Bloomberg BNA | ABA

ABA/BNA
Lawyers' Manual on Professional Conduct™

VOL. 29, NO. 26 | CURRENT REPORTS | DECEMBER 18, 2013

Private Firm

ABA Formal Opinion 464 and Nonlawyer Partners: If You Can't Have One, Can You Work With a Firm That Does?

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It is no secret that there is one and only one jurisdiction in the United States that allows law firms to have nonlawyer partners. District of Columbia Rule 5.4(b) permits a lawyer to "practice law in a partnership . . . in which a financial interest is held . . . by an individual nonlawyer." This rule became effective in 1991 and carried with it a bevy of safeguards and limitations, designed to ensure that the core purpose of Rule 5.4—the professional independence of the lawyer—was preserved.

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The entity containing the nonlawyer partner must have "as its sole purpose providing legal services to clients." D.C. Rule 5.4(b)(1). The nonlawyer partner must agree, in writing, to "abide by [the] Rules of Professional Conduct." D.C. Rule 5.4(b)(2) and (b)(4). The nonlawyer partner cannot be a passive investor but must "perform[] professional services which assist the organization in providing legal services to clients." Rule 5.4(b); *see also* District of Columbia Ethics Op. 362, 28 Law. Man. Prof. Conduct 439 (2012). Finally, the lawyer-partner must also agree, in writing, to be responsible for the conduct of the nonlawyer partner, just as she would be responsible for the conduct of subordinate lawyers under D.C. Rule 5.1.

One and Only

In the decades that followed the District of Columbia's enactment of its version of Rule 5.4(b), other jurisdictions declined to follow the District of Columbia and have maintained the prohibition on nonlawyer partners. *See, e.g.*, ABA Model Rule 5.4(b).

The ABA Commission on Ethics 20/20 considered a more restrictive version of the D.C. rule but concluded in 2012 that "there does not appear to be a sufficient ba-

 ISSN 0740-4050

sis for recommending a change to ABA policy on lawyer ownership of law firms.'' American Bar Association Press Release, *ABA Commission on Ethics 20/20 Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms* (April 16, 2012). See 28 Law. Man. Prof. Conduct 250.

The District of Columbia, for its part, has been unmoved by the refusal of any other jurisdiction to adopt its version of Rule 5.4. In the most recent comprehensive revision of the District of Columbia Rules of Professional Conduct, the drafters left the D.C. rule unchanged:

> There are significant differences between ABA Model Rule 5.4 and D.C. Bar Rule 5.4 because the District of Columbia recognizes nonlawyer partners, in contrast to the ABA rule which prohibits such relationships. The Committee [of the D.C. Bar charged with revising the D.C. Rules] saw no need to revisit the policy determination previously made by the District of Columbia Court of Appeals in this regard.

District of Columbia Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations* 174 (Redlined Version) (June 21, 2005, revised October 6, 2005).

Given this standoff, how do D.C. lawyers in a firm with nonlawyer partners work in the world that surrounds them? And how do firms or lawyers outside of the District of Columbia collaborate with their D.C. brethren? These questions are particularly important for members of the District of Columbia Bar who are also members of the bars of other states.[1] Do they violate the rules of the other jurisdiction if they are part of a firm that has a nonlawyer partner? The ethics authorities are in agreement that the answer is no, with some important caveats. The ABA itself reviewed this issue within months after the D.C. rule became effective in 1991.

ABA Opinion 91-360

In Formal Opinion 91-360, issued in July 1991, the ABA Standing Committee on Ethics and Professional Responsibility posited two scenarios. The first involved a lawyer licensed in the District of Columbia and practicing in the District of Columbia in a firm with a nonlawyer partner but also licensed in ''State X'' which prohibited nonlawyer partners.

The ABA concluded in this scenario that the prohibition on nonlawyer partners acted only to prohibit ''the practice of law in State X by a lawyer whose [DC-based] practice involved the partnership with a nonlawyer.'' In other words, a lawyer whose office was in the District of Columbia and who practiced from that location but was also a member of the bar of another state should not be subject to discipline for being in a partnership with a nonlawyer, provided the lawyer did not practice in the other state to which she was admitted.

The second scenario involved the converse: a lawyer who practices in State X as part of a firm which has a District of Columbia office with a nonlawyer partner. ''The practice question that turns on the answer here . . . is whether a District of Columbia law firm with a nonlawyer partner or principal may have branch offices in State X—or, in effect, in any other American jurisdiction—without running afoul of the prevailing prohibition on nonlawyer partners.''

