

## Advisory Committee Invites Comments on Proposed Amendments of Delaware Supreme Court Rule 55.1 and Professional Conduct Rule 5.5

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In November 2024, the Delaware Supreme Court established an advisory committee (the “Committee”) to consider whether it is advisable to amend Rule 5.5 of the Delaware Lawyers’ Rules of Professional Conduct (the “DLRPC”), which governs the unauthorized practice of law, and Supreme Court Rule 55.1, which sets forth the process for a non-Delaware lawyer to register as Delaware in-house counsel and receive a Certificate of Limited Practice under Rule 55.1 (a “Certificate”). The Court formed the Committee in light of (1) the increased prevalence of remote work; (2) the number of Certificate holders who appeared not to have informed the Court of changes in their employment or other circumstances rendering them ineligible for continued limited practice under Rule 55.1; and (3) recent decisions relating to Rule 55.1 Certificates.<sup>1</sup>

The Committee has proposed the amendments to DLRPC 5.5 and Supreme Court Rule 55.1 that are summarized below. The Committee now invites comments from lawyers and others on the proposed amendments. **Comments may be submitted to the Committee by emailing them to [Rule55.1@delaware.gov](mailto:Rule55.1@delaware.gov) by April 25, 2025.**

### **Proposed Amendments of DLRPC 5.5**

The DLRPC 5.5 restrictions against the unauthorized practice of law are primarily intended to protect the interests of clients and the public from the provision of legal services by unqualified individuals. DLRPC 5.5(d)(1) permits in-house counsel who are admitted in a jurisdiction other than Delaware and who have obtained a Rule 55.1 Certificate to practice law for their employer in Delaware without violating DLRPC 5.5. As comment 16 notes, an attorney who practices in accordance with DLRPC 5.5(d)(1) does not create an unreasonable risk to clients and others because the attorney’s employer is in a strong position to assess the attorney’s qualifications and work product. The Committee concluded that DLRPC 5.5 is largely consistent with ABA Model Rule 5.5, continues to serve its purpose well, and does not require substantive changes.

The Committee proposed two non-substantive amendments to DLRPC 5.5(d)(1): first, amending “after compliance” to “while in compliance,” and second, changing the reference to “Rule 55.1(a)(1)” to “Rule 55.1” to conform with the proposed amendments to Rule 55.1.

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<sup>1</sup> *In re Polk*, 2024 WL 4590033 (Del. Oct. 22, 2024); *In re Hobi*, 2024 WL 3169114 (Del. June 25, 2024); *In re Senerchia*, 2024 WL 3161007 (Del. June 25, 2024).

### **Proposed Amendments of Rule 55.1**

The Committee proposed that existing Rule 55.1 be replaced with a revised rule as set forth in Exhibit A. The proposal restructures the rule to improve readability and compile all eligibility criteria in subsection (a). Subsection (a)(3) requires that the employer have a place of business in Delaware where employees regularly work. Because DLRPC 5.5(d)(1) does not apply to a lawyer who does not have an office or other systematic and continuous presence in Delaware for the practice of law, Rule 55.1(a)(4) explicitly requires that the applicant have an office or other systematic and continuous presence in Delaware for the practice of law for the applicant's employer.

The proposed changes to subsection (b) are also intended to improve readability, reinforce the eligibility criteria, and fulfill the purpose of DLRPC 5.5(d)(1). The application fee, which has not changed in twenty years, would increase from \$100 to \$250. Subsection (c) of the proposed rule sets forth the procedure for processing and reviewing applications.

Proposed subsection (d) corresponds with current subsections (e) and (g) and provides additional information concerning the differences between an attorney admitted to the Delaware Bar and a Certificate holder. Proposed subsection (e) corresponds with current subsections (f) and (h). The changes are intended to improve readability and encourage reporting of changes in circumstances.

