

# Lawyers' Manual on Professional Conduct™

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## CURRENT REPORTS

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### *Advertising and Solicitation*

#### **Creative Arrangement With Nonlegal Business Must Clear Wide Range of Potential Hurdles**

**A** lawyer should consider as many as 21 ethics rules, along with other applicable law and court rules, before deciding whether to form an arrangement with a nonlegal business that wants the lawyer to review forms it has completed for customers seeking citizenship in another country in return for a percentage of the customers' fees the business receives, according to an opinion released this month by the New York City bar's ethics committee (New York City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2014-1, 1/14).

While not exactly saying no to the proposed arrangement, the committee identified numerous potential problems that could make it unethical, such as possibly assisting the unauthorized practice of law, forming a prohibited multidisciplinary practice, sharing legal fees with a nonlawyer and paying prohibited referral fees.

The opinion also spots and discusses ethics obligations that may arise if the arrangement creates an attorney-client relationship between the lawyer and the business's customers. Lack of direct contact with these clients could make it difficult for the lawyer to carry out these professional duties, according to the committee.

**"We had to approach it as an issue-spotting opinion rather than giving definitive answers."**

NICOLE HYLAND  
ETHICS COMMITTEE CHAIR

Lawyers who are contemplating creative arrangements with nonlegal organizations must analyze for themselves how ethics rules apply to the facts of the particular game plan, the opinion makes clear.

**Starting Point.** Nicole Hyland, who chairs the ethics committee, told Bloomberg BNA she hopes the opinion will help lawyers as a starting point when they are considering creative relationships with nonlegal businesses. Hyland practices in New York with Frankfurt Kurnit Klein & Selz P.C.

Hyland said the opinion arose out of a confidential inquiry by a lawyer who had been approached about a proposed business arrangement with a company that helps U.S. citizens apply for citizenship in a foreign country. The committee developed a formal opinion, she said, because in the current legal environment many lawyers are looking at nontraditional business arrangements.

Developing the guidance was challenging, Hyland said. "We had to approach it as an issue-spotting opinion rather than giving definitive answers," and as the committee worked on the opinion, new issues kept popping up, she said. "Every time we thought we were done, we realized there was another issue," she said.

The opinion does not address arrangements between lawyers and nonprofit organizations, Hyland said, because the informal inquiry that sparked the opinion involved a proposed business arrangement, and the opinion is intended for lawyers considering creative business relationships.

**Citizenship-Application Company.** According to the opinion, the inquiring lawyer is originally from a foreign country but lives and is licensed in New York. Part of the lawyer's practice involves advising U.S. citizens who want to apply for citizenship in the lawyer's country of origin.

The lawyer is considering a business arrangement with a nonlegal organization, located in another state, that provides services to U.S. citizens who want to apply for citizenship in that foreign country. Under the proposed plan, the business would prepare citizenship applications for its customers and then send the draft applications to the lawyer for review to ensure they comply with applicable legal requirements.

The lawyer would not meet with or communicate directly with the applicants. The business charges its customers according to a fixed fee schedule, and proposes to pay the lawyer a percentage of these fees.

**Seven Questions.** The committee advised the lawyer to consider seven key questions en route in determining whether the arrangement complies with the New York Rules of Professional Conduct.

**Which state's rules apply?** New York's rules would apply if the lawyer is licensed only in New York; if the lawyer is also licensed elsewhere, Rule 8.5(b) should be reviewed to determine which state's rules apply.

**Will the lawyer's involvement amount to UPL in another jurisdiction?** The lawyer must figure out whether

performing the legal review will violate regulations governing the legal profession in any other jurisdictions implicated in the proposed arrangement. If so, the lawyer would violate Rule 5.5(a), which forbids lawyers from practicing law in a jurisdiction contrary to its regulation of the profession.

**Is the nonlegal business engaged in UPL?** The lawyer must consider whether the nonlegal entity's conduct constitutes the unauthorized practice of law. Although observing that UPL issues are beyond the committee's purview, the panel noted that the lawyer needs to evaluate the types of services the business provides to its customers in light of the relevant legal authorities that define what it means to engage in the practice of law.

