

LO 87-11

ZUGER & BUCKLIN

COUNSELORS AND ATTORNEYS AT LAW

JOHN A. ZUGER, P.C.
LEONARD H. BUCKLIN, P.C.
LYLE W. KIRMIS
ROBERT V. BOLINSKE
THOMAS Q. SMITH, P.C.
MURRAY G. SAGSVEEN, P.C.
LANCE D. SCHREINER, P.C.
JAMES S. HILL, P.C.
PATRICK J. WARD
REBECCA THIEM BENSON, P.C.

MICHAEL G. FIERGOLA
CHARLES T. EDIN
DANIEL S. KUNTZ
MICHAEL G. LIFFRIG
JON E. STRINDEN
BRENDA L. BLAZER

5TH AT ROSSER
PROVIDENT LIFE BUILDING
PO BOX 1695
RISMARCK, N.D. 58502 1695
(701) 225-2711

December 29, 1987

[REDACTED]

Re: Ethics Opinion

Dear [REDACTED]

This is to let you know that the Ethics Committee considered the questions presented by your letter of December 9, 1987, at its meeting on December 29, 1987.

The first question you presented was whether it is ethically proper for a contingent fee to be shared with an attorney who had previously worked on the case but was required to withdraw from representation in order to become a witness. The Committee would direct your attention to both Rule 1.5(e) of the Model Code of Professional Responsibility and Rule DR2-107 of the Code of Professional Responsibility and suggest that the safest course would be compliance with both. As long as the split of the contingent fee is somehow based on the amount of work put into the case by each of the lawyers, is reasonable, and is made with the consent and approval of the client after knowledge, there would be nothing unethical about your proposed sharing of the fee.

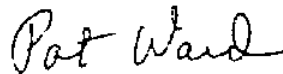
The second question you presented was whether it would be permissible for you to collect your portion of the fee, claim it as income and pay taxes on it, and turn around and loan some or all of that money back to the client. The Committee's opinion is that as long as the fees you are collecting are a legitimate contingent fee and there is no attempt to defraud creditors in the direction of that fee to the attorney the collection of the fee would be ethical. With regard to loaning money to the client we would suggest that you comply carefully with Rule 1.8 of the Model Code of Professional Responsibility dealing with business transactions with a client. Loans should clearly not be contingent on the outcome of any pending or threatened litigation. Rule 1.8(e)(3). So long as the loan is a


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completely independent transaction to anything related to the legal relationship between lawyer and client, we feel it is a totally unrelated transaction to the actual collection of the fee.

I hope this response assists you in clarifying the questions that you have and deciding what course to follow.

Sincerely,



Patrick J. Ward, Chairman
Ethics Committee, State
Bar Association of North
Dakota

PJW:gb

87-11

[REDACTED]
[REDACTED]
[REDACTED]
December 9, 1987

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DEC 10 1987
ZUCKER-BUCKLIN PJW

[REDACTED]
Mr. Pat Ward, Chairman
Ethics Committee
North Dakota State Bar Association
P.O. Box 1695
Bismarck, ND 58502

Re: Possible Ethics Dilemma

Dear Pat:

I write to you with regard to a case which I am handling and in which a sizeable judgment has been obtained. The case was initially commenced by another Bismarck attorney and he put considerable work into the matter before he felt it was necessary to step down as attorney because he would have to be (and was) a witness in the case. This switch of attorneys was done with the full knowledge and consent of the client.

We are now looking to the possibility that we will get a substantial contingent fee. It is virtually impossible at this point to determine who put what amount of time into the case and neither I nor the other attorney have attempted to keep any time records so that it can be determined how much work each of us has done in the case. We have agreed on a percentage split of the contingent fee, with the larger percentage to go to me because there is little doubt that I put more time into the case than the other attorney.

The first question, then is:

Is it ethically proper for two attorneys to agree upon the split of a contingent fee when one attorney has had to withdraw from the case to become a witness and both attorneys have contributed a substantial, although not equal, effort to the case?

There is a second question. This concerns the client who is substantially insolvent. The judgment, if collected, would not pay all of the claims against him. He does have a substantial IRS claim against him and he is in desperate need of funds with which to clear this IRS lien.

We are proceeding on a theory of an attorney's lien which we have argued and submit has priority over all other liens. Assuming that

this is correct, and we are able to collect our attorney's lien as a priority item from the judgment that has been obtained, our client has requested that we make a loan to him to take care of IRS indebtedness for which he would give us a note and make repayment if he ever comes into any funds as the result of proceedings that are still pending.

I am of the opinion that there would be nothing unethical and it would not constitute an act of fraud of creditors if I receive this money from the attorney's lien, pay income taxes upon it and then make a loan of my money to my client. I seek your elucidation, however. The second question is, therefore:

Is it unethical or in any way improper for an attorney to claim an attorney's lien on a judgment, against which there exists a number of claims in excess of the total amount of the judgment, and then, after paying income tax thereupon, to loan part of it to the client to take care of an urgent IRS claim, for which the client would give a note to ensure repayment?

Your early consideration of these matters is urgently requested because this is a case which is currently pending and there hopefully will be distribution of the monies under the attorney lien at an early date. Thank you for your attention to this matter.

Yours very truly,

[REDACTED]