

**Louisiana State Bar Association
Rules of Professional Conduct Committee**

PUBLIC Opinion 12-RPCC-018¹

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Sharing Legal Fees with Suspended or Disbarred Lawyers

While a lawyer may only share legal fees with another lawyer who is a member of the bar in good standing, the lawyer can—and may even have an obligation to—pay the disciplined lawyer as a “creditor” according to a valid contractual agreement for services rendered or for fees earned prior to the suspension or disbarment. In absence of a clear written contractual agreement, the disciplined lawyer may be paid based on quantum meruit. Regardless of the existence of a valid contractual agreement, however, the lawyer’s fee may be subject to reduction if the case or client in question is the underlying basis for the lawyer’s discipline.

The Committee has considered the ethical issue raised when a lawyer wishes to share legal fees with another lawyer who has been suspended or disbarred or has resigned from the practice of law². In considering this issue, the Committee believes Rules 1.5, 1.15(d) and (e), and 5.5(e)(1) and (e)(4) of the Louisiana Rules of Professional Conduct to be the primary rules implicated.

¹ The comments and opinions of the Committee—public or private—are not binding on any person or tribunal, including—but not limited to—the Office of Disciplinary Counsel and the Louisiana Attorney Disciplinary Board. Public opinions are those which the Committee has published—specifically designated thereon as “PUBLIC”—and may be cited. Private opinions are those that have not been published by the Committee—specifically designated thereon as “NOT FOR PUBLICATION”—and are intended to be advice for the originally-inquiring lawyer only and are not intended to be made available for public use or for citation. Neither the LSBA, the members of the Committee or its Ethics Counsel assume any legal liability or responsibility for the advice and opinions expressed in this process.

² Although this opinion is titled *Sharing Legal Fees with Suspended or Disbarred Lawyers*, it has relevance in situations where a lawyer may have permanently resigned from the practice of law in lieu of discipline or transferred to disability inactive status.

In any instance involving an agreement for the division of legal fees made between lawyers who are not in the same firm, the threshold inquiry is whether the agreement complies with Rule 1.5(e)³, which provides:

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive;

(2) the total fee is reasonable;⁴ and

(3) each lawyer renders meaningful legal services for the client in the matter.

Regardless of licensure status, Rule 1.5 does not permit fee sharing as a means for payment of a “referral fee” between lawyers who are not in the same firm when the referring lawyer has not

³ The issue of fees and suspended or disbarred lawyers alternatively could involve facts where the lawyers never worked together simultaneously on the case but, instead, represented the client in the matter at different times but with each still asserting a claim for a portion of the legal fee. Under those circumstances, Rule 1.5(e) would not apply; more likely the balance of Rule 1.5, along with Rule 1.15, would be applicable.

⁴ Whether the total fee is reasonable is fact-intensive and turns upon an analysis of the facts using Rule 1.5(a), which provides:

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(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.

“render[ed] meaningful legal services for the client in the matter”. *See, e.g., Dukes v. Matheny*, No. 2002-0652 (La. App. 1 Cir. 2/23/04); 878 So. 2d 517, 521 (“Notably, the law does not provide a basis for recovering a fee for the referral of a legal matter by one attorney to another. To be entitled to recover a portion of the contingency fee generated in a referred matter, the referring attorney must participate in the representation of the client.”); Rule 5.4(a) (prohibiting legal fee sharing with non-lawyers in most circumstances); Rule 7.2(c)(13) (prohibiting a lawyer from “giv[ing] anything of value to a person for recommending the lawyer’s services”, except that a lawyer may pay the reasonable cost of permitted advertising and may pay non-profit lawyer referral services in certain circumstances).

An attorney whose license has been suspended or revoked cannot represent a client while not an active member of the bar and therefore cannot “render[] meaningful legal services for the client in the matter”, as required by Rule 1.5(e)(3). *See also* LA. REV. STAT. § 37:213; Louisiana Rules of Professional Conduct 5.5(e)(1)⁵ and 5.5(e)(4) (“In addition, a suspended lawyer, or a lawyer transferred to disability inactive status, shall not receive, disburse or otherwise handle client funds.”). Thus, assuming the fee-sharing agreement complies with Rule 1.5(e), the suspended or disbarred lawyer’s share of the fee depends solely on the extent to which the lawyer “render[ed] meaningful legal services for the client in the matter” *before* the lawyer was suspended, disbarred, or resigned from the practice of law⁶.

