New York State Bar Association
Committee on Professional Ethics

Opinion No. 1160 (01/02/19)

Topic: Affiliation and fee-sharing with a New York resident attorney not admitted in New York, although admitted out-of-state, and licensed to practice in New York federal courts.

DIGEST: Not proper for a New York attorney to affiliate and share fees with a lawyer who, though resident in New York, is not admitted to practice in New York, if the solicitation of clients, sharing of fees, and any other services performed, would as a matter of law constitute the unauthorized practice of law.

Rules: 1.5(g); 5.5; 7.1, 7.2, 7.3, 8.4

FACTS

1. The inquirer, an attorney recently admitted to practice in New York, is acquainted with another lawyer. The other lawyer, like the inquirer, resides in New York, but the other attorney is admitted only in another state, not New York, though the latter is admitted to practice in federal courts located in New York. According to the inquirer, the other lawyer is capable of generating business, and the inquirer would like to affiliate with this other lawyer, listing the other lawyer as a partner, associate, counsel, or otherwise, on letterhead showing that the other lawyer is admitted solely in the other state and not New York. The inquirer anticipates that the other lawyer would attend initial meetings with the clients being produced by the other lawyer, but then would not deal with any of the legal work being performed.

QUESTION

2. May a lawyer admitted in New York affiliate and share legal fees with another lawyer, who, while a resident of this State, is not admitted here, with the affiliation intended solely for the purpose of obtaining clients referred by the non-admitted lawyer?

OPINION

3. "Our prior opinions have recognized that a New York law firm may include lawyers not admitted to practice in New York." N.Y. State 955 ¶ 7 (2013); *see, e.g.*, N.Y. State 704 (1997). Our main concern has been that the New York firm, consistent with the rules governing lawyer advertising set out in Rule 7.1 of the N.Y. Rules of Professional Conduct (the "Rules"), avoid misleading the public by failing to disclose the jurisdictional limitations on practice by out-of-state lawyers. *See* Rule 7.5(d) (partnership practicing with lawyers licensed in different jurisdictions must "make clear the jurisdictional limitations on" lawyers in the firm not licensed to practice in all jurisdictions); N.Y. State 1042 ¶ 15 (2014) (so concluding); N.Y. State 144 (1970) (same result under the Rules' predecessor the N.Y. Code of Professional Responsibility (the "Code")).

4. Our prior opinions blessing affiliations with such non-lawyers presupposed that an affiliation among lawyers admitted in different jurisdictions were engaged in a common enterprise in which all lawyers in the firm would render legal services to clients of the firm within the confines of their jurisdictional limitations. The sharing of fees among lawyers in the circumstances is a function of the common enterprise in which the lawyers perform legal services for the benefit of the firm's clients within those confines. But we have never sanctioned an arrangement between a New York lawyer and a non-attorney consisting of nothing more than signing up clients and passing them on to lawyers, with a fee skimmed off the top. N.Y. State 705 (1997)(quotations and citations omitted).

5. The Rules "generally do not allow lawyers to pay for referrals of clients." N.Y. State 979 ¶ 4 (2013). Rule 7.2 (a) says that an attorney "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," subject to two exceptions. *See* Rule 7.2, Cmt [1]. One exception appears in Rule 5.8, which authorizes contractual relationships between lawyers and certain non-legal professional services enumerated in Section 1205.3 of the Joint Appellate Division Rules; an out-of-state law firm is not so listed. The other exception, Rule 1.5(g), allows a lawyer to share a fee with an unaffiliated lawyer if, among other things, the client gives informed consent, confirmed in writing, to the division of fees and the division either reflects the proportional contribution of the lawyers to the services performed or, in a writing shared with the client, the referring lawyer assumes joint responsibility for the representation.

6. We examined Rule 1.5(g) in N.Y. State 864 (2011), in which the inquirer wished to accept a referral from an out-of-state lawyer in a personal injury matter. The injury occurred in New York and the referring lawyer proposed that, in the particular matter at issue, the in-state lawyer would "handle" the matter and pay the referring lawyer a portion of any recovery. We endorsed the proposal subject to compliance with Rule 1.5(g). *Id.* ¶ 16. Although we have declined to delineate the precise contours of "joint responsibility" under this Rule, *see* N.Y. State 745 (2001); *cf.* Rule 1.5, Cmt. [7] ("joint responsibility entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership"), we have made clear that the mere cultivation of client relationships does not qualify as "services performed" by the referring lawyer, N.Y. State 954 ¶ 9 (2013). Thus, the inquirer's contemplated action would violate Rule 7.2(a) unless it could be said that the inquirer is ethically permitted to be affiliated with the out-of-state lawyer in the circumstances presented.

