



COMMITTEE ON PROFESSIONAL ETHICS

Opinion 906 (1/31/12)

Topic: Sharing of legal fees by an attorney with a non-profit organization that is not a law firm.

Digest: Sharing of legal fees by an attorney with a not-for-profit organization that is not a law firm is prohibited by Rule 5.4.

Rules: Rule 5.4.

QUESTION

1. Can an attorney employed by a not-for-profit organization that is not a law firm share legal fees with the not-for-profit organization? The American Bar Association's ("ABA") Model Rules of Professional Conduct specifically allow this sort of fee sharing under Model Rule 5.4(a)(4). However, New York State did not adopt this standard.

OPINION

2. When the proposed Rules of Professional Conduct were submitted by the New York State Bar Association ("NYSBA") to the Presiding Justices of the Appellate Division of the Supreme Court of the State of New York, on February 1, 2008, the Reporters' Notes accompanying proposed Rule 5.4, which included ABA Model Rule 5.4(a)(4), contained the following observation, at pp. 177-178:

Rule 5.4(a)(4), which has no equivalent in the existing Disciplinary Rules, permits a lawyer to share court-awarded fees from a particular matter with a non-profit public-interest organization that procured the lawyer's employment in the matter. This is a change from existing DR 3-102 [22 N.Y.C.R.R. § 1200.17], which would prohibit such sharing. The reason for the change is to make it easier for lawyers to provide financial support to public-interest groups that sponsor or engage in litigation to advance the public interest. The change recognizes the importance of public-interest work and should increase financial support for groups that perform such work. Because the Rule is limited to court-awarded fees, and because fee sharing is permitted only with non-profit public-interest organizations, the potential for abuse is low. Furthermore, Rule 5.4(a)(4) does not permit such sharing where "prohibited by court rule or other law." Currently, section 491 of the Judiciary Law appears to prohibit such fee sharing, so the Rule probably would have no effect without an amendment of that statute. The NYSBA supports such an amendment to Judiciary Law § 491 and believes that an ethics rule should be in place in the event the Legislature enacts such an

amendment. The NYSBA also believes that judicial approval of fee sharing with public-interest groups would remove a potential impediment to legislative action amending section 491.

3. The Administrative Board of the New York State Courts, when adopting the New York Rules of Professional Conduct to supersede the prior New York Code of Professional Responsibility, rejected the NYSBA's proposed Rule 5.4(a)(4). The Administrative Board included only Rule 5.4(a) (1)-(3). As summarized by Professor Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* (2009 ed.) (West), at p. 269:

Section (a) is identical to DR 3-102. It states the basic rule that a lawyer may not divide legal fees with a non-lawyer. This basic rule is followed by three subdivisions, each stating an exception. The first two exceptions relate to deceased lawyers, and the third exception relates to retirement plans.

4. Thus, the exception contained in the Model Rule is not in effect in New York, having been explicitly rejected.

5. We do not address the situation in which the non-profit organization which employs the attorney is itself a "law firm." *See, e.g., Rodriguez v. City of New York*, 721 F. Supp.2d 148, 154 (E.D.N.Y. 2010) (Cogan, J.) ("[S]everal courts have found that where the legal fees awarded are to be deposited into a separate fund controlled exclusively by lawyers and used solely for legal work, the ethical concerns associated with fee splitting are no longer present. . . .") Neither do we address the question – because it is a question of law -- as to whether there is a First Amendment right, which would trump the regulations at issue, to share legal fees with a non-profit organization which is not a law firm. *See, e.g., Roy D. Simon, Jr., Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069, 1126-1132 (1989).

CONCLUSION

6. Sharing of legal fees by an attorney with a non-profit organization that is not a law firm is prohibited by Rule 5.4.

(25-11)