# ATTORNEY PROFESSIONALISM FORUM

**To the Forum:**

I am a partner in a mid-size firm but have decided to set out on my own. Although I am going solo, I expect to continue working on some cases with my current firm. I intend to handle all aspects of my new practice – at least at the outset – including bookkeeping and accounting. In addition to working with my soon-to-be former firm, I also plan to work with some other firms, including some out-of-state firms, where they plan to refer work to me in return for a fee-splitting arrangement. We both will be providing services to the client on those matters. I want to avoid any ethical improprieties and I am concerned that the fee-splitting issues could be complicated.

Are there any issues with engaging in a fee-splitting arrangement with these firms? What rules should I be aware of? Can I put the split fees into a general practice bank account? Are there any types of law practices or attorneys that I am prohibited from entering into a fee-splitting arrangement with?

Any advice on how to handle split fees would be appreciated.

Sincerely,

Gon Solo

**Dear Gon Solo:**

Although all attorneys should be aware of the applicable Rules of Professional Conduct regarding the sharing of fees with other practitioners (or even non-lawyers) who have referred matters to attorneys, this is *especially* true for solo practitioners and small firms when handling a practice's finances.

Fee splitting between lawyers not associated in the same firm is generally governed by New York Rules of Professional Conduct (RPC) 1.5(g). But before we address that rule, as a soon to be attorney *formerly* associated with your firm, RPC 1.5(h) is highly applicable to you. It provides that "Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement."

Comment 8 to RPC 1.5 makes it clear that when you leave your firm, it may divide fees it receives from a client with you without having to comply with the requirements of RPC 1.5(g) provided that you have you arranged for a fee splitting arrangement in your separation agreement with the firm. *See* Comment 8 to RPC 1.5(h) ("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.") As Professor Roy Simon notes, however, this rule *only* applies if the attorney leaving the firm bargained for a share of the firm's fees upon leaving the firm. *See* Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 228 (2016 ed.) ("Rule 1.5(g) does apply to fee sharing with formerly associated lawyers if the division is not pursuant to a separation or retirement agreement."). Therefore, prior to leaving your firm, the fee sharing arrangement you negotiated should be covered in your separation agreement with the firm; the agreement should specifically identify each client for which you expect to receive fees after you leave the firm. Such an agreement will alleviate the need to comply with the more onerous requirements of RPC 1.5(g) discussed below.

When entering into fee-splitting agreements in your new solo practice, you will need to comply with RPC 1.5(g):

> A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:
>
> (1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and
>
> (3) the total fee is not excessive.

For decades, the main issue has centered around whether an attorney may share a fee with another attorney for simply referring a matter to that attorney who then does the work on the case. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 211. Although the rules have changed over the years, RPC 1.5(g)(1) currently allows a fee to be split between attorneys that is not in proportion to the work the attorneys actually do on the condition that both of the attorneys must assume "joint responsibility" for the representation. *See* RPC 1.5(g)(1); *see also* RPC 7.2(a)(2) ("a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g)"). This permits the referring attorney to receive a fee despite the fact that she may not be handling a proportional amount of the work. As Professor Simon notes, some of the policy reasons for permitting fee-splitting under those circumstances

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is that joint responsibility encourages referrals to competent lawyers, since the "referring lawyer must assume financial responsibility for any malpractice or breaches of fiduciary duties by the other lawyer," and the referring lawyer will monitor the handling of the matter. Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 212.

An interesting issue arises when the referral of a case is from an attorney disqualified due to a conflict of interest. The Nassau County Bar Association Committee on Professional Ethics addressed this issue in an ethics opinion analyzing former New York Lawyer's Code of Professional Responsibility 2-107(A) which is similar to current RPC 1.5(g). The committee opined that the incoming attorney could only divide the fees in proportion to the work done on the matter *before* the conflict was realized (or should have been realized) but could not pay the disqualified firm a referral fee because it could not consent to joint responsibility for the matter due to the conflict. *See* Bar Ass'n of Nassau County Comm. on Prof Ethics Op. 1998-7 (1998).

