

## **Ethics Board Opinion 05-03**

The following opinion of the Ethics Board of the National Federation of Paralegal Associations, Inc. (NFPA) is offered based upon NFPA's positions and research in the area of paralegal ethics and discussion and research by the members of the Ethics Board. This opinion should not be construed as binding and must be interpreted in conjunction with the applicable state's Supreme Court rules and opinions governing the professional conduct of members of the legal profession.

**QUESTION:** Is there a "published" rule on paralegals receiving part of settlements in cases?

**OPINION:** Yes, the *ABA Model Rules*, specifically, *Rule 5.4 Professional Independence of a Lawyer*. Most state bar associations also have similar rules; sometimes this is called "fee splitting." Lawyers may split fees with other lawyers, but are prohibited from sharing fees with non-lawyers.

**DISCUSSION:** It is unethical for an attorney to enter into fee sharing agreements with non-lawyers and that includes paralegals. However, an attorney may offer a bonus to their paralegal, provided that the bonus is based on the paralegal's work performance and not based on the settlement amount (for example a percentage).

One familiar example might be the situation depicted in the film *Erin Brockovich*. In the last scene of the movie *Erin Brockovich* (Columbia-Tristar, 2000), Ms. Brockovich receives a bonus check in the amount of roughly 2 million dollars. The audience understands that the check is for her work against Pacific Gas and Electric, which paid the largest amount in a direct (as opposed to derivative) action. The payment to Ms. Brockovich, a paralegal with the firm of Masry and Vititoe, is apparently a true fact. This was not considered an unethical practice, because this situation would be covered under *RPC 5.4(a)(3)*, as it would be considered a "profit-sharing" payment. Since Ms. Brockovich did not enter into an agreement for payment other than her salary, and there was no understanding that she would be given a contingency type fee, this bonus payment appears to be within the Rules of Professional Conduct.

The prohibition against splitting fees with non-lawyers is related to the general need for lawyers to maintain their professional independence (a lawyer who is splitting fees may have undue influence upon his professional judgment, see comments to *Rule 5.4*). When non-lawyers share in the financial interest of the legal services, there is at the least the appearance that they might have an improper influence on how the legal services are conducted.

Referrals are common among lawyers, and there is often a referral fee that is provided to the referring attorney. This, along with other situations where lawyers are sharing or splitting fees, is allowed, provided the cost to the client remains reasonable and in line with the services rendered. Referral fees come out of the fees earned, so the client is not paying a premium for the referral. However, when non-lawyers are doing the referrals

for compensation, then there is a problem. A paralegal getting a percentage of fees earned for "bringing in business" might cause a problem, unless it was clearly set up in the form of a profit-sharing agreement and not directly tied to a particular client's fees.

#### CITATIONS:

Note ABA MODEL RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer of law firm shall not share legal fees with a non-lawyer, except that:

(1) N/A

(2) N/A

(3) 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.

(b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends employs, or pays the lawyer to render legal service for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a non-lawyer 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 non-lawyer is a corporate director or officer thereof; or

(3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

The ABA rules have a provision dealing with lawyers splitting fees: rule 1.5(e):

"A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) The client is advised of and does not object to the participation of all the lawyers involved; and

(3) the fee is reasonable."

Oregon has a slightly different spin on it (Rule 1.5(d)):

"A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client gives informed consent to the fact that there will be a division of fees, and

(2) the total fee of the lawyers for all legal services they rendered the

client is not clearly excessive."

By making a request to the National Federation of Paralegal Associations (NFPA) for an opinion and/or recommendation concerning proper conduct for a member of the legal profession as it pertains to ethical conduct, obligations, utilization and/or discipline of paralegals, the inquirer and his/her employers, employees, agents, and representatives agree to indemnify, hold harmless, and defend the NFPA, its Officers, Directors, Coordinators, Ethics Board and Managing Director from any claims arising from any act or omission of NFPA except those occasioned by NFPA's willful or deliberate acts.