⁵ (e)(1) *A lawyer shall not:*

(i) *employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or*

(ii) *employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, or an attorney who has been transferred to disability inactive status, during the period of suspension or transfer, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.*

⁶ This would also be true in a different factual setting e.g., in a law partnership notwithstanding a partnership agreement to the contrary, as a suspended or disbarred partner could not continue to earn lawyer’s fees while suspended or disbarred.

If the requirements of Rule 1.5(e) have been satisfied, i.e., client disclosure and consent in writing; the fee is reasonable; and each lawyer “renders meaningful legal services for the client in the matter”, but then one of the lawyers is thereafter suspended or disbarred, the other lawyer may have an obligation to pay the suspended or disbarred lawyer, including as a third-party “creditor” under Rule 1.15(d) for his or her work pre-suspension or pre-disbarment. Rule 1.15(d) provides:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge, and shall be limited to a statutory lien or privilege, a final judgment addressing disposition of those funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

There may be situations wherein the court is in the best position to determine the amount of the reduction of fee if the conduct giving rise to the suspension or disbarment arises out of the subject case, and whether he or she is entitled to a fee at all.

What happens when a successor lawyer takes over for a suspended or disbarred or lawyer?

In the instance of hourly fee arrangements, the original, disciplined lawyer can typically make a claim for the hours expended at the agreed upon rate until the representation ends by virtue of the discipline order. Where the fee is a fixed one, it seems reasonable that the original disciplined lawyer can retain only that percentage of the fixed fee as his/her effort bears to the overall percentage of work originally contemplated at the outset of the engagement.

In the instance where a contingency fee agreement is at issue it is relevant whether the lawyer was dismissed with or without cause. Where the fee arrangement is a contingency fee contract, the Supreme Court in *Saucier vs. Hayes Dairy Products*, 373 So.2d 102 (La. 1978), allows the original attorney (discharged without cause) and successor counsel to charge only a single ethical

contingency fee, and apportion that single fee by measuring the degree of work performed by each, and in accordance with the factors set forth in Louisiana Rule of Professional Conduct 1.5⁷:

...This solution envisions apportionment of only the highest agreed upon contingency fee in accordance with factors set forth in the Code of Professional Responsibility. Thus the fee is to be apportioned according to the respective services and contributions of the attorneys for work performed and other relevant factors...

The Louisiana Supreme Court's decision in *O'Rourke vs. Cairns*, 683 So.2d 697 (La. 1996) dealt with the issue of compensating a lawyer discharged with cause in situations involving a contingency fee. The original attorney was found to have been discharged with cause, nevertheless, the Court allowed a recovery, crafting a rule which reduced the discharged lawyer's fee after considering the nature and gravity of the cause of dismissal:

... the trial court should determine the amount of fee according to the Saucier rule, calculating the highest ethical contingency to which the client contractually agreed... then allocate the fee...based upon the Saucier factors. Thereafter the court should consider the nature and gravity of the cause which contributed to the dismissal and reduce by a percentage amount the portion discharged counsel otherwise would receive after the Saucier allocation...

The Louisiana Supreme Court in *O'Rourke* explained that lower courts have *...unartfully termed* [the application of the *Saucier* factors] *quantum meruit*.... The Court acknowledged that in part the *Saucier* factors and quantum meruit analysis “*are to a same degree, the same factors used in the making a quantum meruit award in the pre-Saucier era*”.

See, e.g., Brown v. Seimers, No. 98-694 (La. App. 5 Cir. 1/13/99); 726 So. 2d 1018, 1023 (“The trial judge apportioned the fee based on quantum meruit. ... Based on the facts in this case, we find that a quantum meruit was appropriate to determine Hill’s portion of the fee.”); *Dukes v. Matheny*, No. 2002-0652 (La. App. 1 Cir. 2/23/2004); 878 So. 2d 517, 521 (“On a quantum meruit basis, Dukes may receive payment only for the services he performed and the responsibilities he assumed”).

⁷ The Louisiana Supreme Court refers to the Code of Professional Responsibility, which is now the Louisiana Rules of Professional Conduct.

See, e.g., *Cooper v. Texaco, Inc.*, 961 F.2d 71, 73-74 (5th Cir. 1992) (“The district court held that Strauss was entitled to recover quantum meruit fees for work performed on the three pre-existing cases before he was suspended but that he could recover no fees from the three cases he assumed after the suspension order”).

