IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE DENIAL OF APPLICATION OF GEOFFREY POLK, ESQUIRE, FOR A CERTIFICATE OF LIMITED PRACTICE UNDER SUPREME COURT RULE 55.1	§ § § § §	No. 79, 2024

Submitted: August 23, 2024
Decided: October 22, 2024

Before **SEITZ**, Chief Justice; **VALIHURA** and **TRAYNOR**, Justices.

***PER CURIAM*:**

ORDER

Introduction

(1) In September 2023, Geoffrey Polk, Esquire, submitted an application for a Delaware Certificate of Limited Practice as in-house counsel under Supreme Court Rule 55.1. The application stated that Polk was an active member in good standing of the state bars of Illinois, Texas, Indiana, Maryland, and Florida, and of the bar of the District of Columbia Court of Appeals.[1] It also stated that Polk was "employed exclusively as legal counsel for the Presidential Title LLC whose business is other than the practice of law or the provision of legal services."[2] The employer affidavit that accompanied the application, which Polk signed as President

[1] Appendix to Opening Brief at A2. Polk included with his application certificates of good standing from each of those jurisdictions and the United States District Courts for the District of Maryland and the Northern District of Indiana. *Id.* at A7-16.
[2] *Id.* at A2.

of Presidential Title LLC, stated that Presidential Title's "principal place of business in Delaware" was "8 The Green, Ste A, Dover, DE 19901."[3] The affidavit further certified that Polk was "employed as a lawyer by Presidential Title LLC or one or more of its subsidiaries or affiliates whose business is other than the practice of law or the provision of legal services."[4]

(2) After communications between Polk and Court staff and the Office of Disciplinary Counsel ("ODC") regarding Polk's eligibility for a Certificate of Limited Practice, the application was denied on January 23, 2024.[5] The letter denying Polk's application (the "Denial Letter") explained the reasons for the denial as follows:

> Rule 55.1 requires, among other things, that an applicant submit an application certifying that he is employed exclusively by an entity whose business is other than the practice of law or the provision of legal services. An applicant must also submit an affidavit from an officer, principal, or partner of their employer providing the address of the employer's principal place of business in Delaware, attesting that "the applicant is employed as a lawyer to provide legal services exclusively to the Employer," and certifying that the employer's business is other than the practice of law or provision of legal services.
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> You signed both the application and the employer affidavit. According to the application, employer affidavit, and other information you have provided, you are the 100% owner of your employer, Presidential Title LLC, which has its principal place of business in Delaware at 8 The Green, Suite A, Dover, DE 19901. The Division of Corporations website shows that this is the address of Presidential

[3] *Id.* at A4.
[4] *Id.*
[5] *Id.* at A44-46.

> Title's registered agent; it therefore appears that this address is not a place of business of Presidential Title in Delaware.
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> Your role as in-house counsel for a Delaware entity that does not have a place of business in Delaware also does not satisfy the requirement that you be "employed in the state [Delaware] as a lawyer working exclusively for a for-profit or a non-profit corporation, association, or other organizational entity, which can include its subsidiaries and affiliates." Rule 55.1 does not, contrary to your contentions, contain a residency requirement. Rather, it requires you to be employed as in-house counsel in Delaware, a requirement that applies equally to residents and non-residents.
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> In addition, the website for Presidential Title LLC, www.presidentialtitlegroup.com, advertises its business as real estate closings. Under Delaware law, real estate closings involve the practice of law and must be done by a Delaware attorney. Because Presidential Title's business is the provision of legal services, your work for Presidential Title does not satisfy the Rule 55.1 eligibility requirement that you are "working exclusively" for an "entity . . . the business of which is . . . other than the practice of law or the provision of legal services." The nature of Presidential Title's business also brings into question whether your position conforms to the requirement that you are "employed as a lawyer to provide legal services exclusively to the Employer."
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> Your application for a certificate of limited practice under Rule 55.1 is denied. Your application fee will be reimbursed.[6]

(3) Polk challenges the denial of his application on three grounds. First, he contends that, to the extent that Rule 55.1 requires Polk to be a resident of Delaware, it violates the Privileges and Immunities Clause of the United States Constitution. Second, he argues that Rule 55.1's requirement that an applicant be "employed in the state" is unconstitutionally vague. Third, Polk asserts that the denial was improperly based on facts outside the four corners of his application and its

[6] *Id.* (alterations in original; citations omitted).

accompanying documents. After Polk filed his opening brief, the Court appointed an *amicus curiae* to file an answering brief in opposition to Polk's position.[7] After careful consideration, we conclude that Polk's application was properly denied.

