

TO: Executive Committee, Commercial and Federal Litigation Section, New York State Bar Association

FROM: Committee on Ethics and Professionalism

DATE: July 26, 2012

RE: Report on the American Bar Association's Proposal for Comment on Choice of Law – Alternative Law Practice Structures dated December 2, 2011

Introduction

The Chair of the Section of Commercial and Federal Litigation (“the Section”) has requested that the Committee on Professionalism and Ethics (“the Committee”) report on the American Bar Association’s Proposal for Comment on Choice of Law – Alternative Law Firm Structures dated December 2, 2011 (“the Proposal”). The Proposal suggests two changes to the ABA Model Rules of Professional Conduct relating to sharing fees. The proposed changes are to rules 1.5 Fees, subdivision (e) and 5.4 Professional Independence of a Lawyer, subdivision (a). The proposed changes to the existing rules are set forth in the Proposal, which is attached.

The Committee recommends that the Section endorse the proposed changes to Rule 1.5(e). The Committee has concerns about the changes proposed to Rule 5.4(a), and therefore recommends that it be adopted with certain revisions, explained below.

Summary of the Proposal

The stated purpose of the proposal is to resolve choice of law issues that have arisen and will likely continue to arise with greater frequency due to inconsistencies among jurisdictions on the issue of dividing sharing fees with non-lawyer owners of law firms. New York, like many other jurisdictions, does not permit non-lawyer ownership of law firms. However, other jurisdictions, both in the United States and abroad, do permit non-lawyer ownership of law firms. The Proposal does not extend non-lawyer ownership of law firms to jurisdictions, such as New York, that presently prohibit it. However, in two situations, it does permit lawyers in jurisdictions, such as New York, which do not allow non-lawyer ownership, to share fees with non-lawyer owners of firms in jurisdictions that do permit non-lawyer ownership.

First, under the proposed changes to Rule 1.5(e), lawyers in New York would be permitted to share fees with law firms that have non-lawyer owners in those jurisdictions where such ownership is permitted. Second, under the proposed changes to Rule 5.4(a), in multijurisdictional firms that have foreign offices in which there are non-lawyer owners, members of the firm admitted in New York and working in the New York office would be permitted to share fees with the non-lawyer owners if such fee sharing would be permissible under the rules of the foreign jurisdiction, and the non-lawyer performs professional services that assist the firm in providing legal services to its clients.

Discussion of Proposed Changes to Rule 1.5(e)

The proposed change to 1.5(e) would allow a firm in New York or another jurisdiction that does not permit non-lawyer ownership to share fees with a firm in a foreign jurisdiction that does have non-lawyer owners, provided that the foreign firm is permitted to have non-lawyer owners under the rules in effect in that foreign jurisdiction. The Committee endorses this proposal because it helps clients get multijurisdictional advice, it frees attorneys from the difficult task of policing the compensation policies and ownership structure of independent firms in foreign jurisdictions, and it does not interfere with the ability of New York lawyers to make judgments for the benefit of their clients free from the influence of non-lawyer members of the foreign firms. In the increasingly global economy, clients are frequently in need of advice from lawyers in multiple jurisdictions, both within the United States and abroad. There are now many jurisdictions that permit non-lawyer owners, so it will often be the case that the client needs help from both a New York law firm, and a foreign firm that has non-lawyer owners. Allowing the firms to share fees in that situation, gives firms the incentive to collaborate in situations where the client needs help from multiple firms. We are in favor of reducing the barriers to clients getting this multijurisdictional advice, and believe that rules prohibiting fee sharing in this situation could discourage firms from engaging firms in the foreign jurisdiction that have the expertise the client needs. The Committee also believes that a rule prohibiting fee sharing with foreign firms that have non-lawyer members would unreasonably burden the lawyer in New York, who would have to investigate the ownership and compensation structure of the foreign firm. Finally, because the New York firm and the foreign firm are independent entities, there is little risk that the non-lawyer members of the foreign firm would be able to influence the independent professional judgment of the lawyers in the New York firm.

Discussion of Proposed Changes to 5.4(a)

The proposed change to 5.4(a) deals with firms that have offices both in New York, where non-lawyer ownership is prohibited, and in a foreign jurisdiction that allows non-lawyer owners of law firms. In that scenario, it would allow the lawyer admitted and practicing in New York, to share fees with a non-lawyer owner in the foreign office, if such fee sharing would be permissible under the rules of the foreign jurisdiction, and the non-lawyer performs professional services that assist the firm in providing legal services to its clients. The Committee has serious concerns that this may, in some cases, result in effective ownership and control of the New York office by non-lawyers residing in the foreign jurisdiction. That would be inconsistent with the previous, strong public opposition of the New York State Bar Association to such ownership.

To illustrate the danger, consider a foreign firm where the majority of the owners are non-lawyers, or where the compensation or other key management committees are controlled by non-lawyers. In such a firm, a lawyer in New York could be under extreme pressure to conform his or her views to those of the non-lawyer managers. This would undermine one of the key goals of Rule 5.4 which is to protect the professional judgment that the lawyer owes the lawyer's client from the influence of non-lawyers.

The rule as currently interpreted, protects against this danger by requiring that the New York office be "fiscally and managerially separate from and independent of" any offices located in

jurisdictions that permit non-lawyer partners or owners.¹ The Committee considers this to be an important limitation that should be preserved in the proposed revision. Accordingly, the Committee recommends New York lawyers be permitted to share fees with non-lawyer owners in the same firm only if: (1) the non-lawyer owners are in a foreign jurisdiction that permits non-lawyer ownership; (2) non-lawyer owners do not have the ability to control the management of the firm as a whole; (3) non-lawyer owners do not sit on the compensation committee or play any role, directly or indirectly, in decisions relating to the compensation of attorneys admitted to practice or working in jurisdictions that prohibit non-lawyer ownership; and (4) the non-lawyer performs professional services that assist the firm in providing legal services to its client.

Recommendation of the Committee of Ethics and Professionalism

For the foregoing reasons, the Committee recommends that the Section endorse the proposed revisions to Rule 1.5(e). The Committee also recommends that the Section endorse the proposed revisions to 5.4(a) with the further limitation described above against non-lawyer control of firm management and non-lawyer involvement in compensation decisions concerning attorneys admitted to practice or working in jurisdictions that prohibit non-lawyer ownership.

The Proposal has been controversial and the views of the Committee are not unanimous. The Committee prepared two prior reports to the Executive Committee endorsing the Proposal. Paul Sarkozy, Vice Chair of the Section, responded to the first report with concerns that the Proposal opened a back door to non-lawyer ownership of New York firms. On the motion of the Section's Chair, Tracee Davis, the Executive Committee asked the Committee to redraft the report to address these concerns. The second report still endorsed the Proposal after considering this concern, but with a dissent from Tony Harwood, one of the co-chairs of the Committee. The dissent expressed concern that 5.4(a) could allow non-lawyer owners of multijurisdictional firms with offices in New York to influence the professional judgment of lawyers in the New York offices through control of management or compensation decisions. The Executive Committee then asked the Committee to redraft the report to address the concerns of the dissent, which this report does. However, even as redrafted, one Committee member, Gerard Harper, dissented strongly, stating that he opposes any proposal that allows lawyers to share legal fees with non-lawyer owners or members of a law firm.

¹ ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 91-360 (1991) at 12.