NEW YORK STATE BAR ASSOCIATION
One Elk Street, Albany, New York 12207 ◎ PH 518.463.3200 ◎ www.nysba.org

New York State Bar Association
Committee on Professional Ethics

Opinion 958 (2/4/13)

Topic: Lawyer's Acceptance of a Finder's Fee for Introducing Clients to Other Clients

Digest: A lawyer may accept a finder's fee for introducing clients and prospective clients to prospective investors, whether clients or not, provided that, in doing so, the lawyer complies with the Rules of Professional Conduct, including those governing protection of confidential information, avoidance of conflicts, business transactions with clients, competent advice on the applicability of privileges in the course of performing the non-legal services, and adherence to the rules on excessive fees.

Rules: 1.0(j), 1.1(a), 1.4(a), 1.4(b), 1.5(a), 1.5(b), 1.5(c), 1.5(e), 1.6(a), 1.7(a), 1.7(b), 1.8(a), 1.9(a), 1.18(b), 5.7(a), 5.7(c)

QUESTION

1. The inquiring lawyer asks whether a lawyer may accept a "finder's fee" for introducing potential investors (including existing, former or prospective clients) to a client or prospective client seeking capital for a start-up business.

FACTS

2. It is not uncommon for lawyers to introduce current, former, and prospective clients to each other in the ordinary course of business, for both general and specific purposes, in intimate gatherings and large ones. Such networking is part of the commerce of the law, and yet important ethical issues hover over the practice. Asking for separate compensation for the practice sharpens these issues.

OPINION

3. We start with Rule 5.7, which governs a lawyer's responsibilities regarding non-legal services. Rule 5.7(c) says that, for purposes of the Rule, "nonlegal services" shall mean those services "that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." We do not opine either on the legality of match-making exercises – investment advisors and brokers who engage in similar activities are usually subject to regulatory systems – or on what constitutes the unauthorized practice of law. Nevertheless, common experience teaches that the act of introducing one client to another for a purely business purpose is not a "legal service" in the classic understanding of that phrase, but

instead a "nonlegal service" that lawyers commonly perform, and that nonlawyers do so too, without fear of sanction for want of a law license. Subject to the caveats below, we conclude that the Rules of Professional Conduct permit such an arrangement.

4. Rule 5.7(a) says that, when a lawyer provides non-legal services to clients or other persons, then the lawyer is subject to the Rules of Professional Conduct if (1) the non-legal services are not "distinct" from the legal services the lawyer otherwise provides to the client or prospective client, or (2), even if distinct, the recipient of the services "could reasonably believe that the nonlegal services are subject to the attorney-client relationship." Rule 5.7(a) (1)-(2); *see* N.Y. State 860 (2011). The main difference between the two is that, if the non-legal services are distinct from the legal services but susceptive of client confusion about the existence of an attorney-client relationship, then the lawyer must explain in writing that the services are not legal services and hence not subject to the protections attaching to an attorney-client relationship. Rule 5.7(a) (4). The latter is true whether or not the lawyer intends to perform the non-legal services through the lawyer's firm, as appears to be the inquirer's situation, or through a separate entity that the lawyer owns or controls. *Id.*; *see* Rule 5.7(a)(3).

5. The inquiring lawyer intends to offer legal services to start-up enterprises seeking venture capital which the lawyer hopes to represent. The introductions for which the lawyer would be paid a finder's fee are therefore part and parcel of the lawyer's business plan. This is not uncommon. "Providing legal representation to a client who wishes to buy or sell a business entity may naturally lend itself to assistance by the law firm in helping to locate a seller or a buyer for the client. Through social, business, or professional connections, a lawyer may know of a potential buyer or seller to introduce to a law firm client. Assistance by a law firm in locating a buyer or seller of a business entity for a law firm client is a service related to the lawyer's representation of the client." Ohio 2003-1 (2003).

