NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 930 (8/8/12)

Topic: Arrangement between Law Firm and Non-Legal Service Provider

Digest: A lawyer may not enter into a contractual arrangement with an insurance agency whereby the agency would offer its customers both legal and nonlegal services, even if the agency and lawyer are separately paid and do not share in each other's fees.

Rules: 1.7, 5.7, 5.8(a), 5.8(c), 7.1, 7.2, 7.3

QUESTION

[1] The inquiring lawyer asks whether a lawyer may enter into an exclusive arrangement with an insurance agency whereby the agency would offer its clients a service requiring legal review, and, as part of the same offer, would recommend that its clients use the legal services of the inquiring lawyer.

BACKGROUND

[2] Federal law – specifically the Employee Retirement Income Security Act, or "ERISA," 29 U.S.C. 1002, *et seq.* – requires administrators of benefit plans to provide plan participants in writing the most important facts they need to know about their retirement and health benefits. These facts include plan rules, financial information, and documents on the operation and management of the plan. Some of these facts must be automatically provided by plan administrators; others must be available on request. Among the documents that plan administrators must always supply all plan participants is a summary of the plan, widely called a Summary Plan Description, or "SPD." *See* http://www.dol.gov/dol/topic/health-plans/planinformation.htm.

[3] The inquirer concentrates in employment and labor law, including benefit plans that ERISA regulates. According to the inquirer, both insurance companies and insurance agents commonly charge a fee for preparing an SPD for their customers, the plan administrators. The inquirer proposes to enter into an arrangement whereby an insurance agency will offer the agency's services, together with the inquiring lawyer's services, to the agency's customers to prepare an SPD. The lawyer does not pay the insurance agency for this arrangement, nor does one share in the fees payable to the other.

[4] In a proposed communication with its customer plan administrators, the insurance agency would indicate that the agency will provide an SPD for a lump sum price that includes both the agency's documentation of the SPD plus the inquiring lawyer's review. Of the lump sum price, 87% would be paid directly to the lawyer by the client plan administrator pursuant to a written

engagement letter between the plan administrator and the lawyer; the balance would be paid directly to the insurance agency. The proposed communication notes that other providers of this service charge a fee higher than the proposed lump sum while disclaiming liability for legal review of the SPD. The proposed communication also contains a flattering description of the inquiring lawyer's abilities in employee benefit matters.

[5] The inquiring lawyer states that the inquirer is prepared to conduct the legal review of the SPD for a flat or fixed fee. The lawyer estimates that such review will typically consume X number of hours, and that 87% of the lump sum price equates to X times the lawyer's customary hourly rate. The lawyer (or the lawyer's firm) would be the exclusive legal service provider that the insurance agency would offer to its plan administrator customers under the arrangement for preparing SPDs.

OPINION

[6] We conclude that Rule 5.8 of the New York Rules of Professional Conduct (the "Rules") prohibits the arrangement as the inquirer proposes to structure it, because the structure would constitute an improper multidisciplinary practice. The term "multidisciplinary practice" means a venture that offers both legal and non-legal services to the public. In April 2000, the New York State Bar Association Special Committee on the Law Governing Structure and Operation released the "MacCrate Report," officially titled *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers*. "On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001." N.Y. 755 (2002). There were two new Disciplinary Rules: DR 1-106 and DR 1-107 of the Code of Professional Responsibility (which was then in effect in New York). Each new DR substantially implemented the recommendations of the MacCrate Report. DR 1-106 concerned ancillary non-legal businesses that a law firm owned or controlled; DR 1-107 concerned business relationships between law firms and third-party non-legal service providers. In 2009, when the Appellate Divisions adopted the format of the Model Rules of Professional Conduct, DR 1-106 and DR 1-107 became, respectively, Rules 5.7 and 5.8 of the Rules, with the language unchanged.

[7] The MacCrate Report, and the rules the Appellate Divisions adopted in its wake, embraced a more cautious view of multidisciplinary practice than some other jurisdictions. *See, e.g.*, D.C. Rule. 5.4(b) (permitting non-lawyer equity interests in law firms). New York's Rule 5.8(a) begins with a preamble on the core values of the legal profession, declaring that "[m]ulti-disciplinary practice between lawyers and non-lawyers is incompatible with the core values of the legal profession and, therefore, a strict division between services provided by lawyers and those provided by non-lawyers is essential to protect those values."

[8] The proposed arrangement here is a species of multidisciplinary practice, in this instance implicating Rule 5.8 as a business relationship between a lawyer and a third-party non-lawyer service provider. The proposed conduct consists of an exclusive contractual arrangement between a lawyer and non-legal professional service provider offering to the public, on a systematic and ongoing basis, both legal services (by the inquiring lawyer) and services by a

non-legal professional service provider (an insurance agency). The proposed arrangement contemplates that the agency and the lawyer will regularly offer to the agency's clients the service of drafting SPDs and reviewing them for compatibility with ERISA and other applicable laws.

[9] Rule 5.8(a) says that a lawyer may form an ongoing business relationship with a non-lawyer service provider if each of three requirements set forth there is met. The first of these, set out in Rule 5.8(a)(1), provides that a lawyer or a law firm (with our emphasis)

> *may* enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a) [requiring advance client consent], *provided that*:
>
> (1) the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules; . . .

[10] We may aptly stop there, because the proposed arrangement does not satisfy the first of the three requirements of Rule 5.8(a), each of which the Rule mandates for systematic and ongoing cooperative arrangements offering both legal and non-legal services. Insurance agencies are not among the types of non-legal professional service providers firms listed pursuant to Section 1205.3. *See* 22 NYCRR §§ 1205.3, 1205.5; *see* N.Y. State 885 (2011) (lawyer may not enter into agreement with a tax reduction service). Accordingly, the proposed cooperative arrangement is impermissible under Rule 5.8(a)(1). There may be permissible ways for inquirer to structure a relationship with an insurance agency, *cf.* Rule 5.8(c) (rule on cooperative business arrangements does not apply to "relationships consisting solely of non-exclusive reciprocal referral arrangements"), but we address only the structure outlined in the inquiry before us.

