NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 938 (10/09/12)

Topic: Law firm ownership of business that provides nonlegal services and pays for "leads"

Digest: Law firm that owns an entity providing nonlegal SSDI services is not subject to legal ethics rules as to those services, and no ethical violation would arise from entity's purchase of leads to market those services, if the entity includes no lawyers, operates separately from the law firm, and disclaims the provision of legal services.

Rules: 5.7, 7.2(a)

FACTS

1. The lawyers in inquiring attorney's law firm contemplate forming a separate entity (the "SSDI Entity") for the purpose of providing services to persons with respect to Social Security Disability Insurance claims ("SSDI services"). The inquirer states that while "lawyers can handle these cases, one does not have to be a lawyer to do so"[1] and notes that "Licensed Hearing Representative" is the term used to describe a nonlawyer authorized to handle such cases. The SSDI Entity would have a different name from the firm, would be housed in a different facility and would have its own letterhead, business cards, phone number and employees, including a nonlawyer Licensed Hearing Representative.

2. No employee of the SSDI Entity would be a lawyer.[2] The SSDI Entity would advise customers and potential customers, in writing, that the SSDI services "are not legal services and do not come within any attorney-client relationship."

QUESTION

May the SSDI Entity, if established and owned by inquirer and his colleagues, purchase SSDI leads from a marketing organization? The organization, which advertises heavily on the internet,

[1] The inquirer cites 42 U.S.C. 406 §206(a)(1): "The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys ... representing claimants before the Commissioner of Social Security …."

[2] Different questions would arise if a lawyer (whether one from the firm or one newly employed by the SSDI entity) were to participate in providing SSDI services, for example by meeting with customers or editing documents drafted by a Licensed Hearing Representative. This opinion does not address such scenarios.

would forward to the SSDI Entity the information of people who respond to its website if the SSDI Entity agrees to pay for a certain number of leads in a certain geographic area each month.

OPINION

3. Rule 7.2(a) of the New York Rules of Professional Conduct states that a lawyer "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client" with exceptions not relevant here. The inquirer notes our opinion N.Y. State 779 (2004) in which we relied upon Disciplinary Rule 2-103(B), the predecessor to Rule 7.2(a), in concluding that it is improper for an attorney to pay money to a marketing organization in return for "leads" to potential clients. The inquirer recognizes that his law firm would not be permitted to purchase leads for its law practice but seeks to clarify whether the SSDI Entity, because of its separate nature, could purchase leads without giving rise to an ethical violation by the lawyers in the firm.

4. Rule 5.7, entitled "Responsibilities Regarding Nonlegal Services", is the key Rule to consider. Rule 5.7(c) defines "nonlegal services" to mean "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." We assume, based on assertions in the inquiry, that nonlawyer Licensed Hearing Representatives are permitted by federal law to provide (and accordingly are not prohibited by New York law from providing) the contemplated services. Thus the services qualify as "nonlegal services" for purposes of the Rule.

5. Because there will be no "lawyer or law firm that provides" any SSDI services, Rules 5.7(a)(1) and 5.7(a)(2) do not apply. The relevant provision, Rule 5.7(a)(3), says:

> "A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship."

6. The question, then, is whether recipients of the SSDI services could reasonably believe that those services are the subject of a client-lawyer relationship. We first consider the way the SSDI Entity will present itself to prospective and actual customers. Although the SSDI Entity will be affiliated with the law firm through common ownership, in its outwardly visible aspects it will be separate and distinct from that firm, it will intentionally eschew any reference to the affiliation between them, and it will explicitly disclaim any attorney-client relationship. Unless there are further relevant facts not mentioned in the inquiry (such as perceptible connections between the two entities, or forms of advertising tending to create an impression of legal services), there would be no apparent basis on which customers could reasonably believe they were receiving legal representation.

7. We must, however, consider another relevant provision. Rule 5.7(a)(4) states that for purposes of Rule 5.7(a)(3), "it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship" unless one of two

conditions are met. One of those conditions, and the only one available to the inquirer, is that "the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services." Here, the inquirer proposes to do just that. The written disclaimer must be made at a time and in a manner "sufficient to ensure that the person understands the significance of the communication." Rule 5.7, Cmt. [3]. If it is, then the presumption set forth in Rule 5.7(a)(4) would not apply.

8. Because the law firm would not be subject to the Rules with respect to services provided by the SSDI Entity, Rule 7.2(a) would not preclude the purchase of leads as contemplated. However, the lawyers in the firm should be mindful that they always remain subject to some other Rules, such as those prohibiting lawyers from engaging in illegal or deceptive conduct, including when they engage in conduct incidental to ownership of the SSDI Entity. *See* Rule 5.7, Cmt. [4].

CONCLUSION

9. Members of a law firm who establish and own an entity to provide nonlegal SSDI services are not subject to the Rules with respect to those services if the entity includes no lawyers, operates wholly separately from the law firm, and disclaims the provision of legal services. Under those circumstances, no ethical violation would arise if the entity purchases leads for the purpose of marketing the SSDI services.

(44-12)