New York State Bar Association

Committee on Professional Ethics

Opinion 762 – 3/5/03

Topic: Supervision by New York lawyers and law firms of lawyers licensed in foreign countries

Digest: Law firm with New York office and at least one affiliated New York lawyer is subject to certain New York disciplinary rules; obligation of New York law firm and of supervisory lawyers to ensure compliance with the New York Code extends only to lawyers subject to the New York Code; New York law firm has broad supervisory responsibilities with respect to affiliated lawyers licensed in foreign countries, and must ensure that compliance by such lawyers with foreign law and ethical standards does not compromise the firm's adherence to the New York Code.

Code: DR 1-102; DR 1-104; DR 1-105; DR 1-106; DR 1-107; DR 2-101(E), (G), (L); DR 2-102(A), (D); DR 2-105(A); DR 2-106(A), (C)(2); DR 2-111; DR 3-102(A); DR 4-101(B), (D); DR 5-102(B); DR 5-105(E); DR 5-108(C); DR 6-101; DR 7-102(B)(1); DR 9-102(B), (D); EC 1-8; EC 2-19; EC 4-5;

QUESTION

To what extent must a New York attorney or the attorney's law firm supervise associates, partners and non-lawyers who are admitted to practice in foreign jurisdictions but not in New York?

FACTS

The inquirer is a lawyer admitted to practice in New York and practices in a law firm that has as partners and associates lawyers licensed in a foreign country who are not admitted in New York or any other state.[1] The firm has an office in New York (where the inquirer works) as well as in the foreign country.

OPINION

DR 1-104 of the Lawyer's Code of Professional Responsibility (the "New York Code") imposes certain supervisory responsibilities on law firms and lawyers:

> A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.
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> B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.
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> C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

DR 1-104 provides ethical rules both for the law firm (DR 1-104[A] and [C]) and for individual lawyers (DR 1-104[B]). We first discuss the firms to which DR 1-104(A) and (C) apply. We then discuss DR 1-104(A) and (B), which impose supervisory responsibility with respect to compliance with disciplinary rules, and finally the more general supervisory responsibility imposed by DR 1-104(C).

Law Firms Subject to Disciplinary Rules [2]

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1 We assume for purposes of this inquiry that the inquirer may ethically form a partnership with the lawyers involved. *See* N.Y. State 658 (1994), in which we opined that whether a New York lawyer could affiliate with an attorney or firm from another country was dependent upon the educational requirements and ethical standards for the attorneys licensed in foreign countries. We assume that the New York lawyer here has made an independent inquiry to ensure that there are not substantial differences in the educational requirements or ethical standards applicable to the foreign attorneys that would make it impossible for the inquirer to uphold his or her ethical obligations. N.Y. State 658, at 3.

2 The Definitions section of the New York Code provides:

> "Law firm" includes, but is not limited to, a professional legal corporation, a limited liability company or partnership engaged in the practice of law, the legal department of a corporation or other organization and a qualified legal assistance organization.

Our discussion of DR 1-104 is applicable to all of these entities.

A limited number of disciplinary rules in the New York Code apply to law firms rather than, or in addition to, individual lawyers.[3] *See* DR 1-102, 1-104, 1-106, 1-107, 2-101(E), (G), (L), 2-102(A), 2-105(A), 2-111, 3-102(A), 5-102(B), 5-105(E), 5-108(C), 9-102(B)(2). Our initial task is determining which firms are subject to these provisions of the New York Code.

The New York Code specifically addresses which lawyers are subject to the disciplinary authority of New York. *See* DR 1-105 ("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."). It does not, however, provide a similar rule for "law firms." Although the First Department has adopted such a rule, none of the other Departments in the State has done so.[4] In the absence of a clear rule, the reach of the New York Code as it applies to law firms is uncertain. At a minimum, however, the Disciplinary Rules that are specifically applicable to law firms under the New York Code apply to firms with a New York office and at least one New York lawyer affiliated with the firm in that office.[5] For purposes of this opinion we refer to such a firm as a "New York firm"; it follows that DR 1-104 applies to a New York firm.

Responsibility With Respect to New York Disciplinary Rules

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3 We note that although state law generally treats a partnership as an aggregate of its partners, the New York Code in some cases treats the partnership as an entity and imposes certain obligations on the firm. This requires the firm, through its governance structure, to take steps to satisfy its entity obligations.

