

NEW HAMPSHIRE BAR ASSOCIATION  
Ethics Committee Formal Opinion #1991-92/9  
**Fee Sharing: Association Staff Attorney Representing Association Members  
for Fees Paid to the Association**  
June 11, 1992

**RULE REFERENCES:**

- \*Rule 1.2(a)
- \*Rule 1.7(b)
- \*Rule 1.8(f)
- \*Rule 5.4
- \*Rule 5.4(a)
- \*Rule 5.4(c)
- \*Rule 6.3
- \*Rule 7.2
- \*Rule 7.2(c)

**SUBJECTS:**

- \*Adverse Effect on Professional Judgment
- \*Advertising and Solicitation
- \*Attorney-Client Relationship
- \*Confidentiality
- \*Conflict of Interest
- \*Division of Fees
- \*Fees
- \*Independent Judgment
- \*Lawyer Referral Services
- \*Pre-paid Legal Services
- \*Unauthorized Practice of Law

**ANNOTATIONS:**

A lay nonprofit corporation may not permissibly bill its individual members for legal services performed by the corporation's salaried attorney on behalf of each member because such a practice involves sharing legal fees with a nonlawyer in violation of Rule 5.4(a).

A lawyer who is salaried by a lay nonprofit corporation may represent individual members of the organization as part of its regular, or separately funded, dues as long as the total amount paid by the member is not clearly excessive, the lawyer's independence of professional judgment is maintained, and client confidentiality is maintained. (Rule 1.5, Rule 1.8 (8), Rule 1.6).

A lawyer may participate in a for-profit lawyer referral service as long as the lawyer does not pay a fee to or share the lawyer's fees with the referral service. (Rule 5.4(a); Rule 5.4(c)).

**QUESTIONS:**

Whether a lay organizationally-hired and salaried lawyer may contemporaneously represent individual members of the nonprofit organization for a fee, which fees would be billed by and inure to the benefit of the organization?

Whether the Rules allow a lay nonprofit organizationally hired and salaried lawyer to contemporaneously represent that organization's individual members as part of regular membership dues, i.e. a prepaid close-panel legal services plan?

**RESPONSE:**

**1. Rationale**

Rule 5.4(a) prohibits a lawyer from sharing his or her legal fees with a nonlawyer, unless one of the following three exceptions apply:

1. a lawyer or a law firm may make payments to the estate of or to persons specified by a deceased former partner or associate of that lawyer or firm;
2. a lawyer who completes the unfinished legal work of the deceased may make payments to the estate of the deceased lawyer;
3. lawyers and firms may include nonlawyer employees in compensation or retirement plans that are based, in whole or in part, on profit-sharing arrangements.

The rationale for the general prohibition is that the lay organization cannot be allowed to interfere with the lawyers "exercise" of independent professional judgment on behalf of the client, nor can the lay organization direct or regulate the lawyer's professional conduct. Rule 5.4(c) specifically states that a lawyer is prohibited from permitting "a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. This section includes duties implicit in Rule 1.2(a), 1.7(b), and 1.8(f). Altogether the rules are designed to make certain the lawyer will comply with the clients' decisions concerning the goals of the representation and will serve the interests of the client exclusive to those of a third party.

The usual reason to prohibit the lay control of the operations of an entity that sells legal services is that the lay persons might use their power over employed lawyers to cause them to disserve clients in order to maximize profits for the organization. The rules ensure that the participating lawyers can be disciplined.

The prohibition also avoids encouraging nonlawyers to engage in the unauthorized practice of law. *ABA Informal Opinion 86-1519*.

## **2. Examples**

Fee splitting with a nonlawyer, such as for a referral, is clearly prohibited and may subject a lawyer to disciplinary sanctions. Lawyers practicing with members of other professions to offer clients a variety of services related to a problem, such as taxes, and divorce, have been found to share legal fees with non-lawyers in violation of Rule 5.4.

