

ETHICS OPINION 2013-01

QUESTION:

May an attorney share legal fees with a non-lawyer earned while prosecuting a BP¹ claim?

ANSWER:

No. The sharing of a legal fee with a non-lawyer while prosecuting a BP claim violates Rules 5.4(a), 5.5, and 7.2(c) Ala. R. Prof. C.

DISCUSSION:

The Office of General Counsel has received numerous requests for opinions regarding the handling and filing of claims administered by the BP Claims Program on behalf of clients of accountants, accounting firms, and persons holding themselves out as adjusters, public adjusters, and consultants. Specifically, a number of Alabama attorneys have been approached by the above-described groups regarding the handling and filing of BP Claims for those groups' clients. In many instances, these groups propose referring their clients to the Alabama lawyer in exchange for a portion of any contingency fee obtained by the lawyer or upon an agreement that the lawyer will protect the referring person's fee in the matter. The Disciplinary Commission is issuing this formal opinion in an effort to provide guidance regarding the Alabama Rules of Professional Conduct and the prosecution of BP claims.

As a starting point, Rule 5.4(a), Ala. R. Prof. C., states as follows:

Rule 5.4 Professional Independence of a Lawyer

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

¹This process is governed by the "Deepwater Horizon Economic and Property Damage Settlement Agreement" (as amended). See, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, Doc. 6430-1 (E.D. La. filed May 3, 2012). On the Official Court-Authorized Website at www.deepwaterhorizoneconomicsettlement.com, one can find much of the information regarding the Settlement Agreement (as amended) including: 1) the Settlement Agreement; 2) Claim Forms; 3) the Claims Administrator's "Policy Decisions" interpreting the Settlement Agreement; 4) Court Orders interpreting the rights of the parties and/or administering the Settlement Program; and 5) Rules Governing the Appeals Process which includes the right to appeal directly to the District Court.

At the Home tab of the Court's Website is the following statement: "The Economic & Property Damages Settlement resolves certain economic loss and property damage claims related to the 2010 Deepwater Horizon oil spill." (See, Official Court-Authorized Website, www.deepwaterhorizoneconomicsettlement.com).

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's 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; and

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

In addition, Rule 7.2(c), Ala. R. Prof. C., provides:

Rule 7.2 Advertising

A lawyer who advertises concerning legal services shall comply with the following:

* * *

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service.

Both Rules 5.4(a) and 7.2(c), Ala. R. Prof. C., prohibit attorneys from sharing legal fees with non-attorney and/or paying a non-lawyer anything of value in exchange for a referral of a legal client. The argument raised by some concerning the prosecution of BP claims is that the filing and prosecution of a BP claim is not the practice of law and, therefore, the ethical prohibitions prescribed by Rules 5.4(a) and 7.2(c) do not apply. The Disciplinary Commission disagrees.

In the opinion of the Disciplinary Commission, the filing or prosecution of BP claims on behalf of another is the practice of law. Section 34-3-36, Ala. Code 1975, states:

Whoever,

(1) In a representative capacity appears as an advocate or **draws papers, pleadings, or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission, or officer**

constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or

(2) **For a consideration**, reward, or pecuniary benefit, present or anticipated, direct or indirect, **advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document, or instrument affecting or relating to secular rights;** or

(3) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect, **does any act** in a representative capacity on behalf of another tending to obtain or secure for such other the prevention or **the redress of a wrong or the enforcement or establishment of a right;** or

(4) As a vocation, **enforces, secures, settles, adjusts, or compromises defaulted, controverted, or disputed accounts, claims or demands** between persons with neither of whom he or she is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.

Ala. Code § 34-3-6 (1975) (emphasis added). An understanding of the BP claims process is fundamental to our conclusion that any person prosecuting a BP claim without a license to practice law is, in fact, engaging in the unauthorized practice of law.

The claims process begins with counseling regarding the claimant's rights under the Settlement Agreement and follows with completion of the appropriate Claim Form. Examples of potential claims include Seafood Compensation, Individual Economic Loss, Business Economic Loss, and certain real property claims. Because the Claim Form becomes an integral part of the record for the claimant and answers provided therein may be prejudicial to the claimant's rights, one must have an understanding of the terms of the Settlement Agreement, the Claims Administrator's "Policy Decisions" interpreting the Settlement Agreement, as well as Judge Barbier's and Magistrate Shushan's Orders interpreting the rights of the parties, including the parties' rights, obligations, filing deadlines, the preclusive effect of procedural defects in the parties' submissions, and the nature of the claims released by participating claimants. The Settlement Agreement includes over 1,000 pages of exhibits detailing the requirements for qualification, applicable causation tests depending on the claimant's qualifications, the authority of the Claims Administrator to consider evidence or other matters with respect to eligibility, causation or economic damages, and the rights and procedures for appealing eligibility, causation, and damage determinations.

Pursuant to Ala. Code § 34-3-6, Ala. Code 1975, non-lawyers cannot perform any act for an Alabama resident or business in connection with the BP Claims Program which constitutes advising or counseling another as to their legal rights or seeking redress

of a wrong. However, the prosecuting of BP claims via the process described above would be directed to the enforcement, securing, settling, adjusting or compromising a claim. Under these circumstances, it is impossible for a non-lawyer to assist an Alabama claimant in the BP Claims Program without having to communicate and explain the Settlement Agreement and the BP Claims Program as well as the rights and obligations of the parties.