4 22 NYCRR 603.1(b), 603.2(b) provide that any law firm (as defined in the New York Code) that has as a member, employs, or otherwise retains an attorney or legal consultant who is subject to the New York Code can be disciplined for professional misconduct under the New York Code. 22 NYCRR 603.1(a) provides that "all attorneys who are admitted to practice, reside in, commit acts in or who have offices in this judicial department, or who are admitted to practice by a court of another jurisdiction and who practice within this department [in certain situations]" as well as those admitted pro hac vice are subject to the New York Code.

Read literally the First Department's rule is extraordinarily broad. It would apply the New York Code to any firm that has a partner or associate who resides in New York or who is admitted to practice in New York. For example, the First Department apparently would apply the New York Code to a Connecticut law firm that has a single partner who lives in Westchester County but who is admitted to practice and practices only in Connecticut. It also apparently would apply the New York Code to an Idaho firm that employs an associate who is admitted in both New York and Idaho, but practices only in Idaho. We question whether the court intended to extend the reach of the New York Code in these circumstances.

5 We note that two court rules use the existence of a New York office as a determinant. Part 137, the rule implementing a comprehensive fee dispute resolution program, states that the rule does not apply to "disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in New York, or where no material portion of the services was performed in New York." 22 NYCRR Part 137.1(b)(7). The written letter of engagement rule, Part 1215, contains an identical exception. *See* 22 NYCRR Part 1215.2(4).

DR 1-104(A) requires a New York firm to "make reasonable efforts to ensure that *all lawyers* in the firm conform to *the disciplinary rules."* (Emphasis added). Read literally, this might imply that partners and associates of a New York firm who are licensed in a foreign country but not admitted in New York must conform to the New York Code. We believe that this broad reading is unintended. We conclude that DR 1-104(A) requires a New York firm to make reasonable efforts to ensure that lawyers subject to the New York Code who are affiliated with the firm comply with the New York Code.[6]

The New York Code contemplates that New York lawyers will enter into partnerships with lawyers admitted in other jurisdictions, *see*, *e.g.*, DR 2-102(D), and it is common knowledge that the ethics and disciplinary rules of various jurisdictions differ in material ways. Furthermore, this Committee has opined that partnerships of New York lawyers and lawyers licensed in a foreign country are ethical in circumstances where professional standards of conduct applicable to the foreign lawyers are compatible with the New York Code.[7] Thus, it is clear that New York lawyers may enter into partnerships with lawyers who are bound by ethics rules other than the New York Code.

In addition, the rules of the four Departments, which subject lawyers to the Code of Professional Responsibility, vary somewhat, but generally provide that the New York rules with respect to professional misconduct apply to attorneys who are admitted to practice, reside in, commit acts in, or have offices in New York. 22 NYCRR 603.1, 691.1, 806.1, 1022. Thus, a lawyer licensed in a foreign country who has no relationship to New York is not subject to the New York Code under the Appellate Division rules.

A New York law firm must make reasonable efforts to ensure that any lawyer in the firm who is subject to the New York Code complies with its disciplinary rules. DR 1-104(A) does not impose an obligation on a New York law firm to ensure compliance with

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6 EC 1-8 contains a similar rule, but capitalizes the term "Disciplinary Rules," providing support for the view that DR 1-104(A) is referring only to the disciplinary rules found in the New York Code.

7 In opining that it would be ethical for a New York lawyer to enter into a partnership with a British lawyer, we commented on the "essential compatibility of our standards of professional conduct and discipline." N.Y. State 542 (1982). Similarly, in finding it would be ethical for a New York lawyer to enter into a partnership with a Japanese bengoshi, we noted that "the standard of professional conduct and discipline in Japan appears to be sufficiently similar in relevant aspects." N.Y. 646, at 3. In neither situation did we require an identity of ethical and disciplinary rules, which is not likely to be the case. *See also* ABA 423 (2001) ("The law and ethical standards applicable to the legal profession in foreign countries will differ from some of the law and ethical standards that apply to U.S. lawyers."); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 Georgetown J. Legal Ethics 677 (2000) (outlining some differences between ethical rules in EU countries and the United States).

the Disciplinary Rules by affiliated lawyers licensed in foreign countries who are not subject to the New York Code.[8]

We note that the more general supervisory responsibility imposed by DR 1-104(C) -- which specifically embraces "non-lawyers who work at the firm" -- may in some circumstances require a New York firm to supervise lawyers licensed in foreign countries to ensure that their conduct does not limit the ability of the firm and its New York lawyers to comply with the New York Code. This responsibility is discussed in the next section.

