

**STATE BAR OF NEW MEXICO
ETHICS ADVISORY COMMITTEE
FORMAL ETHICS ADVISORY OPINION**

FORMAL OPINION: 2021- 001

TOPIC: Fee Splitting when one lawyer provides no services

RULES IMPLICATED: Rules 16-100, 16-101, 16-103, 16-104, 16-105 and 16-702 NMRA (2021).

DATE ISSUED: November 15, 2021

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QUESTIONS PRESENTED:

1. May a lawyer split a fee with counsel who, other than signing up the client, does no work in and assumes no responsibility for the matter?
2. Under what circumstances may lawyers who are not in the same firm split a fee?

SUMMARY ANSWERS:

1. No.
2. A fee may only be split between lawyers not in the same firm if each of the conditions of Rule 16-105(F) are met.

ANALYSIS:

1. Referral Fees Generally Prohibited.

In New Mexico, the Rules generally prohibit a lawyer from making the payment of a fee or “anything of value” to a person who has recommended the lawyer’s services. Rule 16-702(B) NMRA (2021). There are only four enumerated and specific exceptions to this prohibition:

- (1) A lawyer may pay the reasonable costs of advertisements or communications through written, recorded or electronic communication, including public media;
- (2) A lawyer may pay the usual charges of a legal service plan¹ or not-for profit or qualified lawyer referral service²;
- (3) A lawyer may purchase a law practice in accordance with Rule 16-117 NMRA (2021); and
- (4) A lawyer may refer clients to another lawyer or non-lawyer professional pursuant to a reciprocal referral agreement so long as the agreement is not exclusive and the client is informed of the nature and existence of the agreement.

Id. Any payment for referral (i.e., referral fee) that does not squarely fall within one of these exceptions is an impermissible referral fee prohibited by the Rules. For purposes of this opinion, the Committee assumes that the lawyer who signed up the client does not fall within any of the four exceptions, and therefore no referral fee or payment for referral is permissible.

2. Fee Splitting Permitted Under Certain Conditions.

The Rules do allow fee splitting, or a division of a fee, between lawyers who do not practice in the same firm but only under certain circumstances. The primary Rule applicable to this issue is Rule 16-105(F), which provides:

- (F) Fee Splitting. 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* each lawyer assumes joint responsibility for the representation;
 - (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
 - (3) the total fee is reasonable.

(Emphasis added).

The [Code of Professional Conduct] Committee Commentary (“Commentary”) to this Rule recognizes that “A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well.” Rule 16-105 NMRA (2021), cmt. [8]. In this Committee’s view, such an arrangement could be appropriate based upon combined ability to timely and competently represent the client.

¹ A “legal service plan” is a “prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation.” Rule 16-702 NMRA (2021), cmt. [6].

² A “qualified lawyer referral service” is defined as a lawyer referral service that has been approved by an appropriate regulatory authority. Rule 16-702(B)(2).

A. Proportion of Services or Joint Responsibility.

The first prong of Rule 16-105(F), *i.e.*, a division of fees may be permitted “in proportion to the services performed by each lawyer” or “each lawyer assumes joint responsibility for the representation.” A division “in proportion to the services performed” is not further explained in the rule or the commentary. In the Committee’s view, such a division might be based upon the respective time spent on the matter by each attorney, or the application of both time and value provided by each lawyer. By example, if one lawyer is providing very generalized legal service while another is providing very specialized legal service, a reasonable adjustment by which the lawyer providing very specialized legal service is compensated more than the lawyer providing more generalized service is likely not prohibited by the Rule.

Lawyers may also split a fee, not based upon the proportion of services provided, so long as each lawyer assumes joint responsibility for representation. While the Rules do not define “joint responsibility,” the Commentary advises that “joint responsibility ... entails financial and ethical responsibility for the representation *as if the lawyers were associated in a partnership.*” (Emphasis added). Rule 16-106 NMRA (2021), cmt. [8]. Existing New Mexico case law does not expound on the meaning of the term as used in this Commentary. However, New Mexico partnership statutes provide: “Except as otherwise provided in Subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.” §54-1A-306 NMSA 1978. Some other ethics committees have opined that “joint responsibility” under similarly worded rules would include joint responsibility for legal malpractice. *See, e.g., New York State Bar Ass’n Ethics Op. 1201* (2020). The Committee does not opine on substantive law issues. However, lawyers utilizing the “joint responsibility” option would be wise to consider the substantive law issues surrounding such a relationship, including partnership law and resulting liabilities. Certainly, at a minimum, a lawyer contemplating a relationship that would be allowed under Rule 16-105(F) should consider the competency of the other lawyer in regard to the representation at hand. *See, Rule 16-101 NMRA* (2021).

Regardless of whether a matter involves proportionate splitting of a fee or a split based on joint responsibility, in any joint representation matter, it is important for all lawyers involved to recognize that the duties to a client as set forth generally in the Rules, as well as in substantive law, apply to each lawyer. By example, responsibilities related to competence, allocation of authority between lawyer and client, diligence, communication, fees, confidentiality, etc., apply to each lawyer engaged in a joint representation. *See, e.g., Rules 16-101 through 16-106.* This includes certain specific obligations, such as the disclosure of professional liability insurance requirement of Rule 16-104(C), which applies to each lawyer, and each lawyer must make the disclosure and obtain an acknowledgement from the client if the requisite level of professional liability insurance coverage is not held by the lawyer.

B. Client Agreement.

Any fee splitting arrangement requires that the “client agrees to the arrangement, including the share each lawyer will receive.” Rule 16-105(F)(2) NMRA (2021). The client’s agreement must

be confirmed in writing. Lawyers are obligated to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Rule 16-104(B) NMRA (2021). Either or both lawyers involved should encourage the client to ask any and all questions the client may have regarding the arrangement and then provide the client with candid responses. In the Committee’s view, this requires the arrangement to be set forth in writing for the client’s review and, at the very least, the writing must confirm the client’s agreement.

C. Fee Must be Reasonable.

Lastly, the final requirement of Rule 16-105(F) is the total fee charged to the client be reasonable. This triggers consideration of Rule 16-105(A) which prohibits a lawyer from “mak[ing] an arrangement for, charg[ing] or collect[ing] an unreasonable fee or an unreasonable amount for expenses.” The Commentary states that the fees must be “reasonable under the circumstances.” Cmt. [1]. A non-exclusive list of considerations is provided in Rule 16-105(A):

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

These factors “are not exclusive . . . nor will each factor be relevant in each instance.” Cmt. [1]. Thus, the reasonableness of a fee in cases involving fee splitting will be based upon the facts and circumstances of the specific representation, as is true for all cases.

CONCLUSION:

Fee splitting where one of the lawyers brings the client to the matter but neither provides any service to the client nor assumes joint responsibility for the representation is prohibited under New Mexico’s Rules. Such an arrangement would amount to an impermissible referral fee.

Any matter in which a fee is split between lawyers not in the same firm must satisfy three requirements:

1. Either:
 - a. The division is in proportion to the services performed by each lawyer; or
 - b. Each lawyer assumes joint responsibility (ethical and financial) for the representation as if the lawyers were in a partnership regarding the matter;
2. The client must agree to the arrangement, including the share each lawyer will receive, with the client's agreement confirmed in writing; and
3. The total fee must be reasonable.