NYCLA COMMITTEE ON PROFESSIONAL ETHICS
FORMAL OPINION
No. 733

TOPIC:

Non-exclusive referrals and sharing of office space, computers, telephone lines, office expenses and advertising with non-legal professionals.

DIGEST:

A LAWYER MAY SHARE OFFICE SPACE AND EXPENSES WITH, AND ENTER INTO AN ARRANGEMENT TO MAKE NON-EXCLUSIVE REFERRALS WITH, A NON-LEGAL PROFESSIONAL, SUCH AS AN ACCOUNTANT, DESIGNATED AS SUCH ON A LIST COMPILED BY THE APPELLATE DIVISION PURSUANT TO DR 1-107 AND 22 NYCRR SECTION 1205.5, PROVIDED THAT THE LAWYER DOES NOT PAY TO OR ACCEPT REFERRAL FEES FROM THE ACCOUNTANT AND COMPLIES WITH OTHER PRECAUTIONS TO PRESERVE CLIENT CONFIDENCES AND SECRETS AND PREVENT CONFLICTS, INCLUDING PREVENTING ACCESS TO THE PHYSICAL AND COMPUTER FILES OF THE ATTORNEY. THE LAWYER MAY ADVERTISE THAT HE HAS A SYSTEMATIC AND CONTINUOUS RELATIONSHIP WITH SUCH A DESIGNATED PROFESSIONAL. A LAWYER MAY ENTER INTO AN ARRANGEMENT TO MAKE NON-EXCLUSIVE REFERRALS WITH OTHER PROFESSIONALS, SUCH AS FINANCIAL ADVISORS, WHICH ARE NOT LISTED BY THE APPELLATE DIVISION AS QUALIFIED PROFESSIONS PURSUANT TO DR 1-107 AND 22 NYCRR SECTION 1205.5. HOWEVER, IN NEITHER CASE MAY THE LAWYER PAY OR RECEIVE REFERRAL FEES AND MUST EXERCISE SPECIAL CAUTION WITH RESPECT TO ANY SHARED SPACE, EXPENSES AND ENSURING THE SECRECY OF COMMUNICATIONS WITH CLIENTS AND THE PUBLIC.

CODE:

DR 1-106, 1-107, 2-101, 2-103, 2-105, 3-103, 4-101, 5-101, EC 1-14, EC 1-16.

QUESTIONS:

1. MAY A LAWYER ETHICALLY SHARE OFFICE SPACE AND EXPENSES WITH A NON-LEGAL PROFESSIONAL, SUCH AS AN ACCOUNTANT, DESIGNATED BY THE APPELLATE DIVISION AS A QUALIFIED PROFESSION PURSUANT TO DR 1-107 AND 22 NYCRR SECTION 1205.5?

2. IF SO, MAY THE LAWYER ENTER INTO AN AGREEMENT WITH THE NON-LEGAL PROFESSIONAL TO SHARE COMPUTERS, TELEPHONES, SECRETARIES, BANK ACCOUNTS, ADVERTISING AND MAILINGS?

3. TO WHAT EXTENT CAN THE SAME ARRANGEMENT BE MADE WITH A NON-DESIGNATED PROFESSIONAL SUCH AS AN INVESTMENT ADVISOR?

OPINION:

An attorney in the process of establishing a practice as a sole practitioner contacted the Committee with a number of questions concerning sharing of space and other facilities and entering into other arrangements with non-legal professionals, in this case a financial advisor and a certified public accountant. Though the three parties would share office space, each would form a separate entity and operate as an independent business.

The activities which the party would like to consider, and which the attorney has asked the Committee to address in terms of potential ethical violations, include the following:

- the sharing of computer services and phone lines;
- having a joint bank account for the purpose of paying office rent and other expenses;
- having a single brochure profiling each of the independent businesses; and
- sending mailings stating that the three independent firms (or individuals) operate out of the shared office.

The inquirer also asks if any form of compensation may be given to the non-lawyers for any referrals received.

The inquirer seeks advice about a business relationship with two non-lawyers. The inquirer's primary focus is the sharing of office expenses and facilities with the non-lawyers. Before addressing the specifics of the inquiry, there are three overarching concerns with any office sharing arrangement. First, the lawyer must act so as not to cause the public to mistake an expense-sharing relationship with a professional relationship, particularly if the lawyer and non-lawyers have mutual clients. Second, clients' confidences and secrets must be protected by the lawyer and any support staff employed by the lawyer and non-lawyers. Third, absolutely no payment, tangible benefits or compensation of any kind, direct or indirect, can be paid or received in consideration for any referral.

