

ETHICS OPINION 2015-01

**Rules:** 1.5 and 5.5  
**Subject:** Division of fees with an out of state law firm  
**Summary:** South Dakota firm may divide fees with an out of state firm in compliance with Rules 1.5 and 5.5

South Dakota Firm has been approached by an out of state law firm to do legal work for clients with a presence in multiple states. As part of the relationship, they propose to divide fees on an equal basis.

The out of state law firm specializes in providing legal services to individuals whose primary residence is a recreational vehicle. The firm assists in establishing and maintaining voter registration, driver licensing, and other necessary registrations. As part of that practice, the out of state law firm assists these individuals in selecting an appropriate state in which to establish domicile and connecting them with a firm in that state to provide related legal services. The out of state firm seeks to have South Dakota Firm provide estate planning services; specifically, South Dakota Firm will review wills, trusts, and related estate planning documents drafted in part by the out of state law firm to ensure compliance with South Dakota law and modify, finalize, and file them accordingly.

The out of state law firm would negotiate a flat rate fee with the individual for the entire package of services. That fee would then be divided with South Dakota Firm on an equal basis. The out of state law firm specifically discloses the existence of a fee division and its terms and conditions in its engagement letter.

South Dakota Firm has asked if it may engage in this practice and the proposed fee division.

### OPINION

The division of fees is generally governed by Rule 1.5. There are three rules to be met to divide fees: 1) they must be divided in proportion to the work done or each firm must assume joint responsibility for the representation; 2) the client must agree to the arrangement which is confirmed in writing; and 3) the total fee is reasonable. South Dakota Firm confirms that the second provision will be met and the Committee assumes that the third will be.

Division of fees between firms in different jurisdictions is widely accepted. *See e.g.*, Arizona Ethics Op. 10-04 (2010); Connecticut Informal Ethics Op. 91-7 (1991); District of Columbia Ethics Op. 197 (1989); Maryland Ethics Op. 88-58 (1988); Nevada Ethics Op. 4 (1987); New Hampshire Ethics Op. 1984-5/19 (1985); New Mexico Ethics Op. 1983-2 (1983); New York State Ethics Op. 864 (2011); Rhode Island Ethics Op. 97-16 (1997); South Carolina Ethics Op. 86-18 (1986); Virginia Ethics Op. 1130 (1988). The Committee concurs with this consensus and opines that no ethical rule, assuming the remaining provisions of Rule 1.5 are met, precludes South Dakota Firm from dividing a fee with an out of state firm.

It is critical to note that under the equal division of fees proposed, both South Dakota Firm and the out of state firm must “assume joint responsibility for the representation.” As Note 7 to Rule 1.5 provides, this means that both firms would assume “financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” It does not appear to the Committee that this requirement raises ethical bars to the proposed arrangement for South Dakota Firm. However, the committee does note that some opinions suggest that a firm may not agree to assume joint responsibility and the corresponding ethical obligations of another state for this purpose. *See e.g.*, Florida Ethics Op. 90-8 (1991, rev. 2011); Washington Informal Ethics Op. 2201 (2009). While the Committee leaves the impact of this line of opinions to the out of state firm, it is also clear that practical solutions to that problem exist in the form of dividing fees in proportion to the work actually done or an arrangement whereby South Dakota Firm bills the client directly for its services.

Lastly, it is important to point out the implications of Rule 5.5 if the equal division is pursued and the out of state firm undertakes the ethical obligations of South Dakota law. Rule 5.5 governs multi-jurisdictional practice and specific ethical obligations for an out of state firm operating within South Dakota. In particular, Rule 5.5(c)(5) makes obtaining a South Dakota sales tax license and the corresponding collection and remission of sales taxes an ethical obligation as well as one of substantive law. This is not a statement by the Committee on substantive law, merely a reminder that under South Dakota’s Rules of Professional Conduct, proper sales tax licensure, reporting, and remission is an ethical, not just substantive, obligation that may exist for the out of state firm under the proposed fee division. Because the ethical and financial obligations would also apply jointly to South Dakota Firm under Rule 1.5, Note 7, it should be aware of the obligations under Rule 5.5 as well.

In considering Rule 5.5, the Committee rejects the conclusion that a lawyer from another jurisdiction is not a “lawyer” in South Dakota for purposes of dividing fees or otherwise applying the Rules of Professional responsibility. *See e.g.*, *Peterson v. Anderson*, 745 P.2d 166, 170 (Ariz. App. 1987). If that position were accepted, the prohibition on dividing fees with “non-lawyers” of Rule 5.4 would bar this proposed arrangement. However, the Committee rejects that position because accepting it would make the provisions of Rule 5.5 effectively surplusage, would ignore the realities of modern multi-jurisdictional practice, be contrary to the position of the majority of jurisdictions to address the question, and be inconsistent with the opening sentence of the Scope section of the Rules that they “are rules of reason.”

## CONCLUSION

Nothing precludes division of fees between a South Dakota firm and an out of state law firm on its face. Any such division must comply with the clear directions of Rule 1.5, and potentially Rule 5.5 depending upon the means of division, which are addressed above as they apply to this setting.

Neil Fulton, Ch.  
Ethics Committee  
State Bar of South Dakota