

How Lawyers Can Avoid the Unauthorized Practice of Law: Simple Steps for Compliance With Rule 49

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Why should a publication for lawyers include an article about the rule against the unauthorized practice of law? Shouldn't this article be published where it will be read by the nonlawyers at whom the rule against unauthorized practice is aimed? The answer is simple, but perhaps surprising.

The incidence of nonlawyers trying to pass as lawyers in the District of Columbia is actually quite low, and such cases comprise only a very small portion of the docket of the Committee on Unauthorized Practice of Law of the D.C. Court of Appeals. The vast majority of the Committee's docket involves complaints about lawyers admitted in other jurisdictions who practice in the District without becoming members of the D.C. Bar. These cases involve D.C. Court of Appeals Rule 49, which says what a lawyer can and cannot do in the District without being admitted to the D.C. Bar. Because almost all of the lawyers who run afoul of Rule 49 practice in partnership or association with D.C. Bar members, D.C. Bar members ought to be concerned—and not least because they have an ethical obligation to ensure that their colleagues comply with the ethics rule against the unauthorized practice of law.

The fact that so many lawyers, with the knowing or unwitting concurrence of their law firms, violate Rule 49 is the bad news. The good news is that compliance with Rule 49 is not onerous, and it is generally a straightforward matter for lawyers and their firms to comply with the Rule and avoid the unauthorized practice of law.

Rule 49

Rule 49 of the D.C. Court of Appeals prohibits the unauthorized practice of law in the District of Columbia. The basic principle is that no one except an active member of the D.C. Bar may engage in the practice of law in the District or hold out himself or herself out as authorized or competent to practice law in the District. Lawyers who maintain an office in the District, alone or as part of a firm, are generally covered by the Rule. Lawyers not admitted to the D.C. Bar may not practice or hold themselves out as authorized to practice in the District, unless their activities fall within one of the exceptions of Rule 49 and are conducted consistent with the terms of the applicable exception.

The exceptions to Rule 49 are significant and apply to a sizeable number of lawyers practicing in the District. The exceptions that most frequently apply are those governing lawyers employed by the U.S. government, lawyers who limit their practice to certain federal or D.C. agencies, in-house lawyers employed by organizations and private companies, lawyers with pending applications to the D.C. Bar, and lawyers engaged in certain types of pro bono work. If a nonadmitted lawyer intends to rely on an exception, all of that lawyer's practice must fall within the exception. If, for example, ninety percent of the lawyer's practice is before federal agencies, but ten percent involves routine corporate work for a local client, the federal agency exception would not excuse the lawyer from the obligation to become a member of the D.C. Bar. In addition to limiting the practice to activities covered by an exception, the lawyer must meet the specific conditions of the exception. The most common of these conditions involves notice on all professional communications of the limited nature of the lawyer's practice.

Rule 49 is accompanied by extensive official commentary. Among other things, the commentary explains the four general purposes of the Rule:

1. To protect members of the public from persons who are not qualified by competence or fitness to provide professional legal advice or services;
2. To ensure that any person who purports or holds himself or herself out to perform the services of a lawyer is subject to the disciplinary system of the District of Columbia Bar;
3. To maintain the efficacy and integrity of the administration of justice and the system of regulation of practicing lawyers; and
4. To ensure that the system and other activities of the Bar are appropriately supported financially by those exercising the privilege of members in the District of Columbia Bar.

Commentary to Rule 49(a)

The commentary provides considerable guidance about the scope of both the basic rule (what is the “practice of law”? when is a lawyer practicing “in” the District?), and its exceptions. [Read Rule 49.](#)

Rule 49 also provides for a Committee on Unauthorized Practice of Law. Like the Committee on Admissions, the Committee is a standing committee of the D.C. Court of Appeals, not part of the D.C. Bar. The Committee has two principal functions. The first is to provide guidance to lawyers and nonlawyers about the requirements of Rule 49. To that end, the Committee issues formal opinions (available on the D.C. Bar Web site cited above) that answers some of the more frequently asked questions about compliance with Rule 49. Members of the Committee also routinely provide informal guidance in response to written and telephone inquiries.

The Committee’s other main function is to enforce Rule 49. The Committee investigates complaints about alleged violations of Rule 49 and, if possible, resolves them without litigation in a way that protects the public. In very rare cases, the Committee has been unable to reach a satisfactory negotiated resolution and has been forced to initiate a judicial proceeding to enforce Rule 49. Under Rule 49(d)(3)(B), the Committee keeps matters under investigation confidential unless and until it initiates formal proceedings. The complainant (and the course the subject) are notified of the results of the investigation or formal proceedings. See Rule 49(d)(3)(E).

