Opinion 11-02

of the District of Columbia Court of Appeals Committee on the Unauthorized Practice of Law

Issued June 10, 2002

Pursuant to District of Columbia Court of Appeals Rule 49 (the "Rule" or "Rule 49"), and specifically its section 49(d)(3)(G), the District of Columbia Court of Appeals Committee on the Unauthorized Practice of Law (the "Committee"), by a majority vote of a quorum of its members then present, approved the following opinion, at its meeting on June 7, 2002:

Amendments to Disclosure Requirements of Rule 49(c)

By Order No. M-212-01 filed on April 25, 2002, the Court of Appeals amended certain disclosure requirements in Rule 49(c). This Opinion provides guidance for compliance with these amended requirements.

Rule 49(c) permits certain persons who are not active members of the District of Columbia Bar to engage in the practice of law in the District provided they comply with certain requirements concerning disclosure of their bar status or limits on their practices. The recent amendments protect to at least the same degree as the prior version the beneficiaries of these notice requirements. These beneficiaries include not only actual or potential clients but also other persons because the ethical obligations of members of the District of Columbia Bar extend to dealings with persons other than clients. *See, e.g.*, Rules 3.3–3.4 and 4.1–4.4 of the D.C. Rules of Professional Conduct. Some of these changes are designed to provide more information to these beneficiaries, and others to give persons practicing under these Rule 49 exceptions additional, reasonable flexibility in providing notice.

Notice of Bar Status. Rule 49(c) contains exceptions for persons who limit their practice to federal or District of Columbia agencies and for persons engaged in certain pro bono work. Before the amendments, several of these exceptions did not require an individual covered by the exception to state explicitly that he or she is not admitted to the D.C. Bar, creating some risk that clients and opposing parties may mistakenly believe that the individual is a member of the D.C. Bar and that they therefore have remedies for misconduct that are not in fact available to them. For example, disclosure under section (c)(2) that a person limits his or her practice to federal courts and agencies does not necessarily imply that the person is not admitted to the District of Columbia Bar, because clients may interpret this only as a statement of specialization. Sections (c)(9) and (c)(10) did not require any disclosure of the bar membership or status of attorneys providing certain pro bono services.

The Court amended sections (c)(2), (c)(5), (c)(9) and (c)(10) to require lawyers with offices in the District of Columbia to disclose explicitly their bar status. This disclosure requirement does not apply to lawyers practicing under other exceptions, such as the (c)(1) and (c)(4) exceptions for government lawyers and the (c)(6) exception for in-house counsel. This new disclosure requirement could be satisfied with such statements as "Admitted only in [specified states]," "Not admitted in D.C.," or in the case of (c)(9), "Inactive member of D.C. Bar." Written notice is preferred, but oral notice may be acceptable if it is reasonable under the circumstances, for example, in the case of a *pro bono* program where an attorney provides legal advice only over the telephone. This amendment thus gives practitioners flexibility in describing their bar status and makes practice under sections (c)(2), (c)(5), (c)(9) and (c)(10) consistent with practice under section (c)(8).

Rule 49(c)(2) and (c)(5). The amendment gives individuals practicing under the (c)(2) and (c)(5) exceptions more flexibility in describing their limited areas of practice. Section (c)(2) had required practitioners to state, "Practice limited to matters and proceedings before federal courts and agencies." That general statement would continue to satisfy the amended disclosure requirements in (c)(2) and (c)(5). However, the lawyer now has the option to use other formulations that provide more specific information about the limited nature of his or her practice. For example, a federal practitioner could state "Practice limited to immigration and naturalization law" or "Practice limited to federal communications matters."

The amendment eliminates the former requirement in section (c)(5) that covered D.C. practitioners state, "Practice limited to matters and proceedings before [specifically-named D.C.

agencies] under District of Columbia Court of Appeals Rule 49(c)(5)." That disclosure would continue to satisfy the requirements of the Rule. However, the (c)(5) disclosure requirement no longer mandates a specific reference to particular D.C. agencies or to Rule 49(c)(5). The amendment gives those who limit their practice to D.C. agencies the same flexibility that federal agency practitioners have in describing the limited nature of their practice in the District. It is now permissible for practitioners to state, for example, that their practice is limited to District of Columbia zoning matters.

