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Splitting Fees in Oregon and Beyond

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In an era of increasing specialization, lawyers frequently partner with counterparts from other firms when representing clients in complex matters. If each firm is billing the client involved separately by the hour, the fee relationship is between each firm and the common client. If the firms are dividing a common fee, however, then Oregon's "fee split" rule—RPC 1.5(d)—comes into play. An easy example is a contingent fee in a complicated personal injury case being divided by a general practice firm and another firm specializing in the particular kind of claim.

In this column, we'll first survey the broad contours of Oregon RPC 1.5(d). Because Oregon's rule differs in significant respects from the ABA Model Rule, we'll then touch on those differences and use Washington as a contrasting illustration.

Before we do, however, four qualifiers are in order.

First, RPC 1.5(d) only enters the mix when two or more law firms are sharing the same fee. As noted earlier, it does not apply to hourly fee arrangements when more than one firm—such as national trial counsel and local counsel for a defense client—are each billing the client separately for their respective work.

Second, RPC 1.5(d) typically does not apply when a firm simply hires a contract lawyer to work on the firm's representation of a client on an hourly or task basis. ABA Formal Opinion 00-420 (2000) addresses charging for contract lawyers generally and *In re Carolan*, 31 D.B. Rptr. 147 (Or. 2017) rejected treating this as a fee-split under RPC 1.5(d).

Third, Comment 8 to ABA Model Rule 1.5 notes that contract law rather than the RPCs typically regulates the division of fees to be received in the future when a lawyer leaves a firm and will be compensated for cases handled at the old firm under a departure agreement. *Gray v. Martin*, 63 Or. App. 173, 663 P.2d 1285 (1983), makes this same point in the context of a partnership agreement involving an Oregon law firm.

Fourth, RPC 5.4(a)(2) exempts fees covered by a law firm sales agreement under RPC 1.17 in several specified scenarios from the fee-split rule.

The Oregon Rule

Oregon RPC 1.5(d) reads in its entirety:

> (d) A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) the client gives informed consent to the fact that there will be a division of fees, and

> (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive.

ORS 9.515 also specifically permits the division of fees in personal injury or wrongful death cases done in compliance with RPC 1.5(d).

Oregon's rule is based primarily on former Oregon DR 2-107(A) rather than the corresponding ABA Model Rule.

Significantly, Oregon's rule permits a fee division without a lawyer actually working on or otherwise being responsible for the case involved. For example, as long as the other aspects of the rule are followed, a lawyer can compensate another lawyer for simply making a referral. This approach was introduced through a 1986 amendment to DR 2-107(A) that followed in the wake of *In re Potts/Trammell/Hannon*, 301 Or. 57, 718 P.2d 1363 (1986), in which lawyers at separate firms were disciplined for a fee division that was not in proportion to their respective contributions to the work involved.

Oregon RPC 1.5(d) requires the client's "informed consent" to the division—but not in writing. That said, prudent practice suggests confirming the client's consent in writing. The Oregon rule also does not specify when client consent must be obtained. The OSB Ethical Oregon Lawyer (at 3-30), however, counsels that despite this ambiguity, it is wise to confirm client consent at the

outset because the fee-split will involve having another firm directly participate in the representation or at least be compensated from the case.

Beyond Oregon

The corresponding ABA Model Rule—1.5(e)—varies from the Oregon rule on both on lawyer responsibility and written confirmation:

> (e) A division of a fee between lawyers who are not in the same firm may be made only if:
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> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
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> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
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> (3) the total fee is reasonable.

Oregon lawyers handling matters in other states, therefore, should carefully review the fee-split rule in that jurisdiction and should not assume that Oregon's rule necessarily controls.

Washington RPC 1.5(e), for example, follows the ABA Model Rule and requires that a lawyer receiving part of a fee-split either participate directly in the case involved or at least share legal responsibility for the case, as Comment 7 to the Washington rule puts it, "as if the lawyers were associated in a partnership." In *Kayshel v. Chae, Inc.*, 486 P.3d 936 (Wash. App. 2021), the Washington Court

of Appeals held that failure to confirm the client's consent in writing renders a fee-split void—leaving the law firms involved with only their respective *quantum meruit* claims to the overall fee. *In re Perkins*, Wash. D. Bd. Case No. 19-00013 (2020) (unpublished), in turn, found that the requisite client consent must occur at the outset of the representation.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP advises lawyers, law firms, and corporate and governmental legal departments throughout the Northwest on professional ethics and risk management. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark has served on the Oregon State Bar Legal Ethics Committee and is a member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *Bar News* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is the editor-in-chief and a contributing author for the WSBA *Legal Ethics Deskbook* and a principal editor and contributing author for the OSB *Ethical Oregon Lawyer* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.