NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 □ PH 518.463.3200 □ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 1068 (8/10/15)

Topic: Aiding Unauthorized Practice of Law; Accepting Referrals from Nonlawyers; Fee-Splitting

Digest: Lawyer may not join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and by the claims recovery firm if it is to be done on a systematic and continuing basis, because claims recovery firms are not on the Appellate Division list of approved nonlegal professionals within the meaning of Rule 5.8. Even if the relationship is a "non-exclusive reciprocal referral agreement" within the meaning of Rule 5.8(c), the lawyer must ensure that the relationship does not interfere with the lawyer's independent professional judgment, does not involve improper solicitation of clients, does not involve aiding in the unauthorized practice of law, and does not involve the improper sharing of legal fees. Lawyer may share in contingent fee paid by client to lawyer and nonlawyer but only if (i) the nonlawyer provides substantial assistance in the proceedings (*i.e.* does not merely sign up clients and pass them on to the lawyer), (ii) the nonlawyer's compensation is commensurate with the nonlawyer's services, and (iii) the lawyer's fee is also commensurate with the lawyer's services (*i.e.* is not reduced so that the reduction is in effect a referral fee to the nonlawyer).

Rules: 1.0(j), 1.2, 1.4(a), 1.5(a), 5.4(a), (b) & (c), 5.5(b), 5.8(a), 7.2, 8.4(a)

FACTS

1. A nonlawyer claims recovery firm (the "Claims Recovery Firm") seeks out and provides assistance to businesses that potentially are entitled to class action recoveries based on class actions that have already been settled or otherwise resolved.

2. After a settlement has been announced, the Claims Recovery Firm provides multiple services. It identifies potential class members and contacts them to make them aware of the settlement. It enters into an agreement with each client and helps the clients assure that all of their eligible business units participate in the claims process. It gives advice to its clients on the documents required in the claims process. When required documents are not available, it negotiates with the claims administrator to use alternative documentation. It prepares, assembles, and submits the client claim packages and documentation. It works with the clients to address any questions raised by claims administrators, and provides responses to the claims administrators. It monitors the claims process and keeps its clients advised with updates on the recovery process and its developments. Upon receipt of payments, it performs an audit to ensure that the payments have not been under-calculated. Finally, it follows up with clients to assure the recovery checks have been deposited. For all these services, the claims recovery firm receives a

contingent commission of 33%, which the inquirer believes is "industry-standard" for such services.

3. Under the inquiry here, in the course of identifying class-action settlement recovery opportunities for its clients and potential clients, the Claims Recovery Firm has identified what it believes may be colorable antitrust damages claims, and it proposes to assist its clients in making those claims. It would engage in activities similar to the services it provides in the class action claims context. It would enter into a written agreement with each client under which the Claims Recovery Firm would (1) act as an agent for the antitrust claimant to engage legal counsel (including, perhaps exclusively, the inquirer here) to represent the client, (2) provide services in connection with the antitrust claim, including gathering client documents relevant to analyzing the potential damages sustained as a result of the alleged antitrust violations, (3) receive a contingent commission of one-third of the client's recovery, and (4) pay the law firm's fees, which would be a percentage of the Claims Recovery Firm's contingent commission.

QUESTION

4. May a lawyer enter into an arrangement with a nonlawyer Claims Recovery Firm in which the Claims Recovery Firm (i) hires the lawyer to represent a client corporation to bring an antitrust claim, (ii) receives a one-third contingent commission out of any recovery, and (iii) pays the lawyer a portion of its commission?

OPINION

5. Our prior opinions have identified a number of concerns with similar relationships between a lawyer and a nonlawyer firm in the provision of legal services, sometimes known as "multi-disciplinary practice." These issues include compliance with Rule 5.8(a) and the potential for (1) interference with the lawyer-client relationship; (2) improper solicitation of legal business; (3) aiding a nonlawyer in the unauthorized practice of law; and (4) improper sharing legal fees between a lawyer and a nonlawyer. We will analyze each of these potential issues here.

