

**THE PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE**

Opinion 2011-1  
(June 2011)

The inquirer is a lawyer who was engaged to represent a client in connection with a motor vehicle accident in which the client was injured. The inquirer was discharged after representing the client for a period of time, and another attorney (“Second Lawyer”) was engaged to take over the representation. When the inquirer was discharged no agreement was reached as to how he would be compensated for the work he had done on the matter up to that time.

After the Second Lawyer had handled the matter for a period of time, he withdrew as counsel, apparently because he realized he had a conflict of interest. The circumstances that led to the creation of the conflict, when the conflict first arose and the timing of the realization that there was a conflict are unclear. By the time he withdrew, the Second Lawyer had incurred expenses in the matter, some of which, in the inquirer’s view, were necessary and some of which were not. The Committee has not seen the Second Lawyer’s fee agreement with the client.

The client returned to the inquirer for representation to complete the matter. The client entered into a fee agreement with the inquirer which provided that the client agreed to pay up to 40% of the gross recovery in the case to the inquirer (the precise amount depended on the stage at which the case was resolved) and stated that “any claims of fees from other attorneys shall be deducted from this fee.” Since the client signed that agreement, it is clear to the Committee that the client was fully aware of the fact that the fee to be paid to the inquirer pursuant to this agreement would in fact be shared with the Second Lawyer and that no objection thereto was raised by the client. There was no upward limit put on the obligation of the inquirer to pay the Second Attorney out of that fee.

The case was resolved and pursuant to the fee agreement between the client and the inquirer, the fee due from the client is \$80,000, or 40% of the \$200,000 recovery. At some point thereafter, in a conversation with the inquirer, the Second Lawyer indicated that he had calculated a *quantum meruit* fee and that amount was almost equal to the entire recovery in the case, based on the number of hours he spent on the matter (prior to his withdrawal), multiplied by an hourly rate.

The inquirer’s fee agreement also addresses the reimbursement of expenses, and provides that any expenses of suit were to be paid out of the client’s share. The inquirer incurred some expenses in connection with the suit, and, as noted above, the Second Lawyer incurred some expenses which were not reimbursed when the Second Lawyer was discharged. It is not clear that the inquirer’s fee agreement covers those expenses.

Notwithstanding that the client signed a fee agreement that made it clear that the Second Lawyer would be paid at least some portion the inquirer's fee, the client now indicates that he may not now want the inquirer to pay the Second Lawyer anything, nor to reimburse the Second Lawyer's expenses.

The inquirer asks several questions:

- 1) whether he has a duty to escrow funds from the recovery to pay the Second Lawyer;
- 2) whether the client may instruct the inquirer to not pay the Second Lawyer any fee and prohibit reimbursement of Second Lawyer's costs;
- 3) whether, assuming the Second Lawyer's conduct created the conflict of interest that led to the requirement that he withdraw from the case, such a circumstance may change the obligations on the part of the client and/or the lawyer to pay the Second Lawyer any amount of the fee, or reimburse his expenses.

Pennsylvania Rule of Professional Conduct (the "Rules") 1.5, **Fees** provides in part that,

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee...

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

(1) the client is advised of and does not object to the participation of all the lawyers involved, and

(2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

Rule 1.15f provides in part that,

(f) When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property, including Rule 1.15 Funds, as to which the interests are not in dispute.

The Committee finds that the inquirer does have a duty to escrow the fee and any disputed expenses which have not already been paid over to the Second Lawyer. It is clear that the inquirer agreed with the client that the Second Lawyer's fee would be paid out of the inquirer's fee. In addition, the Second Lawyer has made a claim for payment of a fee.

For that reason, all of the funds constituting the fee qualify under Rule 1.15(f) as "funds or property in which two or more persons, one of whom may be the lawyer, claims an

interest”, and must be kept separate until the dispute over the fee to be received by each attorney is resolved. In addition, all disputed expenses incurred by the Second Lawyer should be deducted from the client’s recovery and escrowed as well.

The Committee is of the opinion that the total fee of both lawyers cannot exceed the percentage provided for in the inquirer’s fee agreement, which in this case comes to \$80,000. Payment by the client of a larger fee, regardless of the amount received by each attorney, would clearly be in violation of Rule 1.5a. The Committee will not opine as to how the fee ought to be divided since this is a factual and legal issue outside the purview of the Committee’s charge. Indeed, it is because of this that the Committee has advised that the fee must be kept in escrow as required by Rule 1.15(f) until the dispute is resolved.

Whether the inquirer must refuse to pay the Second Lawyer anything if the client instructs him not to do so, the Committee believes that the inquirer is not obligated to abide by the client’s instruction, because of the notice regarding the fee splitting included in the fee agreement with the inquirer, to which the client raised no objection (thus meeting the requirement of Rule 1.5e) and in fact affirmatively agreed to by signing the fee agreement.<sup>1</sup> Plainly, the client was fully aware of the fact that the fee to be paid to the inquirer pursuant to this agreement would be shared with the Second Lawyer. Furthermore, assuming that the total fee is limited to the 40% set forth in the Fee Agreement, that total fee is not illegal or clearly excessive and the Committee notes there is no indication that the client contends otherwise. For that reason the division of the fee between the two lawyers is permissible under Rule 1.5(e).

However, the inquirer poses the question of whether, having made that agreement at the time of the inquirer’s second retention in the matter, the client can revoke it, presumably because he changes his mind. The Committee believes that if a client approves the division of the fee unambiguously, on the basis of full disclosure, the client’s subsequent change of heart without more, does not render the division ethically improper under Rule 1.5. In addition, the client agreed to pay reasonable expenses in his agreement with the inquirer.

In this inquiry, no reason is given as to why the client has changed his mind on this issue. It is plain that the client knew that the Second Lawyer was withdrawing and that the reason was a conflict of interest, and notwithstanding those facts, approved the division of the fee. It is difficult to imagine some other material fact that he might not have known. Still, it is possible that the client might have discovered some conduct on the

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<sup>1</sup> The Committee notes that should the inquirer and the Second Lawyer not reach an agreement as to how to divide the \$80,000 fee, the client might attempt to join as an interested party before whatever body resolves the fee division dispute between the inquirer and the Second Lawyer. However, such joinder, and whether it is even possible would fall into an area of substantive law, and is thus outside the purview of this Committee’s opinion. The Committee does note however, that the dispute at hand is one between the two attorneys and whatever its resolution, the result will not change the net recovery to the client.

part of the Second Lawyer (i.e. malpractice, dishonesty) which might have led to a different decision. In such a case, the client might successfully contend that he would have objected to the fee division had he known about that other conduct. However, the Committee has no evidence that the client makes such a claim.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.