Committee Overview

Disciplinary Rule 1-107, which was added to The Lawyer's Code of Professional Responsibility in 2001, permits an attorney to enter into limited contractual arrangements with designated non-legal professionals for the provision of multi-disciplinary services. These relationships are often referred to as side-by-side arrangements. An attorney may

enter into systematic contractual and referral relationships with professionals in the five professions approved by the Appellate Division (the "Designated Professionals").[1]

An attorney may enter into a relationship consisting of reciprocal, non-exclusive referral agreements or understandings with professionals not on the designated list, such as an investment advisor, apart from the provisions regarding more extensive contractual relationships with Designated Professionals. DR 1-107(C). Certified public accountants are Designated Professionals, but financial or investment advisors are not. 22 NYCRR §1205.5 The existence of any such non-exclusive referral agreement must be disclosed to prospective clients and may limit or complicate sharing space and expenses. An attorney should exercise caution in sharing any expenses with the investment advisor and may not pay referral fees to or receive referral fees from the investment advisor.

Contractual arrangements with the Designated Professionals may include allocation of costs and expenses in addition to the reciprocal, non-exclusive referral arrangements countenanced by DR 1-107(C). In addition, the lawyer may refer to the existence of such an arrangement in advertising, provided that the content of the advertising does not imply or suggest that the lawyer is participating in a partnership with the non-legal professional and is not otherwise misleading. As outlined below, however, precautions must be taken to protect clients' rights and expectations, including, but by no means limited to, delivery of the Statement of Client's Rights in Cooperative Business Arrangements. DR 1-107(A), (B) and (D); 22 NYCRR §1205.4.

A referral arrangement should be independent of any cost-sharing arrangement with the certified public accountant. In no case may the attorney share compensation or give or receive any monetary or other tangible benefit for giving or receiving a referral. DR 2-103(B)(1); 1-107(A)(2). Moreover, the attorney must take precautions with respect to physical files, computer access and telephone service to assure that the preservation of client confidences and secrets are secure.

The Financial Advisor/Non-Designated Professional

DR 1-107(A) generally prohibits multi-disciplinary practices but, as noted above, creates an exception for contractual relationships offering legal and non-legal services on a systematic and continuing basis with the Designated Professionals. Since financial advisors are not Designated Professionals, an attorney may not enter into a contractual relationship with a financial advisor that would offer continuous and systematic services to the public. But for the exception provided in DR 1-107(A), arrangements between attorneys and non-attorneys by which they share facilities, advertise jointly and hold themselves out to the public as affiliated or acting jointly have historically been proscribed. See, e.g., N. Y. County 692 (March 1993); Nassau County 97-8; N.Y. State Op. 765 (July, 2003) (joint advertising and office-sharing with insurance agent and securities broker); but see NYCLA Op. 692, 1993 WL 837934 (permitting attorneys to share office space with insurance salesmen).

[1] The Designated Professionals are certified public accountants, engineers, social workers, architects and land surveyors. See 22 NYCRR §1205.5

DR 1-107(C) provides that an attorney may enter into a non-exclusive referral arrangement with a non-legal professional, provided that there is no fee-sharing or payment of referral fees. What constitutes a "[non-legal] professional" for purposes of DR 1-107(C) is not defined.[2]

The first opinion interpreting DR 1-107 was N.Y. State Op. 765, 2003 WL 21783320, which approved an attorney's referral arrangements with an insurance agent and a stock broker, neither of which are Designated Professionals. That opinion noted that the McCrate Commission study of multi-disciplinary practice, which preceded the promulgation of DRs 1-106 and 1-107, found a relatively low risk of improper behavior or danger to the public in non-exclusive referral arrangements. N.Y. State Op. 765 at 40, citing McCrate Commission Report at 98, 347-48. Financial advisors were referred to in the same sentence of that Report. While questions may arise about whether other professions are eligible for reciprocal, non-exclusive referral arrangements, the Committee believes that at least licensed investment advisors should be considered eligible for the same reason that the New York State Bar Association concluded that the professions there referred to were eligible in its Opinion 765.

