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 1222 (04/12/2021)

Topic: Non-legal services; mediation; unauthorized practice of law

Digest: Lawyers may not jointly own a mediation business with nonlawyers if the mediation business employs lawyers to provide legal services to mediation clients. Lawyers may jointly own a mediation business with nonlawyers if the mediation business does not employ any lawyers and provides only nonlegal services. Lawyers who own a mediation business may accept referrals from it, subject to certain restrictions, and may enter into a non-exclusive reciprocal referral agreement with the mediation business. The Rules of Professional Conduct will apply to the mediation business where a mediation client could reasonably believe that the mediation services are the subject of a client-lawyer relationship and the lawyers who co-own the mediation business do not provide the mediation client with a written disclaimer stating that the mediation services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the mediation services.

Rules: 1.7(a)(2) & (b), 1.12(b), 2.4, 5.5(a), 5.7(a)

FACTS

1. The inquirers are a law firm ("Law Firm") and three partners in that law firm. Law Firm currently offers three types of services: (i) divorce litigation, (ii) collaborative law, and (iii) mediation services.

2. The inquirers believe that Law Firm's mediation services are not attractive because many clients and potential clients are reluctant to use lawyers as mediators. However, the inquirers have an opportunity to purchase a controlling interest in a divorce mediation business ("Mediation Business"). They plan to own the Mediation Business together with an experienced, respected mediator who is not a lawyer.

3. The Mediation Business and Law Firm will occupy separate locations and will not use the Law Firm name or the names of any of the inquiring law partners in the Mediation Business practice Following a successful mediation, the Mediation Business might employ lawyers to draft a separation agreement and related documents to effectuate the divorce on the terms agreed by the parties.

QUESTIONS

4. The inquirers pose five questions:

- May a mediation business co-owned by lawyers and non-lawyers employ lawyers to provide post-mediation legal services to the mediating parties?

- May lawyers and non-lawyers co-own a divorce mediation business?

- May a law firm accept referrals from a mediation business partly owned by partners in the law firm?

- May a law firm and a mediation business enter into a non-exclusive mutual referral agreement?

- How does Rule 5.7 apply to services offered by nonlawyer mediators at a mediation business co-owned by lawyers?

OPINION

May a mediation business co-owned by lawyers and non-lawyers employ lawyers to provide post-mediation legal services to the mediating parties?

5. Rule 5.4 ("Professional Independence of a Lawyer") of the New York Rules of Professional Conduct (the "Rules") governs this question. Rule 5.4(a), (b) and (d) provide, in pertinent part:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer ....
>
> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. ...
>
> (d) A lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if:
>
> > (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
> >
> > (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation; or
> >
> > (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

6. Under Rule 5.4, the Mediation Business may *not* employ lawyers to provide legal services as proposed. First, Rule 5.4(a) prohibits a lawyer from sharing legal fees with a nonlawyer, so any revenues from the legal services could not be shared with the nonlawyers. Second, even if the legal fees could be segregated from the fees for mediation services, or even if the Mediation Business did not charge fees for the legal services, the Mediation Business would still be barred from offering legal services because Rule 5.4(b) prohibits lawyers from jointly owning a business with nonlawyers "if any of the activities of the partnership consist of the practice of law." Third, any lawyer employed by the Mediation Business would be in violation of Rule 5.4(d), which prohibits a lawyer from practicing with "an entity authorized to practice law for profit."

7. We also direct the inquirers' attention to N.Y. Judiciary Law § 495, which states: "No corporation or voluntary association shall (a) practice or appear as an attorney-at-law for any person in any court in this state...(c)...or to 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...." We do not have authority to construe Section 495, but the inquirers should be aware of it.

May lawyers and non-lawyers co-own a divorce mediation business?

8. The answer to this question depends on whether mediation services constitute the practice of law.

9. If providing mediation services constitutes "the practice of law," then the same provisions that prohibited the arrangement addressed in the first question would come into play. Fees earned by the Mediation Business would constitute legal fees that would be shared with the nonlawyers, in violation of Rule 5.4(a); lawyers would be in a partnership (or other entity) with nonlawyers where some of the activities of the partnership would consist of the practice of law, in violation of Rule 5.4(b); and a nonlawyer would own an interest in "an entity authorized to practice law for profit," in violation of Rule 5.4(d).

