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## LEGAL ETHICS OPINION 1742

### ACTIVITIES OF ATTORNEY IN CONNECTION WITH REAL ESTATE TRANSACTION WHEN TITLE COMPANY IS SETTLEMENT AGENT

You have presented a hypothetical situation in which Attorney has received a contract concerning a real estate transaction showing that Attorney will be the settlement agent. The contract has an addendum which indicates that the settlement agent was chosen by the purchaser and that seller will have a separate attorney. The contract states, "Fees for the preparation of the deed, that portion of the Settlement Agent's fee billed to the Seller, costs of releasing existing encumbrances, appropriate legal fees and any other proper charges assessed to the Seller shall be paid by the Seller." Subsequently, Attorney receives a letter from a title company stating: 1) that the title company has been retained to represent the seller; 2) that the title company will prepare the seller's documents, including the deed, the Certificate of Satisfaction, etc.; and 3) that Attorney's settlement statement should show no charges to the seller from Attorney. The letter further states that the title company's fee to the seller should be shown on the settlement statement, payable to the title company, and that seller will sign all documents in the title company's office.

Under the facts you have presented, you have asked the committee to opine on the following questions:

1. Can the title company be retained to represent the seller in the real estate transaction if the title company is not the settlement agent named in the contract?
  - a. If so, does representation by a title company put the named settlement agent in the same position as if the sellers were represented by an attorney, i.e., does this representation by a title company relieve the seller of any charges by the settlement agent except those disclosed and agreed to by the seller?
  - b. If the title company can represent the seller, can the fee to the title company on the settlement statement include the preparation of the deed, or should this be itemized separately with the preparing attorney's name?
2. If Attorney complies with the instructions of the title company, is Attorney aiding the unauthorized practice of law and thus subject to disciplinary action?

3. Would the answers be different if the person representing the title company is an attorney who owns or is employed by the title company?
4. Can an attorney acting in his capacity as an owner/employee of a title company ethically perform legal services for clients of the title company, or is he considered to be the same as a non-attorney in his relationship with title company clients? Are the clients considered to be represented by their own attorney in this situation?

The appropriate and controlling rules relative to your inquiry are: Rule 1.5 (b), requiring that fees be adequately explained to the client; Rule 5.4 (a) which prohibits a lawyer from sharing fees with a nonlawyer; Rules 5.4 (b) and (d) which generally prohibit a lawyer from practicing law as an employee of a corporation owned or controlled by nonlawyers; and Rule 5.5 (a)(2), stating that a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The committee has previously opined, in the context of a real estate closing, that absent an agreement with or forewarning to the seller or seller's attorney, it is improper for a closing attorney engaged by the purchaser to impose certain fees on the seller. LEOs 425, 647, 878, 911,<sup>1</sup> 922, 927, 1177, 1228, and 1346.

Your inquiry raises the question of whether these opinions apply if the seller is represented by a lay title company as opposed to a licensed attorney. The conclusion reached in these opinions was not based, however, on whether the seller was separately represented. As we stated in LEO 1346, "if purchaser's attorney undertakes to perform those functions on behalf of the seller, the fees for the services first must be adequately explained to the seller who must then, after consulting with his own attorney, consent to the charge before it can be imposed on the seller." LEO 1346 (1990). The committee believes that Rule 1.5 (b)'s requirement that fees be adequately explained to a client would require advance notice and agreement by the seller, **even if the seller has not engaged independent counsel**. In that case, the closing attorney would be representing the seller as well as the purchaser. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986) (When a lawyer acts as a closing or settlement attorney and no other lawyer is involved, the closing or settlement attorney represents all the parties and, in this limited sense, all the parties are his clients). Regardless of whether the title company is authorized to represent the seller, the seller must consent to the charges imposed by the closing attorney. This requires notice to the seller that he or she will be charged for certain fees or costs by the closing attorney sufficiently in advance of the closing. The purpose is to provide an opportunity for the seller, if he or she chooses, to avoid the imposition of charges for the performance of certain ministerial functions. LEO 1228.

<sup>1</sup> It is no longer permissible for the buyer's (or lender's) attorney to charge the seller for the preparation and filing of an IRS Form 1099-S. I.R.C. §6045 (e) (3). This provision overruled, in part, LEOs 911, 922 and 927.

