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

Opinion 1246 (11/16/2022)

Topic: Partnership with Non-U.S. Lawyer; partner who is also a member of a firm with non-lawyer ownership or management; whether business management and strategy may be the practice of law; affiliation of law firms; co-naming of law firms; billing for services of another law firm.

Digest: Rule 7.5(d) recognizes a partnership between a lawyer licensed in New York and one admitted in a non-U.S. jurisdiction under certain circumstances. "Administrative duties" in law firm management may involve the practice of law, depending on the circumstances. The sole fact that an English solicitor is a member of a U.K. ABS does not make it unethical for a New York lawyer to partner with that solicitor. "Co-branding" between law firms must avoid misleading the public as to the true relationship between the firms. Where two law firms provide services to the same client, one firm may charge the fees and expenses of the other firm as a disbursement and then pay the other firm what it is owed if the fees and expenses otherwise comply with the Rules.

Rules: 1.5(g), 1.10(a), 5.4(b), 5.4(d), 5.5, 5.5(b), 7.2(a), 7.5(d), 8.5.

FACTS:

1. The inquirer, a New York lawyer, proposes to become a partner in a New York law firm ("Firm XYZ") that is formed as a Delaware limited liability partnership and is expected to be registered in New York as a foreign limited liability partnership. Firm XYZ will have a majority partner ("S" or "Solicitor") who is a solicitor in England and Wales but not admitted in New York. S is based in, and practices law solely from, the United Kingdom ("U.K."). S's role in Firm XYZ would involve matters of strategy, business and general management, but the inquirer represents that S will not practice English or any other law from Firm XYZ.

2. S is also the managing partner of, and has a controlling interest in, a law firm in the U.K. that is in the form of an "Alternative Business Structure" ("ABS") i.e., which has, or is permitted to have, non-lawyer ownership/control. The firm we'll call "Firm ABS" is expected to have seven or eight partners or members, of which six will be solicitors in the U.K. and one or two will be corporations with non-lawyer ownership. At least one corporate member will have an equity stake in Firm ABS and will have certain veto rights, although it will have no active involvement or control rights in respect of the operation and management of Firm ABS. The inquirer is not admitted in England, will not be a member of Firm ABS, and will practice solely in New York for clients of Firm XYZ.

3. The inquirer states that Firm XYZ and Firm ABS would be separate, independent and distinct legal entities. They would have no parent/subsidiary relationship, although S would have an ownership interest in each. They would not share partnership profits, although the inquirer

states that compensation of lawyer members or partners across the two firms might consider, among other factors, the aggregate profits of the two law firms. In addition, the inquirer states that Firm XYZ and Firm ABS may share legal fees, proportionally and in compliance with the Rules. For example, when the law firms represent a client together on the same matter, the combined fees may be presented on a single invoice to the client (after disclosure and client consent), with the law firm receiving the combined fees in the first instance and providing a subsequent payment of the other law firm's share of those fees. Finally, the law firms would be "co-branded".

QUESTIONS:

4. May a New York lawyer become a partner of a New York law firm which has a partner who is an English lawyer not admitted in New York?

5. Does it matter that the English lawyer purports not to practice law with the New York firm?

6. Does it matter if the English lawyer is also a partner of a U.K. law firm that is an "Alternative Business Structure," i.e. has, or is permitted to have, non-lawyer ownership?

7. May Firm XYZ be affiliated with Firm ABS via common ownership by S?

8. May Firm XYZ and Firm ABS be otherwise "affiliated"?

9. May Firm XYZ and Firm ABS be co-branded?

10. May the Firms share legal fees from a common client and may the total fee be billed initially by Firm ABS?

OPINION:

11. The jurisdiction of this Committee is primarily to give opinions interpreting the New York Rules of Professional Conduct. This inquiry implicates several New York laws, including Section 121-1500 of the New York Partnership Law, which are not considered here.

Partnership with a Solicitor Admitted in the U.K.