Multi-Disciplinary Practice

6. First, we review the proposed relationship between the Claims Recovery Firm and the law firm. As proposed, the claims recovery firm will refer the client to the law firm and play an essential role in various steps of the representation, subject to an agreement about the respective work obligations and the sharing of a contingent fee of a percentage of the recovery. The inquiry suggests that this will occur for more than one client, that is, it may be conducted on a systematic or continuing basis.

7. Rule 5.8(a) of the New York Rules of Professional Conduct (the "Rules") prohibits "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," unless:

(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;*

(2) the lawyer or law firm neither grants to the nonlegal professional or nonlegal professional service firm, nor permits such person or firm to obtain, hold or exercise, directly or indirectly, any ownership or investment interest in, or managerial or supervisory right, power or position in connection with the practice of law by the lawyer or law firm, nor, as provided in Rule 7.2(a)(1), shares legal fees with a nonlawyer or receives or gives any monetary or other tangible benefit for giving or receiving a referral; and

(3) the fact that the contractual relationship exists is disclosed by the lawyer or law firm to any client of the lawyer or law firm before the client is referred to the nonlegal professional service firm, or to any client of the nonlegal professional service firm before that client receives legal services from the lawyer or law firm . . . . [Emphasis added.]

8. The second paragraph of Rule 5.8(a)explains that "[m]ulti-disciplinary practice between lawyers and nonlawyers is incompatible with the core values of the legal profession and therefore, a strict division between services provided by lawyers and those provided by nonlawyers is essential to protect those values." Nevertheless, under the three conditions set forth in Rule 5.8(a) and set forth above, a lawyer may have 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. The first such condition is that the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions. Claims recovery firms are not included on the Appellate Division list. Consequently, an exclusive relationship with a claims recovery firm is prohibited by Rule 5.8(a). *See* N.Y. State 992 (2013) (lawyer may not effectively form a partnership with a nonlawyer disability office[1]); N.Y. State. 976 (2013) (lawyer may not enter into an exclusive contractual agreement with a marketing company to provide clients with a forensic mortgage analysis, to pay for referred clients, or to share legal fees); N.Y. State 930 (2012) (lawyer may not enter into an exclusive contractual arrangement with an insurance agency under which the agency would offer its customers both legal and nonlegal services, even if the agency and lawyers are separately paid and do not share in each other's fees, because insurance agencies are not on the professional service provider firms listed under Section 1205.3).

9. Under Rule 5.8(c), however, Rule 5.8(a) does not apply to relationships consisting solely of "non-exclusive reciprocal referral agreements or undertakings" between a lawyer and a

[1] Rule 5.4(b) prohibits a lawyer from forming a partnership with a nonlawyer for the purpose of engaging in the practice of law.

nonlegal professional or nonlegal professional services firm. Although this does not seem to be such a relationship, we do not have sufficient facts to rule it out. We have previously opined that a lawyer may enter into a non-exclusive reciprocal referral agreement with a nonlawyer whose profession is not on the list in Section 1205.3. Nevertheless, the issues identified in the opinions cited in paragraph 5 above may apply to such non-exclusive referral relationships.

Interference with the Lawyer-Client Relationship

10. Rule 5.8(a) stresses that one of the reasons for the limitations on multi-disciplinary practice is the risk that it will undermine the tradition of complete professional independence and uncompromised loyalty of lawyers to their clients ("a lawyer must remain completely responsible for his or her own independent professional judgment). This principle is also reflected in Rule 5.4 (Professional Independence of a Lawyer). Rue 5.4(c) warns "Unless authorized by law, a lawyer shall not permit a person who recommends, employs or pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment in rendering such legal services . . . ." Thus, our prior opinions on multi-disciplinary practice stress the importance of the nonlawyer not imposing conditions on the representation that would require the lawyer to compromise his or her exercise of independent professional judgment on behalf of the client. *See* N.Y. State 705 (1998).