Rules Governing Multijurisdictional Practice by In-House Counsel

(4) This Court has the inherent authority and duty to govern the practice of law in Delaware, including by establishing the requirements for authorization to practice, overseeing the standards of ethical practice, and preventing unauthorized practice.[8] Generally, before engaging in the practice of law in Delaware, a person must demonstrate "good moral character, learning and demonstrated competence"[9] by passing the Delaware bar examination, providing satisfactory evidence of character and fitness, and satisfying the other requirements of Supreme Court Rule 52. The supreme courts of other states regulate the practice of law in their respective jurisdictions. Unauthorized practice of law ("UPL") provisions, widely adopted across the United States beginning in the early twentieth century, "prohibit lawyers

[7] The Court expresses its appreciation to Richard A. Forsten, Esquire, and Devan A. McCarrie, Esquire, of Saul Ewing LLP, for their service to the Court.

[8] *Del. State Bar Ass'n v. Alexander*, 386 A.2d 652, 654 (Del. 1978); *In re Member of Bar*, 257 A.2d 382, 383 (Del. 1969); *Del. Optometric Corp. v. Sherwood*, 128 A.2d 812, 816-17 (Del. 1957).

[9] *In re Green*, 464 A.2d 881, 885 (Del. 1983). This is consistent with the traditional path to bar admission in other United States jurisdictions. *See* Am. Bar. Ass'n, Report of the Commission on Multijurisdictional Practice, at 7 (2002), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/intro_cover.pdf [hereinafter MJP Report] ("The traditional route to bar admission includes graduating from an accredited law school, passing the admitting state's bar examination, and satisfying the state's bar examiners that the applicant possesses the requisite character to practice law.").

from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law."[10] Historically, jurisdictional limitations on law practice did not present significant issues, "because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance."[11] In the latter half of the twentieth century, however, changing economic forces and technological advances drove an increase in cross-border legal practice, posing substantial challenges as to regulation of (i) out-of-state lawyers while they are in a jurisdiction in which they are not licensed and (ii) the provision of legal services by lawyers who are physically located in a jurisdiction where they are licensed, but whose legal services have effects in another jurisdiction.[12]

(5) In response to such concerns, the American Bar Association formed the Commission on Multijurisdictional Practice (the "ABA Commission") to study the issue and make policy recommendations to govern the multijurisdictional practice of law.[13] In 2002, the ABA Commission recommended, and the ABA House of Delegates adopted, amendments to Rule 5.5 of the Model Rules of Professional

[10] MJP Report, *supra* note 9, at 2.
[11] *Id.*
[12] Michael S. McGinnis, *Five Years Later: The Delaware Experience with Multi-Jurisdictional Practice*, 10 DEL. L. REV. 125, 125 (2008); *see also* MJP Report, *supra* note 9, at 2 (explaining that the wisdom of applying UPL laws to licensed lawyers "has been questioned repeatedly since the 1960s" in light of globalization, changes in clients' legal needs and the nature of law practice, and advancing technology).
[13] MJP Report, *supra* note 9, at 3.

Conduct, which governed unauthorized practice of law, to set forth standards for multijurisdictional practice.[14]

(6) This Court amended Rule 5.5 of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") to adopt the model rule's provisions for multijurisdictional practice, effective July 31, 2003.[15] Subparagraph (b) of DLRPC Rule 5.5 identifies two specific categories of activities in which a non-Delaware lawyer—that is, a person who is licensed to practice law in another jurisdiction, but not in Delaware—may not engage. It provides:

> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
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> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
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> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.[16]

Subparagraph (d) of DLRPC Rule 5.5 provides two exceptions to the prohibition on continuous presence of a non-Delaware lawyer.[17] It provides:

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[14] *Id.* at 5; Am. Bar. Ass'n Comm'n on Multijurisdictional Practice, Report 201B to the House of Delegates, at 1 (2002), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201b.pdf [hereinafter Report 201B]. The ABA House of Delegates adopted the Commission's recommendations on August 12, 2002. ABA Commission on Multijurisdictional Practice, About the Commission, https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/.

[15] McGinnis, *supra* note 12, at 126. *Compare* 2 DEL. RULES ANN. 86-87 (Michie 2003 ed.), *with* 2 DEL. RULES ANN. 103-06 (Michie 2004 ed.). Rule 5.5 has been amended since 2003; references to the Delaware rule are to the current version, unless otherwise indicated.

