New York State Bar Association
Committee on Professional Ethics

Opinion 1041 (12/10/14)

Topic: Foreign jurisdiction (practice in); Choice of law, partnership with non-lawyer

Digest: A New York lawyer who practices principally in a foreign country but is not admitted to practice in that country may, without violating the New York Rules of Professional Conduct, (A) engage in lawful conduct that does not require licensing in the foreign country but would constitute the practice of law in New York, and (B) practice in the foreign country in partnership or association with an entity that includes a non-lawyer as a supervisor or owner; provided in each case that such practice is permitted under the laws and rules of the foreign country and the "predominant effect" of the lawyer's practice is not in New York.

Rules: 5.4(b) & (d), 8.5(a) & (b)

FACTS

1. A New York lawyer contemplates establishing a practice based in the United Kingdom. For purposes of this opinion, we assume that the lawyer will practice principally in the U.K. While the lawyer's practice would constitute the practice of law if conducted in New York, the lawyer advises us, and we assume for purposes of this opinion, that the lawyer need not register as a foreign lawyer or otherwise be admitted to the bar in the U.K. in order to carry on his contemplated practice in that country. (Although the lawyer does not plan to register as a foreign lawyer at the outset, he may do so at some point.)

2. The lawyer also expects to join his practice with that of an entity formed and based in the U.K. to render legal services as an Alternative Business Structure ("ABS") under the U.K.'s Legal Services Act. The lawyer informs us, and we assume for purposes of this opinion, that the laws of the applicable jurisdiction in the U.K., unlike the laws and rules of New York, permit an entity practicing law to include among its supervisory personnel and owners both persons who are lawyers duly admitted in a jurisdiction other than the U.K. (but not in the U.K.) and persons who are not lawyers at all, such as management consultants or economists, and to render services as an ABS.

QUESTIONS

3. May a New York lawyer who is based in the U.K. but is not formally admitted to practice in that country ethically engage in conduct there that does not require formal admission to the bar of the U.K. but would be the practice of law in New York?

4. May a New York lawyer who is based in the U.K. but is not formally admitted to practice there ethically practice law there with an entity authorized to practice law for profit if that entity has non-lawyer owners or supervisors?

OPINION

<u>Our Prior Opinions on Foreign Lawyers</u>

5. This Committee has written several times in recent years on the application of the New York Rules of Professional Conduct (the "Rules") to New York lawyers practicing in foreign jurisdictions (or domestic, non-New York jurisdictions), and, in particular, which jurisdiction's ethical rules and disciplinary authority apply under Rule 8.5. *See* N.Y. State 1027 (2014), N.Y. State 1023 (2014), N.Y. State 911 (2012), N.Y. State 889 (2011), N.Y. State 861 (2011) and N.Y. State 815 (2007).

6. Rule 8.5 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:
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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:
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>>> (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
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>>> (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. From these prior opinions and the Rules, the following principles emerge:

- If a lawyer is licensed to practice law by the State of New York, the lawyer -- whether licensed in another jurisdiction or not -- is subject to New York's disciplinary authority

irrespective of where his or her conduct occurs (*see* Rule 8.5(a)).

- If the lawyer is licensed only by the State of New York *and by no other jurisdiction*, conformity to the New York Rules of Professional Conduct will be the standard against which a lawyer's conduct will be judged by disciplinary authorities in New York. Rule 8.5(b)(2)(i); N.Y. State 911 at ¶ 3.

