ETHICS OPINION

RO-93-20

[redacted]

QUESTION:

"The purpose of this letter is to request the Alabama State Bar to advise that the law firm of B[redacted] & W[redacted] may, consistent with the Alabama Rules of Professional Conduct (the 'Rules'), compensate a non-lawyer for very valuable services rendered to B[redacted] & W[redacted] in connection with its representation of certain plaintiffs in litigation that has been conducted in Delaware involving Shell Oil Company. We believe that such payment would not violate any of the Rules. The facts giving rise to this request are as follows:

In March, 1985, E[redacted] S[redacted], a partner in B[redacted], A[redacted] & W[redacted] ('S[redacted]'), filed an objection pro se to a proposed settlement of a stockholder class action pending in the Chancery Court of the State of Delaware involving certain stockholders of Shell Oil Company, as plaintiffs, and Shell Oil Company ('Shell'), Royal Dutch Petroleum Corporation ('Royal Dutch') and related Shell companies, as defendants. This class action ('J[redacted] Action') arose out of a tender offer made by Royal Dutch in February, 1984 for the stock of Shell. Upon approval of a settlement of the J[redacted] Action by the Delaware Chancery Court, Selfe appealed the settlement pro se to the Delaware Supreme Court in May, 1985. S[redacted] briefed and argued the case on appeal. In December, 1985, the Delaware Supreme Court approved the settlement.

On June 7, 1985, a wholly owned subsidiary of Royal Dutch was merged into Shell in a merger in which the public stockholders of Shell were cashed out at $58.00 per share. S[redacted], as a stockholder of Shell, perfected his right to an appraisal arising out of this merger, and in July, 1985 filed a petition pro se in the Delaware Chancery Court seeking appraisal of the common stock of Shell. In October, 1985, S[redacted] amended his petition in the appraisal action to add allegations of unfair dealing with respect to a cash dividend declared by Shell in May, 1985 and unfair dealing in the merger of Royal Dutch and Shell.

As a result of S[redacted]'s appeal of the settlement of the J[redacted] Action, J[redacted] Mc[redacted] of Washington, D.C. ('Mc[redacted]'), approached S[redacted] in May, 1985. At that time, Mc[redacted], who is not a lawyer, was Executive Director of the Shell Shareholder's Committee ('Committee'), a non-profit Delaware corporation organized in 1984 by certain Shell stockholders (at the instigation of Mc[redacted]). During 1984, Mc[redacted], as Executive Director of the Committee, urged Shell stockholders to reject the tender offer made by Royal Dutch in February, 1984 and to seek an appraisal. Mc[redacted] spent all of his business time as Executive Director of the Committee during 1984 trying to persuade Shell stockholders to reject the Royal Dutch tender offer. His principal argument was that the Shell stockholder had a viable alternative to the tender offer, i.e., to seek an appraisal of their Shell stock if Royal Dutch succeeded in cashing out the public stockholders of Shell.

In a letter dated April, 1985 distributed by the Committee under the signature of Mc[redacted] to all Shell stockholders, Mc[redacted] urged all the Shell stockholders to seek an appraisal when the merger of Shell and Royal Dutch

took place. That same letter urged Shell stockholders to become members of the Committee.

In September of 1985, the Committee employed a Wilmington, Delaware lawyer, C[redacted] F[redacted] ('F[redacted]'), and his firm, S[redacted], [redacted] & F[redacted], to file a petition in the Delaware Chancery Court seeking an appraisal on behalf of certain officers of the Committee who were Shell stockholders. Thereafter, S[redacted] kept F[redacted] informed about S[redacted]'s appraisal petition.

In December, 1985, S[redacted] prepared a class action complaint on behalf of Shell stockholders to be filed in the Delaware Chancery Court alleging that Royal Dutch had breached its fiduciary duties to the public stockholders of Shell by causing the merger of Royal Dutch and Shell to occur on June 7, 1985 with the result that such stockholders lost a cash divided of 50¢ per share, which had been declared by the Board of Directors of Shell on May 30, 1985 with a record date later than June 7, 1985. Mc[redacted] introduced S[redacted] to a lawyer named P[redacted]. S[redacted] with the law firm of D[redacted], [redacted] & H[redacted] with a view to employing that firm as Delaware counsel in the action against Royal Dutch arising out of the dividend. In addition, in late 1985, several members of the Committee engaged the law firm of S[redacted] G[redacted], L.L.P., Houston, Texas to represent them in the appraisal action.

