

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 04-02

November 29, 2004

Issues

The Ethics Committee was asked whether the requesting lawyer's fee splitting arrangements may be ethically maintained now that the referring lawyers are suspended and whether the requesting lawyer may pay fees earned to a suspended lawyer.

Background Provided by Requestor

Pseudonyms are used for all parties. Requestor, Girot, entered fee splitting agreements with two lawyers in good standing: Millar and Hamilton.

Prior to his suspension, Millar contacted Girot about joining forces and splitting fees on medical malpractice / products liability type of case. Millar and Girot agreed in writing that Millar would be reimbursed for his costs, and, upon resolution, either 15% of the total attorney fees or 6% of the entire settlement. After the agreement was struck, Millar was suspended. Girot indicates that to date there has been no settlement in the medical malpractice products liability case and that there are, as of this time, no proceeds to distribute. Millar is still suspended and it is unknown whether Millar will ever resume licensed practice in North Dakota.

Prior to his suspension, Hamilton contacted Girot about joining forces and splitting fees on a motor vehicle accident case. Hamilton and Girot agreed (orally only) to split the attorneys' fees 33% to Hamilton and 66% to Girot. Girot indicates that of the three claims in the motor vehicle case, two are settled and the third with an insurer is pending. Proceeds from the two settled claims were distributed to the client and the remainder is being held in Girot's trust account. Hamilton did some work on the case prior to being suspended. Hamilton is still suspended and it is unknown whether Hamilton will ever resume the practice of law in North Dakota.

Discussion

This situation is governed primarily by Rule 1.5 of the North Dakota Rules of Professional Conduct. In particular, 1.5(e) of the Rules specifies that lawyers may divide fees if the fee is reasonable, the client consents, and the fee is proportionate to the work done or, if each lawyer involved accepts joint responsibility for the case, it may be on a basis disproportionate to the work.

(e) 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.

Comment to 1.5(e)

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) 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. It does not require disclosure to the client of the share that each lawyer is to receive.

Fee splitting with a suspended attorney was addressed by this Committee in Opinion 93-01 when the Committee cited with approval language from the ABA/BNA Lawyer's Manual on Professional Conduct that noted a suspended or disbarred lawyer may, under a fee-splitting arrangement in effect prior to the suspension or disbarment, collect for services actually performed prior to the suspension or disbarment. SBAND Opinion 93-01 (citing ABA/BNA Lawyers Manual on Professional Conduct at 41:713); *see also*, State Bar of Michigan Ethics Opinion RI-030 [referring lawyer subsequently suspended can be paid for the service rendered prior to the suspension].

A suspended lawyer may not work on a case as a lawyer and a lawyer in good standing may not maintain an active fee-splitting arrangement with a non-lawyer. It was suggested in Opinion 93-01 that a suspended lawyer could function as a paralegal under the direct supervision of a lawyer in good standing and then be paid at a rate suited for a paralegal. There has been no indication of any intent to build such a relationship in these cases nor any inquiry regarding that sort of structure.

Conclusion

Paying a suspended lawyer, under a Rule 1.5(e) fee-splitting arrangement, for services rendered after the lawyer was suspended would be an ethical violation. Paying a suspended lawyer for services rendered prior to the suspension would not be an ethical violation.

The first situation described above involves Girot and Millar's written agreement to split either the attorney fees 15% to Millar / 85% to Girot or the final settlement 6% to Millar remainder to client and Girot. If, in this instance, the percentages were deemed by Millar and Girot to be proportionate to the legal services that Millar had/would provide, then it is ethical for Girot to pay Millar either of the two figures for services Millar provided prior to suspension. If those percentages were not based on the idea that they were proportionate to the services Millar had or would provide, but were percentages employed for ease of negotiation or as consideration for the commodity of a referral regardless of whether or if any legal services were, had, or would be provided by Millar, then the two attorneys would need to arrive at a figure proportionate to the services Millar actually provided before the suspension. Once done, Girot may ethically disburse that amount Millar.

The second situation above involves Girot and Hamilton's oral agreement to split the fees 1/3 - 2/3. Under the current version of 1.5(e), oral fee splitting agreements can only split in proportion to work actually done. If the 1/3 - 2/3 arrangement is proportionate to the work actually done, then Girot may disburse on that scheme; if not, Girot and Hamilton need to agree what portion of the overall work Hamilton actually performed on the case (only Hamilton's pre-suspension work may be considered) and distribute accordingly.

This opinion was drafted by Fritz Fremgen and unanimously approved by the Ethics Committee on the 29th of November 2004.



Mark Hanson
Chair