



ILLINOIS STATE
BAR ASSOCIATION

ISBA Advisory Opinion on Professional Conduct

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This Opinion was **AFFIRMED** by the Board of Governors in July 2010. Please see the 2010 Illinois Rule of Professional Conduct 1.5(e). See also *Corti v. Fleisher*, 93, Ill.App.3d 517, 49 Ill.Dec. 74, 417 N.E.2d 764 (1981). 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 Number 84-15
May 21, 1985

Topic: Attorney employment
agreement establishing post-termination division
of legal fees

Digest: A partnership or attorney employment agreement may not require withdrawing attorneys to share fees earned from subsequent legal employment by former clients of the firm

Ref: Rule 2-107; ISBA Opinion Nos. 610, 628, 776.

FACTS

A professional service corporation engaged in the practice of law in accordance with Illinois Supreme Court Rule 721 seeks to require all of its attorney-employees to sign employment agreements. The agreement provides that each attorney-employee will remit to the corporation, after termination of employment, 25% of all legal fees collected from any entity or individual who was a client of the corporation at the time of the attorney-employee's termination. This provision for fee splitting would remain in effect for a period of two years following the attorney-employee's termination.

ISSUE

This Committee is asked whether the fee splitting clause of the proposed employment agreement would violate any of the provisions of the Code of Professional Responsibility.

OPINION

Division of legal fees between lawyers is regulated by Rule 2-107 of the Code of Professional Responsibility. The Rule states that division of legal fees is improper unless all of the following three requirements are met: (1) the client consents in writing; (2) the division is made in proportion to the services performed and the responsibilities assumed by each lawyer; and (3) the total fee is not excessive. "Referral fees" are sanctioned under Rule 2-107(a)(2), but only if the arrangement is disclosed to the client and the referring lawyer continues to assume full responsibility for the performance of the receiving lawyer. The "referral" exception to the general rule that fees be divided only in proportion to services performed is intended to encourage lawyers to refer matters to others more skilled in particular areas of law. ISBA Opinion No. 776. The provision allowing "referral fees" is not intended to sanction any implicit or imagined proprietary interest in the client claimed by the referring lawyer.

The pertinent fee-sharing clause of the employment agreement at issue would appear to extend beyond the limits established by Rule 2-107. The post-termination arrangement to share fees is clearly not intended as a "referral" within the letter or the spirit of the Rule; indeed, the purpose of the clause is obviously to protect the firm, or professional corporation, from losing clients who choose to have departing members of the firm represent their legal interests.

A very similar proposed employment agreement was examined by this Committee in Opinion No. 628. In that Opinion, we noted that the fee-sharing provision of the contract constituted an attempt by the law firm or professional corporation to establish a proprietary interest in the business of the clients. The law firm or service corporation has no ethical, legal or moral rights to the continued patronage of past clients who freely choose to retain the terminating partner or employee as their attorney. Because the proposed employment agreement constituted an attempt to require a division of fees without a proportionate division of services or responsibilities, it was determined to be violative of DR 2-107, and was, therefore, held to be improper. The same rationale leads us to conclude that the fee-splitting clause of the agreement described in this inquiry would be improper.

In Opinion No. 610, we examined a partnership agreement providing that withdrawing partners share with the firm fees earned on client files commenced prior to the partner's withdrawal from the firm. Because that agreement limited the division of fees to matters actively handled by the firm prior to a partner's termination, we held that it was merely a practical provision for sharing fees which were earned in part by the old firm, and in part by the withdrawing partner, which did not violate the spirit of Rule 2-107.

For the reasons discussed herein, the Committee believes that the proposed agreement would violate Rule 2-107, and would, therefore, be improper.