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

Opinion 1121 (5/3/17)

Topic: Fee sharing between lawyers and nonlawyers; aiding the unauthorized practice of law

Digest: Where an insurance carrier has paid a claimant corporation's attorney fees in an arbitration directly to the company's in-house counsel as attorney of record, and where the company is entitled to recover reasonable attorney fees under relevant New York law, the in-house counsel may remit the attorney fees to the company without violating the rule against fee-sharing.

Rules: 5.4(a), 5.5(b)

FACTS

1. The inquirer is in-house counsel to XYZ Corporation ("XYZ"), an equipment manufacturer that provides medical equipment to individuals through prescribing physicians. The physicians typically file a claim with the patient's insurance company, seeking payment to XYZ for the cost of the prescribed equipment under provisions of New York's no-fault insurance law and the applicable regulations thereunder. The insurance company either approves the claim and pays XYZ for the prescribed equipment, or preliminarily denies the claim, in which event XYZ contests the denial at an arbitration.

2. The inquirer, an in-house lawyer at XYZ, handles general corporate matters on behalf of XYZ and also litigates arbitrations regarding denied insurance claims on behalf of XYZ. XYZ wants its in-house counsel to represent it at more of these arbitrations instead of engaging outside counsel. XYZ's in-house counsel perform no legal work on behalf of third parties. They receive a salary and do not receive any bonus or other amount relating to the volume or value of successful arbitration awards.

3. If a claimant such as XYZ recovers money as a result of an arbitration, settlement or award after litigation, the amount is paid in a bifurcated remittance: (1) principal and interest on the medical equipment cost denied incorrectly by the insurance company is paid to XYZ; and (2) attorney fees and, where applicable, reimbursement of the arbitration filing fee is paid to XYZ's counsel of record. The insurance company draws from no-fault funded accounts to pay the principal and interest, and from a separate account to cover attorney fees. The inquirer states that insurance companies generally require the attorney fee award be issued to the attorney of record, and will not pay the attorney fee portion directly to the applicant, XYZ company.

QUESTIONS

4. A. May in-house counsel for XYZ remit the entire attorney fee portion of the arbitration award to the claimant, XYZ, or would such a remittal constitute fee-sharing?

B. Would a remittal of attorney fees to XYZ constitute aiding a nonlawyer (XYZ) in the unauthorized practice of law?

OPINION

Remitting Legal Fees to the Client

5. Rule 5.4(a) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from sharing legal fees with a nonlawyer, except under certain circumstances that are not applicable here involving deceased lawyers and retirement plans.

6. It is our understanding that, as a condition to providing medical equipment to an individual, XYZ requires the individual to assign to XYZ his or her claim against the insurance company by way of subrogation. Thus, XYZ is the owner of the claim against the insurance company and is the appropriate "party" to the claim against the insurance company.

7. This Committee has interpreted the applicability of the fee-sharing prohibition in Rule 5.4(a) in several inquiries involving remitting attorney fees to a nonlawyer client or employer. In N.Y. State 1096 (2016), we concluded that an outside lawyer could permit a non-lawyer client to keep some or all of the statutory attorney's fees awarded in a civil rights lawsuit, because the statutory fees were awarded to the "prevailing party" rather than to the lawyer and therefore did not fall within the prohibition against sharing legal fees with a nonlawyer. We observed that a lawyer's decision to decline or waive the right to some or all of the statutory fees awarded directly to a client was not the type of fee-sharing encompassed in Rule 5.4(a). The analysis in Opinion 1096 turned in large part on the fact that the statutory attorney fee award was to the "prevailing party," and thus to the client rather than directly to the lawyer. See N.Y. State 1096 ¶7 (citing various New York State fee-shifting statutes). Thus, if the client gave any part of the fee award to the lawyer, the client would be sharing attorney fees with the lawyer, rather than the other way around.

