

NEW HAMPSHIRE BAR ASSOCIATION

Law Firm Obligations in Sharing Fees and Ownership Control with Retired Lawyers

Ethics Committee Advisory Opinion #2016-17/01

ABSTRACT:

A retired lawyer may hold an ownership interest or control in the former lawyer's firm only if the lawyer remains on "active" or "inactive" status in New Hampshire or is admitted to practice in another U.S. jurisdiction (*i.e.*, does not become a "non-lawyer"). A retired lawyer may receive payment from funds originally earned as fees pursuant to a pension/retirement plan to which the fees were deposited as a contribution even if the lawyer has become a "non-lawyer". A retired lawyer may receive fees from cases on which the lawyer worked while active only if (1) the lawyer does not become a "non-lawyer" and (2) the overall fee is reasonable and no larger than the fee earned by the firm if the retired lawyer never retired.

ANNOTATIONS:

"Inactive" members of the New Hampshire Bar are nonetheless lawyers for purposes of fee-sharing and sharing management control with the inactive lawyer's former law firm.

If a retiring lawyer resigns from the bar, and is no longer a "lawyer", active or inactive, then retention of an ownership interest or control in the former lawyer's firm is not permissible.

To the extent that the fees earned by a law firm become part of the firm's contribution to a firm pension or other form of retirement plan, the sharing of such fees with a retired lawyer who has elected to surrender the lawyer's licenses to practice law is permissible.

Provided that the overall fee is reasonable and no larger than the fee earned by the firm if the retiring lawyer never retired, sharing of fees earned by the firm in a matter following a lawyer's retirement with that retired lawyer is permissible if that retired lawyer remains a licensed lawyer.

Firms may be well-advised to notify the client of the pending retirement of the lawyer if that lawyer was a principal lawyer responsible for the client's matter, and to assure the client that the firm can continue to represent the client in the matter (provided that the firm and the retiring lawyer have created a succession plan that ensures ongoing competent and ethical representation of the client in that matter), and that the retiring lawyer will be compensated pursuant to an arrangement satisfactory to the firm and the retiring lawyer that will not affect the fee agreement originally reached with the client.

It is not permissible for a law firm with whom the retired lawyer was formerly associated to share fees collected in the future, except pursuant to the pension/retirement plan arrangement, with that lawyer, if the lawyer is no longer licensed to practice law.

OPINION

QUESTION:

May a retired lawyer (i) retain an ownership interest in or management control over the lawyer's former firm, and/or (ii) share legal fees earned by that lawyer's former firm for work performed after the lawyer retires?

BACKGROUND:

The significant growth of the New Hampshire Bar in the last thirty to forty years and the aging of the generation that initially spurred that growth now tees up some interesting retirement issues for that same generation. Recently, the New Hampshire Bar Association Ethics Committee received inquiries about the crossroads between retirement from a firm or partnership and the continued receipt by a retired lawyer of financial compensation based on fees earned following the lawyer's retirement in matters on which the retired lawyer worked while at the firm, as well as the retention of an ongoing ownership interest or control in a law firm if the retired lawyer elects to resign from the Bar.

Before analyzing these issues, two issues are worthy of mention. First, in New Hampshire, there are two classes of lawyers – “active” members of the Bar and “inactive” members of the Bar. The distinction (besides the annual dues) between the two classes of membership is that active members may practice law while inactive members may no longer do so. Nonetheless, both classes remain “lawyers” for purposes of this opinion. Second, the Committee notes that the broader topic of closing a solo law practice and tips on succession planning for solo attorneys was the subject of a 2007 article. See “[Closing a Solo Practice in New Hampshire](#)“, *New Hampshire Bar News*, May 2007. For solo attorneys contemplating retirement, the article is well worth reviewing. It provides some helpful general tips and an excellent description of some succession planning resources not only for lawyers who are in solo practice but for those in small law firms.

Retirement: Retention of Ownership Interests/Control

The analysis of this issue is fairly simple. Obviously, if a retiring lawyer elects to remain a member of the New Hampshire bar or another state's bar, and thus, remains a “lawyer” pursuant to the New Hampshire Rules of Professional Conduct (“NHRPC”), then retention of an ownership interest or control in that lawyer's firm is not problematic from an ethical perspective. In this instance, the challenge comes in reaching an acceptable business arrangement with the lawyers in the firm continuing in active practice.

Conversely, if the retiring lawyer resigns from the bar, and is no longer a “lawyer”, active or inactive, then retention of an ownership interest or control in the former lawyer's firm is not permissible. NHRPC 5.4(b) prohibits lawyers from forming “a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.” Likewise, NHRPC 5.4(d) prohibits a lawyer from practicing:

“...with or in the form of a professional corporation or association authorized to practice law for a profit if:

1. a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
2. a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
3. a nonlawyer has the right to direct or control the professional judgment of a lawyer.”

Thus, as thoughtful a gesture as it might be to allow the retired “nonlawyer” to retain an ownership interest, however small, or some modicum of direction or control over the activities of the firm, such provisions are not ethically permissible.

Retirement: Sharing of Fees

The remainder of this opinion deals with whether a firm may share legal fees earned on a matter in which the retired lawyer worked, for the firm’s work on that matter after that lawyer retires. Before analyzing this issue, the Committee notes that there are specific rules governing fee sharing with a lawyer who *sells* his/her practice or an area of his/her practice pursuant to NHRPC 1.17. Specifically, a lawyer or law firm may share such fees pursuant to a purchase of “the practice of a deceased, disabled or disappeared lawyer” as part of the performance of an agreed-upon purchase arrangement. Those fees are typically paid to the estate or other representative of the selling lawyer. *See* NHRPC 5.4(a)(2). Likewise, if the selling lawyer remains an active or inactive member of the New Hampshire Bar, fee sharing is appropriate. That analysis is beyond the scope of this opinion.

