CONTACT
MARIA CILENTI
SENIOR POLICY COUNSEL
212.382.6655 | mcilenti@nycbar.org

REPORT BY THE PROFESSIONAL DISCIPLINE COMMITTEE, PROFESSIONAL ETHICS COMMITTEE AND PROFESSIONAL RESPONSIBILITY COMMITTEE

COMMENTS ON PROPOSED NEW SECTION 523 OF THE RULES OF THE COURT OF APPEALS AUTHORIZING THE TEMPORARY PRACTICE OF LAW IN NYS BY OUT-OF-STATE AND FOREIGN ATTORNEYS

The New York State Office of Court Administration has requested comments on Proposed New Section 523 of the Rules of the Court of Appeals Authorizing the Temporary Practice of Law in New York by Out-of-State and Foreign Attorneys (the "Proposed Rule") as set forth in the Memorandum from John W. McConnell dated September 4, 2015 and subsequently amended September 21, 2015 (the "Memorandum"). The New York City Bar Association (the "City Bar") supports this proposal for the reasons set forth herein.

WHY WE SUPPORT THE PROPOSED RULE

As the City Bar noted in its endorsement of a similar proposal in 2012, law practice has becoming increasingly national and global.[1] New York is a center of global commerce, yet it is one of only a handful of states that have not adopted rules permitting temporary practice. Adoption of the Proposed Rule will bring New York into line with the overwhelming majority of other jurisdictions that permit temporary practice by out-of-state lawyers.[2]

The types of activities permitted under the Proposed Rule are limited in scope, rendered either in association with a lawyer admitted to practice in this state or in connection with a proceeding or the lawyer's practice in another jurisdiction in which the lawyer is admitted. A lawyer engaged in temporary practice would be subject to the New York Rules of Professional Conduct and the disciplinary authority of the relevant Appellate Division. These requirements provide an added safeguard for the public and are preferable to the current situation where an out-of-state lawyer may be engaging in practice in New York but not be subject to any disciplinary authority here.

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[1] *See* Report of the New York State Bar Association, The New York City Bar Association, The New York County Lawyers' Association, June 15, 2012, which the City Bar again endorses. *Available at* http://www.nysba.org/workarea/DownloadAsset.aspx?id=34067.

[2] At least 46 jurisdictions have adopted rules permitting temporary practice by out-of-state lawyers. *See* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

Further, adoption of the Proposed Rule will clarify the circumstances in which out-of-state lawyers may lawfully provide temporary legal services in the State. New York, like other U.S. jurisdictions, regulates the practice of law through an admissions requirement and through various provisions of the Judiciary Law that prohibit the unauthorized practice of law ("UPL"). Specifically, Section 485 of the Judiciary Law makes violation of certain UPL restrictions a misdemeanor while Section 485-a makes violations of certain UPL restrictions a Class E felony. However, like most other U.S. jurisdictions, New York does not define what constitutes the "practice of law in New York." Thus, it is often difficult, if not impossible, for a lawyer to determine whether she is engaged in UPL. For example, in an era when virtual law practice is on the rise, is an out-of-state lawyer "practicing law in New York" when, while on vacation in the State, she advises a client in Hawaii on a Hawaiian transaction? And does the analysis change if that lawyer briefly discusses with the client whether New York law may apply to the transaction?[3]

Given that New York currently criminalizes UPL, and, in addition, that it is a violation of Rule 5.5(b) of the New York Rules of Professional Conduct for a lawyer licensed to practice in New York to "aid a nonlawyer in the practice of law," the Proposed Rule will provide an explicit safe harbor for temporary practice protecting not only out-of-state lawyers, but also New York lawyers who regularly or periodically work with them in the state. At the moment, lawyers who engage in activity which *might possibly be construed* as the practice of law in New York do so at the risk of being prosecuted. Although there is no trend of such prosecution, New York, as a true center for global commerce should not invite visiting lawyers to rely on an "implied safe harbor" in order to risk such activity but, rather, should provide them (and by extension their clients, and the New York lawyers with whom they associate) with an explicit safe harbor for temporary practice.[4]

SUGGESTED AMENDMENTS TO THE PROPOSED RULE

Although we endorse the Proposed Rule as written, we have the following suggested amendments:

(1) We propose changing "and" to "or" in the first line of the Proposed Rule so that it will read "[a] lawyer "admitted or authorized to practice law …." Certain jurisdictions permit (and thereby "license") lawyers to practice in their jurisdiction without formal admission procedures.[5] So if, for example, a French lawyer is

[3] Even more confusing – some activities seem to be treated as the practice of law when performed by a lawyer (for example, assistance with a tax issue) yet nonlawyers are permitted to perform such services without being deemed to engage in UPL.

[4] The Proposed Rule provides an additional benefit for New York lawyers to the extent that reciprocity is required for temporary practice in another jurisdiction. *See* Conn. R.P.C. 5.5(c) (permitting temporary practice only for lawyers admitted in another U.S. jurisdiction "which accords similar privileges to Connecticut lawyers in its jurisdiction.").

