NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1116 (3/29/17)

Topic: Nonlegal services, fee-sharing with nonlawyers, payment for referrals, billing practices, disclosing use of nonlawyer assistants, multidisciplinary practice

Digest: A lawyer may enter into an arrangement with a nonlawyer "foreign migration agent" whereby the nonlawyer hires the lawyer on behalf of the client and assists the lawyer in communicating with the client, as well as gathering and translating documents that are required in connection with the representation, as long as (1) the relationship between the lawyer and the nonlawyer is not exclusive, (2) the nonlawyer does not interfere with the lawyer-client relationship, (3) the client consents to the potential conflict of interest resulting from the referral relationship between the lawyer and the foreign migration agent, and (4) the lawyer is not paying the foreign migration agent for referrals. The lawyer must bill the client separately for fees and expenses and must inform the client of the name and amount charged by the foreign migration agent for nonlegal services.

Rules: 1.0(i) & (j), 1.4(a), 1.5(a), (b) & (d), 1.7(a) & (b), 2.1, 5.3(a)&(b), 5.4(a), 5.5(b), 5.8(a)&(c), 7.2(a)&(b)

FACTS

1. The inquirer is a law firm with a principal office outside New York and a small office in New York. The firm has several partners and associates admitted in NY. It practices US immigration law, and one of its services involves helping clients to obtain lawful permanent residence in the U.S. (also known as obtaining a green card), using the so-called EB-5 Program (the "EB-5 Program"). This Program allows a foreign investor ("EB-5 investor") to qualify for a green card by investing $1 million in a U.S. commercial enterprise ($500,000 if the investment is made in a targeted area with high unemployment) and creating or preserving at least 10 full-time jobs for qualifying U.S. workers.

2. Part of the EB-5 Program allows foreign investors to make passive investments in qualifying projects under the auspices of a Regional Center ("Regional Center") designated by US Citizenship and Immigration Services ("USCIS"). Regional Centers sponsor capital investment projects for investment by EB-5 Investors. Many real estate projects in New York are funded by EB-5 investors through a Regional Center.

3. In the Immigrant Visa Petition on Form I-526, the applicant must demonstrate that he or she has invested the required amount and is the legal owner of the capital invested, that the funds are from a lawful source and that the investment directly or indirectly created 10 jobs. If the Form I-526 is approved, the investor obtains conditional lawful permanent residence for two years. Prior to the end of the 2-year period, another petition must be filed to remove the

conditional status of the visa by establishing that the investor has continued to meet all the conditions of the EB-5 program, including that the EB-5 investment is ongoing.

4. Many EB-5 investors who invest through Regional Centers rely upon foreign migration agents ("FMAs"), who live in such investors' country, to assist them in understanding the projects offered by various Regional Centers, and in navigating the EB-5 Program. Although the petition on Form I-526 is filed by a U.S.-licensed lawyer, an FMA may assist the EB-5 investor in establishing that the requirements of the EB-5 Program have been met, including that the investor has invested the required amount, that the investor is the legal owner of the capital invested, and that the investment has created the requisite number of direct or indirect jobs.

5. The services provided by FMAs to investors may include the following:

a. Translating the investor's documents for the EB-5 process

b. Assisting the law firm to collect all documents required for the process from the investor, organizing the financial documentation for the initial submission to USCIS and responding to any requests for additional information

c. Monitoring the status of all processes and filings of the investor

d. Assisting the law firm in communicating with the investor and participating in calls between the investor and the law firm.

6. The FMA may also assist the EB-5 investor by advising on ancillary relocation matters, such as purchasing a home and selecting schools for children.

7. Finally, the FMA may market the projects of various Regional Centers to investors and may participate in the development of the projects. In addition, the FMA may assist a Regional Center in communicating with the investor. It may receive fees from the Regional Center when the investment is made in the Center's project, including (i) a finder's fee, (ii) a proportion of the proceeds of the deal, and (iii) part of the administrative fee paid by the EB-5 Investor.

8. The FMA does not prepare and file the Immigrant Visa Petition. Rather, it directs its clients to U.S. immigration lawyers. Depending on the size of the project and the FMA, the FMA may have dozens of EB-5 investors invest in a single project, who may all be represented by one U.S. law firm or by different law firms. The lawyer, as preparer of the Petition, affirms that he or she has prepared the petition at the request of the EB-5 investor and that it is based on all information of which he or she has knowledge. The engagement letter of the law firm often provides that the EB-5 investor consents to deal with the law firm through the FMA as the investor's agent.

