

Ethics Opinion

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QUESTIONS PRESENTED:

1. Does an arrangement whereby the Attorney receives nonlegal assistance from a collection agency in exchange for a portion of the potential recovery violate Rule 5.4(a)'s prohibition against fee splitting with a nonlawyer?
2. May attorneys or collection agencies who refer claims to the Attorney for collection receive a forwarding or referral fee?

BRIEF ANSWERS:

1. Yes.
2. No.

ANALYSIS:

1. Model Rule 5.4(a) provides that "[a] lawyer or law firm shall not share legal fees with a nonlawyer." Under the facts as presented, the contingent fee the Attorney recovers following a successful collection constitutes a "legal fee" which the Attorney may not share with a nonlawyer. Although Rule 5.4(a) lists three circumstances under which an attorney may share a legal fee with a nonlawyer, none of the exceptions applies to these facts. The inquiring attorney may not enter into the proposed fee arrangement with a collection agency under Rule 5.4(a). To do so would constitute an improper sharing of legal fees with a nonlawyer.

In concluding that an attorney may not share a contingent fee with a business corporation in exchange for legal research and analysis, the ABA has reasoned that "[a]lthough a lawyer may employ a nonlawyer to provide services, payment for such services may not be based on a percentage of the lawyer's fee in the matter with respect to which the nonlawyer's services are rendered." ABA Informal Op. 86-1519. The ABA further recognized that "[p]ayment on the basis of a percentage of the lawyer's fee has long been considered a sharing of fees in violation of the applicable rules." Id.

An attorney may, however, employ a layman to perform nonlegal services in connection with a case. ABA Formal Op. 48. For example, the ABA has concluded that a lawyer may employ and pay a layman to perform nonlawyer services in connection with patent applications or patent searches, but may not divide fees with the layman for services rendered. Id.

The purpose of Rule 5.4(a) is to "protect the lawyer's independence of judgment" and to help prevent the unauthorized practice of law by nonlawyers. Comment to ABA Model Rule 5.4; ABA Code EC 3-8. At least one court has stated that the prohibition against sharing legal fees was designed in part to protect against "the possibility of control by the lay person, interested in

his own profit, rather than the client's fate..." ABA Informal Op. 86-1519, citing *Gassman v. State Bar of California*, 18 Cal. 3d 125, 132.

In the instant situation, the inquiring attorney may not split a contingent fee recovery with a collection agency, even if the collection agency provides the attorney only with nonlegal assistance. The inquiring attorney may, however, employ a collection agency, paying for its "services in the same manner as any other person who is not admitted to the practice of law...would be paid for services rendered in connection with the matter -- such payment being charged to the client in the same way that other items of expense are charged." ABA Formal Op. 48.

2. Other attorneys who refer claims to the Attorney for collection may not receive a forwarding or referral fee unless certain conditions are met. Rule 1.5(e) provides that "[a] division of fees 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.

The Attorney may divide a fee with another attorney only if all attorneys involved "assume responsibility for the representation as a whole and the client is advised and does not object." Comment to ABA Model Rule 5.4. Accordingly, the inquiring attorney may not encourage referrals by offering a fee to forwarding or referring attorneys. Payment of a referral fee to a collection agency is likewise prescribed by Rule 7.2(c). See also Montana Ethics Opinion 930927.

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