7. Our opinion in N.Y. State 801 (2006), which involved facts closer to the instant situation, is not inconsistent. There, the New York lawyer contemplated forming a professional partnership with an attorney admitted in another state, but not in New York. The out-of-state attorney was nevertheless to be based in the New York office, participate in work of the practice, including "paperwork," meet with clients, and share fees. There, we said that either the out-of-state attorney would be engaging in the unauthorized practice of law here, or acting in a quasi-paralegal capacity, as a non-lawyer. While noting that unauthorized practice is a creature of statute not the Rules, we concluded that, "[i]f the out-of-state lawyer were to limit activities to those permitted a non-lawyer, such as a paralegal, then the lawyer would violate [the Rules] by partnering with the lawyer, as it is impermissible for a New York lawyer to share fees with a non-lawyer," but that "[i]f the out-of-state lawyer is engaged in the unauthorized practice of law, then the New York lawyer would violate [the Rules] by partnering with the lawyer."

8. The principal distinctions between the situation proposed here, and that considered in Opinion 801, would appear to be the facts that (a) the proposed affiliated attorney in the instant

inquiry is not to participate in "paperwork," or in client meetings beyond the initial meeting, and (b) the proposed affiliated lawyer in the instant case is licensed to practice in the New York federal courts. What is being proposed here therefore appears to be an arrangement for the solicitation of legal work in New York, for purposes of receiving a share of the fees earned thereby, by an attorney residing in New York but not licensed to practice by the New York courts, using licensure by the federal courts in New York as a predicate. The question then becomes whether an out-of-state lawyer may set up shop in New York for purposes of rainmaking and fee-sharing based solely upon admission to federal courts located here.

9. As we have said, whether something constitutes the unauthorized practice of law is a question of statutory interpretation, which is beyond our purview. Nevertheless, Rule 5.5 says:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.
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> (b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

10. *In re Peterson*, 163 B.R. 665 (Bkptcy. Ct., D. Conn. 1994) addressed a situation similar to the one described by the inquirer. The situation was summarized by the Bankruptcy Court as follows, *id.* at 667:

> Betsos is not licensed to practice law in Connecticut. He is licensed in New York, and is admitted to practice in the federal district courts for the district of Connecticut and the southern and eastern districts of New York. He has had no office in New York since approximately 1983. Betsos has a law office in Stamford, Connecticut where he has provided legal services by telephone in bankruptcy matters. Moreover, he has prepared pleadings in that office for filing in bankruptcy court. He has not met with clients at his office, but he has met with them at other locations in Connecticut. His stationery lists his Stamford office address and states that he is an attorney-at-law.

11. Determining that Betsos, on those facts, was engaged in the unauthorized practice of law, the Bankruptcy Court held, 163 B.R. at 672-673 (footnotes omitted):

> I find at the outset that Betsos's activities constituted the practice of law. The practice of law is not limited to appearing before state courts; it includes giving legal advice and drafting documents regardless of whether it occurs in a "court of record," and regardless of whether the practice is carried on as a business.
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> The flaw in [the attorney's] argument is that it fails to recognize the distinction between the right to practice in a court and the right to practice law *generally*. The essence of that distinction is that the general practice of law connotes the right to offer legal services to anyone who seeks them, whereas the right to practice in a court is

> limited to providing legal services that are incidental to a specific case or proceeding pending in that court.

12. *Peterson* was subsequently followed by, *e.g.*, *Servidone Const. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F. Supp. 560, 572-576 (N.D.N.Y. 1995) (also citing *Spanos v. Skouras Theatres Corporation*, 364 F.2d 161 (2d Cir.), *cert. den'd*, 385 U.S. 987 (1966)), and *In Re Swendiman*, 57 N.E.3d 1155, 1156-1157 (Sup. Ct., Ohio 2016) (noting that *Peterson* had been distinguished *In Re Desilets*, 291 F.3d 925 (6th Cir. 2002) (holding that an attorney licensed in Texas and admitted to practice before federal bankruptcy court in Michigan was authorized to practice federal bankruptcy law in Michigan, even though he was not licensed in Michigan, because the bankruptcy courts rules expressly permitted the attorney not only to appear before the bankruptcy court, but also to generally counsel clients).

13. The ultimate question being one of law, we leave to the inquirer to resolve the import of *Peterson* and like cases on the proposed arrangement, with the caution that, were *Peterson* to control, then the inquirer would run afoul of Rule 5.5(b). We caution, too, that the proposal may well constitute improper solicitation under Rule 7.3, the provisions of which, in Rule 7.3(i), fully apply to an out-of-state lawyer who solicits retention of clients in New York. *See* Rule 8.4(a) (a lawyer may not "knowingly assist or induce another" to violate the Rules). Finally, we note that the Court of Appeals has adopted rules governing temporary practice by out-of-state lawyers, which provide, among other things, that "except as authorized by other rules or law," an out-of-state lawyer shall not "establish an office or other systematic and continuous presence in this State for the practice of law." 22 N.Y.C.R.R. Part 523.

CONCLUSION

14. It would not be proper for the inquiring New York attorney to affiliate with, and share fees with, a solely out-of-state-licensed attorney, resident in New York, for matters to be solicited and originated by the out-of-state-licensed attorney, based upon the New York resident out-of-state-licensed attorney's admission to New York federal courts, if the solicitation of clients, sharing of fees, and any other services performed, would as a matter of law constitute the unauthorized practice of law.

[12-18]