SPECIAL COMMITTEE ON MULTI-JURISDICTIONAL PRACTICE

KLAUS EPPLER
Chair
Proskauer Rose LLP
1585 Broadway
New York, NY 10036
212/969-3245
FAX 212/969-2900
keppler@proskauer.com

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FURTHER REPORT OF THE NYSBA SPECIAL COMMITTEE ON MULTI-JURISDICTIONAL PRACTICE*

I. On June 22, 2002, the NYSBA House of Delegates approved supporting the ABA Commission on Multi-Jurisdictional Practice 's recommendations regarding Rule 5.5 of the Model Rules with an amendment to the opening sentence of proposed amended Model Rule 5.5(c) which would substitute "not in violation of Paragraph (b) of this Rule" for "on a temporary basis". The ABA House of Delegates on August 12, 2002 approved its Commission's recommendation relating to Rule 5.5 without the amendment supported and approved by the NYSBA House of Delegates. Since the ABA's House of Delegates' action, several states have adopted MJP provisions and in a number of states proposals to adopt the ABA's proposed Model Rule are in various stages of adoption. While we are aware that the Committee on Standards of Attorney Conduct has embarked on a comprehensive review of the Model Rules of Professional Conduct for possible adoption in New York, including the provisions relating to multi-jurisdictional practice recently approved by the ABA House of Delegates, we believe that if the version of the Model Rule approved by the NYSBA House of Delegates is to have any chance of becoming the standard for permissible multi-jurisdictional practice in the United States, New York should adopt the version approved by the NYSBA House of Delegates as soon as possible.

As recommended by the ABA, proposed Rule 5.5(b) would prohibit lawyers from establishing in a jurisdiction in which the lawyer is not admitted "an office or other systematic and continuous presence in this jurisdiction for the practice of law" and from holding out to the public or otherwise representing that the lawyer is admitted to practice law in such jurisdiction. Proposed Rule 5.5(c) would authorize lawyers to provide certain legal services as described in four subparagraphs "on a temporary basis". Since the commentary which accompanies the proposed amended rule makes it clear that the "the line between the 'temporary' practice of law and the 'regular' or 'established' practice of law is not a bright one", lawyers would be at risk of disciplinary action in jurisdictions in which they are not admitted if activities that do not involve establishing "an office or other systematic and continuous presence" may be deemed more than "temporary". The New York version of Rule 5.5 would eliminate this unacceptable middle category.

As the nation's premier commercial and legal center, New York should be in the forefront of adopting rules which recognize the realities of current multi-jurisdictional practice and which

* The Special Committee on Multi-Jurisdictional Practice is solely responsible for the contents of this report. It does not represent the position of the New York State Bar Association unless and until adopted by the House of Delegates.

foster such practice. Permitting a lawyer admitted in another U.S. jurisdiction who has not established an office or other systematic and continuous presence in New York to provide legal services in New York that do not create unreasonable risk to the interests of clients, the public or the courts is likely to enhance the position of New York as a legal center and to improve lawyers' abilities to meet client needs more effectively and efficiently.

Accordingly, we propose that the Disciplinary Rules in the New York Code of Professional Responsibility be amended to add to DR 3-101 (which currently has two paragraphs, lettered A and B) the following additional paragraphs:

C. A lawyer who is not admitted to practice in this state shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this state for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this state.

D. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services not in violation of DR 3-101(C) in this state that:

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

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within DR 3-101(D)(2) or (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.

E. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this state that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this state.

II. The ABA's recommendations with respect to the amendment of Rule 5.5 of the ABA Model Rules includes 21 comments. Paragraph (4) of proposed DR 3-101(D) authorizes legal services in the jurisdiction in which the lawyer is not admitted that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice". The ABA's Comment ¶14 lists a variety of factors that may evidence such a relationship and concludes that, "[i]n addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law". This leaves in uncertain limbo a large number of specialized practices which provide services on a multi-jurisdictional basis where the lawyer's expertise is not based on the bodies of law enumerated in the commentary. Recognizing this, the NYSBA House of Delegates when it approved supporting the ABA's recommendations did so with an amendment to the last sentence of Comment ¶14 of the ABA's comments to substitute "a particular area of practice or body of law, including federal, nationally-uniform, foreign or international law" for "a particular body of federal, nationally-uniform, foreign, or international law".

Several of the ABA's 21 comments had language which is inappropriate if the "on a temporary basis" phrase is eliminated. The New York version of Comment ¶14 (now EC 3-20) would make it clear that any specialized area of practice or any body of law may be the basis of the expertise out of which the lawyer's services arise or to which they are related.

In connection with the amendment of DR 3-101 adding Paragraphs C, D and E, the following should be added to the New York Code of Professional Responsibility as new ECs 3-10 through EC 3-24: (The first sentence of the ABA's Comment ¶2 and some additional language have been deleted; the phrase "on a temporary basis" has been eliminated from ABA Comments ¶¶5; 9, 11, 12 and 14 and language regarding systematic and continuous presence has been inserted where appropriate; and Comment ¶6 has been eliminated.)

