THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2015-8: FEE SHARING WITH LAW FIRMS THAT PERMIT NONLAWYERS TO HAVE A FINANCIAL INTEREST OR MANAGERIAL AUTHORITY, WHERE SUCH LAW FIRMS ARE LOCATED IN JURISDICTIONS THAT PERMIT SUCH ARRANGEMENTS WITH NONLAWYERS

TOPIC: Fee-Sharing and Nonlawyer Ownership

DIGEST: While Rule 1.5(g) of the New York Rules of Professional Conduct permits the division of legal fees between lawyers who work for different law firms, Rule 5.4(a) prohibits lawyers from sharing legal fees with nonlawyers. In addition, Rules 5.4(b) and (c) prohibit lawyers from forming a partnership with a nonlawyer for the purpose of providing legal services and from practicing law for profit in an entity where a nonlawyer has an ownership interest or has authority to control the professional judgment of the lawyer. However, in the District of Columbia and some foreign jurisdictions, attorneys may practice in law firms where nonlawyers have a financial interest or managerial authority. We conclude that attorneys admitted to practice in New York may divide legal fees with lawyers in such law firms. Although fee sharing under these circumstances is permissible, New York lawyers must still comply with New York Rule 5.4(d), which prohibits nonlawyers from interfering with the lawyers' independent professional judgment.

RULES: 1.5(g); 5.4(a); 5.4(d)

QUESTION:

Is a New York lawyer ethically permitted to share fees with a lawyer who practices in a law firm that allows nonlawyers to have a financial interest and/or managerial authority, where the law firm is located in a jurisdiction that permits such arrangements?

OPINION:

Complex cases may require expertise in a variety of disparate legal subjects. In some instances, clients prefer to retain lawyers who are affiliated with different law firms, located in different jurisdictions, to meet their legal needs. For instance, parties in a complex multidistrict litigation may wish to retain lawyers in multiple jurisdictions to advise them on different substantive, procedural and jurisdictional aspects of the case. Similarly, parties to an international business transaction may wish to retain lawyers based in the United States and in one or more foreign jurisdictions to advise them on the different contractual and regulatory aspects of the transaction.

Rule 1.5(g) of the New York Rules of Professional Conduct (the "Rules" or "New York Rules") authorizes joint representation of a single client and the division of legal fees by

attorneys who are not associated with the same law firm, as long as the following conditions are satisfied:

> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
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> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
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> (3) the total fee is not excessive.

See N.Y. Rule 1.5(g). In our view, Rule 1.5(g) does not bar joint representation and the division of legal fees with lawyers in other jurisdictions, as long as the arrangement otherwise complies with Rule 1.5(g). *See* N.Y. State 864 (2011) (a New York lawyer is ethically permitted to work on a personal injury case with an out-of-state lawyer under certain circumstances); N.Y. State 806 (2007) ("A New York law firm may participate with a foreign law firm in handling legal matters in New York referred by the foreign firm, and in sharing of legal fees in such matters, where the foreign firm's lawyers have professional education, training and ethical standards comparable to those of American lawyers and the firm otherwise complies with [Rule 1.5(g).]").

Nevertheless, New York lawyers may be concerned about the ethical implications if the other law firm will further divide a portion of the fee with a nonlawyer. New York Rule 5.4(a) explicitly prohibits lawyers from dividing legal fees or forming partnerships with nonlawyers for the purpose of providing legal services, with three narrow exceptions that do not apply here. In contrast to New York, the District of Columbia and some foreign jurisdictions permit lawyers to practice in firms where nonlawyers hold a financial interest or have managerial authority, provided such firms meet certain conditions. For example, the District of Columbia places the following conditions on law firms that have nonlawyers with financial interests or managerial authority:

1. The law firm's sole purpose must be to provide legal services to clients;
2. All persons that have managerial authority or a financial interest in the partnership must undertake to abide by the D.C. Rules of Professional Conduct;
3. The lawyers in the partnership who have a financial interest or managerial authority must agree to be responsible for the nonlawyer participants as though the nonlawyer participants were lawyers in accordance with D.C. Rule 5.1;[1] and
4. The above conditions are set forth in writing.

See D.C. Rule 5.4(b). In the Committee's view, an attorney who is admitted to practice law in New York may ethically divide legal fees with a lawyer who practices in a law firm where nonlawyers hold a financial interest or managerial authority, provided that the law firm is based in a jurisdiction that permits such arrangements with nonlawyers.

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[1] D.C. Rule 5.1, which is substantially similar to New York Rule 5.1, governs the responsibility of partners, managers, and supervisory lawyers in a law firm.