Proposed subsection (f) adds an annual registration requirement for Certificate holders. As previously noted, it appears that many Certificate holders do not notify the Court when their employment changes or they no longer qualify for a Certificate. An annual registration process will increase the accuracy of the Court's records. The \$100 fee will defray the administrative costs and encourage Certificate holders who no longer satisfy the Rule 55.1 criteria to notify the Court that the Certificate should be terminated. Failure to complete the annual registration process will result in automatic termination of the Certificate. A lawyer who fails to complete the annual registration but remains eligible may reapply.

In the first annual registration cycle, Certificate holders will be asked to certify that they satisfy the new version of Rule 55.1. There might be some Certificate holders who satisfied the current version of Rule 55.1 but do not satisfy the new version. The Committee recommended that the Court provide an opportunity for such individuals to demonstrate "good cause" for maintaining their Certificates.

Subsection (g) of the proposed rule corresponds with current subsection (i). The changes are intended to improve readability. Proposed subsection (h) is substantially similar to current subsection (j).

The Committee also recommended that the Court adopt and publish an official comment to Rule 55.1. The draft comment is attached as Exhibit B. It addresses some common issues and hypothetical scenarios that might arise and would provide additional guidance to potential applicants about eligibility and applicability.

## **EXHIBIT A**

### **[PROPOSED] Supreme Court Rule 55.1. Limited permission to practice as in-house counsel.**

(a) *Applicability and Eligibility.* To provide legal services in this jurisdiction under Rule 5.5(d)(1) of the Delaware Lawyers' Rules of Professional Conduct, a lawyer must obtain a Delaware Certificate of Limited Practice As In-House Counsel issued in accordance with this Rule (a "Rule 55.1 Certificate"). To be eligible to receive and to maintain a Rule 55.1 Certificate, the lawyer must:

- (1) be an active member in good standing at the bar of the highest court of another state or the District of Columbia or, in the Court's discretion, another jurisdiction;
- (2) be in good standing at the bar in every jurisdiction in which the lawyer is admitted to practice law;
- (3) be employed as in-house counsel by an organizational entity, the business of which is lawful and is other than the practice of law or the provision of legal services, and which has a place of business in Delaware where employees of the organizational entity regularly work (the "Employer");
- (4) have an office or other systematic and continuous presence in Delaware for the practice of law for the Employer; and
- (5) provide legal services solely to the Employer and its subsidiaries and affiliates, except as permitted in subsection (d)(6) of this Rule.

(b) *Application.* Within 30 days after beginning employment with the Employer, the applicant shall file with the Clerk of the Court, under oath, a Rule 55.1 Form 1 application. The application shall be accompanied by:

(1) A certificate signed by the licensing authority in each jurisdiction in which the applicant is admitted to practice law, and dated within the 30 days preceding submission of the application, stating that the applicant is (A) licensed to practice law, (B) in good standing, and (C) with respect to at least one jurisdiction, is an active member in good standing as required by Rule 55.1(a)(1);

(2) An affidavit in the form prescribed by Rule 55.1 Form 2 from an officer, principal, or partner of the Employer, other than the applicant, who attests that:

(A) the Employer's business is lawful and is other than the practice of law or the provision of legal services;

(B) the Employer has a place of business in Delaware where employees of the Employer regularly work;

(C) the applicant is employed by the Employer and provides legal services solely to the Employer, which can include its subsidiaries and affiliates, except as permitted by subsection (d)(6) of this Rule;

(D) the applicant will remain an active member in good standing at the bar of a court as required by Rule 55.1(a)(1); and

(E) the affiant or a successor will notify the Clerk of the Court upon the termination of the applicant's employment or upon becoming aware of any change in circumstances affecting the applicant's eligibility for a Rule 55.1 Certificate; and

(3) Payment of an application fee in the amount of \$250.

While the application is pending, the applicant may provide legal services to the Employer in this jurisdiction as if a Certificate had been obtained.