6. In such circumstances, the lawyer is providing both legal and non-legal services to clients and prospective clients, but services inextricably intertwined with the lawyer's legal practice. The lawyer hopes that, by matching a client to a prospective investor, the introduction will lead to a transaction in which the lawyer will earn a legal fee. This factor, together with the fact that the lawyer intends to act through the lawyer's firm and presumably law office, relieves us of the need to tarry on the question whether the non-legal services are "distinct" or not. The match-making services are clearly not distinct, and so the Rules of Professional Conduct fully apply to the activities. In our view, at least five of those Rules are of special importance to the inquirer's proposed course of action.

7. The first is the duty of confidentiality owed to clients, former clients, and prospective clients under, respectively, Rules 1.6(a), 1.9(a), and 1.18(b). In introducing a current, former, or prospective client to another client, the lawyer presumably must disclose confidential information about each that the lawyer is ordinarily bound to protect. The lawyer may not do so without the informed consent of the party who owns the information. This tutorial must start with the client in search of investors, and then, separately, must be repeated to any prospective, existing or former client the lawyer intends to approach. The lawyer must take care to explain to all the full ramifications of disclosing this information to another party, *see* Rule 1.0(j) (defining "informed consent"); Rule 1.4(b) (requiring a lawyer to explain a matter to the extent reasonable

to allow the client to make an informed decision), and must exercise independent professional judgment on the protections, if any, needed to safeguard the information, *see* Rule 1.1(a) (lawyer must represent a client competently). Although not typically required for the disclosure of confidential information, a writing explaining the implications may advisably be included in the other written disclosures likely to be required in these circumstances.

8. The more acute considerations arise under a second set of Rules, those governing conflicts of interests. In its Opinion 98-03, the Illinois State Bar Association articulated the conflicts confronting a patent lawyer who, in that inquiry, proposed to pair client-inventors with client-investors/promoters. The Committee noted that the "firm's choices of individual investors to match with particular promoters could be influenced by the firm's own interest in maximizing its return on a transaction. Further, once a suggested match is made the firm will probably be involved in negotiating the ultimate business arrangement and drafting the necessary documents, which would involve the firm in representing two clients whose interests are adverse. Finally, if the firm will have a financial stake in the transaction as its fee for services [*i.e.,* the finder's fee], the firm's interests could conflict with one or both clients." While warning that "it will not be possible for a lawyer to 'reasonably' believe that" every multiple representation is appropriate, the Committee nevertheless concluded that a lawyer could proceed if the lawyer met, among other things, the requirements of Rule 1.7(a).

9. The conflicts concerns will vary with the circumstances, all the permutations of which are beyond the scope of this opinion to address. One obvious possibility is that the lawyer enters into the finder's fee arrangement with the client seeking capital (say, Client A), which is the only client the lawyer intends to represent in any ensuing transaction. In this instance, the first step is to obtain the consent of both Client A and the proposed investor (Client B), confirmed in writing, if Client B is an existing client or a former or prospective client from which consent is required under the applicable Rule. This consent must make clear that the lawyer's duty of loyalty in the transaction is owed only to Client A, accompanied by such disclosures as may be necessary to obtain informed consent, among them the extent of the lawyer's relationships with Clients A and B, and terms and conditions of the lawyer's interest in the finder's fee, including whether payment of the fee is contingent upon closing of a transaction.

10. If the lawyer obtains informed consent from each, then the principal concern is Rule 1.7(a)(2). That Rule asks whether a "reasonable lawyer would conclude" that a "significant risk" exists that the lawyer's "own financial, business, property or other personal interests" – namely, the payment of the finder's fee – will adversely affect the lawyer's independent professional judgment. If, for example, the payment of a finder's fee is contingent upon the consummation of a transaction, this creates a personal and financial interest for the lawyer to close the deal apart from the payment of the lawyer's legal fee. Depending on the relationship between the amounts of the two fees at stake, the finder's fee could create a risk that the lawyer, in negotiating the transaction for Client A, will sacrifice independent professional judgment on the client's behalf in protecting Client A's legal interests in the deal. This scenario does not materially differ from a fee arrangement, permissible under the Rules in civil matters, providing for a success fee or premium in the event the transaction is successfully completed, one at times payable in equity or as a percentage of the transaction price. If a reasonable lawyer would conclude that, as in the success fee or premium scenario, no such significant risk exists that the lawyer will elevate

personal interests over professional ones, then the lawyer may undertake the representation subject to the other requirements set forth below.