12. The New York Rules of Professional Conduct (the "Rules") prohibit partnerships between lawyers and non-lawyers if any of the activities of the partnership consist of the practice of law. See Rule 5.4(b). We have often noted that this provision, which seems to disallow a partnership with any lawyer not admitted in New York, is not that restrictive. As we explained in N.Y. State 1072 (2015), Rule 5.4(d) is tempered by Rule 7.5(d):

> Rule 7.5(d) . . . recognizes partnerships "between or among lawyers licensed in different jurisdictions." *See* N.Y. State 658 (1993); *see also* N.Y. State 542 (1982). We also previously have noted that the reference in Rule 7.5(d) to "lawyers licensed in foreign jurisdictions" includes lawyers licensed in foreign countries. *See* N.Y. State 542.

13. As we pointed out in N.Y. State 1072, it is not sufficient that the foreign lawyer is licensed as a lawyer in another country. The New York firm must also inquire into two other factors:

> (i) whether the foreign country's educational requirements for admission are generally similar to those for New York attorneys and (ii) whether the standards of professional conduct and discipline governing the foreign attorney are essentially compatible with New York's standards. See N.Y. State 542 (1982); N.Y. State 658 (1993).

14. In N.Y. State 542, we concluded that lawyers admitted only in the United Kingdom met this requirement:

> The general similarity of our educational requirements for admission to practice, as well as the essential compatibility of our standards of professional conduct and discipline, have inevitably led us to consider such persons beyond the traditional proscription against lay partnerships.

15. If the names of the partners of Firm XYZ are listed on the letterhead of the firm, the letterhead must indicate that S is admitted only in England and Wales (or not admitted to practice in New York)

Does it Matter that the U.K. Solicitor Purports Not to Practice Law with Firm XYZ?

16. The inquiry states that S is based in, and practices law solely from, the U.K. S's role in Firm XYZ would involve matters of strategy, business and general management. Inquirer represents that S will not practice English or any other law from Firm XYZ. We addressed similar facts in N.Y. State 1093 (2016). That opinion involved a New York lawyer who practiced principally with a U.K. ABS that had non-lawyer partners. The lawyer also wanted to become a partner of a New York law firm. In that opinion, we said the answer depended on the application of Rule 8.5 – the choice of law rule – which, in turn, depended on the jurisdiction in which the lawyer "principally practiced". As here, we were told that the lawyer would not practice any type of law in New York, but would merely provide management and administrative activities. We noted that what constitutes the practice of law is a question of law that is beyond the jurisdiction of our Committee. See Judiciary Law § 478 (practicing or appearing as attorney-at-law without being admitted and registered), Rule 5.5, Cmt. [2] ("The definition of the "practice of law" is established by law and varies from one jurisdiction to another.") However, we noted that the determination of what constitutes the practice of law depends greatly on the facts:

> While some law firms hire managers who are non-lawyers and whose role is limited to purely administrative matters, many other law firms employ full-time managing partners who are lawyers admitted to practice in New York. Although some of these managing partners do not represent any clients, they may play active roles in determining which clients their firms should represent, including assessing whether representation would involve conflicts of interest and evaluating the merits of cases, and they may actively oversee the conduct of matters being handled by the firm to ensure that the firm complies with law and professional standards. We therefore cannot rule out the possibility that a New York lawyer

> managing a New York law firm will be exercising legal judgment. This is one plausible reason that the New York firm would make the person handling management and administrative activities a partner rather than an employee.

<u>Does it Matter that the Solicitor is also a Partner in a U.K. ABS?</u>

17. The New York Rules preclude a New York lawyer from practicing law in any capacity with an entity authorized to practice law if a nonlawyer (a) is a partner, (b) owns an interest in the entity, (c) is a member, director or officer or has a position of similar responsibility, or (d) has the right to direct or control the professional judgment of a lawyer. Rule 5.4(b) & (d). The New York Rules also preclude a New York lawyer from sharing legal fees with a non-lawyer or from forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law. Rule 5.4(a) & (b). Those principles normally prohibit a New York lawyer from becoming a partner in a firm with nonlawyer owners or supervisors.

