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 1093 (5/20/2016)

Topic: Foreign jurisdiction practice; separate partnership with non-lawyer

Digest: A New York lawyer who is also admitted in a foreign jurisdiction and is practicing with non-lawyer partners in that jurisdiction may also practice in a separate New York law firm without violating the New York Rules of Professional Conduct as long as the lawyer (i) principally practices in the foreign jurisdiction or (ii) the predominant effect of the lawyer's practice with the foreign firm is in the foreign jurisdiction and (iii) the New York firm includes representations by the UK firm in its conflict of interest system.

Rules: 1.10(a) & (e), 5.4(b) & (d), and 8.5(b)(2)

FACTS

1. The inquirer is a lawyer resident in the United Kingdom ("UK") and admitted to practice law both in England and New York. He serves as chief executive officer ("CEO"), director, and majority shareholder of an English law firm regulated by the Solicitors Registration Authority as an alternative business structure (the "UK ABS"). Consistent with English law, the UK ABS has a non-lawyer director and non-lawyer shareholders. The inquirer practices English law and has not practiced New York law since the UK ABS was formed.

2. The inquirer wishes to become a partner of a New York law firm, in addition to continuing with the UK ABS. The inquirer will continue to serve as CEO of the UK ABS, and will practice English law in the UK for that firm, representing primarily UK-based clients. The inquirer represents that the role with the New York law firm will be limited to management and administrative activities, and asserts that these activities do not involve practicing either New York or English law with the New York law firm. The inquirer asserts that the UK ABS and the New York law firm will be separate law firms; the New York law firm will not hold shares in the UK firm, and the UK firm will not be a member of the New York law firm.

QUESTION

3. May a lawyer with a UK firm that has non-lawyer partners and shareholders also become a partner of a New York law firm?

OPINION

4. Rule 5.4 of the New York Rules of Professional Conduct (the "Rules") addresses the professional independence of a lawyer. Rule 5.4(b) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." Rule 5.4(d) also provides that "a lawyer shall not practice with or in the form of an entity

authorized to practice law for profit if . . . (1) a nonlawyer owns any interest therein . . . (2) a nonlawyer is a member, corporate director or officer thereof . . . or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."

5. Comment [2] to Rule 5.4 explains that the rationale for these prohibitions – they express the "traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."

Practice Solely in a UK Alternative Business Structure

6. To answer the question posed, we must determine whether Rule 5.4 applies to the inquirer's conduct. This, in turn, depends on Rule 8.5, entitled "Disciplinary Authority and Choice of Law," which 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.
>
> (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.* [Emphasis added.]

7. In N.Y. State 889 (2011), we concluded that a New York lawyer who "principally practices" in another jurisdiction that allows partnership with a non-lawyer may ordinarily conduct litigation in New York because the other jurisdiction's ethics rules, rather than New York's ethics rules, would govern the fee sharing with respect to the New York matter:

> The inquirer principally practices in the District of Columbia. Unless the formation of the [D.C.] partnership or the division of compensation arising from New York litigation clearly have their predominant effect in New York those matters are subject only to the District of Columbia ethics rules.

8. Similarly, in N.Y. State 1041 (2014), we concluded that a New York lawyer based in the UK, who is not formally admitted to practice in the UK, may ethically practice there with an entity that includes non-lawyer owners or supervisors provided that such conduct is permitted under the rules of that country and "the predominant effect of the lawyer's practice is not in New York." Our conclusion was based on Rule 8.5(b)(2)(ii).

9. In N.Y. State 911 (2012), in contrast, we held that a New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers. That conclusion was also based on Rule 8.5(b)(2)(ii), but in Opinion 911 New York's ethics rules applied because the inquirer was practicing principally in New York. The implication of Opinion 911 is that a foreign law firm with non-lawyer members or managers may not have a branch in New York.

10. Here, the inquirer is admitted to practice both in New York and the UK. Currently, the inquirer is practicing principally (and apparently exclusively) in England, with a UK ABS. The inquirer's UK law firm has non-lawyer directors and shareholders, but non-lawyer directors and shareholders are lawful there. Accordingly, under the present circumstances, the UK rules apply to the inquirer's practice with the UK ABS.

Partnership in a New York law firm

11. If the inquirer becomes a partner in a New York firm, the inquirer must once again determine which rules will apply. This requires determining the jurisdiction in which the lawyer "principally practices" within the meaning of Rule 8.5(b)(2)(ii). Unlike the case in N.Y. State 911, the inquirer is not seeking to practice in a New York branch of the UK firm. (We assume that the New York law firm will not be managed in such a way as to operate as a branch of the UK ABS. We also assume that the two firms do not have a profit-sharing arrangement, which would implicate many of the same concerns.)

12. The inquirer says that the inquirer's role with the New York law firm will be limited to management and administrative activities, and maintains that this will not be "practicing" New York law. Determining what constitutes the practice of law is a question of law that is outside our jurisdiction. Even if we had jurisdiction to decide the issue, the inquirer has not provided us with enough information about this management and administrative role for us to determine the extent to which the role involves the practice of law. While some law firms hire managers who are non-lawyers and whose role is limited to purely administrative matters, many other law firms employ full-time managing partners who are lawyers admitted to practice in New York.