(c) *Review Procedure.*

- (1) The Clerk of the Court, with the assistance of a Supreme Court staff attorney, will conduct an initial review of the application and accompanying documents.
- (2) If the applicant's eligibility for a Rule 55.1 Certificate cannot be determined upon the initial review, the Clerk shall refer the matter to the Board of Bar Examiners (the "Board") for a recommendation on the applicant's eligibility. The Board may request from the applicant any additional information or documents reasonably necessary to determine the applicant's eligibility under this Rule.
- (3) The Board shall submit a written report to the Court with its recommendation and the basis for that recommendation regarding the applicant's eligibility for a Rule 55.1 Certificate. Within 15 days of the submission of that report, the applicant may submit a written response of no more than 5,000 words. Based on the application and accompanying documents, the Board's recommendation, and the applicant's response, the Court shall approve or deny the application.
- (4) If it is determined upon review under Rule 55.1(c)(1) or (3) that the applicant is eligible for a Rule 55.1 Certificate, the Clerk of the Court shall notify the applicant, and the applicant shall take and subscribe to the following oath or affirmation:

I will support the Constitution of the United States and the Constitution of the State of Delaware; I shall conduct myself strictly in accordance with the provisions of the Rules of the Delaware Supreme Court, including Rule 55.1; I will behave myself in the office of an In-House Counsel according to the best of my learning and ability and with all good fidelity as well to the Court as to the client; and I will use no falsehood nor delay any person's cause through lucre or malice.

After the applicant has taken and subscribed to the foregoing oath or affirmation and returned it to the Clerk, the Clerk shall issue a Rule 55.1 Certificate to the applicant. Such Certificate will authorize the lawyer to practice law as in-house counsel in Delaware as provided in this Rule.

(d) *Privileges and Responsibilities.* A lawyer holding a valid Rule 55.1 Certificate (an "Authorized In-House Counsel") is not a Member of the Delaware Bar but shall have some of the privileges and responsibilities otherwise applicable to Members of the Delaware Bar. Specifically, but without limitation, an Authorized In-House Counsel:

- (1) Is subject to (A) all rules governing the practice of law in Delaware and (B) the jurisdiction of the Supreme Court with respect to the lawyer's conduct in this or another jurisdiction to the same extent as members of the Delaware Bar. Jurisdiction of the Supreme Court shall continue whether or not the lawyer retains the Rule 55.1 Certificate and irrespective of the lawyer's continued presence in the state;
- (2) Shall fulfill the Supreme Court's requirements for continuing legal education or the requirements for continuing legal education of the jurisdictions in which the Authorized In-House Counsel is admitted to the bar;
- (3) Shall not appear in a Delaware court or otherwise engage in activities that would require a lawyer who is not admitted to the Delaware Bar to be admitted pro hac vice, unless permission to appear pro hac vice is granted;
- (4) Is authorized to provide legal services only to the Employer and its subsidiaries and affiliates, and not to its employees, directors, or officers;
- (5) May not hold out to the public that the lawyer is a member of the Delaware Bar or otherwise authorized to practice law in Delaware, other than on behalf of the Employer and as a Rule 55.1 Certificate holder;
- (6) Notwithstanding subsections (d)(3)-(5) of this Rule, an Authorized In-House Counsel may participate in

the provision of legal services pro bono publico in Delaware offered under the auspices of organized legal aid societies or state/local bar association projects, or provided under the supervision of a Member of the Delaware Bar who is also working on the pro bono representation.

(e) *Changes in Circumstances.*

(1) The Employer shall promptly provide written notification in the form prescribed by Rule 55.1 Form 3 to the Clerk of the Court upon the termination of the Authorized In-House Counsel's employment or upon becoming aware of any change in circumstances affecting the lawyer's eligibility for a Rule 55.1 Certificate.

(2) Each Authorized In-House Counsel shall promptly provide written notification in the form prescribed by Rule 55.1 Form 4 Part A to the Clerk of the Court of:

(A) any change in employment;

(B) any change in other circumstances affecting the lawyer's eligibility under this Rule;  
and

(C) the imposition of any public or private disciplinary sanction in any jurisdiction in which the lawyer has been admitted to the bar or otherwise authorized to practice.