10. However, in N.Y. State 1026 (2014), we said: "Mediation is a 'nonlegal service' as defined by Rule 5.7(c) ...." See also Rule 2.4 (implying a distinction between legal services, on one hand, and mediation services, on the other hand); N.Y. State 1178 (2019) ("Only when a lawyer-mediator engages in services beyond providing neutral services, such as filing papers in court, does the lawyer-mediator cross the line into providing legal services"). Thus, the answer to the second question is that lawyers and non-lawyers may jointly own a business that provides only mediation services and does not provide any legal services. In this regard, we express no opinion whether mediators who prepare a separation agreement and related divorce documents are engaged in the unauthorized practice of law as that is a question of law that we lack jurisdiction to answer.

May a law firm accept referrals from a mediation business partly owned by the partners in the law firm?

11. The Rules of Professional Conduct contain no per se prohibition against accepting referrals. However, when the Mediation Business refers clients who have successfully mediated their divorce to Law Firm, inquirers may have a conflict of interest under Rule 1.7(a)(2) because of their ownership interest in the Mediation Business. Rule 1.7(a)(2) provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that...
>
> > (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

12. If a divorce mediation client expresses unhappiness or second thoughts about the process or results of a "successful" mediation (despite having agreed to the settlement terms), or if an

individual inquirer sees reason to question the mediation settlement, the inquirer's ownership interest might create a "significant risk" of adversely affecting the inquirer's professional judgment on behalf of the client. Whether such a risk exists will require a case-by-case analysis, and if does exist it will be imputed to all lawyers "associated in" the firm. *See* Rule 1.10(a). If there is a conflict under Rule 1.7(a)(2), then the inquirers will need to determine whether the conflict is consentable (*i.e.,* waivable) under Rule 1.7(b)(1) and, if so, obtain the client's "informed consent,confirmed in writing" under Rule 1.7(b)(4).

May a law firm and a mediation business enter into a non-exclusive mutual referral agreement?

13. Subject to various conditions, Rule 5.8, allows contractual relationships between lawyers and certain nonlegal professionals (such as accountants, social workers, land surveyors, engineers and architects -- see 22 NYCRR §§ 1205.3). Rule 5.8(c), however, includes this exception to its application:

> (c) This Rule shall not apply to relationships consisting solely of ***non-exclusive reciprocal referral agreements or understandings*** between a lawyer or law firm and a nonlegal professional or nonlegal professional service firm. [Emphasis added.]

14. Comment [4] to Rule 5.8 elaborates on this language by saying, "A lawyer may enter into such an arrangement only if it is nonexclusive on both sides, so that both the lawyer and the nonlawyer are free to refer clients to others if that is in the best interest of those clients." Thus, in N.Y. State 755 (2002) (which construed the Code predecessor to Rule 5.8), we said that non-exclusive reciprocal referral relationships between lawyers and nonlawyers were permissible even if the nonlawyers are not "professionals," as long as the lawyers do not (among other things) pay for the recommendations. *See also* N.Y. State 1155 (2018) (concluding that Rule 5.8 "by its terms" does not apply to non-exclusive referral relationship between estate planning lawyer and investment firm); N.Y. State 976 ¶ 19 (2013) (lawyer or law firm may not maintain an "exclusive" contractual arrangement with a company owned by nonlawyers). Accordingly, inquirers may enter into a non-exclusive mutual referral agreement with the Mediation Business as long as they do not pay for those referrals.

15. What is the meaning of "non-exclusive"? Basically, inquirers may not agree that they will refer clients only and exclusively to the Mediation Business, because in some instances a client of Law Firm may be better served by a referral to a different mediation business. Nor may inquirers agree to accept every referral from the Mediation Business. Sometimes, inquirers will have to turn down referrals because they have a conflict of interest or are too busy or lack legal competence to handle to handle a particular referral. And of course inquirers may not refer their clients to the Mediation Business if mediation is not an appropriate approach in the particular client's matter.

16. Thus, a non-exclusive reciprocal referral relationship is essentially an agreement to consider referring a client to the nonlawyer professional (here, the Mediation Business), or to *consider* accepting a referral from the nonlawyer professional. It cannot be a promise to refer every client to the Mediation Business or to accept every referral from the Mediation Business.

