NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 618 - 2/15/91 (20-90)

Topic: Legal fees; remitting fees to a corporate employer.

Digest: A salaried lawyer may not remit to a corporate employer fees received from a third-party in excess of the lawyer's salary and allocable overhead.

Code: DR 1-102(A)(4), 3-101(A), 3-102, 3-102(A), 5-105, 5-105(B).

QUESTION

May a lawyer employed by a multi-employer association serve as co-counsel to a pension plan and remit to the association the legal fees received from the plan?

OPINION

The inquiring lawyer received a salary for full-time employment with a multi-employer association. The association, funded by fees collected from the member companies, employs clerical personnel and professionals. Its principal function is to represent its members in collective bargaining with a national labor union.

Pursuant to a management-labor agreement, a multi-employer pension plan was established. *See* 29 USC §§ 1002(37)(A), 1060. This plan, a separate legal entity under federal law, is administered by trustees, some of whom are selected by the union and some of whom are selected by the participating employers. The plan has co-counsel, one selected by the union trustees of the plan and one selected by the employer trustees. The employer trustees propose to select a lawyer employed by the association to serve as one of the co-counsel. Because this lawyer receives a salary from the association, it is expected that the lawyer will remit to the association the legal fee received from the plan. The inquirer advised that the legal fee may significantly exceed the lawyer's salary for the time estimated to be required as co-counsel for the plan.

A threshhold matter, not raised by the inquirer, is whether the lawyer will be able to exercise independent professional judgment on behalf of the plan while simultaneously serving as counsel to the association in collective bargaining with the union. We believe the lawyer may undertake these roles consistent with the requirements of DR 5-105. The lawyer will serve as counsel to the trustees of the plan who are required to administer the plan pursuant to the written agreement and adhere to the comprehensive mandates of the Employee Retirement Income Security Plan. *E.g.*, 29 USC §§ 1101-12. These trustees may be officers or employees of "a party in interest," which is defined to include the employer or the union, 29 USC §§ 1002(14), 1108(c)(3), and thus any conflict of interest inherent in the mere fact that a fiduciary of a benefit plan is also an officer of an employer (or a union) has been overridden by statute. *Local Union 2134, UMW of America v. Powhatan Fuel, Inc.*, 828 F.2d 710, 713, (11th Cir. 1987); *Evans v. Bexley*, 750 F.2d 1498 (11th Cir. 1985); see generally, Annot., 64 ALR Fed. 602-612 (1983).

As the co-counsel to the plan selected by the employer trustees bears the responsibility of advising those trustees on the proper operation of the plan in accordance with their fiduciary obligations, there does not appear to be any inherent conflict of interest in a staff lawyer for the employer (or as here for the multi-employer association) serving as co-counsel to the plan. While not controlling on questions of ethics, 29 USC § 1108(b)(2) contemplates that reasonable arrangements may be made between a plan and a party in interest allowing for legal services necessary to the operation of the plan, "if no more than reasonable compensation is paid therefor."

Except in unusual circumstances, the participating employers, the association and the plan have an identical interest in having the plan administered in accordance with the plan agreement and the requirements of law. *Cf. Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069 (1982). When unusual circumstances arise (for example, a hostile takeover attempt), the interests of the employer may not be compatible with the interests of the plan, and in that event counsel unaffiliated with the employer or the union will be needed. *See Donovan v. Bierwirth, supra*, 680 F.2d at 272-73.

Even assuming that the legal fee to be paid by the plan is otherwise reasonable, it is improper for the inquiring attorney to remit the payment to the association if to do so amounts to sharing a legal fee with a non-lawyer. DR 3-102, which provides that a lawyer "shall not share legal fees with a non-lawyer...," is designed to prevent a non-lawyer from controlling the lawyer in a way detrimental to the interests of the lawyer's client. Wolfram, Modern Legal Ethics p. 510 n. 91 (1986). Some of the reasons for the prohibitions against fee splitting were discussed in ABA 88-356 (1988) dealing with placement agencies providing temporary lawyers to law firms. *See also* N.Y. City 1988-3, 1988-3-A and 1989-2. Among other things, the rule serves to encourage a lawyer's independence by preventing the practice of law through an entity in which a non-lawyer owns an interest, or is in a position to manage or direct the lawyer, or has an inducement to do so by having a financial interest in the fees to be earned.

The concerns about fee splitting between a salaried lawyer and a lay employer were recently addressed in N.Y. County 670 (1989), which concerned legal fees charged by a bank to its customers for services provided by a bank's salaried lawyers. In pertinent part, that opinion states as follows:

> Numerous opinions of this and other ethics committees condemn the practice whereby a salaried staff attorney participates in an arrangement in which the lay employer charges a third party for services rendered by the staff attorney an amount that exceeds the employer's own cost for the services of the staff attorney. The practice has been censured on at least three separate grounds: (i) it constitutes sharing a legal fee with a lay person in violation of DR 3-102(A); (ii) it constitutes aiding a lay person in the unauthorized practice of law in violation of DR 3-101(A); and (iii) it constitutes a misrepresentation in violation of DR 1-102(A)(4) to label as "attorneys' fees" an amount which has no necessary relationship to the compensation of the attorneys involved.
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> All of these opinions assert a slightly different rationale for condemning the practice of a lending institution charging a borrower a greater amount than it pays a lawyer for legal services. Regardless of the Code provision violated -- be it fee splitting, aiding the unauthorized practice of law, or misrepresentation -- the evil arises only when a lay agency earns a profit from the rendition of legal services by its salaried employee.

The opinion goes on to emphasize that there are several permissible methods for determining the actual cost of a lawyer's services. By analogy to the legal fees of outside lawyers, the charges for in-house lawyers may take into account "customary overhead items such as salary, secretaries and clerks, rent, heat, utilities, library, depreciation on building and furnishings, and similar expenses." N.Y. County 670 (1989). The lay employer may not earn a profit, however, from furnishing the lawyer's services. *See also Matter of Lefkowitz v. Lawrence Peska Assocs.*, 90 Misc 2d 59, 62, 393 N.Y.S.2d 650, 652 (N.Y. Sup. Ct. 1977); *Matter of Thompson v. Chemical Bank,* 84 Misc. 2d 721, 727, 375, N.Y.S.2d 729, 736-37 (N.Y. Civ. Ct. 1975). The analysis in N.Y. County 670 also applies here.

Accordingly, the amount remitted to the association should be carefully calculated so as not to exceed a fair reimbursement for the association's costs, which may include an allocated portion of the lawyer's salary and appropriate overhead expenses. It would be improper and contrary to DR 3-102(A) for the lawyer to remit to the association a fee in excess of such costs.

CONCLUSION

The proposed arrangement is an improper sharing of legal fees unless the amount to be paid by the plan to the lawyer as a legal fee and remitted to the association does not exceed the association's expenses (allocated salary and overhead) in providing the lawyer's services to the plan.