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New York State Bar Association
Committee on Professional Ethics

Opinion 1027 (10/16/2014)

Topic: Choice of ethics rules for non-court matters

Digest: If a lawyer is licensed only in New York, then the New York Rules of Professional Conduct apply to the lawyer's conduct in all non-court matters. If a lawyer is licensed in New York and one or more other jurisdictions, then the lawyer's conduct in non-court matters will be governed by the rules of the jurisdiction in which the lawyer "principally practices" *unless* the "predominant effect" of the lawyer's conduct clearly will be felt in another jurisdiction in which the lawyer is also licensed to practice.

Rule: 8.5

FACTS

1. The inquiring lawyer (the "Dual-Licensed Lawyer") is licensed and in good standing in both New York and the District of Columbia, and has offices in both jurisdictions. The lawyer handles state and federal matters outside of court. For example, he negotiates commercial contracts and real estate deals, and he represents clients in matters before various federal agencies such as the United States Patent and Trademark Office and the Internal Revenue Service. The lawyer does not handle any matters pending in a court.

2. Questions regarding confidentiality, conflicts of interest, and other legal ethics issues have arisen in some of the matters that the Dual-Licensed Lawyer is handling, and he wishes to know which jurisdiction's ethics rules apply to his conduct. This opinion does not address the underlying legal ethics questions in the inquirer's matters. It addresses only choice-of-ethics rules, and only in the context of the inquirer's practice, which does not include matters pending in any court.

QUESTION

3. When a lawyer is licensed to practice in both New York and the District of Columbia, and the lawyer is handling a non-court matter (meaning a matter *other than* a matter in connection with proceedings pending before a court in which the lawyer has been admitted), which jurisdiction's rules of legal ethics govern the matter?[1]

[1] We are choosing the unusual term "non-court" to track the structure of New York Rule 8.5(b), which divides lawyer conduct into two categories: (1) "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice"; and (2) "any other conduct." Many types of litigation occur outside of a "court," so the term "non-litigation matters" would be too narrow to describe the second category, and many types of law practice cannot be described as "transactions," so the term

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4. The relevant provision in the New York Rules of Professional Conduct (the "Rules") is Rule 8.5, entitled "Disciplinary Authority and Choice of Law." Rule 8.5 has two paragraphs.

5. Rule 8.5(a), the "disciplinary authority" part of the rule, provides that a lawyer who is licensed in New York may be disciplined by New York disciplinary authorities for professional misconduct whether the misconduct occurs in New York or elsewhere, and may be disciplined by New York disciplinary authorities even if the lawyer is also disciplined for the same conduct by disciplinary authorities in another jurisdiction. Specifically, Rule 8.5(a) 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.

6. However, Rule 8.5(a) does not specify which jurisdiction's rules of legal ethics will be applied by New York disciplinary authorities when the lawyer is admitted to practice in more than one jurisdiction. That question is instead addressed by the "choice of law" part of Rule 8.5, which provides as follows:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
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> (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
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> (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.

"transactional practice" would also be too narrow. The term "non-court" covers the range of the inquirer's conduct that is not "in connection with a proceeding in a court before which a lawyer has been admitted to practice…." Use of this term could be confusing in some contexts, because a lawyer could work on a proceeding in a court to which the lawyer is not admitted, but the inquirer does not do such work.

Rule 8.5(b) (emphasis added).[2]

7. Rule 8.5(b) is thus designed to ensure that New York disciplinary authorities will apply one and only one set of ethics rules to any particular conduct by a lawyer. *See* Rule 8.5, Cmt. [3] (explaining that the rule takes the approach of "providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct"). To analyze how Rule 8.5(b) applies to the Dual-Licensed Lawyer in non-court matters, we will examine the rule's subparagraphs.

Rule 8.5(b)(1): "conduct in connection with a proceeding in a court"

8. Rule 8.5(b)(1) applies only to "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice," and thus does not apply at all to matters not in a "court." The term "court" is not defined in the Rules, but it is narrower than the word "tribunal," which is defined in Rule 1.0(w) as follows:

> ''Tribunal'' denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

9. Thus, a "court" is just one of many kinds of "tribunal" – and canons of statutory construction support the conclusion that the term "court" excludes the other types of tribunal listed in Rule 1.0(w). *See* N.Y. State 1011 ¶7 (2014) (citing the Rule's history); N.Y. State 968 ¶6 (2013) (also citing Rule 1.0(w) and stating that "we do not believe we are free to read 'court' in Rule 8.5(b)(1) to include administrative tribunals" such as the Merit Systems Protection Board). The practice of the Dual-Licensed Lawyer includes matters before federal agencies, but not matters before courts. Accordingly, Rule 8.5(b)(1) does not apply to his inquiry, and we therefore proceed to Rule 8.5(b)(2).