How does Rule 5.7 apply to services offered by nonlawyer mediators at a mediation business co-owned by lawyers?

17. When nonlegal services are being provided not by a law firm but rather by a nonlegal entity owned by lawyers, the gateway governing provision is Rule 5.7(a)(3), which provides:

> (3) A lawyer or law firm that is an owner ... of ... an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services ***if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship***. [Emphasis added.]

18. Applying Rule 5.7(a)(3) here, we know that each of the inquiring lawyers is an "owner" of the Mediation Business and that the Mediation Business is "providing nonlegal services." Thus, the question is whether persons receiving the mediation services "could reasonably believe" that such services "are the subject of a client-lawyer relationship."

19. In the present inquiry there are several factors which appear to support the conclusion that a client of the Mediation Business could not reasonably believe that she or he was receiving legal services. The Mediation Business and Law Firm offices are separate, their names are different, and there are no lawyers actually providing mediation services. On the other hand, divorce mediation arises in the context of a legal dispute and – unlike many types of disputes – divorce can ultimately be resolved only through the court system. Divorce mediators also often need to explain basic legal principles of divorce, such as equitable distribution, joint custody, and maintenance. In addition, as many divorce mediators are, in fact, lawyers, divorcing spouses may not appreciate the difference between a mediator who is a lawyer and one who is not a lawyer. There are doubtless additional relevant factors that may arise in a particular case, including the scope and precise language of any oral or written disclaimer provided by the mediators that they are not providing any legal services.

20. If after weighing all relevant factors, a person receiving divorce mediation services could not reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, the inquiry would be at end. If, however, a person receiving divorce mediation services *could* reasonably believe that the nonlegal services are the subject of a client-lawyer relationship, compliance with Rule 5.7(a)(4) by the inquirers would be required. Rule 5.7(a)(4) provides:

> (4) For purposes of paragraphs (a)(2) and (a)(3), it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship ***unless*** the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services, or if the interest of the lawyer or law firm in the entity providing nonlegal services is *de minimis*. [Emphasis added.]

21. In other words, once it is determined that a client of the Mediation Business *could* reasonably believe that the nonlegal mediation services are legal services, it will be *"presumed"* that the client *actually* believes that the services are legal services unless the lawyer's interest in the Mediation Business is "de minimis" (apparently not the case here), or the inquirers who co-own the Mediation Business provide a written disclaimer stating that "the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services." The requirement that, in order to rebut the presumption arising under

subparagraph (a)(3), the lawyer-inquirers must provide this disclaimer pursuant to subparagraph (a)(4), cannot be avoided by any earlier disclaimer given by a non-lawyer mediator where the balance of factors, notwithstanding the non-lawyer mediator's disclaimer, tips in favor of concluding that the client *could* reasonably believe that the mediation services are the subject of a client-lawyer relationship under subparagraph (a)(3).

22. Lawyer-owners of a nonlegal entity providing nonlegal services, like the Mediation Business, are not required to provide this written disclaimer, but if they do not, then the Rules of Professional Conduct apply to the nonlegal mediation services, essentially as if the nonlegal mediation services were being provided by lawyers. Here, for example, if the inquirers do not provide the disclaimer specified in subparagraph (a)(4) to rebut the presumption that arises under subparagraph (a)(3), the Mediation Business will be required to abide by Rules 1.7, 1.8, 1.9, 1.18, and other Rules governing conflicts of interest (including Rule 1.10(e), which will require the Mediation Business to check each new mediation engagement for conflicts with Law Firm's clients), and must abide by Rule 1.6 regarding the duty of confidentiality.

CONCLUSION

23. Lawyers may not jointly own a mediation business with nonlawyers if the mediation business employs lawyers to provide legal services to mediation clients. Lawyers may jointly own a mediation business with nonlawyers if the mediation business does not employ any lawyers and provides only nonlegal services. Lawyers who own a mediation business may accept referrals from it, subject to certain restrictions, and may enter into a non-exclusive reciprocal referral agreement with the mediation business. The Rules of Professional Conduct will apply to the mediation business where a mediation client could reasonably believe that the mediation services are the subject of a client-lawyer relationship and the lawyers who co-own the mediation business do not provide the mediation client with a written disclaimer stating that the mediation services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the mediation services.

(35-20)