



Supreme Court of Wisconsin

OFFICE OF LAWYER REGULATION

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KEITH L. SELLEN

November 14, 2011

Clerk of Supreme Court
ATTN: Carrie Janto, Deputy Clerk
P.O. Box 1688
Madison, WI 53701-1688

Rule Petition 11-07, In the Matter of the Petition for Providing Legal Services Following a Determination of Major Disaster

Dear Ms. Janto:

I write to you on behalf of the Board of Administrative Oversight and the Office of Lawyer Regulation in response to Commissioner Rich's letter of October 14, 2011. Commissioner Rich's letter requested information regarding three issues: developments in other jurisdictions, comments from the Legislative Reference Bureau, and filing of registration statements.

Developments in Other Jurisdictions. Mr. John Holtaway, Lead Senior Counsel, Client Protection and Policy Implementation, American Bar Association, provided me an implementation chart as of October 27, 2011. The chart shows that 13 jurisdictions have adopted a rule (up from 9 a year ago), that 18 jurisdictions are considering a rule, and that 6 jurisdictions have decided not to adopt a rule (up from 5 a year ago). The chart also provides information regarding the status of implementation in various jurisdictions.

Mr. Holtaway also provided a copy of Resolution 3, adopted by the Conference of Chief Justices on August 1, 2007, and Revised Report 104, dated January 29, 2007, prepared by the Standing Committee on Client Protection.

Comments from the Legislative Reference Bureau. The Board of Administrative Oversight and Office of Lawyer Regulation have no objection to the comments of the Legislative Reference Bureau. We further suggest that references in the proposed rule to "this Court" be stated as "the Supreme Court;" and that references in the proposed rule to "this jurisdiction" be stated as "the State of Wisconsin."

Filing of Registration Statements. The Board of Administrative Oversight and Office of Lawyer Regulation have no objection to filing registration statements with the Office of Lawyer Regulation. The ABA Model Rule provides for filing registration statements with the Clerk. Of

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the thirteen states adopting the rule, seven require the filing with the clerk of the court. Three states require filing with the disciplinary agency, one with the attorney registration agency, one with the office of court administration, and one with the state bar. In Wisconsin, pro hac vice admissions are filed with and approved by the court. The Office of Lawyer Regulation receives a copy of the filing and a fee. The Supreme Court may wish registrations to be filed with the Clerk, as the Clerk is the custodian of the roll of attorneys. The Supreme Court may instead wish registrations to be filed with the Office of Lawyer Regulation, as the Office assists the Court to supervise the practice of law and to protect the public. Iowa has developed a registration form, which is enclosed as it would well serve the purposes of the proposed rule.

Very truly yours,

Keith L. Sellen
Director

Enclosures

Cc: Rod Rogahn, Chairperson, Board of Administrative Oversight
James Brennan, President, State Bar of Wisconsin

AMERICAN BAR ASSOCIATION
 STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF
 ABA MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF
 MAJOR DISASTER

	Adopted Rule (13)	Considering Adoption (18)	Decided Not To Adopt (6)	Other Info
	(AZ, CO, DE, IA, LA, MN, MO, NH, NJ, NY, OR, TN, and WA)	(AL, CA, DC, FL, GA, HI, IL, MD, MA, MS, MT, NE, ND, OK, TX, VT, VA, and WI)	(MI, NC, OH, PA, UT, and WY)	
AL		X		
AK				
AZ	Rule 39, Rules of the Supreme Court http://www.supremecourt.az.us/rules/2008%20Rules%20a/R-07-0017.pdf			
AR				
CA		X		In May 2008 the Board of Governors of the State Bar of California voted to recommend to the California Supreme Court that no action need be taken on the model court rule.
CO	Rule 224. Provision of Legal Services Following Determination of a Major Disaster: Colorado Rules of Civil Procedure			