In January, 1986, Mc[redacted] recommended to several Shell stockholders that they contact S[redacted] with a view to engaging Selfe to file the dividend action on behalf of such Shell stockholders. The Shell stockholders included R[redacted] S[redacted] ('S[redacted]'), [redacted], North Carolina, F[redacted] P[redacted], [redacted], Missouri, and [redacted] W[redacted], New York, New York. These stockholders became named plaintiffs in the class action filed by B[redacted], [redacted] & W[redacted] and D[redacted] M[redacted] & H[redacted] in February, 1986 against Royal Dutch (the 'S[redacted] Action'). Other Shell stockholders, at Mc[redacted]'s recommendation, became clients of B[redacted], [redacted], [redacted] & W[redacted] in the appraisal case.

During February, March and April, 1986, there were various discussions among the four law firms involved in the Shell appraisal case and in the S[redacted] class action. These four law firms were B[redacted], [redacted] & W[redacted]; D[redacted] & H[redacted], L[redacted] Sm[redacted] of [redacted], Delaware and S[redacted] G[redacted], L.L.P. of [redacted], Texas.

In March or April of 1986, Mc[redacted] strongly recommended to S[redacted] that K[redacted] W[redacted], Vice President and an oil and gas analyst with D[redacted], L[redacted] & J[redacted], Inc. in [redacted], New York, be employed in the appraisal action and the S[redacted] Action to testify as to the value of the common stock of Shell on the date of the Royal Dutch and Shell merger. During 1984 and 1985, Mc[redacted] had devoted a great deal of time and effort on his own and working with K[redacted] W[redacted] to determine the most effective way to establish the value of Shell in an appraisal proceeding. He developed a relationship with K[redacted] W[redacted] during this time which was valuable. He gave S[redacted] the benefit of his views on appraisal valuation and recommended that the value of Shell's oil and gas reserves be determined independently of Shell's publicly disclosed data.

In April, 1986, representatives of the four law firms met in Philadelphia to discuss coordination of the appraisal action and the S[redacted] Action. At that meeting, it was decided that the four law firms would handle the two cases jointly and would share in the work and the fees equally in both cases. It was also decided to accept Mc[redacted]'s recommendation and meet with K[redacted] W[redacted] to consider employing him as an expert witness.

About June 10 or 11, 1986, S[redacted] contacted K[redacted] W[redacted] to set up an appointment with him in New York. Mc[redacted] had previously recommended to W[redacted] that he meet with the attorneys. On June 17, 1986, representatives of the four law firms met with K[redacted] W[redacted] to discuss engaging Mr. W[redacted] to testify as an expert witness with respect to the value of the common stock of Shell in the appraisal case and the S[redacted] Action. As a result of that conference with Mr. W[redacted], the four law firms engaged Mr. W[redacted] to testify

as an expert witness. Mc[redacted]'s relationship with K[redacted] W[redacted] was very helpful in securing the services of Mr. W[redacted] for the cases.

The appraisal case and the S[redacted] Action were subsequently tried in the Delaware Chancery Court, appealed to the Delaware Supreme Court by the defendants and in each case the decision of the Chancery Court was affirmed on appeal. The cases were concluded in 1992, and the Delaware Chancery Court awarded fees to the attorneys in both the appraisal case and the S[redacted] Action. In 1992, Mc[redacted] attempted to recover from the common funds in the appraisal case and the S[redacted] Action fees for his services in organizing and directing the activities of the Committee in 1984 and 1985, but the Chancery Court denied Mc[redacted]'s petition on the grounds that his services were rendered prior to the beginning of the litigation. Mc[redacted] has stated that the net compensation paid him for his work with the Committee in 1984 and 1985 was $23,000.

Mc[redacted] believes that he should be compensated for his work which resulted in approximately one million shares of common stock of Shell being included in the appraisal proceeding and for his services in providing advice and assistance on appraisal valuation and in finding and helping to secure K[redacted] W[redacted] as an expert witness in both cases. In our opinion, the appraisal case was made feasible for the plaintiffs because the holders of approximately one million shares of common stock of Shell sought appraisal of their shares, and the pendency of the appraisal case in turn made the S[redacted] Action more feasible. Mr. W[redacted]'s testimony in both cases was crucial to obtaining the favorable result in both cases. In particular, Mr. W[redacted] discovered that Shell had omitted approximately $1 billion of proven oil and gas reserves from its published financial reports. Neither, B[redacted], S[redacted] & Co., who was engaged by the plaintiff in the J[redacted] Action, nor Mc[redacted], S[redacted] & Co., who testified for Shell in the appraisal S[redacted] & J[redacted] Actions, discovered the omission.

