NYSBA New York State Bar Association
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COMMITTEE ON PROFESSIONAL ETHICS

Opinion 815 – 10/25/07

Topic: Practice of a New York lawyer in a foreign jurisdiction.

Digest: A New York lawyer who can lawfully engage in conduct in a foreign jurisdiction that would be the practice of law in New York, even though the lawyer is not formally admitted to practice in the foreign jurisdiction, is generally subject to the ethics rules in the foreign jurisdiction, and not all of the provisions of the New York Code, provided the lawyer principally practices in that jurisdiction and the conduct's primary effect is not in New York.

Code: DR 1-102(A)(3), DR 1-105(A), DR 1-105(B), DR 9-102, EC 1-12.

QUESTION

1. What ethics rules govern the conduct of an attorney who is admitted to practice in New York and works principally in a foreign jurisdiction, when the lawyer, although not formally admitted to practice in a foreign jurisdiction, is permitted to engage in conduct there that would be the practice of law in New York?

OPINION

2. A lawyer admitted to practice in New York is contemplating an employment relationship with a law firm in a foreign jurisdiction. That jurisdiction permits the lawyer to undertake work that would be the practice of law if performed in the New York, but the New York lawyer does not need to be nor will the lawyer be formally admitted to practice in the foreign jurisdiction. Because the New York lawyer will not be formally admitted to practice, the lawyer cannot, for example, represent clients in the courts of the foreign jurisdiction. The jurisdiction has a code of ethics for attorneys who are admitted to practice, but that code does not apply to the New York lawyer because the lawyer is not admitted to practice in the foreign jurisdiction.

3. Under DR 1-105(A), a lawyer admitted in New York is subject to the disciplinary authority of New York regardless of where the lawyer practices. In certain circumstances, however, "[i]n the exercise of the disciplinary authority of this state," the disciplinary rules of another jurisdiction will be applied. DR 1-105(B)(1) provides that in connection with a proceeding in a court to which the lawyer has been admitted, the rules of the court apply. "For any other conduct," DR 1-105(B)(2) states:

> 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
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> 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.

4. It is clear that DR 1-105(B)(1) applies where the New York lawyer appears in a court in a foreign jurisdiction. If the lawyer cannot appear in court, DR 1-105(B)(1) has no application. With respect to DR 1-105(B)(2)(b), it is the opinion of the Committee that "licensed to practice" includes not only formal licensing procedures like those required by the states in the United States, but also less formal procedures that authorize a lawyer to undertake activities in a foreign jurisdiction that would constitute the practice of law if they were undertaken in the United States. So long as the activities are lawful in the jurisdiction in which they are performed, it is our view that a lawyer undertaking such activities is "licensed to practice" in that jurisdiction, and that jurisdiction is an "admitting jurisdiction," for purposes of DR 1-105(B)(2)(b). If the lawyer principally practices in that jurisdiction and the particular conduct does not clearly have its predominant effect in New York, then under DR 1-105(B)(2)(b), the rules of the foreign jurisdiction apply.

5. A contrary interpretation would lead to anomalous results. It would be impractical, for example, to require a lawyer living abroad and working in a law firm there with foreign clients -- and receiving funds in foreign currency -- to keep funds in a New York bank account with only New York lawyers as signatories, as required by DR 9-102(B) and (E).

6. This may mean that a New York lawyer will be permitted to undertake representations that the lawyer could not undertake in New York. For example, the rules of the foreign jurisdiction may permit the lawyer to proceed against a current client in an unrelated matter, which the New York rules prohibit absent client consent. Because that is permitted by the rules of the foreign jurisdiction, however, it would not surprise clients.[1]

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[1] We do not address in this opinion what rules of imputation would apply in a law firm with lawyers both in New York and outside the country.

7. Although not stated in DR 1-105, we believe that certain rules of the New York Code that apply to lawyers even when not engaged in the practice of law -- such as the rule prohibiting illegal conduct that adversely reflects on a lawyer's honesty, trustworthiness or fitness as a lawyer[2] -- apply wherever the lawyer practices.[3]

CONCLUSION

8. 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. If the lawyer principally practices in that jurisdiction and the particular conduct does not have its predominant effect in New York, the rules of the foreign jurisdiction govern the conduct.

(12-07)

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[2] DR 1-102(A)(3).

[3] *Cf.* EC 1-12 (listing rules that apply to a lawyer rendering non-legal services under DR 1-106(A)).