- If a lawyer is admitted or licensed to practice in New York *and also in another jurisdiction*, then, in exercising its disciplinary authority, under Rule 8.5(b)(2)(ii) the court will apply the rules of the admitting jurisdiction in which the lawyer principally practices, *unless* the "predominant effect" of the lawyer's conduct is "clearly" in another admitting jurisdiction, in which case that jurisdiction's rules of ethics will apply.[1]

Engaging in a Foreign Jurisdiction in Conduct that Does Not Require Foreign Admission

8. Rule 8.5(b)(ii) by its terms applies when the New York lawyer is also admitted or licensed to practice in another jurisdiction. However, occasionally (as is the case in this inquiry) a New York lawyer based in a foreign jurisdiction may engage in conduct that does not trigger a registration requirement in that jurisdiction, but that would constitute the practice of law if conducted in New York. The question in that situation is whether the lawyer may be deemed to be "admitted" or "licensed to practice" in the foreign jurisdiction within the meaning of Rule 8.5(b) notwithstanding the lack of formal admission there.

9. We addressed that question in N.Y. State 815 (2007). In that opinion, we stated:

> "[L]icensed to practice" includes not only formal licensing procedures like those required by the states in the United States, but also less formal procedures that authorize a lawyer to undertake activities in a foreign jurisdiction that would constitute the practice of law if they were undertaken in the United States. So long as the activities are lawful in the jurisdiction in which they are performed, it is our view that a lawyer undertaking such activities is "licensed to practice" in that jurisdiction, and that jurisdiction is an "admitting jurisdiction," for purposes of DR 1-105(B)(2)(b).

Former DR 1-105(B)(2)(b) is identical to present day Rule 8.5(b)(2)(ii). Accordingly, nothing in the replacement of the Code of Professional Responsibility with the Rules of Professional Conduct gives us cause to alter the conclusions reached in N.Y. State 815.

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[1] Rule 8.5(b)(1) sets forth an exception, not apparently applicable in the inquirer's situation, "for conduct in connection with a proceeding before a court before which a lawyer has been admitted to practice." With respect to such conduct, the rules of the jurisdiction in which the court sits are the rules to be applied. We concluded in N.Y. State 889 that Rule 5.4 does not prohibit occasional participation in litigation in New York by a lawyer licensed in New York but also licensed and practicing in a firm with non-lawyers principally in another jurisdiction that permits such practice. A lawyer in that general circumstance will need to judge whether that exception has any possible application to his or her situation.

Affiliation with a U.K. Alternative Business Structure

10. Whether a New York lawyer may affiliate with a law firm in the U.K. that is permitted by the laws of that jurisdiction to have non-lawyers among its owners and supervisors may be resolved by an analysis under Rule 8.5. The New York Rules preclude a New York lawyer from practicing law in any capacity with an entity authorized to practice law if a nonlawyer (a) is a partner, (b) owns an interest in the entity, (c) is a member, director or officer or has a position of similar responsibility, or (d) has the right to direct or control the professional judgment of a lawyer. Rule 5.4(b) & (d). The New York Rules also preclude a New York lawyer from sharing legal fees with a non-lawyer or from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. Rule 5.4(a) & (b). Those principles normally prohibit a New York lawyer from becoming a partner in a firm with nonlawyer owners or supervisors. The prohibitions against non-lawyer owners and splitting legal fees and forming law partnerships with non-lawyers apply even if the entity is located in another jurisdiction in which non-lawyer owners and supervisors are permitted, unless, under New York's choice of law rule, the rules of that other jurisdiction govern the New York lawyer's conduct. *See* Rule 8.5(b); N.Y. State 911 (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); N.Y. State 889 (New York lawyer who principally practices in another jurisdiction allowing partnership with non-lawyers may ordinarily conduct litigation in New York because the other jurisdiction's ethics rules govern fee sharing with nonlawyers).

11. Under Rule 8.5(b), whether the laws of another admitting jurisdiction apply depends generally upon (a) where the New York lawyer has been "admitted to practice" or may be deemed to have been admitted to practice, (b) where the lawyer "principally practices" and (c) whether the predominant effect of the lawyer's practice will be in another admitting jurisdiction or in New York. *See* Rule 8.5(b)(2)(ii) (the rules to be applied to the conduct of a lawyer admitted to practice in more than one jurisdiction "shall be the rules of the admitting jurisdiction in which the lawyer principally practices " unless the particular conduct "clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice").