Several other bar associations that have considered these issues are in agreement with the *quantum meruit* approach, as well⁸.

⁸ American Bar Association Informal Opinion No. 628 (Dec. 31, 1962) states, in pertinent part:

On the assumption that the disbarment of the attorneys has nothing to do with the pending litigation and that there is no reason to believe that there was professional misconduct by the referring attorneys in connection with these cases, we can see no reason why you should be under any ethical limitations of such a nature so as to prevent your seeing that the referring attorneys are compensated for the work performed and are reimbursed for any advances made while they were acting as attorneys at law. In no sense, however, should fees be divided as to work performed, if any, after disbarment. As of that time they were only laymen. Division of fees is proper only with another lawyer based on a division of services and responsibility. Canon 34.

Florida Professional Ethics Committee Opinion 90-3 (July 15, 1990, revised Aug. 24, 2011) concluded that:

[I]t is ethically permissible for an attorney to pay, pursuant to a properly executed fee-division agreement, a suspended or disbarred referring attorney for the responsibility that the attorney did assume and the time that he or she was available for consultation prior to suspension or disbarment. This quantum meruit approach is both logical and reasonable.

Similarly, Rhode Island Ethics Advisory Panel Opinion #91-71 (Oct. 29, 1991) concluded, in pertinent part:

The fee division contract cannot be carried out after the date of the other attorney’s suspension since an attorney cannot work on cases once he is suspended. The fees should be divided according to the fair value of the services rendered before suspension. Both attorneys should try to reach agreement on the reasonable value of services prior to the suspension and division of fees and if that fails, then a court may have to make the determination. The suspended attorney is entitled to his/her share of the fees, as long as the fee is calculated according to the work performed before suspension. There is no need for an escrow account to separate the fees, but they should be kept in a client fund account. Normally maintained time and work records should be kept to support actions taken in respect to fees.

Indiana State Bar Association Legal Ethics Committee Opinion No. 9 of 1991 concluded that “Attorney B may not divide fees with Attorney A [a disbarred attorney]; however, Attorney B ethically may pay Attorney A on a quantum meruit basis for services provided prior to disbarment.” The opinion further elaborated that “[a]ny fee Attorney A receives on a quantum meruit basis must be in accordance with the reasonableness requirements set forth in Rule 1.5. Such fee may well be less than any amount stated in the fee agreements inasmuch as representation apparently was prematurely terminated due to the disbarment.” *Id.*

In practical application, if there is a dispute⁹ as to the amount owed via contract or *Saucier* factors or *O'Rourke* application, then Rule 1.15(e) applies requiring the settlement funds in dispute to remain protected in the lawyer's trust account until the dispute is resolved. Any settlement funds not in dispute should be promptly distributed appropriately to all others, including medical providers and especially the client. Another option to resolve the dispute may be the filing of a concursus proceeding in conjunction with deposit of the disputed funds into the registry of the court, thereby allowing a judge to determine an appropriate division of the funds. To avoid the expenses of a concursus proceeding, a lawyer may wish to consider reasonable means for prompt resolution of the dispute, such as mediation or arbitration, including arbitration with the Louisiana State Bar Association Fee Dispute Resolution Program.¹⁰

Conclusion.

While a lawyer may only share legal fees with another lawyer who is a member of the bar in good standing, the lawyer can—and may even have an obligation to—pay the disciplined lawyer as a “creditor” according to a valid contractual agreement for services rendered or for fees earned prior to the suspension or disbarment. In absence of a clear written lawyer-client contractual agreement, the disciplined lawyer may be paid based on quantum meruit. Regardless of the existence of a valid contractual agreement, however, the lawyer's fee may be subject to reduction if the case or client in question is the underlying basis for the lawyer's discipline.

⁹ Regardless of whether there is a dispute over how the legal fee should be divided, before dispensing any funds to the suspended or disbarred lawyer, a lawyer should review the history surrounding the suspension or disbarment of the disciplined lawyer to ensure that the client and funds at issue are not connected with the disciplinary matter. While not required by the Rules, the lawyer may even wish to consider notifying the Office of Disciplinary Counsel and the LSBA's Client Assistance Fund Committee of the proposed distribution.

¹⁰ <http://www.lsba.org/MembershipDirectory/lawyerfee.asp?Menu=MS>