



New York State Bar Association Committee on Professional Ethics

Opinion 942 (11/2/12)

Topic: Referrals of clients; notice to clients as to legal fees

Digest: Lawyer may not ethically enter into arrangement with a non-lawyer firm to accept referrals of clients whose legal fees, in an amount not disclosed to the client, would be taken from the fee paid by the client to the non-lawyer firm.

Rules: 1.5(a) & (b), 1.8(f), 5.4(a), 5.5(b), 7.2(a), 8.4(b)

QUESTION

1. May a lawyer enter into an arrangement in which a non-lawyer firm, whose customers are hedge fund managers, refers some of those customers for legal services, and the non-lawyer firm will pay the lawyer an undisclosed portion of a flat fee that it collects from those customers?

FACTS

2. A non-lawyer firm (“NL Firm”) sells logo, website and marketing services to hedge fund managers. Along with these services, NL Firm sells template legal documents such as limited partnership agreements to provide fund managers with a cost effective “do it yourself” option. The customers pay NL Firm a flat fee for these services and templates. NL Firm states in its materials that it is not a law firm and that the customer should consult a lawyer.

3. NL also proposes to offer to its customers, for a higher flat fee, an option that would include, in addition to the above services and templates, a referral to an outside attorney with expertise in hedge funds and securities law. The outside attorney would provide the client with “standard hedge fund legal services.” The attorney would provide an engagement letter to the client. However, the attorney’s fee for legal services would be paid by the NL firm, out of the flat fee it receives from its customer, on the basis of a separate agreement between NL Firm and the lawyer. The engagement letter would not state the amount of the fee to be paid by NL Firm to the lawyer, and it appears that the client would not otherwise be so advised.

OPINION

4. As a preliminary matter, the inquiry raises some questions of law. Would NL Firm, by selling templates of legal documents to its customers, be engaged in the unauthorized practice of law? *See* Judiciary Law §§ 478, 484. Would NL Firm, by its arrangements with the inquiring attorney, be improperly involved in legal practice? *See* Judiciary Law § 495(1) (d),

(e) & (h) (no corporation shall furnish attorneys, render legal services, nor advertise that either alone or with an admitted attorney, it has an office for the practice of law or the furnishing of counsel). Would NL Firm be engaged in unlawful solicitation of business on behalf of an attorney? *See* Judiciary Law § 479 (unlawful to solicit legal business, or to solicit a retainer authorizing an attorney to perform or render legal services). All such questions of law are beyond the jurisdiction of this Committee to resolve.

5. We note, however, that the answers to these legal questions may have consequences under the Rules of Professional Conduct (the “Rules”). If the sale of legal templates constitutes unauthorized practice of law, then under Rule 5.5(b), the lawyer would be prohibited from aiding NL Firm in such unauthorized practice. More generally, the lawyer’s involvement with NL Firm could be unethical if the proposed arrangements were to violate any of the Judiciary Law provisions cited above. *See* Rule 8.4(b) (a lawyer shall not “engage in illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer”).

6. Whatever may be the answers to the above legal questions, the proposed arrangement violates the ethical requirement that a lawyer communicate fee information to a client. Rule 1.5(b) requires, subject to an exception not applicable here, as follows:

A lawyer shall communicate to a client ... the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule.

The information must be in writing when the fee to be charged is expected to be \$3,000 or more. *See* 22 N.Y.C.R.R. §§ 1215.1, 1215.2.

7. Under the proposed arrangement, the written engagement letter would be silent as to the legal fee. The lawyer could provide fee information other than in writing if the legal fee were expected to be less than \$3,000, but it appears from the inquiry that information about the legal fee will not be provided to the client even orally. The proposed arrangement would thus violate Rule 1.5(b).

8. There are other ethical rules that could also be violated by the proposed arrangement, but the inquiry does not provide enough information to make that determination. One of these is Rule 5.4(a), which provides, subject to exceptions inapplicable here, that a lawyer “shall not share legal fees with a nonlawyer.” NL Firm charges a lower amount to those customers who do not seek legal services, and a higher amount to those who do. The difference between the lower and higher amounts is, in effect, what the customer is paying for the legal services. The inquiry does not reveal how that enhancement of the customer’s fee relates to the fee paid by NL Firm to the attorney. If the increased amount paid by the customer were more than the amount paid to the lawyer, then NL Firm would be retaining part of what the customer is

paying for legal services, which would violate Rule 5.4(a).¹

9. Also relevant is the rule against payment for referrals. Rule 7.2(a) provides, subject to certain exceptions: “A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client.”² It would violate this rule if the inquiring lawyer would be giving something of value to NL Firm in exchange for client referrals. For example, if the lawyer had a standard fee for “standard hedge fund legal services,” and if it were to charge NL Firm less than that standard fee, then the discount would appear to be an impermissible payment for referrals. The inquiry does not include enough information to determine whether the lawyer would be in violation of this rule.

10. Given the NL Firm’s role in providing the fee to the lawyer, another relevant rule is the one governing payment of legal fees by third parties. A third party may pay legal fees, but only if the client gives informed consent, the third party does not interfere with the lawyer’s independent professional judgment or with the client-lawyer relationship, and the client’s confidential information is appropriately protected. Rule 1.8(f). Informed consent can occur only after the lawyer has adequately explained the risks and provided enough information for the client to make an informed decision. Rule 1.0(j). That standard may not be satisfied here, given the apparent limits to the planned disclosure to the client, who will not be told even the amount of the fixed legal fee to be paid by NL Firm.

11. Finally, we note that as always, a lawyer’s fee cannot be excessive. Rule 1.5(a). It appears that NL Firm is to pay a fixed amount for a standard set of legal services. A flat rate fee is not necessarily excessive, but neither is it necessarily reasonable. *See* Simon’s New York Rules of Professional Conduct Annotated 111 (2012 ed.). Whether or not the fee described in the proposed arrangement would be excessive cannot be determined based upon the facts given in this inquiry.

CONCLUSION

12. A lawyer may not ethically enter into an arrangement with a non-lawyer firm to accept referrals of clients whose legal fees, in an amount not disclosed to the client, would be taken from the fee paid by the client to the non-lawyer firm.

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¹ On the other hand, if the increased amount paid by the customer were *less* than the amount paid to the lawyer, then NL Firm would be paying part of the legal fee from its own assets. This possibility underlines the importance of considering Rule 1.8(f), which we discuss in paragraph 10.

² The exceptions to Rule 7.2(a) are inapplicable here. One of them allows payment of usual and reasonable fees charged by a qualified legal assistance organization, Rule 7.2(a)(2), but NL Firm is not such an organization. More broadly, various restrictions discussed in this opinion may not apply to certain other kinds of organizations specified in the Rules, but again, NL Firm does not fit within any of these categories. *See* Rule 7.2(b) (allowing lawyer to be recommended and paid, and cooperate with, certain legal aid or public defender offices, a military legal assistance office, certain lawyer referral services, and certain bona fide organizations with legal services plans for their members or beneficiaries).