These notice requirements in sections (c)(2) and (c)(5) are limited, with one exception, to attorneys with an office in the District of Columbia. If a lawyer with an office only outside the District practices before federal or District of Columbia agencies, the lawyer may still practice "in" the District because the lawyer's presence in the District is more than "incidental" or "occasional." *See* Rule 49(b)(3). In the case of attorneys who do not maintain offices in the District but who are authorized by federal statute or rule to practice before federal agencies in the District, the fact that the attorney does not maintain an office here should be sufficient to alert clients that the attorney is not licensed in the District. A notice requirement for federal practitioners who do not maintain offices in the District would impose a substantial and generally unanticipated burden on such lawyers. For these reasons, requiring any disclosure by lawyers who do not have an office in the District but who practice in the District before *federal* agencies on a more-than-incidental basis is not necessary to protect clients or other parties.

Different considerations apply to individuals who do not have an office in the District but who practice in the District before *District of Columbia* agencies on a more-than-incidental basis. A significant number of lawyers with offices in Maryland and Virginia may fall into this category. A requirement that such individuals provide notice on all business documents would be overbroad and unduly burdensome because only a small portion of their practice may involve practice before District of Columbia agencies. However, to ensure that clients and other parties in any matter that the practitioner handles before local agencies understand the practitioner's bar status, the new Rule 49(c)(5)(D) requires the practitioner to provide written notice in each such matter.

Rule 49(c)(8). The amendments clarify the notice requirements in section (c)(8) for attorneys with pending applications for membership in the D.C. Bar who are supervised by active members of the D.C. Bar. The amended provision permits either the practitioner or the supervising attorney to make the required disclosure. The requirement of notice of the practitioner's bar status would continue to be satisfied by a statement that the practitioner is "admitted only in" other specified jurisdictions. *See* Opinions 1-98 and 5-98. The Rule continues to require practitioners to make the required disclosure in *all* business documents. These documents include, without limitation, letters, emails, websites, business cards, and documents submitted to courts or other tribunals. The Committee also encourages notice of the bar status of attorneys who will be working on the matter to be included in the retainer agreements that Rule 1.5(b) of the District of Columbia's Rules of Professional Conduct requires attorneys to provide to any new client.

The amendment states expressly that individuals practicing under the limited duration supervision exception are required to move for admission pro hac vice when they appear in District of Columbia courts. The current rules and commentary make clear that admission *pro hac vice* is required for practitioners practicing under the (c)(8) exception who wish to appear in court: the *pro hac vice* exception in Rule 49(c)(7) does not contain any exception for persons practicing under (c)(8); and Sup. Ct. Civ. R. 101 also plainly applies to individuals practicing under the (c)(8) exception because they are, by definition, not admitted to the District of Columbia Bar. However, the text of (c)(8) had not stated this requirement explicitly, and some practitioners practicing under this exception may have mistakenly believed that they were not required to obtain admission *pro hac vice*. The amendment therefore adds the proviso "that the practitioner is admitted *pro hac vice* to the extent he or she provides legal services in the courts of the District of Columbia."

Rules 49(c)(9) and (c)(10). The amendment to sections (c)(9) and (c)(10) requires practitioners to provide notice of their bar status in any matter in which they are providing legal services on a *pro bono publico* basis or through a specifically authorized court program. Unlike section (c)(8), sections (c)(9) and (c)(10) as amended do *not* require the practitioner to give notice of his or her bar status in *all* business documents. The person must provide notice not only to the client but, if the person deals with other parties or attorneys in the matter, to these other persons as well.

The staff of the Committee shall cause this opinion to be submitted for publication in the same manner as the opinions rendered under the Rules of Professional Conduct.

Done this 10th day of June, 2002.