12. The first question under Rule 8.5(b) is whether the inquirer has been admitted to practice or may be deemed to have been admitted in a jurisdiction besides New York. As we noted above, in this case the inquirer may be deemed to be "licensed to practice" in the U.K. (*i.e.,* "admitted" to practice there) within the meaning of Rule 8.5(b). As to that question of interpretation, this Committee opined in N.Y. State 815 that "so long as the activities are lawful in the jurisdiction in which they are performed, it is our view that a lawyer undertaking such activities is 'licensed to practice' in that jurisdiction, and that jurisdiction is an 'admitting jurisdiction' for purposes of DR 1-105(B)(2)(b) [now Rule 8.5(b)(2)(ii).]" *See also,* N.Y. State 911; N.Y. State 889.

13. The second question under Rule 8.5(b) is where the lawyer "principally practices." In N.Y. State 1027 (2014), where the lawyer had offices in two different admitting jurisdictions, we noted that the Rules do not contain any guidance on the meaning of "principally practices." To help fill this gap, we set forth various factors that we believe are relevant to determining the jurisdiction 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). (*citing* Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated 1915-17 (2014).

We also noted that, 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.

14. The present inquirer indicates that his practice would be "based" in the U.K., and this is certainly a significant factor. But, ultimately, the determination of "principally practices" is question of fact that is beyond the Committee's jurisdiction to decide.

15. The third question under Rule 8.5(b) is whether the lawyer's practice in the principal practice jurisdiction will have its "predominant effect" in another admitting jurisdiction. For example, if the inquirer principally practiced in the U.K., but most of his clients were in New York, then the choice of law rule would apply the New York rules because the predominant effect of the lawyer's conduct occurred in New York, which is also an admitting jurisdiction. This, too, is a question of fact.

16. In N.Y. State 889, we addressed whether a lawyer admitted to practice law in New York and, therefore, subject to New York's jurisdiction for disciplinary matters may join in the practice of law with an entity in the District of Columbia that has a non-lawyer partner, a technical expert, with whom legal fees are shared, where the majority of the partnership's revenue is derived from matters within D.C., but the firm might occasionally bring cases in New York. We noted that conduct in connection with litigation in New York would be subject to the New York Rules, as provided by Rule 8.5(b)(1) (conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice is ordinarily governed by the ethics rules of "the jurisdiction in which the court sits"). However, we also determined that, as long as undertaking occasional matters in New York did not shift the lawyer's principal practice from D.C. to New York, the formation of the partnership and the distribution of its profits would not constitute "conduct in connection with" the New York proceeding, and thus would be analyzed under Rule 8.5(b)(2).

17. In N.Y. State 911, the inquirer proposed to establish a New York office of an entity formed as a U.K. Alternative Business Structure under the U.K.'s Legal Services Act. We noted that the New York lawyers would be practicing principally in New York, and that the "predominant effect" of their conduct, while practicing law from a New York office on behalf of New York clients, also would be in New York. We therefore concluded that the New York Rules prohibiting sharing legal fees with non-lawyer would apply, even if the lawyers were also licensed in the U.K.

18. The distinctions we made in these prior opinions indicate the importance of determining (i) where a lawyer is "licensed" (or "admitted") to practice, (ii) where the lawyer "principally practices," and (iii) where the "predominant effect" of the lawyer's conduct occurs.

CONCLUSION

19. For the reasons, and subject to the conditions, stated above, a New York lawyer who practices principally in a foreign country but is not admitted to practice in that country may, without violating the New York Rules of Professional Conduct, (A) engage in lawful conduct that does not require licensing in the foreign country but would constitute the practice of law in New York, and (B) practice in the foreign country in partnership or association with an entity that includes a non-lawyer as a supervisor or owner; provided in each case that such practice is permitted under the laws and rules of the foreign country and the predominant effect of the lawyer's practice is not in New York.

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