The ABA concluded that such a practice would offend State X's interests in not allowing nonlawyer partners. A lawyer practicing in another state could not do so ''through a firm with a nonlawyer partner or principal.'' The ABA even looked at the issue of pro hac vice admission outside of the District of Columbia by a lawyer in a D.C. firm with a nonlawyer partner but concluded application of the forum state's rules are ''unlikely to extend to a matter of firm organization.''

State Guidance

The path set by ABA Formal Ethics Op. 91-360 has been followed in the few other ethics opinions to address the issue.

In Michigan Informal Ethics Op. RI-225 (1995), the bar concluded that ''[a] lawyer does not violate Michigan ethics rules by obtaining a financial interest in an out-of-state firm that has nonlawyer partners, provided that the ethics rules of the other state allow nonlawyer ownership of law firms and the law firm does not handle Michigan legal matters.'' The prohibition on Michigan work was categorical and without exception: no ''portion of the firm's operation [could] be conducted in Michigan.'' In this sense, the Michigan bar went further than the ABA which found pro hac vice appearances by D.C. firms with nonlawyer partners permissible.

Virginia Ethics Op. 1584 issued in 1994 is to like effect. A Virginia-admitted lawyer who was also a member of the D.C. Bar could practice in a D.C. firm with nonlawyer partners provided that the D.C. firm ''[did] not engage in the practice of law in Virginia.''

No Reported Problems

Given their full scope, these opinions essentially restrict the operations of a D.C. firm with nonlawyer partners to the District of Columbia and its courts. One consequence of these opinions is that those District of Columbia firms with nonlawyer partners typically do not highlight that fact.

The experience, however, within the District of Columbia, albeit based on unscientific and anecdotal evidence, is that the restrictions and limitations contained in D.C. Rule 5.4(b)(1)-(5) have been sufficient to pre-

[1] The District of Columbia, with approximately 100,000 members, has one of the largest bars in the country. It has a liberal admissions policy that allows any lawyer who has been a member in good standing of another (state) bar for five years to become a member upon application, with no exam requirement. *See* Rule 46(c)(3)(i) of the Rules of the District of Columbia Court of Appeals.

  MOPC ISSN 0740-4050

serve the lawyer's professional independence and allowing nonlawyer partners has not led to bar prosecutions, malpractice actions or the like.

The annotations to D.C. Rule 5.4 do not reflect any bar prosecutions involving nonlawyer partnerships. A search of the decisions of the Board of Professional Responsibility, the body that issues decisions in disciplinary matters, subject only to the District of Columbia Court of Appeals, shows no disciplinary actions taken under Rule 5.4(b).

A search of the dockets of the District of Columbia Court of Appeals and the D.C. federal courts similarly shows that no malpractice actions have involved nonlawyer partners or other issues relating to the unique aspects of D.C. Rule 5.4(b).

Permissive Trend

While the ABA Commission on Ethics 20/20 refused to adopt the D.C. version of 5.4(b) and declined to recommend even a more restrictive alternative, the hostility to the D.C. rule evinced in the early and mid-90s has markedly softened.

In Philadelphia Ethics Op. 2010-7, 26 Law. Man. Prof. Conduct 556 (2010), the question was whether a Pennsylvania admitted lawyer could share fees with a D.C. law firm that had a nonlawyer partner with respect to a class action case to be brought in Pennsylvania.

The opinion nowhere questioned the propriety of the D.C. firm's participation in litigation in Pennsylvania even though the D.C. firm had a nonlawyer partner. The opinion further did not hinge its decision upon whether the D.C. firm had Pennsylvania admitted lawyers.

Instead, the opinion concluded that the fee-sharing arrangement was permissible: ''although the DC firm might under some arrangement ultimately share profits with a nonlawyer pursuant to the [District of Columbia Rules of Professional Conduct], the propriety of [a] fee-sharing arrangement [between the Pennsylvania and D.C. firms] is not vitiated.'' So long as the Pennsylvania firm followed the Pennsylvania rules and the D.C. firm followed the D.C. rules, the fee sharing arrangement was permissible.

The permissive trend continued with New York State Ethics Op. 889, 27 Law. Man. Prof. Conduct 743 (2011). The facts involved a lawyer admitted in both New York and the District of Columbia who planned to form a firm with a nonlawyer partner. The lawyer's office was in the District of Columbia but the lawyer anticipated bringing litigation in New York and asked the New York State Bar Association if these arrangements were consistent with the New York ethics rules.