Like the previous issue, the fee sharing analysis turns to some degree on whether the retiring lawyer elects to remain a licensed “lawyer”.

First, to the extent that the fees earned by a law firm become part of the firm’s contribution to a firm pension or other form of retirement plan, the sharing of such fees in the context of those plans is permissible with a retired lawyer who has elected to surrender the lawyer’s licenses to practice law. NHRPC 5.4(a)(3) provides that “a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.” Thus, the law firm and a retired lawyer, even if that lawyer has resigned from the bar, may ethically participate in a pension or other form of retirement plan fueled by earned fees.

Second, to the extent that the overall fee is reasonable and no larger than the fee earned by the firm if the retiring lawyer never retired, sharing of fees earned by the firm in a matter following a lawyer’s retirement with the retired lawyer is permissible if that retired lawyer remains a licensed lawyer.¹ NHRPC 1.5(f).² Indeed, Comment 8 to NHRPC 1.5 states that the division of fees to be received in the future for work done when lawyers were previously associated in a law firm is permissible, and not regulated by the fee sharing rules. However, even if NHRPC 1.5(f) does not literally apply, perhaps the best practice is to (i) notify the client of the pending retirement of the lawyer (which likely invokes NHRPC 1.16(d)³ if the retiring lawyer was a principal lawyer responsible for the client’s matter), (ii) assure the client that the firm can continue to represent

the client in the matter (provided that the firm and the retiring lawyer have created a succession plan that ensures ongoing competent and ethical representation of the client in that matter), and (iii) inform the client that the retiring lawyer will be compensated pursuant to an arrangement satisfactory to the firm and the retiring lawyer that will not affect the fee agreement originally reached with the client.

Third, it is not permissible to share fees collected in the future, except pursuant to the pension/retirement plan arrangement described above, with a retired lawyer who is no longer licensed to practice law. NHRPC 5.4(a) generally prohibits the sharing of legal fees with a non-lawyer. To be certain, NHRPC 5.4(a)(1) allows for an "€ agreement by a lawyer with the lawyer's firm, partner or associate which provides for the payment of money over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons", but that exception is confined to a lawyer's death. Whether sensible or not, it does not apply to retirement – even an involuntary retirement, such as a disability short of death. However, this prohibition does not prevent a firm from sharing fees collected post-resignation with the former attorney for work performed prior to that attorney's surrender of his or her license. This result is consistent with opinions which prohibit ongoing fee-sharing arrangements with attorneys after they are suspended or disbarred, but permit fee-sharing for work performed up to the point of disbarment or suspension.⁴

Thus, to the extent that a law firm wishes to compensate a retiring lawyer based on fees earned after the retiring lawyer surrenders his or her license to practice law, that arrangement is not permissible except through a pension or retirement plan under NHRPC 5.4(a)(3).

Conclusion

Based on the applicable rules of professional conduct, in order to share fees earned by that lawyer's former firm from a legal matter or to retain control or ownership rights in that law firm, a retiring lawyer needs to retain his or her status as a duly-licensed lawyer. Once that retiring lawyer surrenders his or her status as a "lawyer", there are prohibitions on the retention of ownership rights and restrictions on the sharing of fees earned by the firm after the lawyer's retirement.

ENDNOTES:

[1] In addition to the retention of a lawyer's status as a lawyer, if that lawyer elects "inactive" status in New Hampshire, most courts have held that lawyers who are licensed in another United States jurisdiction are considered "lawyers" and may divide fees with out-of-state attorneys, so long as such arrangements comply with the applicable rules of professional conduct. ABA/BNA Lawyers' Manual on Professional Conduct, §41.707 and cases and opinions cited therein.

[2] Recall that unlike ABA Model Rule 1.5(e) – the ABA version of the rule which addresses fee sharing, New Hampshire does not require fees to be divided based on the proportion of services provided by each attorney – in this case, the services to be provided by the retired attorney. *Compare* ABA Model Rule 1.5(e)(1) and NHRPC 1.5(f)(1)(b).

[3] NHRPC 1.16(d) states that: “As a condition to termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.” The article identified in the opening of this opinion elaborates on the protection of clients when a lawyer closes his/her practice. Retiring lawyers must be mindful of those same protections if the lawyer is the principal lawyer or one of the principal lawyers responsible for the client’s matter.

[4] ABA/BNA Lawyers’ Manual on Professional Conduct, §41.708-709 and cases and opinions cited therein.

This opinion was submitted for publication to the NHBA Board of Governors at its April 20, 2017 meeting, and was published in Bar News on ???.

NH RULES OF PROFESSIONAL CONDUCT:

NHRPC 1.5(f)
NHRPC 1.16(d)
NHRPC 1.17
NHRPC 5.4(a)(1)
NHRPC 5.4(a)(2)
NHRPC 5.4(a)(3)
NHRPC 5.4(b)
NHRPC 5.4(d)

NH ETHICS COMMITTEE OPINIONS AND ARTICLES:

“[Closing a Solo Practice in New Hampshire](#)“, *New Hampshire Bar News*, May 2007

SUBJECTS:

Sharing of Legal Fees
Withdrawal from Representation
Sale of Law Practice
Professional Independence of a Lawyer
Practice with Non-Lawyers

- **By the NHBA Ethics Committee**

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