

## Opinion 12-02

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

Issued September 16, 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 September 13, 2002:

### **Supervision of Attorneys Under Rule 49(c)**

Two exceptions in Rule 49(c) authorize attorneys not licensed in the District of Columbia to practice here provided that, among other things, they are supervised by a member of the D.C. Bar. The Committee has received several requests for guidance about the meaning of this supervision requirement, in particular with respect to whether the supervising attorney must always be present when the supervised attorney appears in court.

Rule 49(c)(8) permits attorneys who are licensed in another jurisdiction and who have pending applications for membership in the D.C. Bar to practice law in the District "under the direct supervision of an enrolled, active member of the District of Columbia Bar." Rule 49(c)(9)(B) permits certain attorneys employed by or affiliated with the Public Defender Service or certain non-profit organizations to provide legal service *pro bono publico* provided "that such attorney is supervised by an enrolled, active member of the Bar who is employed by or affiliated with" the same organization. Similarly, Rule 49(c)(9)(C) authorizes attorneys employed by the United States to provide legal service *pro bono publico* "provided that the person is supervised by an enrolled, active member of the District of Columbia Bar."

The same standard governs the supervision requirement in Rule 49 as in the District of Columbia Rules of Professional Conduct. Rule 5.1(b) of the Rules of Professional Conduct provides, "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." This provision requires the supervising lawyer to make reasonable efforts to ensure conformity with, among other Rules, Rule 1.1 requiring competent representation and Rule 1.3 requiring zealous and diligent representation within the bounds of the law.

In the Committee's judgment, whether reasonable supervision requires the supervising attorney to attend personally with the supervised lawyer such events as a trial, hearing, or meeting depends on the circumstances. That is true in both litigation and non-litigation matters. The supervising attorney should consider all factors relevant to the appropriate degree and manner of supervision, including the experience and skill of the supervised attorney and the nature of the matter.

Thus, in deciding whether to be present for a trial, hearing, or conference before a court or other tribunal, the supervising attorney should consider, among other factors, the experience and skill of the supervised attorney, the nature of the case, and the type of proceeding. For example, whether the supervising attorney should be present at a jury trial depends in part on the nature and extent of the supervised attorney's prior jury trial experience, and in-person supervision may not be necessary if the supervised attorney has extensive experience trying similar cases in other jurisdictions where he or she is licensed or has been admitted *pro hac vice*. In some situations, a responsible supervisor ought to be present in court with the supervised attorney, but in others, the supervisor may reasonably decide that he or she does not need to be present.

In litigation matters, this case-by-case approach is consistent with Rule 101(a) of the Superior Court Rules of Civil Procedure, which contemplates that the presiding judge may in some cases authorize an attorney supervising a lawyer admitted *pro hac vice* not to be present in court. Moreover, it is the Committee's understanding that the Public Defender Service and non-profit organizations providing *pro bono* legal services have generally interpreted Rule 49(c) consistent with this opinion, and their use of a case-by-case approach has not resulted in any problems due to lack of in-person supervision. With respect to Rule 49(c)(9), this approach is also consistent with the purpose of the (c)(9) exception—"to provide the broadest access to pro bono legal services, while serving the purposes of Rule 49 to protect the public from unlicensed legal practitioners." See

Op. 3-98. The Committee recognizes that it would place a substantial burden on the Public Defender Service and other non-profit organizations with limited budgets to send supervising attorneys to court with all lawyers practicing under the (c)(9) exception.

The Committee emphasizes that whether or not the supervising attorney is physically present when the supervised attorney provides legal services, the supervising attorney remains responsible for the conduct of the supervised attorney. Any recourse the client may have against the supervising attorney is not affected by whether the supervision is in-person. The supervising attorney also remains accountable under Rule 5.1(b) if he or she fails to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Nothing in Rule 49 or in this opinion affects any supervision requirement imposed by any court in which an attorney practicing under any exception requiring supervision appears. In its Opinion 3-98, the Committee explained that when a lawyer appears in Superior Court under Rule 49(c)(9), "neither an application nor a motion to appear *pro hac vice* in litigation is required." However, attorneys practicing under the (c)(8) supervision exception are required to move for admission *pro hac vice* when they appear in District of Columbia courts. This provision was recently amended to make explicit the requirement "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." As noted above, the Superior Court's Civil Rule 101(a) concerning admission *pro hac vice* requires the supervising lawyer to be present unless the judge authorizes him or her not to be present in court. If a judge requires the supervising attorney to be present, the supervised attorney—whether or not admitted *pro hac vice*—must of course comply with that requirement. Conversely, if a judge authorizes the supervised attorney to appear without the supervising attorney, that authorization is dispositive, and Rule 49 imposes no greater obligation on the supervising attorney.

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 16th day of September, 2002.

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