Committee on Professional Ethics

Opinion 927 (8/2/12)

Topic: Referrals by Non-Lawyer; Attorney Fees Paid by Third Party

Digest: Lawyer may not ethically enter into arrangement with a non-lawyer to accept referrals for a fixed monthly fee for each case referred where case has been obtained by telephonic solicitation.

Rules: 1.0(j),1.5(a) and (b), 1.8(f), 5.3(b), 5.4(a), 7.2(b), 7.3(a)(1), 8.4(a)

QUESTION

[1] May a lawyer enter into an arrangement to (a) accept referrals of mortgage foreclosure cases from a non-lawyer who will pay the lawyer a monthly fee and (b) have the lawyer's legal fees paid by a third party that referred the client to the lawyer?

FACTS

[2] A corporation (the "Corporation") that is not a law firm intends on a non-exclusive basis to refer clients to the lawyer which clients are in the process of having their residences in New York foreclosed. The legal services would include matters related to loan defaults, mortgage foreclosures and bankruptcies. The lawyer will bill the Corporation a flat fee of $300 each month for each referral regardless of how many or how few hours the lawyer must devote to the matter. The Corporation will pay the lawyer from funds paid to the Corporation each month by the Client. Upon conclusion of the matter the Corporation will retain the balance of the funds for its role in obtaining the Client. The Corporation has no obligation to refer any clients to the lawyer and the lawyer has no obligation to accept any client. Before accepting any client the lawyer will run a conflict check. The Corporation obtained the potential clients by checking public records and contacting the individuals by telephone. The clients enter into an agreement with the Corporation to pay something each month in excess of the amount paid to the lawyer. The lawyer is not advised how much in excess is paid by the client to the Corporation. The Corporation promises prospective clients that it has lawyers in the client's geographical area that are competent to handle the matter and refers their matter to such lawyer. The agreement is between the client and the Corporation, not between the client and the lawyer.

[3] The lawyer has not and will not pay the Corporation anything of value for the referrals.

APPLICABLE RULES

[4] The answer to the question based upon the facts implicates a number of provisions of the Rules of Professional Conduct (the "Rules") including the following:

(a) Rule 1.5(a) prohibits a lawyer from charging an excessive or illegal fee.
(b) Rule 1.5(b) and 22 N.Y.C.R.R §1215.1 require a lawyer to furnish a client with an engagement letter or retainer agreement at the outset of the representation.

(c) Rule 1.8(f) prohibits third party payment of legal fees unless the client gives informed consent.

(d) Rule 5.3(b) makes a lawyer responsible for conduct of a non-lawyer associated with the lawyer that would be a violation of the Rules if engaged in by the lawyer.

(e) Rule 5.4(a) prohibits a lawyer from sharing a legal fee with a non-lawyer.

(f) Rule 7.2 (b) provides that a lawyer may be recommended, employed or paid by a legal aid office, a public defender office or a bar association sponsored lawyer referral service.

(g) Rule 7.3(a)(1) prohibits a lawyer from solicitation by in-person or telephone contact.

(h) Rule 8.4((a) prohibits a lawyer from violating a Rule through the acts of another.

OPINION

Question of Law

[5] This inquiry raises a substantial question of law which is beyond the jurisdiction of this Committee to resolve. Would the Corporation by solicitation of clients from public records of current foreclosures and referring the matter to an attorney be engaged in actions in violation of Judiciary Law §479 (soliciting business on behalf of an attorney), §482 (employment by attorney of person to aid, assist or abet in the solicitation of business or the procurement through solicitation of a retainer to perform legal services) or §495(1)(d) (prohibiting corporations from furnishing attorneys)? Apart from the law, the proposed arrangement is ethically flawed in numerous respects and accordingly, a New York lawyer should not enter into the proposal.

Fee Not to be Excessive

[6] While flat or fixed fees are not prohibited by Rule 1.5(a) as such, Simon's New York Rules of Professional Conduct 111 (2012 ed.), the fee cannot be excessive. Rule 1.5(a); Restatement Third, The Law Governing Lawyers §34 (2000). This is so even though the parties agreed to the fee. Restatement Third, The Law Governing Lawyers §34, com. *a* (2000). Here there is to be a charge by the lawyer of $300 each month for the entire length of the matter whether or not legal services are performed that month. This is more akin to a monthly retainer which, depending upon the circumstances, may be permissible. N.Y. State 599 (1989). For the purposes of this opinion we need not distinguish between the classical or general retainer, advance refundable payment, minimum non-refundable payment or fixed fee. Whether or not

the fee described in the proposed arrangement would be excessive cannot be determined based upon the facts given in this inquiry; but there is a rebuttable presumption that a flat or fixed fee unrelated to the service performed for a lengthy period at some point becomes excessive. Retainer or fixed fees agreed to by unsophisticated clients should be more closely scrutinized to ensure that they are no greater than is reasonable. On top of the fee charged by the lawyer, the Corporation here adds its monthly fee. The two combined are presumptively excessive for lack of a stated justification.

