NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1096 (5/20/2016)

Topic: Lawyer declining attorney fees awarded to client

Digest: A lawyer may allow a civil rights client to keep some or all of the statutory attorney fees awarded to the client even if the client is not a lawyer. Because statutory attorney fees in civil rights cases are awarded to the "prevailing party" (*i.e.*, to the client) rather than to the lawyer, allowing a civil rights client to keep part of the court-awarded fees does not fall within the prohibition against sharing legal fees with a nonlawyer.

Rules: 5.4(a) and 8.5(b)(1)

FACTS

1. The inquirer is a lawyer who is admitted to practice law in Florida but has been admitted *pro hac vice* to represent a client (the plaintiff) in a civil rights suit pending in a court in New York. The client is not a lawyer. The client prevailed in the suit on the merits, so the court ordered the defendant to pay statutory civil rights attorney fees to the client. The inquirer believes that the damages award to the client is too low. To make up for the low damages award, the lawyer would like to let the client keep some of the court-awarded attorney fees.

QUESTION

2. May a lawyer allow a civil rights client who is not a lawyer to keep some or all of the court-awarded statutory attorney fees when the client is the prevailing party in a civil rights suit?

OPINION

A. Which Jurisdiction's Rules of Professional Conduct Apply?

3. A preliminary question is which jurisdiction's Rules of Professional Conduct apply to this inquiry. The inquirer is admitted to practice law generally in Florida, but has been admitted *pro hac vice* in a New York court. With respect to the Rules of Professional Conduct, Rule 8.5(b)(1) of the New York Rules of Professional Conduct (the "Rules") provides as follows:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> > (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise ….

4. The inquiry before us involves "conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice … for purposes of that proceeding" (*i.e., pro hac vice*). Consequently, the rules to be applied are the rules of the jurisdiction in which the court sits (*i.e.,* New York), "unless the rules of the court provide otherwise" (which they do not, since all New York state and federal courts apply the New York Rules of Professional Conduct). Thus, the applicable ethics rules are the New York Rules of Professional Conduct.

B. The Prohibition Against Sharing Fees with a Nonlawyer

5. For centuries, the legal profession has prohibited lawyers from sharing legal fees with nonlawyers. *See* Roy D. Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069, 1076 (1989) ("The rule against sharing legal fees with nonlawyers traces back to a 1729 English Act of Parliament"). In New York, as in most jurisdictions, the prohibition against sharing legal fees with nonlawyers is contained in Rule 5.4 ("Professional Independence of a Lawyer"). Specifically, Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, with three exceptions not relevant here.

6. Since none of the express exceptions to Rule 5.4 apply to the facts of the present inquiry, the situation might at first glance appear to be governed by the general rule prohibiting lawyers from sharing legal fees with nonlawyers. However, the reach of the rule against fee sharing with nonlawyers is not unlimited, and a lawyer declining to accept some or all of the statutory fees the court has awarded directly to a client who is a nonlawyer is not the type of fee sharing encompassed in Rule 5.4(a)'s command not to "share legal fees with a nonlawyer" who is a stranger to the attorney-client relationship.

7. The dispositive point in our analysis is that most statutory fee awards are to the prevailing "party," not directly to the lawyer. That is the case in federal civil rights cases. *See, e.g., Evans v. Jeff D.,* 475 U.S. 717 (1986) ("Congress bestowed on the 'prevailing *party*' a statutory eligibility for a discretionary award of attorney's fees in specified civil rights actions") (emphasis by the Court). The same is true of New York State fee-shifting statutes. *See, e.g.*, N.Y. Gen. Bus. Law § 349(h) (court may award reasonable attorney fees to a "prevailing plaintiff"); N.Y. State Finance Law §§ 187-194 ("prevailing plaintiff" in a False Claims Act case is entitled to recover attorney fees and costs).[1] The statutory fees are awarded to the party, not to the lawyer. Accordingly, the party (the client) would be "sharing" the fee award with the lawyer, not the other way around. Accordingly, we believe that the prohibition against sharing fees with a nonlawyer does not bar a lawyer from allowing a civil rights client to keep some or all of the legal fees awarded by the court to the prevailing party (*i.e.,* to the client) in a civil rights case.

8. We understand that a lawyer's retainer agreement in a civil rights case typically

[1] For a chart listing various federal and New York statutes permitting a court to award attorney's fees to a successful litigant, see *http://www.empirejustice.org/assets/pdf/litigation/federal-attorney-fee-statutes.pdf*.

contains a clause assigning the client's statutory fee award to the lawyer, but the award is still made in the first instance to the client, not the lawyer. Even if the retainer agreement assigns the fee award to the lawyer, the lawyer may ethically waive that assignment, in whole or in part. Waiving the assignment of fees is equivalent to offering the client a discount on fees, a practice that is undoubtedly permitted because it does not implicate the underlying concern of Rule 5.4, which is to avoid interference with the lawyer's professional judgement. *See* Rule 5.4, Cmt. [1] ("limitations on sharing fees" with nonlawyers "protect the lawyer's professional independence of judgment").

9. Our opinion in N.Y. State 906 (2012) does not require a different conclusion. There, a lawyer employed by a not-for-profit organization that was not a law firm asked if it would be ethical to share legal fees with the not-for-profit employer. We responded that to do so would violate Rule 5.4(a). That situation is distinguishable from the one presented here. In Opinion 906, the lawyer employed by the not-for-profit organization was apparently representing third parties, such as civil rights plaintiffs, and was not representing the not-for-profit organization itself. The not-for-profit corporation was the lawyer's *employer*, not the lawyer's *client*. Thus, the lawyer in Opinion 906 wanted to share statutory fee awards not with the client but instead with a nonlawyer not-for-profit corporation that sponsored litigation to advance the public interest. Here, the lawyer wants to allow a civil rights client to keep some or all of the court-awarded statutory attorney's fees. Opinion 906 does not govern that scenario.

CONCLUSION

10. A lawyer may allow a civil rights client to keep some or all of the statutory attorney fees that are awarded to the client, even if the client is not a lawyer.

(9-16)