NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 864 (5/10/11)

Topic: Fee sharing and co-counsel arrangements with a lawyer not licensed in New York; disclosure in retainer and closing statements

Digest: A lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer and share legal fees with that lawyer if the arrangement complies with Rule 1.5(g).

Rules: 1.5(g), 5.1, 5.4(b), 5.5, 7.5(d).

QUESTION

1. The inquirer, a New York lawyer who desires to works on a personal injury case in New York with a lawyer who is admitted in another state but not New York (the "Out-of-State Lawyer"), raises three related questions:

A. May the New York lawyer share legal fees with the Out-of-State Lawyer?

B. If so, should the name of the Out-of-State Lawyer and the basis for the division of fees be placed in the retainer agreement that the New York lawyer provides to the client?

C. Should the Out-of-State Lawyer's name and the basis for the division of fees be included in any retainer statement and/or closing statement that the New York lawyer files with the Office of Court Administration?

OPINION

2. The inquirer, a personal injury lawyer who is admitted and practicing law in New York, has been contacted by the Out-of-State Lawyer, who represents a client in another state on certain matters. The client was injured as the result of an accident that occurred in New York. The Out-of-State Lawyer suggests that the New York lawyer "handle" the case but that the Out-of-State Lawyer remain involved and be compensated for her work out of the recovery proceeds. The inquirer asks whether the fee sharing arrangement is ethically permissible even though the Out-of-State Lawyer is not admitted in New York. In addition, the inquirer asks about

how to prepare the retainer agreement for the client and what to disclose about the Out-of-State Lawyer under the rules of the Appellate Divisions.

Question A: Sharing Legal Fees with an Out-of-State Lawyer

3. Rule 1.5(g) of the New York Rules of Professional Conduct states that a lawyer shall "not divide a fee for legal services with another lawyer who is not associated in the same law firm" unless three factors are met:

(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.

4. Implicit in the inquirer's question is whether a non-New York lawyer qualifies as a "lawyer" for purposes of the fee-sharing safe harbor set forth in Rule 1.5(g). The issue is an important one because the term "lawyer" when used in a New York Rule of Professional Conduct does not have a constant, fixed meaning, and may have different meanings in different rules and contexts. *See, e.g.,* Wally Larson, Jr. and Lewis Tesser, *Who is the "Lawyer" Governed by New York's Disciplinary Rules*, Bloomberg Law Reports – New York Law at 8-11 (June 2009).

5. Consider the predecessor of Rule 5.1(a) -- DR 1-104(A) – which provided: "A law firm shall make reasonable efforts to ensure that *all lawyers in the firm* conform to the Disciplinary Rules." (Emphasis added.) In N.Y. State 762 (2003), which inquired about supervisory responsibilities in a New York law firm that had offices in multiple states, we interpreted that language to require a New York firm to make reasonable efforts only to ensure that "lawyers subject to the New York [Rules] who are affiliated with the firm comply with the New York [Rules].". Since Rule 5.1(a) is virtually identical to DR 1-104(A), that interpretation still holds. Thus, the term "lawyer" in Rule 5.1(a) means a lawyer admitted in New York and subject to New York Rules for purposes of the conduct at issue.

6. In other Rules, however, we have interpreted the term "lawyer" to mean something broader. For example, Rule 5.4(b), like its predecessor DR 3-103(A), prohibits a lawyer from forming a law partnership with a "nonlawyer." In N.Y. State 806 (2007), we noted that the predecessor of Rule 7.5(d) – DR 2-102(D) – explicitly contemplated partnerships between New York lawyers and lawyers licensed in other jurisdictions. We concluded that while the predecessor of Rule 5.4(b) might appear on its face to prohibit partnerships between a New York lawyer and a non-New York lawyer, the language of Rule 7.5(d) must mean that a "nonlawyer" is someone not subject to comparable educational requirements for admission and standards of training, professional conduct and discipline. In other words, a "lawyer" need not be admitted and practicing in New York to qualify as a "lawyer" for purposes of Rule 5.4(b). *See also* N.Y. State 542 (1982) (a lawyer admitted to practice law in any U.S. jurisdiction is not a "non-lawyer" under DR 3-103)

7. Various other New York Rules also use the term "lawyer" to refer to something broader than a New York-admitted practitioner. For example, Rule 7.3(i) states that the restrictions on solicitation apply to a "lawyer" who is "not admitted to practice in this State" but who solicits retention by New York residents. Rule 7.5(d) refers to "lawyers licensed in different jurisdictions." And Rule 8.5 refers to a "lawyer admitted in this state" and "lawyer licensed to practice in this state," implying that the term "lawyer" standing alone could apply to those not admitted or licensed in New York State.