Improper Solicitation of Legal Business

11. One of the concerns when a lawyer has a relationship with a nonlawyer is that the nonlawyer will engage in improper solicitation of the lawyer's services. A lawyer may not allow, assist, or induce a nonlawyer to engage in conduct that the lawyer could not engage in directly. Rule 8.4(a). Thus, since a lawyer may not engage in in-person solicitation of a non-client, so a lawyer may not allow, induce, or assist a nonlawyer to engage in in-person solicitation of business for the lawyer. *See* N.Y. State 885 ¶ 12 (2011). In N.Y. State 885, we said:

> Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the nonlawyer's communications. *See* Rule 8.4(a) ("A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or *do so through the acts of another*…" (Emphasis added.) For example, if the lawyer had control over the non-attorney or control over the solicitation or advertising, the lawyer might be said to be accomplishing through indirect means what the lawyer could not accomplish directly. The level of control the attorney has depends on many factors, including the amount of business the attorney conducts with the non-attorney and any other connections between the two.

12. The inquirer argues that the arrangement with the recovery agent here is similar to that of an insurer, which engages law firms to represent policyholders. However, the relationship between insurance companies and the lawyers for their insureds has long been authorized by New York's ethics rules because the insurance company is liable under the insurance policy and the insured, under the insurance policy, has expressly authorized the insurer to hire counsel on the insured's behalf to defend covered claims. *See* N.Y. State 73 (1968) (the assured is the client of the retained attorney and the attorney is obligated to represent him with undivided fidelity

regardless of the fact that his fee for legal services is being paid by the insurance company); N.Y. State 109 (a lawyer employed by an insurance company is not violating the spirit or the letter of the provisions of Canons 6 and 35 (pre-1970 predecessors to the Rules concerning conflicting interests and intermediaries); N.Y. State 716 (1999) (when a lawyer defends a policyholder in civil litigation, the client is the policyholder, not the insurance company, even though the insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder).

13. With respect to solicitation, the lawyer is authorized to accept a retainer from an insurance company under Rule 7.2(b), which authorizes a lawyer to be recommended, employed or paid by a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, as long as certain specified conditions are satisfied. Two conditions are that (i) the lawyer must treat the member or beneficiary to whom the legal services are furnished, and not the organization, as the client, and (ii) the legal service plan must provide appropriate relief for any member or beneficiary who believes that representation by the counsel furnished by the organization would be unethical. Although the Comments to this Rule refer only to prepaid legal service plans and group legal plans, the rule by its terms applies to counsel furnished by insurance companies to its beneficiaries. *See also* Rule 1.8, Comment [11].

Aiding in the Unauthorized Practice of Law

14. Rule 5.5(b), which is closely related to Rule 5.8, provides that a lawyer may not aid a nonlawyer in the unauthorized practice of law. The Claims Recovery Firm here, like any business owned by a nonlawyer, is considered a "nonlawyer" with the meaning of Rule 5.5(b).

15. Whether particular conduct constitutes the unauthorized practice of law, which is a crime in New York, is a legal question. *See* Rule 5.5, Cmt. [2] (definition of "practice of law" is established by law); Judiciary Law §485-a (making certain violations of §§ 478, 474, 486 and 495 a class E felony); Judiciary Law § 495 (No corporation or voluntary association shall (i) practice or appear as an attorney-at-law for any person in any court in this state, (ii) hold itself out to the public as being entitled to practice law, or (iii) furnish attorneys or counsel); Judiciary Law § 478 (unlawful for any natural person (i) to practice or appear as an attorney-at-law in a court of record in this state, (ii) to furnish attorneys or to render legal services, or (iii) to hold himself out in such manner as to convey the impression that he or she either alone or together with any other persons maintains a law office); § 484 (no natural person shall ask or receive compensation for preparing pleadings of any kind in any action brought before any court of record in this state).