In the companion opinion issued by the Standing Committee on the Unauthorized Practice of Law, that committee determined that the lay title company which is the subject of your inquiry could not lawfully undertake a legal representation of the seller. UPL Op. 197 (2000). The UPL committee opined that no employee of the title company is authorized to give legal advice to the seller nor prepare on the seller's behalf legal instruments affecting the title to real estate such as a deed or certificate of satisfaction. *Id.* Therefore, the UPL committee concluded that the closing attorney may regard the seller as unrepresented by independent counsel. This means, for example, that the closing attorney may communicate directly with the seller to obtain consent regarding the fees and costs the closing attorney intends to charge to the seller without violating Rule 4.2 of the Virginia Rules of Professional Conduct.<sup>2</sup>

As to your second inquiry, if the closing attorney complies with the instructions of the title company, the committee believes that the closing attorney would be assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. Rule 5.5 (a) (2). In the facts you present, the closing attorney would be disbursing to the title company payment for the preparation of the seller's deed, knowing that the title company is not authorized to practice law. Such conduct, in the committee's opinion, is violative of Rule 5.5 (a) (2).

With regard to your third and fourth inquiries, the committee agrees with the distinction drawn by the UPL committee in UPL Op. 197 between a lawyer who is an employee of the title company as opposed to a lawyer in private practice who simply owns the title company. If the seller were represented by a licensed attorney in private practice and that attorney also owns the title company, the attorney could properly advise the seller and prepare legal instruments on seller's behalf, subject to the ethical obligations discussed in LEO 1564 concerning lawyer-owned title companies. In contrast, if the attorney owns the title company but is working not as the seller's private attorney but on behalf of the title company, then that attorney should not be treated by the purchaser's attorney as representing the seller. Only an attorney engaged in private practice specifically retained by the seller may undertake legal representation of the seller. Similarly, if the licensed attorney is employed directly by the title company, and subject to its control, it would not be proper for the lawyer to provide legal services to customers of the title company. Rule 5.4 (a) prohibits the lawyer from sharing legal fees with the title company. Rules 5.4 (b) and (d) generally prohibit a lawyer from providing legal services or practicing law within a corporation owned by nonlawyers. Since the title company is not authorized by law to serve as the seller's legal representative at closing, the committee believes that the seller should not be regarded as represented by their own counsel.

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<sup>2</sup> In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

## LEGAL ETHICS OPINION 1744

### ATTORNEY RETURNING COURT-AWARDED FEES TO CLIENT IN PRO BONO REPRESENTATION

You have presented a hypothetical situation in which Lawyer A is an employee of a non-profit corporation which brings legal actions on behalf of clients. Lawyer B, a private practitioner, sometimes handles these cases at the request of the non-profit corporation on a pro bono basis, alone or as co-counsel with Lawyer A. Although no fee is charged, in some instances the legal actions result in court-awarded attorney's fees.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the non-profit corporation.

The appropriate and controlling disciplinary rule relative to your inquiry is Rule 5.4 (a) of the Virginia Rules of Professional Conduct<sup>1</sup> providing that:

A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
- (2) a lawyer who undertakes to complete unfinished legal business of a deceased, disabled, or disappeared lawyer may pay to the estate or other representative of that lawyer that portion of the total compensation that fairly represents the services rendered by the deceased, disabled or disappeared lawyer; and
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

The committee has previously opined that it is unethical for a lawyer who accepts a pro bono referral from a nonprofit organization to charge or collect a contingent fee for the representation. Legal Ethics Op. 1691 (1996). Thus, in the facts you present, it would be improper for the staff attorney (Lawyer A) or the pro bono lawyer (Lawyer B) to claim the court-awarded fees. In some situations, however, a cooperating attorney may contract for a reduced fee with the nonprofit organization and therefore be entitled to a part of the court-awarded legal fees. The issue remains, then, whether the lawyer may ethically agree to turn over all or part of the fees awarded by the court to the nonprofit organization that has sponsored the litigation. Rule 5.4 (a) is implicated because nonprofit organizations or

<sup>1</sup> The prohibition in Rule 5.4 (a) on sharing fees with a nonlawyer is substantially identical to its predecessor, DR 3-102 (A) of the Code of Professional Responsibility.

public interest groups are controlled, in whole or in part, by boards or governing bodies composed of nonlawyers.