[11] In so opining, we necessarily conclude that the language of rule 5.8(a) is mandatory, not permissive. Thus, only those non-legal professional service providers that the Appellate Divisions lists in § 1205 may be parties to an ongoing cooperative practice arrangement. In our view, the plain language of the Rule so indicates. The Rule says that a lawyer "may" enter into such an arrangement "provided" that the lawyer satisfies the three requirements in Rule 5.8(a), the first of which is appearance on the Appellate Divisions' list. We read this language to mean that a lawyer may not enter into such an arrangement unless each of the requirements is met. *See Webster's Unabridged Dictionary* 1450 (2^{d} ed. 1979) (defining "provided" as "on condition; this being understood; conceded, or established; if").

[12] Comment [5] accompanying Rule 5.8 supports this result. The Comment says, in relevant part:

> [5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) ***only if*** the

> nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 NYCRR § 1205.5. … [Emphasis added.]

On at least three prior occasions, we have expressly said as much, two of them within the past year. *See* N.Y. State 888 (2011) ("Rule 5.8(a) *specifically limits* the non-legal professionals with whom a lawyer may contract) (emphasis added); N.Y. State 885 (2011) ("attorney may enter into a cooperative business arrangement *only* where the profession of the non-legal professional is included in a list jointly maintained by the Appellate Divisions") (emphasis added); N.Y. 765 (2003) (DR 1-107(A), the forerunner of Rule 5.8(a), "*limits* the professions with which lawyers can so contract to those professions on a list designated by the Appellate Divisions") (emphasis added). Others uniformly agree. N.Y. County 733 (2004) ("Since financial advisors are not Designated Professionals [on the § 1205 list], an attorney may not enter into a contractual relationship with a financial advisor that would offer continuous and systematic services to the public.); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 993 (2012 ed.) ("lawyers are permitted to enter into a full-fledged contractual relationship with nonlegal professionals *only if* the nonlegal professionals are on the special list of approved professions established and maintained by the Appellate Divisions") (emphasis added).

[13] In our view, these comments and opinions keep faith with the origins of Rule 5.8(a). In advancing the language of its forerunner DR 1-107(a), which the Appellate Divisions adopted not once but twice, the MacCrate Report said (footnotes omitted and emphasis added):

> … [T]he Committee is concerned that lawyers and law firms not be permitted to join alliances with non-lawyers whose standards of ethics and professionalism could dilute the lawyers duties to clients. . . . Accordingly, the determination whether lawyers should be permitted to enter into systematic and continuous inter-professional arrangements *is best determined on a profession-by-profession basis, taking into account the intrinsic nature of each profession and assuring that affiliation with it will not impair lawyer professional standards to any extent.*

[14] Based on these considerations, the MacCrate Report recommended that the courts retain control over the types of professions with which a lawyer may properly form an ongoing cooperative business arrangement. The Appellate Divisions' enactment of the MacCrate Report's recommendations evinces the courts' determination to maintain control over this form of multidisciplinary practice in New York.

[15] Thus, the plain language of Rule 5.8(a), the comments accompanying it, the prior views of this and other committees and commentators, and the history animating the Rule, potently support the conclusion that the intention of Rule 5.8(a) is to limit this type of multidisciplinary practice to combinations with professionals that the Appellate Divisions have blessed in § 1205.

[16] That the lawyer and the agency intend separately to bill for the services does not alter this conclusion. The focus of our attention is the arrangement between the lawyer and the non-

lawyer service provider, and the continuing and systematic offer of their services to the public. The inquirer and the insurance agency are engaged in what amounts to a joint venture to provide a service for the public. This falls squarely within the ambit of multidisciplinary practice governed by Rule 5.8(a).

[17] Even if the arrangement were permissible, the proposed announcement of the arrangement, which promotes the inquiring lawyer's qualities and is directed to a specific group of recipients, could well be considered both lawyer advertising and solicitation, and hence subject to Rules 7.1 and 7.3. Without resolving the matter on this inquiry, we note, too, that the proposed arrangement could raise issues under Rule 7.2, which regulates payments for referrals. Although the inquirer is not compensating the agency for including the lawyer in its promotion, and is apparently prepared to accept a flat fee for the service being rendered to the agency's clients, a serious question could arise if the inquirer is providing a benefit to the agency – and therefore consideration for a referral – if the lawyer charges a higher rate to review SPDs to the firm clients that retain the firm outside the context of the insurance agency's promotion. That would be the functional equivalent of the discount that troubled this Committee in N.Y. State 885.

[18] Finally, the lawyer must consider the edicts of Rule 1.7(a)(2), as qualified by Rule 1.7(b), to determine whether the lawyer's personal and financial interest in the arrangement complicates the inquirer's representation of the insurance agency's clients. These same considerations animated the MacCrate Report's recommendations ("[T]he current Code does not adequately deal with … the risk that the non-lawyer professional service firm may be the dominant participant in the alliance and may possess -- and, by possessing, exert -- economic influence of a kind not adequately anticipated or prevented by DR 5-101(A)," the forerunner of Rule 1.7(a)(2)) and prompted the Appellate Divisions to adopt Rule 5.8.

CONCLUSION

[19] A lawyer may not enter into and maintain a contractual arrangement with an insurance agency in which agency offers both legal and nonlegal services on an ongoing basis to the agency's customers.

(21-12)