Advisory Opinion 1984-13

The Advisory Opinions Committee has received a request for an opinion from an attorney who is in-house legal counsel for a bank. One of the bank's functions is making loans to borrowers. When special documentation is required for a loan because of its size or complexity, the bank retains an outside law firm to prepare the documentation and handle the closing of the loan. The law firm represents the bank, not the borrower, but the bank requires the borrower to pay the firm's legal fee as a part of the cost of obtaining the loan. On occasion, the in-house attorney will prepare the documentation and handle the closing of the loan. The bank will charge the borrower a fee, described as a documentation fee, for the attorney's services. The bank bills the borrower and receives the fee; the attorney receives only her salary. The fee charged to the borrower never exceeds the attorneys salary for the time spent on the loan plus a reasonable amount for overhead. Borrowers are made aware that the attorney represents the bank and is not providing legal services, except incidentally, for the benefit of the borrower.

The attorney poses two questions:

1. If the bank is engaging in the unauthorized practice of law by charging borrowers for the in-house attorney's services?

2. Is the attorney improperly "dividing fees with a non-lawyer" by acquiescing in the bank's billing for her services?

It is not the function of this Committee to pass upon the question of whether the bank under these circumstances is engaged in the practice of law, that being a question of law. ABA Informal Decision 544 (1962). Therefore, this question will be referred to the Committee on the Unauthorized Practice of Law for their consideration.

The second question is properly before this Committee. As analyzed below, the Committee concludes that it is ethical and proper for the attorney to participate or acquiesce in the bank's billing for her services.

ANALYSIS:
The pertinent code section under consideration is Rule 3-102, which says, "A lawyer or law firm shall not share legal fees with a non-lawyer .... 11 There is ample authority which holds that fee-splitting with a non-lawyer is prohibited. *National Treasury Employees Union v. U.S. Department of Treasury.* 656 F.2d 848 (D.C. Cir. 1981) (where union which provided legal counsel for a member under a pre-paid legal service plan could not receive attorney's fees greater that the amount actually expended to represent the member); ABA Formal Opinion 10 (1926) ("An attorney who is a salaried trust officer of a bank may not ethically accept employment to represent the bank in proceedings involving the bank as trustee for minor heirs .... [because] a lawyer may not share his professional emoluments with a layman or lay agency and may not properly accept employment from a lay intermediary with the knowledge that such lay intermediary is profiting or expecting to profit from his professional service."); ABA Formal Opinion 157 (1936) ("where a promissory note contains a stipulated amount for attorney's fees in the case of collection and the court adopts that figure as attorney's fees, it is improper for the lawyer to accept less than that amount for his services .... otherwise stated, the attorney cannot properly divide with his client the amount awarded by the court as attorney's fees.").

In an ABA informal decision with facts similar to the request now before the Committee, the ABA committee concluded without analysis that it is unethical for an attorney to participate in a practice where the attorney is paid a salary by the bank not related to fees collected by a bank from a borrower, and that bank keeps the fees charged to the borrower. ABA Informal Decision 544 (1962). The specific facts involved a lender who employed an Attorney to consummate its mortgage closing transactions. The attorney's services included title examination, document preparation and attendance at closing. It is not clear if the attorney was a full-time employee of the lender.

In contrast, recent authority at least inferentially supports the view that the factual situation described in this request is not in violation of Rule 3-102. In ABA Informal Opinion 1451 (1980), the Committee was presented with the following situation. The lawyer was a full-time salaried employee of a bank. Among his duties was the examination of real estate titles in order that the bank may have advice and assurrance as to the quality of real estate security for loans. The bank charged its borrowers a loan fee that the bank denominated as attributable to title examination. The lawyer's duties also included representation of the bank in litigation, such as actions to collect debts or to enforce security interests. The Committee concluded that there was no violation of the ABA Model Code of Professional Responsibility. Unfortunately, there is no discussion or analysis of how that conclusion was reached.

The recently adopted model Rules of Professional Conduct (August 2, 1983) likewise do not contain or impose an absolute prohibition of fee-splitting in a situation as presented here. The commentary to Rule 5.4 states that the purpose underlying traditional limitations on sharing fees is to protect the lawyer's professional independence of judgment. The authority cited above in opposition to the sharing of fees strongly suggests that another reason for limitations on sharing fees is that there is something inherently unfair about an employer receiving a profit or windfall from a charge or an award of attorney's fees.

The Committee notes that under the facts presented in this request, the fee charged for the attorney's services does not exceed her salary, so that the bank is not making a profit on her services. Furthermore, the attorney is providing services for the bank, not the borrower. The bank is her employer and she is receiving a salary, which she does not share, for her services to the bank. The relationship between the attorney and the bank in this case is essentially that of a master and servant rather than that of attorney and client. As an employee, her only duty is to the bank. As a lawyer, she owes a duty to the court and to the public, as well as to the client. *See* ABA Formal Opinion 10 (1926). In the present factual situation, the attorney is not put into a position where she must act in dual capacities as employee and lawyer at the same time and perhaps inconsistently.

The facts also do not indicate any interference with the independence of her judgment in preparing documentation and handling the closing of the loan. She apparently is free to exercise her independent judgment as an attorney for the benefit of the interests she represents, which she could not be expected to do if she was under the domination of a third party as its salaried servant.

The Committee believes that the attorney's conduct is ethical and proper under the circumstances. Questions of fee sharing between in-house legal counsel and an employer are by no means clear cut. We are mindful that factual situations may arise which may constitute improper fee sharing. Until such time as the fee sharing rules are re-thought and more clearly defined, the attorney is advised to review the authorities cited herein if confronted with a questionable factual situation and request another advisory opinion.