Attorney's fees awarded to successful plaintiffs pursuant to statute are a significant source of funding for nonprofit public interest organizations. Typically, all such organizations require staff or cooperating attorneys to turn over all or a part of any court-awarded legal fees arising out of successful litigation sponsored by the organization. Roy Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L. J. 1069, 1070-71 (1989) (hereinafter "Simon"). A legal ethics rule prohibiting lawyers from sharing court awarded fees with public interest groups would jeopardize this important source of funding.<sup>2</sup>

The committee opines that there is no ethical impropriety in a lawyer's sharing court-awarded fees with the sponsoring pro bono organization. Rule 5.4 (d) states that a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if nonlawyers are in a position to exercise control over the professional judgment of a lawyer. Given the rule's history, development and reference to *for profit* associations of lawyers and nonlawyers, the committee believes that Rule 5.4 (a) does not prohibit an attorney sharing or turning over court-awarded attorneys fees to a nonprofit public interest group which sponsored the litigation.<sup>3</sup> The primary purpose of Rule 5.4 is to prohibit nonlawyer interference with a lawyer's professional judgment and ensure lawyer independence. The fact that the entity with which legal fees are shared is a nonprofit organization is significant given Rule 5.4 (d)'s language. In addition, the legal fees in question are court-awarded rather than paid by the client. In Legal Ethics Op. 1598 (1994), the committee concluded that the thrust of DR 3-102 (A) is that a lawyer and a nonlawyer enter into an agreement where fees received from one or more clients are shared with the nonlawyer. In the facts you present, there is no issue that the client will be charged an excessive fee, due to the nonlawyer's influence or involvement, since the client does not pay the fee and the court hears evidence and determines the amount of the fee to be awarded.

2 Professor Simon cited a study of nonprofit public interest groups revealing that at least nine percent (9%) of their budgets were funded by court-awarded attorneys fees. Simon, *supra* at 1074.

3 In Formal Opinion 93-374 issued by the ABA's Standing Committee on Legal Ethics, the committee analyzed Rule 5.4, reasoning that:

Paragraph (a), with its more general prohibition on a lawyer sharing legal fees with a lay person, must address some residual range of circumstances, not caught by the other, more specific paragraphs of the rule, where the sharing of fees alone, absent a partnership agreement or its equivalent, presents a significant threat to the lawyer's independence of judgment. That threat, presumably, must arise from the fact that the fee-sharing arrangement gives the lay participant both the incentive and the power to interfere in the lawyer's conduct of a matter.

4 *See*, ABA Formal Op. 93-374 (1993); Cleveland Bar Ass'n Op. 141 (1979) (staff attorney for organization dedicated to legal rights for women could agree to remit court-awarded fees as condition of employment); But *see*, *ACLU v. Miller*, 803 S.W.2d 592 (Mo. 1991) (organization had no enforceable right to court-awarded attorneys fees because this would constitute fee-splitting between participating lawyer and a nonlawyer); Maine Comm'n on Legal Ethics, Op. 69 (1986).

This Committee is of the opinion that it is not unethical for an attorney to participate with a nonprofit organization that requires participating attorneys to turn over court-awarded fees to the organization, notwithstanding Rule 5.4 (a) or DR 3-102 (A).<sup>4</sup>

Therefore, under the facts you have presented, Attorney A, as a condition of employment, and Attorney B, as private practitioner, may give court-awarded attorney's fees to the nonprofit corporation. Such conduct does not violate Rule 5.4 (a) of the Virginia Rules of Professional Conduct.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion  
June 27, 2000

### LEGAL ETHICS OPINION 1747

#### ATTORNEY BREACHING CONTRACT TO PAY MEDICAL BILLS OUT OF SETTLEMENT PROCEEDS (RECONSIDERATION OF LEO 1413 ISSUED JAN. 10, 1992)