9. Because the EB-5 investor is in a foreign country and may not speak English, the lawyer or the EB-5 investor must hire agents, including accountants and translators, to prepare and translate the necessary papers to document the source of the investment funds and how they were transferred from the investor's control to the project. Here, the FMA is proposing that the law firm engage the FMA to provide the services that would otherwise have to be performed by a foreign-language speaking accounting firm or staff of the law firm. The inquirer represents that

the FMA would charge the same fixed fee that an outside firm or the law firm would charge. The FMA also proposes to serve as the point of contact with the client in the client's home country and to liaise with the lawyer in obtaining necessary documentation, for which the FMA would charge the lawyer an additional fee.

10. The law firm asks whether it may charge the client for such nonlegal services, whether it must disclose to the client that any portion of the fees charged to the client are being used to retain a nonlawyer to perform services in connection with the visa application, and whether it must disclose that the FMA is providing these services.

QUESTIONS

11. May a law firm charge the client for nonlegal services?

12. May the lawyer charge the client a single fee that includes a flat fee for the lawyer's services and a flat fee for the services of the nonlawyer?

13. Must the lawyer disclose to the client either the identity of the nonlawyer or the amount paid to the nonlawyer?

14. What other considerations apply when a law firm participates in an arrangement with a nonlawyer whereby the nonlawyer assists the lawyer in communicating with the client, and manages all document gathering and translation in connection with the representation?

OPINION

Nonlawyer Assistants

15. Lawyers often hire nonlawyers to help them provide legal services. These nonlawyers may be employees of the law firm or outside service providers. See New York Rules of Professional Conduct (the "Rules"), Rule 5.3, Comment [3] ("A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include . . . an investigative or paraprofessional service, . . . a document management company . . . , . . . a third party for printing or scanning, and . . . an Internet-based service to store client information").

16. Ordinarily, when use of a communication agent is necessary for effective communication with a client, use of such an agent is ethically required. See N.Y. State 1053 (2015) (use of sign language interpreter to assist communication with a deaf client). As we said in N.Y. State 1053, under Rule 1.4, a lawyer must, among other things, apprise the client of material developments in the client's matter and consult with the client about the means by which the client's objectives are to be accomplished. However, there is also a danger, when the intermediary is the sole source of communication with the client without appropriate participation by the lawyer, that the intermediary could interfere with the lawyer's obligation under Rule 1.4 to communicate with the client. Consequently, the lawyer must ensure that the intermediary is facilitating and not controlling communication with the client.

17. As Rule 5.3, Comment [2] explains, the lawyer must ensure that the conduct of nonlawyers that the lawyer employs or retains is compatible with the lawyer's professional obligations:

> [2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by. . . the law firm . . . is compatible with the professional obligations of the lawyers and firm. Lawyers . . . may employ nonlawyers outside the firm to assist in rendering those services. . . . A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information . . . . A law firm should make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer.

Charging the Client for Legal and Nonlegal Services

18. The inquirer asks whether the lawyer may charge a single fee for legal and nonlegal services. Even if the inquirer were willing to be liable for the nonlegal services under the Rules, we believe including the expense for nonlegal services in the fee for legal services would be inappropriate. Rule 1.5(b) enjoins a lawyer to communicate to a client "the basis or rate of the fee and expenses for which the client will be responsible." [Emphasis added]. See also 22 N.Y.C.R.R. Part 1215.1(b) (Written Letter of Engagement Rule requires that the lawyer's letter of engagement address the scope of the legal services to be provided and an explanation of attorney's fees to be charged, expenses and billing practices). This information must be communicated to the client before or within a reasonable time after commencement of the representation and must be in writing where required by statute or court rule. Consequently, in order for the inquirer to bill the client for the expense of services provided by the FMA (or, for that matter, the expenses of third-party accountants and translators), the inquirer must communicate this possibility to the client and the nature of the charges that will be billed to the client.

19. Since these expenses would not constitute legal fees of the lawyer, they would appropriately be listed separately on any legal bill as expenses of the matter. Like legal fees, expenses are subject to the requirements of Rule 1.5(a) that they not be excessive. Moreover, without the consent of the client, the lawyer may bill only the exact amount of the expenses. See N.Y. State 1050 (2015) (citing ABA 93-397 (1993) and N.Y. City 2006-3); Cf. Rule 1.5, Comment [1] (discussing in-house expenses). Since the inquirer states that the FMA would charge the same amount that would be charged by a third-party provider or by the law firm for in-house staffers, these charges may not be not clearly excessive. However, the lawyer would have to determine that the FMA provides services of the same quality as those the lawyer's firm could provide itself or through third party providers.

