

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Advisory Opinion #1992-93/1
Fee Splitting in Contingent Fee Cases with a Referring Attorney
Whose License is Revoked Subsequent to the Referral
November 18, 1992

RULE REFERENCES:

- *Rule 1.5(f)
- *Rule 5.4(a)
- *Rule 8.4(a)

SUBJECTS:

- *Contingent Fees
- *Division of Fees
- *Fees
- *Referrals

ANNOTATION:

An attorney may share fees with a disbarred attorney who referred a case to the extent that the right to receive those fees accrued before disbarment. (Rule 5.4(a))

The receiving attorney may not make a gift of a portion of that lawyer's fees to someone in the disbarred lawyer's family if the purpose of the gift is to circumvent the rule against improperly sharing fees with a disbarred lawyer. (Rule 8.4(a))

FACTS:

A law firm accepts a referral or referrals of contingent fee cases from an attorney whose license to practice law in New Hampshire is later revoked. For purposes of this opinion we assume that the client has consented and that "referral fees" are allowed under Rule 1.5(f) of the N. H. Rules of Professional Conduct. Note that there is some disagreement on the Ethics Committee as to whether a fee paid solely for the referral violates New Hampshire's Rule 1.5(f). *[Ed. Note: This opinion does not address this issue.]* Some of the cases are settled or tried to verdict after the referring attorney is disbarred.

QUESTIONS:

1. To what extent do the NH Rules of Professional Conduct permit sharing of fees with the disbarred attorney?
2. Regarding any fees which could not be ethically shared with the referring disbarred attorney:
 - a. Do the Rules permit those fees to be, instead, shared with the referral attorney's successor who takes over his/her practice and the handling of his/her cases?
 - b. Do the Rules permit those fees to be, instead, placed in trust for the benefit of the disbarred attorney's minor children until they reach age 18?
 - c. Do the Rules permit the firm to make a gift to the disbarred attorney's spouse or children of part of the firm's fee in an amount equal to the share which the disbarred attorney would have received if not for the disbarment?

RESPONSE:

Under Rule 5.4(a) fee splitting with non-lawyers is generally not permitted (with 3 enumerated exceptions which do not apply to the above hypothetical). A disbarred attorney is by definition a non-lawyer. Therefore an attorney may share fees with a disbarred attorney to the extent that the right to receive those fees accrues before disbarment. The key question is what portion, if any, of the fees was earned by the disbarred attorney prior to disbarment? The answer to this question requires an analysis of the specific provisions of the contract between the two attorneys, made in light of Rule 1.5.

Any fees earned after referral could be shared with the attorney who took over the referring/disbarred attorney's cases to the extent that the replacement attorney performs the work or assumes the appropriate responsibility or risks which would justify fee splitting under Rule 1.5(f). However, ethics committees from other states have refused to allow a division even for fees earned before disbarment if such fees arise from the matters for which said attorney was disbarred or disciplined. Philadelphia Ethics Opinions 89-26 (1989) cited in ABA/BNA Lawyer's Manual on Professional Conduct 41:713-714. Moreover, the replacement attorney cannot pay the disbarred attorney any amount as consideration for the right to receive such fees which have not been earned by the disbarred attorney prior to disbarment. Such payment would be considered fee splitting on the part of the replacement attorney with the "non-lawyer" disbarred attorney. Rule 5.4(a).

Any firm or individual lawyer can take a fee which is otherwise reasonable, pay any applicable gift tax, and make a gift of the money if he/she so chooses. However, the problem with making such a gift as described in "b" and "c" above is that it would appear to be a sham gift intended to circumvent the Rules of Professional Conduct. Rule 8.4(a) states that "It is professional misconduct to . . . violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another".