Office Space

DR 1-107 could be read to imply by omission that an attorney may not permissibly share office space pursuant to a joint lease with a financial advisor or other non-Designated Professional as part of an arrangement that also includes required referrals. Entering into a joint lease for office space could be thought of as both "contractual" and "systematic and continuing" within the meaning of DR 1-107. The Committee does not believe that this is the intent of the Rule. A better interpretation, in the Committee's view, is that the drafters of the Rule were aware of a line of opinions permitting, in a pre-Rule 1-107 setting, the sharing of office space with non-professionals. See NYCLA Op. 692, 1993 WL 837934 (permitting attorneys to share office space with insurance salesmen); N.Y. City Op. 1987-1, 1987 WL 346191 (1987) ("There is, of course, nothing inherently unethical about a lawyer sharing offices with a non-lawyer."); N.Y. City Op. 81-105. As Professor Roy Simon of Hofstra University School of Law notes, "Many lawyers and non-legal professionals already share offices, and they may ethically do so as long as the lawyers diligently protect confidential client information, avoid conflicts of interest, avoid improper solicitation, and otherwise take all necessary steps to uphold the standards of the profession." Simon's New York Code of Professional Responsibility Annotated 417 (2004 ed.) DR 1-107 was adopted in response to debate about multidisciplinary practice and is primarily addressed to the provision of services on a systematic and continuous basis, not the common practice of sharing office space.

The Committee believes that attorneys must nevertheless exercise heightened vigilance in sharing space with any non-Designated Professional with whom the attorney expects to have a reciprocal referral arrangement. The sharing of office space, by its very nature, places the non-attorney in proximity to confidential information and may create

[2] DR 1-107(B) defines the term but only for purposes of DR 1-107(A)).

unwarranted inferences in the minds of the public of a systematic and continuous relationship that does not and should not exist. The sharing of office space with non-lawyers increases the risk both of clients' misunderstanding the relationship and of disclosing confidences and secrets to unauthorized persons. A real estate lawyer could share office space with a real estate broker whose customer's interests are adverse to those of the attorney's client. A securities attorney who shares space with a stockbroker could inadvertently expose client confidences and secrets to a suite-mate. The stringent requirements of DR 1-107 would make little sense if there were fewer safeguards in the case of non-professionals than for Designated Professionals.

For those lawyers sharing office space with non-lawyers, a few words of guidance are in order. If there is a common reception area, the signage and office nomenclature must not create the impression to the public that the lawyer and non-lawyer have a professional relationship. If there is one receptionist the same proscription applies. Existing space can be subdivided such that access to file rooms and computers containing confidential files is restricted.

In an office suite, the manner in which a telephone is answered must not lead a caller to believe there is a relationship between the suite-mates. Calls should be received through separate telephone lines and numbers so that the non-lawyer suite-mates do not receive any client confidences or secrets. Safeguarding the confidentiality of telephone calls is important because the client's name alone may well be a confidence or secret that must be protected. In furtherance of protecting this information, any person answering the telephone must be instructed to assure the confidentiality of the lawyer's telephone calls. Mail, facsimiles and electronic mail must be segregated to avoid disclosure of client confidences and secrets to the non-lawyer. (For a discussion of some ways of meeting this requirement, see Simon at 118-19.)

Thus, the Committee believes that a reciprocal referral arrangement is permissible with a person who is not a Designated Professional. Joint office sharing arrangements with non-Designated Professionals, while historically permitted, should be entered or continued only when precautions such as sub-dividing space and separating communications are undertaken, and these precautions will be particularly important whenever reciprocal referrals are also contemplated.

Certified Public Accountant/ Designated Professionals

The inquirer may enter into a more systematic contractual arrangement with the certified public accountant who is a Designated Professional. An attorney may share office space with a Designated Professional, provided strict precautions are taken to preserve client confidences and prevent imputed and actual conflicts, and the client's informed, written consent is obtained. In entering a contractual relationship with the certified public accountant, the attorney must exercise great care in meeting several other requirements and taking other precautions.[3]

[3] These suggestions may also provide guidance to lawyers who share office space with non-professionals.