(3) An Authorized In-House Counsel who has become employed by a different Employer, but who remains eligible under this Rule, may seek to transfer the certificate by filing with the Clerk of the Court within 90 days of their departure from the former Employer a Rule 55.1 Form 4 Part B accompanied by an affidavit from the new Employer that complies with Rule 55.1(b)(2).

(f) *Annual Registration.* On or before October 1, each Authorized In-House Counsel who received a Rule 55.1 Certificate before the preceding April 1 shall register with the Clerk's office, certify that the Authorized In-House Counsel continues to satisfy the requirements of Rule 55.1, and pay a \$100 fee.

(g) *Suspension and Termination.*

(1) A lawyer's Rule 55.1 Certificate shall be automatically terminated when:

(A) the lawyer fails to complete the registration and certification process as provided in subsection (f);

(B) the lawyer's employment by the Employer furnishing the affidavit required by this Rule is terminated, unless the lawyer's Certificate is transferred under Rule 55.1(e)(3);

(C) the lawyer is no longer an active member in good standing at the bar as provided in Rule 55.1(a)(1);

(D) the lawyer is suspended or disbarred for disciplinary reasons in any jurisdiction in which the lawyer has been admitted to practice; or

(E) the lawyer is admitted to the Delaware Bar.

(2) A lawyer whose Rule 55.1 Certificate has been terminated under subsections (g)(1)(A)-(C), but who is eligible for a Rule 55.1 Certificate, may reapply as provided in subsection (b). A lawyer whose Rule 55.1 Certificate has been terminated under subsection (g)(1)(D) may be considered for reinstatement in accordance with Rule 22 of the Delaware Lawyers' Rules of Disciplinary Procedure.

(3) The Court may suspend a lawyer's authorization to practice under Rule 55.1 if the lawyer fails to comply with any other provision of this Rule. After such suspension, the Court may terminate the Certificate after providing the lawyer with notice and an opportunity to show cause why the Certificate should not be terminated.

(h) The Court may adopt such additional regulations or procedures as needed to implement this Rule.

## **EXHIBIT B**

### **[PROPOSED] Rule 55.1 Comment**

In 2003, the Court amended Rule 5.5 of the Delaware Lawyers’ Rules of Professional Conduct (“DLRPC”), which governs the unauthorized practice of law, to adopt standards for multijurisdictional practice as set forth in Rule 5.5 of the Model Rules of Professional Conduct. DLRPC 5.5(b)(1) prohibits a non-Delaware lawyer—that is, a person who is licensed to practice law in another jurisdiction but not in Delaware—from establishing an office or other systematic and continuous presence in Delaware for the practice of law, except as authorized by the DLRPC or other law. DLRPC 5.5(d) provides two exceptions to that prohibition. One of those exceptions, set forth in DLRPC 5.5(d)(1), permits a non-Delaware lawyer, who is not disbarred or suspended from practice in any jurisdiction, to provide legal services in Delaware to the lawyer’s employer or its organizational affiliates, if the lawyer obtains a Delaware Certificate of Limited Practice as In-House Counsel (a “Rule 55.1 Certificate”) under Supreme Court Rule 55.1. The Court adopted Rule 55.1 in 2005 after considering the Model Rule for Registration of In-House Counsel drafted by the Council of the Section of Legal Education and Admission to the Bar of the American Bar Association.

By 2024, it became apparent that, although Rule 55.1 required a Certificate holder and the Certificate holder’s employer to notify the Court Clerk if the

Certificate holder's employment or other circumstances affecting eligibility under Rule 55.1 had changed, many had failed to do so. There were also an increasing number of applications for which the applicant and employer had no apparent connection to Delaware other than (1) the employer's status as an entity organized under Delaware law and (2) the employer's retention of a third-party registered agent located in Delaware. The Court confronted some of these issues in three cases relating to the termination or denial of Rule 55.1 Certificates in 2024. Thus, in November 2024, the Court appointed an advisory committee to examine Rule 55.1 and DLRPC 5.5 and consider whether any amendments to those rules were advisable.