[7] As stated in N.Y. State 599 (1989), paralleling the Code (now the Rules) provisions are legal standards applicable to a lawyer's fee. "[A]s a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients. . . . An attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client. . . ." *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985). "A client may always discharge his attorney, with or without cause, and in the absence of a contract providing otherwise an attorney discharged without cause is entitled to be compensated in quantum meruit." *Id.* citing *Martin v. Camp*, 219 N.Y. 170 (1916); *see also,e.g.,Rubenstein v. Rubenstein*, 137 A.D.2d 514 (2d Dep't 1988) (fairness and reasonableness of fee); *J.M. Heinike Associates v. Liberty National Bank*, 142 A.D. 2d 929, 930 (4th Dep't 1988) (unconscionability of retaining prepaid fee following withdrawal from employment in absence of good cause). *Cf.*, Brickman & Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 Fordham L.Rev. 149 (1988).

Notice to Client

[8] Both the Rules [Rule 1.5(b)] and the law where the fees are expected to exceed $3,000 (22 N.Y.C.R.R. §1215.1) require that the lawyer at the commencement of the representation or a reasonable time thereafter advise the client the scope of the representation and the basis or rate of the fee unless the client has been regularly represented and the services are of the same general kind as previously rendered. Under the facts of the matter before us, this was not done. The proposed arrangement thus does not comply with the Rule and possibly the regulation.

Telephone Solicitation

[9] The Corporation's telephonic solicitation of the client if done by the lawyer would be in violation of Rule 7.3(a)(1) and its predecessor DR 2-103 (A) of the Code of Professional Responsibility (the "Code") prohibiting such solicitation. Because Rule 5.3(a) and its predecessor DR 1-104(D)(1) of the Code makes a lawyer responsible for conduct of a non-lawyer associated with the lawyer that would be a violation of the Rules if engaged in by the lawyer, the lawyer would be in violation of the Rules as the lawyer is associated with the Corporation in the proposed arrangement. N.Y. State 694 (1997); N.Y. State 828 (2009). We do not address First Amendment considerations discussed in *Ohralik v. Ohio State Bar Assn.,*436 U.S. 447 (1978) upholding a ban on in person solicitation, *Shapero v. Kentucky Bar Assn.,* 486 U.S. 466 (1988) permitting direct mail solicitation, *In re von Wiegen,* 63 N.Y. 2d 163 (1984) permitting direct mail solicitation or *Florida Bar v. Went for It, Inc.,* 515 U.S. 618 (1995) upholding a ban on mail solicitation to accident victims as these are questions of law beyond the jurisdiction of this Committee.

Division of Legal Fees

[10] It has long been established in New York that a lawyer may not share a legal fee with a non-lawyer. Rule 5.4(a) and its predecessors, DR 3-102 of the Code and Canon 34 of the Canons of Professional Ethics; N.Y. State 889 (2011); N.Y. State 906 (2012); N.Y. State 911 (2012). Here the fee paid by the client to the Corporation includes the lawyer's fee for legal services. In substance the lawyer is sharing a legal fee with a non-lawyer. This is no different than the lawyer billing the client and remitting a portion of the fee to the Corporation. The lawyer cannot do indirectly what the lawyer cannot do directly. Rule 8.4(a). N.Y. State 860 (2011). The arrangement would violate these Rules.

[11] Notwithstanding the foregoing, we recognize that it may be ethically possible for a client separately to engage the services of the lawyer and the non-lawyer at the same time and that the non-lawyer may be paid directly by the client and the lawyer also be paid directly by the client. *See Blumenberg v. Neubecker*, 12 N.Y.2d 456 (1963). Notably, *Blumenberg* centered around the anti-fee splitting with non-lawyers prohibition contained in Judiciary Law §491 and did not address the ethical issues of fee splitting with non-lawyers contained in Canons 34 of the Canons of Professional Ethics in effect at the time of the decision. The application of Judiciary Law §491 is a question of law beyond the jurisdiction of this Committee. Without reference to *Blumenberg* or to Judiciary Law §491 this Committee concluded in N.Y. State 875 (2011) that there "is no ethical barrier to a lawyer entering into a contingent fee arrangement with a client where the client already has retained a non-testifying expert to work on the same case on a contingent fee basis." That is not the case here. Here the client pays a single fee directly to the non-lawyer, a portion of which is then paid to the lawyer. What is happening is that the non-lawyer Corporation is acting as a referral agent for a fee. However, the Corporation is not one of the entities permitted to be a referral agent under Rule 7.2(b). N.Y. State 597 (1989). Accordingly, these Rules would be violated.

Third Party Payor of Legal Fees

[12] There is nothing *per se* ethically improper if a third party pays the lawyer's legal fee provided that the client is fully informed of the arrangement, including the amount to be paid to the lawyer, and the client gives informed consent as defined by Rule 1.0(j) and provided the third party does not interfere with the representation. Rule 1.8(f); N.Y. State 825 (2008); Restatement Third, The Law Governing Lawyers §134(1) and com. *c* (2000). In the arrangement described in the facts there is no indication that the client has fully been informed of the arrangement and has given informed consent. Thus, the arrangement would also violate these provisions of the Rules.

CONCLUSION

[13] A lawyer may not ethically enter an arrangement with a non-lawyer to accept referrals for a fixed monthly fee for each case referred by the non-lawyer where the client has been obtained by the non-lawyer by telephonic solicitation and receives a fee from the client that includes the lawyer's fee.

(41-12)