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

Committee on Professional Ethics

Opinion 1234 (12/07/2021)

Topic: Ownership of New York Law Firm by Nonlawyers

Digest: A New York lawyer may not be a partner, associate or employee of a law firm in New York or in another jurisdiction that has direct or indirect ownership by nonlawyers in accordance with the rules applicable in that jurisdiction, unless the lawyer is licensed in the other jurisdiction and principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not in New York. A New York lawyer may be employed in a senior leadership position in a law firm in another jurisdiction that has nonlawyer ownership in accordance with the rules of that jurisdiction, as long as the lawyer principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not in New York. Whether a New York lawyer may practice with a valid license in another jurisdiction after retiring from the practice of law in New York is a question of law on which we cannot opine. If a lawyer may lawfully do so, then whether the New York Rules will continue to apply to the lawyer will depend on the type of retirement the lawyer chooses.

Rules: 5.4(d) and 8.5(b)

FACTS:

1. The inquirer is a New York lawyer practicing with a New York law firm. He resides overseas and does not currently have any clients physically located in New York, but other New York attorneys in his firm are apparently practicing in New York and serving New York clients. The inquirer is pending admission to the bars in certain U.S. states and foreign countries which permit nonlawyer ownership of law firms. Recently, a publicly traded law firm based in England (the "English firm") has proposed to purchase the inquirer's New York firm, or to merge with it. The English firm has nonlawyer ownership, although the majority shareholder and other shareholders are attorneys licensed in England and Wales.

QUESTION:

2. The inquirer asks questions about three distinct scenarios:

A. May the inquirer sell his New York firm in its entirety to the English firm if the New York firm would become a wholly-owned subsidiary of the English firm and would employ New York licensed attorneys as employees and not as shareholders? If not, may the inquirer sell a majority interest in the New York firm to the English firm, with the inquirer and other New York attorneys remaining as shareholders?

B. May the inquirer be employed directly by the English firm in a senior leadership role based in the United Kingdom or European Union if he continues to practice in New York? If not, would it make a difference if the inquirer ceased to practice law in New York, removed references to New York admission, and did not advise clients on matters of New York law, but continued to practice under his licenses elsewhere?

C. May the inquirer retire from the practice of law in New York, while continuing to practice with a valid license in another jurisdiction?

OPINION:

Ownership of All or Part of a New York Law Firm by Nonlawyers

3. Although we answer questions only about an inquirer's own proposed conduct, and not the conduct of other lawyers, the inquirer's first question is in effect a question on behalf of both himself and his firm. (New York is one of the only jurisdictions in the United States where a law firm as an entity is subject to discipline.) This opinion will therefore discuss the application of the New York Rules of Professional Conduct (the "Rules") to other New York lawyers in the inquirer's firm, since their conduct may affect whether the inquirer and his firm may ethically enter into the proposed transaction.

4. Rule 5.4 (Professional Independence of a Lawyer) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, prohibits a lawyer from forming a partnership with a nonlawyer if the activities of the partnership include practicing law, and prohibits a lawyer from practicing in an entity authorized to practice law for profit in which a nonlawyer owns any interest or serves as a director or officer or has the right to direct or control the professional judgment of a lawyer. Specifically, Rule 5.4 provides:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer [except in certain circumstances not relevant here].
>
> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
>
> * * *
>
> (d) 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, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
> >
> > (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
> >
> > (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

5. Comment [1] to Rule 5.4 explains that the purpose of the Rule is to protect the independence of the lawyer's professional judgment. Similarly, Comment [2] to the Rule notes: "This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another."

6. Another provision of the Rules that is relevant to multi-jurisdictional practice is Rule 8.5, the provision governing disciplinary authority and choice of law. That Rule provides:

> (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.

