

LEGAL ETHICS OPINION 1732

CONTRACT BETWEEN LAW FIRM
AND ATTORNEY/EMPLOYEE
REQUIRING PAYMENT TO FIRM OF A
PERCENTAGE FROM ANY
CONTINGENCY FEE CASE
ATTORNEY/EMPLOYEE TAKES WITH
HIM IF HE LEAVES THE FIRM.

You have presented a hypothetical situation in which an attorney worked for a law firm in which the attorney was required to enter into a written employment agreement. The employment agreement included a fee-splitting arrangement in the event that the attorney left the firm and took clients with him which had retained the firm on a contingency fee basis. The agreement provided that if the attorney settled a client's contingency fee case within six months after leaving the firm, the attorney must share with the firm 80 percent of the fee collected. The attorney would owe the firm 65 percent of the total fees collected for any case settled within seven to twelve months after the attorney left the firm. For any case settled more than twelve months after the attorney left the firm, the attorney must share 50 percent of the total fees collected with the former firm.

This agreement made no provision for client consent to the fee splitting arrangement. In addition, the firm never disclosed the terms of the fee-splitting arrangement with any client. The attorney left the firm to join a new law firm and has settled some contingency fee cases which fall within the scope of the fee splitting agreement with the old firm. The old firm has demanded that the new firm honor the provisions of the fee-splitting agreement.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the fee-splitting agreement and the new law firm's ethical obligations with respect to payment of the fees demanded by the old law firm.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-105(D) which sets out the requirements for fee-sharing between attorneys who are not members of the same law firm; and DR:2-106(A) which prohibits a lawyer from entering into an agreement that restricts the right of the lawyer to practice law.

The committee has previously opined that DR:2-105(D)'s provisions concerning fee-sharing permit the division of fees among lawyers not in the same firm only if all three requirements are met: (1) the client must consent to the employment of additional counsel; (2) both attorneys must assume responsibility to the client; and (3) the terms of the agreement must be disclosed to the client and the client must consent thereto. In the context of a fee-splitting agreement between a departing lawyer and his former law firm, the committee has previously expressed the view that such arrangements cannot meet the requirements under DR:2-105(D). There is no expectation that the old law firm would assume responsibility to the client following the attorney's departure from the firm. Nor is it likely that the client would have agreed, when the client first engaged the old law firm,

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to the employment of additional counsel or to the division of fees. LE Op. 1232, LE Op. 1404 and LE Op. 1556. Even if such expectation were reasonable, there was no client consent obtained under the facts of your inquiry.

In LE Op. 1556 the Committee opined that it is improper to contractually obligate the departing attorney who takes clients of the firm with him to share his post-withdrawal fees collected for such clients with the old law firm. The committee also opined that such agreements improperly restrict the departing attorney's ability to practice law:

[T]he interjection of a fee [to the firm from which the lawyer withdrew] obviously impairs the creation of a lawyer-client relationship between the departing lawyer and the client of his former firm. The impairment arises on both sides of the transaction. The attorney may be unwilling to work at substantially reduced rates for even his best clients, and pressure against acceptance in favor of clients paying full value to the firm would arise within the new [firm employing the departing lawyer]. The attorney would thus be compelled to decline employment and the client would be deprived of the attorney of his choice.

LE Op. 1556. Therefore, in addition to violating DR:2-105(D), the committee believes that the agreement in your hypothetical creates an improper financial disincentive which has the effect of penalizing the attorney for leaving and competing with the old law firm and impairs the client's right to select counsel of his choice, in violation of DR:2-106(A).

In the facts you present, the committee believes the fee-sharing agreement violates DR:2-105(D) and DR:2-106(A). The committee does not opine on whether the fee-sharing agreement is enforceable since this is a question of law beyond its purview.

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Legal Ethics Committee Notes. – Rule 1.5(f) allows fee sharing between lawyers formerly associated in a law firm, with no requirement for client consent.

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