New York State Bar Association

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 806 – 1/29/07

Topic: Referrals by foreign lawyers; permissibility of fee sharing.

Digest: A New York law firm may participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and in sharing of legal fees in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with DR 2-107(A).

Code: DR 2-102(D), 2-107(A), 3-102(A), 3-103(A), EC 3-8.

QUESTION

Where New York and Italian law firms, neither of whose attorneys reside in or are licensed to practice in the other's country, refer legal matters to each other, may the New York firm share a percentage of its fees with the Italian law firm for matters referred to the New York firm, and if so, under what condition and in what proportions?

OPINION

A New York lawyer is the member of a New York law firm "affiliated" with an Italian law firm, none of whose attorneys resides in or is licensed to practice law anywhere in the United States. While at least some of the New York firm's attorneys are licensed to practice in other states, none resides in or is licensed to practice in Italy. The word "affiliated" is said to be limited in its meaning to the mutual referral of matters as between the two firms. Although the New York lawyer travels to Italy from time to time to assist the Italian firm there on cases referred by the lawyer's firm (presumably in conformity with Italian law), no attorney from the Italian firm comes to New York to assist the New York firm on cases the Italian firm refers to the New York firm. The Italian firm's participation in such matters involves consultation, advice and guidance, all rendered from Italy. The New York lawyer is satisfied that the Italian firm is in fact a firm of attorneys, all of whom are licensed and in good standing to practice law in Italy pursuant to the laws of that country and that they are bona fide members of the Italian bar.

Assuming that the Italian firm refers a matter to the New York firm that generates a fee to the New York firm and that the Italian firm does not record time on the matter but is available for consultation, advice and guidance and is therefore actively involved in and adding value to the matter, we consider whether the New York firm may share a percentage of its earned fees with the Italian firm, and, if so, in what proportion.

This Committee does not render opinions on issues of law, as opposed to ethics, nor on issues of ethical conduct regulated by the law or codes of professional conduct outside of the State of New York. Its responsibility is limited, rather, to the issuance of opinions based upon the application of the New York Code of Professional Responsibility.

DR 3-102(A) prohibits a lawyer from sharing fees with a "non-lawyer" (except in circumstances not relevant here). The ethical requirements governing the division of legal fees among lawyers not associated with the same firm are prescribed in DR 2-107(A). It reads as follows:

> A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:
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> 1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
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> 2. The division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.
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> 3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

The initial question to be determined is whether the lawyers of the Italian firm are "lawyers" within the meaning of DR 2-107(A) or "non-lawyers" within the meaning of DR 3-102(A).

DR 3-103(A) prohibits lawyers from entering into law partnerships with non-lawyers.[1] While on its face the rule might appear to prohibit affiliations with persons not licensed to practice law in New York, that interpretation is tempered by DR 2-102(D) which provides that if a partnership is formed between lawyers of different jurisdictions, the partnership's letterhead must clearly state the jurisdiction in which each lawyer is licensed to practice law. DR 2-102(D) thus contemplates the formation of partnerships

[1] *See also* EC 3-8 ("Since a lawyer should not aid or encourage a non-lawyer to practice law, the lawyer should not practice law in association with a non-lawyer or otherwise share legal fees with a non-lawyer.").

between lawyers of different jurisdictions.[2] In N.Y. State 542 (1982) this committee applied that conclusion to lawyers in a jurisdiction outside the United States — there, Great Britain — and it has likewise applied the conclusion to lawyers in Japan[3] and Sweden.[4]

In N.Y. State 542, this committee observed that a lawyer admitted to practice law in any jurisdiction of the United States is not a "non-lawyer" for the purposes of DR 3-103(A) (citing N.Y. State 175 (1970) and N.Y. State 144 (1970)). With respect to persons recognized as lawyers in non-U.S. jurisdictions, our committee adopted an analysis that compares the educational requirements for admission to practice, and standards of professional conduct and discipline, of the non-U.S. jurisdiction with those of New York State in order to determine whether "to consider such persons beyond the traditional proscription against lay partnerships."[5]

Accordingly, if the Italian legal system is determined upon inquiry to provide persons admitted or licensed to practice law with education, training and ethical standards comparable to those of American lawyers, Italian lawyers may be considered "lawyers" within the meaning of DR 2-107(A). Although, as noted above, we have in the past made such a determination with respect to the legal systems of several other nations, we decline to do so here or in the future, as we believe it is not necessary or appropriate for this Committee to continue to do so.