The Committee has identified at least seven issues in the proposed arrangements that the inquirer will need to consider:

1. Client Consent. DR 1-107(A)(iii) requires that the contractual relationship be disclosed to a client either before the attorney makes a referral to a non-legal professional or before any client of the non-legal professional receives service from the attorney. The attorney must also explain the effect of the relationship on the client's confidences and secrets and the attorney's obligation to preserve and safeguard client funds. The client must be provided and sign a "Statement of Client's Rights in Cooperative Business Arrangements" which appears at 22 NYCRR §1205.4. This mandatory form requires written consent by the client and advises the client of the right to consult with an independent lawyer or other third party before signing.

2. Referral on a non-exclusive basis and only as necessary. EC 1-16 instructs that "referrals should only be made when requested by the client or deemed to be reasonably necessary to serve the client." Moreover, a contractual relationship "may not require referrals on an exclusive basis." Id. The attorney has a continuing obligation to verify the competence of the non-legal professional to handle the relevant affairs and interests of the client.

3. Communications with the public. DR 2-101(C)(1) was amended at the time DR 1-107 was adopted to permit a lawyer to include information in public communications about the existence of a contractual relationship between the lawyer and the non-legal professional and the nature and extent of services available through the continuing relationship. However, the attorney must be circumspect about how the relationship with the non-legal professional is characterized in any communications with the public. According to Professor Simon: "In terms of public perception, both the law firm and the non-legal professionals must make clear to the public that the law firm and the non-legal professional service firm remain separate entities." The separate nature of the several professionals must be clearly designated "on signs, in advertising, on stationery, in the way the receptionists answer the phone, and in all other ways that the firms interact with the public." Simon at 119. The attorney may not include in its firm name the name of the non-legal professional or adopt a name that would suggest an impermissible partnership with a non-attorney. DR 3-103.

With respect to mailing or dissemination of brochures or other literature, the attorney would have to comply with the limitations in DR 2-103. The attorney should review any brochures or advertising prepared by a non-legal professional to ensure that, insofar as they describe the relationship or refer to the attorney, their content is accurate and does not incorrectly characterize the relationship or the attorney's credentials. See, e.g., DR 2-101, 2-105.

4. Protection of client confidences. An attorney engaged in a permissible systematic and continuous relationship must take special precautions to insure the protection of client confidences. EC 1-15 states in this regard, "The lawyer or law firm cannot permit its obligation to maintain client confidences as required by DR 4-101 to be compromised

by the contractual relationship or by its implementation by or on behalf of non-lawyers involved in the relationship." Confidential information must not be accessible to the non-legal professional services provider when the attorney represents a client who is not referred to the non-legal professional. Even when a referral is made, some client confidences may need to be kept from the non-legal professional. When services are provided by the non-lawyer as a result of the joint relationship, confidences should be shared by the attorney only with the consent of the client, or in very limited situations when disclosure for a specific purpose, such as a trust accounting, would be expected. See N.Y. State Op. 473 (1977). An attorney in such a relationship may have to exercise considerable care in segregating files and keeping them unavailable to the non-lawyer and the non-lawyer's staff. See Simon at 119.

5. Computers and phone lines. The inquirer asked whether the arrangement could involve sharing computer services. Without knowing what particular computer service the inquirer is referring to, and without having particular computer expertise of its own, the Committee believes that any computer services which involve communications with or contain client information and which are shared with or accessible to non-attorneys could run afoul of the attorney's ethical obligations to preserve client confidences. The attorney must diligently preserve the client's confidences, whether reduced to digital format, paper, or otherwise. The same considerations would also apply to electronic mail and websites to the extent they would be used as vehicles for communications with the attorney's clients. See, generally, N.Y. State Op. 709 (Sep. 1998); Simon at 119.

The attorney is also responsible for taking necessary precautions so that telephone and fax lines and any voice mail or similar capability will be secure. "If the lawyers and non-legal professionals share fax machines, photocopy equipment, telephones, conference rooms, or receptionists, both the lawyers and the non-lawyers must constantly be vigilant to prohibit anyone in the other firm from seeing confidential papers or overhearing confidential conversations". Simon at 119. This is especially important because there may be occasions when the client's name is an important confidence or secret that must be protected. In furtherance of protecting this information, any person answering the telephone must be instructed to assure the confidentiality of the lawyer's telephone calls.

