



Ohio Board of Professional Conduct

OPINION 2023-11

Issued October 6, 2023

Nonlawyer Employee Bonus Plan

SYLLABUS: A lawyer may not pay a bonus to a nonlawyer staff member based solely on the staff member receiving a positive online review.

The Board recommends that the holding in this opinion be applied prospectively.

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Ohio Board of Professional Conduct

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APPLICABLE RULES: Prof.Cond.R. 5.3, 5.4, and 7.2

QUESTIONS PRESENTED:

1. May a lawyer pay a bonus to nonlawyer staff members of a law firm when the staff members are mentioned by name in a positive online review?
2. Is compensating a staff member pursuant to a bonus structure described above giving something of value to a person for recommending the lawyer's services under Prof.Cond.R. 7.2?

ANALYSIS: The requesting lawyer would like to compensate staff for providing exceptional service to the law firm's clients. The lawyer has proposed incentivizing the provision of exceptional service by paying a bonus to any staff member who is named in a positive online review. The Board assumes that the nonlawyer staff members are aware of and informed of the law firm's bonus pay structure.

Sharing Legal Fees

Prof.Cond.R. 5.4 prohibits a lawyer from sharing legal fees with a nonlawyer. The traditional limitations on sharing legal fees are designed to protect the lawyer's independence of judgement. *Id.* at cmt. [1]. The rule does not specifically prohibit a lawyer from providing bonuses to nonlegal employees in that it allows law firms to include nonlawyer employees in compensation or retirement plans, even if the plan is based in whole or in part on a profit-sharing agreement. Prof.Cond.R. 5.4(a)(3). *See also Columbus Bar Assn. v. Plymale*, 91 Ohio St.3d 367, 745 N.E.2d 413 (2001)(no rule violation found when a year-end bonus policy provided that nonlegal assistants assigned to a particular lawyer would be paid .004 [.4%] of the gross fees earned by the lawyer during the fiscal year). The rule has often been interpreted to prohibit nonlawyer participation in plans that tie the shared profits to particular clients or particular matters. Bennett & Gunnarsson, *Annotated Model Rules of Professional Conduct* 527 (9th ed. 2019).

Law firms should avoid structuring bonuses for nonlawyer employees in any of the following ways: (1) reliant on the outcome of a case, (2) based on the number of clients worked with, (3) as a "commission" or "referral" payment for bringing clients to the firm, (4) solely based on number of hours billed by the nonlegal staff member, or (5) based on the percentage of fees earned on any particular case. *See id.* The Board believes law firms can consider the following as factors in determining whether to pay a bonus to nonlegal staff members: (1) revenue, (2) expenses, (3) profit, or (4) the exceptional efforts of a nonlegal staff member. *See* Tex. Ethics Op. 642 (rev. 2015) and Fla. Ethics Op. 02-1 (2002).

When a lawyer possesses managerial authority in a law firm, he or she must make reasonable efforts to ensure that there are measures in effect giving reasonable assurance that nonlawyer staff members' conduct is compatible with the professional obligations of the lawyer. Prof.Cond.R. 5.3(a). To do so, lawyers must give nonlawyer assistants appropriate instruction and supervision concerning all aspects of their employment. *Id.* at cmt. [2]. In the Board's view, if a lawyer is fulfilling his or her obligation to properly supervise nonlawyer staff members, then he or she should be aware when a staff member is providing exceptional service to a client. A positive online review is not necessary to determine whether exceptional service is provided. The Board concludes that a bonus structure reliant on a staff member obtaining a positive online review impermissibly ties the bonus to a particular client or matter.

Recommendation of Professional Employment

While a strict interpretation of Prof.Cond.R. 7.2(b) may not result in a conclusion that the lawyer has given something of value to a person for recommending the lawyer's services, the Board believes that the potential for undue influence, intimidation, or overreaching is present in the proposed bonus structure. If the nonlegal staff member informs the client of the fact that he or she will receive a bonus if the client posts a positive review online, this may place the client in a position of feeling uncomfortable or possibly harassed, especially if it occurs in the course of the representation or if the request is made more than once. It may also cause a client to feel compelled to leave a positive review out of fear that the staff member may not continue to work as diligently on the client's behalf or that the lawyer may not be willing to continue the representation unless the client complies with the request. Additionally, the underlying purpose of the bonus structure is to further the lawyer's own business interests by accumulating as many positive reviews as possible. Because the rules do not exhaust the moral and ethical considerations that should inform a lawyer, the Board believes the lawyer should refrain from using a bonus structure that might call into question whether the lawyer or his or her staff has exercised undue influence, intimidation, or overreaching to further his or her own financial or business interests. *See* Prof.Cond.R., Preamble [16].