If an outgoing firm's conflict was *consentable*, however, and the clients give their informed consent of the conflict and its implications, a referral fee under RPC 1.5(g) appears to be permissible. *See* NYSBA Comm. on Prof'l Ethics, Op. 745 (2001) (analyzing former rule 2-107(A), the committee opined that "[a] disqualified lawyer cannot assume 'joint responsibility' for a matter and therefore, may not be paid a referral fee, unless the referring lawyer obtains client consent under the same standard that would have allowed the lawyer to accept or continue 'sole responsibility' for the matter.").

If you are acting as local counsel for an out-of-state firm, you can share the legal fees with the lead counsel. *See, e.g.,* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-8 (2015), *citing* NYSBA Comm. on Prof'l Ethics, Op. 864 (2011) (opining that a New York lawyer is permitted to divide legal fees with a non-New York lawyer on a personal injury case); NYSBA Comm. on Prof'l Ethics, Op. 806 (2007) (opining that a New York lawyer is permitted to divide legal fees with a foreign firm where their lawyers have professional education and training, as well as ethical standards, comparable to American lawyers). If your fees as local counsel are paid out of the lead counsel's fee, however, you must comply with RPC 1.5(g). *See* NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-4 n. 4 (2015) ("Local counsel should also be mindful of how her fee will be paid. If she is being paid a share of the lead counsel's fee, she must comply with Rule 1.5(g) . . . ."); Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 211. If you want to avoid the fee-sharing obligations under RPC 1.5(g) as local counsel, you may arrange to bill the client directly for your services on the matter.

While the sharing of legal fees with attorneys is controlled by RPC 1.5(g), the sharing of legal fees with *nonlawyers* is governed by RPC 5.4(a) and New York State Judiciary Law § 491 and is generally prohibited with certain exceptions. *See* Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 210. Judiciary Law § 491 makes the splitting of fees with a nonlawyer a misdemeanor offense but does not apply to fee-splitting agreements between attorneys. *See* Judiciary Law § 491. RPC 5.4(a) prohibits sharing of legal fees with nonlawyers with certain exceptions such as the estates of deceased attorneys and compensation or retirement plans for nonlawyers based on a profit sharing arrangement. *See* RPC 5.4(a).

The New York City Bar Association (NYCBA) Committee on Professional and Judicial Ethics addressed an unusual fee-splitting dilemma involving out-of-state nonlawyers in Formal Opinion 2015-8. The question presented to the committee was whether a New York lawyer could ethically share fees with an American law firm, outside of New York, that operated in a manner that would not be permissible under the RPC because it allowed nonlawyers to have a financial interest and/or managerial authority in the firm. As discussed *supra*, RPC 1.5(g) generally does not prohibit joint representation and division of legal fees with out-of-state firms as long as the agreement otherwise complies with RPC 1.5(g). RPC 5.4(a), however, prohibits attorneys from sharing legal fees with nonlawyers and RPC 5.4(b) and (c) prohibit attorneys from forming a legal services partnership where a nonlawyer has an ownership interest or authority to control the professional judgment of the lawyer. *See* RPC 5.4(a-c); NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-8 (2015). But, in certain jurisdictions such as Washington D.C., nonlawyers may – contrary to the RPC – hold a financial interest or have managerial authority over a law firm. *See* D.C. Rules of Professional Conduct 5.4(b). Therefore, a New York lawyer splitting fees with a Washington D.C. firm potentially faced an ethical conflict between RPC 1.5(g) and 5.4.

The NYCBA Committee on Professional and Judicial Ethics ultimately opined that it was ethical for a New York attorney to "divide legal fees with a lawyer who practices in a law firm where nonlawyers hold a financial interest or managerial authority, provided that the law firm is based in a jurisdiction that permits arrangements with nonlawyers." NYCBA Comm. on Prof'l and Jud. Ethics, Op. 2015-8 (2015). The committee believed that there was little risk that a nonlawyer would impair the New York attorney's independent professional judgment but noted that, under RPC 5.4(d)(3), the "New York lawyer must not allow nonlawyers in the other law firm to improperly influence their professional judgment." *Id.* The takeaway from this opinion is that you should make sure that the firms with which you are entering into fee-splitting agreements are complying with their ethical obligations and nonlawyers at that firm are not impairing your professional judgment to your client.