Rule 8.5(b)(2): "any other conduct"

10. Rule 8.5(b)(2) governs "any other conduct," a phrase that encompasses all of a lawyer's conduct *not* in connection with a proceeding in a court before which the lawyer has been admitted to practice. Thus, non-court law practice encompasses many types of conduct, including:

- *adversarial matters* (*i.e.*, matters with an opposing party) that are pending before (i) a state or federal agency, (ii) an arbitrator not annexed to a court, or (iii) some other adjudicative body that is not a "court" – *see* Rule 1.0(w) (defining "Tribunal");

[2] New York Rule 8.5(b) is intended to guide choice-of-law decisions by New York disciplinary authorities. Other jurisdictions may have different versions of rules of professional conduct governing choice-of-law questions, or may govern such questions by common law, such as by reference to Restatement (Second) of Conflict of Laws §§ 6 and 188 (setting forth multiple factors for resolving a conflict of laws).

- *non-adversarial matters* before a government agency, such as prosecuting patents in the USPTO, filing papers with the SEC, and requesting private letter rulings from the IRS;
- *transactional matters,* such as mergers and acquisitions, contract negotiations, and formation of partnerships; and

- *counseling-only matters,* such as tax advice, estate planning advice, advice on corporate by-laws, and other counseling matters involving neither a government agency or an opposing party.[3]

11. Rule 8.5(b)(2) is divided into two subparagraphs. Subparagraph (b)(2)(i) governs lawyers who are licensed to practice solely in New York. Subparagraph (b)(2)(ii) governs lawyers who are licensed to practice in New York and in at least one other jurisdiction, whether in the United States or a foreign country. *See* Rule 8.5, Cmt. [7] ("The choice-of-law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between or among competent regulatory authorities in the affected jurisdictions provide otherwise."). We will deal with both subparagraphs in turn.

12. Rule 8.5(b)(2)(i) provides that if a lawyer is "licensed to practice only in this state" (meaning only in New York), then the applicable ethics rules shall be "the rules of this state." The inquirer here, however, is licensed in both New York and in the District of Columbia, so subparagraph (b)(2)(i) does not apply.

13. Rule 8.5(b)(2)(ii) contains both a general rule and an exception. The general rule is that when a lawyer is licensed in two or more jurisdictions, "the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices." An exception applies, however, if "particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice." In that case, the rules of the jurisdiction feeling the "predominant effect" apply to the lawyer's conduct.

14. Here, the Dual-Licensed Lawyer maintains offices in both New York and D.C., but we do not know the jurisdiction in which he "principally practices." Neither the text of Rule 8.5 nor its Comments provide any guidelines for determining where a lawyer principally practices. We believe that when a lawyer is licensed in more than one jurisdiction, various factors are relevant to determining the one in which the lawyer principally practices, including: (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; (d) the activities the lawyer performs in each jurisdiction (*e.g.*, legal work for clients vs. administrative work for the law firm); and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster). For a discussion of each of these factors, *see* Roy D. Simon, Simon's New York Rules

[3] The phrase "any other conduct" in Rule 8.5(b)(2) would also seem to include conduct in connection with a proceeding in a court before which a lawyer has *not* been admitted to practice. But because the inquirer does not practice in any "court," this opinion does not address a lawyer's conduct in connection with a proceeding in a court before which the lawyer has not been admitted to practice. It addresses only conduct that is not in connection with any court proceeding.

of Professional Conduct Annotated 1915-17 (2014). 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.

15. Even if we had sufficient information to determine the jurisdiction in which the Dual-Licensed Lawyer principally practices, his conduct could in some situations be evaluated by the ethics rules of the *other* admitting jurisdiction because of the exception stated in Rule 8.5(b)(2)(ii). Specifically, "if particular conduct *clearly* has its *predominant effect* in another jurisdiction in which the lawyer is licensed to practice," then "the rules of that jurisdiction" – the one where the predominant effect occurs – "shall be applied to that conduct." (Emphasis added.) Here, for example, if the Dual-Licensed Lawyer principally practices in New York but the predominant effect of particular conduct "clearly" would be in D.C., then the D.C. Rules of Professional Conduct would govern that conduct. But if the Dual-Licensed Lawyer principally practices in New York and the predominant effect of the conduct would *not* "clearly" be in D.C., then the New York Rules of Professional Conduct would govern that conduct.

