

In the Matter of the Petition
of the State Bar of Wisconsin
to Amend Chapter 20 of the Supreme Court Rules

PETITION

TO: Chief Justice Shirley S. Abrahamson
Justice Jon P. Wilcox
Justice Ann Walsh Bradley
Justice N. Patrick Crooks
Justice David T. Prosser, Jr.
Justice Patience D. Roggensack
Justice Louis B. Butler

NOW COMES the State Bar of Wisconsin and hereby petitions the Supreme Court for an order amending SCR 20:5.5 and SCR 20:8.5 of the Rules of Professional Conduct for Attorneys, as follows:

- To amend SCR 20:5.5 to allow for the temporary practice of law by lawyers not licensed to practice in the State of Wisconsin as exceptions to the prohibition against the unauthorized practice of law; and
- To amend SCR 20:8.5 to modify the Rules regarding the applicability of Rules of Professional Conduct to lawyers engaged in the temporary practice of law in the State of Wisconsin.
- To amend SCR 10.03(4) to modify the Rules on pro hac vice admission.

Attached to this petition are the proposed amendments to SCR 20:5.5 and SCR 20:8.5 along with a Memorandum in Support of the Petition.

The changes presented in these proposed amendments coincide for the most part to the proposed changes to Model Rule 5.5 and Model Rule 8.5 in order to address the question of lawyers temporarily providing legal services on behalf of a client in a jurisdiction where the lawyer is not licensed, known as multi-jurisdictional practice. The proposed amendments are very similar to the amendments to the Model Rule 5.5 and 8.5 as recommended by the American Bar Association and its Study Committee on the topic of multi-jurisdictional practices. The proposed changes to the “pro hac vice” rule are designed to incorporate the Model Rule and procedures for pro hac vice admission that have been recommended by the American Bar Association to all states. The purpose of these proposed changes are to incorporate a model procedure for a lawyer to obtain pro hac vice status in the State of Wisconsin like in all other states.

The Board of Governors of the State Bar of Wisconsin recommends approval of these modifications to SCR 20:5.5 and SCR 20:8.5 as well as SCR 10.03(4). The Board of Governors of the State Bar believes it is important to address the issue of multi-jurisdictional practice within the context of ensuring protection to the public by allowing the Office of Lawyer Regulation to investigate and issue discipline for lawyers that decide to engage temporarily in the practice of law in Wisconsin on behalf of specific clients.

Respectfully submitted this ____ day of _____, ____.

STATE BAR OF WISCONSIN

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**SCR 20:5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL
PRACTICE OF LAW**

- (a) A lawyer shall not:
 - (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction except that a lawyer admitted to practice in Wisconsin does not violate this Rule by conduct in another jurisdiction that is permitted in Wisconsin under SCR 20:5.5(c) and (d) for lawyers not admitted in Wisconsin; or
 - (2) assist another in practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by this Rule or other law, establish an office or maintain a 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 the practice of law in this jurisdiction.

- (c) A lawyer who is not admitted to practice in this jurisdiction but who is admitted to practice in another jurisdiction of the United States and who is in good standing, and not disbarred or suspended from practice in any jurisdiction, may not provide legal services in this jurisdiction except when providing services on an occasional basis 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 or order 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 within 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 to practice in another jurisdiction of the United States, who is in good standing, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that a government lawyer is authorized to provide in the State of Wisconsin by operation of federal law, however, this provision shall not apply to non-government attorneys providing services under federal law.
- (e) A lawyer admitted to practice in another jurisdiction of the United States who provides legal services in this jurisdiction pursuant to section (c) and section (d) above shall consent to the appointment of the Clerk of the Wisconsin Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction.

SCR 20:8.5 Disciplinary authority; choice of law

(a) Disciplinary Authority. A lawyer admitted to the bar of this state is subject to the disciplinary authority of this state regardless of where the lawyer's conduct occurs. A lawyer not admitted to the bar of this state is also subject to the disciplinary authority of this state if the lawyer provides or offers to provide any legal services in this state. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction for the same conduct.

(b) Choice of Law. In the exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

(2) for any other conduct,

(i) if the lawyer is admitted to the bar of only this state, the rules to be applied shall be the rules of this state.

(ii) if the lawyer is admitted to the bars of this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices, except that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is admitted to the bar, the rules of that jurisdiction shall be applied to that conduct.

(iii) if the lawyer is admitted to the bar in another jurisdiction and is providing legal services in this state as allowed under these Rules, the rules to be applied shall be the rules of this state.

