



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 1.5 (e) and Comments [7-8]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 03-06
May, 2004**

Topic: Referral Fees; Sharing Fees; Retaining Responsibility for Matter after Leaving Firm

Digest: Law firm can properly pay former partner share of contingent fee earned after partner left firm to become State's Attorney as long as payment is part of separation agreement under Rule 1.5(j) and payment does not violate public policy concerns; former partner's disqualification from private practice as State's Attorney does not bar payment to former partner of share of fee earned by firm after partner withdrew when paid as part of separation agreement; former partner sharing fee under Rule 1.5(j) need not retain responsibility for matter, share fee proportionally to service performed, get client consent or make disclosures required for fee sharing, all as required by Rules 1.5(f) or (g) .

Ref: IRPC 1.5(f), (g) (j)

Romanek v. Connelly, 234 Ill.App.3d 393, 257 Ill.Dec. 436, 753 N.E.2d 1062 (Ill.App. 1 Dist. 2001)

In Re Storment, 203 Ill.2d 378, 786 N.E.2d 963, 272 Ill. Dec. 129 (2002).

Elane v. St. Bernard Hospital, 284 Ill.App.3d 865, 220 Ill.Dec. 3, 672 N.E.2d 820 (Ill.App. 1 Dist. 1996)

Corti v. Fleisher, 93 Ill.App.3d 517, 49 Ill.Dec. 74, 417 N.E.2d 764 (Ill.App. 1st Dist. 1981)

Illinois Judicial Ethics Committee Op. 94-16

Facts

A partner brought two clients into the law firm. Each client had a significant personal injury case that the firm began to handle. The partner then withdrew from the firm to work as an Assistant State's Attorney. The former partner/lawyer's job as a State's Attorney disqualified the lawyer from engaging in private practice. At the time of the withdrawal from the firm, the lawyer demanded that his former partners pay him one third of any contingent fee that the firm might realize from the two cases that the lawyer brought to the firm, however, no agreement was reached on this issue.

At the time of the lawyer's withdrawal from the firm, neither case was ready for trial nor was there a settlement offer in either case. Approximately one year after the lawyer withdrew from the firm, the firm settled the first case for a significant amount. At the time of the settlement the case had been pending for two years. For the first of these two years, the lawyer had been a partner in the firm; for the second year the lawyer worked as a State's Attorney. The second case is still being handled by the firm.

Questions

1. Can the law firm properly pay to its former partner, who is now a State's Attorney, a one third share, or any other portion, of the contingent fee generated in the first case?
2. Does the lawyer's disqualification from private practice as a State's Attorney prevent the lawyer from sharing in any portion of the fee earned after the lawyer withdrew from the firm and became a State's Attorney?
3. If the lawyer may properly receive a share of the contingent fee realized by the firm in the first case, is the lawyer's share limited to a portion of the fee the firm earned while the lawyer was still in the firm?
4. If the lawyer may properly receive a share of the contingent fee realized by the firm in the first case, may the lawyer, in anticipation of receiving a share of the fee in the second case, contribute money to the to the firm to help pay the cost of preparing the second case for trial.

Discussion

1. The law firm may properly pay its former partner a one third or other share of a fee earned by the firm on the case the partner brought into the firm where the payment is made as part of a separation agreement between the lawyer and the firm pursuant to IRPC 1.5(j) and the payment does not otherwise violate public policy by leaving the firm doing the work without proper incentive to carefully and competently handle the client's case.

In *Romanek v. Connelly*, 234 Ill.App.3d 393, 257 Ill.Dec. 436, 753 N.E.2d 1062 (Ill.App. 1 Dist. 2001) an associate brought a breach of contract claim against her former firm alleging that the firm failed to honor a fee sharing agreement with regard to a case she brought in to the firm and the firm continued to handle after she left. The court held that the agreement between the former associate and the firm to share in any contingent fee later generated by the case the associate had brought into the firm fell within the scope of IRPC 1.5(j) which allows payment "to a lawyer formerly in the firm, pursuant to a retirement or separation agreement." The court affirmed the dismissal of the former associate's contract claim, without prejudice, because she had failed to allege sufficient facts to support a cause of action, 753 N.E.2d at 1071-72; however, it remanded the case to let her file an amended complaint.

The court rejected the law firm's contention that the more stringent requirements of IRPC 1.5(f) with regard to fee sharing should apply to this case. Rule 1.5(f) requires, among other things, that the client consent to a fee sharing in a writing that discloses: that a division of fees will be made; the basis of that division and the economic benefit to be received by the referring lawyer; and the responsibility being assumed by the referring lawyer. 1.5(f)(1)-(3). The court also rejected the claim that payments pursuant to a separation agreement must be made from the firm's general profits, 753 N.E.2d 1070, and that since the agreement was linked to a particular case, the more specific fee sharing rule, Rule 1.5(f), should apply. It noted that, according to *Corti v. Fleisher*, 93 Ill.App.3d 517, 49 Ill.Dec. 74, 417 N.E.2d 764 (Ill.App. 1st Dist. 1981), such a fee sharing payment linked to specific cases is improper only when it violates public policies like those mentioned in *Corti* involving, for example, an agreement where the firm would do all the work on referred files but send all the fees to the originating lawyer who was no longer in the firm. In such a situation the firm sending the fees on would have little incentive to effectively handle the client's matter. *Ibid.* 753 N.E.2d 1070. The *Corti* case also involved fee sharing solely on the basis of referral of cases to the firm, which is now governed by IRPC 1.5(g).