[5] *See, e.g.*, N.Y. State 815 (2007) ("A New York lawyer who is permitted by the law of a foreign jurisdiction to engage in conduct in a foreign jurisdiction that would constitute the practice of law if undertaken in New York, even though the lawyer is not formally admitted to practice law, is "licensed to practice" in that jurisdiction").

permitted by the United Kingdom to assist with a transaction of UK focus, we believe that if that transaction gives rise to a New York issue, such temporary practice in New York would merit protection as well.

(2) For the same reason, we propose adding "or authorized" after "admitted" in sections (c) and (d).

(3) In section (c), we propose deleting "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and." Courts in New York have recognized that participation in arbitration or other alternative dispute resolution procedures by an out-of-state lawyer should not be deemed UPL.[6] The suggested change will clarify that the Proposed Rule is not intended to limit this principle.

RESPONSES TO THE FIVE ISSUES HIGHLIGHTED BY THE OFFICE OF COURT ADMINISTRATION

The Office of Court Administration asked for responses to five specific questions. The City Bar considered these issues and has the following responses:

1. Should there be a definition of "temporary practice", and, if so, what definition?

New York has not comprehensively defined the temporary "practice of law in New York", and the City Bar does not believe it is feasible to attempt to define all circumstances that would constitute the "temporary practice" of law under the Proposed Rule. We believe the concepts are so complex and varied that any attempt to incorporate an all-inclusive definition would likely derail the larger purpose of the Proposed Rule. It is better left to the courts and other tribunals to define incrementally as questions arise. To the extent that some guidance is necessary, because the Proposed Rule is very similar to ABA Model Rule of Professional conduct 5.5, we recommend that the relevant Comments to ABA Model Rule 5.5 be considered when interpreting the Proposed Rule. This will serve the underlying purpose of the Proposed Rule by helping clarify for tribunals and attorneys the circumstances in which out-of-state lawyers may lawfully provide temporary legal services in New York.

2. Should there be a registration requirement?

The City Bar weighed the benefits and burdens of a registration requirement and concluded that it is not necessary. We are aware that some other jurisdictions have implemented additional registration requirements by out-of-state lawyers temporarily practicing in such jurisdictions.[7]

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[6] *See Prudential Equity Group, LLC v Ajamie*, 538 F. Supp. 2d 605 (S.D.N.Y. 2008); *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982).

[7] *See e.g.*, Rule 1-3.11 of the Rules Regulating The Florida Bar, requiring out-of-state lawyers appearing in domestic arbitrations to, *inter alia*, file a registration statement with The Florida Bar and pay a fee; Rule 404(l) of the South Carolina Appellate Court Rules, requiring the out-of-state lawyer to, inter alia, file a verified statement with the South Carolina Supreme Court Office of Bar Admissions and pay a fee; and Rule 1.2 of the Rules of Practice of the

These requirements, however, appear to us to be burdensome for out-of-state lawyers and are not supported by compelling evidence that the registration requirements actually assure increased compliance with temporary practice obligations. We believe that a registration requirement would result in time-consuming paperwork with little benefit and cut against the goal of "seamless" multi-jurisdictional practice.

3. Should there be procedures to assure fulfillment of disciplinary responsibilities?

No. We believe that the Proposed Rule, together with existing disciplinary procedures, is sufficient to enforce compliance with temporary practice obligations. In particular, we note that Proposed Rule Section 523.3 provides that a lawyer practicing in New York pursuant to the Rule is subject to the New York Rules of Professional Conduct and to the New York disciplinary authorities. Thus, a complaint made to the New York disciplinary authorities regarding a lawyer admitted in another state, but not New York, may be adjudicated in New York, or referred to disciplinary authorities in such lawyer's jurisdiction of admission.

Further, for out-of-state lawyers who seek to practice temporarily before a New York tribunal, the tribunal itself may regulate the lawyer's temporary practice through its *pro hac vice* procedures and as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Accordingly, we do not believe that there should be additional procedures implemented in New York to assure fulfillment of disciplinary responsibilities.

4. Should the rule apply to candidates applying for admission to the NY Bar? **If so, how?**

A good case could be made for providing a safe harbor for such candidates in certain circumstances but perhaps this issue should be left for a separate initiative and analysis.

5. Should the rule apply to registered in-house counsel and licensed legal consultants?

Registered in-house counsel and licensed legal consultants should be included if they qualify under the Proposed Rule.

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The City Bar strongly supports the Proposed Rule. It will provide clarity to lawyers and clients while enabling New York to discipline and regulate those out-of-state lawyers engaged in the temporary practice of law in New York. Further, it will underscore and enhance New York's role as a leading global center and enable it to join the ranks of the 46 U.S. jurisdictions that

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Supreme Court of Ohio, requiring out-of-state attorneys seeking permission to appear *pro hac vice* in an Ohio proceeding to first register with the Supreme Court Office of Attorney Services and pay a fee

permit the temporary practice of law within their borders. We urge adoption of the Proposed Rule.

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