7. Thus, under Rule 8.5(b)(2)(ii), if a lawyer is licensed to practice in New York and another jurisdiction (as the inquirer here will be if his pending applications for admission to other bars are approved), then the New York Rules of Professional Conduct apply only in two circumstances: (a) the lawyer "principally practices" in New York and the "predominant effect" of the lawyer's conduct is in New York; or (b) the lawyer does *not* principally practice in New York but the "particular conduct" at issue "clearly has its predominant effect" in New York. (In contrast, whether the dual-licensed lawyer principally practices in New York or elsewhere, if the "predominant effect" is in the lawyer's non-New York jurisdiction, then the New York Rules will not apply.)

8. Our Committee has written a number of opinions on Rule 5.4 and Rule 8.5 as they apply to arrangements between a New York lawyer or law firm, on the one hand, and a non-New York law firm with nonlawyer owners in a jurisdiction that permits nonlawyer ownership of law firms, on the other hand. *See* N.Y. State 1166 (2019), N.Y. State 1093 (2016), N.Y. State 1041 (2014), N.Y. State 1041 (2014), N.Y. State 1038 (2014), N.Y. State 1027 (2014), N.Y. State 1023 (2014). Our opinions may be divided into two groups: (1) opinions where the lawyer proposes to principally practice law in New York, and (2) opinions where the lawyer will not principally practice in New York and the lawyer's conduct will not have its predominant effect in New York.

If the Inquiring Lawyer or Other Lawyers in the Firm will Practice in New York

9. In N.Y. State 1038 (2014), the inquirer was a New York lawyer who was also admitted in D.C., a jurisdiction that allows a law firm to have nonlawyer partners in limited circumstances. The inquirer proposed to join the D.C. firm and to staff an office in New York to handle New York cases. The inquirer would either join the D.C. firm as a partner or be a partner in a separate wholly-owned subsidiary of the D.C. firm, which the New York lawyer would independently manage. Applying Rule 8.5, the Committee determined that the lawyer's "conduct" was equivalent to "practicing in New York in a partnership with a nonlawyer partner and sharing legal fees from New York matters with a nonlawyer partner." This, we decided, was not conduct "in connection with" a particular New York proceeding in a court within the meaning of Rule 8.5(b)(1), even if the New York lawyer would be involved in New York litigation. Rather, the applicable provision was Rule 8.5(b)(2) ("any other conduct") and, since the lawyer was "licensed to practice in this state and another jurisdiction" (New York and D.C.), the questions were (a) where did the lawyer "principally practice[]" and (b) in which of these jurisdictions did the lawyer's conduct clearly

have its "predominant effect"? We concluded that the conduct of practicing in New York with a partnership with a nonlawyer partner and sharing legal fees from New York matters with the nonlawyer partners would have its predominant effect in New York. Here, similarly, since the purpose of the proposed arrangement seems to be to have an office in New York staffed by New York lawyers, the "predominant effect" would clearly be in New York. Consequently, the New York Rules of Professional Conduct will apply, rather than the Rules of the non-New York jurisdiction, and the proposed firm here would likewise violate Rule 5.4.

10. Our other opinions addressing Rule 5.4 and Rule 8.5 have employed a similar analysis. *See, e.g.,* N.Y. State 1190 (2020) (a professional limited liability company with nonlawyer members may not provide legal services in New York), N.Y. State 1041 (2014) (a New York lawyer may practice in a foreign country with an entity that includes a nonlawyer supervisor or owner if the predominant effect of the lawyer's practice is not in New York), N.Y. State 911 (2012) (a New York lawyer may not establish the New York office of a U.K. law firm with nonlawyer owners, because, even if the New York lawyers also were admitted in the U.K., the predominant effect of their conduct would be in New York); N.Y. State 889 (2011) (a lawyer licensed in both New York and D.C. may practice in a D.C. firm with nonlawyer members if he principally practices in D.C. and receives a majority of his revenue from D.C. cases and matters, but if the partnership were created for the purpose of practice in New York, establishing it in D.C. would be ineffective to circumvent the New York rules on fee sharing.)