The practice of an employer who pays a lawyer a salary to provide legal services for the employer's clients or members, and then charges or receives fees for those services that exceed the employers costs in providing the services, involves the lawyer in unethical fee sharing. *National Treasury Employees Union v. U. S. Department of Treasury*, 656 F.2d 848 (1981). Here, the United States Court of Appeals for the District of Columbia Circuit noted:

Lawyers are free to accept employment by an organization offering a prepaid legal services plan to its members, but only if such organization, including an affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers. This restriction is closely related to two more of the Code's most fundamental prohibitions. Attorneys may not split fees with laymen or lay organizations, or enable them to engage in the unauthorized practice of law.

The same Court awarded attorney's fees in Title VII litigation based on the market value of the services rendered the client by attorneys associated with a private for-profit law firm. *Copeland v. Marshall* 205 U. S. App. D.C. 390, 641 F.2d 880 (1980 en banc).

Several courts have approved market-value attorney's fee allowances directly to legal aid offices and public interest organizations. The underlying policy is that this promotes the legal services organization to assist in the enforcement of congressionally favored individual rights, i.e. statutes.

The distinction is noted that the lay organization would use the money for the enrichment of its own assets and for the support of its diverse operations.

Therefore the Committee believes that the rules disallow a lawyer salaried by a lay organization from simultaneously representing individual fee paying members of the organization when the fees would inure to the benefit of the organization, due to Rule 5.4 prohibiting a lawyer sharing legal fees with a nonlawyer.

### 3. Prepaid Legal Plans

The fee-splitting prohibition has been considered with the financial arrangements of prepaid legal plans. The ethical opinions differ when viewing the usual for-profit plan where plan members are entitled to a particular range of legal services in exchange for a monthly fee, part of which is retained by the plan sponsor to pay for its overhead and costs; and part paid to the participating attorney.

The *ABA Formal Ethics Opinion 355* (1987) allows a lawyer to participate in a for-profit legal service plan; however the plan must allow the participating lawyer to exercise independent professional judgment on behalf of the client, to maintain client confidences, to avoid conflicts of interest, and to practice competently. Typically the members make the monthly payments prior to the beginning of the lawyer's representation. The lawyer gives nothing of value to the plan sponsor, other than agreeing to provide legal services to the subscribers according to the plan. Therefore, the plan is compensating the lawyer, while the lawyer is not compensating the plan. Consequently, a lawyer may participate in a for-profit lawyer referral service as long as the lawyer does not pay a fee to or share the lawyer's fees with the referral service. Rule 7.2. [see also Rule 5.4]

When considering prepaid legal services in a nonprofit organization the *ABA Informal Ethics Opinion 1409* (1978) allowed the lawyer's participation in a plan that deducts a portion of the subscribers payments to cover administrative costs. [see Rule 7.2 (c)]

A law firm may participate in a prepaid legal services plan which provides nonprofit member organizations with legal services for a fixed monthly fee based on the number of hours each member wishes to "reserve" up to a maximum of 10 hours per month, and provides that additional hours may be charged at a rate not exceeding the firm's regular hourly rate. Such a plan, however, must satisfy the following conditions: (1) the fees charged are not excessive based on the services actually performed and the Code's criteria for a reasonable fee; (2) the clients are not misled to believe that all of their legal matters can be completed within the reserved hours, without additional charges; (3) the disbursement to the parent organization for administrative costs is reimbursement for expenses actually incurred by that organization and not a division of legal fees with a nonlawyer or compensation for recommending or securing the lawyer's employment; (4) the parent organization does not direct or regulate the lawyer's professional judgment in rendering services to the member organizations; (5) the firm maintains its duties and responsibilities to the members of the organization and recognizes that they, not the parent organization, are the clients; and (6) if the firm also represents the parent organization, it must be obvious that the firm can adequately represent the interests of the members and the parent organizations. *District of Columbia Ethics Opinion* (1985)

In the past the Code has included some prohibitions concerning a lawyer's involvement with group legal services, however, the current Rules do not address group legal services (other than Rule 6.3), whether to proscribe them or limit them. Therefore, it may be concluded that they may be allowed as long as "a lawyer or law firm shall not share legal fees with a nonlawyer" pursuant to Rule 5.4(a).