NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

Committee on Professional Ethics

Opinion 860 – 4/26/11

Topic: Compensation of nonlawyer "Business Developer" by law firm with grant writing business.

Digest: If grant writing involves legal services, then Rule 5.4(a) prohibits a law firm from paying a nonlawyer Business Developer a percentage of grants awarded to clients, and the Business Developer may not advertise or solicit grant writing business in violation of Rules 7.1, 7.2, and 7.3.

If grant writing does not involve legal services, but the law firm also provides legal services to grant writing clients, then the law firm must determine if the legal services are "distinct" from the nonlegal grant writing services. If the legal and nonlegal services *are not* distinct, then the Rules of Professional Conduct apply to both the legal and nonlegal services. If they *are* distinct and the law firm gives grant writing clients the written disclaimer set forth in Rule 5.7(a)(4), then Rules governing advertising, solicitation, and compensation will not apply to the grant writing services (but Rules not dependent on an attorney-client relationship will still apply).

Rules: 5.4(a), 5.5, 5.7(a), 7.1, 7.2, 7.3, 8.4.

QUESTION

1. A law firm assists municipal and not-for-profit clients in applying for competitive grants. (We use the term "client" in this opinion to mean the same thing as "customer" – the term "client" does not imply that an attorney-client relationship exists.) The law firm poses a series of related questions:

2.

a. May the law firm hire a nonlawyer "Business Developer" to help attract new clients for the law firm's grant writing services?

b. If so, may the law firm pay the Business Developer a percentage of grants awarded to clients that the Business Developer brought to the firm? (The Business Developer would not prepare grant applications.)
c. Does it make a difference whether the Business Developer is an independent contractor rather than an employee?
d. Does it matter whether grant writing services are legal services or nonlegal services?

OPINION

3. The inquiring law firm has a number of municipal and not-for-profit clients who have signed retainer letters engaging the law firm's services in connection with applying for grants. (We refer to these services as "grant writing services.") When the law firm identifies a grant opportunity, it contacts clients who have signed retainer letters and brings the grant opportunity to their attention. If a client wishes to pursue the grant opportunity, the client passes a resolution to pursue it, after which the law firm writes the grant application. The law firm may be compensated on either an hourly basis or on a contingent fee basis.

Are Grant Writing Services "Legal Services"?

4. The initial question raised by the inquiry is whether the law firm's grant writing services are legal services, nonlegal services, or a combination of the two.

5. Comment [2] to Rule 5.5 of the New York Rules of Professional Conduct (the "Rules"), which deals with the unauthorized practice of law, states: "The definition of the 'practice of law' is established by law and varies from one jurisdiction to another." We do not render opinions on matters of law (and defining unauthorized practice is a matter of law), but we note that Ethical Consideration 3-5 of the former Code of Professional Responsibility gave the following helpful guidance: "Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client ...."

6. A definition of "nonlegal services," on the other hand, is expressly contained in the Rules of Professional Conduct. Rule 5.7 provides: "For purposes of this Rule, 'nonlegal services' shall mean those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." This definition begs the question of what constitutes unauthorized practice of law, but it seems likely that grant writing services may be performed without giving legal advice. If that is the case, then the grant writing services at issue here would constitute nonlegal services – but since we lack jurisdiction to say definitively whether the grant writing services are legal services or nonlegal services, our opinion will explore the consequences of both determinations.

Consequences If Grant Writing Services *Are* Legal Services

7. If the grant writing services *are* legal services, then the Rules would prohibit the law firm from soliciting grant writing business in person or by telephone contact from persons other than close friends, relatives, existing clients, and former clients – *see* Rule 7.3 – and the law firm would be prohibited from violating this Rule "through the acts of another," such as a Business Developer – *see* Rule 8.4(a).

8. Moreover, if grant writing services are legal services, then paying the Business Developer a percentage of the grant awards would violate Rule 5.4(a) (which bars a lawyer from sharing legal fees with a nonlawyer). This would be true whether the Business Developer is an employee of the law firm or a non-employee agent (*i.e.,* an independent contractor). *See* N.Y. State 565 (1984) (paying marketing and public relations firms a commission or percentage of fees from clients the firms obtained would be an improper division of fees with a nonlawyer).

9. However, despite the general prohibition in Rule 7.2(a) on compensating a person to recommend clients, the law firm could hire a nonlawyer Business Developer to engage in advertising and solicitation activities in which lawyers themselves could ethically engage. *See* Rule 7.2, cmt. [1] (a lawyer may "compensate employees, agents and vendors who are engaged to provide marketing or client development services"). For example, the Business Developer, like the lawyers in the firm, could develop printed or web-based marketing materials and could solicit grant writing business in person or by telephone from the law firm's existing and former clients.

Consequences If Grant Writing Services *Are Not* Legal Services

10. If grant writing services *are not* legal services, we need to apply Rule 5.7 ("Responsibilities Regarding Nonlegal Services"). That rule applies in two situations that might arise in the circumstances of this inquiry.

11. Rule 5.7(a)(1) applies where (i) the law firm simultaneously provides both legal and nonlegal services to a client, and (ii) the legal and nonlegal services are "not distinct" from each other – for example, where the law firm provides both grant writing services and tax advice or other legal services related to the grant application.

