

DELAWARE STATE BAR ASSOCIATION  
COMMITTEE OF PROFESSIONAL  
ETHICS OPINION 1980-5

A member of the Delaware Bar had requested an opinion of this Committee on the following factual framework.

The Delaware attorney accepts referrals of clients from a Philadelphia law firm which administers a pre-paid legal services fund for the Philadelphia Federation of Teachers and for the Teamsters. The Philadelphia firm also provides legal services under the fund's plan for members of the plan who are residents of Philadelphia. Members who require Delaware counsel are referred to the Delaware attorney by the Philadelphia firm.

The Philadelphia firm imposes a 20 percent fee called an "administrative" fee on all fees billed by the Delaware attorney to cover the cost of administering the plan. The fees billed by the Delaware attorney are billed to the fund through the Philadelphia law firm and their amounts are controlled by a fee schedule imposed on the attorney. Some fees are flat rates, while others are at an hourly rate.

Questions Presented

The Committee's opinion is requested as to the

following questions in the context of the facts presented above:

1. Is the imposition by the Philadelphia law firm of fees to be charged by the Delaware law firm permissible?
2. What should be done by the Delaware law firm regarding on-going cases in the event that the fee schedule is not permissible?

The Committee's Answer

1. No.
2. Further fee arrangements with the Philadelphia firm's representation of clients should be in accordance with this opinion.

Discussion

The United States Supreme Court in United Transportation Union vs. State Bar of Michigan, 401 U.S. 576, 91 S. Ct. 1076 (1971), upheld the right of a labor organization to limit the amount of fees to be charged by an attorney from the union fund for services to be rendered by the attorney. The Court further permitted the fund administrator to set a reasonable fee schedule for the protection of the funds' members. Once the fee schedule is established, the attorney must decide for himself whether or not to be retained by the fund at the scheduled rate.

In the instant case, the Delaware law firm does not have a problem with the rates permitted by the fund. The question posed is whether or not the fee charged by the Philadelphia law firm is permissible. As structured in the present fact situation, the fee charged by the Philadelphia law firm in cases handled by the Delaware law firm is not permissible.

The applicable provision of the Code of Professional Responsibility is DR 2-107. The pertinent portions of that provision states:

(A) "A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each."

The American Bar Association in Formal Opinion 265 (1945) indicates that an attorney who merely recommends an attorney in another jurisdiction to his client or who, at the client's request retains such attorney to represent the client is not thereby entitled to a division of fees earned by the latter. No division of the attorney's fee or imposition of a percentage charged by the forwarding

attorney is permitted unless the division is based on the proportion of services performed or responsibility assumed by the respective attorneys. See Informal Opinion #1007 - ABA (Oct. 1967); and 1975 Supplement to the Digest of Bar Association - Ethics Opinion, Olavi Maru, Informal Opinion #7480.

The forwarding attorney is entitled to a percentage of the fee of the working attorney in cases where the forwarding attorney retains the attorney-client relationship and retains ultimate responsibility to the client both as to communications and performance of legal services required. Informal Opinion #8518 (KY Opinion, E-55, Sept. 71); Informal Opinion #7862 (CA '78 Informal Opinion 1969-3); ABA Informal Opinion #848 (1965).

In the instant case it does not appear that the forwarding law firm is maintaining any responsibility for the conduct of a case once the referral is made. The forwarding attorney, however, charges a 20% administrative fee on all cases referred to the Delaware law firm regardless of whether or not billings by the Delaware law firm are made on a flat rate or hourly basis.

Here, from the facts given, the implication is that the Philadelphia law firm treats cases referred to the Delaware law firm differently than cases that it

handles itself. Furthermore, the fee charged by the Philadelphia law firm is directly tied into the work performed by the Delaware law firm and not at all to the work performed by the Philadelphia law firm in administering the fund.

Where no services are rendered nor responsibility assumed, a division of fees, even under a guise of an 'administrative' fee, is improper. ABA Formal Opinion #204 (1940).

Under the facts presented here, payment of the fee by the Delaware law firm to the Philadelphia law firm is in actuality a referral fee prohibited by DR 2-107.

As to the conduct of on-going cases, in the event that a more appropriate arrangement cannot be entered into with the Philadelphia law firm, the Delaware law firm may withdraw from representation of clients involved in the fee arrangement pursuant to DR 2-110(C)(2) after rules of the appropriate courts are complied with and after the Delaware law firm has taken reasonable steps to avoid foreseeable prejudice to the rights of his clients pursuant to DR 2-110(A).

Dated: July 7, 1980