> EC 3-10 A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. DR 3-101(A) and (B) apply to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. DR 3-101 does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.
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> EC 3-11 A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

EC 3-12 Other than as authorized by DR 3-101 or by law, a lawyer who is not admitted to practice generally in this state violates DR 3-101(C) if the lawyer establishes an office or other systematic and continuous presence in this state for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this state.

EC 3-13 There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this state under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. DR 3-101(D) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of DR 3-101(E)(1) and (2), DR 3-101 does not authorize a lawyer to establish an office or other systematic and continuous presence in this state without being admitted to practice generally here.

EC 3-14 DR 3-101(D) and (E) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in DR 3-101(D) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

EC 3-15 DR 3-101(D)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this state. For DR 3-101(D)(1) to apply, however, the lawyer admitted to practice in this state must actively participate in and share responsibility for the representation of the client.

EC 3-16 Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under DR 3-101(D)(2), a lawyer does not violate this Disciplinary Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this state requires a lawyer who is not admitted to practice in this state to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this DR 3-101 requires the lawyer to obtain that authority.

EC 3-17 DR 3-101(D)(2) also provides that a lawyer rendering services in this state without a systematic and continuous presence in this state does not violate DR 3-101 when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct in this

state without a systematic and continuous presence in this state in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this state. When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, DR 3-101(D)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

EC 3-18 DR 3-101(D)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services in this state without a systematic and continuous presence in this state if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this state or in 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. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

EC 3-19 DR 3-101(D)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services in this state without a systematic and continuous presence in this state that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within DR 3-101(D)(2) or (3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

EC 3-20 DR 3-101(D(3) and (4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise 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. In addition, the services may draw on the lawyer 's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular area of practice or body of law, including federal, nationally-uniform, foreign or international law.

EC 3-21 DR 3-101(E) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this state for the practice of law as well as provide legal services in this state without a systematic and continuous presence in this state. Except as provided in DR 3-101(E)(1) and (2)), a lawyer who is admitted to practice law in another

jurisdiction and who establishes an office or other systematic or continuous presence in this state must become admitted to practice law generally in this state.

EC 3-22 DR 3-101(E)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. DR 3-101(E)(1) applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and 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. If an employed lawyer establishes an office or other systematic presence in this state for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

EC 3-23 DR 3-101(E)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. A lawyer who practices law in this state pursuant to DR 3-101(D) or (E) or otherwise is subject to the disciplinary authority of this state.

EC 3-24 In some circumstances, a lawyer who practices law in this state pursuant to DR 3-101(D) or (E) may have to inform the client that the lawyer is not licensed to practice law in this state. For example, that may be required when the representation occurs primarily in this state and requires knowledge of the law of this state. DR 3-101(D) and (E) do not authorize communications advertising legal services to prospective clients in this state by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this state is governed by DR 2-101 through 2-105.

III. The ABA has recommended an amendment to Model Rule 8.5 to provide that when a lawyer provides or offers to provide legal services in a jurisdiction in which the lawyer is not admitted, the lawyer should become subject to the disciplinary authority of that jurisdiction as well as the jurisdiction in which the lawyer is admitted to practice. The ABA recommendations also include a choice of law provision. We believe that expanding New York's authority to discipline lawyers not admitted in this State but providing or offering to provide legal services pursuant to the amendments described above is appropriate. Accordingly, we propose DR 1-105 be amended to read as follows:

DR 1-105 Disciplinary Authority and Choice of Law

(A) Disciplinary Authority. A lawyer admitted to practice in this state is subject to the disciplinary authority of this state, regardless of where the lawyer's conduct

occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this state if the lawyer provides or offers to provide any legal services in this state. A lawyer may be subject to the disciplinary authority of both this state and another jurisdiction for the same conduct.

(B) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

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

(2) For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer 's conduct will occur.

The following is a version of the proposed amendments to DR 1-105, marked to show changes from the current text. Suggested additions are underscored; suggested deletions are overstricken:

DR 1-105 Disciplinary Authority and Choice of Law.

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

B. In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a ~~proceeding in~~ matter pending before a ~~court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding),~~ tribunal, the rules ~~to be applied shall be the rules~~2 of the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the ~~court~~ tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

~~a. If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and~~

~~b. If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally~~

~~practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.~~

IV. In connection with the amendment of DR 1-105, the following comments to ABA Model Rule 8.5, should be added to the New York Code of Professional Responsibility as new ECs 1-19 through EC 1-22: (The ABA's first comment contains a sentence to the effect that a lawyer subject to the disciplinary authority of this state appoints an official to receive service of process. That sentence has been omitted from EC 1-19 as ineffective for a New York EC. If deemed appropriate, it would need to be added to DR 1-105.)

EC 1-19 It is longstanding law that the conduct of a lawyer admitted to practice in this state is subject to the disciplinary authority of this state. Extension of the disciplinary authority of this state to other lawyers who provide or offer to provide legal services in this state is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of DR 1-105. The fact that the lawyer is subject to the disciplinary authority of this state may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

EC 1-20 A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction. DR 1-105(B) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

EC 1-21 DR 1-105(B)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of professional conduct of that tribunal. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, DR 1-105(B)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction. When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct

will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under DR 1-105.

EC 1-22 If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying DR 1-105 or its counterpart, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules. The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.