New York State Bar Association

Committee on Professional Ethics

Opinion 814 – 3/3/08 **(Revised and Reissued)**	Topic:	Supervision of a branch office managed by a non-partner.
Overrules: N.Y. State 175	Digest:	In N.Y. State 175 (1971), this Committee opined that the New York Lawyer's Code of Professional Responsibility permitted a multi-state firm to practice in New York under a firm name that included names of non-New York lawyers only if the firm had an active partner admitted in New York. In *New York Criminal and Civil Courts Bar Association v. Jacoby & Meyers*, decided in 1984, the New York Court of Appeals reached the same conclusion under the New York Judiciary Law. In this opinion, we re-examine the question under the Code based on intervening Code amendments and developments in legal practice. In our view, the Code now permits the New York office of a multi-state law firm to be staffed solely by a non-partner lawyer who is admitted to practice in New York where the non-partner lawyer is supervised by an out-of-state partner who is licensed in another state but not in New York.
	Code:	DR 1-104(A), (C); DR 2-102(D); DR 2-106; DR 4-101; DR 5-105(E); DR 6-101; DR 9-102; EC 1-8; EC 2-28.

QUESTION

1. May the New York office of a multi-state firm be staffed solely by a non-partner who is admitted in New York, where the non-partner is supervised by an out-of-state partner who is admitted in another state, but not in New York?

OPINION

2. A lawyer admitted to practice in New York State is contemplating becoming an associate or of counsel to what will be a two-person law firm, with offices in New York and New Jersey. The New York attorney will be paid a salary and will work out of and manage the New York office, but will not share in the overall profits and liabilities of the law firm. The firm will practice in the name of the New Jersey attorney, who is not admitted in New York.

This Committee's Opinion in N.Y. State 175

3. In N.Y. State 175 (1971), this Committee addressed whether a multi-state law firm could use for its New York office a name composed of the names of one or more partners who are not admitted to practice in New York. We noted that before New York adopted the Lawyer's Code of Professional Responsibility (the "Code") in 1970, numerous opinions by other ethics committees[1] had held that the inclusion in the firm name of one never admitted to practice in New York was improper. These opinions rested at least in part on the ground that the name falsely implied that all named partners were locally admitted. We concluded that DR 2-102(D) of the then-new Code had effected a change that undermined those earlier opinions, because DR 2-102(D) expressly permits partnerships among lawyers licensed in different jurisdictions to use the same firm name in each jurisdiction.[2] In light of this provision, we opined in Opinion 175 that a multi-state law firm could use in New York a name composed of the names of one or more lawyers not admitted in New York "provided the circumstances are not such as to cause the local use of the name to be misleading." We concluded, however, that the firm had to have a partner admitted in New York:

> To avoid the danger of franchising [an out-of-state law firm's name] and the risk of misleading the public, the Committee is of the opinion that a multi-state law firm may not use in New York a name composed of one or more lawyers not admitted to practice in New York unless the local lawyer is a true partner with a real share in the over-all profits, liabilities and professional responsibilities of the entire firm.

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[1] Opinion 175 cited N.Y. City 684 (1946), N.Y. City 698 (1946), N.Y. City 700 (1946), N.Y. City 749 (1950), N.Y. City 786 (1954), N.Y. County 182 (1920), N.Y. County 426 (1954), ABA Inf. 830 (1965), ABA Inf. 1059 (1968) and ABA 318 (1967).

[2] DR 2-102 (D) as adopted in 1970 -- and unchanged today -- provides:

> A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

The Court of Appeals' Opinion in Jacoby & Meyers

4. Thirteen years later, in *New York Criminal and Civil Courts Bar Association v. Jacoby & Meyers*, 61 N.Y.2d 130, 136, 460 N.E.2d 1325, 1328, 472 N.Y.S.2d 890, 894 (N.Y. 1984), the New York Court of Appeals (the state's highest court) addressed the same question under New York Judiciary Law section 478, which prohibits the unauthorized practice of law. The Court held that it was not a violation of that statute for a multi-state law firm to practice in New York under a firm name that includes the names of lawyers not admitted in New York, "provided that it has an active partner who is admitted to practice in New York."[3] The Court did not explain the source of this proviso or its rationale. The Court's opinion was based largely on an interpretation of the Judiciary Law,[4] but it noted that opinions of ethics committees recognize the ethical propriety of practice in New York by multi-state law firms that include lawyers not admitted in New York. In that connection, the Court cited our opinion in N.Y. State 175 (1971), [5] among others. [6]

Is N.Y. State 175 Still Valid?