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	(AZ, CO, DE, IA, LA, MN, MO, NH, NJ, NY, OR, TN, and WA)	(AL, CA, DC, FL, GA, HI, IL, MD, MA, MS, MT, NE, ND, OK, TX, VT, VA, and WI)	(MI, NC, OH, PA, UT, and WY)	
CT				No proposal pending. Connecticut has adopted Section 1-9B of the Superior Court rules, effective January 1, 2011, which provides that in the event that the Governor declares a public health emergency or a civil preparedness emergency, the Chief Justice or in certain circumstances the Chairman of the Rules Committee may call a meeting of the Rules Committee at which that committee will have the power to adopt, revise and suspend rules deemed necessary in light of the emergency. (See also Public Act 10-43 attached which gives the Chief Justice and the Chief Court Administrator emergency powers.)
DE	Supreme Court Rule 58			
DC		X		DC Bar has established a working group to make recommendation to the Board of Governors. Rule 49 may already allow "temporary/intermittent practice".
FL		X		Florida has proposed the adoption of a Major Disaster Rule. Proposed Rule 1-3.12. http://www.floridabar.org/DIVCOM/JN/jnews01.nsf/8c9f13012b96736985256aa900624829/53a08da3b3410c3f852577850066e462!OpenDocument
GA		X		A Bar committee has been working on getting the Court to approve it. If the Court approves the Rule, they will amend the

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				comment to 5.5 as the ABA did.
HI		X		The Hawaii Supreme Court considered the ABA Model Rule on Major Disasters in March 2007 and referred the proposal to the court's Commission on Professionalism. The Commission has not reported back.
ID				
IL		X		Materials forwarded to the ISBA's Standing Committee on Professional Responsibility. Their next meeting is scheduled for February 8, 2008.
IA	Iowa Court Rules 31.17, 31.25 (Form 3) and Iowa Rule of Professional Conduct 32:5.5 Comment [14a] (May 14, 2007, effective immediately) http://www.legis.state.ia.us/Rules/Current/court/courtrules.pdf			
KS				
KY				
LA	Part O, Rule XLI, Rules of the Supreme Court of Louisiana			

	Adopted Rule (13) (AZ, CO, DE, IA, LA, MN, MO, NH, NJ, NY, OR, TN, and WA)	Considering Adoption (18) (AL, CA, DC, FL, GA, HI, IL, MD, MA, MS, MT, NE, ND, OK, TX, VT, VA, and WI)	Decided Not To Adopt (6) (MI, NC, OH, PA, UT, and WY)	Other Info
	http://www.lasc.org/rules/orders/2011/PARTO_RULE_XLI.pdf			
MD		X		Court of Appeals studying the issue.
MA		X		

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MI			X	On November 5, 2009 the Michigan Supreme Court decided not to publish for comment a proposed Major Disaster Rule.
MN	Minnesota Supreme Court Rule on the Provision of Legal Services Following the Determination of a Major Disaster http://www.mncourts.gov/Documents/0/Public/Clerks_Office/2009_12_10_Order_Legal_Svc_Rule.pdf			
MS		On November 27, 2007 the Special Panel on Rules Governing Admission to the Mississippi Bar submitted a report and Recommendations to the Mississippi Supreme Court. The panel recommended the adoption of new Mississippi Rules of Appellate Procedure Rule 46(f): Temporary Admission and Practice upon Declared Emergencies.		On October 15, 2007, the Sup. Ct. of Mississippi adopted an Amendment to Rule 46 of the MS Rules of Appellate Procedure to include a provision for Pro Bono Publicus Attorneys. The purpose of Rule 46(f) is to permit and encourage attorneys who do not engage in the active practice of law in MS to provide legal representation to persons who cannot afford private legal services. See http://www.mssc.state.ms.us/Images/Opinions/143112.pdf Although Rule 46(f) doesn't quite emulate the Katrina Model Court Rule, it does facilitate deployment of out-of-state pro bono lawyers (whether or not there is a declared disaster).
	Adopted Rule effective January 1, 2008			