Compliance With Rule 49

Three years ago, the Court of Appeals adopted major changes in Rule 49. Those amendments received widespread publicity and significantly increased awareness of the requirements of the Rule. Since these changes, the Court of Appeals has seen a substantial upsurge in bar applications as many nonmember lawyers who practiced in the District realized they were practicing, at least to some degree, in violation of Rule 49.

Notwithstanding the increased level of awareness of the requirements of Rule 49 among lawyers, there are still a distressing number of violations. Perhaps the most common involve lawyers admitted in other jurisdictions whose practice falls within an exception to Rule 49 but who do not provide the required notice about the limitations on their practice. For example, lawyers who confine their practice exclusively to representation of clients before the Patent and Trademark Board, the Federal Communications Commission, or the Internal Revenue Service (and other conduct reasonably ancillary to such representation) may fit within section (c)(2) of Rule 49, the exception for U.S. government practitioners. However, Rule 49(c)(2) requires such lawyers to give “prominent notice in all business documents that his or her practice is ‘limited to matters and proceedings before federal courts and agencies.’ ” It is not enough for business documents to state “not admitted in D.C.” or “admitted only in [a specified state].” The Committee has found that a number of patent and trademark lawyers, communications lawyers, energy lawyers, and other government agency practitioners do not provide the required notice on letters, business cards, Internet sites, and other communications to the public.

A similar issue arises for lawyers covered by Rule 49(c)(8), the exception that allows lawyers admitted in another jurisdiction to practice in the District (under the supervision of a D.C. Bar member) for up to 360 days while their timely application for D.C. Bar membership is pending. Such individuals must, among other things, give notice to the public both of their bar status and of their supervision by a District of Columbia Bar member. The Committee has found that a number of lawyers, while relying on the exception, fail to give the required notice.

Less common, but more common than should be, are lawyers who practice in the District but do not fall within any Rule 49 exception. For example, some lawyers appear to labor under the misapprehension that they may maintain offices in the District if they generally limit their practice to federal courts (in some cases without even being admitted to the federal courts in all the districts where their clients reside or their clients’ legal problems arise). The seriousness of these violations varies, ranging from lawyers whose practice fits almost exclusively, but not completely, within an exception (for example, a patent lawyer who occasionally handles another type of matter), to lawyers who routinely practice out of offices in the District in nonexempt areas, providing questionable notice or no notice to the public that they are not members of the D.C. Bar.

These problems are not limited to sole practitioners or small law firms. Lawyers in some of the largest and best-known firms in the city and around the country have been the subject of recent Committee investigations and enforcement actions. The Washington offices of these firms often hire or transfer lateral partners and associates without paying sufficient attention to the restrictions of

Rule 49. Failure to pay attention to the Rule 49's requirements can put at risk not only the lawyer involved—often a young lawyer who may naively assume he or she is compliant with Rule 49 because no partner has said otherwise—but the reputation of the firm itself.

A substantial portion of the Committee's docket consists of cases referred by the Committee on Admissions. These usually involve a lawyer admitted in another jurisdiction who has applied for admission to the D.C. Bar after having practiced law in the District for a substantial period, and who does not provide a satisfactory explanation of how that lawyer's practice fits within an exception to Rule 49. In most of these cases, the Committee on Unauthorized Practice advises the Committee on Admissions that its investigation showed that a violation occurred but that it was not intentional or aggravated, and the Committee on Admissions ultimately recommends the lawyer's admission to the D.C. Bar. However, even if the lawyer is eventually admitted to the D.C. Bar, such a referral can substantially delay admission and, as discussed below, may result in embarrassing future disclosure obligations by the lawyer who was the subject of the investigation.

In most cases investigated by the Committee, the subject of the complaint admits that he or she has not complied with the substance or notice requirements of Rule 49 but maintains that the violation was "technical" or "inadvertent." Consistent with the general purposes of Rule 49 described above, the Committee views its primary goal as protecting consumers from persons who are not qualified to provide professional legal services in the District. To that end, the Committee focuses on compliance, not punishment for inadvertent or harmless violations of Rule 49. In cases where the Committee concludes that the violation is inadvertent and did not injure a client, the Committee will often resolve the matter with a written agreement that the lawyer will correct the violation and comply with Rule 49 in the future. That said, the Committee does not automatically or uncritically accept the excuse that a lawyer is ignorant of Rule 49, and it does not hesitate to take appropriate enforcement action for serious violations, particularly violations involving deception or harm to the lawyer's client.