16. Unfortunately, no simple formula is available to determine where the "predominant effect" will occur. As Comment [5] to New York Rule 8.5 points out: "When a lawyer is licensed to practice in New York and another jurisdiction and the lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in an admitting jurisdiction other than the one in which the lawyer principally practices."[4] Factors to consider include such things as: (a) where the clients reside, and where they work; (b) where any payments will be deposited; (c) where any contract will be performed; and (d) where any new or expanded business will operate. For example, if a lawyer principally practices in D.C. but is advising a New York client on how to draft (or interpret, or enforce) a commercial contract among several parties, and all of those parties live and work in New York, and the contract will be performed solely in New York, then advising the client would ordinarily be conduct that "clearly has its predominant effect" in New York. But if some of the parties to the contract work outside New York, or if part of the contract will be performed outside New York, then the lawyer's advice may not "clearly" have its predominant effect in New York – in which case the ethics rules applicable under Rule 8.5(b)(2)(ii) will be the rules of the jurisdiction in which the lawyer principally practices.

17. Notably, the exception in the second half of Rule 8.5(b)(2)(ii) applies only if the

[4] The ABA version of this rule adds the following escape hatch: "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." Model Rule 8.5(b)(2). The New York State Bar Association proposed that language to the Courts in 2008, but the Courts decided not to adopt it. Consequently, New York Rule 8.5(b)(2)(ii) has no exemption based on a lawyer's reasonable belief. However, New York builds in some leeway by limiting the exception to those admitting jurisdictions in which the predominant effect will "clearly" occur. If a lawyer "reasonably believes the predominant effect of the lawyer's conduct will occur" (to use the ABA's wording) in the admitting jurisdiction in which the lawyer principally practices, then it will seldom be the case that the predominant effect "clearly" occurs in a different jurisdiction.

predominant effect occurs in another jurisdiction *and* the lawyer is licensed to practice in that jurisdiction. Both criteria must be met for the exception to apply. If the Dual-Licensed Lawyer principally practices in D.C. but the predominant effect will clearly occur in a jurisdiction where he is *not* licensed to practice (in this case, anywhere other than New York or D.C.), then the ethics rules of D.C. (the jurisdiction in which the lawyer principally practices) will apply even though the predominant effect is elsewhere. As Comment [5] says, "as long as the lawyer's conduct conforms to the rules of the jurisdiction in which the lawyer principally practices, the lawyer should not be subject to discipline unless the predominant effect of the lawyer's conduct will clearly occur in another *admitting* jurisdiction." (Emphasis added.)

Do the ethics rules of a federal agency apply?

18. Because this inquiry concerns a lawyer who handles matters before federal agencies, the rules of the federal agency in question may also come into play.[5] If an agency has its own professional conduct rules, then those rules might take precedence over state rules by virtue of the Supremacy Clause and the pre-emption doctrine.[6] There are interesting and controversial questions about the circumstances in which a federal agency's rules might pre-empt state rules of legal ethics.[7] But these are questions of law beyond our jurisdiction, and we do not address them.

CONCLUSION

19. If a lawyer is licensed only in New York, then the New York Rules of Professional Conduct apply to the lawyer's conduct in non-court matters (meaning all matters not in

[5] For example, the USPTO adopted Rules of Professional Conduct, effective May 3, 2013, that govern a wide range of professional conduct by lawyers and others practicing before the USPTO. *See* 37 C.F.R. §§ 11.101 *et seq.* Similarly, the IRS has adopted ethics rules governing lawyers and others in practice before the IRS. *See* 31 C.F.R. §§ 10.20 *et seq.*

[6] *See* U.S. Const., Art. VI, cl. 2 (providing that federal laws "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-54 (1982) (discussing various forms of pre-emption).

[7] For example, controversy continues as to whether Sarbanes-Oxley regulations governing attorneys who practice before the SEC enjoy supremacy over contrary state rules of professional conduct. Under 17 C.F.R. § 205.3(d)(2), an attorney practicing before the SEC may reveal a client's confidential information to the extent the attorney reasonably believes necessary to "prevent the issuer from committing a material violation [of the federal securities laws] that is likely to cause substantial injury to the financial interest or property of the issuer or investors." Other regulatory provisions address choice of law. *See* 17 C.F.R. § 205.1 ("Where the standards of a state ... where an attorney is admitted or practices conflict with this part, this part shall govern."); 17 C.F.R. § 205.5(c) ("An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state … where the attorney is admitted or practices."). Nevertheless, N.Y. County 746 (2013) opined that a New York lawyer may not disclose confidential information pursuant to SEC regulations that permit but do not mandate disclosure. We have no occasion here to endorse or reject N.Y. County 746.

connection with proceedings pending before a court in which a lawyer has been admitted). If a lawyer is licensed in New York and other jurisdictions, then the lawyer's conduct in non-court matters will be governed by the rules of the jurisdiction where the lawyer principally practices *unless* the predominant effect of the lawyer's conduct clearly will be felt in another jurisdiction where the lawyer is also licensed to practice. Whether a federal agency's rules of ethics pre-empt the New York Rules in particular cases depends on questions of law beyond our jurisdiction.

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