

Advisory Opinion 1985-12

ISSUE

May an existing partnership split or pay 5% of its gross fees collected by the partnership with a former partner, who either will turn in his license to practice law in an unrelated matter or be suspended or disbarred, in light of, the prohibition against dividing legal fees with a non-lawyer?

FACTUAL SITUATION

A legal partnership was dissolved. The remaining members to the partnership entered into an agreement with a former partner under a Buy-Out Agreement to pay the former partner 5% of the gross fees collected by the partnership for a period of two years. The partnership has been paying the former partner 5% of gross fees collected pursuant to the Buy-Out Agreement. Now, a situation arises where the former partner may turn in his license or be suspended or disbarred from the practice of law in New Mexico. The partnership is concerned about continuing to pay a percentage of gross fees collected to a former partner who arguably becomes a non-lawyer if he is unable to practice law in the State of New Mexico. The partnership wants to know if there is a violation of Rule 3-102, which prohibits the dividing of legal fees with a nonlawyer except in certain circumstances.

OPINION

Clearly, a division of fees among lawyers is permitted under the Code of Professional Responsibility. Rule 2-107 states:

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) the client consents to employment of the other lawyer after a full disclosure that a division of fees will be made;

(2) the division is made in proportion to the services performed and responsibility assumed by each;

(3) the total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This disciplinary rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

So long as the former partner remains a licensed attorney, the Buy-Out Agreement, if otherwise proper, is permissible under 2-107.

The propriety of the Buy-Out Agreement is not necessarily affected by the resignation, suspension or disbarment of the former partner. The relevant disciplinary rule is 3-102. It is found in Canon 3 which requires that a "lawyer should assist in preventing the unauthorized practice of law." Rule 3-102 provides that"

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

(1) An agreement by a lawyer with his firm, partner or associate may provide for the payment of money, over a reasonable period of time after his death, to his estate or to one or more specified persons:

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

It is contemplated by the disciplinary rule that a lawyer can make an agreement with his partnership to pay him money over time for legal services he performed, or in consideration for other services performed for the law firm, even after his death to his estate or to persons he may specify. The actual payment by the law firm to the lawyer's estate or another

specified person would be to a non-lawyer, but the monies paid would be for consideration flowing to the law firm during the time the deceased lawyer performed services. The situation is similar with a lawyer who executes a Buy-Out Agreement with his former law firm that will pay him money over time for services he performed while with the law firm and other consideration flowing to the law firm for which he will be receiving payment in the future. There is little difference between payment of monies by a law firm to a deceased partner's estate and payment to a former partner of a percentage of fees collected in the future for a reasonable period of time as part of a Buy-Out Agreement when the former partner turns in his license, is suspended or disbarred. The legal services or other services performed or contributions made by the former partner have occurred in the past and he is merely receiving deferred payment for those services performed in the past for the law firm as part of a Buy-Out Agreement. His suspension or disbarment does not prohibit his collection for services previously rendered while a licensed attorney.

Several decisions in other jurisdictions support this conclusion. The case of *Reardon v. DeBlasio and Meagher*, N.Y. Sup. Ct., April 9, 1984, (ABA/BNA Lawyer's Manual p. 200) is directly on point. A suspended attorney who had performed substantial services for a client in a case prior to his suspension and unrelated to his suspension was entitled to recover a portion of a contingent fee from an attorney to whom he had referred the case and who had agreed to pay the forwarding attorney one-half of the fee collected upon final resolution. The forwarding attorney did substantial work on the case prior to its referral and accompanied the client to trial counsels office and participated in the consultation. He further made himself available to do whatever was asked of him throughout the litigation and continued as the claimant's attorney of record. The forwarding attorney was subsequently suspended temporarily from the practice of law when he acted unprofessionally in another setting. Local appellate division rules in New York specifically allowed payment for services rendered by counsel prior to any suspension as long as the errant attorney's conduct in connection with the case involving the claim for fees was not part of the disciplinary proceedings leading to his suspension. See also, *Marett v. Schneider, Klein & Weitz, P.C.*, N.Y. Sup. Ct., June 18, 1985 (ABA/BNA Lawyer's Manual p. 864) (permitting a disbarred lawyer to recover one-third of the net legal fee from a trial attorney where the disbarred attorney had, prior to disbarment, forwarded the tort case to the trial attorney and entered into a contingency fee arrangement with the trial attorney, having completed performance of his agreed-upon services prior to disbarment for conduct in an unrelated case).

In Opinion 80-2, ABA/BNA Lawyer's Manual § 801:6301 (N.Y. undated), it was held that a lawyer may pay a partner, withdrawing from his firm, the worth of the withdrawing partner's services in existing cases and the approximate value of those cases, in the form of a payout over a period of years whether the compensation is for the withdrawing partner's past services to the firm or is based on anticipated future earnings of the firm in cases with the firm prior to the partner's withdrawal. See, e.g., ABA/BNA Lawyer's Manual *Opinion 83-5*, § 801:6206 (N.Y. 1983); *Opinion 343*, § 801:6612 (N.Y. 1984); *Opinion 83-F-50*, § 801:8109 (Tenn. 1983); *Opinion 19*, § 801:1104 (Ala. 1982) (a division of fees with a suspended lawyer for services rendered before the suspension would not be aiding or encouraging nonlawyers to practice law). The crucial issue in any division is to make sure that such division is in proportion to the services performed or the responsibility assumed. *Informal Decision 628* (1962).

In the present request, it appears the Partnership's payout would be based on a Buy-Out Agreement between a former partner and the partnership of a percentage of gross fees to be collected in the future, but paid to the former partner for his work with the former partnership. It further appears that the former partner performed substantial services or made contributions to the firm in connection with the monies he will be receiving in the future as part of being bought out. If the Buy-Out Agreement covers fees in future cases which were not with the firm before the partner's withdrawal or which the former partner performed no services and assumed no responsibilities, the Committee believes this arrangement is prohibited under Rules 2-107 and, 3-102 whether the attorney was licensed, suspended, disbarred or had resigned.