Must the Lawyer Disclose the Identity of the Nonlegal Services Provider?

20. The inquirer asks whether it is necessary to disclose that nonlegal services are being provided by the FMA or another nonlawyer provider. We assume this means that the nonlegal expenses (e.g. for accounting and translation) would be listed as expenses but the provider would not be identified.

21. The answer to this question is governed by Rule 1.4 on communication with the client. Rule 1.4(a)(2) requires the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and Rule 1.4(a)(4) requires the lawyer to "promptly comply with a client's reasonable requests for information." Comment [5] explains that the client should have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued" and that the lawyer must act in the client's best interests. Thus, the answer depends upon whether it is reasonable to withhold the name of the provider.

22. In any representation, outside service providers may fall within a spectrum of importance to the client. In the case of an outside photocopy service, the name of the service provider likely is unimportant to the client, and the lawyer could reasonably conclude that its name need not be provided on the legal bill (although the client is always entitled to request copies of the bills for nonlegal services received by the lawyer).

23. Here, for several reasons, we believe it would not be reasonable to withhold the name of the provider. First, the FMA will have significant contact with the client, both in the collection of the necessary documents and in assisting in communication with the lawyer. Consequently, we believe it is important that the client be aware that the personnel providing these services are not employees of the lawyer but rather employees of the FMA.

24. Second, since the inquiry lists services that the FMA normally provides directly to the EB-5 investor, it is not clear whether the services for which the law firm would be paying are services for which the EB-5 investor is already being charged. We believe the EB-5 investor is entitled to a listing of services for which the lawyer is charging disbursements and the identity of the service provider, so that the investor may judge whether the charges are reasonable and appropriate and are not duplicative.

25. Third, the FMA here has a potential conflict of interest, which the client is entitled to assess. According to the inquirer, the FMA may be working for itself and a Regional Center, as well as for the law firm and the investor. For itself and the Regional Center, the FMA may (i) participate in the development of Regional Center Projects, (ii) market the projects of various Regional Centers to investors, and assist a Regional Center in communicating with the investor. It may receive fees from the Regional Center when the investment is made in the Center's project, including (i) a finder's fee, (ii) a proportion of the proceeds of the deal, and (iii) part of the administrative fee paid by the EB-5 Investor to the Regional Center. The FMA may also assist the EB-5 investor by advising on ancillary relocation matters, such as purchasing a home and selecting schools for children. We assume this may also involve a fee. In addition, the FMA is proposing to provide services to the law firm, for which it will be paid additional fees. We believe the client is entitled to understand the extent of the total fees that will be paid to the FMA, and to assess whether the FMA is exerting pressure on the client to "close the deal" on a particular Regional Center investment.

26. Fourth, informing the client of the name and compensation of the FMA also enables the client to determine whether the compensation contains an element of payment for the FMA's referral of the lawyer. The client may be the only person in a position to determine whether its interests are served by having the FMA perform the many functions it would be performing in connection with the visa application.

27. Finally, if the reason for failure to disclose the fact that the nonlegal services were provided by the FMA is to hide from the client the fact that the FMA is being paid additional amounts in connection with the immigration visa application, then the bill might be fraudulent within the meaning of Rule 1.5(d)(3) (a lawyer shall not enter into an arrangement for, charge or collect "a fee based on fraudulent billing."); Rule 1.5, Cmt. [1A] ("A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information"); Rule 1.0(i) ("fraud" or "fraudulent" includes conduct that has a purpose to deceive).