16. We do not interpret statutes, so we do not express opinions on what constitutes the unauthorized practice of law. This Committee limits itself to interpreting the Rules of Professional Conduct. When judging whether a lawyer is aiding someone in the unauthorized practice of law, we look at the lawyer's conduct, not the nonlawyer's conduct. Thus, we do not express any opinion on whether the Claims Recovery Firm's conduct would be unauthorized practice of law, either in the class action setting where the firm handles post-liability claims or in the antitrust setting, where the claims recovery firm proposes to identify potential antitrust claims, to engage counsel for the client, and perform other services. However, in our view the activities of the Claims Recovery Firm, particularly in identifying potential antitrust claims, raise

serious questions about unauthorized practice of law, and the inquirer should consider them carefully. If the Claims Recovery Firm's activities would constitute the unauthorized practice of law, then there is a question of whether the lawyer's conduct would "aid" the unauthorized practice of law. We conclude that it would.

17. Opinions of this Committee on aiding the unauthorized practice of law have focused on the extent to which the lawyer facilitates the activities of the intermediary. Some opinions have approved the intermediary's role as long as certain conditions are met. In N.Y. State 705 (1998), for example, a nonlawyer tax reduction company's role was to represent property owners in legal proceedings for property tax relief, and to obtain the property owner's written authorization for the tax reduction company to engage counsel to represent the property owner if the first stage of proceedings did not produce a sufficient tax reduction. We held that a lawyer was not barred from accepting an engagement from the tax reduction company pursuant to the property owner's authorization as long as (i) the lawyer's client is the property owner, not the tax reduction company, (ii) the company does not impose conditions on the representation that would require compromising the lawyer's exercise of independent professional judgment on behalf of the property owner, (iii) the property owner, and not the company, makes decisions affecting the merits of the cause, such as whether to settle the action,[2] (iv) the lawyer, not the tax reduction company, makes those decisions that are for the lawyer's determination in the handling of a legal matter, and (v) the arrangement with the tax reduction company does not involve improper solicitation or fee-splitting. Similarly, in N.Y. State 885 (2011), we opined that a lawyer may accept referrals from a nonlawyer property tax reduction firm, but must be retained by the client, not by the tax reduction company. We expressed concern that Section 495(d) of the Judiciary Law (prohibiting the "furnishing" of attorneys or counsel) would prohibit a lawyer from being retained by the non-attorney to provide services to the property owner.

18. Other opinions analyzing the role of an intermediary between lawyers and clients have also warned that a lawyer might be aiding in unauthorized practice. *See* N.Y. State 976 (2013)

[2] The Rules of Professional Conduct provide for independence in the lawyer's professional judgment and control of the lawyer's work by the client; third parties are not permitted to invade either role. Thus, it is for the client and lawyer alone to determine whether a claim should be brought and how; the lawyer may not permit third parties to affect the lawyer's professional judgment. "A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal service for another to regulate the lawyer's professional judgment in rendering such legal services or to cause the lawyer to compromise the lawyer's duty to maintain the confidential information of the client under Rule 1.6." Rule 5.4(c). The lawyer must abide the "*client's* decisions concerning the objectives of the representation," and "shall abide a *client's* decisions whether to settle a matter." Rule 1.2 (emphasis added). The lawyer is bound to inform the *client* of any "decision or circumstance with respect to which the client's informed consent as defined in Rule 1.0(j) is required by these Rules; any information required by court rule or other law to be communicated to a client; and material developments in the matter including settlement…." Rule 1.4(a)(1) (emphasis added). The lawyer is required to "consult with the *client* about the means by which the client's objectives are to be accomplished and keep the client reasonably informed about the status of the matter." Rule 1.4(a)(2) and (3) (emphasis added).