(3) A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT**Disciplinary Authority**

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is

subject to the disciplinary authority of this jurisdiction under SCR 20:8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

SCR 10.03(4). Only Active Members May Practice Law

(a) A judge in this state may allow a nonresident counsel to appear in his or her court and participate in a particular action or proceeding in association with an active member of the State Bar of Wisconsin who appears and participates in the action or proceeding. Permission to the out-of-state lawyer may be withdrawn by the judge granting it if the lawyer by his or her conduct manifests incompetency to represent a client in a Wisconsin court or by his or her unwillingness to abide by the Rules of Professional Conduct for Attorneys and the rules of decorum of the court.

(b) A judge in this state may allow a nonresident military counsel representing military personnel to appear in his or her court and participate in a particular action or proceeding without being in association with an active member of the State Bar of Wisconsin and without being subject to any application fees required by this Rule.

(c) Admission in pending litigation before a court or agency.

1. Definitions.

(a) An "out-of-state" lawyer is a person not admitted to practice law in this state but who is admitted in another state or territory of the United States or of the District of Columbia and not disbarred or suspended from practice in any jurisdiction.

(b) An out-of-state lawyer is "eligible" for admission pro hac vice if that lawyer:

i. lawfully practices solely on behalf of the lawyer's employer and its commonly owned organizational affiliates, regardless of where such lawyer may reside or work; or

ii. neither resides nor is regularly employed at an office in this state; or

iii. resides in this state but (i) lawfully practices from offices in one or more other states and (ii) practices no more than temporarily in this state, whether pursuant to admission pro hac vice or in other lawful ways.

(c) A "client" is a person or entity for whom the out-of-state lawyer has rendered services or by whom the lawyer has been retained prior to the lawyer's performance of services in this state.

- (d) An "alternative dispute resolution" ("ADR") proceeding includes all types of arbitration or mediation, and all other forms of alternative dispute resolution, whether arranged by the parties or otherwise.
 - (e) State refers to State of Wisconsin.
- 2. Authority of court or agency to permit appearance by out-of-state lawyer.
 - (a) Court proceeding. A court of this state may, in its discretion, admit an eligible out-of-state lawyer retained to appear in a particular proceeding pending before such court to appear pro hac vice as counsel in that proceeding.
 - (b) Administrative agency proceeding. The agency may, using the same standards and procedures as a court, admit an eligible out-of-state lawyer who has been retained to appear in a particular agency proceeding to appear as pro hac vice counsel in that proceeding, provided the representation is undertaken in association with a lawyer who is admitted to practice in the State of Wisconsin.
- 3. In-state 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 in-state lawyer, or in an advisory or consultative role, the in-state 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 in-state lawyer to advise the client of the in-state lawyer's independent judgment on contemplated actions in the proceeding if that judgment differs from that of the out-of-state lawyer.
- 4. Application procedure.
 - a. Verified application. An eligible out-of-state lawyer seeking to appear in a proceeding pending in this state as counsel pro hac vice shall file a verified application with the court where the litigation is filed. The application shall be served on all parties who have appeared in the case, the Office of Lawyer Regulation of the Wisconsin Supreme Court and the State Bar of Wisconsin. The application shall include proof of service. The court has the discretion to grant or deny the application summarily if there is no opposition.
 - b. Objection to application. The Office of Lawyer Regulation or a party to the proceeding may file an objection to the application or seek the court's imposition of conditions to its being granted. The Office of Lawyer Regulation or objecting party must file with its objection a verified affidavit containing or describing information establishing a factual basis for the objection. The Office of Lawyer Regulation or objecting party may seek denial of the application or modification of it. If the application has already been granted, the Office of

Lawyer Regulation or objecting party may move that the pro hac vice admission be withdrawn.

c. Standard for admission and revocation of admission. The courts and agencies of this state have discretion as to whether to grant applications for admission pro hac vice. An application ordinarily should be granted unless the court or agency finds reason to believe that such admission:

i. may be detrimental to the prompt, fair and efficient administration of justice,

ii. may be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent,

iii. 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

iv. the applicant has engaged in such frequent appearances as to constitute regular practice in this state.

d. Revocation of admission. Admission to appear as counsel pro hac vice in a proceeding may be revoked for any of the reasons listed in Section (b)4(c) above.

5. Application.

a. Required information. An application shall state the information listed on Appendix A to this rule. The applicant may also include any other matters supporting admission pro hac vice.

b. Application fee. An applicant for permission to appear as counsel pro hac vice under this Rule shall pay a non-refundable fee as set by the State Bar of Wisconsin at the time of filing the application.

c. Exemption for pro bono representation. An applicant shall not be required to pay the fee established above if the applicant will not charge an attorney fee to the client(s) and is:

i. 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

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

(d) Authority of the Office of Lawyer Regulation and court: application of ethical rules, discipline, contempt, and sanctions.

