



## **New York State Bar Association Committee on Professional Ethics**

Opinion 992 (11/13/13)

**Topic:** Permissible business structures and fee arrangements for a lawyer to work with a business person who seeks to establish a “Disability Office” to help persons with government benefit matters, most of which do not require representation by legal counsel.

**Digest:** A lawyer seeks to work with a nonlawyer who will establish a “Disability Office” in the local community to assist people with Social Security Supplemental Income, Social Security Disability Income, Medicaid Planning, and Guardianship matters. Some of these services may be performed by a nonlawyer pursuant to applicable regulations. The lawyer may not enter into a partnership or be employed by a nonlawyer to solicit third party clients, nor may the lawyer share legal fees with the business person. The lawyer may compensate the business person for marketing and may provide for other forms of compensation for the success of the firm. The lawyer may not enter into a business with a nonlawyer to handle matters where the lawyer is practicing law even if those services may be performed by a nonlawyer.

**Rules:** 5.4, 5.7, 5.8, 7.2 (a)

### **QUESTION:**

1. The inquiring lawyer seeks to enter into an arrangement with a business person to provide legal services to assist clients in the community with government benefits programs (Social Security Supplemental Income, Social Security Disability, Medicaid Planning, Medicare and an occasional guardianship). He asks whether any of the following four proposals are consistent with the Rules of Professional Conduct:

- a. Businessman runs a “Disability Office” and employs attorneys. Attorney meets with clients and sets the fees. The fees are paid to the Office, and the percentage is then paid to the attorney.
- b. Businessman runs a “Disability Office” and enters into a legal services agreement with attorney’s law firm, where attorney pays the Office certain percentage of the fees from each case.
- c. Attorney opens a separate law firm and employs the businessman as an Office and Marketing manager. Officer gets paid percentage of the overall business he brings in through his marketing efforts.
- d. Businessman employs attorney in nonlegal capacity to represent clients with the matters not requiring a legal license.

## **BACKGROUND**

2. The inquirer practices in the field of trusts and estates, guardianships and provides services to assist clients in Medicaid planning, Medicare, Social Security Supplemental Income (SSI), Social Security Disability Income (SSDI), and guardianships. He is of Russian descent, fluent in Russian, and provides these services to the Russian immigrant community. There are few lawyers of his background in his community performing these services, which are in high demand.

3. By statute, nonlawyers may represent clients in Social Security and Medicaid cases through the hearing process. 42 U.S.C. 406 (a) (1); 20 C.F.R. §404.1705 (non-attorney representatives”), 18 N.Y.C.R.R. 358-3.9 (non-attorney authorized representatives for Medicaid and other hearings). Only attorneys may represent a client in the appeal of such cases, in guardianship proceedings or in providing legal advice in Medicaid planning. In SSI and SSDI matters, fees are contingent of up to 25 per cent of the overall award.

4. A businessman in the inquirer’s community wants to establish a “Disability Office” to assist the community with its unmet needs to obtain Social Security Supplemental Income, Social Security Disability Income, Medicaid Planning, and Guardianships. This for-profit entity would market its services to assist clients in the community with government benefit programs, fair hearings and guardianships. The businessman (owner) would have no client contact and would not interfere with the attorney-client relationship.

5. The attorney seeks to enter into a structural relationship and fee arrangement with the businessman that is consistent with the Rules of Professional Conduct. The attorney proposes four structures and inquires whether any of them are permissible.

## **OPINION**

### Structural Relationship

6. Rule 5.4 (d) provides that:

“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...
- (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

7. The rule seeks to protect the independent professional judgment of a lawyer and uncompromised loyalty to the client. Despite longstanding debate as to whether it should be

revised to permit Alternative Law Practice Structures,<sup>1</sup> New York Rule 5.4(d)(2) endures and is intended to regulate nonlawyer ownership of entities in which a lawyer engages in the practice of law for profit. See Roy D. Simon, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED, 1152-1157 (2013). So the proposal for the inquiring attorney working as an "employee" of the Disability Office is prohibited by Rule 5.4(d)(2).

8. Judiciary Law § 495 prohibits the practice of law by a corporation or voluntary association. Thus, the Disability Office may not engage in the practice of law. Moreover, Rule 5.4 (b) also prohibits a lawyer from forming a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law. Even if the business employed persons who are permitted by law to represent claimants in Social security and Medicaid hearings, it could not provide representation of clients in guardianships and Medicaid planning because legal advice on such matters constitutes the practice of law. In such circumstances, the lawyer may not form a partnership with a nonlawyer.

9. Rule 5.8 permits ongoing business relationships with a nonlawyer service provider, but only under limited circumstances that are not presented here. The first of these criteria is that the nonlawyer professional be one of those listed by the Appellate Division Rules §1205.3 (22 NYCRR §§1205.3) (limited to architects, certified public accountants, professional engineers, land surveyors, certified social workers). See N.Y. STATE 930 (2012); N.Y. STATE 885 (2011). Thus, neither Rule 5.4 (d) nor Rule 5.8 permits the first two business arrangements contemplated by the inquirer, wherein the attorney proposes to work directly for the business entity or have a legal services agreement with the business owner.