18. In two prior opinions, this Committee considered whether Rule 5.4 prohibited a New York lawyer from being a partner or associate of a U.K. firm formed as an Alternative Business Structure. See N.Y. State 1093 (2016) (a New York lawyer who is also admitted in a foreign jurisdiction and is practicing with non-lawyer partners in that jurisdiction may also practice in a separate New York law firm without violating the New York Rules of Professional Conduct as long as the lawyer (i) principally practices in the foreign jurisdiction or (ii) the predominant effect of the lawyer's practice with the foreign firm is in the foreign jurisdiction and (iii) the New York firm includes representations by the UK firm in its conflict of interest system); N.Y. State 1041 (2014). See also N.Y. State 1038 (New York lawyer with New York-based practice may not partner with nonlawyer or practice in law firm owned by parent firm that has nonlawyer partner.)

19. This inquiry does not involve a New York lawyer practicing principally outside the U.S. The inquirer would not be a partner, associate or other employee of a U.K. ABS. The U.K. ABS would have no ownership in Firm XYZ or any right to control S's independent professional judgment or role in Firm XYZ. Under Rule 8.5, concerning disciplinary authority, the Rules apply to a foreign lawyer only if the lawyer is admitted here or appears in court here. We therefore see no basis for finding a violation of Rule 5.4 by the New York lawyers in Firm XYZ based solely on the fact that S would be a partner of both firms. Nevertheless, as noted in paragraph 24 below, the conflict of interest considerations discussed in N.Y. State 1093 would apply.

<u>May Firm XYZ and Firm ABS be otherwise "affiliated"?</u>

20. The inquiry does not specify how the firms would be "affiliated," other than through the fact that S is a member of and possesses a majority interest in each. Consequently, we do not have sufficient facts to answer the question. We have previously issued opinions on referral relationships, including firms that wanted to be "associated" or "correspondents", see, e.g., N.Y. State 806 (2007), N.Y. State 538 (1981), stressing that the propriety of the proposals was dependent on the facts.

21. We advised in N.Y. State 538 that the inquirer should consider (and we believe the present inquirer should consider) several factors, including Judiciary Law § 479 (making it unlawful for any person to solicit legal business on behalf of a New York attorney) and the predecessor provision to Rule 7.2(a) (which prohibits a lawyer from compensating or giving anything of value

to a person or organization to obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, with certain exceptions not applicable here.)

22. In addition, we cautioned that fees should be divided only in accordance with the predecessor to Rule 1.5(g), which currently provides:

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> > (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
> >
> > (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
> >
> > (3) the total fee is not excessive.

23. In this case, the inquirer represents that legal fees will be shared "proportionally," which we assume means in proportion to the services provided by each firm.

24. Finally, because S will be a member of both Firm XYZ and Firm ABS, the two firms must comply with the conflict provisions of Rule 1.10(a). See N.Y. State 1093, N.Y. State 876 (2011) (Where a lawyer is "associated" with more than one law firm within the meaning of the imputation rule, all of the law firms with whom the lawyer is associated are treated as one law firm for purposes of conflicts of interest.)

May Firm XYZ and Firm ABS be co-branded?

25. The inquiry does not give us any information about what being "co-branded" would entail. We assume that co-branding means that the firms would have similar names.

26. Before June 2020, Rule 7.5 prohibited a lawyer in private practice from practicing under a trade name, or a firm name containing names other than one or more of the lawyers in the firm, with certain exceptions not relevant here. Then, however, the Rules were changed to allow a firm to use any name that is not false, deceptive or misleading, including one that is misleading as to the lawyers practicing under such name:

> (b) (1) A lawyer in private practice shall not practice under:
> (i) a false, deceptive or misleading a trade name;
> (ii) a false, deceptive, or misleading domain name; or
> (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

27. As we noted in N.Y. State 1207 (2020), this allows a name that does not include the name of any lawyer in the firm, and a name based on its street address. Comments [3], [4] and [5] to Rule 7.5 give examples of deceptive and misleading firm names. However, as we noted in N.Y.

State 1207, whether a particular name is false, deceptive or misleading is a heavily fact-based inquiry and beyond the jurisdiction of our Committee.

28. The concern with co-branding two completely separate firms is the possibility that it will mislead the public as to the nature of the relationship between the firms and may indicate that the firms are branches of a single firm. Cf. Rule 7.5(d), which allows partnerships between lawyers licensed in different jurisdictions, as long as any enumeration of the members and associates of the firm make clear the jurisdictional limitations of those lawyers not licensed to practice in all listed jurisdictions, and allowing the same firm name to be used in each jurisdiction.

