



Committee on Professional Ethics

Opinion #535 - 6/10/81 (73-80)

Topic: Division of fees; performance of agreement made in violation of Code.

Digest: Lawyer who agrees to share fee in violation of Code should submit issue concerning division of fee to bar association panel.

Code: Canon 1;
EC 1-5, 2-22, 8-7, 9-1;
DR 1-102(A)(3) and (4), 2-107(A).

QUESTION

May a lawyer, who has entered into a referral agreement violative of the Code, retain the entire fee and refuse to honor his agreement?

OPINION

The rules regarding fee-sharing are simply stated. It is proper to divide fees for legal services with another lawyer who is not a partner or office associate where: (1) the client consents to employment of the other lawyer after 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, and (3) the total fee does not clearly exceed reasonable compensation for all legal services rendered. DR 2-107(A); see also, EC 2-22 and N.Y. State 414 (1975); cf., N.Y. City 80-19 (1980) and N.Y. City 500 (1939).

Questions of law are, of course, beyond the province of this Committee, and we cannot rule on matters of legal interpretation or the enforceability of a contract. A lawyer who is engaging in an illegal act, as by performance of an illegal agreement, is in the usual case also engaging in an unethical act. N.Y. State 415 (1975); see also, EC 1-5 and DR 1-102(A)(3) and (4).

But the situation presented raises entirely different considerations. Where a lawyer enters into an agreement with another lawyer and benefits therefrom, a refusal thereafter to honor that agreement cannot be defended in the name of professional ethics. Neither the former Canons nor the Code would shield a lawyer from performance of an agreement where the claimed violation were not unlawful apart from the Code.

ABA Inf. 6 (undated), decided under the former Canons of Professional Ethics, held that, where an attorney had agreed to divide his fee with a bank trust officer (also a lawyer) who had performed no service, the attorney did so at his own peril; similarly, where a lawyer agreed to pay forty percent of a fee to the estate of a deceased partner in violation of the Code, it was at his own peril.

Such a determination rests on the value placed by the former Canons

and the Code on a lawyer's integrity. See, e.g., Canon 1, EC 8-7 and EC 9-1. Integrity is the foundation of the profession. To permit a lawyer to avoid an obligation by wrapping himself in the Code erodes that foundation.

"A very great part of a man's comfort, as well as of his success at the Bar, depends upon his relations with his professional brethren. With them he is in daily necessary intercourse, and he must have their respect and confidence, if he wishes to sail along in smooth waters. He cannot be too particular in keeping faithfully and liberally every promise or engagement he may make with them. One whose perfect truthfulness is even suspected by his brethren at the Bar has always an uneasy time of it. He will be constantly mortified by observing precautions taken with him which are not used with others." Sharswood, *Professional Ethics*, p. 73, cited in Drinker, *Legal Ethics*, 194 (1953).

As illustrated by several examples given in Drinker (at pp. 194-195), agreements and representations by lawyers, not violative of the law, must be scrupulously honored. Trustworthiness, fairness and candor affect not only a lawyer's own experience at the Bar but also public confidence in the profession.

These sentiments find expression in DR 1-102(A)(4), which provides that a lawyer should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Reneging on an agreement in the name of professional ethics is simply inconsistent with honesty and fair dealing. See also, Weckstein, *Maintaining the Integrity and Competence of the Legal Profession*, 48 *Tex. L. Rev.* 267, 275 (1970) (suggesting that the proscribed conduct evidences characteristics of dishonesty, faithlessness and inability to exercise fiduciary responsibility, and therefore bears directly upon fitness to practice).

Applying these principles to the present inquiry, it is clear that the lawyer may not retain the entire fee received from the client. To permit the lawyer to keep the entire fee would enable that lawyer to escape his own contractual commitment, while at the same time rewarding an unethical act.

In order to uphold the interest of the profession in maintaining the standards articulated by the Code and to protect against the possibility of excessive fees, we believe that the matter should be submitted to an appropriate bar association panel. At that time, the panel can review and determine what fees, if any, may properly be charged to the client, as well as whether or to what extent such fees should be shared with the forwarding lawyer.

For the reasons stated, subject to the qualifications hereinabove set forth, the question posed is answered in the negative.
