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Wisconsin Memorandum Ethics Opinion EM-17-03: Division of Fee Between Different Firms

*April 18, 2017*

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**Question: If I am representing the worker's compensation insurer, and I refer an unrepresented injured worker to a personal injury attorney in a Wis. Stat. §102.29 third-party liability case, can that attorney and I agree to the following:**

- **The attorneys' fees and costs to be deducted from the third-party recovery will be a contingent attorney fee of one-third of the gross recovery, plus actual litigation expenses.**
- **The one-third contingent attorney fee will be divided 50/50 between the two attorneys. This 50/50 split would be a reasonable estimate of the amount of time both attorneys will spend on the file.**

The requesting lawyer states that their firm represents worker's compensation insurers who have paid a claim in seeking recovery from a liable third party, such as the manufacturer of a dangerous machine. The requesting lawyer states the following:

This third-party liability litigation is controlled by Wis. Stat. §102.29. Wis. Stats. §102.29 provides the following:

- The injured employee and the worker's compensation insurer each have an independent right to pursue a tort claim against the liable third party.
- If either the employee or the worker's compensation insurer pursues a tort claim against the liable third party, the other shall have a right to join in the pressing of the claim.
- If there is a recovery from the liable third party, the recovery is distributed pursuant to the following formula:
  - The reasonable cost of collection (i.e., the attorney fee and litigation expenses) is deducted first. Please note that the statute does not define the reasonable cost of collection.
  - After the reasonable cost of collection is deducted, one-third of the remainder shall be paid to the injured employee.
  - Out of the balance remaining, the insurance carrier shall be reimbursed for all payments made or which the insurance carrier may be obligated to make in the future.
  - Any balance remaining shall be paid to the employee. If the employee makes any future work comp claim, this remaining balance shall serve as a credit against that claim.

The requesting lawyer also references Wisconsin case law discussing the statute in question.

The requesting lawyer asks the State Bar’s Standing Committee on Professional Ethics (the “Committee”) if the Rules of Professional Conduct for Attorneys (the “Rules”) permit the division of fees under the circumstances proposed in the question.

It must first be noted that the Committee follows a policy of not opining on questions of law and normally does not interpret Wisconsin statutes. Therefore, the Committee does not take any position on the meaning of any part of Wis. Stat. §102.29.<sup>1</sup> It must further be noted that to the extent Wisconsin case law and/or statutes govern the lawyers’ fee in these matters, those laws control and the requirements of the Rules are subordinate.

With that in mind, the question may be rephrased as follows:

**Do the Rules permit two law firms, who are jointly pursuing a claim for monetary recovery on behalf of two separate clients, to charge a one third contingency fee, plus actual costs, to be deducted from the recovery, which will be divided equally between the two firms?**

The Rules do not prohibit the proposed arrangement, provided the following conditions are met.

**1. The division of fees between separate law firms must comply with SCR 20:1.5(e):**

A division of a fee between two or more law firms is governed by SCR 20:1.5(e), which states, in relevant part:

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

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement.

The question addressed in this opinion is governed by SCR 20:1.5(e)(1). That Rule requires that the division be based upon the services performed by each lawyer, the clients are informed of and do not object to the participation of all lawyers and the client is informed of whether the fee will increase as a result of their involvement. Wisconsin’s Rule differs from the ABA Model Rule, which states:

(e) 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;*

(emphasis added)

Wisconsin’s choice of “based upon” rather than “in proportion to” is explained by the Wisconsin Committee Comment to SCR 20:1.5, which provides in relevant part:

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<sup>1</sup> Because the Committee does not interpret statutory language in this opinion, the statute, which is lengthy, will not be quoted.

Paragraph (e) differs from the Model Rule in several respects. The division of a fee "based on" rather than "in proportion to" the services performed clarifies that fee divisions need not consist of a percentage calculation.

Thus, under Wisconsin's SCR 20:1.5(e)(1), a division of fees need not be in proportion to the amount of work done by each lawyer. Therefore, the proposed 50/50 division of the fee would not violate the Rule even if that division did not approximate the amount of work done by each lawyer.

Compliance with SCR 20:1.5(e)(1) further requires that each client be informed of and not object to the participation of all lawyers and be informed if the fee will increase as a result of the participation of the lawyers. The requesting lawyer does not state if the fee will increase under the proposed arrangement, but even if the fee would increase that in itself would not prohibit the proposed arrangement as long as the clients are informed.<sup>2</sup>

## **2. The lawyers must comply with the requirements of SCR 20:1.5(c).**

The proposed fee is a contingent fee, and SCR 20:1.5(c) requires that clients sign written fee agreements when contingency fees are used, and that those written agreements contain certain information. That Rule states:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and if there is a recovery, showing the remittance to the client and the method of its determination.

It is also worth noting that the Rule requires that the clients be provided with a settlement statement upon conclusion of the matter.

## **3. The fee must be reasonable.**

All lawyers' fees, including contingency fees, must be reasonable, and SCR 20:1.5(a) governs the reasonableness of fees:

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:

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<sup>2</sup> See also SCR 20:1.5(b) for lawyers' obligation to inform clients of the basis or rate of their fees.

- (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.

The Committee lacks sufficient information to analyze the reasonableness of the proposed arrangement, but notes the requirement that the Rule be followed.

If these requirements are met; the division of fees complies with SCR 20:1.5(e), the written contingency fee agreement complies with SCR 20:1.5(c) and the fee is reasonable, there is no barrier in the Rules to the proposed arrangement.