though he or she is not a member of the bar in that jurisdiction. *See* Exhibit A, at 10. This rule "would not apply, however, to appearances in judicial and agency proceedings that are subject to *pro hac vice* provisions; to participate in such proceedings, out-of-state employed lawyers, like other out-of-state lawyers, would be required to seek and obtain admission *pro hac vice*." *Id.* The organization's interests are served by "being provided legal services in an efficient, cost-effective and competent manner by a lawyer in whom it reposes confidence" *Id.* Importantly, from a regulatory standpoint, "a lawyer who is employed to represent an organization on an ongoing basis poses less of a risk to the client and the public than a lawyer retained by an individual on a one-time basis" because the in-house lawyer is "under the constant scrutiny of his or her employer." *Id.*

If Model Rule 5.5(d)(1) is adopted, to be counsel of record in a state court lawsuit, an in-house attorney would continue to be required to obtain *pro hac vice* admission. Therefore, to appear in state court, an in-house attorney who is not a member of the Montana Bar would still be required to associate with a Montana attorney for the state court proceedings and would continue to be limited to two *pro hac vice* admissions without receiving leave of the Court. *See* Amended Rules for Admission to the Bar of Montana, Rule IV.

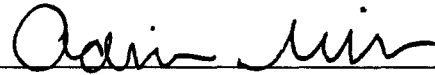
IX. ADMINISTRATION OF THE NEW RULE

Many states have adopted rules similar to the rule sought by MPA. MPA recommends adoption of the rule language proposed in Section II of this Petition. In addition, to administer the new rule, MPA encourages the court to consider and adopt the structure employed by the State of Nevada through Nevada Supreme Court Rule 49.10, which is attached as Exhibit C.

X. CONCLUSION

Rule 5.5 of the Montana Rules of Professional Conduct has not been amended in nearly 30 years, but it is necessary to provide a safe harbor for in-house lawyers practicing in a limited capacity for their employer-clients. The proposed revisions to Rule 5.5 would allow for in-house lawyers to provide limited Montana-specific legal advice to their clients, but would still require *pro hac vice* admission for judicial and agency proceedings.

DATED this 19th day of November, 2014.

A handwritten signature in black ink, appearing to read "William W. Mercer", written over a horizontal line.

William W. Mercer

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I certify that this Petition is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word, is not more than 4,000 words, excluding certificate of service and certificate of compliance.

DATED this 19th day of November, 2014.



Adrian A. Miller

CERTIFICATE OF SERVICE

This is to certify that the foregoing Petition To Revise the Montana Rules of Professional Conduct was served by U.S. Mail upon the following this 19th day of November, 2014:

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