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MO	Rule 4-6.6. http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/C0C6FFA99DF4993F86256BA50057DCB8/6A94EF68DB80284D862573C20056BBAE?OpenDocument			
MT		X		STATE BAR OF MONTANA BOARD OF TRUSTEES September 17,2008 Regular Meeting The ABA has asked Bars with no reciprocity to consider a disaster plan that would allow for displaced lawyers to temporarily practice law in their respective states. A motion was made, and seconded, to table this item to the December 2009 board meeting; motion approved.
NE		X		Volunteer Lawyers Committee is studying.
NV				
NH	NH Supreme Court Rule 60 http://www.courts.state.nh.us/rules/scr/scr-60.htm			

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NJ	Rules Governing the Courts of the State of New Jersey (Effective September 1, 2008). Rule 1:21-10. Provision of Legal Services Following Determination of Major Disaster http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202422998686			
NM				
NY	http://www.courts.state.ny.us/CTAPPS/news/nottobar/MajorDisaster.pdf			
NC			On January 24, 2008 the North Carolina State Bar Issues Steering Comm. decided not to adopt. The Committee believed that existing provisions in the State's administrative rules and Rules of Professional Conduct are sufficient.	
ND		X		Referred to Attorney Standards Committee by the North Dakota Supreme Court.
			X	Declined to adopt.

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OH				
OK		X		
OR	Supreme Court Rule 146 http://www.publications.ojd.state.or.us/RULE146.htm			
PA			X	
SC				
SD				
TN	Tenn. Sup. Ct. R. 47 (Effective January 1, 2010).			
TX		X		(Chief Justice Wallace Jefferson recently appointed Denise Davis as Chair of Task Force to study.)
UT			X	Supreme Court of Utah letter regarding Major Disaster Rule: http://www.abanet.org/cpr/nosearch/katrina_chart.pdf
VT		X		The Civil Rules Committee has not yet begun review the Major Disaster Rule
VA		X		As of September 16, 2008, pending in the Virginia Supreme Court. http://www.vsb.org/site/regulation/provision-of-legal-services-following-determination-of-major-disaster

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WA	Effective September 1, 2008 http://www.courts.wa.gov/court_Rules/proposed/2007Nov/APR27.doc			
WV				
WI		X		
WY			X	

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Conference of Chief Justices

Policy Statements & Resolutions

Resolution 3

Encouraging Consideration of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster

WHEREAS, on February 12, 2007 the American Bar Association adopted the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster; and

WHEREAS, this Model Court Rule was adopted after study and upon recommendation of the ABA Task Force on Hurricane Katrina; and

WHEREAS, a major disaster, such as a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war can not only cause catastrophic physical damage in the affected jurisdictions but also can damage or cripple the legal systems in these areas; and

WHEREAS, experience has taught that following such disasters there may be the need for lawyers from other jurisdictions to volunteer to provide pro bono legal services in the affected jurisdictions and further that lawyers from affected jurisdictions may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction; and

WHEREAS, the creation of a process for making legal services available in the aftermath of disasters is an administrative and operational issue for consideration by each state's highest court;

NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices urges the highest court of each state that has not already done so to consider adopting a rule setting forth an orderly manner for the provision of legal services following determination of major disaster, and further the Conference commends the ABA Model Court Rule on this subject as the foundation upon which to create such a rule.

Adopted as proposed by the CCJ Professionalism and Competence of the Bar Committee at the 59th Annual Meeting on August 1, 2007.

REPORT

BACKGROUND

In the summer of 2005, Alabama, Louisiana and Mississippi were devastated by Hurricanes Katrina and Rita. The physical damage done in those jurisdictions was catastrophic but the storms also damaged and crippled their legal systems. In response, then American Bar Association President Michael S. Greco formed the ABA Task Force on Hurricane Katrina (the “Task Force”). One of the most significant early efforts of the Task Force was advocating the suspension of unlicensed practice of law rules by various states impacted by the hurricane so that lawyers from other jurisdictions could volunteer to provide pro bono legal services in the affected jurisdictions.¹

The Task Force soon recognized the need for a model rule that would allow out-of-state lawyers to provide pro bono legal services in an affected jurisdiction and lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction. Both the highest court of a jurisdiction affected by the major disaster and the highest courts of jurisdictions not affected by the disaster could implement the Rule on an emergency basis. In February 2006, the Task Force approached the ABA Coordinating Council for the Center for Professional Responsibility and requested assistance in drafting such a model rule. In light of its jurisdictional statement that includes the multijurisdictional practice of law and the unlicensed practice of law, the Standing Committee on Client Protection (the “Committee”) agreed to undertake the project.