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[2] *See* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 41:712 (2007), which states in part as follows:

> Virtually every jurisdiction that has examined the issue allows its attorneys to divide fees with out-of-state lawyers or law firms, provided that the in-state ethics requirements are satisfied. *See Freeman v. Mayer*, 95 F. 3d 569 (7th Cir. 1996); *Sims v. Charness*, 103 Cal. Rptr. 2d 619, 17 Law. Man. Prof. Conduct 83 (Cal. Ct. App. 2001); *Cunningham v. Langston, Frazer, Sweet & Freese P.A.*, 727 So. 2d. 800, 15 Law. Man. Prof. Conduct 66 (Ala. 1999); *see also* Connecticut Informal Ethics Op. 91-7 (1991); District of Columbia Ethics Op. 197 (1989); Maryland Ethics Op. 88-58 (1988); Michigan Informal Ethics Op. CI-938 (1983); Nevada Ethics Op. 4 (1987); New Hampshire Ethics Op. 1984-5/19 (1985); New Mexico Ethics Op. 1983-2 (1983); New York City Ethics Ops. 82-66 and 82-28; Rhode Island Ethics Op. 97-16 (1997); South Carolina Ethics Op. 86-18; Virginia Ethics Op. 1130 (1988).

See also Arizona Opinion 2000-08; California Opinion 1986-88. *Cf*. Delaware Opinion 1980-5 (referral fee prohibited because referring law firm did not maintain "any responsibility for the conduct of a case" once the referral was made).

[3] N.Y. State 646 (1993).

[4] N.Y. State 658 (1994) (New York law firm may enter into partnership with Swedish law firm provided that the partnership will not compromise the New York lawyer's ability to uphold ethical standards). *See also* N.Y. City 81-72 ("Under the Code of Professional Responsibility, a New York lawyer may enter into a partnership with lawyers from other [foreign] jurisdictions."); Alabama Opinion 2002-02; ABA 01-423.

[5] *Accord* N.Y. State 658; N.Y. State 646; N.Y. City 81-72.

Thus, if (1) lawyers admitted or licensed to practice law in Italy meet the standard set forth above, (2) the New York firm fully discloses to the client the firm's intent in a matter to share its fees with the Italian firm and has obtained the client's consent to such arrangement pursuant to DR 2-107(A)(1), (3) the total fee in the matter will not exceed reasonable compensation for all legal services rendered to the client (DR 2-107(A)(3)), (4) the Italian law firm takes joint responsibility for the matter or the portion of the fee it earns is in proportion to the services it performs, and (5) the Italian law firm's work on, or taking joint responsibility for, the matter is not otherwise barred,[6] we find no Code prohibition on the New York firm's sharing a percentage of its legal fees with the Italian firm. In particular, under DR 2-107(A)(2), which permits the sharing of fees where a firm takes joint responsibility for the matter, if the criteria set forth above are met, we find no impediment to a foreign lawyer or law firm assuming such joint responsibility.

CONCLUSION

Based upon the information presented above, and upon the assumption that members of a foreign law firm are in fact "lawyers" and that both firms act in full compliance with the provisions of DR 2-107(A) and are not otherwise disqualified under the Code, nothing in the New York Code prohibits the New York firm from sharing a percentage of its reasonably stated fees with a foreign firm for legal services rendered to clients on matters referred to the New York firm by the foreign firm.

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[6] *See, e.g.*, N.Y. State 745 (2001) (opining that if a lawyer is unable to assume sole responsibility for a matter because of a conflict of interest, he or she is also disqualified from assuming joint responsibility for it).