[16] DEL. L. R. PROF. COND. 5.5(b).

[17] *See id.* R. 5.5 cmt. 15 ("Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from

> (d) A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
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> (1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or
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> (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.[18]

Thus, DLRPC Rule 5.5(d)(1) allows "in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer" to have an office or other systematic or continuous presence in Delaware, without

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practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law . . . ."). In addition to the exceptions to the continuous-presence prohibition set forth in Rule 5.5(d), Rule 5.5(c) identifies circumstances in which a non-Delaware lawyer "may provide legal services on a temporary basis" in Delaware. Temporary practice is permitted when the legal services:

> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
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> (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
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> (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.

Id. R. 5.5(c); *see also In re Kingsley*, 2008 WL 2310289, at *3 (Del. June 4, 2008) ("Rule 5.5 of the Delaware Lawyers' Rules of Professional Conduct permits out-of-state lawyers to provide legal services in Delaware under four exceptions set forth in Rule 5.5(c) and two exceptions in Rule 5.5(d). Apart from these exceptions, Rule 5.5 prohibits a lawyer who is not admitted to practice in Delaware from establishing an office or having a 'systematic and continuous presence' in Delaware for the practice of law." (footnotes omitted)).

[18] DEL. L. R. PROF. COND. 5.5(d).

violating DLRPC Rule 5.5(b), if such lawyer complies with Supreme Court Rule 55.1.[19] In-house counsel's provision of legal services to his or her Delaware employer, without passing the bar and submitting to the other requirements for admission to the Delaware bar set forth in Supreme Court Rule 52, "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."[20]

(7) Supreme Court Rule 55.1, which this Court adopted effective December 1, 2005, sets forth the process for a non-Delaware lawyer to register as Delaware in-house counsel.[21] To be eligible for a Rule 55.1 "Certificate of Limited Practice," the applicant must be "admitted to the practice of law in a jurisdiction other than this state, of the United States" and "employed in the state as a lawyer working exclusively for a for-profit or a non-profit corporation, association, or other

[19] *Id.* R. 5.5 cmt. 16. Subparagraphs (c) and (d) of DLRPC Rule 5.5 do "not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions," and a lawyer who practices law under DLRPC Rule 5.5(c) or (d) "may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction." *Id.* R. 5.5 cmts. 20-21.

[20] *Id.* R. 5.5 cmt. 16.

[21] DEL. SUPR. CT. R. 55.1(a); *see* McGinniss, *supra* note 12, at 167-68 (discussing the promulgation of, and certain later amendments to, Rule 55.1). Many states impose registration requirements on lawyers practicing in such states under the in-house counsel provision of the states' versions of Model Rule 5.5(d). *See* Am. Bar Ass'n Section of Legal Education and Admissions to the Bar, Report to the House of Delegates (2008), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/in_house_registration.pdf (proposing model rule for in-house counsel registration). Links to charts cataloging and comparing the in-house counsel rules of various jurisdictions can be found at https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/.

organizational entity, which can include its subsidiaries and affiliates, the business of which is lawful and is other than the practice of law or the provision of legal services (hereinafter termed 'Employer')."[22] Rule 55.1(b) sets forth the application requirements, which include (i) filing under oath the Court's form application for the Certificate; (ii) furnishing certificates of good standing from each jurisdiction in which the applicant is admitted to practice law, at least one of which must demonstrate that the applicant is on active status in that jurisdiction; and (iii) filing an affidavit from an officer, principal, or partner of the Employer, who attests that the applicant is employed as a lawyer to provide legal services exclusively to the Employer, the applicant will remain an active member in good standing of another bar during the entire course of employment, the nature of the applicant's employment conforms to the requirements of this Rule, and the Employer shall notify the Supreme Court immediately upon the termination of the applicant's employment.[23]

[22] DEL. SUPR. CT. R. 55.1(a). The rule also permits applications by lawyers admitted to practice in foreign jurisdictions. *Id.* R. 55.1(a)(1).

[23] *Id.* R. 55.1(b)(1)-(3); *see also In re Hobi*, 2024 WL 3169114, at *1 (Del. June 25, 2024) ("To obtain his Certificate of Limited Practice, Hobi had to submit an application certifying that he was employed exclusively by an employer whose business was other than the practice of law or the provision of legal services. He also had to submit the affidavit of an officer of his employer identifying the employer's principal place of business in Delaware and certifying that Hobi was employed as in-house counsel and worked exclusively for the employer." (citations omitted)). The applicant must also certify that he or she has read and is familiar with the Delaware Lawyers' Rules of Professional Conduct and pay an application fee. DEL. SUPR. CT. R. 55.1(b)(4)-(5).