Although some of these managing partners do not represent any clients, they may play active roles in determining which clients their firms should represent, including assessing whether representation would involve conflicts of interest and evaluating the merits of cases, and they may actively oversee the conduct of matters being handled by the firm to ensure that the firm complies with law and professional standards. We therefore cannot rule out the possibility that a New York lawyer managing a New York law firm will be exercising legal judgment. This is one plausible reason that the New York firm would make the person handling management and administrative activities a partner rather than an employee.

13. Consequently, after becoming a partner in the New York firm, the inquirer will need to determine whether the inquirer still "principally practices" in the UK. *See* N.Y. State 1027 ¶14 (2014) (setting forth factors for determining where a dual-licensed lawyer principally practices); N.Y. State 1041 (2014) (applying factors from Opinion 1027). In N.Y. State 1041 and N.Y. State 1027, we stated:

> 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 and we should consider a lawyer's significant contacts with all jurisdictions, not solely the jurisdiction in which the lawyer is most often physically present.

14. N.Y. State 1027 and N.Y. State 1041 also state that one of the factors in determining where a dually-admitted lawyer "principally practices" is whether the activities the lawyer performs in each jurisdiction constitute "legal work for clients," as opposed to "administrative work for the law firm." We believe there is a difference between purely administrative work (e.g., handling personnel matters, hiring and managing clerical staff, and ordering office equipment) and other management work for the firm that may involve legal judgment (e.g. determining what matters to accept, including whether a new matter would create a conflict of interest and evaluating the merits of cases; supervising legal work; and evaluating whether a given legal claim or motion would be frivolous). *See* Rule 5.1(b)(1) ("A lawyer with management responsibility in a law firm shall make reasonable efforts to ensure that other lawyers in the law firm conform to these Rules."). Managerial work that involves legal judgment should be counted in determining the place where the lawyer "principally practices."

15. If the inquirer is still practicing principally in the UK, then the UK ethics rules will continue to apply to the inquirer's activities, unless particular conduct clearly has its predominant effect in New York. *See* N.Y. State 889 (2011) (When a New York-admitted lawyer principally practices in the District of Columbia, unless the formation of the DC partnership or the division of compensation arising from New York litigation clearly have their predominant effect in NY, those matters are subject only to the District of Columbia ethics rules.) For example, the "predominant effect" of the inquirer's work as a manager and administrator of the New York firm will clearly be in New York.

16. Conversely, if the inquirer's managerial duties as a partner in the New York firm constitute the practice of law in New York, and if that law practice is substantial enough that the inquirer is deemed to be principally practicing in New York, then the New York Rules will apply to all of the lawyer's activities globally, unless particular conduct of the inquirer "clearly has its predominant effect" in the UK. Thus, the New York Rules would apply to the "conduct" of managing the New York law firm, but if the predominant effect of being a partner of the UK ABS is in the UK, then Rule 5.4 would not prohibit the lawyer from being a partner in the UK ABS because that "conduct" would be governed by UK Rules.

17. Determining whether the conduct of the inquirer in serving as a partner of the UK ABS has its predominant effect in the UK is a factual question that is beyond the jurisdiction of the Committee to determine. Rule 5.4(d) prohibits a member of a New York law firm from permitting nonlawyers to affect the members of the New York firm or jeopardize their independent professional judgment. We see no indication that any of the non-lawyer directors and shareholders in the inquirer's UK ABS would (1) own any interest in the New York law firm, (2) be a member, corporate director or officer thereof, (3) share legal fees with the New York law firm, or (4) have the right to direct or control the professional judgment of the inquirer or any other lawyer in the New York firm. However, this is a determination that the inquirer must make.

Conflict implications of practicing in two law firms simultaneously

18. The inquirer has told us, and we assume, that the New York and UK offices will be "unrelated." However, the two firms must still comply with the conflict provisions of Rule 1.10(a), which will impute conflicts of each firm to the other. Rule 1.10(a) provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein.

19. We described the effect of Rule 1.10(a) in N.Y. State 876 (2011):

> For decades, both this Committee and various New York courts have consistently stated that where a lawyer is "associated" with more than one law firm within the meaning of the imputation rule, all of the law firms with whom that lawyer is associated are treated as one law firm for purposes of conflicts of interest. Accordingly, under Rule 1.10(a), all conflicts in each firm are imputed to all lawyers in all of the firms associated with a common lawyer. *See, e.g.* N.Y. State 807 (2007) (lawyer working part-time at two firms); N.Y. State 794 (2006) (lawyer working at law firm and law school clinic); N.Y. State 793 (2006) (lawyer with "of counsel" relationship with two firms at the same time); N.Y. State 715 (1999) (contract lawyer for two firms); N.Y. State 388 (1975) (sole practitioner and member of partnership) N.Y. City 2000-4 (2000) (affiliated law firms*); Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976).

20. Rule 1.10(e) requires a New York law firm to check all proposed engagements against current and previous engagements. As N.Y. State 876 indicates, when two firms share a common partner or other member, they are treated as one for conflicts purposes. Consequently, in order to comply with Rule 1.10(e), the New York firm must include engagements of the UK firm in its conflict checking system.

CONCLUSION

21. A New York lawyer who is also admitted in a foreign jurisdiction and is practicing with non-lawyer partners in that jurisdiction may also practice in a separate New York law firm without violating the New York Rules of Professional Conduct as long as the lawyer (i) principally practices in the foreign jurisdiction or (ii) the predominant effect of the lawyer's practice with the foreign firm is in the foreign jurisdiction and (iii) the New York firm includes representations by the UK firm in its conflict of interest system.

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