The New York State Bar Association's Task Force on Nonlawyer Ownership ("Task Force") was created to consider various nonlawyer ownership proposals in New York State. In 2012, the Task Force issued a report, which, *inter alia*, opposed nonlawyer ownership of New York law firms. *See* Report of the Task Force on Nonlawyer Ownership (Nov. 17, 2012). The Task Force also considered the propriety of a New York law firm dividing legal fees with an out-of-state law firm composed, in part, of nonlawyer owners. *See id.* at 74 ("[g]iven the continued increase in interstate and international law practice, New York lawyers need guidance on the ethical issues involved in associating with law firms outside New York that have nonlawyer owners and managers."). The report described such conduct as "inter firm fee sharing." In an inter firm fee sharing agreement, the New York lawyer contracts with an independent law firm, which is responsible for complying with the ethics rules of its jurisdiction. The Task Force recommended the creation of a new comment to Rule 1.5, approving of such inter firm fee splitting unless the New York lawyer involved in such sharing knows that the other firm's relationship with nonlawyers violates the rules of the jurisdiction that apply to that relationship, or knows that a nonlawyer owner is directing or controlling the professional judgment of a lawyer working on the matter for which fees are being divided. *See* Rule 8.4(a) (prohibiting a lawyer from "knowingly assist[ing]" another to violate the Rules of Professional Conduct); Rule 8.5(b) (Choice of Law).[2]

The American Bar Association reached a similar conclusion to that of the Task Force. In Formal Opinion 464, the American Bar Association endorsed fee sharing between a law firm based in a state where the Model Rules of Professional Conduct have been adopted and a law firm based in the District of Columbia. According to the ABA, "The possibility that the ...[DC] firm may, or may not, eventually 'share' some fraction of that firm's portion of the fee with a nonlawyer should not expose the lawyer in the Model Rules jurisdiction to discipline." The opinion noted that "[a] contrary conclusion . . . would place the lawyer in the Model Rules jurisdiction at the mercy of the organization and compensation practices of the District of Columbia firm." ABA Formal Op. 464 (2013). The ABA cautioned that while inter firm fee sharing was appropriate, lawyers were still bound to comply with Model Rule 5.4, which requires lawyers to maintain professional independence. We agree with the ABA and the Task Force that inter firm fee sharing is permissible. *See also* Phila Bar Assn. Op. 2010-7 (2010) (concluding that inter-firm fee sharing with D.C. firm was permissible because "although the DC firm might under some arrangement ultimately share profits with a non-lawyer pursuant to the DC RPC, the propriety of this fee-sharing arrangement under the PA RPC is not vitiated.").

In our view, inter firm fee sharing with a firm in the District of Columbia or other jurisdiction that permits nonlawyer ownership presents little risk that a nonlawyer would impair a New York lawyer's independent professional judgment. We believe such an arrangement will promote the interests of New York clients without significantly threatening the integrity of the legal system. Still, New York lawyers must not allow nonlawyers in the other law firm to improperly influence their professional judgment. *See* N.Y. Rule 5.4(d)(3) (prohibiting a lawyer

[2] The Task Force ultimately referred the proposed comment to the Committee on Standards of Attorney Conduct, which is still considering the proposal.

from practicing with or in the form of an entity authorized to practice law for profit if "a nonlawyer has the right to direct or control the professional judgment of a lawyer").

We note that the question we address here is different from the issue in N.Y. State 1038 (2014), which involved *intra* firm fee sharing (i.e. fee splitting between a New York branch of a law firm based in the District of Columbia that permitted nonlawyer ownership). That Opinion concluded that a New York lawyer practicing primarily in New York may not join a District of Columbia law firm that includes a nonlawyer partner. It is also different from the issues addressed in N.Y. State 911 (2012) (which concluded that a New York lawyer who practices in New York may not be employed by a U.K. law firm with nonlawyer owners) and from N.Y. State 889 (2011) (which concluded that, under the Rule 8.5's choice of law analysis, a dual-admitted lawyer who principally practices in D.C. may share fees with nonlawyers under D.C. rules). In our scenario, the New York lawyer is not forming a partnership with a law firm that has nonlawyer owners. Rather, the New York lawyer is merely entering into a fee sharing arrangement with such a law firm for the purpose of representing a client in a particular matter.

CONCLUSION:

Attorneys admitted to practice in New York may enter into fee sharing arrangements with lawyers who practice in law firms that permit nonlawyers to have a financial interest or managerial control, provided those law firms are based in jurisdictions that permit such arrangements with nonlawyers. Although fee sharing under these circumstances is permissible, New York lawyers must still comply with New York Rule 5.4(d), which prohibits lawyers from allowing a nonlawyer to interfere with their independent professional judgment.

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