

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1986-87/11
Payment of Fees to Lawyer Referral Service
September 8, 1987

RULE REFERENCES:

- *Rule 1.5
- *Rule 1.5(f)
- *Rule 5.4(a)
- *Rule 7.2(c)

CODE REFERENCES:

- *DR2-103(B)
- *DR2-103(C)(1)

SUBJECTS:

- *Contingent Fees
- *Division of Fees
- *Fees
- *Lawyer Referral Services
- *Referrals

ANNOTATION:

It is unclear under the present Rules whether the New Hampshire Bar Association's Lawyer Referral and Information Service may base its referral fee on a percentage of the participating lawyer's total fee. (Rules 1.5; 1.5(f); 5.4(a); 7.2(c))

QUESTION:

The New Hampshire Bar Association operates a "full fee" Lawyer Referral and Information Service which refers a prospective client to a lawyer willing to handle the client's case. Presently this service is funded by a \$30 per referral contribution, split equally between the client and the lawyer. This funding mechanism does not produce sufficient revenue to cover the administrative costs. A proposal has been made to alter the funding mechanism so that the participating lawyers would remit a percentage of their total fee received to the Service. The Service has asked whether such a funding scheme would be ethical under Rule 1.5 of the New Hampshire Rules of Professional Conduct. The Service has also asked whether the answer would be affected by the following specific factors:

- a. The amount of the percentage.
- b. The existence of a standard cap on the amount remitted in every case.
- c. A limit on the gross amounts collected by the Service to equal its administrative costs.
- d. A prohibition against the participating lawyers' raising their total fee to pass along the additional cost to their clients.

RESPONSE:

Although the Service has submitted its inquiry concerning Rule 1.5, the Committee has identified several other Rules which have an impact on this question. After lengthy discussion and consideration, the Committee was not able to arrive at an opinion harmonizing the arguably conflicting provisions of Rules 1.5(f) and 7.2(c) on this point. Therefore, this Opinion will discuss the reasoning behind the two opposing positions that can be taken on this issue, for whatever guidance it may offer to the Service.

1. The favorable view is derived from those bar association opinions which permit a percentage fee reimbursement to a lawyer referral service as envisioned in the question presented. The American Bar Association Formal Opinion 291 (August 1, 1956), as well as opinions from Los Angeles, San Diego, Chicago, New Jersey, Maryland, and California all permit their lawyer referral services to charge a percentage of the attorney's final fee as reimbursement for the referral. These opinions are based upon provisions of the former Canons of Professional Conduct and two provisions of the former Code of Professional Responsibility, D.R. 2-103(B) and D.R. 2-103(c)(1). D.R. 2-103(B) states that a lawyer may pay the "usual and reasonable fee or dues charged" by a lawyer referral service operated by a Bar association. D.R. 2-103(C)(1) states that a lawyer may request a referral from a lawyer referral service operated by a bar association, and "may pay its fee incident thereto."

These rules have been recodified, with slight changes, in Rule 7.2(c) of the Rules of Professional Conduct, now in force in New Hampshire. Rule 7.2(c) states:

A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

The proponents of the proposed reimbursement scheme argue that Rule 7.2(c) governs this issue and allows the Service to collect a percentage of the participating lawyer's fee to generate its revenue. The rule explicitly permits a lawyer to pay the "usual" charges of the lawyer referral service. As long as the Service continues to be bona-fide, not-for-profit service run by the New Hampshire Bar Association, and as long as it has properly adopted this method as its "usual" charge, there should be no further need for inquiry.

Although the "usual charges" of the Service at the time of promulgation of the Rules in New Hampshire were based on a flat fee, the proponents of this view do not believe that a flat fee is the only type of "usual charge" that may be collected by the Service. There is no such restriction built into the Rule.

Some have argued that the change in the language between the old Code and the new rules from "usual and reasonable fees or dues" to "usual charges" is significant enough to evince a legislative intent to prohibit the percentage reimbursement scheme in question here. The argument is that the term "charges" implies a fixed levy across the board, whereas the term "fees" connotes something more than a fixed levy, and can more readily encompass a percentage of a contingent legal fee. This argument is refuted by the point that, if the drafters of the Rules were concerned about and wanted to abolish percentage fee reimbursement plans, they could have easily done so in clear and unequivocal language.

2. Notwithstanding the provisions of Rule 7.2(c), an equally strong argument can be made that the specific prohibitions in the rules against fee splitting override the general permission granted by Rule 7.2(c) to collect "usual charges". This argument presupposes that this form of reimbursement constitutes a division of fees, and further presupposes that a "usual charge" for the purposes of Rule 7.2(c) can never include a fee sharing arrangement declared to be unethical by other portions of the rules. This was the position taken by the Illinois State Bar in its Opinion 506 (October 7, 1975).

The argument for considering this scheme to be a division of fees rather than merely a contribution to cover administrative expenses is that the administrative overhead involved in making each individual referral is basically the same in each case. There is no meaningful relationship between the amount of work performed and the costs expended by the Service in making a referral, and the amount of the percentage fee remitted to the Service by the lawyer under the Proposed scheme. Therefore, the Service is generating revenue by dividing or sharing fees with its participating lawyers.

Rule 1.5(f) governs the division of fees between lawyers who are not in the same firm, and permits it only if:

- (1) the client consents to employment of the other lawyer after a full disclosure that a division of fees will be made;
- (2) the division is made in reasonable proportion to the services performed or responsibility or risks assumed by each; and
- (3) the total fee of the lawyers is reasonable.

Although the Service is controlled by and on behalf of an association of lawyers, and it is managed by a lawyer, there is some doubt that the entity itself should be deemed to be a "lawyer" for the purpose of this Rule. If it should be, subsection (2) would arguably prohibit the scheme, since the Service performs no legal services for the client and assumes no responsibility or risk for the work performed.

If the service were not deemed to be a "lawyer" under Rule 1.5(f), the scheme can then be judged under Rule 5.4(a). This Rule prohibits a lawyer from sharing fees with a non-lawyer except in three specific circumstances which are not relevant to this case. This rule would arguably prevent the participating lawyer from remitting a percentage of his or her fee to the Service.

CONCLUSION:

The Committee believes that there is merit to both of the opposing views on this issue. There is no clear answer to the question presented given the present state of the rules. The Service may wish to seek clarification from the Supreme Court, or it may wish to seek an amendment to the rules. Since the Committee could not agree on an answer to the main question presented, it could not give any meaningful advice concerning the subsidiary issues raised by alternatives and set forth in the inquiry.