11. A considerably more problematic possibility is that the lawyer proposes to introduce the capital-seeking Client A to another of the lawyer's clients, Client B, and to represent both Clients A and B in the transaction. In this scenario, the lawyer not only has a personal interest conflict, but a competing and ongoing loyalty conflict as well. The amount of the fee, the payer of the fee, and the circumstances in which the fee is payable are all among the factors relevant to whether a reasonable lawyer would conclude that a single lawyer could competently and diligently represent each party. In negotiating a transaction the successful conclusion of which determines whether the lawyer will receive the finder's fee, for instance, it may well be that the lawyer's personal financial interest in consummating any transaction may unduly influence the lawyer's professional duty to discharge independent judgment on behalf of both clients. In a predecessor to its Opinion 98-03, the Illinois State Bar Association expressed grave doubt that a lawyer could ever reasonably conclude that these various competing interests could be reconciled. Illinois Opinion 94-21. We share this skepticism, and also have serious questions about the prudence of such a course of action, but we do not foreclose the possibility that highly sophisticated clients, particularly those accustomed to negotiating the major deal terms between principals in which the lawyer's role is akin to a scrivener, could provide informed consent to an arrangement in which a lawyer entitled to a finder's fee could represent each party in drafting the documents effecting the transaction. *Cf.* N.Y. State 438 (1976) (allowing joint representation of lender and borrower with their informed consent if a disinterested lawyer would believe the lawyer can competently represent both); N.Y. County 615 (1973) (allowing representation, with informed consent, of buyer and seller who had already agreed upon the principal terms and conditions of sale); N.Y. State 162 (1970) (allowing lawyer to represent both buyer and seller with their consent if their interests are not actually or potentially differing); N.Y. State 38 (1966) (representation of buyer and seller "should be practiced sparingly and only when it is clear that neither party will suffer any disadvantage from it"); Connecticut Inf. Opinion 91-14 (1991) (lawyer may draft sales contract between two longstanding clients when each side agrees and lawyer does not negotiate material terms). *But see* Florida Opinion 97-2 (1997) (unwaivable conflict to represent both sides in closing of a transaction); Maine Opinion 106 (1990) (under prior rules, not "obvious" that lawyer could represent both sides in a transaction).

12. In addition to the concurrent client conflict issues, a third Rule of importance here is Rule 1.8(a), for we consider the agreement between the lawyer and the client for a finder's fee to be a business transaction with the client to which the regulations of that Rule fully apply. Rule 1.8(a) requires a twofold inquiry. The first is whether the transaction itself is one in which the lawyer and client have differing interests *and* in which the client expects the lawyer to exercise the lawyer's independent professional judgment on the client's behalf. Here, the answers to those questions are likely to be evident: the lawyer and client plainly have differing interests in the size and payment terms of the finder's fee, and, because both contemplate that the lawyer will represent the client in the transaction to which the fee appends, the client is likely to expect that the lawyer will be mindful of the client's interests in addressing the terms of the finder's fee. Consequently, under Rule 1.8(a), the lawyer must assure that the terms are fair and reasonable to the client and fully disclosed in a writing that includes not only the deal's essential

terms and the lawyer's role in shaping them, but also the desirability of the client seeking independent legal advice on the finder's fee arrangement. N.Y. State 913 (2012)

13. A fourth concern is that, because the match-making activity of the lawyer, though a non-legal service, is plainly not "distinct" from the lawyer's legal services, the provisions of Rule 5.7(a)(4) do not apply. These provisions require a written instrument to the client explaining that the protection of the lawyer-client relationship does not exist with respect to the rendition of non-legal services. Nevertheless, no assurance exists that a court would grant the protections of the attorney-client relationship to the purely non-legal activity of introducing one client to another solely for business purposes. Rules 1.1(a) and 1.4(a) & (b) require a lawyer to represent a client competently and to advise the client of considerations relevant to the client's decision-making about the representation. These Rules mandate that the lawyer alert the client to the risks that the lawyer's prospecting activities and attendant discussions may not enjoy the full protections of the attorney-client relationship. Such disclosure may well accompany the writing that Rule 1.8(a) requires in connection with business transactions with a client.