With the assistance of Professor Stephen Gillers, Chair of the ABA Joint Committee on Lawyer Regulation and former member of the Commission on Multijurisdictional Practice, the Committee spent the next several months researching the issues and the law and preparing drafts of model rules. On September 6, 2006, the Committee circulated for comment to all ABA entities and other interested parties a proposed new Model Rule of Professional Conduct 5.8 (Provision of Legal Services Following Determination of Catastrophic Event) and a Model Court Rule with the same title. The ABA entities and other interested parties were requested to comment on the substance of the Model Rule/Model Court Rule and whether the topic should be addressed in a Model Rule of Professional Conduct or in a Model Court Rule.²

It was the consensus of the responding entities, including the Standing Committee on Ethics and Professional Responsibility, that the issues to be addressed were administrative matters involving the temporary practice of law and that they should be addressed in a Model Court Rule. The Standing Committee on Ethics and Professional Responsibility believes that the proposed Model Court Rule, if adopted, would effectively facilitate the provision of legal services in urgent

¹ *In the Wake of the Storm: The ABA Responds to Hurricane Katrina*. Report of the ABA Task Force on Hurricane Katrina. www.abanet.org/katrina

² The Committee received comments from numerous ABA entities including: the Standing Committees on Ethics and Professional Responsibility, Professional Discipline, Professionalism, Pro Bono and Public Service, Legal Aid and Indigent Defendants, Delivery of Legal Services, the Commissions on Interest on Lawyers’ Trust Accounts and Law and Aging, the Task Force on GATS Legal Services Negotiations, the National Organization of Bar Counsel and the Association of Corporate Counsel.

situations, such as the occurrence of natural disasters. The Ethics Committee also believes that because the creation of a mechanism for making legal services available is not an ethical, but essentially an administrative and operational concern of each state's highest court, it is appropriate that the subject be addressed by a Model Court Rule, rather than a Rule of Professional Conduct, and supports its adoption by the House of Delegates. The Ethics Committee agrees that proposed amended Comment [14] to Model Rule of Professional Conduct 5.5, which serves as an important cross-reference to any such rule of court, is a necessary and helpful addition to the Model Rules, and supports its adoption by the House of Delegates as well.

MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

An emergency affecting the justice system, as a result of a natural or other major disaster, may for a sustained period of time interfere with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. A natural or other major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or whose legal needs temporarily are unmet because of disruption to the practices of local lawyers.

Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit legal services organization or such other organizations specifically designated by the highest court of the affected jurisdiction.

Under the Model Court Rule, the highest court in the affected jurisdiction shall determine whether an emergency affecting the justice system as a result of a natural or other major disaster has occurred in the jurisdiction, or in a part of the jurisdiction, for purposes of triggering paragraph (b) of the Model Court Rule. The regulation of the practice of law by the judicial branch of government, which includes jurisdictional limits on legal practice, is a fundamental principle recently re-affirmed as policy by the American Bar Association.³ The court in making a determination whether an emergency affecting the justice system has occurred can take judicial notice of any Presidential proclamations or declarations by the governor or executive officer of an affected jurisdiction.

Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency affecting the justice system and the provision of legal services. Lawyers permitted to provide legal services pursuant to this Model

³ Report 201A, *Regulation of the Practice of Law by the Judiciary*, adopted August 12, 2002.

Court Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. The rules governing the not-for-profit organization will determine who should be considered an eligible client in light of the circumstances caused by the disaster.

