NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1042 (12/11/14)

Topic: Choice of Law, Firm Name, Letterhead, Business Cards, Website

Digest: Where a lawyer admitted to the New York bar has applied for admission to the District of Columbia bar, and, while such application is pending, will practice from an office located in D.C. under the direct supervision of a member of the D.C. bar in accordance with the applicable D.C. court rule, the lawyer will be deemed to be "licensed to practice" in D.C. for purposes of applying New York Rule 8.5(b) on choice of law for disciplinary purposes. The rules of professional conduct to be applied to such lawyer will depend upon the jurisdiction where the lawyer "principally practices," and whether the conduct of the lawyer will have its "predominant effect" in another jurisdiction where the lawyer is admitted or deemed admitted. Determining which jurisdiction's rules apply to the website, letterhead and business card of the inquirer depends on the same principles.

Rules: 7.1(a), 7.5(d), 8.5(b).

FACTS

1. The inquirer previously submitted an inquiry asking whether an attorney admitted to practice only in New York may be of counsel to a D.C. law firm that practices under a trade name. In N.Y. State 1023 (2014), the Committee concluded that, under the New York Rules of Professional Conduct (the "Rules"), a lawyer who is admitted solely in New York, where Rule 7.5(b) prohibits lawyers from practicing under trade names, may not be of counsel to an out-of-state firm that is practicing under a trade name.

2. The inquirer subsequently informed us, and we assume for purposes of this opinion, that (i) he has applied for admission to the D.C. bar, (ii) the applicable court rule, D.C. App. Rule 49(c) (8) (the "D.C. Court Rule"), permits a lawyer who is admitted in another jurisdiction and who has submitted an application for admission to the D.C. bar to practice law from a principal office located in D.C. for up to 360 days under the direct supervision of a member of the D.C. bar while the application for admission to the D.C. bar is pending, provided that (A) the District of Columbia Bar member takes responsibility for the quality of the work and for any complaints concerning the services, and (B) the practitioner or the District of Columbia Bar member gives notice to the public of the member's supervision and the practitioner's bar status, and (iii) the lawyer complies with each requirement of the D.C. court rule.

QUESTION

3. Where a lawyer admitted to practice only in New York has applied for admission to the D.C. bar, and, while such application is pending, will practice from an office located in D.C. under the direct supervision of a member of the D.C. bar in accordance with the applicable D.C. Court Rule, will the rules applicable to the lawyer's conduct be those of New York or D.C.?

4. What rules will govern disclosures about the lawyer's practice made on the website, business cards and stationery of the law firm?

OPINION

5. Rule 8.5 provides as follows:

> (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 may be subject to the disciplinary authority of both this state and another jurisdiction where the lawyer is admitted for the same conduct.
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> (b) In any exercise of the disciplinary authority of this state, the Rules of Professional Conduct to be applied shall be as follows:
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> > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
> >
> > (2) For any other conduct:
> >
> > (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
> >
> > (ii) 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.

6. In N.Y. State 1023, we concluded that the inquirer was admitted only in New York and that the lawyer was therefore subject only to New York's disciplinary authority under Rule 8.5(b)(1). The question raised in the inquirer's follow-up inquiry is whether the inquirer may be deemed to be "licensed to practice" in D.C. as well, in which case Rule 8.5(b)(2) will apply. Rule 8.5(b)(2)(ii) by its terms states that, in the exercise of the disciplinary authority of New York, the rules of another admitting jurisdiction will be applied to the lawyer's conduct if (a) the lawyer is "licensed to practice" both in New York and in another jurisdiction, (b) the lawyer "principally practices" in the other jurisdiction, and (c) the lawyer's conduct does not clearly have its "predominant effect" in another jurisdiction in which the lawyer is licensed.

Being “Licensed to Practice” in Another Jurisdiction

7. With respect to the first of these three tests, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in a foreign jurisdiction without being formally admitted in the foreign jurisdiction, even though such conduct would constitute the practice of law in New York, the lawyer should be deemed to be "licensed to practice" in the foreign jurisdiction. We explained:

> 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).

8. Although N.Y. State 815 interpreted DR 1-105(b)(2)(b) under the former Code of Professional Responsibility, the analysis employed in N.Y. State 815 is still applicable under the instant facts because Rule 8.5(b)(2)(ii) is identical to its predecessor DR 1-105(B)(2)(b). See also N.Y. State 1041 (2014) (interpreting the Rules).

9. Assuming for purposes of this opinion that the inquirer's proposed practice complies with the D.C. Court Rule, then such practice would constitute being "licensed to practice" in another jurisdiction for purposes of New York's Rule 8.5, and D.C. would be an “admitting jurisdiction” for purposes of Rule 8.5(b)(2).

Whether the Lawyer “Principally Practices” in Another Jurisdiction

10. If a lawyer is deemed admitted in a second jurisdiction, it is still necessary under Rule 8.5 to determine the admitting jurisdiction in which the lawyer "principally practices." In N.Y. State 1027 (2014), the inquirer was licensed in both New York and D.C. and had offices in both jurisdictions. We noted there that neither the text of Rule 8.5 nor its Comments provide any guidelines for determining where a lawyer principally practices, and we set forth various factors that we believe are relevant to determining the jurisdiction in which the lawyer principally practices, including:

> (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; (d) the activities the lawyer performs in each jurisdiction (e.g., legal work for clients vs. administrative work for the law firm); and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster). (*citing* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 1915-17 (2014).