Rule 55.1 Does Not Violate the Privileges and Immunities Clause

(8) Polk's first argument is that, to the extent that Rule 55.1 requires him to reside in Delaware, it violates the Privileges and Immunities Clause of the United States Constitution.[24] In *Supreme Court of New Hampshire v. Piper*, the United States Supreme Court held that a New Hampshire rule that limited bar admission to residents of New Hampshire violated the Privileges and Immunities Clause.[25] As a result of *Piper* and later decisions striking down residency-based restrictions on state bar admission, all states (including Delaware)[26] have eliminated residency-based bar admission requirements.[27] For purposes of our analysis, we assume that requiring an applicant for, or holder of, a Certificate of Limited Practice to reside in Delaware would similarly run afoul of the Privileges and Immunities Clause. Rule 55.1 does not have a residency requirement, however, and Polk's argument that it violates the Privileges and Immunities Clause is unavailing.

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[24] *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). Under the Privileges and Immunities Clause, "the terms 'citizen' and 'resident' are used interchangeably." *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279 n. 6 (1985). "Under the Fourteenth Amendment, of course, '[a]ll persons born or naturalized in the United States . . . are citizens . . . of the State wherein they reside.'" *Id.* (alterations in original).

[25] 470 U.S. 274, 288 (1985); *see also Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (holding that rule that permitted out-of-state lawyers to be admitted to the Virginia bar "on motion" if they were permanent residents of Virginia violated the Privileges and Immunities Clause).

[26] *See In re Nenno*, 472 A.2d 815, 817 (Del. 1983) (stating that in 1982 Supreme Court Rule 52 provided that a person could not be admitted to the Delaware bar unless he or she was a bona fide resident of Delaware at the time of taking the bar examination and at the time of admission).

[27] *Tolchin v. Supreme Court of N.J.*, 111 F.3d 1099, 1112 (3d Cir. 1997).

(9) Polk does not point to any language in Rule 55.1 that purportedly constitutes a residency requirement, nor have we identified any such language. To the contrary, under the express terms of Rule 55.1, a Certificate of Limited Practice is available to a person who is "*employed* in the state as a lawyer."[28] One need not reside in Delaware to be employed here. As discussed above, Rule 55.1 provides a mechanism by which certain lawyers who are admitted in other jurisdictions—specifically, in-house corporate lawyers, government lawyers, and others who are employed to provide legal services exclusively to a single organizational entity—may establish "an office or other systematic and continuous presence in this jurisdiction for the practice of law" without violating DLRPC Rule 5.5(b).[29] Thus, the geographic focus of Rule 55.1 is on whether the lawyer is practicing law in Delaware on a systematic and continuous basis, not on where the lawyer resides.[30]

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[28] DEL. SUPR. CT. R. 55.1(a) (emphasis added).

[29] DEL. L. R. PROF. COND. 5.5(b), (d)(1), cmt. 16. To the extent that Polk is providing legal services that do not establish a systematic and continuous presence in Delaware but rather fall under the categories of more limited contact with Delaware that are permitted under DLRPC R. 5.5(c), a Rule 55.1 certificate is not required. *See, e.g.*, *id.* R. 5.5 cmt. 14 (providing examples of when services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted, including "when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each"); McGinniss, *supra* note 12, at 146 & n.89 (providing examples of multijurisdictional transactional work that falls within DLRPC Rule 5.5(c)(4)).

[30] After the Supreme Court Clerk informed Polk that he was not eligible for a Rule 55.1 certificate, Polk's request for further guidance was forwarded to ODC. Appendix to Opening Brief at 33-37. In addition to its investigatory, prosecutorial, and other roles as set forth in Supreme Court Rule 64, ODC "will provide informal, non-binding guidance to a lawyer regarding compliance" with professional conduct rules. Office of Disciplinary Counsel, Ethics Hotline for Lawyers, *at* https://courts.delaware.gov/odc/ethics.aspx. To the extent that ODC's response to Polk's inquiry

Rule 55.1 therefore "imposes identical requirements on residents and nonresidents alike."[31]

(10) Even "if a state statute or regulation imposes identical requirements on residents and nonresidents alike," however, it might still violate the Privileges and Immunities Clause if it has a "discriminatory effect on nonresidents."[32] In *Tolchin v. Supreme Court of New Jersey*, the United States Court of Appeals for the Third Circuit considered whether a New Jersey rule requiring that New Jersey lawyers maintain a bona fide office and attend continuing legal education ("CLE") courses in the state violated the Privileges and Immunities Clause. The court determined that the bona fide office and CLE requirements applied equally to residents and nonresidents and did not "impose a disproportionately heavy burden on nonresidents."[33] The same is true of Rule 55.1. To be eligible for a Rule 55.1

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suggested that a Rule 55.1 applicant or certificate holder must reside in Delaware, Appendix to Opening Brief at A36, that was not a correct statement of the eligibility requirements, for the reasons discussed in this order.