DR 1-104(B) imposes similar obligations on a lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer. Thus, these individuals have responsibilities to the same extent the law firm has a responsibility under DR 1-104(A) to ensure that lawyers in the firm subject to the New York Code abide by the New York disciplinary rules.[9]

Both DR 1-104(A) and (B) provide that the law firm and lawyers with management or supervisory responsibility in the law firm must make "reasonable efforts" to ensure that other lawyers in the firm conform to the disciplinary rules. While what constitutes "reasonable efforts" will vary from firm to firm, some general standards are applicable. First, the firm should adopt procedures to deal with ethical questions and problems. EC 1-8 suggests that these measures may include "informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics." What constitutes reasonable efforts will depend, in part, on the size of the firm and its structure. Informal supervision may be sufficient in a small one-office firm, but detailed written policies and procedures may be necessary in a multi-office firm. *See* ABA Model Rule 5.1, cmt. [2]. The locus for confidential referral of ethical questions confronting a New York lawyer should be another New York lawyer. Other ways in which a firm may carry out its responsibilities include adopting internal standards of conduct or an ethics manual, seeking opinions of bar ethics committees, or consulting outside experts. *See generally New York Code of Professional Responsibility: Opinions, Commentary & Caselaw* bk. xi at 20-22 (Mary C. Daly ed. 2002); Roy D. Simon, Jr., *Simon's New York Code of Professional Responsibility Annotated* 50-52 (2003).

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8 Under the ABA Model Rules, "[a] partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Model Rule 5.1(a). The ABA Standing Committee on Ethics and Professional Responsibility interpreted this to mean the Model Rules if they are in effect in a jurisdiction and, if not, other ethical and disciplinary rules applicable in the United States or foreign jurisdiction. *See* ABA 423 (2001). The ABA Committee did not address the choice of law question as to which ethical rules apply to lawyers engaged in a multinational legal practice.

9 DR 1-104(B) does not apply to managing or supervisory lawyers who are not subject to the New York Code. So, for example, a British lawyer who directly supervises a New York lawyer in a London office has no responsibility to ensure that the New York lawyer complies with the New York Code.

Second, in addition to having procedures in place to respond to ethical inquiries or lapses, the firm has an obligation to respond to any ethical issue that comes to its attention. Third, while the firm does not need to monitor every aspect of every representation undertaken by one of its lawyers, it does have a duty to make inquiries where it has reason to believe there is a likelihood that there may be ethical problems.

General Supervisory Responsibilities

DR 1-104(C) requires a law firm adequately to supervise, as appropriate, the work of partners, associates, and non-lawyers who work at the firm. This provision imposes obligations on the New York firm with respect to affiliated lawyers licensed only in foreign countries who are, for this purpose, "non-lawyers."

In general, DR 1-104(C) requires a New York law firm to have systems in place to ensure that the firm's practice will be conducted in a professional and ethical manner. For example, the law firm has an obligation (i) to have a policy and system for detecting conflicts of interest, DR 5-105(E); (ii) to provide accurate bills to clients, EC 2-19; *see* DR 2-106(A); (iii) to retain appropriate records, DR 9-102(D); (iv) to provide retainer agreements where necessary, DR 2-106(C)(2); and (v) to segregate client funds, DR 9-102(B). The law firm must take reasonable measures to assure that its lawyers and non-lawyers are familiar with these procedures and comply with them. It is not sufficient for the firm simply to assume that its lawyers and non-lawyers will comply. *Cf*. *Dresser Industries v. Digges*, 1989 WL 139234 (D. Md. 1989) (finding nonparticipating partners liable for misconduct of a partner based in part on the firm's failure to have a system in place to assure compliance with disciplinary rules); *Restatement (3d) of The Law Governing Lawyers* § 11(1) (partners can be disciplined for failing to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to applicable code requirements"). The firm's responsibility for developing and implementing systems to ensure professional and ethical practice may be delegated to a management committee or similar group. *See id.* § 11, cmt. d.

Furthermore, DR 4-101(B) imposes on lawyers the obligation to preserve the confidences and secrets of a client. DR 4-101(D) requires that a lawyer "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client . . . ." *See also* EC 4-5. The firm must acquire, store, retrieve, and transmit client confidential information "under systems and controls that are reasonably designed and managed to maintain confidentiality." *Restatement (3d) of The Law Governing Lawyers* § 60, cmt. d. The firm must take steps to ensure that all persons affiliated with the firm understand the sanctity of this provision. Non-lawyers and lawyers licensed in foreign countries whose confidentiality rules may differ need to be sensitized to the obligation not to disclose or use a client confidence or secret. *See generally* James Altman, "An Associate's Duty to Supervise Non-Lawyers," N.Y.L.J., Oct. 11, 2002, at 28.

