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

Opinion 976 (7/25/13)

Topic: Arrangement between law firm and nonlegal service provider

Digest: A law firm may not enter into an exclusive contractual agreement with a marketing company to provide clients with forensic mortgage analysis as well as legal services, to pay the company for referred clients, or to share legal fees with the company.

Rule: 1.7(a); 5.4(a); 5.5(b); 5.8, 7.2(a)

FACTS

1. The inquiring law firm wishes to enter into an exclusive Services Agreement with an entity ("the Company") that it describes as "a national marketing company with a nationally marketed website that educates mortgagors on a unique cause of action where they can proactively bring an action in state court to contest the validity of their mortgage."

2. The Company's website would inform its New York viewers of the availability of this cause of action. For those interested in pursuing such relief, the Company would "enter into a contractual agreement with the individual mortgagor for the purpose of performing a forensic analysis on their mortgage and its chain of title" so as "to ascertain if an error exists." If the Company finds such an error, it would "inform the individual of [the inquiring law firm's] services." When such persons contact the inquiring firm, the firm would "attempt to become retained by them for the purpose of filing this particular action" in New York. The inquiring firm would charge such clients a contingent fee or "success fee" of twenty percent of the debt it reduces in a successful action to "invalidate a client's … mortgage and clear their title."

3. The Company would charge the inquiring firm a fixed monthly fee for marketing the law firm's services. It would also charge the law firm additional fees relating to individual clients that it has referred to the firm. These additional fees would be characterized either as a success fee or as a fee for the Company to file and collect on a lien on the client's house to ensure payment of legal fees. The inquiring firm has asked whether these additional fees – whichever way characterized – could properly be set as (a) "a determined percentage" of the law firm's fee, or (b) a fixed fee regardless of the size of the client's mortgage or debt reduction.

4. Thus the firm proposes a multi-faceted relationship with the Company. The Company would market to people in need of a specific legal service. The Company would conduct a "forensic" analysis of whether those people may have legal claims, and then would refer prospective claimants to the law firm. To secure the legal fee as well as its own fee, the Company may file liens against the firm's clients. The law firm would pay the Company both the fixed periodic "marketing fee" and also, in the particular matters undertaken, the "success"

fee or a fee for lien services as described above. The arrangement is exclusive to the law firm; the Company would not offer legal services by any other provider.

QUESTION

5. The inquiring law firm asks whether it can enter into compensation arrangements as described above. We will address that question, but we also perceive and analyze additional ethical concerns with the firm's proposal.

OPINION

6. "The term 'multidisciplinary practice' means a venture that offers both legal and non-legal services to the public." N.Y. State 930 ¶6 (2012) (recounting history of multidisciplinary practice rules, including "MacCrate Report" of 2000, subsequent adoption of DR 1-106 and DR 1-107 in Code of Professional Responsibility, and their replacement by Rules 5.7 and 5.8 upon adoption of Rules of Professional Conduct in 2009).

7. One form of multidisciplinary practice occurs through contractual relationships between lawyers and nonlegal professionals. This form is authorized, but also limited, by Rule 5.8 of the New York Rules of Professional Conduct. That rule provides that a lawyer or law firm may – but only under certain conditions – "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." Rule 5.8(a). In the Joint Appellate Division Rules, such a relationship is termed a "cooperative business arrangement." *See* 22 NYCRR §1205.2 (definition).

8. The inquiry contemplates an exclusive contractual relationship between the inquiring law firm and the Company, which is a nonlegal professional service firm. The proposed relationship would be for the purpose of offering the public legal services, as well as services of the nonlegal professional service firm, on a systematic and ongoing basis. This form of multidisciplinary practice would thus be a cooperative business arrangement, and thus, to be permissible, it would have to satisfy Rule 5.8. *See* N.Y. State 930 ¶¶ 11-15 (2012) (concluding that language of rule 5.8(a) is mandatory, not permissive); Rule 5.8(c) (rule on cooperative business arrangements does not apply to relationships consisting solely of "non-exclusive" reciprocal referral agreements).

9. Rule 5.8(a) specifies three conditions that must be met for a law firm to enter into a cooperative business arrangement with a nonlegal professional service firm. The first of these is that the profession of the 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." Rule 5.8(a)(1).

10. The proposed arrangement does not satisfy this first of the three requirements in Rule 5.8(a). Whether the Company is viewed as a marketing company or one that provides forensic mortgage analysis, it is not engaged in one of the nonlegal professions listed by the Appellate

Divisions, which are currently limited to Architecture, Certified Public Accountancy, Professional Engineering, Land Surveying, and Certified Social Work. *See* 22 NYCRR §§ 1205.3 (process for establishing list of professions), 1205.5 (setting forth list); *cf., e.g.*, N.Y. State 930 ¶10 (1012) (lawyer may not enter into proposed cooperative business arrangement because listed professions do not include provision of insurance services); N.Y. State 885 ¶¶ 6-7 (2011) (lawyer may not enter into proposed cooperative business agreement because listed professions do not include provision of tax reduction services).

11. Thus, from the fact that the Company is not among the types of nonlegal professional service firms that have been approved for cooperative business arrangements, it follows that the proposed arrangement is impermissible. Although Rule 5.8(a) fully disposes of the inquiry, other features of the proposed arrangement also raise concerns meriting comment.

12. First, Rule 5.5(b) provides that a lawyer "shall not aid a nonlawyer in the unauthorized practice of law." Determining the boundaries of unauthorized practice is not within our charge, but we consider the Company's activities here – conducting forensic analyses of mortgage instruments and title, and identifying "errors" that would make the mortgage appropriate for the marketed "unique cause of action" – sufficiently near the borders of legal practice to advise the law firm to reflect on these matters.