You have presented a hypothetical situation in which a personal injury client [Client] sought medical treatment from Medical Group for injuries sustained in an automobile accident. Client did not have any health insurance coverage nor the means to pay for medical treatment. Client entered into an agreement with Medical Group authorizing Lawyer to pay directly to Medical Group sums due and owing for medical services rendered, and to withhold such sums from any settlement, judgment, or verdict as may be necessary to adequately protect Medical Group. Client also agreed to give a lien on his case to Medical Group against any and all proceeds of any settlement, judgment, or verdict which may be paid to Lawyer or Client as a result of the injuries for which he had been treated. Furthermore, Client agreed to be directly and fully responsible to Medical Group for all medical bills submitted for services rendered, and also agreed that payment was not contingent on any settlement, judgment, or verdict by which he might eventually recover such fee. Lawyer signed his name below language in the Agreement which stated that he agreed to observe all terms of the Agreement between Client and Medical Group and that he specifically agreed to withhold such sums from any settlement, judgment, or verdict as might be necessary to protect Medical Group. Medical Group provided treatment to client, deferred collection on Client's unpaid account, and cooperated with Lawyer by providing Lawyer with copies of medical bills and reports which Lawyer submitted to the tortfeasor's insurance carrier. In negotiating a settlement with the insurance carrier, Lawyer asserted that Medical Group's services and the fees charged were reasonable and necessary for the treatment of Client's accident-related injuries.

Lawyer subsequently received a settlement on Client's personal injury claim. Although Lawyer had received bills from Medical Group, he did not pay any of the settlement proceeds to Medical Group. Instead, Lawyer paid Medical Group's portion

directly to Client who said he was having financial difficulties and that he preferred to pay Medical Group directly. Ultimately, Client did not pay any portion of the proceeds to Medical Group as payment of their bill.

Under the facts you have presented, you have asked the committee to opine on whether it was ethical for Lawyer to pay over the proceeds to Client, rather than Medical Group, when Lawyer had agreed to pay Medical Group directly for services rendered and to withhold such sums from any settlement as might be necessary to protect Medical Group.

The rule applicable to your inquiry is Rule 1.15 (c)(4) of the Virginia Rules of Professional Conduct which provides:

- (c) A lawyer shall:
- (4) promptly pay or deliver to the client or another as requested by such person the funds, securities, or other properties in the possession of the lawyer which such person is entitled to receive.

Neither the former Code of Professional Responsibility nor the Rules of Professional Conduct specifically address the lawyer's dilemma when both the client and a third party claim entitlement to the same funds. In Legal Ethics Op. 1413 (1992) the committee addressed a situation identical to the facts you present. Applying DR 9-102 (B)(4), which is identical to Rule 1.15 (c)(4), the committee concluded that the determination of the ownership of the funds in question raised required a legal determination beyond its purview. *Id.* The committee also observed that the version of DR 9-102 (B)(4) in effect at that time seemed to address only the preservation of *client* funds, rather than funds ostensibly owed to some third party. While it is true that the caption for DR 9-102 was entitled, "Preserving Identity of Funds and Property of a Client," the full text of DR 9-102 imposed more obligations than simply preserving the identity of client funds and property.

Well before LEO 1413 was issued, the Virginia Supreme Court concluded, in the context of a settlement attorney handling a real estate closing, that the lawyer's fiduciary duties under Canon 9 extended to protecting funds owed to or claimed by third parties, and not simply the client. *Pickus v. Virginia State Bar*, 232 Va. 5, 348 S.E.2d 202 (1986) (decided under former DR 9-102). Pickus, a new attorney, allowed a coercive client, the seller, to receive directly the settlement proceeds without having determined whether a prior deed of trust lien on the subject real estate had been released. As things turned out, the prior lien had not been satisfied. The Court upheld the disciplinary board's finding that DR 9-102 had been violated, holding that DR 9-102 was promulgated to protect third parties as well as clients. 232 Va. at 14.

The committee believes that the issue is not who is "entitled" to the funds in the attorney's possession, but rather what does Rule 1.15 (c)(4) require when both the client and a third party claim a right to those same funds? The committee's answer is that the attorney must take a course of action that will protect

the interests of both the client and the third party. Thus it would be unethical for Lawyer to disburse the funds in question to the client when the client, by agreement or by law, is under a legal obligation to deliver those funds to another. *See* Alaska Bar Ass'n Ethics Op. 92-3 (1992) (lawyer may not follow client's instruction to disregard facially valid assignment or statutory lien in favor of third party; lawyer should advise client that he will withhold funds until dispute is resolved). The committee believes that a lawyer's obligations under Rule 1.15 (c)(4) do not extend to all general creditors of the client, but only those persons who have an interest in the settlement proceeds either by law or assignment.