[31] *Tolchin*, 111 F.3d at 1111; *see also Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216, 224 (3d Cir. 2015) (holding that a rule allowing attorneys admitted to a reciprocal state's bar to be admitted to the Pennsylvania bar without taking the Pennsylvania bar exam "does not contravene Article IV's Privileges and Immunities Clause because it treats Pennsylvania residents no differently than out-of-state residents" and "inquires not into an applicant's state of residency, but rather, his or her state of bar membership").

[32] *See Tolchin*, 111 F.3d at 1111 ("If a state statute or regulation imposes identical requirements on residents and nonresidents alike and it has no discriminatory effect on nonresidents, it does not violate the Privileges and Immunities Clause. But when a challenged restriction deprives nonresidents of a privilege or immunity protected by this clause, it is invalid unless (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." (citation and internal quotations omitted).

[33] *Id.* at 1113.

Certificate of Limited Practice, the applicant must be employed in Delaware as a lawyer working exclusively for an organizational entity, regardless of where the applicant lives.[34] The rule therefore falls squarely within this Court's authority to regulate the practice of law in Delaware and does not violate the Privileges and Immunities Clause.

Rule 55.1 Is Not Unconstitutionally Vague

(11) Focusing on the provision in Rule 55.1 that an applicant must be "employed in the state," Polk also contends that the eligibility requirements are unconstitutionally vague. "A statute or rule that imposes a standard of conduct for the breach of which an individual will be held responsible must define the conduct with sufficient particularity to enable the person to make his or her conduct conform."[35] Rule 55.1 does not by itself impose a standard of conduct on a lawyer

[34] *Cf. id.* (explaining that the New Jersey bona fide office requirement similarly affected residents and nonresidents because "[r]esident and nonresident attorneys alike must maintain a New Jersey office"); *id.* (rejecting argument that CLE policy discriminated against nonresidents and stating: "a New Jersey resident may need to travel farther and longer than someone in New York City to get to a course site. In other words, the discrimination here is based on the inconvenience of course sites and not on residence status"); *cf. also Castille*, 799 F.3d at 225 (concluding that reciprocal bar admission rule did not treat Pennsylvania residents differently than out-of-state residents, and observing that "a Pennsylvania resident barred only in New Jersey would, like a New Jersey resident barred only in New Jersey, be unable to join the Pennsylvania bar by motion, because New Jersey is not a reciprocal state").

[35] *Crissman v. Del. Harness Racing Comm'n*, 791 A.2d 745, 747 (Del. 2002) (internal quotations and alteration marks omitted); *see also id.* ("Stated another way, 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'" (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

who does not hold a Rule 55.1 Certificate of Limited Practice.[36] Rather, DLRPC Rule 5.5 prohibits a lawyer from engaging in unauthorized practice and sets forth circumstances in which a non-Delaware lawyer's provision of legal services in Delaware is authorized, one of which is when the lawyer provides the services "to the lawyer's employer or its organizational affiliates" under DLRPC Rule 5.5 and Supreme Court Rule 55.1.[37] Thus, Polk's vagueness argument can succeed only if DLRPC Rule 5.5 and Supreme Court Rule 55.1, when read together, do not enable a licensed lawyer to determine whether his or her provision of legal services in Delaware is unauthorized.[38]

(12) The rules are sufficiently clear. DLRPC Rule 5.5 is based on the ABA model rule, which has been widely adopted and applied across the United States.[39]

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[36] The rule does impose certain obligations on lawyers who *do* hold Rule 55.1 certificates, such as complying with applicable CLE requirements and promptly reporting changes of circumstances. DEL. SUPR. CT. R. 55.1(e)(2), (f), (h). Obligations that arise after the issuance of a Certificate of Limited Practice are not at issue here.

[37] DEL. L. R. PROF. COND. 5.5(d)(1).