Even a violation that may be considered "minor" or "technical" may have significant ramifications for the lawyer and his firm. For example, clients may contend (with more or less justification) that they are not required to pay for work done by lawyers who do not practice in compliance with Rule 49, or that a presumption of incompetence should be drawn in malpractice litigation if a lawyer not admitted in D.C. practices in D.C. without full compliance with the Rule. Lawyers may be required to report any action taken by the Committee if they apply for admission to another bar or for admission *pro hac vice* in a federal or state court. Even the fact of an investigation may be required to be disclosed on future bar applications, security clearances, or job applications. Dissatisfied clients, aggressive opponents, disgruntled firm employees, and sometimes even unhappy spouses can and do submit complaints—sometimes anonymously—to the Committee that the Committee investigates. Even if the lawyer and the lawyer's firm consider the complaint unjustified, responding to an inquiry from the Committee takes time and effort. More and more, lawyers and firms decide it is prudent to incur the cost of counsel when they face an inquiry from the Committee.

What Lawyers and Law Firms Should Do

Why are we telling you this? This article is directed both at lawyers practicing in D.C. without D.C. Bar membership and at their colleagues—including the managing partners of their firms and partners responsible to ensure that a law firm complies with applicable ethics rules. Rule 5.5(b) of the D.C. Rules of Professional Conduct makes it unethical for a lawyer to assist a person who is not a member of the Bar in any activity that constitutes the unauthorized practice of law. As a result, any lawyer in a firm has a responsibility to ensure that the lawyers with whom he or she practices comply with Rule 49. This responsibility belongs to the firm as well as individual attorneys. The Committee is increasingly concerned that law firms do not establish and enforce policies and procedures designed to ensure compliance with Rule 49 by their partners and associates. The lawyers and law firms that ignore this obligation risk embarrassment or worse. What to do?

First, any lawyer practicing in the District who is not a member of the D.C. Bar should read Rule 49 to determine whether he or she is in full compliance. Do not assume that you know what the Rule says. Many lawyers investigated by the Committee have learned the hard way that there is no substitute for reading and understanding Rule 49's very specific requirements. And compliance means full compliance. Take an objective look at your practice and decide whether it fits cleanly and completely within an exception to Rule 49. If not, you should apply for membership in the D.C. Bar,

assuming of course you meet the qualifications. While your application is pending, you should not engage in any practice not covered by an exemption, such as the exemption for federal or local agency practice. However, if you submit your application within 90 days after commencing practice in the District, you may be covered by the Rule 49(c)(8) exception, which permits eligible lawyers with pending applications to engage in the general practice of law, provided they meet the supervision and notice requirements. You should also make sure that you are providing to prospective and actual clients, as well as others with whom you have dealings, notice of your status in the form required by the Rule. Again, bare statements such as "not admitted in D.C." do not by themselves satisfy these notice requirements.

The Committee also calls on law firms to audit their compliance with Rule 49 and take immediate steps to bring their lawyers into compliance, if they are not already. Prudent steps range from reviewing the firm's practice with respect to new entry-level or lateral attorneys, to evaluating the adequacy of disclosures in the firm's Web site and in retainer letters for new clients. The firm should determine whether lawyers who are not admitted in D.C. are currently satisfying the requirements of Rule 49. Because lawyers' practices change over time, the firm may need to reassess compliance on a regular basis. You might consider, for example, an annual interview of each lawyer who is not a member of the D.C. Bar, or an annual certification that each such lawyer has read Rule 49 and has concluded in good faith that his or her practice falls within a specific exception to the Rule, with a brief explanation of that conclusion. Responsibility for ensuring firmwide Rule 49 compliance should be given to an individual attorney (which could be the managing partner or the firm's ethics officer, if it has one) or a small committee so that this task does not fall through the cracks. As in many other areas of law firm management, an ounce of prevention is worth a pound of cure. Monitoring your law firm's compliance will take only modest time and effort, particularly when compared to the time and effort required to deal with an issue of unauthorized practice.

The Committee urges all lawyers and law firms in the District to take these simple steps. Compliance with Rule 49 is good for clients, good for lawyers, and good for the Committee, which would be delighted to have an empty enforcement docket. If you have any questions, please contact the Committee: District of Columbia Court of Appeals, Committee on Unauthorized Practice of Law, 500 Indiana Avenue NW, Room 4200, Washington, DC 20001.