11. In N.Y. State 1038, we also addressed whether a New York firm could be a wholly-owned subsidiary of a non-New York law firm with nonlawyer owners, rather than being directly owned by nonlawyers. We did not find the answer to this question directly in Rule 5.4, but we concluded that such indirect ownership by nonlawyers would be prohibited, because Rule 8.4(a) prohibits a lawyer from violating the Rules indirectly "through the acts of another." If a New York law firm were owned by a non-New York firm with nonlawyer owners, the New York firm would be violating Rule 5.4(d) indirectly, through the acts of non-New York lawyers who permitted their firm to have nonlawyer owners. In addition, Opinion 1038 noted that Rule 5.4(d) prohibits a lawyer (whether a partner, associate, or employee of a law firm) from practicing "with or in the form of an entity authorized to practice law for profit, if . . . *a nonlawyer owns <u>any</u> interest therein*" or "has the right to direct or control the professional judgment of a lawyer." (Emphasis added.) We interpreted the term "owns any interest therein" in Rule 5.4(d) to extend to an indirect ownership interest. Thus, the inquirer here may not escape Rule 5.4(d) by practicing in a law firm that is a wholly-owned subsidiary of a non-New York law firm with nonlawyer owners.

<u>Would it Make a Difference if the UK Firm Owned Less Than a Majority of the New York Firm?</u>

12. A limited number of U.S. jurisdictions have modified their versions of Rule 5.4 to allow some nonlawyer ownership of a law firm and to allow lawyers to share legal fees with nonlawyers. In 2021, for example, Arizona eliminated its version of Rule 5.4 entirely and substituted a system in which Arizona law firms with nonlawyer owners may be certified by the Arizona Supreme Court as "alternative business structures." In 2020, the Utah Supreme Court created a pilot program – a so-called legal-regulatory "sandbox" – that allows Court-approved entities to include nonlawyer owners. Decades ago, the District of Columbia modified its version of Rule 5.4 to allow firms to have nonlawyer partners if (among other restrictions) those nonlawyers provide professional services that assist the law firm in delivering legal services. *See also* Wash. R. of Prof'l Conduct 5.9 (authorizing ownership by Limited License Legal Technicians). Moreover, the American Bar Association and certain states have committed to exploring the issue of nonlawyer ownership of legal service providers, sometimes where nonlawyers own less than a majority of the firm. *See generally* ABA 499 (2021) (discussing jurisdictions that allow nonlawyer ownership of

law firms and concluding that lawyers in other jurisdictions may ethically have a "passive" ownership interest in such law firms).

13. New York is not among the jurisdictions that allow nonlawyer ownership. New York Rule 5.4(d) prohibits a New York lawyer from practicing in an entity authorized to practice law for profit if a nonlawyer owns *any* interest. *Cf*. N.Y. City 2020-1 entitled "Ongoing Relationships with Alternative Legal Business Entities" (concluding that a New York lawyer may enter into a non-exclusive ongoing co-counsel relationship with a firm with nonlawyer owners as long as the New York lawyer is not employed by the firm, is not a partner or shareholder in the firm, and has no similar role with the firm).

May the inquirer be employed directly by the English firm in a senior leadership role based in the UK/EU?

14. The inquirer's second question assumes the firm will not have a New York office but that the inquirer would be employed in the U.K. in a senior leadership position.

15. The inquirer does not describe what his duties as a senior leader would be, but we assume he would not be practicing law in New York. Not only would practicing New York law implicate the problems under Rule 5.4 discussed above, but it also would implicate Section 470 of the New York Judiciary Law. Under that statute,"[a] non-resident attorney who is admitted to practice in New York and who practices New York law must have an office in New York that meets the minimum requirements of Section 470, but we express no opinion as to what Section 470 requires." N.Y. State 1223 ¶ 14 (2021); *see also* N.Y. State 1025 (2014) (an attorney who is admitted to practice in New York and advertises his or her law practice in New York, but who does not reside in New York, must have an office that meets the minimum requirements of Judiciary Law §470, whatever those requirements may be). Section 470 would not be applicable if no lawyer in the firm were practicing law in New York.

