

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1996-97/5
Conflict of Interest: Representing a Client Through Business
Arrangement with For-profit Lay Corporation
February 25, 1997

RULE REFERENCES:

- *Rule 1.2(a)
- *Rule 1.6
- *Rule 1.7(b)
- *Rule 5.4(a)
- *Rule 5.4(c)
- *Rule 7.2(c)

SUBJECTS:

- *Business Activities
- *Confidentiality
- *Division of Fees
- *Independent Judgment
- *Referrals

ANNOTATIONS:

An attorney may ethically enter into a business arrangement with a corporation whereby for a set fee, the attorney reviews denials of social security claims to decide whether the client should appeal a denial of the client's social security claim, provided that: (1) neither the corporation (or insurance companies with which the corporation solicits such business) shall interfere or influence the attorney's independent judgment; (2) the focus of the review will be on what is best for the client (and not the insurance company); (3) all information received during the attorney's representation shall remain confidential; and (4) the attorney shall abide and be bound by the decisions of the client. Rule 5.4(c); Rule 1.7(b); Rule 5.4(c); Rule 1.2(a).

The attorney having received a fee from a third party to review a denial of social security benefit on behalf of a client, may not share with that third party any attorney's fees awarded in the successful representation in an appeal on behalf of that client. Rule 5.4(a); Rule 7.2(c).

FACTS:

The inquiring attorney would like to enter into a business arrangement with a national for-profit lay corporation which through contracts with insurance companies, represents social security claimants (who must file for social security as part of the process required of individuals seeking long-term disability benefits) before the Social Security Administration. Under the terms of this business arrangement, the attorney would review the file of an unsuccessful claimant sent to him by the corporation, with the permission of the claimants and after reviewing the file, the attorney would either reject the case or file an appeal at Federal District Court. The attorney stated that an appeal would be undertaken only if he believed it was meritorious and only with the client's agreement. The attorney would receive a set fee from the corporation for each appeal filed to cover the costs of analysis and preparation. The attorney would

seek further fees under the Equal Access to Justice Act (EAJA), should his client prevail. The corporation would derive no profit from the outcome of the appeal.

QUESTIONS:

1. Do any rules of the New Hampshire Rules of Professional Conduct prohibit such a business arrangement?
2. Although not part of the proposed business arrangement at present, could the corporation receive reimbursement of the set fee it pays the attorney for preparing the appeal from the EAJA fees the attorney will seek?

RESPONSE:

It is possible that the business arrangement described in the inquiry could be carried out without violating the Rules of Professional Conduct. However, there are significant ethical concerns not resolved in the terms of the attorney's agreement with the referring corporation that must be addressed.

To begin with, the agreement with the corporation must expressly identify the client as the social security claimant and clearly exclude both the corporation and the insurance company from all aspects of the attorney-client relationship as required under Rule 1.7(b): "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person...."

The terms of the agreement must ensure that the attorney will have complete and unconditional authority to exercise independent judgment on behalf of the client, free of any interference from the corporation or insurance company, as required by Rule 5.4(c): "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."

The client's best interests must be the focus of the representation. This must be emphasized because the corporation, the insurance company, and the client will not necessarily have an identity of interest and may, in fact, have conflicting interests. Thus, an analysis of the file provided by the corporation (with the potential client's permission) can be no more than a starting point in determining whether an appeal should be filed. The client's personal situation and insurance coverage must be evaluated as a whole; it is conceivable, for instance, that a successful appeal might benefit the insurance company but have a detrimental effect on the client's overall financial situation, again illustrating the potential for conflicts of interest unless the agreement explicitly addresses this area of concern. The ABA Model Code Comment to Rule 1.7 states: "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."

Following consultation with the "client," the attorney must as required by Rule 1.2(a), "abide by a client's decision concerning the objectives of representation" (emphasis added). The client, not the corporation, must dictate the course of action.

The information received by the attorney during the course of representation must be protected as confidential information as required by Rule 1.6 and must not be revealed in any manner to the corporation or the insurance company. Certainly one of the more difficult aspects of the arrangement will be to ensure that neither the corporation nor the insurance company receive any indication from the attorney of why in certain cases an appeal will not be pursued. It would seem that some sort of system must be implemented to preserve the confidentiality of the attorney-client decision making process; otherwise, it is possible that the decision not to pursue an appeal could be used by the insurance company to the client's disadvantage.

Essentially, to avoid any violations of the Rules of Professional Conduct, the attorney must ensure that there is a wall, a functional separation between the corporation and the attorney in dealing with clients. That separation would be breached by any fee-splitting arrangement between the for-profit lay corporation and the attorney as suggested in Question 2. Rule 5.4(a) states: "A lawyer or law firm shall not share legal fees with a non-lawyer except...[exceptions not relevant]." Similarly, 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." Reimbursement of the corporation from the EAJA fees, even though court-awarded fees, would be a form of fee-sharing and therefore prohibited by the Rules of Professional Conduct.