For bookkeeping purposes, you must be especially careful to treat funds subject to a fee-splitting agreement as funds belonging to a third person. Your ethical obligations regarding such

funds are governed by RPC 1.15. The American Bar Association Standing Committee on Ethics and Professional Responsibility recently addressed how funds subject to a fee-splitting agreement must be maintained and distributed. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 475 (2016). The committee opined that when an attorney receives fees from a client subject to a fee-splitting agreement, the other attorney should be treated as a "third person" under ABA Model Rule 1.15. *See id.* While ABA Model Rule 1.15 varies in some ways from RPC 1.15, we believe that the findings of the committee and its analysis of fee splitting funds under ABA Model Rule 1.15 are consistent with your obligations under RPC 1.15. *Compare* ABA Model Rule 1.15 and RPC 1.15. Under RPC 1.15(b)(2) and (4), the attorney receiving fee-split funds must deposit those funds in an account separate from any business or personal accounts of the lawyer or lawyer's firm. *See* RPC 1.15(b)(2) and (4). The receiving attorney must promptly notify the other attorney of receipt of the funds and deliver their portion of fees. *See* RPC 1.15 (c)(1) and (4). If a portion of the funds are due to the receiving attorney, they may be withdrawn unless there is a fee dispute with the client or the other attorney. *See* RPC 1.15 (b)(4). In the event of a fee dispute, the funds cannot be withdrawn until the dispute is resolved. *See id.* Although it should go without saying, be very careful with keeping these funds in an account that complies with RPC 1.15. The improper commingling of funds is a surefire way to end up before a grievance committee.

Managing all aspects of a solo practice will require a great deal of attention to a number of issues and fee sharing is certainly an area that needs to be dealt with correctly to avoid ethical pitfalls in the future. In your case, your first step should be to negotiate and include any future fee-sharing arrangement with your firm for work in your separation agreement to avoid the need to later obtain the clients' written consent. Next, it is imperative that you create a separate bank account in your solo practice for fees subject to split-fee agreements and that you avoid any mixing of split fees with your personal or general accounts. Finally, as you negotiate fee-sharing agreements going forward, always consider RPC 1.5(g) and evaluate whether the work to be done for that case is proportionate to the fee agreed upon or whether the lawyers need to assume joint responsibility for the representation to be provided to the client in writing.

Sincerely,

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## QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

Although the majority of my practice is in litigation, I recently represented a longtime client in negotiating the purchase of real property with a number of environmental regulatory issues. After entering into the contract, however, a dispute arose when a third party claimed it was entitled to purchase the property. They commenced an action claiming irregularities with the contract and closing and I appeared for my client in the litigation. The plaintiff issued a subpoena to me regarding the transaction – demanding both documents and a deposition – and is moving to have me disqualified as counsel. I don't think the plaintiff's complaint has much merit and that the subpoena may be a litigation tactic to frustrate my client.

Shortly after receiving the subpoena and motion to disqualify, I also received a request to submit to a voluntary interview with an environmental agency investigating a claim alleged against my client with respect to the sale of the property. While the agency hasn't served an administrative complaint against my client yet, based upon my knowledge of the transaction and property, I think there is a strong possibility that an administrative complaint may be filed after their investigation is complete.

As an attorney in the litigation, can the other side subpoena me to testify about the transaction? Isn't my involvement in the transaction protected by an attorney-client privilege? If the court requires me to respond to the subpoena and appear at the deposition, will I also have to be disqualified as counsel? If I am disqualified, may someone from my firm step in to continue representing my client in the litigation? This client is very comfortable with our firm and we are the only attorneys they have had for many years.

If I appear for the voluntary administrative interview, will that create a basis for the agency to later seek to have me disqualified if an administrative complaint is filed?

Going forward, if I do transactional work in the future, are there any actions I should take to avoid disqualification motions and becoming a potential fact witness?

Sincerely,

Ina Jam

## MEMBERSHIP TOTALS

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| **New Regular Members 1/1/17-2/14/17** | **1,866** |
| **New Law Student Members 1/1/17-2/14/17** | **147** |
| **Total Regular Members as of 2/14/17** | **65,459** |
| **Total Law Student Members as of 2/14/17** | **6,881** |
| **Total Membership as of 2/14/17** | **72,340** |