

NEW HAMPSHIRE BAR ASSOCIATION

Inactive Lawyers and Referral Fees

Ethics Committee Opinion #2021-22/01

ABSTRACT:

An inactive lawyer may not enter into a referral fee agreement with an active New Hampshire lawyer for matters that first arose after the change in status because that would violate the restrictions on the practice of law and present a great risk of misrepresentation.

ANNOTATIONS:

The Committee believes that an inactive lawyer may not enter into a referral fee agreement with an active New Hampshire lawyer for matters that first arose after the change in status because that would violate the restrictions on the practice of law and present a great risk of misrepresentation.

We reaffirm our conclusion in Opinion 2016-17/01 that the inactive lawyer may accept fees from his or her prior firm in cases on which the now inactive lawyer worked, or brought to the firm, before the change of status, even though the fees are paid after the change.

The annotations are written by individual Committee members to assist the reader and are not meant to be part of the actual opinion. *See e.g., United States v. Detroit Lumber Co.*, 201 U.S. 321 (1906)(dealing with the syllabus of Supreme Court opinions).

Our first concern in this matter is that the inactive lawyer, by engaging in what will necessarily be at least a somewhat substantive discussions with the prospective client, would be practicing law.

Another concern is that there is a substantial danger that the prospective client could be misled about the status of the inactive lawyer.

A third concern is that the prospective client may misunderstand the issues of confidentiality and privilege during the discussion.

Finally, permitting payments of referral fees to inactive lawyers would not further the purpose of New Hampshire's somewhat unique referral fee rule.

Opinion:

A. Facts

An attorney inquired about amending his New Hampshire Bar status from "active" to "inactive." The inquirer wanted to ensure that he would be able to receive referral fees for matters he might

refer after his status change. He indicated that he would comply with the terms of NHRPC 1.5(f), governing referral fees, which requires that any division of fees between lawyers not in the same firm be:

- (1) Either:
 - a. in reasonable proportion to the services performed or responsibility or risks assumed by each, or
 - b. based on an agreement with the referring lawyer;
- (2) in either case above, the client agrees in a writing signed by the client to the division of fees;
- (3) in either case, the total fee charged by all lawyers is not increased by the division of fees and is reasonable.

Presumably, the inquirer would utilize the provisions of subpart 1(b), an agreement between the active and inactive lawyer, to satisfy this rule since, after the status change, he could not assume any risk or responsibility for the actual representation.

The inquirer relies on language from a prior Committee opinion to support his belief that inactive lawyers should be able to receive referral fees, even if the underlying case arose after the inactive lawyer could no longer practice. He points to Ethics Committee Advisory Committee Opinion #2016-17/01, *Fee Sharing/ Referral Fees*, where the Committee's annotation provided that "[i]nactive' 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." *Id.* at p. 1.

He also notes that as an inactive lawyer, he cannot practice law in New Hampshire, and suggests, in all such matters, he would not provide any legal advice to the prospective client and would strictly limit his interaction with the prospective client to the basic facts of the matter. He further asserts that he would treat those facts as strictly confidential and privileged.

The inquirer's specific questions are: 1. May "inactive" members enter into referral fee agreements with active New Hampshire lawyers? 2. Are fee sharing/referral fees of inactive members only permitted when sharing fees with their former law firms? and 3. Assuming referral fees to "inactive" lawyers are treated differently as between those formerly with a law firm and those without a former law firm, what is the rational basis of treating them differently?

B. Opinion

The Committee believes that an inactive lawyer may not enter into a referral fee agreement with an active New Hampshire lawyer for matters that first arose after the change in status because that would violate the restrictions on the practice of law and present a great risk of misrepresentation. This is true, in our opinion, regardless of whether the proposed division is with one's prior firm. In light of this, the final two questions are moot.

We reaffirm our conclusion in Opinion 2016-17/01 that the inactive lawyer may accept fees from his or her prior firm in cases on which the now inactive lawyer worked, or brought to the firm,

before the change of status, even though the fees are paid after the change. But as noted above, that is not the case presented by the inquirer.

