



30 Bank Street  
PO Box 350  
New Britain  
CT 06050-0350  
*06051 for 30 Bank Street*  
(860)223-4400  
fax (860)223-4488

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Informal Opinion 07-04

Fee-Sharing Agreement

You have asked the committee whether a proposed fee-sharing agreement between your firm and its attorneys raises any ethical concerns under Rules 1.5 or 5.6 of the Rules of Professional Conduct. The purpose of the agreement is to reward attorneys who develop new business for the firm and to attempt to recoup the firm's investment in business development if an attorney leaves the firm and a client chooses to follow the departing attorney.

According to that proposed agreement, bonus compensation will be paid to each attorney employed by the firm who develops new client relationships for the firm. The bonus fee is one-third of the net fee received by the firm from a client for an "eligible matter." An "eligible matter" is a case that resulted primarily from the efforts of the bonus recipient.

The proposed fee-sharing agreement continues after an attorney's employment with the firm ends. Under the terms of the agreement, your firm agrees to continue to provide bonuses on "eligible matters" to the departing attorney. Conversely, the fee-sharing agreement requires that if an attorney leaves the firm and "eligible matters" are subsequently transferred to that attorney or to his or her new firm, the attorney or the new firm will pay your firm one-third of the fees generated by those "eligible matters." Consequently, after an attorney leaves your firm, the fee-sharing agreement requires a division of fees with an attorney or firm who is not working on the "eligible matters."

The agreement thus covers three fee-sharing situations: one that arises while the attorney who is receiving a share of the fee is employed by your firm, and two possible situations that arise after the attorney terminates employment with the firm. These situations will be discussed separately because different Rules of Professional Conduct govern.

**Fee-Sharing During Employment**

Rule 1.5 of the Rules of Professional Conduct generally governs fees charged to clients. Although the Rule does not define "fee," it is clear that the Rule uses the term, as it is commonly used, to refer to the amount charged to a client for legal services performed for that client.

The Rule does not directly address the division of fees by lawyers *within* the same firm, except in its general provision that a lawyer "shall not make an agreement for, charge, or collect an unreasonable fee. . ." The factors for determining reasonableness are enumerated in Rule 1.5(a). These include "the time and labor required" and the "fee customarily charged ... for

similar legal services.” Rule 1.5(a)(1) and (3). Apportionment of the fee within a firm does not violate Rule 1.5 as long as the total fee charged to the client is reasonable.

## **Fee-Sharing After Termination of Employment**

Your proposed agreement contemplates two situations in which the firm and a departing lawyer would share fees for “eligible matters” after the lawyer’s departure from the firm. It appears that neither of these situations involves compensation for legal work done for the client while the lawyer was associated with the firm; instead, each situation involves compensation for business-generation activities that benefit the firm.<sup>1</sup> Consequently, the rules governing these situations are Rule 1.5(e) (division of fees between lawyers who are not in the same firm) and Rule 5.6 (restriction on the right to practice).

### “Bonus” to the Departing Lawyer

Rule 1.5(e) governs the division of fees between lawyers who are not in the same firm. Your proposed agreement requires fee-sharing to continue for “a period of three years after termination.” If the clients brought in to your firm by a departing lawyer remain with your firm, your firm will continue to pay the departing attorney a bonus, amounting to one-third of the fee received by the firm for that attorney’s “eligible matters.” The attorney is not being compensated for legal services performed for the client before the attorney left the firm, but instead is being compensated by the firm for his or her business development efforts. The “bonus” is therefore similar to a division of fees for referring a client to a firm.

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<sup>1</sup> If the proposed agreement addressed a division of fees for legal work done for the client while all lawyers involved were associated in your firm, even though the compensation was to be paid after the departure of the originating lawyer, the situation would be governed only by the general requirement of Rule 1.5(a) that the overall fee must be reasonable; Rule 1.5(e), governing the division of fees between lawyers not associated in a firm, would not apply. The commentary to Rule 1.5(e), as amended effective January 1, 2007, makes clear that Rule 1.5(e) “does not prohibit or regulate divisions of fees to be received in the future for work done when lawyers were previously associated in a law firm.” As the committee understands the terms of your proposed contract, however, the bonus compensation to be paid either to the departing lawyer or to the law firm is solely for business generation activities. If the client stays with the firm when the departing lawyer leaves, the bonus to the departing lawyer is compensation for the lawyer’s efforts in bringing the client to the firm; if the client leaves the firm with the departing lawyer, the bonus to be paid to the firm is intended to compensate the firm for its investment in the departing lawyer’s business development activities.

Rule 1.5(e) applies to this fee-sharing arrangement. It states:

A division of fee between lawyers who are not in the same firm may be made only if:

- (1) The client is advised in writing of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and
- (2) The total fee is reasonable.

Connecticut's rule "permits the practice of paying referral fees even where there is no sharing of responsibility or proportionality of service." Informal Opinion 97-02. By analogy, the fee-sharing agreement you describe is also permissible if the conditions stated in Rule 1.5(e) are satisfied. However, the proposed agreement violates Rule 1.5(e) in that it does not provide for notifying the client, and it does not address the possibility of a client's objection to the proposed division. Even if the fee paid by the client remains unchanged, the client must be advised in writing of the arrangement, and the fee cannot be divided if the client objects. It is the responsibility of the first lawyer or firm retained by the client to inform the client of the division of fees. See Informal Opinion 97-02.

"Bonus" to the Firm If the Client Follows the Departing Lawyer

If the client elects to be represented by the departing attorney, the proposed agreement gives your firm a right to receive one-third of the fees collected for "eligible matters" from that client by the attorney or his or her new employer for three years. This provision runs afoul of Rule 5.6.

Under Rule 5.6, "A lawyer shall not participate in offering or making (1) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement."

The retirement exception in this Rule does not apply to your proposed agreement, since the proposed agreement expressly contemplates that the departing lawyer continues to practice law.

Reviewing similar agreements, this committee has found violations of Rule 5.6(1). "[T]he scope of Rule 5.6 is not confined solely to direct prohibitions on the future practice of law. Financial disincentives can just as effectively "restrict" a departing attorney's right to practice law." Informal Opinion 02-05. In Informal Opinion 89-26, the committee considered an agreement where the amount of post-withdrawal payments decreased by half if the departing attorney continued to practice law in Connecticut. The committee concluded that this created a "financial disincentive" to the future practice of law. The

provision was an “impermissible burden” on the lawyer’s right to practice in Connecticut and interferes with the client’s choice of counsel. In your proposed agreement, the requirement that the departing attorney and his or her new employer share fees with your firm creates a financial disincentive that effectively restricts the departing lawyer’s right to practice of law in violation of Rule 5.6(1).

THE COMMITTEE ON PROFESSIONAL ETHICS

By \_\_\_\_\_  
Wesley W. Horton, Chair