The New York State bar concluded that ''[a] lawyer who principally practices in another jurisdiction, but is also admitted in New York may conduct occasional litigation, even if a non-lawyer would benefit from the resulting fees (either as a member of the lawyer's partnership in that other jurisdiction or as its employee compensated through a profit-sharing arrangement), if the arrangements comply with the ethics rules of that other jurisdiction.''

Detour. The permissive trend took a detour in Maryland Ethics Op. 2012-12 (2012). The opinion looked at two questions. First, could a Maryland lawyer act as local counsel to a D.C. firm with a nonlawyer partner provided that the client consented to the fee-sharing arrangement? The opinion answered this question with a resounding no. Second, would the above local counsel arrangement be permissible if the nonlawyer partner in the D.C. firm were screened from the representation and did not receive any share of the profits from the matter? Again, the Maryland bar's ethics committee said no.

The opinion noted that the above scenarios were based on litigation matters, covered by Rule 8.5(b)(1) in which the ethics rules of the forum state—here Maryland—would govern. In nonlitigation matters, the ethics rules to be applied under Maryland Rule 8.5(b)(2) are those where the predominant effect of the lawyer's conduct occurs. If that conduct occurs in Maryland, the analysis does not change and Maryland lawyers cannot work on matters with law firms with nonlawyer partners. If, however, the predominant effect is outside of Maryland, then the Maryland ethics rules will not apply.

The opinion advised Maryland lawyers ''to act with caution when representing Maryland clients, advising as to Maryland law, or participating in transactions with a significant connection to Maryland, as each of those situations suggests that the predominant effect of the lawyer's conduct would be in Maryland.'' Maryland Ethics Op. 2012-12, at 3.

ABA Opinion 464

Finally, the ABA itself, in an opinion issued in August 2013, concluded that fee sharing between lawyers in ABA Model Rule jurisdictions (i.e., those that do not permit nonlawyer partners) with lawyers in jurisdictions that allow nonlawyer ownership was permissible.

The synopsis of ABA Formal Ethics Op. 464, 29 Law. Man. Prof. Conduct 546, portends a broader opinion than the body of the opinion supports. The synopsis states ''a lawyer subject to the Model Rules may divide a legal fee with a lawyer or law firm in [another] jurisdiction even if the other lawyer or law firm might eventually distribute some portion of the fee to a nonlawyer.''

In the body of the opinion, the analysis is more nuanced and less clear. The ABA addressed its earlier opinion, 91-360, stating that the two opinions were ''consistent'' because 91-360 dealt with partnerships with nonlawyers under Rule 5.4(b) and the current opinion considered fee sharing under Rule 5.4(a). Opinion 91-360 ''decided that a lawyer licensed both in a Model Rules jurisdiction and the District of Columbia should adhere to the restrictions of the jurisdiction where the lawyer actually practiced.''

The ABA carefully constructed its hypothetical in Formal Opinion 464 to avoid confronting the broad conclusions of its earlier opinion. In Opinion 464, a lawyer in a Model Rules jurisdiction determines that she needs the assistance of a District of Columbia law firm. The opinion never states where the matter is pending but says that it involves ''federal government contracts,'' a subject concerning which the Model Rules attorney needs specialized knowledge which she or her firm does not otherwise possess. Read one way, Opinion 464 allows only for a Model Rules-based lawyer to come to the District of Columbia for specialized expertise and share fees with a D.C. firm, even though that firm has a nonlawyer partner.

Unanswered Questions

The opinion does not address the logical extension of the hypothetical that it posits. If it is acceptable for a Model Rules-based firm to seek out a D.C.-based firm for its particular expertise in a federal matter, is it acceptable for a Model Rules-based firm to co-counsel with the D.C. firm in litigation outside of the District of Columbia in order to utilize that expertise effectively?

Is the ABA following New York and Philadelphia in allowing such arrangements? Does the subject matter selected for the hypothetical in Opinion 464—federal government contracts—imply that the reason why the D.C. firm is brought into the matter must be related to the District of Columbia or federal law? Would Opinion 464 endorse the association of a D.C. firm with a nonlawyer partner because that firm had particular expertise in aviation accidents or state insurance regulation?

In sum, Opinion 464 takes a very cautious step and straddles the inconsistent approaches taken by New York and Philadelphia, on the one hand, and Michigan, Virginia and Maryland, on the other. It does little to resolve a question that has lingered since D.C.'s 1991 adoption of a rule allowing nonlawyer partners and gives both the Model Rules-based lawyer and her D.C. counterparts precious little new guidance.