12. Rule 5.7(a)(2) applies where (i) the law firm simultaneously provides both legal and nonlegal services to a client, but (ii) the legal and nonlegal services *are* "distinct" from each other – for example, where the law firm represents the client in a tort suit unrelated to the grant application. In such cases, a question arises whether the client receiving the nonlegal services mistakenly believes that they are legal services because they are being delivered by a law firm. Rule 5.7(a)(4) addresses this question, stating:

> For purposes of paragraph (a)(2) … it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship unless the lawyer or law firm has advised the person in writing that

> the services are not legal services and that the protection of a lawyer-client relationship does not exist with respect to the nonlegal services ....

Thus, Rule 5.7(a)(2) requires the law firm to answer two questions – (i) is the firm providing both legal and nonlegal services, and (ii) if so, are the two distinct?

13. Whether the law firm is providing both legal and nonlegal services is a question of fact. The main question is whether the law firm is giving legal advice to a client that is also a grant writing client. As we noted in N.Y. State 832 (2009), even when a nonlawyer could provide a "nonlegal" service without engaging in the unauthorized practice of law, if a law firm in fact provides legal advice in connection with a nonlegal service, then the law firm would be providing legal services as well as nonlegal services.

Are the Legal and Nonlegal Services "Distinct"?

14. If the law firm is providing both legal and nonlegal services to the same client, then the applicability of the Rules of Professional Conduct depends on whether the legal and nonlegal services are "distinct" from each other. If they *are not* distinct, then the Rules of Professional Conduct apply to both the legal and the nonlegal services. Rule 5.7(a)(1). If they *are* distinct, then the Rules do not apply to the nonlegal services, *unless* "the person receiving the services could reasonably believe that the nonlegal services are the subject of an attorney-client relationship." Rule 5.7(a)(2).

15. The question whether the nonlegal services are "distinct" is easier to answer when the legal and nonlegal services are provided by two different entities (*i.e.,* the law firm provides only legal services and a separate entity provides the nonlegal services). Where the law firm itself provides both legal and the nonlegal services, however — as the inquiring firm proposes here – clients may have difficulty distinguishing between the two. If the law firm's legal advice is related to the law firm's provision of grant writing services, we think the legal and nonlegal services are "not distinct." For example, if the law firm writes a grant and also advises the grant writing client regarding the legal conditions of the grant or the tax implications of obtaining the grant, the line between the legal and nonlegal services may be far from distinct.

16. Even if a separate entity (rather than the law firm itself) provides the nonlegal services, client confusion remains a concern if the separate nonlegal entity provides the nonlegal services from the law firm's own offices because the client is aware of the law firm's status as a law firm. *Cf.* N.Y. State 832 (2009) (risk of confusion when attorney's status as a lawyer is visible to the public). In that case, the law firm must either give the disclaimer set forth in Rule 5.7(a)(4) or abide by the Rules of Professional Conduct with respect to the nonlegal services.

What If the Law Firm Provides No Legal Services to the Client?

17. If grant writing services are not legal services, then another possibility is that the law firm may provide only grant writing services and provide no legal advice to a client,

either in connection with the grant writing services or in unrelated matters. In that case, the law firm could hire and pay the Business Developer on terms that would not be permitted by the Rules if the law firm were also performing legal services for the client.

18. However, even if the law firm does not provide any legal advice to a grant writing client, confusion may arise. If the law firm provides the grant writing services out of its own offices, a substantial risk arises that the client may be misled as to whether an attorney-client relationship exists. As explained in Comment [1] to Rule 5.7: "The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of nonlegal services when that may not be the case." To avoid this confusion, the lawyer should give the grant writing client the written disclaimer suggested by Rule 5.7(a)(4) (quoted in ¶ 10 above). The disclaimer would explain that the grant writing services are not legal services and that the protection of an attorney-client relationship does not exist with respect to those services. *See* N.Y. State 832.

19. Even if the Rules on advertising, solicitation, and compensation do not apply to the grant writing services because the law firm is not providing legal services to the client and has given the disclaimer set out in Rule 5.7(a)(4), the law firm would remain subject to all Rules that do not depend on the existence of a legal representation or an attorney-client relationship. *See* Rule 5.7, cmt. [4]. For example, the law firm could not engage in illegal, dishonest, fraudulent or deceptive conduct, and could not state or imply an ability to influence a public official improperly or to achieve results using means that violate the Rules or other law. *See* Rule 8.4(c), (e). The law firm also would be required to provide appropriate supervision of nonlawyers who work for the law firm. *See* Rule 5.3.

CONCLUSION

20. If grant writing involves legal services, then Rule 5.4(a) prohibits a law firm from compensating a nonlawyer Business Developer (whether an employee or outside contractor) by paying a percentage of grants awarded to clients. Moreover, the Business Developer may not advertise or solicit business in violation of Rules 7.1, 7.2, and 7.3.

21. If grant writing does not involve legal services, but the law firm also provides legal services to grant writing clients, then the law firm must determine whether the legal and nonlegal services are "distinct" from each other within the meaning of Rule 5.7. If they are "not distinct," then the Rules apply to both the legal and nonlegal services, so the activities and compensation of the Business Developer will be subject to Rules 5.4(a), 7.1, 7.2, and 7.3.

22. If the law firm provides "distinct" legal and nonlegal services – or if it provides only nonlegal services – to grant writing clients, and if the law firm gives grant writing clients the written disclaimer set forth in Rule 5.7(a)(4), then the Rules governing

advertising, solicitation, and compensation do not apply to the grant writing services. In that case, the law firm may pay a Business Developer on terms that would not otherwise be permitted by the Rules -- but Rules not dependent on the existence of a legal representation or an attorney-client relationship will still apply to the law firm.

(7-10)