[38] Courts in numerous jurisdictions have applied the "licensed lawyer" standard when evaluating vagueness challenges to lawyer professional conduct rules. *See, e.g.*, *People v. Morley*, 725 P.2d 510, 516 (Colo. 1986) ("Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer."). *Accord Guerra v. Supreme Court of Tex.*, 1998 WL 870695, at *2 (5th Cir. Dec. 2, 1998); *In re Kleinsmith*, 409 P.3d 305, 311 (Colo. 2017); *In re Lerner*, 197 P.3d 1067, 1076 (Nev. 2008); *In re Crossen*, 880 N.E.2d 352, 379 n.45 (Mass. 2008); *Neb. ex rel. Counsel for Discipline of Neb. Supreme Court v. James*, 673 N.W.2d 214, 225 (Neb. 2004); *In re Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991); *In re Sekerez*, 458 N.E.2d 229, 236 (Ind. 1984).

[39] *See* Am. Bar Ass'n, State Implementation of ABA Model Rule 5.5 (2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.pdf (indicating that, as of May 16, 2016, the highest court in forty-six states and in the District of Columbia had adopted a rule identical or similar to ABA Model Rule 5.5, a

And, like Delaware, many of the states that have adopted Rule 5.5 have also adopted registration requirements for those seeking to practice under the in-house exception.[40] As discussed above, DLRPC Rule 5.5 prohibits a non-Delaware lawyer from establishing "an office or other systematic and continuous presence in this jurisdiction for the practice of law",[41] unless one of the exceptions in subparagraph (d) is satisfied. The prohibition is clear, and Polk offers no argument to the contrary.

(13) The rules also provide sufficient guidance to a licensed lawyer as to when he or she *may* provide legal services in this state without admission to the Delaware bar. For example, under subparagraph (c) of Rule 5.5, non-Delaware lawyers may provide a range of services on a "temporary" basis, including services that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[42] Such "[s]ervices may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time."[43] There are also two exceptions to the prohibition on non-Delaware lawyers' establishment of "an office or other systematic and

recommendation for adoption was pending in another state, and only three states were not considering adopting a multijurisdictional practice rule).

[40] *See supra* note 21 (discussing states' adoption of in-house counsel registration requirements).

[41] DEL. L. R. PROF. COND. 5.5(b)(1). A non-Delaware lawyer is also prohibited from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in this jurisdiction." *Id.* R. 5.5(b)(2).

[42] *Id.* R. 5.5(c)(4).

[43] *Id.* R. 5.5 cmt. 6.

continuous presence" in Delaware.[44] One of those exceptions is for in-house lawyers who are employed in Delaware by an organizational entity and work exclusively for that entity and its affiliates.[45]

(14) As to the in-house exception, "employed" and "working exclusively for" concern the relationship between the lawyer and the entity. Under the commonly understood meaning of the words, a lawyer is "employed" by an entity if the entity controls and directs the lawyer under an express or implied contract and pays the lawyer's salary or wages.[46] And the lawyer is "working exclusively for" the entity—that is, the lawyer is "in-house counsel"—if the entity (and its subsidiaries and affiliates) is the lawyer's only client.[47]

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[44] *Id.* R. 5.5 cmt. 15

[45] *Id.* R. 5.5(d)(1); DEL. SUPR. CT. R. 55.1(a).

[46] *Employer*, BLACK'S LAW DICTIONARY (pocket ed. 1996); *id. Employee*; *see also id. Employment* ("Work for which one has been hired and is being paid by an employer.").

[47] DEL. L. R. PROF. COND. 5.5(d)(1); DEL. SUPR. CT. R. 55.1(a); *see also Hobi*, 2024 WL 3169114, at *2-3 (discussing the dictionary meanings of "exclusive" and "exclusively;" stating that "there was simply no basis for Hobi to believe that he could be employed in Delaware as a lawyer working exclusively for Buchanan as required by Rule 55.1 while simultaneously providing legal services to individuals or entities other than Buchanan outside of Delaware;" and terminating Hobi's Rule 55.1 certificate); *In re Senerchia*, 2024 WL 3161007, at *1-2 (Del. June 25, 2024) (ordering surrender of Rule 55.1 certificate after ODC alleged that the non-Delaware lawyer was not eligible, and might never have been eligible, because he was "not employed in Delaware as a lawyer working exclusively for a company whose business is other than the practice of law or the provision of legal services," as he had been practicing law with a law firm in Rhode Island for approximately twenty years).

