

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-55
Issued: September 1971

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May an attorney divide legal fees with a referring attorney where the latter performs no legal service and assumes no responsibility?

Answer: No.

References: Code DR 2-107

OPINION

Over the years customs and practices have developed which are constantly changing and being shaped by the demands of our progressively ever-changing society. One of these customs and practices concerns the division of fees among attorneys. Such customs and practices vary from area to area, state to state and in the Nation as a whole. Because of this variance and because of the responsibility of the attorney to his client this article is being written and published by direction of the Board of Governors of your Bar Association.

We are dealing here only with the division of fees among attorneys. Without dispute or argument the division of legal fees with a non-attorney is absolutely prohibited.

With ever increasing frequency, especially in this area of broad travel, nationwide and worldwide commerce, as affects even the smallest communities, with the complexity of our modern technology the questions often arise:

When is the division of legal fees among attorneys proper and when is it improper? If it is proper, how should the fee be apportioned?

Fee apportionment can take the form of splitting or sharing and this subject, because of its vital importance to the attorney, to the client, and to the attorney-client relationship, is dealt with at length in the Code of Professional Responsibility, DR 2-107, "Division of Fees Among Lawyers" as follows:

- (a) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
 2. The division is made in proportion to the services performed and responsibility assumed by each.
 3. The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they render the client.
- (b) This disciplinary rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

The lawyer in the course of his practice is confronted with many different situations relating to the division of legal fees. For the purpose of this article and this article only we refer to fee splitting as those situations which involve the division of legal fees with an attorney who performs no legal service, and fee sharing which involves the division of legal fees with another lawyer who performs some legal service. Such situations may fall in these three broad categories:

- (1) The client is referred to another lawyer. The referring attorney does nothing in reference to the client's interest other than the referral, but expects and/or receives a portion of the ultimate fee. This, of course, is absolutely prohibited under the Code of Professional Responsibility referred to above.
- (2) A legal matter is referred to or forwarded to another attorney for attention. The forwarder retains the relation of attorney and client and retains the ultimate responsibility to the client both as to communication and as to the performance of the legal services required. So long as the division of the legal fee is reasonable and understood between the attorneys and the original forwarding attorney and his client, so there is no misunderstanding regarding this division of the fees, such sharing is perfectly legitimate and proper.
- (3) A legal matter is referred to or forwarded to another attorney for assistance. Both attorneys share work and share responsibility. The legal fee is divided between them on the basis of work, skill and ability. Of course, this presupposes that the matter is referred to the other attorney with the consent of the client as in the preceding paragraph (2). Such a division is proper.

The first situation most often occurs where a popular attorney attracts through personal or political associations or otherwise a number of cases which he is unable or unwilling to handle and he "farms out" the client to other attorneys and receives a fee for doing so although he takes no further responsibility in the case. Naturally in almost every conceivable instance this must be done with the consent and knowledge of the client and after such referral the client's relationship is with the new attorney. Accordingly, any legal fee division with the original attorney for the referral would be absolutely forbidden and in violation of the Code of Professional Responsibility.

The second situation referred to, most often relates to collections in commercial matters where an attorney has a standing relationship with a vendor, bank or lending

institution in securing and supervising legal services on behalf of the client, and in doing so maintains their records, follows up on the matter, does the prompting that may be necessary in the situation and secures and forwards documentation and assists in the production of witnesses as may be necessary. Naturally, a “grey” area arises in this situation as to whether the division of legal fees which is usually preagreed upon bears a strict, realistic relationship to the amount of the effort involved. While such a situation can be abused it is generally regarded as reasonable and proper so long as the apportionment is not unreasonable.

The third situation usually involves securing with the consent of the client the services of another attorney who can be either local, particularly expert in a field, or distant. Most practitioners experience this frequently. For instance, a Kentucky client is injured while driving through Alabama. The client goes to his Kentucky lawyer who with the consent of the client and at his request engages an Alabama lawyer. The Alabama lawyer does the necessary Alabama work. The Kentucky lawyer assembles the necessary information as to proof of damages, local medical information, perhaps researches such Kentucky law as would be applicable, and may or may not attend the trial assisting the Alabama attorney, if necessary. The sharing of fees based on the responsibility assumed, the amount of effort, time and work involved, and the skill and ability of respective counsel, is proper and appropriate.

Similarly, a client may have a difficult matter in the field of taxation, labor law, or antitrust law, patent law or otherwise. These areas are semi-recognized specialties in which the attorney may not, in justice to his client, be capable of offering adequate or complete representation. He, with the consent of the client, may engage the services of another attorney he considers expert in a particular field. The services of the original attorney may be required to the extent that he is capable of rendering assistance. The sharing of legal fees in this instance, likewise based on responsibility, effort, time and work involved and skill and ability required, is appropriate and proper.

Obviously, these three basic subdivisions of legal fee apportionment situations cannot answer all the questions and cannot cover all possible situations. Between each lies a large grey area, and the ethical judgment of the attorneys involved as to what is reasonable and proper must be the key. Development of strict, objective standards is obviously impossible in these areas.

The rule and guide controlling the ethical judgment of the attorney in these grey areas should forever be the best interest of the client and the non-exploitation of the attorney.

With these considerations in mind, it is believed that if there has been any question in the minds of the Bar of this Commonwealth as to the propriety of the sharing of legal fees that these guidelines and the Code of Professional Responsibility will be of assistance to them in the future to the end that the client receives the best legal service and the attorney receives adequate compensation for his efforts.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.