28. For all these reasons, we believe the lawyer must disclose to the client the roles and compensation of the FMA.

Other Considerations When a Lawyer has a Relationship with a Nonlawyer

29. Both the Rules and our opinions note several concerns when lawyers and nonlawyers join to provide legal and non-legal services. These include ensuring that (A) the lawyer does not allow the nonlawyer to affect the lawyer's independent professional judgment on behalf of the client, (B) the client consents to any potential conflicts of interest; (C) the lawyer does not share legal fees with the nonlawyer, (D) the lawyer does not pay the nonlawyer for referrals, (E) the lawyer adequately supervises the work of nonlawyers who assist in the provision of legal services, and (F) the client understands the scope of the representation. See N.Y. State 1068 (2015) (lawyer joining with a claims recovery firm which would assemble documents necessary to file the client's claim and monitor the process of applications filed on behalf of the client); N.Y. State 992 (2013) (lawyer and nonlawyer establishing disability office to help with government benefit matters); N.Y. State 976 (2013) (lawyer and nonlawyer performing forensic mortgage analysis and legal services); N.Y. State 885 (2011) (lawyer and nonlawyer working together on property tax reductions). See also N.Y. City 2014-1. We summarize those issues below.

A. Interference with Lawyer's Independent Professional Judgment

30. Rule 5.8(a) prohibits, except in certain limited circumstances, a "contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services," (emphasis added). The exceptions provided for in Rule 5.8(a) involve relationships with firms in professions contained on a list maintained by the Appellate Divisions under Section 1205.3 of the Joint Appellate Division Rules. FMAs are not in one of those professions. Consequently, an exclusive relationship with any FMA is prohibited by Rule 5.8.

31. Under Rule 5.8(c), the provisions of Rule 5.8(a) do not apply to "relationships consisting solely of non-exclusive reciprocal referral agreements or understandings" between a lawyer and

a nonlegal professional or nonlegal professional services firm. This opinion assumes that the inquirer and the FMAs with which the inquirer deals do not have an exclusive relationship. Nevertheless, since the inquiry suggests that FMAs are one of the major ways attorneys in this field obtain their clients, the inquirer must be wary of a relationship that is non-exclusive in name only. Our opinions express concern for referral relationships that are effectively exclusive. See N.Y. State 992 (2013) (lawyer may not effectively form a partnership with a nonlawyer disability office).

32. Even when Rule 5.8(a) does not apply, other Rules require complete professional independence and uncompromised loyalty of the lawyers to the client. See Rule 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice"); Rule 5.4(a) ("Unless authorized by law, a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.") Because an FMA who is entitled to fees upon closing of an investment may have an economic interest in ensuring that the closing occurs, where the FMA has a continuing role in the representation of the client, we believe there is a significant risk of interference with the lawyer's independent judgment. Cf. Matter of Greene, 54 N.Y.2d 118, 429 N.E.2d 390, 444 N.Y.S.2d 883 (1981), cert. denied, 455 U.S. 1035 (1982) (lawyer may not ask a real estate broker to solicit clients for the lawyer, because the broker has a conflict of interest that may affect the recommendation). Consequently as noted in the next paragraph, the lawyer must take steps to ensure that the lawyer's duty of loyalty will not be compromised.

B. Client Consent to Potential Conflicts of Interest.

33. Rule 1.7(a)(2) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business or other personal interests.

34. Here, because the lawyer may receive continuing referrals from the FMA, there is a significant risk that the lawyer's judgment on behalf of the client will be affected. The FMA has an economic interest in the client's investing in a particular Regional Center project as the basis of the visa application. If the lawyer believes the investment is not in the best interests of the client, the lawyer may nevertheless be reluctant to so advise the client, because acting contrary to the interests of the FMA may affect future referrals from the FMA. See Matter of Lefkowitz, 47 AD3d 326, 328 (1st Dep't 2007) (upholding findings of liability against an immigration lawyer on conflicts grounds, among others, when referee found that lawyer was dependent on an immigration agent for case referrals, but never informed clients of this conflict).

35. Rule 1.7(b), however, allows the lawyer to represent the client as long as the lawyer reasonably believes he or she will be able to provide competent and diligent representation and the client gives informed consent, confirmed in writing. Although some of the language of Rule 1.7(b) seems more suited to representation of two clients with differing interests, Comment [2] to Rule 1.7 explains that it also applies to a client whose representation might be adversely affected by the lawyer's personal interest. Rule 1.0(j) indicates that "informed consent" denotes that the client must agree to the proposed course of conduct after the lawyer has communicated

information "adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives."

36. We believe that the lawyer's potential personal conflict of interest here is consentable, as long as the lawyer believes he or she will be able to provide competent and diligent representation to the client, and the representation is not prohibited by law, within the meaning of Rule 1.7(b)(2). Consequently, we believe the lawyer must make the determination that he or she will be able to provide competent and diligent representation, and, if the lawyer is able to make such determination, must obtain the client's informed consent.