Rule 55.1 provides one exception to the sole-client requirement; the rule expressly permits a lawyer practicing in Delaware under Rule 55.1 to participate in pro bono work "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." DEL. SUPR. CT. R. 55.1(g).

(15) The requirement that the applicant be employed "in this state" relates to where the lawyer is practicing law. The lawyer is employed "in this state" within the meaning of Supreme Court Rule 55.1 if he or she "establish[es] an office or other systematic and continuous presence" in Delaware for the practice of law as provided in DLRPC Rule 5.5(b)(1).[48] The most traditional model of such presence was that of an in-house lawyer who was physically present in the employer's office in Delaware Monday through Friday each week. The multijurisdictional practice rules were adopted in recognition that the traditional model was changing, however, and the official comments observe that "[p]resence may be systematic and continuous even if the lawyer is not physically present here."[49] Thus, for example, an in-house lawyer might have a systematic and continuous presence in Delaware if the employer's legal department is located in Delaware and the lawyer works remotely from a home office in another state. In the foregoing examples, the lawyer is systematically and continuously present for work in Delaware for purposes of

[48] *See* DEL. L. R. PROF. COND. 5.5 cmt. 5 ("With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here."). In 2016, the ABA amended Model Rule 5.5 to permit a lawyer admitted in a jurisdiction outside the United States to practice as in-house counsel. The amended Model Rule repeats the "office or other systematic and continuous presence" language from Model Rule 5.5(b)(1) in Model Rule 5.5(d). Although Delaware amended DLRPC Rule 5.5(d) to extend in-house eligibility to foreign lawyers, our rule does not repeat the "office or other systematic and continuous presence" language in subparagraph (d). We do not see that repetition as necessary to understand the meaning of the rule. Nevertheless, the Court will refer DLRPC Rule 5.5 and Supreme Court Rule 55.1 to an advisory committee to study whether further amendments should be made.

[49] DEL. L. R. PROF. COND. 5.5 cmt. 4.

DLRPC Rule 5.5(d)(1) and Supreme Court Rule 55.1 because he works, physically or virtually, for the employer's place of business in the state. Indeed, Rule 55.1 requires an applicant to identify the work location in Delaware by supplying an affidavit from "an officer, principal, or partner of the applicant's[] Employer" identifying the employer's "principal place of business in Delaware."[50] Polk's argument that Rule 55.1 is void for vagueness is unavailing.[51]

Polk's Application Was Properly Denied

(16) Polk's application was inconsistent with the conclusion that he was "employed in the state as a lawyer working exclusively for a for-profit or a non-profit . . . entity . . . , the business of which is lawful and is other than the practice of law or the provision of legal services."[52] We therefore affirm the denial of his application.

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[50] *See* DEL. SUPR. CT. R. 55.1(b)(3) & Form 4 (requiring the applicant to file an "affidavit on a form furnished by the Supreme Court, from an officer, principal, or partner of the applicant's[] Employer" attesting to various statements, including the address of the employer's "principal place of business in Delaware").

[51] Polk's inquiries in his briefing regarding how much he would need to increase his presence in Delaware in order to obtain a Rule 55.1 Certificate of Limited Practice miss the point. DLRPC Rule 5.5(d)(1) and Supreme Court Rule 55.1 provide an in-house counsel who is not admitted to the Delaware bar and has a systematic and continuous presence in Delaware with a safe harbor from discipline for the unauthorized practice of law. To be clear, the record does not reflect—and Polk does not assert—that court staff or ODC suggested to Polk that he has engaged in the unauthorized practice of law in Delaware. Based on the limited statements in Polk's briefing regarding his practice, it appears likely that his activities are more properly viewed under the exception provided in DLRPC Rule 5.5(c)(4) than under DLRPC Rule 5.5(d)(1).

[52] DEL. SUPR. CT. R. 55.1(a).

(17) First, nothing in application supported the conclusion that Polk was employed by Presidential Title "in the state" of Delaware, and the information that Polk provided was inconsistent with that conclusion. The employer affidavit stated that Presidential Title was a limited liability company organized under Delaware law and identified Presidential Title's principal place of business in Delaware as 8 The Green, Suite A, Dover, DE 19901.[53] Because the publicly available records of the Delaware Division of Corporations showed that address—the only Delaware address provided in the application materials[54]—was the address of Presidential Title's registered agent, the Denial Letter concluded that Presidential Title did not have a place of business in Delaware.

