



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1054 (4/10/15)

Topic: Choice of law, virtual law office.

Digest: If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the Rules of Professional Conduct to be applied will ordinarily be Virginia's rules. If the lawyer does not represent a client in a proceeding in a court, 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. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer will be deemed to be "licensed to practice" in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits retention by residents of New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York, and the disciplinary authorities will apply New York's ethics rules.

Rules: Rules 1.1, 1.4, 1.6(c), 1.15, 5.1, 5.3, 5.5, 7.1(h), 7.3(i), 8.5(b)(1) & (2).

FACTS

1. The inquirer is an attorney licensed to practice in both the State of New York and the Commonwealth of Pennsylvania. He now intends to open a solo law office in Virginia, for the sole purpose of representing veterans and their dependents in the United States Court of Appeals for the Fourth Circuit, the United States District Courts in Virginia, and the Administrative Board of Veterans Appeals.
2. The inquirer seeks to practice in Virginia by using a physical office two days per month, using the street address of the office as his mailing address, having access to a private mailbox at that address five days a week; answering phone calls personally when in the office; forwarding calls to the inquirer's cell phone or to a personal voicemail account attached to the cell phone when he is not in the physical office; and using a recorded message when he is not available to answer a phone call.
3. The inquirer formerly worked for the federal government, working on rulemakings pertaining to veterans' benefits and representing the government on appellate briefs.
4. The inquirer states that he has obtained an advisory opinion from the Virginia State Bar Association's ethics committee, advising that he is permitted to practice from an office address in Virginia, as long as the inquirer (a) limits his practice to federal court and (b) indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. The inquirer also states that such opinion would permit the inquirer to operate

using a "virtual office."

QUESTION

5. May a lawyer admitted only in New York and Pennsylvania practice in the federal courts in Virginia and before the Administrative Board of Veterans Affairs from a "virtual office" in Virginia?

OPINION

6. Under Rule 8.5(a) of the New York Rules of Professional Conduct (the "Rules"), a lawyer admitted in New York is subject to the disciplinary authority of New York no matter where the lawyer's conduct occurs. However, the rules of conduct that the 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.

7. We assume for purposes of this opinion that the inquirer has been (or will be) admitted to practice, either generally or for purposes of a particular proceeding, before the federal courts in Virginia. *See* Rule 5.5 (a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction).

8. Clearly, if the inquirer has been admitted to practice before the Virginia courts (either generally or for purposes of a particular proceeding), when the inquirer represents a client in a proceeding in a court in Virginia, then Rule 8.5(b)(1) provides that Virginia's ethics rules will be applied, unless the court rules provide otherwise. For purposes of Rule 8.5(b)(1), the Administrative Board of Veterans Affairs 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)).

9. When the inquirer does not represent a client in a proceeding in a "court," Rule 8.5(b)(2) provides that the ethics 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." Rule 8.5(b)(2) thus recognizes that New York does not have an interest in applying its own rules when the lawyer's conduct has its principal effect in another jurisdiction that has disciplinary authority over the conduct.

10. Here, the inquirer is not formally admitted to the bar in Virginia, the jurisdiction in which he intends to principally practice. 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, then the lawyer should be deemed to be "licensed to practice" in the other jurisdiction, even though such conduct would constitute the practice of law if the lawyer were practicing in New York.¹ According to the inquirer, the Virginia State Bar Association has opined that he may practice from an office address in Virginia, as long as he limits his practice to federal court, and indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. Consequently, the inquirer is deemed "licensed to practice" in Virginia, and the New York disciplinary authorities would ordinarily apply the Virginia Rules of Professional Conduct to his conduct. However, an exception will arise if the inquirer solicits business in New York or Pennsylvania. In that case, the lawyer's conduct regarding the solicitation would clearly have its "predominant effect" in the admitting jurisdiction to which the solicitations are directed, and the disciplinary authorities would apply the rules of that jurisdiction to the solicitations. *Cf.*, New York 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). Whether any ensuing business would also be subject to the rules of such admitting jurisdiction depends upon where such business has its "predominant effect." That is a factual question on which we do not opine.

¹ N.Y. State 815 was decided under former DR 1-105(B)(2)(b), but the language of that provision is the same as the language of Rule 8.5(b)(2)(ii), so our conclusion would remain the same today. See N.Y. State 1042 (2014); N.Y. State 1041 (2014) (both applying this principle of N.Y. State 815 under Rule 8.5(b)(2)).

11. Assuming the inquirer is soliciting business in New York, another question arises: must he have a local office in New York? This question is governed by law and not by the Rules. In N.Y. State 1025 (2014), we noted that Judiciary Law §470 has been interpreted by New York courts to require that attorneys have an office in New York if they practice, but do not live, in New York. *See Lichtenstein*, 251 A.D.2d 64; *Haas*, 237 A.D.2d 729; *Matter of Larsen*, 182 A.D.2d 149 (2d Dept 1992). We also determined that Rule 7.1(h), which requires that every lawyer advertisement include the “principal law office address and telephone number of the lawyer or law firm whose services are being offered,” does not provide an independent basis for requiring a physical office in New York.

12. In N.Y. State 1025, we noted the case of *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014). There, the Northern District of New York found unconstitutional the interpretation of § 470 requiring a physical office. On appeal, the Second Circuit referred a certified question to the New York Court of Appeals, asking about the minimum requirements necessary to satisfy the requirement for a local office for the transaction of law business. Although the Court of Appeals had not responded when we published N.Y. State 1025, on March 31, 2015, it issued its response, confirming that the statute requires a physical office for the conduct of business. The Second Circuit must now decide whether enforcement of §470 as so interpreted would be constitutional.

13. Assuming the inquirer is soliciting business from New York residents, the inquirer must comply with various duties imposed by the Rules. *See* N.Y. State 1025 (2014) (listing duties under various Rules, and noting that there is no “virtual law office exception” to any of the Rules).

CONCLUSION

14. If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the rules to be applied ordinarily will be the rules of Virginia, unless the court rules provide otherwise. If the lawyer does not represent a client in a proceeding in a court, 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. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer should be deemed to be "licensed to practice" in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits business in New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York and the disciplinary authorities would apply the rules of New York.

(6-15)