

You have presented a hypothetical situation in which Lawyer A is an employee of a non-profit corporation which brings legal actions on behalf of clients. Lawyer B, a private practitioner, sometimes handles these cases at the request of the non-profit corporation on a pro bono basis, alone or as co-counsel with Lawyer A. Although no fee is charged, in some instances the legal actions result in court-awarded attorney's fees.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the non-profit corporation.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 5.4(a) of the Virginia Rules of Professional Conduct¹ providing that:

A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer; and
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

The committee has previously opined that it is unethical for a lawyer who accepts a pro bono referral from a non-profit organization to charge or collect a contingent fee for the representation. Legal Ethics Op. 1691 (1996). Thus, in the facts you present, it would be improper for the staff attorney (Lawyer A) or the pro bono lawyer (Lawyer B) to claim the court-awarded fees. In some situations, however, a cooperating attorney may contract for a reduced fee with the nonprofit organization and therefore be entitled to a part of the court-awarded legal fees. The issue remains, then, whether the lawyer may ethically agree to turn over all or part of the fees awarded by the court to the non-profit organization that has sponsored the litigation. Rule 5.4(a) is implicated because non-profit organizations or public interest groups are controlled, in whole or in part, by

¹ The prohibition in Rule 5.4 (a) on sharing fees with a nonlawyer is substantially identical to its predecessor, DR 3-102 (A) of the Code of Professional Responsibility.

boards or governing bodies composed of nonlawyers.

Attorney's fees awarded to successful plaintiffs pursuant to statute are a significant source of funding for non-profit public interest organizations. Typically, all such organizations require staff or cooperating attorneys to turn over all or a part of any court-awarded legal fees arising out of successful litigation sponsored by the organization. Roy Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L. J. 1069, 1070-71 (1989)(hereinafter "Simon"). A legal ethics rule prohibiting lawyers from sharing court awarded fees with public interest groups would jeopardize this important source of funding.²

The committee opines that there is no ethical impropriety in a lawyer's sharing court-awarded fees with the sponsoring pro bono organization. Rule 5.4 (d) states that a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if nonlawyers are in a position to exercise control over the professional judgment of a lawyer. Given the rule's history, development and reference to *for profit* associations of lawyers and non-lawyers, the committee believes that Rule 5.4(a) does not prohibit an attorney sharing or turning over court-awarded attorneys fees to a non-profit public interest group which sponsored the litigation.³

The primary purpose of Rule 5.4 is to prohibit nonlawyer interference with a lawyer's professional judgment and ensure lawyer independence. The fact that the entity with which legal fees are shared is a non-profit organization is significant given Rule 5.4 (d)'s language. In addition, the legal fees in question are court-awarded rather than paid by the client. In Legal Ethics Op. 1598 (1994), the committee concluded that the thrust of DR 3-102 (A) is that a lawyer and a nonlawyer enter into an agreement where fees received from one or more clients are shared with the nonlawyer. In the facts you present, there is no issue that the client will be charged an excessive fee, due to the nonlawyer's influence or involvement, since the client does not pay the fee and the court hears evidence and determines the amount of the fee to be awarded.

This Committee is of the opinion that it is not unethical for an attorney to participate with a nonprofit organization that requires participating attorneys to turn over court-awarded fees to the organization, notwithstanding Rule 5.4 (a) or DR 3-102 (A).⁴

² Professor Simon cited a study of non-profit public interest groups revealing that at least nine percent (9%) of their budgets were funded by court-awarded attorneys fees. Simon, *supra* at 1074.

³ In Formal Opinion 93-374 issued by the ABA's Standing Committee on Legal Ethics, the committee analyzed Rule 5.4, reasoning that:

Paragraph (a), with its more general prohibition on a lawyer sharing legal fees with a lay person, must address some residual range of circumstances, not caught by the other, more specific paragraphs of the rule, where the sharing of fees alone, absent a partnership agreement or its equivalent, presents a significant threat to the lawyer's independence of judgment. That threat, presumably, must arise from the fact that the fee-sharing arrangement gives the lay participant both the incentive and the power to interfere in the lawyer's conduct of a matter.

⁴ See, ABA Formal Op. 93-374 (1993); Cleveland Bar Ass'n Op. 141 (1979)(staff attorney for organization dedicated to legal rights for women could agree to remit court-awarded fees as condition of employment); *But see*,

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Therefore, under the facts you have presented, Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the non-profit corporation. Such conduct does not violate Rule 5.4 (a) of the Virginia Rules of Professional Conduct.

ACLU v. Miller, 803 S.W.2d 592 (Mo. 1991) (organization had no enforceable right to court-awarded attorneys fees because this would constitute fee-splitting between participating lawyer and a non-lawyer); Maine Comm'n on Legal Ethics, Op. 69 (1986).