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Committee on Professional Ethics

Opinion 889 (11/15/11)

Topic: Sharing legal fees and forming partnership with non-lawyer.

Digest: A lawyer who principally practices in a jurisdiction that allows partnership with a non-lawyer, and who is also admitted in New York, may ordinarily conduct New York litigation even if in a partnership that includes a non-lawyer who would benefit from the resulting fees; although the New York rules generally prohibit such arrangements, in this case the governing ethical provisions would be those of the other jurisdiction.

Rules: 5.4(a) & (b), 8.5(a) & (b)

FACTS

[1] The inquirer is a lawyer admitted to practice in both New York and the District of Columbia. The lawyer's practice is based in the District of Columbia and the majority of his revenue is derived from cases and matters within that jurisdiction.

[2] The lawyer desires to form a District of Columbia partnership with a non-lawyer, a technical expert, who will assist the lawyer with prosecuting certain class action claims, at least one of which would be brought in the State of New York. For the purposes of this opinion, it is assumed that the District of Columbia permits lawyers to form a partnership with non-lawyers, and to share legal fees and profits as between them, if they comply with certain rules. *See* D.C. Opinion 322 (2004); D.C. Rule 5.4.

QUESTIONS

[3] When the lawyer earns legal fees resulting from litigation commenced and prosecuted in New York, may he share those fees with his District of Columbia partnership, which would include a non-lawyer who has worked on that litigation? If the lawyer may not share the fees directly, may the firm hire the non-lawyer as an employee, to be compensated through a profit-sharing arrangement triggered by increases over the firm's current average profit?

OPINION

[4] New York Rule 5.4(a) provides that, with exceptions not here pertinent, a lawyer or law firm shall not share legal fees with a non-lawyer. New York Rule 5.4(b) provides that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." While it is clear that the New York rules of legal ethics prohibit such a partnership and such fee sharing, the nuanced question here is whether a lawyer admitted in New York runs afoul of our ethics rules by litigating in New York as part of a partnership in the District of Columbia that is, and ethically may be, structured in the way the New York rules generally prohibit.

[5] Under New York Rule 8.5(a) a New York admitted lawyer is subject to the disciplinary authority of New York regardless where the conduct occurs, but we must determine whether the ethics rules to be applied are those of New York or those of the District of Columbia. To make this determination we look to the New York choice of law rules contained in New York Rule 8.5.

[6] Under New York Rule 8.5(b)(1), for "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Thus, the New York Rules of Professional Conduct apply to conduct in connection with proceedings in a New York court unless the rules of that court provide otherwise.

[7] Forming a District of Columbia partnership with a non-lawyer in the District of Columbia does not become subject to New York Rule 5.4 just because the partnership may undertake some New York litigation work. As we read the inquiry, there is no suggestion that undertaking the New York litigation would substantially shift the firm's focus. We assume that the firm, even if it undertook the New York litigation, would continue to be centered on cases and revenue within the District of Columbia. Under those circumstances, we believe that formation of the partnership cannot be said to be "conduct in connection with" the New York litigation. The same is true of distributing profits, including those generated from occasional legal fees in New York, according to the general terms of the District of Columbia partnership agreement.

[8] Under New York Rule 8.5(b)(2)(ii), for conduct not in connection with a proceeding in court, the rules to be applied shall be "the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." The inquirer principally practices in the District of Columbia. Unless the formation of the partnership or the division of compensation arising from New York litigation clearly have their predominant effect in New York, those matters are subject only to the District of Columbia ethics rules.

[9] Forming the District of Columbia partnership does not clearly have its predominant effect in New York just because the partnership may undertake some New

York litigation work. Under the circumstances presented, neither does it clearly have a predominant effect in New York for the partnership to distribute its fees according to the general terms of the partnership agreement, even though this may include occasional fees from New York litigation.

