



**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(c), 5.4(a)-(c), 5.5(a), 7.2(b), and 7.3. 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. 93-11
March, 1994**

Topic: Professional Independence: Retention of legal services by a third party; division of fees

Digest: An attorney may be retained to render services for a client by a third party. The party must be authorized to retain the attorney and the attorney's judgment must not be directed or regulated by the third party. The third party must be paid on either an hourly or contingent fee basis by the client and the attorney must not share fees with a non-attorney third party.

Ref.: Illinois Rules of Professional Conduct: Rule 1.5(c); 5.4(a), (b), and (c); 5.5(b); 7.2(b); 7.3
ISBA Opinion Nos. 87-2, 91-3 and 89-17

FACTS

I. A business located in another state consisting of non-attorneys solicits individuals who may have interests in estates. Upon finding a previously unknown or unfound heir, the business seeks a contingent fee agreement from the individual based upon the assignment to the business of a percentage of the recovery from the estate. The business agrees to assist the individual in the securing of the recovery. In many cases, legal proceedings are necessary to determine the heir's rights and to protect the interests of the heir. The business has asked an Illinois attorney to represent the heir.

II. Security brokerage account agreements commonly contain mandatory arbitration clauses governing disputes between the customer and the broker. Applicable regulations of the New York Stock Exchange and the National Association of Securities Dealers permit non-attorneys to represent the customer in proceedings before those agencies. Non-attorneys, as well as attorneys, are bound by the rules of the exchanges and the NASD. An arbitration firm based outside Illinois and consisting of non-attorneys specializes in such representation, and advertises its services in the media. Its fees are based on a contingent fee agreement with the customer, calling for a fee of between 20% and 30% of any recovery, plus a deposit for investigative expenses. The arbitration firm does not represent or advertise that it performs legal services, but its fee agreement recites that it will pay any necessary legal fees.

The arbitration firm has asked an Illinois attorney to represent its customer in a brokerage dispute before the NYSE. It agrees to pay the attorney's hourly fee, and payment is not contingent upon success of the undertaking.

QUESTIONS

I. Is it permissible for an attorney to accept representation from an estate beneficiary search business or for such business to direct its client to a particular attorney if the business is paying the attorney's fee?

Is it possible for the attorney to enter into an agreement with the heir for a percentage contingency fee which would be separate and distinct from percentage fee to be paid to the business?

In each of the questions above, there is no referral agreement between the business and the attorney.

II. Is it permissible for a securities arbitration firm to pay legal fees to an attorney for services rendered on behalf of the client where such fees may serve to reduce the fees of the arbitration firm?

May an arbitration firm direct its customer to a particular attorney where there is no agreement between the firm and the attorney calling for such referrals?

May the attorney enter into a separate contingent fee agreement with the customer with a corresponding reduction in the arbitration firm's contingent fee?

OPINION

It is not uncommon that an attorney is asked by a third party to perform legal services for a client or that the attorney's fee is paid by the third party. In ISBA Advisory Opinion No. 87-2, the Committee cautioned that the attorney must be satisfied that the purported agent has authority to retain the attorney and to perform legal services for another since an attorney-client relationship is thereby created between the attorney and the person for whom services are to be performed. We reiterated that admonition in Opinion No. 91-3.

In all such cases, the attorney must not permit the person who recommends, employs, or pays the attorney to render services for another to direct or regulate the attorney's professional judgment in rendering such services. (See Rule 5.4(c), Rules of Professional Conduct, and ISBA Opinion No. 89-17.)

The facts indicate that the business shall represent the heir in the securing of inheritance. The attorney should take caution to review the actions of the business in its "representation" to assure that those actions do not include the practice of law. It is presumed that the rights of inheritance are not assigned to the business for valuable consideration and thus the business is not the real party in interest. Efforts by the business may be the unauthorized practice of law. If it is so determined, the services of lawyer result in the assisting of a non-attorney in the unauthorized practice of law, a violation under Rule 5.5(b).

Though many of the actions of the arbitration firm are similar to actions which would be taken by attorneys in representation of clients in arbitration, such action is sanctioned by Federal regulations. Thus, due to federal preemption of state laws in this area, participation by an attorney in conjunction with such action by a non-attorney could not be considered assisting in the unauthorized practice of law.

With respect to the referral of matters by the arbitration firm to the attorney, there is no impropriety assuming that the attorney does not give anything of value to the firm for recommending the attorney as proscribed by Rule 7.2(b). Depending upon the relationship between either the arbitration firm or the search business and the attorney, the solicitation of clients by a third party may be in violation of Rule 7.3.

The arrangement regarding the attorney entering into a contingent fee agreement with the brokerage customer appears to reduce the fee of the arbitration firm. However, the fee of the attorney is not reduced or shared with the arbitration firm. While Rule 1.5(c) permits contingent fees, the sharing of legal fees with a non-attorney is prohibited by Rule 5.4(a). (It may also be argued that the arrangement suggests a partnership between an attorney and a non-attorney where at least some of the partnership's activities consist of the practice of law, prohibited under Rule 5.4(b). As long as the attorney does not divide his or her fee with the arbitration firm, the Committee concludes that such an arrangement would be professionally proper.

If the attorney enters into a separate contingent fee agreement or hourly fee agreement with the heir, which does not depend upon the contingent fee agreement with the search business, or the business's fee would not be modified by the work done by the attorney, such an agreement would be proper. Similarly, if the work to be done by the attorney was paid for by the business on an hourly basis, and the retention of the attorney was approved by the heir, such an agreement would also be proper.

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