5. Our jurisdiction is limited to questions arising under the Code, and does not extend to interpreting New York's statutes on the unauthorized practice of law. To the extent the Court of Appeals' proviso in *Jacoby & Meyers* was based on those statutes, we express no opinion on the question other than to observe that if the conduct is illegal, it is also unethical.[7] To the extent the proviso in *Jacoby & Meyers* was based in

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[3] The Court articulated this requirement twice in its opinion. The other reference reads, "A multi-state law firm (consisting of partners admitted to practice in different States) may practice law in New York State *if at least one of its active partners is admitted to practice in this State*, and it may conduct such practice under a firm name comprised of a combination of surnames, although none of them is the surname of a partner licensed to practice in New York." 61 N.Y. 2d. at 132, 460 N.E.2d at 1325, 472 N.Y.S.2d at 891 (emphasis added). The firm in the *Jacoby & Meyers* case had a New York partner resident in New York State, who was supervising "20 or so" offices around New York State. The Court found no violation of Judiciary Law § 478.

[4] The Court at one point distinguished between the relative weight to be given statutory law and the provisions of the Code, noting that "the provisions of the Code of Professional Responsibility are not entitled in all instances to be accorded the status of statute or case law," but that DR 2-102(D) (quoted above) "fairly states the appropriate application to multi-state law firms of the provisions of section 478 of the Judiciary Law." 61 N.Y.2d at 135-36, 460 N.E.2d at 1327, 472 N.Y.S.2d at 893.

[5] The Court quoted the portion of our Opinion 175 that stated, "a multi-state law firm practicing in New York may use the same name as in other states." 61 N.Y.2d at 136 n.3, 460 N.E.2d at 1327 n.3, 472 N.Y.S.2d at 893 n.3.

[6] In addition, relying in part on our Opinion 175, a state trial court in 1979 held that a multi-state law firm with an office in New York must have at least one partner admitted in New York. *Rosenberg v. Johns-Manville Sales Corp.,* 99 Misc. 2d 554, 558, 416 N.Y.S.2d 708, 710 (Sup. Ct. N.Y. County 1979) (multi-state firm practicing in New York must have at least one partner admitted to practice in New York).

[7] DR 1-102(A) states that a lawyer or law firm shall not "(3) [e]ngage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer" or "(5) [e]ngage in conduct that is prejudicial to the administration of justice."

part on our views in Opinion 175,[8] we believe subsequent amendments to the Code, and changes in law firm practices over the last 37 years, call for a re-examination of the conclusion we reached in Opinion 175. Having re-examined that conclusion, we no longer adhere to it, for the reasons set forth below.

6. It is clear from the text of DR 2-101(D), and we have previously opined (for example, in N.Y. State 801 [2006] and N.Y. State 144 [1970]), that a New York attorney may form a partnership with a lawyer who is admitted only in another jurisdiction. Nothing in the Code, however, states that partnership is the only permissible professional relationship between a New York lawyer and an out-of-state lawyer or firm. To the contrary, while the Code repeatedly mentions "partners" and "associates," the Code generally imposes the same ethical obligations on all lawyers whether they are partners or not. In general, under the Code a New York lawyer is a New York lawyer regardless of the title bestowed upon the lawyer by the lawyer's firm.

7. Since Opinion 175 and since the Court of Appeals' decision in *Jacoby & Meyers*, the Code has been amended to provide for explicit regulation of law firms as entities, rather than only of New York lawyers. Under amendments to DR 1-104(A) and (C) of the Code adopted in 1996, a law firm has an obligation to ensure the ethical conduct of attorneys in its New York offices.[9] Thus, the drafters of the Code have chosen to ensure law firm compliance with the Code by directly regulating law firms as entities rather than solely by regulating law firm partners. To the extent the conclusion in Opinion 175 was based on a concern that only a partner can ensure that lawyers in a firm confirm with ethical standards,[10] these amendments substantially undermine that conclusion. These new rules do not require that the firm include any New York lawyers as partners.[11] Indeed, in N.Y. State 762 (2003), we concluded that, "[a]t a

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[8] We note that the Hon. Hugh R. Jones, the author of the Court's opinion in *Jacoby & Meyers*, served as Chair of our Committee from 1961 to 1964.

[9] DR 1-104(A) and (C) provide:

> A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.
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> C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

[10] *See Rosenberg*, 99 Misc. 2d at 558, 416 N.Y.S.2d at 710 (multi-state firm must have at least one New York-admitted partner, because an associate is "not capable of setting policy for the firm, or of holding himself out to the public as the firm, or of accepting the legal responsibility for all of its acts and those of its other employees").

[11] We are aware that the language of DR 1-104(D)(2) assigns particular responsibility to partners in law firms. It states:

> D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the

minimum, . . . the Disciplinary Rules that are specifically applicable to law firms apply to firms with a New York office and at least one New York lawyer *affiliated* with the firm in that office." (Emphasis added.) This is consistent with 22 N.Y.C.R.R. §§ 603.1(b) and 603.2(b), the only rules that any of the four New York judicial departments have adopted defining which law firms are subject to the Code. Under sections 603.1(b) and 603.2(b), which are in the First Department rules, any law firm that "has as a member, *employs, or otherwise retains* an attorney or legal consultant" who is subject to the New York Code can be disciplined for professional misconduct under the Code. (Emphasis added.)

