

**PROPOSED AMENDMENTS TO THE NEW YORK CODE OF
PROFESSIONAL RESPONSIBILITY
APPROVED BY THE HOUSE OF DELEGATES OF THE
NEW YORK STATE BAR ASSOCIATION ON JUNE 21, 2003***

I. Amend the Disciplinary Rules in the New York Code of Professional Responsibility to add to DR3-101 the following paragraphs:

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

(1) 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 in or reasonably related to a proceeding described in DR 3-101(D)(2) or (3) and arise out of or are reasonably

* The amendments contained herein are not binding on attorneys practicing in the State of New York unless and until adopted by the Appellate Division of State Supreme Court.

related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

E. Notwithstanding DR3-101C(1), 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 from an office or by maintaining any other systematic and continuous presence in this state if those services:

(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. Amend the New York Code of Professional Responsibility to add the following Ethical Considerations as EC3-10 through EC3-24:

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.

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. A lawyer who provides services in this state on a recurring basis, or for an extended period of time, as when representing a client in a single lengthy negotiation or litigation, does not necessarily have a systematic and continuous presence in this state for purposes of DR3-101(C).

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. Amend DR1-105 of the New York Code of Professional Responsibility 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.

IV. Amend the New York Code of Professional Responsibility to add the following Ethical Considerations as EC 1-19 through EC 1-22:

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.