The opinion the inquiring attorney relies on addressed both management of a law firm after inactive status and whether the firm can share fees that are paid after the change of status with the inactive lawyer. The opinion holds that both are permissible. However, that opinion did not address fee sharing for matters that the inactive lawyer brings to a firm after he or she is no longer able to practice law, due to the inactive status, the issue we will address below.

We can see why the inquirer may have been confused about the scope of the opinion. The annotation to which he cited provides that “‘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.” However, the actual text of the opinion is far more limited in scope. On page 2, the Committee states: “... [B]oth classes [active and inactive] remain ‘lawyers’ for purposes of this opinion.” (emphasis supplied). Thus, the opinion related only to cases that began when the lawyer was active. The language cited is from an annotation, as opposed to the actual opinion. The annotations are written by individual Committee members to assist the reader and are not meant to be part of the actual opinion. *See e.g., United States v. Detroit Lumber Co.*, 201 U.S. 321 (1906)(dealing with the syllabus of Supreme Court opinions).

As noted above, the distinction we are drawing is not between fee splits within law firms and those outside a former law firm. It is between permissible payments that occur after the change of status but are based on practice of law activities that occurred before the lawyer took inactive status, and the situation posed by the inquirer of a referral made after taking inactive status.

Our first concern in this matter is that the inactive lawyer, by engaging in what will necessarily be at least a somewhat substantive discussions with the prospective client, would be practicing law. These discussions would most often occur because the prospective client knew that the person at one time was a practicing lawyer. *See* NHRPC 5.5, ABA cmt. 7 (“... admitted... contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status”). Also, the judgment that the lawyer to whom the referral is made is competent to handle this particular matter is a legal judgment. *See e.g., Tormo v. Yormark*, 397 F.Supp. 1159 (D.N.J. 1975)(denying summary judgment in a negligent referral claim within a legal malpractice action).

Another concern is that there is a substantial danger that the prospective client could be misled about the status of the inactive lawyer. We have issued two prior opinions on this. *See* Ethics Committee Formal Opinion 1988/9-2, *Letterhead Listing- Of Counsel if Inactive* (stating that it is misleading under Rules 7.1 and 7.5 to list an inactive member as of counsel); and Ethics Committee Advisory Opinion 2006-07/02, *Identification of Inactive Bar Member Status* (cautioning a firm about including an inactive lawyer on its website or letterhead, even with a designation that he or she is inactive, due to concerns about misleading the public).

A third concern is that the prospective client may misunderstand the issues of confidentiality and privilege during the discussion. While it is possible under the Evidence Rules that the

conversation with an inactive lawyer might be privileged, this is far from a foregone conclusion. *See* Rule 502(a)(3) of the New Hampshire Rules of Evidence (A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation). The inquirer's communication with us reflects his belief that he could protect the information from forced disclosure.

Finally, permitting payments of referral fees to inactive lawyers would not further the purpose of New Hampshire's somewhat unique referral fee rule. *See* Ethics Committee cmt. to NHRPC 1.5. When the Ethics Committee recommended this change to the Supreme Court and its Advisory Committee on Rules, the purpose was to remove any incentive for a lawyer to retain a case that would better be handled elsewhere, and thus to enhance client representation. Since the inactive lawyer is unable to retain the case, allowing a referral fee would do little to guarantee competent representation.

C. Conclusion

For these reasons, the Committee believes that inactive lawyers may not receive referral fees for matters that arose while they were not able to practice law.

N.H. Rules of Professional Conduct:

NHRPC 1.5.

NHRPC 1.5(f)

NHRPC 5.5, ABA cmt. 7

N.H. ETHICS COMMITTEE OPINIONS AND ARTICLES:

Ethics Committee Advisory Committee Opinion #2016-17/01, *Fee Sharing/ Referral Fees*

Ethics Committee Formal Opinion 1988/9-2, *Letterhead Listing- Of Counsel if Inactive*

Ethics Committee Advisory Opinion 2006-07/02, *Identification of Inactive Bar Member Status*

SUBJECTS:

Fees

Attorney Client Relationships

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