Alternatively, the Court may instead designate other specific organizations through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized under paragraph (b) of this Rule to provide legal services on a temporary basis in an affected jurisdiction, or to provide legal services on a pro bono basis to the citizens of an affected jurisdiction who have been displaced to and are temporarily residing in an unaffected jurisdiction, ~~under Rule 5.5(e) of the Rules of Professional Conduct.~~

Lawyers authorized to practice law in an affected jurisdiction, as determined by the highest court of the affected jurisdiction, and whose practices are disrupted by a major disaster there, are authorized under paragraph (c) to provide legal services on a temporary basis in the jurisdiction adopting the Model Court Rule. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. The Court in the affected jurisdiction shall determine when a major disaster has occurred in another jurisdiction but only after such a determination and the geographical scope of the disaster have been made by the highest court of that other jurisdiction. The authority to engage in the temporary practice of law in an unaffected jurisdiction pursuant to paragraph (c) shall extend only to those lawyers who principally practice in the area of a jurisdiction determined to have suffered an emergency affecting the justice system and the provision of legal services.

Emergency conditions created by major disasters end, and when they do, the authority created by the Model Court Rule also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), the highest court in the affected jurisdiction determines when those conditions end only for purposes of the Model Court Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of the affected jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end 60 days, or as otherwise enacted in the Rule, after the highest court in an unaffected jurisdiction makes such a determination with regard to an affected jurisdiction. The parameters created by the Model Court Rule are intended to be flexible and the highest court in a jurisdiction has the discretion to extend the time period during which out-of-state lawyers may provide pro bono legal services in an affected jurisdiction or during which lawyers displaced by a disaster may practice law on a temporary basis in an unaffected jurisdiction.

Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of the affected jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. The highest court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in the jurisdiction under paragraph (b) to

appear in all or designated courts of the jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of an affected jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by the major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

AMENDMENT TO COMMENTARY OF RULE 5.5 OF THE *RULES OF PROFESSIONAL CONDUCT*

Following the occurrence of a major disaster, lawyers practicing law outside the affected jurisdiction will begin to research what legal services they may provide on a temporary basis to the citizens of the affected jurisdiction. In addition, not-for-profit legal organizations within the affected jurisdiction will begin to research what legal services out-of-state lawyers may provide in their jurisdiction on a temporary basis. At some point, the lawyers and not-for-profit organizations will consult the *Rules of Professional Conduct*. While Rule 5.5 of the *Rules of Professional Conduct* is titled “Unauthorized Practice of Law: Multijurisdictional Practice of Law,” Rule 5.5 does not directly address the provision of pro bono legal services by out-of-state lawyers in a jurisdiction affected by a major disaster nor does it address the temporary practice of law in an unaffected jurisdiction by displaced lawyers principally practicing in the affected jurisdiction. The *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* does address these issues. Upon the suggestion of the Standing Committee on Ethics and Professional Responsibility, whose jurisdictional statement includes recommending to the ABA House of Delegates amendments to the *Rules of Professional Conduct*, the Committee recommends that Comment [14] to Rule 5.5 of the *Rules of Professional Conduct* be amended to include a cross-references to the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*.

CONCLUSION

Following Hurricanes Katrina and Rita, thousands of lawyers from across the United States were inspired to offer their legal expertise on a pro bono basis to the citizens of the affected jurisdictions. Unfortunately, in some instances, the delivery of those pro bono legal services was hampered by the existence of unlicensed practice of law statutes and rules. The Committee believes that the adoption of the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* will allow lawyers to provide temporary pro bono legal services and that it will allow lawyers whose legal practices have been disrupted by major disasters to continue to practice law on a temporary basis in an unaffected jurisdiction. The Model Court Rule will facilitate the delivery of pro bono legal services while at the same time insuring the proper regulation of the lawyers providing those legal services in an affected jurisdiction and those displaced lawyers practicing law on a temporary basis in an unaffected jurisdiction

Janet Green Marbley, Chair
Standing Committee on Client Protection

REVISED REPORT 104
January 29, 2007

February 2007