

New York State Bar Association

Committee on Professional Ethics

Opinion 733 (10/5/00)

Topic: Sharing legal fees with non-lawyer employees

Digest: Non-lawyers may be compensated based on a profit sharing arrangement but may not be paid a percentage of profits or fees attributable to particular client matters referred by the employee.

Code: DR 2-103(B); DR 3-102(A)(3);
EC 3-8

QUESTION

Does the 1999 amendment to DR 3-102(A)(3) of the New York Lawyer's Code of Professional Responsibility, which permits non-lawyer employees to be compensated based on a "profit-sharing" arrangement, allow a lawyer to pay a non-lawyer employee a percentage of fees attributable to matters referred by the employee?

OPINION

DR 3-102(A)(3) addresses the topic of lawyers dividing legal fees with non-lawyer employees. The rule recently was amended to expand the circumstances in which a non-lawyer employee may be compensated based on a profit-sharing arrangement:

A lawyer or law firm may compensate a non-lawyer employee, or include a non-lawyer employee in a retirement plan, based in whole or in part on a profit-sharing arrangement.

The New York State Bar Association Special Committee to Review the Code of Professional Responsibility, which prepared the amendment to DR 3-102(A)(3), offered the following explanation of the change:

Incorporates the substance of Model Rule 5.4(a)(3) in allowing non-lawyer employees of a lawyer or law firm to participate in a profit-sharing plan with respect to their salaries and bonuses and otherwise to be compensated, in whole or in part, based on the profitability of the lawyer or law firm. Under the current rule, non-lawyer employees may participate in profit-sharing only as part of a retirement plan.

Whereas the Disciplinary Rule previously limited profit-sharing arrangements with non-legal employees to retirement plans, the rule now expressly permits non-lawyer compensation to be "based in whole or in part on a profit-sharing arrangement." See also EC 3-8 ("profit-sharing compensation or retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper"); cf. Utah State Bar, Ethics Advisory Op. Comm., Op. 139 (1994) (non-lawyer office administrator may be compensated based on a percentage of the net or gross income of the firm so long as compensation is not tied to receipt of particular fees).

The Committee has been asked whether DR 3-102 as amended to permit "profit-sharing compensation" would now allow payment to a non-lawyer employee of a percentage of fees attributable to matters referred by the employee as compensation for the referral. Although the Disciplinary Rule as amended provides greater latitude with respect to compensation arrangements for non-lawyer employees that have profit sharing as a component, the particular compensation arrangement suggested continues to be unethical.¹

DR 3-102 generally prohibits the sharing of legal fees with non-lawyers. It has long been believed that "fee-splitting between lawyer and layman ... poses the possibility of control by the lay person, interested in his own profit, rather than the client's fate." *Emmons v. State Bar*, 86 Cal. Rptr. 367, 372 (Ct. App. 1970). The Code's approbation of lay compensation based on "profit sharing" does not represent a departure from the general prohibition against fee sharing. Rather, it specifies a particular situation where the dangers of lay interference with the exercise of independent professional judgment that are inherent in most fee sharing arrangements are not present. See EC 3-8. The limited circumstance contemplated by the 1999 amendment – compensation based on a lawyer or law firm's business performance – is just that; it is not an endorsement of or a departure from the general prohibition against sharing of legal fees.

Indeed, that general prohibition survives not only in DR 3-102; a particular application of the prohibition is reflected in DR 2-103(B), which provides that "a lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client or as a reward for having made

¹ Whether and under what circumstances a lawyer may now compensate a non-lawyer employee based on the profitability of a particular client's matter where the payment is not compensation for a referral is beyond the scope of this opinion.

a recommendation resulting in employment by a client." *Cf.* N.Y. State 731 (2000) (lawyer may not compensate employees for making a referral to a title company owned by the lawyer). This specific prohibition is not in conflict with the authority to compensate non-lawyers based on a profit sharing arrangement. While non-lawyers may be paid based on a lawyer or law firm's profitability or business performance, a non-lawyer may not be paid a percentage of fees attributable to matters referred by the employee. Indeed, a contrary construction of the new amendment to DR 3-102 would conflict directly with Section 491 of the Judiciary Law, which provides:

§ 491. Sharing of compensation by attorneys prohibited

1. It shall be unlawful for any person, partnership, corporation, or association to divide with or receive from, or to agree to divide with or receive from, any attorney-at-law or group of attorneys-at-law, whether practicing in this state or elsewhere, either before or after action brought, any portion of any fee or compensation, charged or received by such attorney-at-law or any valuable consideration or reward, as an inducement for placing, or in consideration of having placed, in the hands of such attorney-at-law, or in the hands of another person, a claim or demand of any kind for the purpose of collecting such claim, or bringing an action thereon, or of representing claimant in the pursuit of any civil remedy for the recovery thereof. But this section does not apply to an agreement between attorneys and counsellors-at-law to divide between themselves the compensation to be received.

Thus, DR 3-102's allowance of profit-sharing arrangements between lawyers and non-lawyers may not be used to circumvent the specific prohibition on fee sharing reflected in Judiciary Law §491 and DR 2-103(B). DR 3-102 does not countenance a compensation arrangement whereby a lawyer pays a non-lawyer employee a percentage of fees attributable to matters referred by the employee. Other compensation arrangements that have profit sharing as a component would be permitted under the amendment to DR 3-102, provided the arrangement is not designed to reward a lay person for having made the referral or recommendation resulting in employment.

CONCLUSION

Under DR 3-102(A)(3) as amended, a lawyer may compensate non-lawyer employees based on profit sharing but may not tie remuneration to the success of specific efforts by employees to solicit business for lawyers or law firms.