

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1989-90/14
Division of Fees Between Lawyers
June 14, 1990

RULE REFERENCES:

- *Rule 1.5
- *Rule 1.5(f)
- *Rule 1.5(f)(1)
- *Rule 1.5(f)(3)

SUBJECTS:

- *Division of Fees
- *Fees
- *Unauthorized Practice of Law

CODE REFERENCE:

- *DR 2-107

STATUTORY REFERENCES:

- *RSA 311:7

ANNOTATIONS:

Whether an attorney licensed in another state is a "lawyer" within the meaning of the rules governing division of fees is an issue to be resolved by the judiciary. (RSA 311:7)

A lawyer may divide fees with another lawyer if such division is in reasonable proportion to either the services performed or responsibility or risk assumed by each. (Rule 1.5(f))

Client consent to such division must be obtained after full disclosure by the attorney. (Rule 1.5(f)(1))

The total fee charged by both lawyers must be reasonable. (Rule 1.5(f)(3))

I. QUESTION:

May an attorney divide a fee with a second attorney who refers a personal injury case to the first attorney and provides certain support services?

II. BRIEF RESPONSE:

A division of fees would be proper in this case if: (1) The division is reasonably proportional to the services performed or risks or responsibilities assumed; (2) The total fee is reasonable; (3) The client consents to the arrangement after a full disclosure.

III. RESPONSE:

A New Hampshire law firm inquires regarding the propriety of dividing legal fees with a California attorney who is not licensed in New Hampshire under the following circumstances: the California attorney claims to have considerable experience in personal injury litigation and as a personal injury claims adjuster. The California attorney seeks one-third (1/3) of any attorney's fees recovered by the New Hampshire law firm in the personal injury cases referred to the New Hampshire law firm. In addition to referring the client, the out-of-state attorney will pay for all advertising, shall provide other services including consultation and advice throughout the various proceedings and an

expert witness referral bank, and would assist in discovery, preparation for trial, and evaluation of the case for trial or settlement.

We treat this inquiry as presenting the question of whether the proposed arrangement is a proper division of fees between lawyers who are not in the same firm. See Rule 1.5(f). Prior to reaching the merits of the issue presented, we must address the status of the California attorney within the meaning of Rule 1.5(f)--i.e., is the California attorney a "lawyer" within the meaning of the Rule?

Courts have been divided on the question of whether an attorney not licensed in a particular jurisdiction can nevertheless split fees with a licensed attorney pursuant to Rule 1.5. Compare *Peterson v. Anderson*, 745 P.2d 166(Ariz.App.1977) (fee splitting arrangement with a lawyer who was neither licensed to practice in a particular state nor admitted *pro hac vice* violated ethical rule against sharing of legal fee with "nonlawyer") with *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422 (10th Cir. 1979) (law professor not licensed in a particular state is nevertheless a lawyer within the meaning of the rule governing division of fees). See also, NH Op 1988-89/20 ("Attorney involved in an 'of counsel' relationship must be particularly sensitive about fee-splitting arrangements generally, and in particular with a person not admitted to practice in this jurisdiction.").

The Committee believes it does not have authority to resolve this issue, since issues of unauthorized practice have been delegated by the New Hampshire Legislature to the courts. See RSA 311:7. Attorneys confronted with this problem may wish to seek a declaratory ruling from the appropriate court regarding the interpretation of the Rule. Therefore, for purposes of this decision we will treat the sole issue presented as one relating to division of fees.

Restrictions on the division of fees between lawyers who are not in the same law firm were modified in New Hampshire with the adoption of the New Hampshire Rules of Professional Conduct. DR 2-107 of the old Code required that any division of fees among lawyers who were not in the same firm be in proportion to the responsibility assumed **and** the services performed by each lawyer. In contrast, N.H. Rule 1.5(f) provides that such a division of fees may be made "in reasonable proportion to the services performed or responsibility or risks assumed by each [lawyer]"¹ The rule further specifies that the client must provide consent to employment of the other attorney after full disclosure, Rule 1.5(f)(1), and that the total fee be reasonable, Rule 1.5(f)(3).

The Committee interprets the New Hampshire Rule to require each New Hampshire attorney to make a reasonable judgment that the division of fees is "proportional" to one or more of the three factors described in the Rule. Without further information, the Committee is unable to determine whether the arrangement described above meets the standard.

¹ The N.H. rule differs substantially from the Model Rules. The analogous Model Rule permits division in proportion to the services performed by each attorney or by written agreement with the client when each lawyer assumes joint responsibilities for representation, ABA Model Rules of Professional Conduct 1.5 (e).