6. Allocation of costs and expenses. With respect to the sharing of costs, DR 1-107(A) provides that, notwithstanding DR 3-102(A) (which bars payment of compensation directly or indirectly for referrals), costs may be allocated "provided the allocation reasonably reflects the costs and expenses incurred or expected to be incurred" by the legal and non-legal professionals. See, also, EC 1-14. Several opinions predating the side-by-side rules have reached the same conclusion, albeit also emphasizing the care that must be taken in such arrangements. E.g., N.Y. City Op. 81-105; 82-36; Nassau Op. 97-6. Payment of costs and expenses disproportionate to those actually incurred would be a potential way to arrange for a disguised referral fee. Professor Simon advises attorneys to keep "meticulous track" of shared expenses so that the allocation can be as precise and accurate as possible. Simon at 142. Estimates could be made at the beginning of a relationship or at the beginning of a fiscal period, but should be revised and adjusted in light of actual experience.

The inquirer's proposal contemplated a joint bank account for payment of these costs and expenses. Such a joint account could lead to potential ethical problems, given the fact that the attorney and the non-legal professional cannot be partners to a joint enterprise. Difficulties could also be encountered if, for example, the attorney were to advance funds to such an account in order to pay expenses while payments from the non-legal professional were delayed or in arrears. There are circumstances under which the attorney's contributions could be viewed as disproportionate if the non-lawyer were to encounter financial difficulty or for any other reason did not contribute his proportionate share. Under those circumstances, the attorney's overpayment of expenses or over-contribution to the joint account might be characterized as an impermissible referral fee. Similarly, if the situation were to become reversed and the law firm were to fall in arrears in payment, the non-legal professional services firm would, in effect, be advancing funds and might thus be thought to be giving compensation for referrals or even, by becoming a creditor for sums advanced, obtaining an "investment interest" in the legal practice contrary to DR 1-107(B)(2) and DR 5-107(C). The Committee believes that it would be preferable for the attorney and non-legal professional to make separate expense agreements, without a joint account.

7. Conflicts. Finally, the attorney must be cognizant of the conflict of interest that could arise from a contractual arrangement. EC 1-18 notes that, "[d]epending upon the extent and nature of the relationship," it may be appropriate to treat the contractual relationship as a single law firm, "as would be the case if the non-legal professional or non-legal professional service firm were in an 'of counsel' relationship with the lawyer or law firm."

Judging from past experience among co-counsel or affiliated lawyers, key criteria for this purpose would be the extent to which the parties to a side-by-side arrangement appear to operate as a single firm, the manner in which they identify themselves to the public, and the extent to which they maintain a physical separateness and access to client files. NYCLA Op. 680 (1990); N.Y. City Op. 80-63; Simon at 118-19. Note that if they were to be treated as one firm for conflict purposes, the attorney would have to keep records pertaining to engagements of the non-legal service providers and establish a system for checking them under DR 5-105(E). See N.Y. City Op. 2000-4. These considerations underscore the practical necessity in any such contemplated relationship that referrals be truly non-exclusive, that the physical separateness of the operations and client information be vigorously maintained, and that all communications with the public appropriately describe the relationship.

Conclusion

The Committee believes that, with exercise of precautions and full disclosure and informed consent, including but not limited to that mandated in 22 NYCRR §1205.4, the attorney may enter a contractual relationship and share space with the certified public accountant. Although the contractual relationship with the accountant could not include the financial advisor, the Committee believes that the attorney could enter a separate

relationship with an investment advisor limited to non-exclusive reciprocal referrals and sharing of space with appropriate physical subdivision of offices, and separation of electronic files and electronic and telephonic communications.

APPENDIX

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Chart Concerning Permissible Arrangements

Activity	Designated Professional	Non-Designated Professional
Shared Office Space	Yes.	Discouraged but permissible with precautions and as much segregation or subdivision of space as possible.
Non-Exclusive Referrals	Yes.	Yes.
Shared Computer Access	No.	No.
Joint Telephone Lines	No.	No.
Shared Receptionist	Permissible, if clear separation of communications with clients and identity.	Permissible, if clear separation of communications with clients and identity.
Joint Bank Account	Discouraged.	Discouraged.
Brochures & Advertising	Yes.	No.
Referral Fees	Never.	Never.
Sharing of some Office Expenses	Yes, if meticulously allocated and accounted for.	Yes, if meticulously allocated and accounted for.
Joint Name	No.	No.