8. In N.Y. State 806 (2007), which is even more closely on point, we construed DR 2-107(A), which was the predecessor of Rule 1.5(g). We concluded that a New York law firm is ethically permitted to "participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and *in sharing of legal fees* in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with. DR 2-107(A)." (Emphasis added.) We reasoned that if an examination shows that Italian lawyers have education, training and ethical standards comparable to those of American lawyers, Italian lawyers may be considered "lawyers" within the meaning of Rule 1.5(g). N.Y. State 806 also noted (in footnote 2) that virtually every jurisdiction examining the issue has permitted its lawyers to divide fees with out-of-state lawyers, provided that in-state ethics requirements are satisfied.

9. What we implied in N.Y. State 806, we now make explicit. Lawyers from other U.S. jurisdictions are "lawyers" within the meaning of Rule 1.5(g), and New York lawyers may share fees with lawyers from other U.S. jurisdictions as long as the fee-sharing arrangement complies with the terms of Rule 1.5(g). We do not believe that sharing fees with the Out-of-State Lawyer will diminish the quality of the representation or undermine the inquirer's ability to fulfill the duties of loyalty and confidentiality. *See generally* ROY SIMON, SIMON'S CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED at 447 (2008) ("Unlike a disbarred lawyer or a lawyer disqualified due to a conflict of interest, the out-of-state lawyer could handle the matter personally if he came to New York to be admitted *pro hac vice*."); Rule 5.4, cmt. [1] (the prohibition on fee-sharing with nonlawyers is intended to protect the lawyer's professional independence of judgment). *Cf.* Rule 1.5, Cmt. [7] ("Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.").

10. We assume that the Out-of-State Lawyer would not violate New York's rules against unauthorized practice of law. If our assumption is incorrect, then the inquirer might be violating Rule 5.5(b) (lawyer shall not aid nonlawyer in the unauthorized practice of law). *See* N.Y. State 801 (2006) (interpreting the term "nonlawyer" for purposes of DR 3-103(A), the Code predecessor of Rule 5.5(b), to mean a non-New York lawyer, and interpreting DR 3-103(A) to prohibit a New York attorney from partnering with an out-of-state attorney whose services constitute the unauthorized practice of law).

Question B: The Retainer Agreement Provided to the Client.

11. Given that the New York lawyer and the Out-of-State Lawyer will be dividing the legal fees from the personal injury action, the New York lawyer asks whether the name of the Out-of-State Lawyer and the basis for the division of fees must be placed in the retainer agreement that the New York lawyer intends to provide to the client. Two provisions of Rule 1.5 are potentially relevant.

12. Rule 1.5(c) addresses the specific contents of the "writing" that a lawyer must promptly give to a client in a contingent fee matter. That writing must state "the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated." The writing must also "clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party." But despite this high level of detail, Rule 1.5(c) does not say that the share of the fee that each lawyer will receive must appear in the required writing. Nor does it say that the writing must be a retainer agreement.

13. Rule 1.5(g)(2) (already quoted above) requires that the inquirer obtain the client's agreement to employment of the Out-of-State 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" – but it does not say that this information must appear in the retainer agreement. We assume that the inquirer will comply with Rule 1.5(g).

14. We therefore conclude that the New York Rules of Professional Conduct do not require either the name of the Out-of-State Lawyer or the basis for division of fees to be included in a retainer agreement. It may be that court rules outside the Rules of Professional Conduct require such information. *See, e.g.,* 22 NYCRR Part 1215 (requiring a written letter of engagement or a retainer agreement in certain matters, and specifying their contents). But interpreting court rules is outside the jurisdiction of this Committee.

Question C: The Closing Statement Filed with OCA.

15. The inquirer also asks whether the Out-of-State Lawyer's name and the basis for the fee division must be reflected on any retainer and/or closing statements filed with the Office of Court Administration. The *inquirer* appears to be referring to the requirements of court rules such as 22 NYCRR §603.7 (1st Dept.) and §691.20 (2nd Dept.), which prescribe filing requirements in claims or actions for personal injuries, property damage, etc.. (The Third and Fourth Departments of the Appellate Division do not have analogous requirements.) Again, our Committee's jurisdiction is limited to interpreting the New York Rules of Professional Conduct. We do not interpret the filing requirements of the First or Second Judicial Departments as set forth in the Rules of the Appellate Courts.

CONCLUSION

16. A New York lawyer handling a personal injury case referred by an out-of-state lawyer is ethically permitted to work on the case with the out-of-state lawyer and share legal fees with the out-of-state lawyer, provided that the arrangement complies with Rule 1.5(g).

(6-11)