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

Opinion 954 (1/11/13)

Topic: Law firm succession planning, fee-sharing, offering services to other lawyers.

Digest: A firm's offering of succession/contingent planning services to other lawyers is neither an "advertisement" nor "solicitation" under the Rules. One attorney's agreement to refer a matter to another attorney in the event of becoming unable to practice, would not create an association between the two attorneys for purposes of the fee-sharing rule either at the time such agreement is executed or triggered, unless and until the amount of work being transitioned to the second attorney becomes significant. An attorney's successful efforts to cultivate a client relationship are not "services" under the fee-sharing Rule and thus not a legitimate basis for dividing fees proportionately.

Rules: 1.0(a) and (h), 1.5(g), 7.3(b).

FACTS

1. A law firm proposes to offer the following service to solo practitioner "Planning Attorneys": assist them in implementing a contingency, continuity and succession "Plan" in which the planning attorney contracts with an "Assisting Attorney" to perform certain functions for the Planning Attorney in the event of the Planning Attorney's inability to practice.

2. The firm further proposes to target communications regarding the services at attorneys likely to be interested in the planning services.

QUESTION

3. The inquiring firm asks whether each proposed communication would be regulated as an "advertisement" under the Rules, and if so, whether it would be regulated as a "solicitation." If a solicitation, the firm also asks whether it would nevertheless be permissible in certain alternative forms such as in-person, phone or mail.

4. The firm also asks whether the execution of a Plan would thereby create an association between the Planning and Assistant Attorneys so that Rule 1.5(g) is not implicated, or, if not, whether such association would arise if/when the Planning Attorney becomes unable to practice and the Assisting Attorney steps in to assist the client.

5. Finally, the firm asks whether an attorney's successful efforts to "cultivate" a client relationship qualify as "services" under Rule 1.5(g)(1) and are thus a legitimate basis for dividing fees so that the "proportion" takes into account such cultivation efforts.

OPINION

6. Rule 1.0(a), the definition of "advertisement", states that it "does not include communications to existing clients or *other lawyers*." (Emphasis added). Because the contemplated communications would be solely to other lawyers, they would not constitute "advertisements." Rule 7.3(b) states that a "solicitation" is "any advertisement" that meets certain criteria; in other words, it is a communication that not only meets the criteria for being an "advertisement" but also certain additional criteria. "By definition, a communication that is not an advertisement is not a solicitation." Rule 7.3, Cmt. [1].

7. Because Rule 1.5(g) provides that "A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm" the following question arises: would the Planning and Assisting Attorney become "associated in a law firm" for purposes of Rule 1.5(g), upon execution of a Plan or, if not, would they later become "associated in a law firm" when the Assisting Attorney, pursuant to the Plan, takes over a client matter for the Planning Attorney? We conclude that neither scenario, on its own, would give rise to association for purposes of Rule 1.5(g).

8. As we noted in N.Y. State 715 (1999), the term "associated" is not defined. N.Y. City 2007-2 opined that "the touchstones for determining association" for conflict imputation purposes are the nature of the relationship, and, significantly, access to client confidential information. It seems clear that neither a referral, nor an agreement to refer, on its own gives rise to association because such acts do not create a level of affiliation or information access that could reasonably be construed as a "law firm" under Rule 1.0(h). However, if the Planning Attorney and Assisting Attorney were to hold themselves out to the public as a "firm" or were to share each other's client files generally (whether electronically or in paper form), they would more likely be construed as associated for the purpose of Rule 1.5(g). So if the Planning Attorney's inability to practice were to trigger in the Plan a comprehensive merger of the Planning Attorney's firm and the Assisting Attorney's firm, then the two attorneys would become "associated" for purposes of the Rule. Overall, the more time the Assisting Attorney is called upon to assist the Planning Attorney, and the greater the volume of work the Assisting Attorney receives from the Planning Attorney, the higher the likelihood that the two attorneys will become "associated" for purposes of Rule 1.5(g).

9. Finally, regarding an attorney's efforts to "cultivate" a relationship, we conclude that such efforts do not qualify as "services performed by" such lawyer for the purpose of determining a proportional division of fees. It seems clear that the intent of Rule 1.5(g)(1) is, in the event fee-sharing lawyers decide to qualify for fee-sharing through a proportional division, that the division be based on services performed *for the client's benefit*.

10. We note a Kansas Supreme Court case on the issue of fee-sharing, in which that court, construing Model Code of Professional Responsibility Disciplinary Rule 2-107(A), stated that "We are convinced that merely to recommend another lawyer or to refer a case to another lawyer and to do nothing further in the handling of the case cannot be construed as performing a legal service. . . The service and responsibility referred to in DR 2-107 before a lawyer is entitled to a division of fees, must relate to actual participartion in or handling of the case. The rule would be meaningless if this were not so." *Palmer v. Breyfogle*, 535 P.2d 955, 967 (Kan. 1975).

CONCLUSION

11. A firm's offering of succession/contingent planning services to other lawyers is neither an "advertisement" nor "solicitation" under the Rules. A Planning Attorney's agreement to refer a matter to an Assisting Attorney in the event of becoming unable to practice, would not create an association between the two attorneys for purposes of Rule 1.5(g) either at the time the Plan is ex*ecuted or triggered*, unless and until the firms truly merged. One attorney's efforts to "cultivate" a relationship leading to retaining a client are not "services" under Rule 1.5(g)(1) and thus not a legitimate basis for dividing fees proportionately.

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