We also noted that, given the increase in law practice over the Internet, and the corresponding decrease in the importance of a lawyer's physical location, the jurisdiction in which a lawyer

"principally practices" for purposes of Rule 8.5(b)(2)(ii) is becoming less certain. Thus it is important to consider a lawyer's significant contacts with all jurisdictions, not solely the jurisdiction in which the lawyer is most often physically present.[1] Ultimately, this determination is one of fact that is beyond the jurisdiction of this Committee.

Whether Lawyer's Conduct has its "Predominant Effect" in Another Jurisdiction

11. Under Rule 8.5(b)(2)(ii), even if the lawyer principally practices in a particular admitting jurisdiction, there is an exception to the usual choice of law rule if the conduct of the lawyer would have its "predominant effect" in a different admitting jurisdiction. For example, if the inquirer principally practiced in D.C., but most of his clients were in New York, then the choice of law rule would apply the New York Rules (absent some countervailing factor) because the predominant effect of the lawyer's conduct would occur in New York, which is also an admitting jurisdiction. Determining where the predominant effect occurs, however, is also a question of fact that is beyond the jurisdiction of this Committee. Here, the inquirer has told us that the firm will not advertise in New York, which may make it more likely that the conduct of the lawyer's practice will not have its predominant effect in New York.

12. Comment [5] of Rule 8.5 states:

> When a lawyer is licensed to practice in New York and another jurisdiction and the 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 an admitting jurisdiction other than the one in which the lawyer principally practices. For conduct governed by paragraph (b)(2), as long as the lawyer's conduct conforms to the rules of the jurisdiction in which the lawyer principally practices, the lawyer should not be subject to discipline unless the predominant effect of the lawyer's conduct will clearly occur in another admitting jurisdiction.

13. In contrast, in N.Y. State 815, the Committee concluded that "[i]f the lawyer principally practices in that [foreign/non-New York] 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."

14. We have previously addressed a choice-of-law question involving a trade name. In N.Y. State 861 (2011), the Committee considered whether a lawyer who is admitted both in New York and another jurisdiction that permits a law firm to practice under a trade name, and who principally practices in the other jurisdiction, may be of counsel to a firm with a trade name, even though the lawyer could not do so in New York. The committee held that the lawyer could ethically do so. In reaching its conclusion, the committee analyzed Rule 8.5(b)(2)(ii) and

[1] We understand that the inquirer in this case teaches law but is not formally admitted to practice in yet a third jurisdiction (neither New York nor D.C.), and that inquirer may perform some client work in that jurisdiction. If the work performed in that jurisdiction would not require formal admission in that jurisdiction (*e.g.,* if the work is authorized by some variant of ABA Model Rule 5.5(b), which governs temporary practice by out-of-state lawyers), then that jurisdiction could be deemed to be a third admitting jurisdiction. The existence of a third jurisdiction may complicate the determination of where the lawyer principally practices.

concluded that "[b]ecause the conduct – practicing with a firm that uses a trade name – principally occurred in the other jurisdiction, the applicable ethical rules would be those of the other jurisdiction." *See also* N.Y. State 889 (2011) (a lawyer admitted in New York who principally practices in D.C., which allows partnership with a non-lawyer, may conduct New York litigation even if the D.C. partnership includes a non-lawyer who would benefit from the resulting fees, because the governing ethical provisions would be those of D.C.).

Disclosures on the Website, Business Cards and Stationery of the Law Firm

15. The inquirer also asks whether anything other than the fact he is practicing law in D.C. under the D.C. Court Rule should be disclosed on the firm's website and letterhead and on the lawyer's business cards. Such disclosures are covered by Rule 7.1 and by Rule 7.5(d). Specifically, New York Rule 7.5(d) requires that a law firm's letterhead listing the names of lawyers in the firm "must make clear the jurisdictional limitations" on lawyers not licensed to practice in all of the jurisdictions listed on the letterhead. *See generally* N.Y. State 704 (1997). Whether the New York rules or the rules of another admitting jurisdiction will apply to the website, letterhead and business card of the inquirer depends on the same principles discussed above in connection with the choice of law for other purposes.

CONCLUSION

16. Where a lawyer admitted to the New York bar has applied for admission to the D.C. bar, and, while such application is pending, will practice from an office located in D.C. under the direct supervision of a member of the D.C. bar in accordance with the applicable D.C. Court Rule, the lawyer will be deemed to "licensed to practice" in D.C. for purposes of New York Rule 8.5(b). The rules to be applied to such lawyer will also depend upon the jurisdiction where the lawyer "principally practices," and whether the conduct of the lawyer will have its "predominant effect" in another jurisdiction where the lawyer is licensed or deemed to be licensed. Determining which jurisdiction's rules apply to the website, letterhead and business card of the inquirer depends on the same principles.

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