



## Committee on Professional Ethics

Opinion 887(11/15/11)

**Topic:** Non-lawyer marketers; bonus compensation to non-lawyer based on new business

**Digest:** A lawyer or law firm may have a non-lawyer marketer who engages in only that advertising and solicitation in which the lawyer or law firm could engage. The lawyer or law firm may have a profit-sharing plan that pays bonus compensation to the non-lawyer marketer based on overall profits of the firm or on a percentage of the employee's base salary. However, the bonus compensation may not be based on referrals of particular matters and may not be based on the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts.

**RULES:** Rule 1.0(a), 5.3(b), 5.4(a), 5.4(a)(3), 7.1, 7.2, 7.3(a)(1), 7.3(b), 8.4(a), 8.4(a)(3).

### QUESTION

[1] May a law firm hire a non-attorney marketer to market to potential corporate or union clients the firm's pre-paid legal services plans and its services as a provider of pre-paid legal services? May a law firm marketer be paid more than a salary, e.g., a success fee for signing up pre-paid legal services plan sponsors?

## OPINION

[2] A lawyer may disseminate an advertisement<sup>1</sup> about the lawyer or his/her law firm and the lawyer's or law firm's services, including newspaper advertisements, letters and brochures. See *generally* Rule 7.1 of the N.Y. Rules of Professional Conduct (the "Rules") and the comments thereto.

[3] The lawyer's ability to engage in in-person solicitation,<sup>2</sup> however, is far more limited. Rule 7.3(a)(1) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from engaging in solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication" unless the recipient is a close friend, relative, former client or existing client of the lawyer."

[4] Clearly, a lawyer may hire an employee ("Marketer") to engage in advertising and solicitation activities in which lawyers themselves could ethically engage. See Rule 7.2, cmt [1](a lawyer may "compensate employees, agents and vendors who are engaged to provide marketing or client development services"). Thus a Marketer, like a lawyer in the firm, could develop print or web-based marketing materials and could solicit business in person or by telephone from the law firm's existing and former clients. See also the definitions of advertisement and solicitation, each of which includes a communication made on behalf of a lawyer or law firm.

[5] A Marketer, however, is not permitted to engage in any activities that would be prohibited to the lawyer. See Rule 8.4(a)("A lawyer or law firm shall not violate or attempt to violate the Rules of Professional Conduct through the acts of another"). Moreover, a lawyer is liable for compliance by his or her employees with the requirements of the Rules of Professional Conduct. See Rule 5.3(b)("A lawyer shall be responsible for the conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer [under the circumstances specified in the Rule].")

[6] Consequently, if the Marketer would merely prepare written advertising materials for distribution to prospective clients or to the public, there would be no ethical issues, provided that they complied with Rule 7.1, including labeling it "attorney advertising", and the requirement for having it pre-approved by the firm. This is so even if the written materials were directly addressed to particular persons. See *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988)(letter targeted to clients that lawyer knew could use the lawyer's services.)

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<sup>1</sup> An advertisement is any public or private communication made by or on behalf of a lawyer or law firm about the lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers. Rule 1.0(a).

<sup>2</sup> Solicitation means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client. See Rule 7.3(b).

[7] However, the law firm could not authorize the Marketer to meet with or call prospective clients who are acquaintances of the Marketer in order to promote the firm's services, because doing so would violate Rule 7.3(a)(1) unless the prospects were close friends, clients or former clients of the law firm.

### Employee Compensation Arrangements

[8] Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlayer, with limited exceptions. A significant exception is that Rule 5.4(a)(3) permits a lawyer to "compensate a nonlawyer employee . . . based in whole or in part on a profit sharing plan." Comment 1B explains:

Paragraph (a)(3) permits limited fee sharing with a nonlawyer employee, where the employee's compensation or retirement plan is based in whole or in part on a profit-sharing arrangement. Such sharing of profits with a nonlawyer employee must be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case.

[9] Rule 5.4 (a)(3) is a limited exception to the prohibition against a lawyer or law firm sharing legal fees with a non-lawyer. However, it does not supersede Rule 7.2, which prohibits a lawyer from compensating a person to recommend the lawyer's employment or rewarding that person for a recommendation resulting in employment.

[10] In N.Y. State 733 (2000), we held that a lawyer may not pay a non-lawyer employee a percentage of fees attributable to matters referred by the employee as compensation for the referral. Although that opinion interpreted former DR 3-102(A)(3) under the Code of Professional Responsibility, the former disciplinary rule is the same as Rule 8.4(a)(3) except for punctuation, and we would reach the same result under the Rules.

[11] Rule 5.4(a)(3) clearly allows a lawyer to pay a bonus to a non-lawyer employee, including an employee engaged in marketing, that is not based on referrals of particular clients or matters, but rather is based on the profitability of the entire firm or a department within the firm. Although Comment 1B interprets this prohibition as prohibiting the profit-sharing arrangement from being based on the fee resulting from a single case, it does not rule out the success of marketing efforts from being a factor in the amount of the bonus. Nevertheless, if the profits of the firm or the employee's department are directly related to the success of the employee's marketing efforts, it is difficult to see how a law firm could pay a marketing employee a bonus based on the profits of the firm or the department for which the employee engages in marketing without the bonus being considered a direct sharing of legal fees. This, of course, would depend on the size of the department and the extent to which the profits of the department are based on clients resulting from the employee's marketing efforts. Such determinations are necessarily fact-specific. Accordingly, they are not amenable to general rules. Where profits of the firm or the department are not directly correlated with the employee's marketing efforts, a bonus plan based on a percentage of the

employee's salary or a percentage of the overall profits of the firm would pass muster under the Rule.

### **CONCLUSION**

[12] A lawyer or law firm may have a non-lawyer marketer who engages in only that advertising and solicitation in which the lawyer or law firm could engage. The lawyer or law firm may have a profit-sharing plan that pays bonus compensation to the non-lawyer marketer based on the overall profits of the firm or on a percentage of the employee's base salary. However, the bonus compensation may not be based on referrals of particular matters and may not be based on the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts.

(9-11)