14. A fifth Rule that the finder's fee arrangement implicates is Rule 1.5(a) governing legal fees. Whether a finder's fee transaction may be deemed "fair and reasonable" under Rule 1.8(a) is analytically distinct from whether the fee may be "excessive" under Rule 1.5(a), though in the end the relevant considerations are substantially similar. We recognize that a fee for a non-legal service such as introducing clients to each other is not the intended object of Rule 1.5(a), but at least when those non-legal services are manifestly not distinct from the lawyer's legal services, we conclude that the lawyer's overall compensation for a particular transaction should fall within the scope of Rule 1.5(a). The principal general limit on a lawyer's compensation in that Rule is that a lawyer may not accept a fee the amount of which, upon review of the facts, would leave a reasonable lawyer "with a definite and firm conviction that the fee is excessive." Among the facts that Rule 1.5(a) identifies as relevant are the time, labor, and skill required; the novelty and difficulty of the services requested; the lawyer's inability, by reason of the representation, to represent other clients; the amount at stake and the results the lawyer achieves; the fee typically charged for comparable services in the locality where the lawyer practices; the time period in which the lawyer must complete the assignment; the lawyer's experience and reputation; and whether the fee is fixed or contingent. In considering whether a lawyer's fee in a transaction is excessive, the lawyer must take account of the totality of the transaction, including the finder's fee, in assessing whether the lawyer's compensation in the matter is excessive.

15. We reach these conclusions with little aid from opinions in other jurisdictions. Apart from the Illinois opinions cited above, which address a situation closest to the inquiry before us and reach a similar result, Opinion 2003-1 of the Ohio Supreme Court's Board of Commissioners and Discipline focused on a fact pattern akin to ours. There, the issue, among others, was whether a lawyer who introduces either a buyer or a seller of a business to a client may represent that client in the deal and be paid a fee based on a percentage of the transaction price, to our mind a proxy for a finder's fee. With some of the caveats we listed above, the Board concluded that the arrangement was permissible as long as the fee was payable by the initial client – that is, the lawyer could make the arrangement with a buyer/client or a seller/client, but could not receive such a fee from, for example, an investment/buyer group

while also representing the seller in the same transaction. In this latter instance, under the now-abandoned "obviousness" standard of DR 5-105(C), the Board, which considered the relationship with the investment/buyer group as indistinguishable from a lawyer-client relationship, joined with other jurisdictions cited above that, no matter informed consent, a lawyer may not properly represent both the buyer and the seller in the same transaction.

16. Our research has uncovered other jurisdictions that proscribe the receipt of a "finder's fee" in situations very different from those before us. In each of these opinions, the committees addressed whether a lawyer may receive a fee from a non-lawyer third party for referring clients to that party to perform non-legal services. Thus, in South Dakota Opinion 96-6 (1996), the committee opined that a lawyer could not receive a fee for referring the lawyer's clients to an asset management firm. In Iowa Opinion 98-6 (1998), the committee held that a lawyer could not receive a fee from an investment advisory firm for referring clients to that firm. In North Carolina Opinions 2000-3 and 2006-2, the committee believed that a lawyer could not receive a fee for referring clients to a financing company. In Florida Opinion 70-13, the committee said that a lawyer could not accept fees from a bank for encouraging clients to deposit money there. To be sure, these opinions raise the concern we outline above concerning the impact of the lawyer's personal financial interest in a transaction on the lawyer's independent professional judgment, but to be paid by a non-client to refer clients for such services is not comparable to the receipt by a lawyer of a fee from a client to perform a service for that client closely related to the lawyer's rendition of legal services for that client. *Cf.* N.Y. State 845 (2010) (lawyer/broker may share broker's commission with lawyer who referred matter provided lawyer/broker does not represent party to transaction).

