NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ☐ PH 518.463.3200 ☐ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1058 (6/10/15)

Topic: Choice of law; immigration practice

Digest: If a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require the lawyer to do so.

Rules: 1.0(w), 1.15(b); 7.3(i), 8.5(a) & (b)

FACTS

1. The inquirer was recently admitted to practice in New York but plans to reside and practice solely in Illinois and will engage in a practice limited to immigration law. She inquires about her obligations under Rule 1.15(b) of the New York Rules of Professional Conduct (the "Rules") regarding client trust accounts.

QUESTION

2. If a lawyer is admitted in New York but practices solely in Illinois and limits her practice to immigration law, is the lawyer bound by the requirements in New York Rule 1.15(b) to maintain client funds in a banking institution within New York State?

OPINION

Attorney Trust Accounts

3. Rule 1.15(a) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer who "is in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." Rule 1.15(b)(1) provides that, where the lawyer is in possession of funds or property of another person, the lawyer must maintain the funds in a banking institution as defined in the Rule and 22 N.Y.C.R.R. Part 1300.

4. We assume for purposes of this opinion that the lawyer has or will receive funds belonging to the client incident to her practice of law.

Federal Regulations Governing Immigration Practice

5. Federal immigration regulations provide that a person entitled to representation may be represented by a member in good standing of the bar of the highest court of any state, who is not under suspension or otherwise restricted in his or her practice of law, as long as the lawyer is registered to practice with the Executive Office for Immigration Review. *See* 8 C.F.R. §§ 1001.1(f), 1292.1(a)(1); *see also* Anna Marie Gallagher, "A primer on immigration court practice," 08–12 Immigration Briefings 1 (2008) (hereinafter "Gallagher") (noting six categories of persons who are permitted to represent parties in the immigration courts); N.Y. State 863 (2011) (discussing lawyer licensed only in Texas who works at law firm in New York State that "exclusively" practices immigration law). The cited federal regulations apparently apply to appearances before the U.S. Citizenship and Immigration Service, the Board of Immigration Appeals, and an Immigration Court or Judge, including any related application, proceeding, practice, and preparation. The full scope of federal law permitting lawyers to practice immigration law is a question of law beyond this Committee's jurisdiction. *See* N.Y. State 863 (2011).

The New York Choice of Law Rule: Rule 8.5(b)

6. Under Rule 8.5(a), a lawyer admitted in New York is subject to the disciplinary authority of this state no matter where the lawyer's conduct occurs – but that does not necessarily mean that the New York Rules will apply. Rather, the rules of conduct that a New York disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b). Rule 8.5(b) provides:

> (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 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.

Proceedings Before a Court

7. If the inquirer receives client funds in connection with a proceeding in a court before which the inquirer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied will be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise. *See* Rule 8.5, Comment [2] (observing that a lawyer "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"). *See also* Gallagher, *supra*, at 1 ("There are over 50 immigration courts nationwide where immigration hearings are held").

8. We do not opine on the specific ethical obligations governing immigration lawyers, but we note that the rules governing practice before the United States Citizenship and Immigration Services ("USCIS") state several grounds for imposing discipline on any practitioner who appears before the Board of Immigration Appeals and the Immigration Courts. *See* 8 CFR Part 1003, Subpart G, entitled "Professional Conduct for Practitioners - Rules and Procedures". However, such rules do not contain any requirements for establishing and maintaining escrow accounts. Consequently, we believe that the escrow rules of the State of Illinois (*i.e.* the jurisdiction in which the Court sits) would apply.

9. For purposes of applying New York's Rule 8.5(b), the Board of Immigration Appeals is not a "court." As we noted in N.Y. State 968 (2013):

> As [the inquirer is] asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule . . . . [W]e do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals. . . .

For the same reason, in 2010, the New York State Bar Association amended Comment [4] to Rule 8.5 to replace the word "tribunal" with the word "court." See also N.Y. State 1027 (2014) (canons of statutory construction support the conclusion that the term "court" in Rule 8.5(b)(1) excludes the other types of tribunal listed in Rule 1.0(w)).

Matters Not Involving Court Proceedings

10. When the inquirer does not represent a client in a proceeding in a court, Rule 8.5(b)(2) provides that the rules to be applied will be those of the "admitting jurisdiction" in which the inquirer "principally practices," unless the conduct clearly has its "predominant effect" in another jurisdiction in which the lawyer is "licensed to practice." This rule recognizes that New York does not have an interest in applying its own rules where the lawyer's conduct clearly has its predominant effect in another jurisdiction that has disciplinary authority over the conduct.

11. Here, the inquirer is not admitted to the bar in Illinois, the jurisdiction in which the inquirer principally practices. However, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in another jurisdiction without being formally admitted in that jurisdiction, the lawyer should be deemed to be "licensed to practice" in the other jurisdiction for purposes of DR 1-105(B)(2)(b), the predecessor to Rule 8.5(b)(2)(ii). See also N.Y. State 1054 (2015), N.Y. State 1042 (2014), N.Y. State 1041 (2014) (all applying this principle). If Federal law authorizes the inquirer to practice immigration law from an office address in Illinois, even if not in connection with a "court" proceeding, we believe the New York disciplinary authorities would apply the Illinois Rules of Professional Conduct, unless the inquirer solicits business in New York, in which case the lawyer's conduct in making the solicitation would usually have its predominant effect in New York, which is an admitting jurisdiction, and the disciplinary authorities would apply the New York Rules of Professional Conduct. *Cf.,* Rule 7.3(i) (the provisions of Rule 7.3 on solicitation apply to a lawyer not admitted in New York who solicits retention by residents of New York).

The Illinois Rules of Professional Conduct

12. Our conclusion that New York would apply the escrow provisions of the Illinois Rules of Professional Conduct is consistent with Rule 8.5 of the Illinois Rules of Professional Conduct, which provides as follows:

> (a) *Disciplinary Authority*. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
>
> (b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, 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.

13. Thus, under the Illinois rules, the inquirer is subject to discipline in Illinois because the lawyer provides legal services in Illinois, and the Illinois disciplinary authority will apply the Illinois Rules of Professional Conduct if the conduct occurred in Illinois – whether or not in connection with a proceeding before a tribunal in Illinois – unless the predominant effect of the conduct is in a different jurisdiction. Unless the Illinois Rules of Professional Conduct require a

lawyer to maintain client funds in a banking institution in a state where she is formally licensed to practice (here, New York), the inquirer need not maintain an attorney trust account in a New York banking institution. (Whether the Illinois Rules of Professional Conduct so require is a question of law beyond our jurisdiction.)

14. There could, however, be disciplinary proceedings in both jurisdictions, because both the New York and Illinois versions of Rule 8.5(a) provide that a lawyer may be subject to the disciplinary authority of more than one jurisdiction for the same conduct. Thus, if the inquirer were to violate the Illinois Rules of Professional Conduct, she could be disciplined by New York, by Illinois or by both states.

CONCLUSION

15. If a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require her to do so.

(9-15)