

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1993-94/16
Fee Sharing: Association Staff Attorney Representing
Association Members for Fees Paid in Trust
May 11, 1994

RULE REFERENCES:

*Rule 1.5 *Rule 1.6
*Rule 1.7 *1.7(b)
*Rule 1.8(f) *Rule 1.13(e)
*Rule 5.4 *Rule 5.4(a)
*Rule 5.4(c)

SUBJECTS:

*Charitable Organization
*Confidentiality
*Conflict of Interest
*Division of Fees
*Dual Representation
*Fees
*Independent Judgment

ANNOTATIONS:

The staff lawyer of a non-profit association may render legal services to members of that association provided that the client consents to payment from a trust set up by the association, neither the trust nor the association interfere with the lawyer's independence of professional judgement, or with the lawyer-client relationship, and the lawyer protects client confidences. (Rule 1.6, 1.7, 1.8(f), 5.4(c)).

A staff lawyer of a non-profit association may receive payment for legal services provided to the members of the association from a trust established by the association and funded by member-client payments, provided the association does not share in the fees (payments) made by member-clients. (Rule 5.4(a)).

FACTS:

The issue currently before the Committee involves a non-profit association with its own salaried counsel that intends to provide its member-clients with prepaid legal services to be rendered by the association's counsel. The plan proposed shall be funded by a separate trust to which the members would contribute a fixed fee for specified legal assistance. The sole purpose of the trust shall be the provision of legal services. The members may retain counsel on an hourly basis for any additional services, with the fees payable to the Trust. The attorneys would be hired by the member-clients as their attorneys and paid by the Trust. The trust document shall prohibit the Trust from exerting any influence or control upon the attorney. Payment from the member-clients shall be directly to the Trust. Payment by the Trust to attorneys may be either by direct distribution to the attorney or by reimbursement by the Trust to the association for a percentage of the association counsel's time used by the Trust.

QUESTION:

Whether it is permissible under the Rules for a lay non-profit organization to establish a separate trust, administered by the trustees and funded by organization members, to provide members of the

organization with legal aid assistance performed by those attorneys employed by the parent organization and paid for by the trust with fees from the participating members?

RESPONSE:

1. Rationale

A client seeks out an attorney for assistance and counseling in matters that often seem intricate and confusing. The attorney is a guide through the maze of intertwining issues, rulings and regulations, and as such has a singular commitment and obligation to the client. As a counselor and confidante, an attorney's professional judgment cannot be compromised by either outside influence or excessive monetary gain. Rule 5.4 was devised to protect a lawyer's independent judgment. Rule 5.4 limits the circumstances in which an attorney may share his or her fees.

Rule 5.4(a) prohibits a lawyer from sharing his or her legal fees with a non-lawyer, except in cases involving the estate of a deceased former partner or in compensation or retirement plans. Rule 5.4(c) further states that "a lawyer shall not permit a person who recommends, employs, or pays him or her to render legal services for another to direct or regulate his or her professional judgment in rendering such legal services." Rule 5.4(d)(3) also states that "a lawyer shall not practice with or in the form of a professional corporation or association for a profit if a non-lawyer has the right to direct or control the professional judgment of a lawyer."

These provisions prohibit any undue influence or conflicting interests exerted by non-lawyers upon attorneys for monetary gain. Fee-splitting by an attorney with a non-lawyer, such as for referrals, is absolutely prohibited.

Rule 1.13(e) states that "a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7". Such provisions prohibit representation if [representation of] the client may be materially limited by the attorney's duty to another client, or to a third party or by the attorney's own self-interest. Rule 1.7(b) further states that the attorney must be reasonably certain that the client's representation shall not be affected and that the client has been notified of the consequences of such representation and consents to it.

These rules are intended to ensure that the individual client is fully aware of the attorney's affiliation with the organization and is agreeable to it, and that the client's interests are not compromised by those of the organization.

2. Prepaid Legal Plans

The ABA Informal Ethics Opinion 1409 (1978) permits an attorney to participate in a plan, offered by a non-profit organization, which provides legal services that are prepaid as long as no more than a reasonable portion of the subscribers' payments are deducted to cover administrative costs.¹

The District of Columbia Ethics Opinion (1985) allows attorneys to participate in a non-profit organization's prepaid legal services plan which provides members with legal services for a fixed monthly fee based on the number of hours each member wishes to reserve up to a certain maximum, as well as for additional hours that may be charged at an established hourly rate. There are certain criteria for such a plan: the fees charged cannot be excessive based on services performed; the member-clients

are made aware that the services they request may require more than the reserved hours at additional cost; that payment to the parent organization is for services rendered and is not intended as fee splitting between a non-lawyer and an attorney; the parent organization does not control or influence the attorneys' judgment regarding services rendered to the member-clients; that the attorneys maintain professional loyalty to the member-clients; and that the attorneys are capable of representing the interests of the member-clients and the parent organization.

An organization cannot provide the services of its salaried counsel to its individual members at a profit to the organization. The fees charged to the member-clients cannot exceed the organization's costs in providing the services. This is a direct violation of the prohibition against fee-sharing between attorneys and non-attorneys. National Treasury Employees Union v. U. S. Department of Treasury, 656 F.2d 848 (1981). However, the Court stated that such services may be provided so long as the organization derives no profit.

As proposed, the non-profit association's provision for a separate trust funded by fixed fees satisfies the prohibitions of Rule 5.4 regarding the sharing of fees between lawyers and non-lawyers. The member-client's notice of and consent to contemporaneous representation satisfies the provisions of Rule 1.13(e) regarding dual representation. The prohibition of any regulation by the parent association of the attorneys' representation of the member-client corresponds to the dictates of Rules 1.7, 1.8, and 1.13(e).

The current New Hampshire Rules do not permit a salaried lawyer, hired by a lay organization, to simultaneously represent a member-client whose fee payment would constitute a monetary profit to the organization. The association trust plan before the Committee is proposed to compensate the salaried attorney. The attorney is not intended to compensate the association. The attorney is not practicing in order to create a profit for the association. Any funds received by the association shall be directed to its own operating costs, and its administrative expenses. Therefore, the Rules do not prohibit such a plan.

¹ [Lawyers must decline reputation from for-profit plans. See Arizona Ethics Opinion 85-3 (1985).]