

District of Columbia Court of Appeals
Committee on Unauthorized Practice of Law
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OPINION 17-06:

THE SCOPE OF THE FEDERAL COURT PRACTICE EXCEPTION IN RULE 49(c)(3)

Issued July 21, 2006

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 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 July 21, 2006:

The Committee believes that guidance concerning the scope of the exception for federal court practice in Rule 49(c)(3) would be useful to lawyers who are based in the District of Columbia and who practice before federal courts in the District of Columbia.

The pertinent language of Rule 49 is contained in section (c):

(c) **Exceptions.** The following activity in the District of Columbia is excepted from the prohibitions of section (a) of this Rule, provided the person is not otherwise engaged in the practice of law or holding out as authorized or competent to practice law in the District of Columbia:

(3) **Practice Before a Court of the United States:** Providing legal services in, and reasonably ancillary to litigation in any court of the United States following admission to practice in that court.

This Opinion focuses on lawyers who use the District of Columbia as a base from which to practice, who are not active members of the D.C. Bar, and who practice *only* before federal courts to which they are admitted. *See* Commentary to Rule 49(b)(3) (Rule 49 “is intended to require admission where an attorney is using the District of Columbia as a base from which to practice”). Such lawyers qualify for the exception in Rule 49(c)(3), but only if they make clear in business documents both that (1) they are not admitted in the District of Columbia and (2) their practice is limited to practice before federal courts (and to other matters within the scope of other exceptions in section (c)).

Section (a) of Rule 49 prohibits not only the practice of law but holding out in any manner as authorized or competent to practice law in the District of Columbia, unless the practitioner is an active member of the D.C. Bar or the Court’s rules otherwise permit. As explicitly stated in the introductory provision quoted above, the exceptions in section (c) apply “provided the person is not otherwise . . . holding out as authorized or competent to practice law in the District of Columbia.” Use of business documents with a D.C. address ordinarily implies that a lawyer is generally authorized to practice law in the District of Columbia, unless the lawyer makes clear that he or she is not admitted in the District of Columbia and that his or her practice is limited to matters within the scope of an exception in section (c). Without such disclosure, clients and opposing parties may mistakenly believe that the practitioner is a member of the D.C. Bar and that they therefore have remedies for misconduct that are not in fact available to them.¹

¹ Business documents include, without limitation, letters, emails, websites, business cards, and documents submitted to courts. *See* Opinion 11-02, Amendments to Disclosure Requirements of Rule 49(c) (issued June 10, 2002) (available at http://www.dcappeals.gov/dccourts/docs/rule49_opinion11.pdf).

The scope of the exception in Rule 49(c)(3) is comparable to the scope of the exception in Rule 49(c)(2). Rule 49(c)(2) authorizes lawyers with an office in the District of Columbia to practice before federal agencies that authorize and regulate their practice, provided that “the practitioner expressly gives prominent notice in all business documents of the practitioner’s bar status and that his or her practice is limited consistent with this section (c).” The same reasons for these disclosures by D.C.-based lawyers who practice only before federal agencies apply to D.C.-based lawyers who practice only before federal courts.

This interpretation is consistent with the principle, recognized in the Commentary to Rule 49(c)(3), that “[p]ractice before the courts of the United States is a matter committed to the jurisdiction and discretion of those entities.” In *Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006), the U.S. Court of Appeals for the Third Circuit held that a lawyer admitted to the federal district court bar could practice in that federal court from an office in Pennsylvania even though he was suspended from the Pennsylvania bar. The Court of Appeals concluded that any state law or regulation restricting the right of the lawyer to practice in federal court is preempted under the Supremacy Clause because it interferes with the ability of federal courts to determine who may practice before it, and maintaining an office is reasonably within the scope of the practice authorized by the federal court. Importantly, the lawyer was required to make clear in business documents that he was authorized to practice only in federal court. If lawyers who are suspended from general practice in a jurisdiction may maintain an office in that jurisdiction in connection with a federal court practice, then *a fortiori* lawyers who have not been disciplined in that jurisdiction may do so – provided they inform people about their bar status and limits on their practice. These disclosures leave these practitioners free to practice, with no significant or undue burden, before federal courts where they are authorized to practice.

The Committee emphasizes that the exception in Rule 49(c)(3) applies only if the *entire* practice of a D.C.-based lawyer falls within section (c). If any part of the practice – no matter how small a percentage – is not covered by an exception, Rule 49 requires a practitioner with an office in the District of Columbia to be an active member of the D.C. Bar.

Rule 49(c)(3) permits lawyers whose practice is based *outside* the District of Columbia and who are admitted to practice before federal courts based in the District to practice before those federal courts, and to do so without express disclosure in business documents of their bar status and limits on their practice in the District. These disclosure requirements in Rule 49(c)(3) (like the ones in Rule 49(c)(2)) apply only to practitioners with an office in the District of Columbia. In the case of an attorney whose office is outside in the District of Columbia, the fact that the attorney does not maintain an office here should be sufficient to alert clients and others that the attorney is not generally authorized to practice in the District of Columbia. Moreover, a requirement that attorneys based outside the District modify their business documents would impose a substantial and unanticipated burden on such lawyers. *See* Opinion 11-02, Amendments to Disclosure Requirements of Rule 49(c) (issued June 10, 2002) (available at http://www.dcappeals.gov/dccourts/docs/rule49_opinion11.pdf).


The Committee has previously provided guidance about the form and content of disclosures about a practitioner’s bar status and limits on his or her practice. *See* Opinion 11-02, Amendments to Disclosure Requirements of Rule 49(c) (issued June 10, 2002) (available at http://www.dcappeals.gov/dccourts/docs/rule49_opinion11.pdf). With respect to bar status, the practitioner’s business documents may state, for example, “Admitted only in [specified states]” or “Admitted only in D.C.” With respect to limitations on practice, the notice may be general (for example, “Practice limited to cases in federal court”) or more specific (for example, for

practitioners who handle discrimination cases in federal courts and before the U.S. Equal Employment Opportunity Commission, “Practice limited to federal employment matters”).

The Committee notes that lawyers based in the District of Columbia may not be eligible for admission to certain federal courts located in the District. The local rules of the U.S. District Court for the District of Columbia do “not permit a person who holds himself out as a lawyer in the District of Columbia or who practices routinely from an office in the District of Columbia to rely on a Bar admission from another jurisdiction to practice law in this Court,” and any such person who practices in that Court “is engaged in the unauthorized practice of law in the District of Columbia.” *Blackman v. Clark*, Civil Action No. 97-1629 (PLF) (D.D.C. Jan. 3, 2005). For the reasons explained above, even if lawyers based in the District are admitted to practice in a federal court and otherwise qualify for the federal court practice exception in Rule 49(c)(3), they violate the “holding out” provisions of Rule 49 unless they affirmatively disclose in business documents their bar status and the limits on their practice.

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 21st day of July, 2006.


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