Comment [3] to Rule 1.15 offers some guidance:

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

If a third party has a valid statutory lien,<sup>1</sup> contract or court order that grants an interest in the settlement proceeds, the lawyer may not ignore the third party's interests and deliver the funds in question to the client, even if the client directs the lawyer to do so. *See Aetna Casualty & Surety Co. v. Gilbreath*, 625 S.W.2d 269 (Tenn. 1981) (lawyer has duty to honor employer's statutory workers' compensation lien against settlement with third party); California Formal Ethics Op. 1988-101 (lawyer whose client agreed to pay recovery proceeds to health care provider may not ignore agreement and disburse all funds to client upon client's instruction); Maryland Ethics Op. 94-19 (1993) (lawyer must disregard client's instruction not to pay creditor when client had valid assignment with creditor); Ohio Ethics Op. 95-12 (1995) (lawyer must disregard client's instruction not to pay physician when client had earlier agreed to pay medical bills from settlement proceeds); and South Carolina Ethics Op. 94-20 (1994) (if lawyer knows that client has executed valid doctor's lien he may not comply with client's instruction to disregard it; no principle of confidentiality or client loyalty permits lawyer to violate ethical obligations owed to third parties).

By the same token, a lawyer should not disburse the client's funds to a third party if the client contests such action. *See*

<sup>1</sup> A physician, registered nurse, registered physical therapist and private and public hospitals have a statutory medical lien on the personal injury claim of any patient who is treated by such health care providers for injuries caused by the negligence of another. The physician, nurse, or therapist has a lien up to \$500. The hospital lien is protected up to \$2000. A pharmacy that fills prescriptions for medicine prescribed by a health care provider is protected as well up to \$500. Va. Code §8.01-66.2 (Michie 1999). If the client's employer paid workers' compensation benefits, the employer may have a workers' compensation subrogation lien against a recovery from a third party tortfeasor. Va. Code §65.2-310 (Michie 1995).

Connecticut Informal Ethics Op. 95-20 (1995) (lawyer cannot pay money over to creditor over client's objection); Pennsylvania Bar Ass'n Ethics Op. 92-89 (1992) (lawyer, whose client was ordered to pay child support arrearage, cannot release funds from real estate sale without client consent).

The committee opines that a lawyer who knows that his client has made a valid assignment of rights to the proceeds of a settlement or has allowed for the creation of a consensual lien on the settlement cannot disregard the third party assignee or lienholder's rights, notwithstanding a client's directive to do so. Rule 1.15 recognizes circumstances in which a lawyer may refuse to surrender property or funds to a client when a third party asserts what appears to be a valid claim to such property or funds. In your hypothetical, Lawyer is charged with notice of Client's assignment to Medical Group

since Lawyer also signed the Agreement. The lawyer's ethical duty does not require Lawyer to make a legal determination as to who is entitled to the proceeds, only that Lawyer protect the interests of both the client and the third party who appear to have conflicting claims to the funds or property. It is the opinion of the committee that if a dispute arises concerning the rights of third parties to funds held by the attorney on behalf of a client, the attorney must segregate the amount in dispute until the dispute can be resolved. If the dispute cannot be resolved, the attorney may interplead the funds into court and request that the court determine the legal entitlement to the funds. *See* Alabama Bar Ethics Op. 90-48 (1990) (lawyer whose client executed assignment of proceeds to chiropractor but later instructed lawyer to disregard assignment should interplead the disputed funds into circuit court in order to establish the rights of the parties).

In conclusion, the committee opines that it was unethical for Lawyer to disburse funds to Client where Client had agreed to pay such funds to Medical Group out of the settlement proceeds and that Lawyer should have withheld or interpleaded the disputed funds assuming Client would not authorize payment to Medical Group. To the extent that this opinion is inconsistent with LEO 1413, that opinion is hereby overruled.

Committee Opinion  
June 26, 2000