

Ethics Opinion

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FACTS: An associate/employee in a sole proprietorship law office chose to leave the office and begin his own practice. The verbal agreement with the employer was that the associate on departure would take one client and the file to the associate's new practice. The agreement reached between employee and employer was that the employer would be given a lien on the transferred case equivalent to an hourly rate for the time worked on the case. The client had entered a written contingent fee agreement with the law office. Upon departure, the client did not terminate the written fee agreement with the law office, nor was a new attorney fee agreement entered with the former associate. It is unclear the degree of the client's knowledge or compliance with the financial arrangement entered concerning the case between the associate and employer.

Two days following the former associate's departure new facts came to light and the former associate accomplished settlement for an amount that exceeded by 66% the last offer made before his departure. Former employer learned of this development and requested that the settlement check be written for payment to both employer and former associate. Upon receipt of the check, employer claimed the full contingent fee rather than the following the terms of the verbal agreement.

QUESTIONS PRESENTED:

1. How should the disbursement be handled when both attorneys claim entitlement to the balance of the fee?
2. Who is entitled to the fee?

SHORT ANSWER: The Ethics Committee's charge is to offer opinions applying the Montana Rules of Professional Conduct to prospective conduct of lawyers. Both of the questions presented raise contract issues and as such are not normally appropriate for the Committee's opinion. However, to the degree the issues involving the Montana Rules of Professional Conduct can be isolated from the contract components, the following suggestions are offered so that this type of situation can be avoided in other cases:

1. Contract issues aside, both attorneys' first responsibility is to assure the settlement proceeds are disbursed to the client. Neither attorney should use their signature of the check as leverage against the other. Assuming the client and both attorneys expected the written contingent fee to follow the client into the new arrangement, the client should receive the proportion of the settlement in accord with that agreement at the earliest opportunity. The disputed fee should be placed in either attorney's trust account until some agreement is reached as to the division between them.
2. Again, the issue of after-the-fact entitlement is not an issue the Ethics Committee can propound on. However, in the discussion below, the Committee offers suggestions as to what associate attorneys might do to avoid the situation.

DISCUSSION: Rule 1.5 requires all contingent-fee agreements and fee-sharing agreements among lawyers be in writing. (Rule 1.5(c) and (e).) A lawyer is not necessarily deprived of all fees if neither agreement is written. Courts have upheld a division of fees applying quantum merit principles to fee dispute issues between attorneys. ABA/BNA Lawyers' Manual on Professional Conduct, 41:101, et. seq., 91:701, et. seq. However, this begs the question: Why create the issue? Why not do it the right way, write the agreement down at the beginning? The lesson to be learned is that this dispute and any potential litigation could be eliminated if the parties reduced to writing that to which they agreed.

Assuming as we have that the client agrees to the amount paid out of the settlement to the attorneys, both attorneys' first responsibility is to assure the settlement proceeds are disbursed to the client. The client should receive the proportion of the settlement in accord with that agreement at the earliest opportunity. Neither attorney should use their endorsement of the check as leverage against the other. The issue between the attorneys should not delay the service to the client. The disputed fee should be placed in either attorney's trust account until agreement is reached as to the division between them, be that via litigation, mediation, or other mechanism using the law of contracts as the basis.

As to which of the attorneys is entitled to the fee, the Committee won't posit an opinion. Instead, we offer the following suggestions as to issues to be addressed in associate's employment agreements, as firms may use employment agreements with associates to set forth post-departure rights and obligations.

1. Address the notice to be given to the firm by the withdrawing associate; the form and timing of the notice; and the firm's right to accelerate the departure of a withdrawing associate;
2. Address information as to how clients will be notified of the change of relationship; who will issue the notice; which clients will be contacted and the content of the notice; and
3. Address retention and/or transfer of client files.

ABA/BNA Lawyers' Manual on Professional Conduct, 91:713.

CONCLUSION: While the Ethics Committee may not offer opinions on the contractual issues presented, the Committee is of the opinion that both attorneys' first responsibility is to assure the settlement proceeds are disbursed to the client at the earliest opportunity. The disputed fee should be placed in either attorney's trust account until some agreement is reached as to the division between them. Division of fees is an issue firms and associates should consider incorporating into employment agreements to set forth post-departure rights and obligations.

THIS OPINION IS ADVISORY ONLY

ENDNOTES

1. Rule 1.5 (c) states, in pertinent part: ".A contingent fee agreement shall be in writing and shall state the method by which the fee is to be

determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated."

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

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