29. In N.Y. State 1093 (2016), which involved a New York law firm and a U.K. ABS with a common partner, we assumed that the New York firm would not be managed in such a way that it operated as a branch of the U.K. ABS. See also N.Y. State 911 (2012) (a foreign law firm with non-lawyer members or managers may not have a branch in New York). We also stated that a profit-sharing arrangement (which we are told is not present here) would implicate the same concerns.

30. The inquirer states that, although the firms would not share profits, the compensation of partners across the two firms may consider, among other factors, the aggregate profits of the two firms. We believe this would be an indicator that the firms are being managed as a single firm.

31. We believe that a co-branding arrangement could also raise concerns that Firm XYZ is a branch of the U.K. ABS, without disclosure of the exact nature of the relationship between the two firms.

Joint Billing

32. The inquiry states that, when the two law firms represent a client together on the same matter, the combined fees may be presented on a single invoice to the client (after disclosure and client consent), with the law firm receiving the combined fees in the first instance and providing a subsequent payment of the other law firm's share of those fees. We assume that both firms are proving legal services, and that one firm is not entitled solely to a referral fee (i.e. dividing a single legal fee).

33. In N.Y. State 1211 (2020), we considered how counsel in one matter may charge the client for the fees and disbursements of another lawyer who performs related legal services for the client. We noted that Rule 1.5(b) requires that the New York lawyer communicate with the client "the scope of the representation and the basis or rate of the fee or expenses for which the client will be responsible." We also advised that there are two caveats when two firms supply services in the same matter. First, the fees of both firms must be reasonably incurred to achieve the objectives of the representations. Second, charging the legal fees and disbursements of the second firm as disbursements of the first firm must not violate the prohibition of Rule 1.5 against charging an "excessive" fee or expense. However, we concluded that how the client would actually be billed was a matter of contract law with the client, citing ABA 00-420 ("Whether the cost attributable to a contract lawyer is billed as an expense or included in legal service fees is not addressed by the Model Rules and does not seem to be a matter of ethics.") Here, although each firm would be calculating its own fees and expenses, the retainer agreement of one of the law firms may provide that such firm will charge the fees and expenses of the other firm as long as the fees of both firms were reasonably incurred to achieve the objectives of the representations, the total fees and expenses of the two firms are not excessive and the work performed by each firm is made clear to

the client.

CONCLUSION

34. Rule 7.5(d) recognizes partnerships between a lawyer licensed in New York and one admitted in a foreign jurisdiction, as long as the foreign country's educational requirements for admission are generally similar to those for New York attorneys and the standards of professional conduct and discipline governing the foreign attorney are essentially compatible with New York's standards.

35. Although the role of English lawyer here would involve matters of strategy, business and general management, and the inquirer states that the English lawyer will not practice law from the New York firm, we cannot rule out that administrative duties will involve the practice of law. For example, if the foreign lawyer plays an active role in determining which clients the New York firm should represent, including assessing whether representation would involve conflicts of interest and evaluating the merits of cases, or actively oversees the conduct of matters being handled by the firm, the foreign lawyer might be deemed to be exercising legal judgment and thus practicing New York law without a license.

36. No New York-admitted lawyer would be a member or employee of the U.K. ABS. The U.K. ABS would have no ownership in Firm XYZ or any right to control S's independent professional judgment or role in Firm XYZ. We therefore see no basis for finding a violation of Rule 5.4 based solely on the fact that S would be a partner of both firms.

37. We cannot opine as to affiliations between law firms without sufficient facts, but our prior opinions address referral relationships, and the problems of describing relationships between firms without being deceptive or misleading.

38. The issue with co-branding two completely separate firms is the possibility that it will mislead the public as to the nature of the relationship between the firms and may indicate that the firms are branches of a single firm.

39. Where two law firms provide services to the client on the same or ancillary matters, it is permissible for the retainer agreements to provide that one of the firms will charge the fees and expenses of the other firm as a disbursements on its own invoice and then pay the other firm what it is owed, as long as the fees of both firms were reasonably incurred to achieve the objectives of the representations and the total fees and expenses of the two firms are not excessive.

(10-22)