(nonlawyer business would provide lien services, including a "forensic" analysis to determine whether clients had legal claims, in which case, they would be referred to the law firm; Committee warns that Company's activities are sufficiently near the borders of legal practice that law firm "should reflect on these matters"); N.Y. State 957 (2013) (nonprofit credit counseling agency proposed to offer legal services programs including filing for bankruptcy protection and advising seniors concerning whether they should join supplemental needs pooled income trusts; Committee warns that if agency is providing legal services, lawyer would be assisting it in the authorized practice of law); N.Y. City 2014-1 (2014) (to determine whether the nonlegal organization is engaged in the unauthorized practice of law, the lawyer would need to evaluate the types of services it provides to its clients in light of the relevant legal authorities that define what it means to engage in the practice of law; if the nonlegal organization is engaged in the unauthorized practice of law, the lawyer's involvement in the contemplated relationship would likely violate Rule 5.5(b)). *See also In re Lefkowitz*, 47 A.D.3d 326 (lst Dep't 2007) (attorney aided the unauthorized practice of law by representing immigration clients at hearings and interviews where (1) lawyer was paid by nonlawyer entity to represent clients; (2) nonlawyer entity prepared the immigration applications and had the "primary financial and substantial relationship with" the clients; and (3) the work done by the nonlawyer entity "involved some legal analysis").

19. In essence, our litmus test under Rule 5.5(b) is whether a lawyer provides substantial assistance to the nonlawyer engaging in unauthorized practice. See N.Y. State 809 (2007) ("aid" requires a purpose and intent to *substantially* assist or cause another to commit an act that constitutes the unauthorized practice of law, as opposed to doing something for one's own purposes that *incidentally* permits the other person to commit that act); N.Y. State 705 (1998) (law firm may be "aid[ing] a nonlawyer in the unauthorized practice of law" if its willingness to accept referrals from a tax reduction company on a regular basis may aid the company's business by giving it assurance that, if a grievance is denied, the company will be able to engage counsel to represent the property owner in Supreme Court proceedings, which may be integral to the company's ability to solicit clients or otherwise to do business).

20. If this were merely a "one-off" referral where the inquirer assumed complete control of the engagement upon receiving the referral, and if the lawyer had an attorney-client relationship only with the referred client, not the claims recovery firm, then there would not be a violation of Rule 5.5. However, if the Claims Recovery Firm's conduct constitutes the unauthorized practice of law, then the lawyer's proposed relationship with the Claims Recovery Firm here would violate Rule 5.5(b). It appears the Claims Recovery Firm's actions would not be possible here absent the active participation of a lawyer. More than merely making the referral, the nonlawyer would provide significant services in connection with handling the legal matter. The lawyer's proposed conduct here would thus cross the line into aiding the Claim Recovery Firm's conduct in violation of Rule 5.5(b).

Fee Splitting with a Nonlawyer

21. Our third concern is potential fee-splitting with a nonlawyer. With three exceptions not applicable here, Rule 5.4(a) states that a "lawyer or law firm shall not share legal fees with a nonlawyer." Our prior opinions regarding fee sharing in situations resembling the one here reach varying results.

22. In N.Y. State 705 (1998), we concluded that a lawyer "may enter into an agreement to represent the property owner for a fee that is paid by the [nonlawyer] agency from funds obtained from the client if the lawyer' fee is allocable to the lawyer's services." We said it followed that "if the lawyer may receive a fee contingent on the amount by which taxes are reduced, the lawyer may receive a fee that is a percentage of the tax reduction company's fee, where that fee is itself a percentage of the amount by which taxes are reduced."

