

## Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 139

Approved January 27, 1994

**Issue:** May a law firm's nonlawyer office administrator be compensated solely on the basis of a percentage of the gross income of the firm?

**Opinion:** Under Rule of Professional Conduct 5.4(a)(3), a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, which may be based upon a percentage of the net or gross income of the firm, so long as compensation is not tied to receipt of particular fees. The nonlawyer's employment, however, must still comport with Rule 5.4(d), which prevents the nonlawyer from owning an interest in or controlling the activities of a law practice.

**Analysis:** The well-established general rule is that a lawyer or law firm may not compensate a lay assistant or employee a percentage (split) of a particular fee or on a contingency basis. (fn1)

Prior to 1988, the Code of Professional Responsibility, based on the American Bar Association Model Code of Professional Responsibility, was in effect in Utah. Under former Disciplinary Rule 3-102(A)(3), it was improper for a lawyer or law firm to share legal fees with a nonlawyer, "except that . . . a lawyer or law firm may include nonlawyer employees in a *retirement plan*, even though the plan is based in whole or in part on a profit sharing arrangement." (fn2)

Under this provision, it was improper to tie a nonlawyer employee's compensation, as distinguished from retirement, to the profits of the firm. (fn3) The rationale for this proscription was to avoid encouraging a nonlawyer to engage in the practice of law and to assure professional control over the representation of clients. (fn4)

In 1979, the ABA issued an opinion that expanded upon the rule. The ABA Committee on Ethics and Professional Responsibility considered the circumstances where a lay office administrator was generally in charge of all nonprofessional business matters within the firm, but had no professional responsibilities, participated in no decisions

involving professional judgment, and did not determine or accept legal fees or participate in decisions concerning collection of fees. The ABA concluded that it would not be violative of Disciplinary Rule 3-102 to compensate the administrator on the basis of a fixed, predetermined annual salary plus "a percentage of the profits which might be 1/4 to 1/3 of the administrator's total compensation." (fn5) Such a compensation structure, the opinion stated, "would provide an incentive and reward for unique talents and dedicated services in achieving greater efficiency and productivity in the operation of the law firm."

The ABA opinion noted that the source of payment for nonlawyer employees will be legal fees, recognized that nonlawyers may be included in retirement programs even though such plans are based in whole or in part on a profit sharing arrangement, recognized the development of professional business management within law firms, and noted the prevalence of fixed-salary-plus-incentive compensation programs in the business community as a whole:

In our view, the foregoing proposal does not constitute dividing legal fees with a nonlawyer under DR 3-102, because the compensation relates to the net profits and business performance of the firm and not to receipt of particular fees. (fn6)

In 1980, the ABA Model Code of Professional Responsibility was amended to be consistent with Informal Opinion 1440, adding to the text of DR 3-102(A)(3) the two words "compensation or" before the term "retirement plan," thus specifically allowing nonlawyer employees to be included in a compensation or retirement plan "based in whole or in part on a profit-sharing arrangement." However, even under this amendment, such compensation had to be based on the profits or fees from all cases. (fn7)

The old Utah Code of Professional Responsibility was not so amended. However, in 1988 the new Utah Rules of Professional Conduct were adopted, replacing the Code. The pertinent provision of the Rule 5.4, Professional Independence of a Lawyer states: "A lawyer or law firm shall not share legal fees with a nonlawyer, except that . . . [a] lawyer or law firm may include nonlawyer employees in a *compensation plan or retirement plan*, even though the plan is based in whole or in part on a profit-sharing arrangement." (Emphasis added.)

Thus, an arrangement where nonlawyer employees are compensated on a percentage basis of profits is now proper under the Utah Rules of Professional Conduct. (fn8) Further, this Committee sees no material ethical distinction between *profit* sharing and *revenue* sharing. The ethical

considerations are the same.

The paramount concern is in maintaining the independent judgment of the lawyer or law firm. Nonlawyers may, therefore, not become involved in the practice of setting fees, the administration or collection of fees, or the direction or control of the professional judgment of the lawyer. (fn9) All salaries are ultimately paid from receipt of fees, however, and little if any distinction can be made between compensation based upon gross receipts or net profit. So long as there is nothing in the nature of the arrangement that would tend to impair the independence of the law firm or lawyer, and provided no other rule of professional conduct is violated, compensation of nonlawyer employees may be based upon a percentage of gross or net income so long as it is not tied to specific fees from a particular case.

#### Footnotes

1. *See, e.g.*, Ore. State Bar, Legal Ethics Comm., Op. 505 (1985), ABA/BNA Lawyers' Manual on Professional Conduct 801:7115-16 (lawyer may not pay disbarred lawyer-employee on contingency basis or only when fees are collected from client); Md. State Bar Ass'n, Inc., Comm. on Ethics, Op. 84-103 (1984), ABA/BNA Lawyers' Manual on Professional Conduct 801:4346-47.

2. Former Utah Code of Professional Responsibility DR 3-102(A)(3) (emphasis added).

3. Mass. Bar Assoc., Ethics Comm., Op. 84-2 (1984), ABA/BNA Lawyers' Manual on Professional Conduct 801:4608; *In re Shapiro*, 90 A.D.2d 22, 455 N.Y.S.2d 604 (1982).

4. *See* former Utah Code of Professional Responsibility EC 3-8.

5. ABA Standing Comm. on Ethics & Professional Responsibility, Inf. Op. 1440 (1979) (citing ABA Model Code of Professional Responsibility DR 3-102(A)).

6. *Id.*

7. Note 1, *supra*.

8. Accord Va. State Bar, Standing Comm. on Legal Ethics, Op. 885 (1987), ABA/BNA Lawyers' Manual on Professional Conduct 901:8716 (lawyer handling collections may compensate nonlawyer employees on a percentage of all profits from collection received); Va. State Bar, Standing Comm. on Legal Ethics, Op. 806 (1986), ABA/BNA Lawyers' Manual on Professional Conduct 901:8707 (law firms may pay secretaries annual bonuses based on firm's profits).

9. Utah Rules of Professional Conduct 5.4(d)(3).

#### Rule Cited:

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