In the case before it, the *Romanek* court found that the fee sharing agreement violated no public policy concerns. The interests of the client in receiving complete and careful representation were not compromised and the fee sharing arrangement was not predicated on the mere referral of a client. *Ibid.* 753 N.E.2d 1071.

In the current inquiry, the former partner and the firm have not yet settled their respective claims arising from the lawyer's leaving the firm. Assuming the parties do reach such a separation agreement that does not violate the public policy concerns expressed in Romanek, payment under it to the lawyer would be proper IRPC 1.5(j).

2. The lawyer's work as a State's attorney would not disqualify the lawyer from receiving the payment under a separation agreement pursuant to IRPC 1.5(j). Section (j) of 1.5 does not require the disclosure and client consent required for fee sharing under Rule 1.5(f). Section 1.5(j) also does not require that the referring lawyer agree "to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer" to share in a fee, or require that a fee division be made in proportion to the services performed, as is specified under Rule 1.5(g).

If the lawyer and the firm do not enter into a separation agreement under 1.5(j), the firm can properly share the fee with the lawyer only under the terms of Rules 1.5(f) and (g). Under the pure referral provisions of 1.5(g), the lawyer, now State's Attorney, would still have retained sufficient responsibility for the referred case to be entitled to a referral fee. Under this section, the only responsibility the referring lawyer needs to maintain to be entitled to collect a referral fee is to have "potential financial responsibility for any malpractice action" that the client might file against the referring lawyer in connection with the referred case. *In Re Storment*, 203 Ill.2d 378, 786 N.E.2d 963, 272 Ill. Dec. 129 (2002) (see below). In this case the lawyer, though disqualified from private practice as a State's Attorney, appears to have retained sufficient financial responsibility under Rule 1.5(g) to be entitled to share a fee. However, neither the lawyer nor the firm got the required consent of the client under Rule 1.5(f) or made the required disclosure necessary under Rule 1.5 (g) to properly share the fee. Where the fee sharing is not done under the pure referral provisions of Rule 1.5(g), the fee must be divided under the other provisions of that section "in proportion to the services performed and responsibility assumed by each lawyer".

See *In Re Storment*, 203 Ill.2d 378, 786 N.E.2d 963, 272 Ill. Dec. 129 (2002), where the court held that an Illinois attorney (reinstated after a suspension) who was disbarred in Missouri was eligible to receive a referral fee under Rule 1.5(g) from a Missouri case even though he was ineligible to practice law in Missouri. The court, however, suspended the Illinois attorney for two years for failure to obtain the client's written consent to the referral fee as required under Rule 1.5(f).

See also, *Elane v. St. Bernard Hospital*, 284 Ill.App.3d 865, 220 Ill.Dec. 3, 672 N.E.2d 820 (Ill.App. 1 Dist. 1996), cited favorably in *Storment*, *ibid*. In *Elane*, a lawyer referred a case to a firm and then became a judge. The written referral agreement contemplated that the primary service rendered by the referring lawyer would be the referral of the case as is provided for in IRPC 1.5(g) and provided that the lawyer would receive 45% of the attorney's fees if the case were settled or tried. The lawyer, now judge, though disqualified from practicing law retained sufficient financial responsibility under the rule to be entitled to enforce her fee sharing contract with regard to fees earned by the firm after the lawyer went on the bench. The court held that "a judge's 'legal responsibility' in reference to a referred case does not involve the practice of law" and that a fee

sharing arrangement “involving a lawyer who later becomes a judge is enforceable as long as it is consistent with Rule 1.5’s provisions as to client consent and the assumption of legal responsibility by the referring lawyer.” 672 N.E.2d at 825, citing Illinois Judicial Ethics Committee Opinion (IJE) 94-16. Since the judge had presented a prima facie case of her entitlement to a referral fee under her contract with the law firm, the court erred in directing a judgment in favor of the firm.

3. The law firm may properly agree to pay the former partner a percentage of the fee earned on the referred case after the partner withdrew from the firm as part of a separation agreement under RPC 1.5(j) as long as the agreement does not violate the public policy concerns outlined above.

4. The Rules of Professional Conduct and the case law suggest that the former partner now State’s Attorney, in anticipation of receiving a share of the fee in the second case, and as part of a separation agreement under Rule 1.5(j), could properly contribute money to the firm to help pay the cost of preparing the second case for trial.