



Ethical Issues and Requirements for Lawyers in Compensating Nonlawyer Employees

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Ethical Issues and Requirements for Lawyers in Compensating Nonlawyer Employees

Written by Joseph A. Corsmeier

This article will discuss the ethical considerations for lawyers when compensating nonlawyer employees.

State Bar disciplinary rules, including Florida Bar Rule 4-5.4(a), prohibit lawyers from sharing legal fees with nonlawyers. The Comment to the Florida Bar Rule states, "The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment...." Notwithstanding this prohibition, the Bar rules provide for exceptions.

Bonuses

Florida Bar Rule 4-5.4(a)(4) states that "bonuses may be paid to nonlawyer employees for work performed, and may be based on their extraordinary efforts on a particular case or over a specified time period. Bonus payments shall not be based on cases or clients brought to the lawyer or law firm by the actions of the nonlawyer. A lawyer shall not provide a bonus payment that is calculated as a percentage of legal fees received by the lawyer or law firm..."

In Florida Bar Ethics Op. 02-1 (1/11/02), the lawyer requested an ethics opinion regarding the following question: "May I bonus a non-lawyer employee based on the number of hours the non-lawyer employee has worked on a case for a particular client?" The lawyer stated that "I would like to bonus my employees based on their own productivity. I would not be utilizing any portion of the fees received by me for that purpose."

The opinion concluded:

"Based on the rules and opinion, the inquiring **attorney may pay** *the legal assistant a bonus based on the legal assistant's extraordinary efforts on a particular case or over a specific period of time.* While the number of hours the legal assistant works on a particular case or over a specific period of time is one of several factors that can be considered in determining a bonus for the legal assistant, it is not the sole factor to be considered. It must be remembered that the rule allows a bonus to be paid to a nonlawyer based on "extraordinary efforts" either in a particular case or over a specific time period. A bonus which is solely calculated on the number of hours incurred by the legal assistant on the matter is tantamount to a finding that every single hour incurred was an "extraordinary effort", and such a finding is very unlikely to be true. Therefore, *unless every single hour incurred by the legal assistant was a truly extraordinary effort, it would be impermissible for the inquiring attorney to pay a bonus to his legal assistant calculated in the manner the inquiring*

attorney has proposed. However, the number of hours incurred by the legal assistant on the particular matter or over a specified time period may be considered by the lawyer as one of the factors in determining the legal assistant's bonus." (emphasis added).

Pension, Profit Sharing, and Retirement Plans

Florida Bar Rule 4-5.4 (b) states that a "lawyer or law firm may include nonlawyer employees in a qualified pension, profit-sharing, or retirement plan, even though the lawyer's or law firm's contribution to the plan is based in whole or in part on a profit-sharing arrangement."

ABA Informal Opinion 1440 also states that a compensation plan proposed for an office administrator which relates to the net profits and business performance of the firm and not to specific fees does not violate the model rules. New York State Bar Assoc. Ethics Op. 887 (2011) states that a law firm may pay a marketing employee a bonus based on the firm's profits, the profits of a department, or as a percentage of the marketer's salary; however, the bonus cannot be based on referrals of specific legal matters or on firm profits from cases that the marketer brought to the firm. District of Columbia Ethics Op. 322 (2004) states that a nonlawyer employee may not be paid a bonus based on fees the firm receives from specific cases, but may be paid a bonus based upon the firm's overall profitability.

Referrals

Unless there is an exception, lawyers are prohibited from paying nonlawyers based on the referral of specific clients to the firm. Florida Bar Rule 4-1.17(b) states that a lawyer “may not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may pay the reasonable cost of advertising permitted by these rules, may pay the usual charges of a lawyer referral service, lawyer directory or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.”

A lawyer cannot circumvent the rules by providing non-monetary “gifts”. Such gifts would most likely be something “of value” under Florida Bar Rule 4-1.17(b) and would be prohibited under that rule. The key issue is whether something “of value” is exchanged for future referrals.

Examples include: Maryland Ethics Op. 2000-35 (2001) states that lawyers who participate as panelists in seminars offered by accounting and financial services company, in exchange for referrals, could be interpreted as giving something “of value” to accounting firm; Pennsylvania Bar Association in Op. 2005-81 states that a lawyer may not give a nonlawyer employee a paid day off for referring a new client to the firm; and Connecticut Informal Ethics Op. 92-24 (1992) states that a

lawyer may not give indirect benefits, including gifts, to a client who made referrals to a lawyer.

Lawyers must be aware of the Bar rules governing compensation to non-lawyers to fully comply with the Bar rules and avoid an unintentional violation.

Joseph A. Corsmeier is a Martindale-Hubbell "AV" rated attorney who practices in Clearwater, Florida. His practice consists primarily of the defense of attorneys and licensed professionals in disciplinary and admission matters, expert analysis and opinion and court testimony on ethics and liability issue, and estate planning. Mr. Corsmeier is available to provide attorney ethics and professionalism advice, provide expert opinions on ethics and malpractice

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