**Is the arrangement a forbidden MDP?** The committee noted that New York's Rule 5.8 does not allow lawyers to join with nonlegal businesses in offering services to the public except for a few specified categories, none of which includes businesses providing immigration services. If the proposed arrangement constitutes multidisciplinary practice—which the committee said it lacked sufficient information to determine—it is prohibited under Rule 5.8.

**Is there improper fee splitting?** When analyzing whether the payment structure violates the prohibition on sharing fees with a nonlawyer under Rule 5.4(a), the lawyer should consider whether the customers are paying the business more, less or exactly the same for the lawyer's legal review as they would if they made payment directly to the lawyer for this legal service. If the nonlegal business gets a financial benefit by including the lawyer's legal fees in its overall charges, the arrangement may violate Rule 5.4(a). Disciplinary authorities are likely to give the payment arrangement close scrutiny, the committee predicted. It noted that New York has enacted criminal penalties against fee sharing with nonlawyers.

**Does the payment structure amount to paying a referral fee?** Rule 7.2(a) forbids a lawyer, except in certain limited circumstances, to "compensate or give anything of value" to another to recommend or obtain business for the lawyer. The proposed referral structure might result in an indirect referral fee if, for example, the amount the nonlegal business pays the lawyer out of the customers' fees is less than what the lawyer would charge them directly for the legal review. However, Rule 7.2(a) is not necessarily violated by offering a "preferential rate" to clients from a particular referral source. In addition, the lawyer should determine whether the nonlegal business fits within one of the categories in Rule 7.2(b) that are excepted from the prohibition against referral fees.

**Who is the lawyer's client?** The lawyer needs to consider, depending on the circumstances and facts, whether the lawyer's clients would be the customers, the nonlegal business or both.

**Obligations if Customers Are Clients.** If the lawyer represents the individuals applying for citizenship, the committee said, the business arrangement raises concerns about the lawyer's ability to meet obligations to those clients under numerous ethics rules:

■ Rule 1.1(a) — The lawyer may have a difficult time providing competent representation if the lawyer has no contact with the clients, and the lawyer would not be in a position to ensure that the nonlegal business implements the legal advice in a competent manner.

■ Rule 1.2(c) — If this is a "limited scope representation," the limits must be reasonable and the client's informed consent needs to be obtained. The lawyer may not be able to evaluate the reasonableness of the limits and may not be able to obtain informed consent without directly communicating with the clients.

■ Rules 1.4 and 1.2(a) — The lack of direct contact with the clients would make it difficult to comply with the communication requirements of Rule 1.4 and the consultation requirements of Rule 1.2(a). Disciplinary authorities are likely to scrutinize the arrangement closely because the lawyer would have no opportunity to correct any misleading statements the nonlegal business may make to the clients about the lawyer, the scope of the representation or the nature of the legal review.

■ Rule 1.5 — The lawyer's lack of involvement in determining the amount charged for the legal review is incompatible with the duty to ensure that the fee charged to a client is not excessive. Although a fee schedule prepared by a lawyer for legal services is not necessarily improper, the arrangement would violate Rule 1.5 if the lawyer cedes control over the setting of legal fees to a nonlawyer. Furthermore, the lack of direct contact with the clients may make it difficult to comply with the duty to explain the basis or rate of the fee and expenses to the client, as required by Rule 1.5.

■ Rule 1.6(a) — The lawyer would need the client's informed consent to pass her information through the nonlegal business. The client may not be able to make an informed decision about whether to waive confidentiality without direct communication with the lawyer.

■ Rule 1.7(a) — If the business arrangement creates a personal conflict of interest for the lawyer in representing a client, the client is unlikely to be in a position to give informed consent to waive the conflict.

■ Rule 1.8(f) — If an individual seeking citizenship is the client and the nonlegal business pays her legal fees, the lawyer must comply with the conditions in Rule 1.8(f) for accepting compensation from a third party, including getting the client's informed consent to the payment arrangement and protecting the client's confidential information from the payor.

Full text at <http://www.nycbar.org/ethics/ethics-opinions-local/2014opinions/1933-formal-opinion-2014->

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