



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1218 (02/22/2021)

Topic: Sharing Legal Fees with Former Associate

Digest: Subject to any applicable law, a law firm may pay legal fees on particular cases to an attorney formerly affiliated with the firm and now serving in a non-judicial public office for work previously performed at the firm to the same extent that the attorney would have been paid if still affiliated with the law firm.

Rules: 1.5(g-h), 1.11(f)

FACTS

1. The inquirer is a New York lawyer who is a member of a firm that practices in New York. The firm concentrates primarily on contingent fee personal injury matters. The firm has agreements with its lawyers on the amounts that lawyers working on these matters will be paid upon completion of the matter.

2. Recently, a lawyer in the firm was elected to a non-judicial public office in New York and resigned from the firm to assume the public office. Before resigning, this lawyer had worked on particular cases, some of which were resolved before the lawyer resigned from the firm. The resolution of at least one other matter, for which (the inquirer tells us) the lawyer was “responsible,” is now “imminent.” The resigning lawyer, who remains a member of the bar, has asked to be paid a share of the legal fees from all three cases to the same extent and in the same percentage as if the lawyer were still affiliated with the firm.

3. The inquirer has asked us to assume that, under the firm’s arrangements, the firm would be obligated to pay the lawyer as requested, but the inquirer is concerned about whether the payment would run afoul of the N.Y. Rules of Professional Conduct (“Rules”). Solely for our purposes, we construe this assumption to mean that, in the firm’s view, the lawyer’s resignation did not terminate the existing arrangement between the firm and the lawyer regarding compensation for services previously rendered.

QUESTION

4. May a law firm pay to a lawyer previously affiliated with the firm a share of legal fees otherwise due and owing to the lawyer after the previously affiliated lawyer has assumed a public office?

OPINION

5. Our answer is yes. In so concluding, we stress that we offer no view on whether such a payment to the public official is consistent with whatever laws, regulations, ethics codes, or other mandates may govern the public official's receipt of such legal fees. These are questions of law beyond our purview. We are aware that, in New York, some public officials are permitted to earn income from outside sources, provided that the payments are not made to influence "the lawyer's actions as a public official." Rule 1.11(f)(3). *See* N.Y. State 1169 ¶ 10 (2019) ("Rule 1.11(f) also governs the conduct of lawyers in public office"). But these questions of law are not within our jurisdiction to decide. Accordingly, we limit ourselves to addressing the Rules and we assume without deciding that complying with the firm's arrangement to share the legal fees with a former colleague and current public servant has no legal impediment and no improper purpose.

6. Rule 1.5 governs the division of legal fees between unaffiliated lawyers. To us, the operative provision is Rule 1.5(h), which says that Rule 1.5(g) "does not prohibit payment to a lawyer formerly associated in a law firm pursuant to" a separation agreement. Rule 1.5(h) is intended to clarify that Rule 1.5(g) – which regulates the division of a legal fee with a lawyer not associated in the firm – is inapplicable when the fee is paid to a formerly affiliated lawyer pursuant to a separation agreement. *See* Rule 1.5, Cmt. [8] ("Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.").

7. We believe that the arrangement the inquirer describes qualifies as a "separation agreement" within the meaning of Rule 1.5(h). Although the inquiry makes no reference to a formal *written* "separation agreement," nothing in Rule 1.5(h) requires a writing. It appears that the resigning lawyer left in the belief that the firm would honor its prior agreement, whether written or oral, to compensate the lawyer consistent with the firm's standard compensation practice, and it appears that the firm, for purposes of this inquiry, does not say otherwise.

8. On our view, absent circumstances in which a client must consent – and here the Rules do not so require – we see nothing in the Rules that prohibits a law firm from paying a departing lawyer a share of legal fees that the departing lawyer earned in rendering services to a firm's client, in accord with the parties agreement and the firm's standard compensation practice, to the same extent and in the same percentage as if the lawyer were still affiliated with the firm.

CONCLUSION

9. Unless law prohibits the payment, a law firm may pay a former lawyer in the firm a share of legal fees in matters on which the former lawyer rendered services, in keeping with the parties agreement and the firm's standard compensation practice, in amounts equal to what the former lawyer would have been paid if the former lawyer were still affiliated with the firm, notwithstanding that the former lawyer has since assumed public office.