#### Fee Agreement

10. Even though the inquiring attorney may not enter into a business relationship as discussed above, the lawyer may enter into an agreement to compensate the business owner for marketing or other services. That agreement is subject to several rules.

11. First, it is long established that a lawyer may not share a legal fee with a nonlawyer. Rule 5.4 (a); N.Y. JUDICIARY LAW §491. Two of the proposed business structures are impermissible fee sharing agreements.

These are:

Businessman runs a "Disability Office" and employs attorneys. Attorney meets with clients and sets the fees. The fees are paid to the Office, and the percentage is then paid to the attorney.

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<sup>1</sup> NYSBA Task Force on Nonlawyer Ownership, [www.nysba.org](http://www.nysba.org); ABA Commission on Ethics 20/20 Discussion Paper on Alternative Law Practice Structures, <http://222.americanbar.org/Ethics2020>; See District of Columbia Rules of Professional Conduct, Rule 5.4 (permitting forms of Alternative Law Practice), [http://www.org/for\\_lawyers/ethics/legal\\_ethics/rules\\_of\\_professional\\_condcut/amended\\_rules/rule\\_five/rule05\\_04.cfm](http://www.org/for_lawyers/ethics/legal_ethics/rules_of_professional_condcut/amended_rules/rule_five/rule05_04.cfm)

Businessman runs a “Disability Office” and enters into a legal services agreement with attorney’s law firm, where attorney pays the Office certain percentage of the fees from each case

12. Second, a lawyer may not pay a fee to a person or organization for referring or recommending employment by specific clients. Rule 7.2 (a); N.Y. STATE 887 (2011); N.Y. STATE 917 (2012).

13. However, a lawyer may pay for marketing and advertising. Comment [1] to Rule 7.2 provides that:

A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services such as publicists, public relations personnel, marketing personnel and web site designers.

*See also* N.Y. STATE 860 (2011) (firm can pay for marketing or client development services).

14. In N.Y. STATE 887 (2011) we opined that a firm could pay a bonus to the marketer employee based on overall profits of the firm or on a percentage of the employee’s salary. The firm may pay a bonus to the marketer based upon the number of clients referred, but not based on the fees paid by those clients. N.Y. STATE 917 (2012).

15. The firm may also enter into a profit sharing arrangement as part of a retirement plan so long as that agreement is not tied to profit from a particular case or cases. Rule 5.4 (a)(3) provides that “a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit sharing arrangement. Comment 1[B] clarifies that “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.”

16. Thus, the third proposed business arrangement is permissible only if the business person receives a bonus based upon firm profitability or a percentage of his salary. Payment of a percentage of firm profits for a specific matter is tantamount to fee sharing and is not permitted. The proposed arrangement is prohibited because it contemplates that the attorney will open a firm, employ the businessman as an Office and Marketing manager, and pay him a percentage of the overall business he brings in through his marketing efforts.

### Nonlawyer Practice

17. The final proposed structure contemplates that the businessman will hire the lawyer in a nonlegal capacity to represent clients for the matters not requiring a legal license.

18. As indicated above, regulations authorize persons other than attorneys to represent claimants in Social Security hearings. The governing regulations set forth specific criteria that qualify non-attorneys as representatives of clients in these cases.. CFR § 404.1705 (b). The non-attorney is referred to as a “representative.” N.Y. STATE 938 (2012). State regulations permit

non-attorneys who are authorized by claimants to represent them in Medicaid hearings. These persons are referred to as “authorized representatives.” Thus, the business may employ any such qualified person to represent claimants in such proceedings.

19. We have previously opined that SSDI services are “nonlegal services” defined in Rule 5.7 (c) as “those legal services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer.” NY STATE 938 (2012). It is not the unauthorized practice of law for non lawyers to advise clients as to SSDI. The same is true for nonlawyer representatives in Medicaid hearings.

20. However, a lawyer who provides such SSDI or Medicaid services, is by definition, engaged in the practice of law and provides the client with legal services. (NY STATE 938 (fn.2) notes that a lawyer providing such services was a different matter).

21. The governing SSDI regulations distinguish between attorney and non-attorney representation. Attorneys may represent claimants so long as they are in good standing before a court. CFR§ 404.1705 (a). Where an attorney is engaged, the client has a reasonable expectation that the attorney has the skills and qualifications beyond that of a non attorney representative, is governed by professional conduct rules, and is subject to civil liability for the representation. Consequently, that lawyer may not circumvent the Rules of Professional Conduct and practice law by a designation that the attorney is employed in a “non-legal capacity” even if a non attorney may perform the same legal services. Cf., Rule 4.3.

## **CONCLUSION**

22. The lawyer may not be employed by a nonlawyer to represent third party clients, nor may the lawyer share legal fees with the business person. The lawyer may compensate the business person for marketing and may provide for other forms of compensation for the success of the firm. Alternatively, the lawyer may hire a business person and compensate him through a bonus or profit-sharing as part of a retirement plan. The lawyer may not enter into a business with a nonlawyer to handle matters where the lawyer is practicing law even if those services may be performed by a nonlawyer.

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