Additionally, depending on the type of claim involved, the claimant is required to present specific information relating to their potential claimant status. In a business economic loss claim, for example, the claimant is required to submit organizational documents establishing the existence and nature of their business. The Claims Administrator has a right to, and does, conduct independent investigations into a claimant's claim including their status. A claimant or his representative is often contacted by a Claims Administrator reviewer. Another circumstance requiring advocacy involves analysis of the language in the Settlement Agreement regarding an inconsistency between the language explaining the "Modified V-test" for causation and the example relating to the "Modified V-test." Counsel for claimants are routinely required to argue to the claim reviewer in those cases where the "Modified V-test" applies.

Following the submission of a claim, the claimant's representative is often contacted by a Claims Administrator reviewer. The reviewer typically asks a number of questions relating to eligibility, causation, or compensation, and routinely requests additional corroborating evidence. This places the claimant in an adversarial posture due to the authority of the reviewer to employ discretion during his or her review.

The conclusion of the review of a claim ends with either a formal notice of eligibility or a denial. The claimant has 30 days to accept this determination or to pursue three alternate avenues to adjudicate the claim. First, claims can be re-reviewed. This process involves counsel presenting new evidence and exhibits to alter the original outcome. Second, the claim can be reconsidered. This involves the claim being reviewed de novo. New evidence and exhibits can and in almost all cases must be presented by counsel so that the client has the best opportunity to change the original result. Finally, a claim can be appealed, which involves counsel officially notifying the claims center that they wish to appeal, submitting a filing fee, and adhering to the strict deadlines of the appeal process. BP also has between 10 and 20 days to appeal all claims above \$25,000. A review of the Claims Administrator's Status Report No. 10, dated June 11, 2013, on the Official Court-Authorized Website reveals that BP has appealed 12.4% of the claimant award. This high percentage of appeals illustrates the "non-neutral" adversarial nature of the claims reviews process.

The Claim Form required by this process becomes part of an official record. It has a potentially prejudicial effect on the claimant's rights under the Settlement Agreement, and is the basis upon which the Court appointed Claims Administrator determines qualification, eligibility, and compensation. The claims process is clearly a proceeding "*pending or prospective* before a court or a body, board, committee, commission or

officer constituted by law or having authority to take evidence in or settle or determine controversies.”

In the opinion of the Disciplinary Commission, the shepherding of a claim through the claims process described above, to the extent it includes the advising of parties of their legal right, acting on parties’ behalf in a representative capacity to enforce those rights and/or seek redress for violations of the same, the filing of claims, or the appearance before a body authorized to take evidence and settle or determine controversies, is the “practice of law” as defined by § 34-3-36, Ala. Code 1975. Therefore, Rule 5.4(a), Ala. R. Prof. C., prohibits an attorney from sharing fees with a non-lawyer or other consideration paid by a client for those services provided in conjunction with the prosecution of a BP Claim.

Additionally, an attorney in violation of Rule 5.4(a), Ala. R. Prof. C., by virtue of such impermissible fee-splitting would also be guilty of violating Rule 5.5, Ala. R. Prof. C., which prohibits a lawyer from assisting another in the unauthorized practice of law. Rule 5.5, Ala. R. Prof. C., states:

Rule 5.5 Unauthorized Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) Subject to the requirements of Rule VII, Rules Governing Admission to the Alabama State Bar (Admission of Foreign Attorneys Pro Hac Vice), a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services:

(1) are performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, including transactional, counseling, or other nonlitigation services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;

(2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or

(3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the Rules Governing Admission to the Alabama State Bar and who is performing only those services defined in that rule.

(c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama.

(d) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in the State of Alabama shall not (1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama.

(e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the Rules Governing Admission to the Alabama State Bar, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law.

(emphasis added). However, the Comment to Rule 5.5, Ala. R. Prof. C., makes clear that a lawyer is not prohibited from employing the services of professionals whose skills are necessary to properly present the claims of the lawyer's clients, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and medical personnel.

While an attorney cannot share a fee with a non-lawyer or assist a non-lawyer in the unauthorized practice of law, an attorney may employ the services of an accountant or other professional to assist in supporting or proving the client's claim. In Formal Opinion 1993-20, the Disciplinary Commission previously held that an Alabama attorney may, consistent with the Alabama Rules of Professional Conduct, compensate a non-lawyer for services rendered in connection with its representation of certain plaintiffs in litigation. Therefore, an attorney hired to prosecute a BP claim may hire an accountant to perform loss calculation services as described in *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, Doc. 6430-1 (E.D. La. filed May 3, 2012).

However, the attorney may not split or share any contingency fee with the non-lawyer as a means for compensating the non-lawyer for their services. If the accountant

or non-lawyer has a separate fee agreement with the client, the attorney may not agree to protect the fee of the accountant or non-lawyer in exchange for a referral of that accountant's or non-lawyer's client.

Finally, pursuant to Rule 1.5(c), Ala. R. Prof. C., any contingency fee between an attorney and the client must be in writing. Further, an attorney may not be hired by an accounting firm on a contingency fee basis to prosecute the claims of its clients. In other words, the attorney's client must be the person or business for whom the BP claim is being prosecuted and the attorney should have a contract clearly stating this arrangement with each client.

Based on the foregoing, the Disciplinary Commission counsels all Alabama attorneys to take great care to avoid violations of Rules 5.4, 5.5, and 7.2(c), Ala. R. Prof. C., in the prosecution of BP claims.

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