8. The firm's specific supervisory obligations also do not require that there be a New York partner. The firm is obligated to make reasonable efforts to ensure that all lawyers "conform to the disciplinary rules," and the firm must "adequately supervise" the work of all of the attorneys in the firm. Generally, this requires the firm to develop systems to ensure that its New York lawyers comply with New York's disciplinary rules and that the firm's practice is conducted in a professional and ethical manner.[12] To discharge this duty, the firm may consider establishing systems and procedures: (i) to ensure that lawyers reach agreement with clients on fees and provide accurate bills (DR 2-106; EC 2-28); (ii) to educate lawyers and nonlawyers about the importance of maintaining client confidences and secrets and to assist with the maintenance of client confidences (DR 4-101); (iii) to keep records of prior engagements and to detect conflicts of interest (DR 5-105(E)); (iv) to oversee work handled by any New York attorney and ensure that the lawyer is handling his or her matters competently (DR 6-101); (v) to allow non-partners to raise concerns about ethical conduct (EC 1-8); (vi) to segregate client funds and maintain appropriate records (DR 9-102); and (vii) to provide continuing legal education in professional ethics to attorneys (EC 1-8). None of this requires a New York-admitted partner.

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lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

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2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

Under this rule, however, the partner is responsible only if he or she knows, or should have known, of the conduct. The same responsibility is imposed on a non-partner lawyer in the firm who has supervisory authority over another lawyer or non-lawyer. Thus, the responsibility imposed by DR 1-104(D)(2) does not depend on the status as a partner but on the status as a supervisor, of which partners are only one category.

[12] N.Y. State 762 (2003); *see also* EC 1-8 ("A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of lawyer in the firm.").

9. Indeed, a lawyer in New York may ethically practice as a sole practitioner, without any partners in the firm at all, and may even operate multiple offices. If a lawyer is ethically permitted to practice alone, with sole and complete responsibility under DR 1-104 for his or her law firm's ethical compliance, it is difficult to see, as a practical matter, why the same lawyer could not maintain responsibility for ethical compliance by the New York office of a law firm whose partners are all based in offices outside New York. Since the Code allows any lawyer admitted in New York to run a law firm alone, there is no obvious reason why the Code should not also allow a lawyer admitted in New York to run the New York office of an out-of-state firm even if the New York lawyer is an associate rather than a partner.

10. Moreover, in the 37 years since Opinion 175, the bar and users of legal services have become familiar with the presence in New York of firms that originated or have their principal offices outside the State -- and indeed outside the country -- and that practice here under their nationwide or worldwide names. This now-widespread practice draws into question the concerns about "franchising" and consequent dilution of adherence to ethical standards that we had in 1971, when cross-border partnerships were new. In addition, a wide variety of employment and partnership arrangements have become common in law firms since 1971, including "contract partners," "non-equity partners," "contract lawyers" and other appelations. These two developments together call into question the continued viability of our conclusion in Opinion 175 that operating without a New York-admitted partner was inherently misleading. Examining the question against the backdrop of legal practice today, we do not think that the presence of a New York office implies that the out-of-state firm has a New York partner as opposed to a New York lawyer who is, for example, an associate or a non-equity partner. Accordingly, we overrule Opinion 175.

11. We thus find no express or implied requirement in the Code that a firm with a New York office have a partner admitted in New York. Of course, the lawyers in the New York office must comply with New York State statutes on unauthorized practice of law as interpreted by the courts. In addition, the firm's letterhead and advertisements must not misleadingly state or imply that the associates or of counsel who work in the New York office are partners.[13] But as long as the New York office is staffed by one or more lawyers admitted to practice in New York and in good standing in New York, we conclude that the Code does not itself require that the firm have a partner admitted in New York.

[13] DR 2-101(A)(1) (barring advertisements that contain "statements or claims that are false, deceptive or misleading"); DR 2-102(C) ("A lawyer shall not hold himself or herself out as having a partnership with one or more other lawyers unless they are in fact partners."); DR 2-102(D) (permitting a firm to use the same name in various jurisdictions if "all enumerations of the members and associates of the firm make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions"). We do not address what might be required to make a particular communication not misleading.

CONCLUSION

12. Under the New York Lawyer's Code of Professional Responsibility, the New York office of a multi-state firm may be managed by an associate or of counsel attorney who is admitted in New York and supervised by an out-of-state partner who is licensed in another state. The law firm is responsible for establishing procedures to ensure that the New York attorney complies with New York's disciplinary rules. We caution lawyers, however, with respect to the Court's statements in *Jacoby & Meyers*, 61 N.Y.2d at 130, 136, 460 N.E.2d at 1325, 1328, 472 N.Y.S.2d at 890, 894, noted above, regarding the requirements of the New York Judiciary Law. If it is illegal under those statutes for a law firm to maintain an office in New York when it has no New York-admitted partner, it would also be unethical.

(40-06)