37. We note that the inquiry states that the lawyer's engagement letter often provides that the EB-5 investor consents to deal with the law firm through the FMA as the investor's agent. We do not believe the lawyer may rely on that authorization until the client has provided informed consent to the lawyer's personal conflict. Nor should the lawyer rely on the FMA to explain the conflict and obtain consent.

C. Fee-Sharing

38. Our prior opinions have identified two concerns involving the fee paid to a nonlegal services provider – whether the lawyer is sharing legal fees with the nonlawyer and whether the lawyer is paying the nonlawyer for referring legal business.

39. Subject to exceptions not applicable here, Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer. Rule 5.4(a). The inquirer states that both the lawyer and the FMA would charge flat fees for their services. Moreover, the inquirer would pay the FMA the same fixed fee that the law firm would otherwise have to pay foreign-language speaking accounting firm or staff of the law firm speaking that language. Assuming that the fees of the FMA are not related to the amount of the fees charged by the immigration lawyer, and that the lawyer has not reduced the fees the lawyer normally charges in order to cover the fees of the nonlawyer, the inquiry would not involve a lawyer sharing legal fees with a nonlawyer. See N.Y. State 1068 (2015) (as long as the claims recovery firm provides substantial assistance in the proceedings and the compensation of the claims recovery firm is commensurate with the services it provides, then the lawyer would not be improperly sharing legal fees with a nonlawyer); N.Y. State 976 (2013) (arrangement could constitute impermissible fee sharing if the lawyer's payment to the intermediary is insufficiently related to the value of the company's services); N.Y. State 885 (2011) (finding improper fee sharing where there appeared to be no relation between the funds to be received by the nonlawyer company and the value of the services performed and stating that the lawyer may not reduce fees as part of an arrangement to accept referrals from a nonlawyer who provides services to clients).

D. Payment For Referrals

40. Rule 7.2(a) prohibits a lawyer from compensating or giving anything of value to a person to recommend or obtain employment by a client or as a reward for having made a recommendation resulting in employment by a client. As we said in N.Y. State 942 (2012), "it would violate this rule if the inquirer would be giving something of value to [the nonlawyer] in

exchange for client referrals." As long as hiring the FMA is not a condition (express or implied) of the referral, and the compensation to the FMA for the services does not exceed the reasonable value of its services, the lawyer does not appear to be paying a prohibited referral fee in violation of Rule 7.2(b). On the other hand, if the lawyer chooses to hire the FMA rather than another service provider that the lawyer believes would be better at performing the required tasks, then the choice of the FMA may reflect compensation for referring the client.

E. Supervision of Nonlawyers

41. As we noted above, the lawyer must ensure that the conduct of nonlawyers employed by or retained by the law firm is compatible with the professional obligations of the lawyer. See Rule 5.3, Comment [2].

42. Rule 5.3(b) provides that "A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer" if the lawyer "orders or directs the specific conduct or with knowledge of the specific conduct, ratifies it." The immigration lawyer here is undoubtedly ordering the work and "ratifies" that work by incorporating it into the EB-5 visa application. Accordingly, the lawyer must supervise the work of the FMA and ensure that the work of the FMA is consistent with the lawyer's professional obligations to the client and that the lawyer – not the FMA -- is controlling the representation.

F. Scope of Representation

43. The inquiry indicates that the FMA is referring the EB-5 client for the purposes of preparing the EB-5 investor's immigration application. Since the EB-5 investment is an integral part of the immigration application, we believe a reasonable client would expect that the lawyer will give advice on whether the proposed investment meets the EB-5 visa criteria. If there is any disagreement between the lawyer and the FMA in this regard, the lawyer must ensure that his or her advice is transmitted accurately to the client.

CONCLUSION

44. A lawyer may enter into an arrangement with a nonlawyer foreign migration agent whereby the nonlawyer hires the lawyer on behalf of the client and assists the lawyer in communicating with the client, as well as gathering and translating documents that are required in connection with the representation, as long as (1) the relationship between the lawyer and the nonlawyer is not exclusive, (2) the nonlawyer does not interfere with the lawyer-client relationship, (3) the client consents to the potential conflict of interest resulting from the referral relationship between the lawyer and the foreign migration agent, and (4) the lawyer is not paying the foreign migration agent for referrals. The lawyer must bill the client separately for fees and expenses and must inform the client of the name and amount charged by the foreign migration agent for nonlegal services.

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