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Fee-Sharing Issues For NY Lawyers Got More Complicated

Law360, New York (September 27, 2013, 12:39 PM ET) -- Rule 5.4 of the New York Rules of Professional Conduct is based on, and generally tracks, Rule 5.4 of the Model Rules of Professional Conduct. Both versions of the rule provide that "[a] lawyer or law firm shall not share legal fees with a nonlawyer."[1]

Both versions provide that "[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law."[2] And both prohibit a lawyer from practicing with or in the form of an entity authorized to practice law for profit if a nonlawyer owns an interest in the entity, serves as a member, director or officer of the entity or in another similar position of responsibility, or otherwise "has the right to direct or control the professional judgment of a lawyer."[3]

But recent and conflicting guidance provided by the New York State Bar Association Committee on Professional Ethics — in Opinion 889 (Nov. 15, 2011) and Opinion 911 (Mar. 14, 2012) — and the American Bar Association Standing Committee on Ethics and Professional Responsibility — in Opinion 464 (Aug. 19, 2013) — suggests that the similarities between New York Rule 5.4 and Model Rule 5.4 may end there, at least with respect to the appropriate method for determining whether fee sharing between a New York lawyer and an out-of-state lawyer or partnership with nonlawyers comports with the rules.

NYSBA Ethics Committee Opinions 889 and 991 both answer questions about fee sharing and the formation of partnerships with nonlawyers by looking first to the choice-of-law rules set forth in New York Rule 8.5(b).[4] Thus, Opinion 889's analysis of whether a lawyer who earns fees from litigation commenced and prosecuted in New York may share those fees with his D.C. partnership, including a nonlawyer partner, depended on its finding that the formation of a D.C. partnership would not have a "predominant effect in New York" and thus, "is not subject to New York Rule 5.4."[5]

That choice-of-law analysis was effectively outcome determinative: Opinion 889 went on to conclude that a "lawyer who principally practices in another jurisdiction but is also admitted in New York may conduct occasional New York litigation, even if a nonlawyer would benefit from the resulting fees … if the arrangements comply with the ethics rules of that other jurisdiction."

NYSBA Ethics Committee Opinion 911 deployed the same choice-of-law approach to analyze whether lawyers admitted in New York may enter into a business relationship with a United Kingdom firm that had nonlawyer supervisors and owners.

Applying New York Rule 8.5(b), Opinion 911 reasoned that New York Rule 5.4 "would govern the propriety of the arrangement with the U.K. entity" because the "predominant effect" of "practicing law from a New York office on behalf of New York clients" is in New York.

Here, again, the choice-of-law analysis was outcome determinative: The proposed arrangement did not comport with New York Rule 5.4, and Opinion 911 thus concluded that a "New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has nonlawyer owners or managers."

In contrast with the NYSBA Ethics Committee approach, ABA Ethics Committee Opinion 464 recently considered a similar question — whether a lawyer subject to the Model Rules may divide a legal fee with a lawyer whose firm has nonlawyer owners if some portion of the fee may be distributed to a nonlawyer — without repair to a choice-of-law analysis.

Instead, Opinion 464 looked to Model Rule 1.5(e), which "permits the division of a legal fee between lawyers who are not in the same firm" in circumstances where the division is in proportion to the services performed by each lawyer, the client agrees to the arrangement, and the total fee is reasonable.[6]

Opinion 464 concluded that a lawyer in a Model Rules jurisdiction may share a fee with a lawyer who practices at a firm with nonlawyer owners in a jurisdiction that permits nonlawyer ownership without violating Rule 5.4 as long as the requirements of Model Rule 1.5(e) are met.

Opinion 464 explained that a lawyer complies with Model Rule 5.4 by dividing the legal fee only with "another lawyer"— and thus need not consider the other lawyer's potential division of the legal fees with a nonlawyer thereafter.

Opinion 464 separately concluded that the independence of professional judgment of a lawyer is not undermined by sharing fees with a lawyer at a firm with nonlawyer owners in violation of Model Rule 5.4 because "there is no reason to believe that the nonlawyer" "who practices in a different firm, in a different jurisdiction" "might actually influence the independent professional judgment of the lawyer in the Model Rules jurisdiction."

According to Opinion 464, the minimal risk of improper influence is further obviated by the fact that "[l]awyers must continue to comply with the requirement of Model Rule 5.4(c) to maintain professional independence."

Because different factors are implicated by these alternative approaches to Rule 5.4 questions, the evolving Rule 5.4 guidance may complicate, rather than simplify, the resolution of fee-sharing issues that a multijurisdictional practitioner admitted in New York may confront.

The NYSBA Ethics Committee's choice-of-law approach depends on issues such as where the fee-splitting lawyers are admitted, where their firms have principal places of business, where the business that generates the fee to be split is earned, and how much revenue the lawyers or their firms earn in or from the relevant jurisdictions.

The ABA Ethics Committee's approach considers whether the recipient of the shared fee is a lawyer, and the outcome of the analysis may depend on whether the fee is shared with a lawyer who works at a firm with nonlawyer owners, or directly with a firm with nonlawyer owners, or not.

The ABA Ethics Committee's approach also anticipates taking indicia of a lawyer's independence of professional judgment, as well as the potential influence of the nonlawyer on the lawyer's judgment, into account.

Pending further guidance, a New York lawyer should consider any Rule 5.4 fee-sharing issues under both approaches — and proceed with caution.

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[1] See New York Rule 5.4(a); Model Rule 5.4(a).

[2] See New York Rule 5.4(b); Model Rule 5.4(b).

[3] See New York Rule 5.4(d)(1)-(3); Model Rule 5.4(d)(1)(3).

[4] Pursuant to New York Rule 8.5(b)(1), "[f]or conduct in connection with a proceeding in a court before which a lawyers has been admitted to practice …, the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Pursuant to New York Rule 8.5(b)(2), "for other conduct, (i) [i]f the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and (ii) [i]f the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if the particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct."

[5] Opinion 889 made clear that different factors — including the locus of the principal place of business of the lawyer or the firm, or where the bulk of the lawyer's or firm's revenue is earned — could impact the choice-of-law analysis.

[6] Model Rule 1.5(e) substantially corresponds to New York Rule 1.5(g), which provides that a "lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same firm unless: (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' (2) the client agrees to the 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 (3) the total fee is not excessive."