13. Second, we note some statutory provisions that may be relevant. New York prohibits the corporate practice of law.[1] There are also statutory limits on the solicitation of legal business by employees of attorneys,[2] and on the solicitation of legal business by corporations.[3] These provisions (like the prohibition of aiding unauthorized practice) present questions of law on which the Committee does not opine.

14. Third, the proposed fee arrangements implicate the rule against paying for referrals. Rule 7.2(a) says that (except in circumstances not applicable here) a lawyer "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a

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[1] Judiciary Law §495(1) provides: "No corporation or voluntary association shall … (c) … render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law, … nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel."

[2] Judiciary Law §482 provides: "It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services."

[3] Judiciary Law §495(2) provides: "No corporation or voluntary association shall … solicit any claim or demand for the purpose of … furnishing legal advice, services or counsel to, a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body."

client." This provision does not prohibit paying a fixed monthly fee to a company for advertising or marketing services, though the advertisements and other aspects of the arrangement must comply with other relevant Rules. Rule 7.2, Cmt. [1]; *see*, *e.g.*, Rule 7.1 (advertising); Rule 7.3 (solicitation); Rule 8.4(a) (a lawyer may not violate the Rules through the acts of another).

15. Here, however, the law firm would pay the Company not only the monthly marketing fee but also, for individual cases handled, either "success fees" or fees for services in connection with filing and collecting on liens. If any of the various fees would constitute payments to the Company for having recommended or obtained employment by a law firm client, then those payments would violate Rule 7.2(a). There could be a violation even if the fee were stated to be one for lien services,[4] and the violation would be plain if the law firm were to pay the Company a "success fee" for each referred client. *See* N.Y. State 902 (2012) (lawyer may not base marketing fee on number of actual or potential clients the marketer introduces to the lawyer); *cf.* N.Y. State 887 (2011) (improper to pay marketer a bonus based on particular referrals or profitability); N.Y. State 779 (2004) (improper for attorney to pay marketer for bundles of leads to potential clients).

16. Moreover, whatever the particulars of the inquiring firm's payments to the Company, other more general considerations suggest that the firm's participation would violate Rule 7.2(a). The law firm would be providing benefits to the Company not only through the marketing payments and per-client payments but also by its very participation in the ongoing program. It appears that a substantial part of the value that the Company would provide in return would consist in providing referrals. The Company will advise potential clients of its "unique" claim for relief, identify the law firm (and only the law firm) as engaged in the business of filing such a claim, and then refer potential claimants to the law firm upon the company's "forensic" inquiry into the claimants' qualifications to make the claim. The firm may legitimately provide benefits to the Company for marketing and lien services, but if the benefits are also to reward referrals, then it is difficult to harmonize the arrangement with Rule 7.2(a). *See* N.Y. State 799 (2006) (impermissible for lawyer to pay a website marketer a fee for recommending the lawyer based on the marketer's analysis of the client's problem).

17. Fourth, one of the options contemplated by the inquiry is that the law firm would pay the Company an amount based on a percentage of the firm's legal fee. Rule 5.4(a) provides that a "lawyer or law firm shall not share legal fees with a nonlawyer," except in circumstances outside the scope of the inquiry. The inquiring firm, recognizing this fee-sharing issue, asks whether it may be avoided by having the payment made not from the firm to the Company, but rather directly from the client to the Company, as to be provided by contract between those parties. If such a contractual arrangement is independent of the legal fee, then it may be consistent with Rule 5.4. *See*, *e.g.*, N.Y. State 875 (2011) (lawyer may handle case on contingent fee basis where the client has already retained a non-testifying expert to work on the same case on a

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[4] It might be permissible for the firm to pay the Company a fee for lien services if the fee were reasonably related to the value of the services provided, but otherwise that characterization of the fee could be problematic. *Cf.* N.Y. State 727 (2000) (when accounting firm that referred clients to law firm received fees from those clients for accounting services that clients had not sought, fee arrangement appeared to serve as impermissible pretext to avoid prior Code rule against payments for referrals).

contingent fee basis).

18. However, the situation would be different if the separate compensation agreement between the client and the Company were merely an attempt to circumvent the rule against fee-sharing. For example, the arrangement could constitute impermissible fee-sharing if the client's payment to the Company were insufficiently related to the value of the services provided by the Company, or if the law firm's fees were reduced to allow for the client's payment to the Company. *See* N.Y. State 885 ¶8 (2011) (finding improper fee-splitting where attorney reduced customary contingency fee "knowing that the amount of the reduction would be owed to the non-attorney company" that provided tax reduction services and referred clients to the attorney, and where there appeared to be "no relation between the funds to be received by the non-lawyer company and the value of the services actually performed for the client"); N.Y. State 727 (2000) (when accounting firm that referred clients to law firm received fees from those clients for accounting services that clients had not sought, fee arrangement "appear[ed] to constitute a portion of the contingency fee that would otherwise have been paid to the lawyer").

19. Finally, a participating lawyer in the inquiring firm would have to "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 [Company's] clients." N.Y. State 930 ¶18 (2012); *see* N.Y. State 932 (2012) (even when referral arrangements are non-exclusive, "the lawyer must not have such an interest in a steady stream of referrals that it undermines the lawyer's professional judgment for the client").

CONCLUSION

20. A lawyer or law firm may not maintain an exclusive contractual arrangement with a company that provides marketing services and forensic mortgage analysis so as to offer both legal and nonlegal services to the public on a regular basis; may not pay the company for referring clients; and may not share legal fees with the company.

(20-12)