The Court considered the advisory committee's recommendations and determined that the rules should be amended. The amendments restructure Rule 55.1 to reinforce the eligibility criteria for a Rule 55.1 Certificate and specify the procedure by which applications are reviewed. Consistent with DLRPC 5.5(b)(2), which prohibits a non-Delaware lawyer from holding out to the public or otherwise representing that the lawyer is admitted to practice law in Delaware, *see also* DLRPC 5.5 cmts. 4, 20-21, Rule 55.1(d)(5) provides that a Certificate holder "[m]ay not hold out to the public that the lawyer is a member of the Delaware Bar or otherwise authorized to practice law in Delaware, other than on behalf of the Employer and as a Rule 55.1 Certificate holder." To address the apparent failure of some Rule 55.1



Certificate holders to report changes in circumstances as required, the amendments add an annual registration requirement. Failure to complete the annual registration process will result in automatic termination of the Certificate.

Rule 55.1(a) sets forth the eligibility criteria for a Rule 55.1 Certificate. Subsections (a)(1) and (a)(2) address the status of the lawyer's non-Delaware licensure. The other eligibility criteria address the nature of the employer's business in Delaware; the lawyer's systematic and continuous presence in Delaware; and the relationship between the lawyer and the employer.

DLRPC Rule 5.5(d)(1) applies to lawyers who are employed to render legal services to an organizational client. As explained in comment 16 to that rule, in-house counsel's provision of legal services to the employer, without passing the Delaware Bar examination and submitting to the other requirements for admission to the Delaware Bar, "does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work." To ensure that an in-house counsel's practice remains within that limited and protected scope, Rule 55.1(a)(3) and (5) require that the non-Delaware lawyer is employed by the organizational client and, except in certain limited circumstances set forth in Rule 55.1(d)(6), provides legal services solely to the organizational employer. Thus, to be eligible for and to maintain a Rule 55.1 Certificate, the lawyer may not have clients other than the organizational employer

and its affiliates, with the limited exception set forth in Rule 55.1(d)(6). The rule does not prohibit the lawyer from having other employment that does not constitute the practice of law or the provision of legal services.

Under Rule 55.1(a)(3), the employer's business must be lawful and may not constitute the practice of law or the provision of legal services. The employer must also have a place of business in Delaware where employees of the entity regularly work. A third-party registered agent or a mail drop or other location that is not regularly staffed by employees of the entity does not satisfy this requirement.

Because DLRPC 5.5(d)(1) does not apply to a lawyer who does not have an office or other systematic and continuous presence in Delaware for the practice of law, Rule 55.1(a)(4) requires that the lawyer has an office or other systematic and continuous presence in Delaware for the practice of law for the lawyer's employer. This requirement relates to the lawyer's presence in Delaware for the practice of law. The lawyer is not required to reside in Delaware. Moreover, merely working at home in Delaware—whether in the lawyer's principal or secondary residence—for a company that does not have a place of business in Delaware does not constitute a “systematic and continuous presence in Delaware” for purposes of Rule 55.1, unless the lawyer meets in person with other employees or third parties at the home in the course of employment. An in-house counsel who does not have a systematic and continuous presence in Delaware is not required to obtain a Rule 55.1 Certificate

merely because the employer is organized under Delaware law and has a registered agent in Delaware. Rather, such lawyer should consider whether the lawyer's practice is authorized by some other provision of the DLRPC, such as DLRPC 5.5(c)(1)-(4). If the employer's sole place of business is in Delaware, the non-Delaware lawyer must obtain a Rule 55.1 Certificate, regardless of where the lawyer regularly works.