1. Authority over out-of-state lawyer and applicant.

a. During pendency of an application for admission pro hac vice and upon the granting of such application, an out-of-state lawyer submits to the authority of the courts and the Office of Lawyer Regulation for all conduct relating in any way to the proceeding in which the out-of-state lawyer seeks to appear. The applicant or out-of-state lawyer who has obtained pro hac vice admission in a proceeding submits to this authority for all that lawyer's conduct (i) within the state while the proceeding is pending or (ii) arising out of or relating to the application or the proceeding.

b. An applicant or out-of-state lawyer who has pro hac vice status for a proceeding may be disciplined in the same manner as an in-state lawyer.

c. The court's and Office of Lawyer Regulation's authority includes, without limitation, the court's and Supreme Court Rules of Professional Conduct (SCR Chapter 20), the rules of decorum of the court, rules of discipline, contempt and sanctions orders, local court rules, and court policies and procedures.

2. Familiarity with rules. An applicant shall become familiar with the Supreme Court Rules of Professional Conduct for Attorneys (SCR Chapter 20), the rules of decorum of the court, rules of discipline of the Office of Lawyer Regulation, local court rules, and policies and procedures of the court before which the applicant seeks to practice.

(e) Out-of-state proceedings, potential in-state and out-of-state proceedings, and all ADR.

1. In-state ancillary proceeding related to pending out-of-state proceeding. In connection with proceedings pending outside this state, an out-of-state lawyer admitted to appear in the proceeding may render in this state legal services regarding or in aid of such proceeding.

2. Consultation by out-of-state lawyer.

a. Consultation with in-state lawyer. An out-of-state lawyer may consult in this state with an in-state lawyer concerning the in-state lawyer's client pending or potential proceeding in this state.

- b. Consultation with potential client. At the request of a person in this state contemplating a proceeding or involved in a pending proceeding, irrespective of where the proceeding is located, an out-of-state lawyer may consult in this state with that person about that person's possible retention of the out-of-state lawyer in connection with the proceeding.
3. Preparation for in-state proceeding. On behalf of a client in this state or elsewhere, the out-of-state lawyer may render legal services in this state in preparation for a potential proceeding to be filed in this state, provided that the out-of-state lawyer reasonably believes he is eligible for admission pro hac vice in this state.
4. 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 a client or potential client located in this state, provided that the out-of-state lawyer is admitted or reasonably believes the lawyer is eligible for admission generally or pro hac vice in the jurisdiction where the proceeding is anticipated to be filed.
5. Services rendered outside this state for in-state client. An out-of-state lawyer may render legal services while the lawyer is physically outside this state when requested by a client located within this state in connection with a potential or pending proceeding filed in or outside this state.
6. Alternative dispute resolution ("ADR") procedures. An out-of-state lawyer may render legal services to prepare for and participate in an ADR procedure regardless of where the ADR procedure is expected to take or actually takes place.
7. 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.
8. Temporary practice. An out-of-state lawyer will only be eligible for admission pro hac vice or to practice in another lawful way on a temporary basis.
9. Authorized services. The foregoing services may be undertaken by the out-of-state lawyer in connection with a potential proceeding in which the lawyer reasonably expects to be admitted pro hac vice, even if ultimately no proceeding is filed or if pro hac vice admission is denied.

APPENDIX A

The out-of-state lawyer application shall include:

1. The applicant's residence and business address;
2. The name, address and phone number of each client sought to be represented;
3. The courts before which applicant has been admitted to practice and the respective period(s) of admission;
4. Whether the applicant (a) has been denied admission pro hac vice in this state, (b) had admission pro hac vice revoked in this state, or (c) has otherwise formally been disciplined or sanctioned by any court in this state. If so, specify the nature of the allegations; the name of the authority bringing such proceedings; the caption of the proceedings, the date filed, and what findings were made and what action was taken in connection with those proceedings;
5. Whether any formal, written disciplinary proceeding has ever been brought against the applicant by a disciplinary authority in any other jurisdiction within the last five (5) years and, as to each such 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 style of the proceedings; and the findings made and actions taken in connection with those proceedings;
6. 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 before which such proceedings were conducted; 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);
7. 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 this state within the preceding two years; the date of each application; and the outcome of the application;
8. An averment as to the applicant's familiarity with the Supreme Court Rules of Professional Conduct for Attorneys (SCR Chapter 20), the rules of decorum of the court, rules of discipline of the Office of lawyer Regulation, local rules and court procedures of the court before which the applicant seeks to practice; and

9. The name, address, telephone number and bar number of an active member in good standing of the bar of this state who will sponsor the applicant's pro hac vice request. The bar member shall appear of record together with the out-of-state lawyer.
10. The applicant's prior or continuing representation in other matters of one or more of the clients the applicant proposes to represent and any relationship between such other matter(s) and the proceeding for which applicant seeks admission.
11. 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.