



Committee on Professional Ethics

Opinion 917 (3/27/12)

Topic: Non-lawyer marketers; bonus compensation to non-lawyer based on number of clients.

Digest: A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients. The law firm may not pay a fee for the referral or recommendation of a specific client.

Rules: 5.4, 7.2, 7.3

QUESTION

1. May a law firm ethically pay a bonus to a nonlawyer employee marketer based on either (1) the number of clients brought in, without regard to the fee paid or recovery awarded to the client, or (2) the actual number of clients over a certain minimum threshold.?

OPINION

2. A lawyer or law firm may utilize a non-lawyer marketer to engage in advertising and solicitation in which the lawyer or law firm could 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”). Such marketer, however, may only engage in such advertising or solicitation that the lawyer or law firm itself could ethically engage. N.Y. State 887 (2011). Thus a marketer could prepare print or web-based marketing materials and advertisements and could solicit business in person or by telephone from the law firm’s existing and former clients.

3. A marketer, however, may not engage in any activities that would be prohibited if undertaken by a lawyer. Rule 7.3 (a)(1) of the New York Rules of Professional Conduct provides that a “lawyer shall not engage 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.” Thus the law firm could not authorize a nonlawyer employee to engage in in-person solicitation on its behalf, unless the person being solicited is a close friend, relative, former or existing client. *See* N.Y. State 887 ¶ 8.

4. Furthermore, Rule 7.2(a) provides a “lawyer 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.” Thus the law firm could not pay a bonus to an employee-marketer that is based on the referral or recommendation of specific clients. In N.Y. State 902 (2012), the Committee opined that a lawyer could not compensate a

marketing firm to introduce the lawyer to its network of doctors and may not compensate the marketing firm for each introduction and meeting with one of the doctors. In addition, the law firm could not pay an additional fee to the marketer if the doctor retained the attorney in a fixed number of collection cases. *Id.* at ¶ 10.

5. If, however, the marketing by the nonlawyer employee is advertising and does not constitute solicitation, it would be permissible to pay the marketing employee based on the number of clients obtained so long as that payment does not relate to fees earned from those clients. Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, 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.

6. In N.Y. State 887 (2011) the Committee opined that a lawyer or law firm may have a profit-sharing plan that pays bonus compensation to a 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. Thus, the employee-marketer might be paid a bonus based solely on the number of clients obtained from the advertising, but that bonus could not be calculated with respect to the fees paid by those clients.

CONCLUSION

7. A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to fees paid by the clients. The law firm may not pay a fee for the referral or recommendation of a specific client.

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