In addition, Canon 6 provides that a lawyer should represent a client competently. DR 6-101 specifically provides that: "A lawyer shall not handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it." The presence of another lawyer in the firm competent to handle the matter does not absolve the first lawyer of the obligation under DR 6-101 unless he or she actually consults with the second lawyer. Therefore, a New York firm should assure itself that all lawyers (including lawyers licensed only in foreign countries) working in the New York office are competent to handle matters undertaken by them, and if not, to have in place a procedure for consultation with a lawyer who has competence in the area. As DR 1-104(C) suggests, the degree of supervision will vary with the circumstances, taking into account "the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter."

The supervision mandated by DR 1-104(C) requires reasonable efforts to ensure that adherence to the disciplinary rules of a foreign country by a lawyer licensed in a foreign country does not expose the New York firm or its New York lawyers to the possibility of violating the New York Code. In N.Y. State 646, which permitted New York lawyers generally to enter into partnerships with lawyers licensed in foreign countries, we required that the partnership "not compromise the New York lawyer's ability to uphold ethical standards." Specifically, "the New York lawyer who enters into a partnership with lawyers licensed in . . . [a] foreign country has an obligation to ensure that participation in the law partnership does not compromise the lawyer's ability to abide by the ethical standards of this State, including the standards governing attorney-client confidentiality." *Id.* at 3-4; *see also* D.C. Op. 278 (1998) (same). Furthermore, a New York lawyer is responsible for a violation of the New York Code by a lawyer or non-lawyer employed, retained, or associated with the New York lawyer where the New York lawyer (1) orders, directs or ratifies the conduct or (2) is a partner or has supervisory responsibility for the person who engaged in the conduct and knows of such conduct or in the exercise of management or supervisory responsibility should have known of such conduct so that remedial action should have been taken. DR 1-104(D).

For example, while there might be no per se prohibition against a New York lawyer entering into a partnership with lawyers from Country X where the ethical and disciplinary rules of both jurisdictions are similar, the New York lawyer could not enter into the partnership if one of the Country X partners was not a lawyer. Although such a partnership might be permitted in Country X, the New York lawyer could not enter into the partnership because it would compromise the lawyer's ability to abide by the New York ethical rules. *See* DR 3-103 (lawyer cannot form a partnership with a non-lawyer if the partnership practices law); *see also* ABA 423, *supra*.

Even where forming a partnership with lawyers licensed in foreign countries is ethically permissible, in carrying out its supervisory obligations under DR 1-104(C) the law firm may need to take steps to ensure that particular actions of the foreign lawyers do not compromise the New York lawyer's ethical responsibilities. *Cf.* EC 1-8 ("A law

firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm.") Suppose, for example, that the ethical rules of Country X generally comport with the New York confidentiality rules but *require* a lawyer to reveal a client's past fraud. Because a New York attorney is prohibited from revealing a client confidence or secret in that situation (DR 7-102[B][1]; DR 4-101), the firm must take reasonable steps to ensure compliance with the New York Code (for example, by ensuring that such confidential information is unavailable to the lawyer licensed in Country X).[10] To ensure that adherence to the disciplinary rules of a foreign country by a foreign lawyer does not expose the New York firm or its New York lawyers to a violation of the New York Code, supervision of the lawyer licensed in the foreign country by the firm should be by a lawyer (or lawyers) familiar with the New York Code.

The New York firm may also have affirmative duties with respect to a client whose matter will be handled in a foreign jurisdiction with differing ethical rules. For example, the firm must explain to the client the extent to which the confidentiality rules in the foreign jurisdiction provide less protection than they do in New York.

CONCLUSION

New York lawyers with management or supervisory authority in law firms with New York offices, as well as the firms themselves, are required to make reasonable efforts to ensure that lawyers subject to the New York Code who are affiliated with the firm in such offices comply with the New York Code. A New York firm has broad supervisory responsibility under DR 1-104(C) with respect to non-lawyers and lawyers licensed in foreign countries in the New York office, and must ensure that compliance by foreign lawyers with the ethical rules of a foreign jurisdiction does not compromise the firm's adherence to the New York Code.

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10 If this is impossible because of the size or the nature of the firm, the partnership itself may be unethical.