17. In the wake of the adoption of Rule 5.7 expressly permitting a lawyer to perform both legal and non-legal services, this Committee has consistently opined that "Rule 1.7 applies with undiminished force in circumstances where a lawyer's conflicting personal interest arises from a separate, nonlegal business or activity permitted by Rule 5.7." N.Y. State 886 (2011); *accord* N.Y. State 891 (2011). Nothing in this opinion is intended to alter that conviction; indeed, we stress that a lawyer entering into a finder's fee arrangement must fully comply with the dictates of Rule 1.7 as we elaborate above. In so concluding, we are fully mindful of earlier opinions of this Committee, many of them described in our Opinion 752 (2002), that categorically prohibit a lawyer from performing certain non-legal services and legal services for the same client in the same matter. As we said there:

> In a number of opinions that this committee has issued over the years, we have opined that in certain circumstances a lawyer also engaged in a nonlegal business cannot provide both legal and nonlegal services in the same transaction even with the consent of the client. Brokerage businesses are a salient example. We held in N.Y. State 208 (1971), N.Y. State 291 (1973), N.Y. State 340 (1974), and N.Y. State 493 (1978), that a lawyer could not act as a lawyer in the same transaction in which the lawyer or his or her spouse acted as a real estate broker "because of the possible conflict between his client's and his own personal interest." N.Y. State 208 (1971). *Accord* N.Y. County 685 (1991); *see also* N.Y.

> State 694 (1997) (impermissible to participate in broker-run home buyer's program because of resulting strong interest in broker's success). The rationale is that the broker's interest in closing the transaction interferes with the lawyer's ability to render independent advice with respect to the transaction. We have reached similar conclusions with respect to insurance brokers and securities brokers. N.Y. State 536 (1981) . . . . N.Y. State 619 (1991). *See also* N.Y. State 595 (1988), N.Y. State 621 (1991), N.Y. State 738 (2001) (dual role of lawyer for real estate client and abstract title examiner impermissible because of possible need to negotiate exceptions to title).

18. We remain committed to this view. As Opinion 752 recognized, however, certain non-legal services rendered in connection with legal services do not merit such categorical treatment, such as those discussed in N.Y. State 687 (1997) (lawyer-broker can sell insurance to a client where advice about the purchase of insurance products is "merely tangential" to the legal representation); N.Y. State 711 (1998) (same); *see also* NY State 832 (2009) (activity incidental to the rendition of legal services). The non-legal services that we have previously deemed incompatible with the simultaneous rendition of legal services even with informed consent – the real estate broker, the insurance broker, abstract title examiner – are incontestably "distinct" from the provision of legal services, and activities to which the Rules of Professional Conduct do not neatly conform. Such is not the case here. The current inquiry does not require us to determine whether informed consent is curative of a lawyer performing *every* conceivable non-legal service that is *not* "distinct" from the legal services the lawyer plans to render in the same transaction. Here, we address only the matter before us. We do not believe that, under Rule 1.7, a client's payment of a finder's fee to a lawyer representing that client in a transaction – a transaction brought about by the lawyer's introductions to the client in the course of rendering legal services – invariably creates such an insurmountable personal financial conflict that informed consent, together with the other limitations we have set forth, can never allow the lawyer to proceed with the arrangement. Accordingly, we conclude that, in the context of non-legal services that plainly are *not* meaningfully distinct from the legal services the lawyer renders in the same transaction, but instead are incidental to the rendition of those legal services, a lawyer may permissibly accept a fee for introducing a client or prospective client to someone interested in making an investment in that person's (or entity's) business venture.

<u>Conclusion</u>

19. A lawyer may accept a finder's fee for introducing current, former or prospective clients to prospective investors, whether current, former or prospective clients or not, provided that, in doing so, the lawyer complies with the Rules of Professional Conduct, including those governing protection of confidential information, avoidance of conflicts, business transactions with clients, competent advice on the applicability of privileges in the course of performing the non-legal services, and the limits on excessive fees.

(29B-11)