[redacted], A[redacted], [redacted] & W[redacted] considers that Mc[redacted]'s advice to it to employ Mr. W[redacted] as an expert witness, his assistance in securing Mr. W[redacted]'s services and his advice on appraisal were extremely valuable to both cases, and Mr. W[redacted]'s testimony was crucial to the successful result in both cases. The aggregate recoveries in both cases exceeded $150 million and the aggregate attorneys fees were $16 million, a portion of which was received by [redacted], [redacted], [redacted] & W[redacted]. In view of this, [redacted], [redacted], [redacted] & W[redacted] is prepared and wants to pay Mr. Mc[redacted] $100,000 so long as such a payment is permissible under the Rules. We believe that such a payment to Mc[redacted] can be analogized to a payment for the testimony of an expert witness or other non-lawyer services rendered to lawyers in the preparation and trial of a case. In this regard, it should be noticed that Mc[redacted]'s assistance in securing Mr. W[redacted] as an expert witness took place at a point in time after both the appraisal case and the S[redacted] case had been filed in the Delaware Chancery Court.

[redacted], [redacted], [redacted] & W[redacted] did not have any agreement with Mc[redacted] to pay him for his services to the Committee or for his assistance in engaging Mr. W[redacted]. Nevertheless, Mc[redacted] rendered a valuable service, and B[redacted] & W[redacted] is willing to pay him some fee for these services. Accordingly, B[redacted] & W[redacted] hereby respectfully requests the Disciplinary Committee of the Center for Professional Responsibility to render its advice as to whether B[redacted] & W[redacted] consistent with the Rules, including, without limitation, Rule 7.2 thereof, may pay Mc[redacted] the sum of $100,000 under the circumstances described in this letter."

* * *

ANSWER:

Rule 5.4 of the Rules of Professional Conduct of the Alabama State Bar prohibits a lawyer from splitting a legal fee with a non-lawyer, however, you

may pay a non-lawyer for services rendered to the Lawyer. You may not under any circumstances compensate, from any source, a non-lawyer for soliciting or referring clients to the lawyer. Consequently, it is the view of the Disciplinary Commission that no rule of professional conduct is violated if you compensate Mr. Mc[redacted] for advice and assistance in obtaining a qualified appraisal expert and other services performed during the course of the litigation. You may not, however, compensate Mr. Mc[redacted] for recommending that several Shell stockholders contact your firm with a view to engaging your firm.

DISCUSSION:

Rule 5.4 of the Rules of Professional Conduct and its predecessor, Disciplinary Rule 3-102(A) of the Code of Professional Responsibility, broadly prohibit a lawyer or law firm from sharing fees with a non-lawyer. The Comment to Rule 5.4 states that:

> "The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment."

The American Bar Association Committee on Ethics and Professional Responsibility, in Informal Opinion 86-1519, April 19, 1986, stated that:

> "The rationale for this long-standing general prohibition against the sharing of fees between lawyers and non-lawyers is that the public interest is best served by assuring that clients are represented by lawyers who, as members of a regulated profession, are an arm of and subject to the courts, are committed to court-approved standards of ethics and professional conduct, are not subject to conflicting interests or divided loyalties and are protected against possible control by others in the exercise of their professional judgment." (Informal Opinion 86-1519, p.3)

Put more simply, the rule prohibits "the possibility of control by the lay person, interested in his own profit, rather than the client's fate ...." Gassman v. State Bar of California, 553 P.2d 1147, 1151 (Cal. 1976). Another purpose is to discourage laypersons from engaging in the unauthorized practice of law. The rule also clearly prevents a lawyer from agreeing to pay a non-lawyer for referring clients to the lawyer. In Florida State Bar v. Sagrans, 388 So.2d 1040 (Fla. 1980), a lawyer was

disciplined for violating Rule 5.4 when he agreed to compensate a chiropractor for medical malpractice cases referred to him.

ABA Informal Opinion 86-1519 also points out that:

> "While a lawyer may employ a non-lawyer to provide services, payment for such services may not be based on a percentage of the lawyer's fee in the matter with respect to which the non-lawyer's services are rendered. Payment on the basis of a percentage of the lawyer's fee has long been considered a sharing of fees in violation of the applicable rules. See Formal Opinion 48 (1931)." (supra at page 2)

Applying the above principles, it clearly appears that the problems at which the rule is aimed, i.e., to prevent a non-lawyer from controlling the lawyer in a way detrimental to the interest of the lawyer's client and the prevention of the unauthorized practice of law, are not here present. Consequently, it is the view of the Commission that Mr. Mc[redacted] may be compensated for services rendered during and before the above-described litigation. The Commission also notes that Mr. Mc[redacted] in January of 1986, recommended to several Shell shareholders that they contact the law firm with a view to engaging the firm. Care should be exercised to insure that no part of the compensation provided to Mr. Mc[redacted] can in any way be attributed to these recommendations.

RWN/vf

10/7/93