[10] Accordingly, while the proposed distribution of legal fees may have to comply with relevant ethical rules in the District of Columbia, it is not subject to New York Rule 5.4. A contrary result, applying the New York Rules more broadly than their intended reach, could result in undue burdens for lawyers admitted in New York, but legitimately practicing in the District of Columbia through a partnership that includes a non-lawyer, who wish to participate in the occasional New York litigation matter.

[11] Our conclusion as to choice of law is premised on the particular facts of the inquiry. These include that the lawyer and the law firm, now and in the foreseeable future, have their principal place of business in the District of Columbia and that the bulk of their revenue is derived from matters unrelated to the State of New York. Different facts could lead to a different result. For example, if a major portion of the revenue of the lawyer or the law firm were derived from the practice of law in the State on New York, then, depending on the particular facts, Rule 8.5 could make applicable the prohibitions of New York Rule 5.4. Certainly if the partnership were created for the very purpose of litigation in New York, establishing it in the District of Columbia would be ineffective to circumvent the New York rules on fee sharing.

[12] Other jurisdictions have reached varying conclusions as to the choice of law that governs such situations. *Compare* Philadelphia Opinion 2010-7 (opining that a Pennsylvania lawyer could share fees with a non-Pennsylvania lawyer in the District of Columbia even though the DC firm had a non-lawyer partner) *with* ABA 91-360 (opining that lawyer practicing in a jurisdiction forbidding partnerships with non-lawyers would be subject to that prohibition even if a member of a DC firm), *followed in* Virginia Opinion 1584 (1994). It should be noted, however, that the ABA and Virginia opinions were based on codes without choice of law provisions similar to the current Rule 8.5 in New York.[1] We believe that the Philadelphia opinion is the more instructive precedent, and for the reasons stated above, we believe the New York choice of law rules support a similar conclusion.

[13] Alternatively, we are asked to address whether the lawyer could employ the non-lawyer technical expert, with the expert receiving compensation based upon a profit-sharing model based on increases from the firm's current average profit. In N. Y. State 733 (2000), we addressed whether a lawyer may share legal fees with non-lawyer employees. Under DR 3-102 [now Rule 5.4(a)], we held that "a lawyer may compensate non-lawyer employees based on profit sharing but may not tie

[1] The ABA opinion was issued at a time when ABA Rule 8.5 was limited to jurisdiction of the disciplinary authority without provision for choice of law. Amendments adopted by the ABA in 1993 broadened the rules to include choice of law provisions as are found in New York Rule 8.5(b) upon which we base our conclusion. At the time of the Virginia opinion, the applicable conflicts rule, Virginia DR 1-102(B), was limited in scope.

remuneration to the success of specific efforts by employees to solicit business for lawyers or law firms." We specifically stated that any permissible profit sharing between lawyer and non-lawyers "may not be used to circumvent the specific prohibition on fee sharing reflected in Judiciary Law §491 and DR 2-103(B)." *See also* Rule 5.4, Cmt. [1B].

[14] As posed to this Committee by the inquirer, the profit-sharing with the non-lawyer employee would be based upon total profits above a significant minimum threshold. Although the non-lawyer would not be paid a percentage of fees from a given case, the non-lawyer's compensation under this profit-sharing model would correspond roughly to the amount by which his involvement increases the profit of the firm.

[15] We do not reach the question whether this proposed profit-sharing model would comport with the standards that would generally apply in New York. On the facts of this inquiry, and following the same analysis as set forth above with respect to partnership, we believe the propriety of the profit-sharing arrangements would be governed by the ethics rules of the District of Columbia. If the facts were different – for example, if New York litigation represented a significantly greater portion of the firm's caseload or revenues – then it would be necessary to consider whether the profit-sharing model would be consistent with New York ethical rules.

CONCLUSION

[16] A lawyer who principally practices in another jurisdiction but is also admitted in New York may conduct occasional New York litigation, even if a non-lawyer would benefit from the resulting fees (either as a member of the lawyer's partnership in that other jurisdiction or as its employee compensated through a profit-sharing arrangement), if the arrangements comply with the ethics rules of that other jurisdiction.

(38-11)