8. In N.Y. State 906 (2012), this Committee addressed whether an in-house lawyer employed by a not-for-profit organization that was not a law firm could share legal fees with the not-for-profit. We noted that New York did not adopt ABA Model Rule 5.4(a)(4), which expressly permits a lawyer to share court-awarded attorney fees with non-profit public interest organizations where the lawyer has prevailed in a litigated matter on behalf of the organization, and we therefore concluded that sharing fees with a not-for-profit is prohibited under New York's Rule 5.4(a). In distinguishing Opinion 906, N.Y. State 1096 (2016) explained that, in Opinion 906, the inquirer was a lawyer employed by a not-for-profit organization that was representing third parties, such as civil rights plaintiffs, and not representing the not-for-profit organization itself. Thus, in Opinion 906, the inquirer proposed to share fees not with the client who had won fees for itself (as in Opinion 1096), but rather with a not-for-profit organization that had sponsored the litigation on behalf of a prevailing third party.

9. The facts in this inquiry are distinguishable from those in both Opinion 1096 and Opinion 906. Here, the inquiring lawyer is an in-house counsel employed by the prevailing plaintiff (unlike the outside lawyer in Opinion 1096), and in-house counsel litigates the claim on behalf of the for-profit employer and not on behalf of third parties (unlike the staff lawyers employed by the non-profit representing prevailing third parties in Opinion 906). In addition, settlements and arbitral awards are bifurcated into a remittance of the principal and interest on the medical equipment claim to XYZ, and a separate remittance of attorney fees to the attorney of record in the proceeding. However, the statute authorizing the attorney fee award here convinces us that the analysis in Opinion 1096, not Opinion 906, applies to this inquiry.

10. New York insurance law provides that, where the claimant proves a valid claim, "the claimant shall also be entitled to recover his attorney's reasonable fee for services necessarily performed in connection with securing payment of the overdue claim ...." N.Y. Ins. Law §5106: Fair Claims of Settlement (emphasis added).[1] Although the inquirer states that the arbitration panel remits payment of principal and interest to XYZ when XYZ recovers on its claims, and a separate attorney's fee check to the attorney of record, the statute provides that the claimant is "entitled" to the attorney fee award -- not the attorney. Similarly, the rules of the AAA for New York no-fault claims governing the form and scope of the award (which may apply here) separately designate the portion reimbursable to the claimant for the filing fee, reasonable attorney's fees, and interest on the claim. Thus the claimant is entitled to payment of all components of the award, including the attorney fees, notwithstanding that the check for attorney fees is made out to the attorney of record. Because the claimant is entitled to the attorney fees under both New York Insurance Law and AAA rule, we conclude that in-house counsel may sign over to XYZ the attorney fee portion of the award without violating Rule 5.4(a)'s prohibition on fee-sharing.

Aiding in Unauthorized Practice of Law

11. The inquirer also asks if turning over the attorney fee awards here would aid a nonlawyer in the unauthorized practice of law. Rule 5.5(b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. Section 495 of the New York Judiciary Law generally prohibits a corporation from practicing or appearing as an attorney-at-law for any person, soliciting any claim, or taking an assignment of a claim for the purpose of representing any person in the pursuit of a civil remedy.

12. Whether particular activity constitutes the unauthorized practice of law is a legal question that is beyond the jurisdiction of this Committee. However, the inquirer may wish to consider two exceptions to the prohibitions of Judiciary Law §495 that may apply here. First, Section 495(2) allows a moneyed corporation authorized to do business in New York to receive an assignment of a claim under a subrogation agreement. Second, Section 495(5) allows a corporation to employ attorneys in its own immediate affairs or in any litigation to which it is a party.

CONCLUSION

13. Where an insurance carrier has paid a claimant corporation's attorney fees in an arbitration directly to the company's in-house counsel as attorney of record, and where the company is

entitled to recover reasonable attorney fees under relevant New York law, the in-house counsel may remit the attorney fees to the company without violating the rule against fee-sharing.

(11-17)

[1]See also 11 NYCRR 65-4.6 (Insurance Department regulations providing for limitations on attorney fees pursuant to section 5106 of the Insurance Law).