

NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Formal Opinion #1990-91/4
Providing Legal Services on a Sliding
Fee Scale Based Upon Client's Income.
November 8, 1990

RULE REFERENCES:

- *Rule 1.5
- *Rule 1.5(c)
- *Rule 6.1
- *Rule 7.1
- *Rule 7.2

SUBJECTS:

- *Advertising & Solicitation
- *Client Communications
- *Contingent Fees
- *Fee Agreements
- *Fees
- *Pro Bono

SUPREME COURT RULE REFERENCE:

- !!!Rule 47
- !!!Rule 48

ANNOTATIONS:

Rule 6.1 encourages a lawyer to discharge the duty to render public interest legal service by, among other means, providing professional services at no fee or a reduced fee to persons of limited means. (Rule 6.1).

A lawyer may charge for services on a sliding scale basis (adjusted based upon the client's income), consistent with Rule 1.5 ("Fees"), and Rule 6.1 ("Pro Bono" Publico Service"). (Rule 1.5; Rule 1.6).

A lawyer may advertise having a sliding fee scale determined by a client's income, provided that such advertising is not misleading and that the client clearly understands the sliding scale fee arrangement, (which should preferably be reduced to a written fee agreement). (Rule 1.5(c); Rule 7.1; Rule 7.2).

FACTS:

A New Hampshire attorney seeks to offer legal services to clients on a sliding fee scale basis. Specifically, this attorney wishes to provide legal services in a diligent and competent manner consistent with Rules 1.1 and 1.3 at a reduced rate for those clients who would otherwise be unable to afford legal services.

QUESTION:

(a) May an attorney charge for legal services on a sliding scale basis adjusting the fee based on the client's income?

(b) May an attorney advertise that legal fees are determined by the income of the client?

RESPONSE:

(a) Sliding fee scale

Rule 6.1 of the New Hampshire Rules of Professional Conduct states that "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means..."

A private attorney's desire to serve clients of limited income by reducing his or her fee is well within the parameters of Rules 6.1. The ABA Model Code Comments suggest that "...(t)he basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer..." The comments suggest particular areas that are most appropriate for pro bono including poverty law, civil rights law, and public rights, but do not proscribe pro bono work or reduced fee work in any or all areas of an attorney's practice.

Rule 1.5 of the New Hampshire Rules of Professional Conduct states that "(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee..." The rule then details eight factors in determining whether a fee is reasonable. A fee which is reduced from an attorney's usual and customary fee would not be clearly excessive.

Nor would a reduced fee be illegal. Consider that attorney's fees for counsel appointed to represent indigent clients, including criminal defendants, parents, children, and wards, is limited to \$20 per hour for out-of-court preparation and \$30 per hour for in-court time by NH Supreme Court Rules 47 and 48. These rates are considerably below that of the usual and customary hourly fees charged by attorneys in New Hampshire. See e.g. NH Bar Association Economics of Law Practice Committee, Economics of Law Practice Survey (1985).

Furthermore, the ABA Committee on Ethics and Professional Responsibility gave its opinion in analyzing rule 1.5 that the rule prohibits only unreasonably high fees and does not restrict lawyers from charging less than normal fees or no fee at all. Informal Opinion 84-1509 (10/20/84), as cited in ABA/BNA Lawyer's Manual on Professional Conduct, Vol. 1, No. 21 (10/31/84).

(b) Advertising sliding fee scale

Rule 7.1 states that "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services..." Rule 7.2 states that "Subject to the requirements of Rule 7.1, a lawyer may advertise through public media...or through written communication not involving solicitation..." The ABA Model Code Comments specifically state that a lawyer may advertise "...the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements..." The New York State Bar Association Committee on Professional Ethics has given its opinion that a lawyer may offer a discount from customary fees and advertise such discount as long as customary fees are reasonable ascertainable and the terms and conditions, if any, of the discount are explained. Opinion 563 (10/1/84) as cited in ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 1, No. 21 (10/31/84).

An attorney considering advertising a sliding scale fee arrangement should however take care that such advertising is not misleading to the client and that the terms of the arrangement are clear to the client. The attorney should recognize that there may need to be appropriate disclosure of the factors affecting the sliding scale fee to insure that the advertising is not misleading.

To assure the client's understanding of the sliding scale fee arrangement, the attorney should seriously consider the use of written fee agreements in such a circumstance. Rule 1.5(c) requires a written fee agreement in situations in which the fee is contingent upon the outcome of the matter for which the service is rendered. Although not specifically required, the attorney should likewise consider a written fee agreement when the fee for services is contingent upon the client's income.

An attorney considering a sliding fee scale based on the client's income may also want to consider the following issues prior to entering into or advertising a sliding fee scale:

- * whether there is a minimum fee for legal services rendered or whether a client with no income is charged no fee
- * whether there is a maximum fee or hourly rate for legal services rendered so that a wealthy client is not charged a fee which is clearly excessive
- * whether assets are considered as well as income in determining fees
- * whether the type of service being delivered affects the determination of fees
- * whether the fees charged for legal services may be modified at some future date and under what circumstances fees would be modified, such as: changes in client income or in the cost of living, length of case or legal services, expansion of scope of services. (See Rule 7.1.)

Some or all of these issues should be contained in a written fee agreement or otherwise made clear to the attorney's prospective client.

4/5/2021

N. H. ETHICS OPINIONS ANNOTATED

CONCLUSION:

An attorney may offer legal services to clients on a sliding fee scale basis and so advertise as long as the advertisement for such is not misleading.