23. In N.Y. State 698 (1998), in contrast, we said that an attorney may not accept a referral of a medical malpractice case from a medical consultant if the consultant required the attorney to agree to a contingent consultant's fee in addition to the attorney's fee (*i.e.,* required the attorney to hire the medical consultant) as a precondition to the referral. The consultant proposed to assist in evaluating and preparing the case, and would charge more than the lawyer's regular consultant, who charged on an hourly basis. We held that this "package deal" violated the rules requiring the lawyer's independence in matters of professional judgment and was a payment for referral. We also stressed the importance of informing the client about the fee arrangement with the medical consultant and the availability of lower-cost alternatives. We cautioned that the lawyer might be obligated to reduce his own fee to avoid charging an excessive fee or unreasonable expenses to the client (which was subject to a statutory limit on medical malpractice fees).

24. A "package deal" may or may not result in charging an excessive fee, but the lawyer cannot reduce the lawyer's normal fee if doing so would be equivalent to paying for a referral. In N.Y. State 885, we opined that an attorney may not reduce the fees the lawyer would ordinarily be paid as part of an arrangement to accept referrals from a nonlawyer who would perform some services if the funds to be received by the nonlawyer significantly exceeded the value of the services actually performed. In essence, the nonlawyer's compensation was an improper fee for the referral, which was prohibited by Rule 7.2(b). Just as a lawyer could not collect a full fee and share part of it with the nonlawyer, so the lawyer could not reduce the fee to free up funds for the client to pay the nonlawyer unless the nonlawyer was performing services worth the amount of the reduced fee. *See* N.Y. State 705 (1998), *citing* Kenneth L. Gartner, "Acceptance of Referrals from Non-Attorney Firms," 217 N.Y.L.J. 1, 4 (Mar. 25, 1997) (ethics rules do not permit lawyers to accept referrals from nonlawyers who are "signing up clients and passing them on to lawyers, with a fee skimmed off the top").

25. If the Claims Recovery Firm provides substantial assistance in the proceedings and the compensation of the Claims Recovery Firm is commensurate with the services it provides, then the lawyer would not be sharing legal fees with a nonlawyer in violation of Rule 5.4(a) even if the lawyer reduces his fee by the amount of the Claims Recovery Firm's compensation. Likewise, if the Claims Recovery Firm's compensation does not exceed the reasonable value of its services, then the lawyer would not be paying a prohibited referral fee and thus would not be

violating Rule 7.2(b). Of course, regardless of the nonlawyer's compensation, the fee for the lawyer's services, whether calculated based on an hourly fee, a contingent fee, or some other formula, and expenses must not be excessive when analyzed using the criteria set forth in Rule 1.5(a). If the client will be compensating the Claims Recovery Firm for services that the lawyer would ordinarily be expected to perform, and if the lawyer is charging a contingent or other non-hourly fee, then the lawyer may have to reduce his fee to avoid an excessive fee. *See* N.Y. State 885 ("This is especially so where some of the consultant's services may involve work that 'the lawyer himself is professionally obligated to do at no extra cost to the client'"). A lawyer cannot simultaneously charge a full contingent or flat fee and slough off work to a nonlawyer who is also charging for those services.

CONCLUSION

26. A lawyer may not join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and by the claims recovery firm if it is to be done on a systematic and continuing basis, because claims recovery firms are not on the Appellate Division list of approved nonlegal professionals within the meaning of Rule 5.8. Even if the relationship is a "non-exclusive reciprocal referral agreement" within the meaning of Rule 5.8(c), the lawyer must ensure that the relationship does not interfere with the lawyer's independent professional judgment, does not involve improper solicitation of clients, does not involve aiding in the unauthorized practice of law, and does not involve the improper sharing of legal fees. The lawyer may share in a contingent fee paid by the client to the lawyer and nonlawyer but only if (i) the nonlawyer provides substantial assistance in the proceedings (*i.e*. does not merely sign up clients and pass them on to the lawyer), (ii) the nonlawyer's compensation is commensurate with the nonlawyer's services, and (iii) the lawyer's fee is also commensurate with the lawyer's services (*i.e*. is not reduced so that the reduction is in effect a referral fee to the nonlawyer).

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