

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION N° 93-01

February 9, 1993

The Ethics Committee received a request for an opinion from [REDACTED], Attorney at Law, [REDACTED], North Dakota. His letter stated, in part:

FACTS:

Loreen [sic] Whitesides Larson of Park River, North Dakota, is currently under suspension by the disciplinary board. Her case is reported at 485 NW2d 345 (ND 1992). The terms of her suspension prohibit her specifically from income tax preparation. Ms. Larson has tried without success to sell the assets of her law office, but has not found a buyer.

She had approximately 100 clients last year for whom she prepared income tax returns. She would like to refer those clients to me, when and if they call her this year for tax preparation. A 33 1/3% "referral fee" has been suggested based on the 1993 billing. I would like to be able to assist these former clients of Ms. Larson, however, I have concerns as to whether such a fee arrangement would be permissible under the North Dakota Rules of Professional Conduct, specifically Rule 1.5(c) and Rule 5.4(a). My questions are as follows:

1. What is Ms. Larson's status? Is she an attorney or a non-attorney? This is important, as it will determine whether Rule 1.5(c) or Rule 5.4(a) of the Rules of Professional Conduct apply.
2. If Ms. Larson is still considered an attorney,
 - (a) Would it be a violation of Ms. Larson's suspension for her to engage in meeting with her former clients at her former office to take in the documentary information for the past tax year and then deliver those documents and Ms. Larson's prior years' income tax file for that client to my office one block away for preparation of the return by me? I am only in our Park River office one day per week.

- (b) Would that activity by Ms. Larson be sufficient to allow a division of fees on a two-thirds/one-third basis?
3. If Ms. Larson were allowed to meet with her former clients as outlined in Question 2 above, what would be considered a reasonable effort on my part, under Rule 5.1, to give reasonable assurance that Ms. Larson conforms to the Rules of Professional Conduct and does not engage in the practice of law while taking documentary information from her clients, being that would take place outside of my presence?
4. If division of a fee is not permissible, is there any other alternative for a referral of her former clients to me which would allow her some form of compensation?

Discussion

The letter raises the following issues:

1. **The division of fees.** The proposed fee arrangement would not be appropriate under either Rule 1.5(e) or Rule 5.4(a), North Dakota Rules of Professional Conduct.

Rule 1.5(e) states:

A division of fee between lawyers who are not in the same firm may be made only if:

- (1) The division of fee is in proportion to the services performed by each lawyer or each lawyer, by written agreement, assumes joint responsibility for the representation;
- (2) After consultation, the client does not object to the participation of all the lawyers involved; and
- (3) The total fee is reasonable.

Rule 5.4(a) states:

A lawyer or law firm shall not share legal fees with a nonlawyer except that:

- (1) An agreement by a lawyer with his firm, partners, or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons;
- (2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the

total compensation which fairly represents the services rendered by the deceased lawyer; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on the profit-sharing arrangement.

Rule 5.4(a) does not apply to this factual situation so it will not be addressed.

The arrangement that you have described is not a fee-splitting arrangement as contemplated by Rule 1.5(a). The comment to Rule 1.5(e) states that this provision "permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is consulted and does not object." However, you have explained that Lorene Whitesides Larson will not be providing any legal services (i.e., delivering papers from the client to you) and the North Dakota Supreme Court has explained that she can not assume any "responsibility for the representation."

The ABA/BNA Lawyers' Manual on Professional Conduct also provides the following comment (at 41:706) about the related Model Code DR 2-107:

DR 2-107(a)(2) allows a division of fees only if "[t]he division is made in proportion to the services performed and responsibility assumed by each" lawyer. This is by far the most frequently scrutinized language in the mass of court decisions and ethics opinions treating the subject of fee-splitting among attorneys. The policy behind DR 2-107 is that a lawyer should not be compensated for doing nothing more than referring a client to another lawyer. Attorneys should not broker clients as if they were merchandise. *Palmer v. Breyfogle*, 217 Kan 128, 535 P2d 955, 965-66 (Kan Sup Ct 1975). Therefore, the theory is that a lawyer can split fees only by staying in the case. He accomplishes this by retaining some degree of supervision or control over the client's matter and by performing some of the legal services required to resolve it.

The Manual also discusses (at 41:713) fees which can be paid to disciplined lawyers:

A lawyer who has been suspended or disbarred may nonetheless recover, in most jurisdictions, under a fee-splitting agreement he made while still practicing. The amount the lawyer receives must be limited, however, to the value of his services rendered before his suspension or disbarment...

It is the committee's opinion that the fee-splitting or referral arrangement that you outlined in your letter would violate the North Dakota Rules of Professional Responsibility.

2. Meetings with her former clients. The North Dakota Supreme Court clearly explained the terms of her suspension in *Disciplinary Action Against Larson*, 485 N.W.2d 345, 350 (N.D. 1992):

Tax work was a substantial portion of Larson's practice. We will not construe a suspension to allow the attorney to continue, unabated, a significant part of her practice in the same community and state where she has practiced law. The public is likely to be misled if a suspended attorney is allowed to continue with "business as usual."

. . . .
A suspended attorney must refrain from all facets of the practice of law.

Lorene Whitesides Larson would not be refraining from all facets of the practice of law if she maintained her office, continued to meet with her former clients, determined which information would be relevant for the preparation of the tax returns, and later delivered the information to you. The public could easily perceive her continued tax work as "business as usual."

This committee has previously opined that a suspended attorney may work under a licensed attorney's direct supervision as a paralegal. See, *Opinion* (dated May 29, 1992) to Marvin Kaiser and *Application of Christianson*, 215 N.W.2d 920, 926-927 (N.D. 1974). However, it is this committee's opinion that she, in this factual situation, could not work as your paralegal out of her office or out of your Park River office when you are not present to actually supervise her work.

3. Compensation to Lorene Whitesides Larson. The committee believes that you would violate the Rule of Professional Conduct if you paid her any type of referral or finder's fee under these circumstances (however, if she were employed under your direct supervision as a paralegal, she could recommend that her former clients retain you to prepare their tax returns). Her only compensation would be a reasonable paralegal salary as your employee.

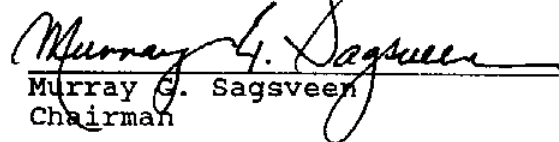
Conclusion

You may not pay Lorene Whitesides Larson any type of referral fee while she is suspended from practicing law. However, you could pay her a salary for working as a paralegal in your office, under your direct supervision.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Murray G. Sagsveen and was unanimously approved by the Ethics Committee on February 9, 1993.


Murray G. Sagsveen
Chairman

kac:65-599.opn

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[REDACTED]

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Murray G. Sagevean
January 18, 1993
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I would appreciate an expeditious response as 1099 forms for Ms. Larson's former clients would be due at the end of January and typically taxpayers begin making tax preparation appointments beginning about February 1.

Sincerely,

[Redacted Signature]

[Redacted]