16. If the inquirer in his capacity as a senior leader principally practices in the U.K. and his activities do not clearly have their predominant effect in New York, then we see no problem with this role.

May the Inquirer Retire from Practice in New York and Continue to Practice with a Valid License in Another Jurisdiction?

17. Finally, the inquirer asks if he may "retire" from the practice of law in New York but continue to practice in another jurisdiction in which the inquirer is licensed. As we pointed out in N.Y. State 1172 ¶8 (2019), there are several ways by which a lawyer might seek to "retire" from law practice in New York.

18. One way of retiring is for the lawyer to stops practicing law in New York, but to retain his or her license through ongoing registration with the Office of Court Administration and compliance with New York's mandatory continuing legal education (CLE) requirements. Such a person is still a New York lawyer and remains subject to the Rules, including Rule 5.4 and Rule 8.5. Consequently, if the inquirer used this method to retire, Rule 8.5(b)(2)(ii) would apply, requiring an analysis of where the lawyer "principally practices" and where his conduct clearly has its "predominant effect".

19. Another way of retiring from New York law practice is for a lawyer to change his or her New York registration status to "retired" under Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 NYCRR §118.1(g). Lawyers who retire via this method are exempt from paying the biennial registration fee and from complying with the mandatory CLE requirement, but they may render legal services "without compensation." Those lawyers remain members of the

bar and thus are subject to the Rules, including Rule 5.4 and Rule 8.5. As we said in N.Y. State 1172, this change in registration does not strip the lawyer of a license to practice law but instead places parameters on the lawyer's practice. However, under §118.1(g) this form of retirement does not appear to be available to lawyers who confine their practice to a foreign jurisdiction. Moreover, in *Matter of Attorneys in Violation of Judiciary Law § 468-a [DaCunzo]*, __ A.D.3d ___ (Nov. 4, 2021), the court held that a lawyer may not "retire" from practice in New York but continue to practice in another jurisdiction because §118.1(g) provides that the practice of law includes the giving of legal advice in New York "or elsewhere." The *DaCunzo* court therefore held that respondent's claim that she was retired was improper because she still practiced outside New York. Whether this interpretation is correct is a question of law on which we cannot opine, but the inquirer should research the law carefully before choosing this method of retirement.

20. A third method of "retiring" is for a lawyer to voluntarily and formally resign from the New York bar. The Rules for Attorney Disciplinary Matters of the Supreme Court, Appellate Division, which are contained in 22 NYCRR Part 1240, provide for voluntary resignation from the bar for non-disciplinary reasons as follows:

> § 1240.22 Resignation for Non-Disciplinary Reasons; Reinstatement (a) Resignation of attorney for non-disciplinary reasons. (1) An attorney may apply to the Court for permission to resign from the bar for non-disciplinary reasons by submitting an affidavit in the form in Appendix E to these Rules. … (2) When the Court determines that an attorney is eligible to resign for non disciplinary reasons, it shall enter an order removing the attorney's name from the roll of attorneys and stating the non-disciplinary nature of the resignation.

21. If this form of resignation has been accepted by one of the Appellate Divisions, such individual is no longer a member of the New York bar and therefore is no longer subject to the New York Rules of Professional Conduct.

CONCLUSION:

22. A New York lawyer may not be a partner, associate or employee of a law firm in New York or in another jurisdiction that has direct or indirect ownership by nonlawyers in accordance with the rules applicable in that jurisdiction, unless the lawyer is lawfully practicing in the other jurisdiction and principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not clearly in New York. A New York lawyer may be employed in a senior leadership position in a law firm in another jurisdiction that has nonlawyer ownership in accordance with the rules of that jurisdiction, as long as the lawyer principally practices in such jurisdiction, and the predominant effect of the lawyer's conduct is not clearly in New York. Whether a New York lawyer may retire from the practice of law in New York while continuing to practice in another jurisdiction is a question of law on which we cannot opine. If a lawyer may lawfully do so, then whether the New York Rules will continue to apply to the lawyer will depend on the type of retirement the lawyer chooses.

(25-21)