(18) Polk does not contend that Presidential Title has a place of business in Delaware. Rather, he argues that the Denial Letter improperly relied on "evidence" outside the four corners of his application package in reaching the conclusion that it does not.[55] He cites no authority for the proposition that Court staff or the Arms of Court[56] cannot review publicly available information—including Division of

[53] Appendix to Opening Brief at A4.
[54] Aside from the Delaware address in the employer affidavit, Polk supplied home and work addresses in Illinois. *Id.* at A1.
[55] Opening Brief at 15-16. In his reply brief, Polk also argues that Rule 55.1 does not require that Presidential Title have a place of business in Delaware. As explained herein, Rule 55.1 does require that the employing entity have a place of business in Delaware.
[56] The opening appendix reflects that Polk had communications regarding his application with the Supreme Court Clerk; Chief Disciplinary Counsel; and the Supreme Court Chief Staff Attorney, who purportedly issued the Denial Letter "on behalf of the Delaware Board of Bar Examiners." Opening Brief at 1. Although Rule 55.1 is located in a subpart of this Court's rules titled "Board

Corporations records and Presidential Title's own website—when considering an application for a Certificate of Limited Practice. Moreover, Polk had ample opportunity while his application was pending to demonstrate that the inference that Presidential Title did not have a place of business in Delaware was incorrect, but he did not do so. Rather, he acknowledged that there was not an office in Delaware.[57] We are not persuaded that Polk's application was erroneously denied on this basis.

(19) Second, the Denial Letter concluded that Polk's work for Presidential Title did not satisfy the requirement that he was "working exclusively" for an "entity . . . the business of which is . . . other than the practice of law or the provision of legal services" because Presidential Title's website indicated that the company was in the business of real estate closings.[58] Polk argues that the Denial Letter reached that conclusion by improperly relying on information outside the four corners of his application materials, and that the Court should therefore "strike" that portion of the

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of Bar Examiners," the rule does not explicitly identify who reviews an application for a Certificate of Limited Practice. Rule 55.1 is intertwined with DLRPC Rule 5.5, the enforcement of which is in ODC's purview. The Court will ask an advisory committee, *supra* note 48, to evaluate whether Rule 55.1 should be amended to expressly assign review of Rule 55.1 applications to BBE or ODC.

[57] *See* Appendix to Opening Brief at A33-34 (Dec. 5, 2023 email from Supreme Court Clerk to Polk stating that it appeared that the address provided was a registered agent and that the employer did not appear to have a place of business in Delaware); *id.* at A35-43 (communications from Dec. 5, 2023, to Jan. 17, 2023, including statements such as, "I would be happy to open an office within the state were the statute [sic] to require it").

[58] Appendix to Opening Brief at A45-46 (quoting DEL. SUPR. CT. R. 55.1(a)) (alterations in original); *see also id.* at A46 ("The nature of Presidential Title's business also brings into question whether your position conforms to the requirement that you are 'employed as a lawyer to provide legal services exclusively to the Employer.'"). As explained in the Denial Letter, under Delaware law "several aspects of a real estate closing . . . constitute the practice of law." *In re Mid-Atl. Settlement Servs., Inc.*, 2000 WL 975062 (Del. May 31, 2000).

Denial Letter.[59] As discussed above, Polk cites no authority for the proposition that Court staff or the Arms of Court cannot review publicly available information when considering an application for a Certificate of Limited Practice.[60] We therefore decline Polk's request that we reject the Denial Letter's conclusion that Polk was not working exclusively for an entity the business of which was other than the practice of law or the provision of legal services.[61]

(20) For all these reasons, we conclude that Polk's application for a Certificate of Limited Practice under Supreme Court Rule 55.1 was properly denied. Polk may reapply if his circumstances change. The Court will refer consideration of amendments to Rule 55.1 to an appropriate committee, as discussed herein.

IT IS SO ORDERED.

[59] Opening Brief at 16.
[60] *Supra* at 19-20.
[61] In his reply brief, Polk asserts that the nature of his practice and Presidential Title's business comply with the rule. The record before us as to this issue is limited. Nevertheless, we approve the denial based on our conclusions that Polk's application did not support a determination that he was employed in the state and that he has not shown that Court or Arms of Court staff could not consider publicly available information outside the four corners of Polk's application package. We note that two separate elements of the eligibility requirements appear to be at issue, however: the first is the requirement that Polk is working "exclusively" for Presidential Title, and the second is that Presidential Title's business is "other than the practice of law or the provision of legal services." Thus, for Polk to be eligible under Rule 55.1, Presidential Title cannot be engaged in the practice of law or the provision of legal services *and* Polk cannot be working for an employer or clients other than Presidential Title.