

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

Formal Opinion No. 470

November 12, 1992

SUMMARY: PAYMENT OF YEAR-END BONUS TO AN "OF COUNSEL" ATTORNEY

The payment of a "year end bonus" to an "of counsel" attorney who is not a partner, associate, or shareholder of the law firm and whose relationship to the law firm consists primarily of the reciprocal referral of business, is prohibited without client consent under Rule 2-200.

AUTHORITIES CITED:

Moran v. Harris, 131 Cal. App. 3d 913, 182
Cal. Rptr. 519 (1982)
Dunne & Gaston v. Keltner, 50 Cal. App. 3d, 560,
123 Cal. Rptr. 430 (1975)
California Rules of Professional Conduct, Rules 1-
100(B)(4), 1-320, 1-400, 2-200, 3-310
State Bar Formal Opinion No. 1986-88
Los Angeles County Bar Association Formal Opinion
No. 457 (1989)
ABA Formal Opinion No. 90-357

SUMMARY OF FACTS

In the inquiry before this Committee, a law firm (the "Firm") refers business to an attorney, denominated as "of counsel"¹ by the Firm (the "Attorney"), and the Attorney refers business to the Firm. The Attorney specializes in tax and corporate matters; the Firm handles litigation only. The basis for referral depends solely on the area of these respective specializations. Both the Firm and the Attorney bill their respective clients separately for their own time. The Firm asserts that no referral fees are paid by the Firm to the Attorney, and that the Firm's billings to its clients are not affected by the fact of referral to the Attorney. Although the Firm provides the Attorney with office space and secretarial, postage, xerox, and telephone services, it is rare for both the Firm and the Attorney to work on the same case.

The Firm proposes to pay the Attorney a bonus out of Firm profits, and the bonus shall be based on a percentage of the

¹ The term "of counsel" has no generally accepted definition, nor has it been codified by the California Rules of Professional Conduct, any statute, or any decision of the California Supreme Court. See, State Bar Formal Opinion No. 1986-88. For purposes of this opinion, the phrase "of counsel" has been interpreted solely in the context and under the facts presented.

It should be noted that State Bar Formal Opinion No. 1986-88 points out that the use of the term "of counsel" may be subject to Rules of Professional Conduct 2-101 [currently Rule 1-400], 2-108 [current Rule 2-200] and 5-102 [current Rule 3-310].

Although beyond the scope of this inquiry, it may be pertinent for the inquirer to review the discussion of the "of counsel" relationship in State Bar Formal Opinion No. 1986-88. See also, ABA Formal Opinion No. 90-357.

profits derived from the business referred to the Firm from the Attorney. The Firm specifically requested that this inquiry be addressed on the assumption that the Firm does not want to obtain client consent for this bonus payment.

DISCUSSION

1. Payment of a Bonus from the Firm to the Attorney in This Case Constitutes Fee-Splitting under Rule 2-200.

Rule 2-200(A) states that a "member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member," unless certain conditions are met. Rule 2-200(B) prohibits the gift of "anything of value" in return for the referral of business, except between partners, associates, or shareholders of a firm.²

The issue of whether the payment of a bonus would constitute the sharing of legal fees or anything of value has been addressed in the context of California Rule of Professional Conduct 1-320 in Los Angeles County Bar Association Formal Opinion No. 457.

Although Opinion No. 457 focused on the payment of a bonus to a lay person (a paralegal) under Rule 1-320, it is clear from that opinion that a bonus based on fees received in a

² The underlying purpose for Rule 2-200 is to maximize the recovery in tort to the injured party, to be reduced only by "necessary legal fees and other necessary expenses of litigation." Moran v. Harris, 131 Cal. App. 3d 913, 921, 182 Cal. Rptr. 519, 523 (1982), citing Dunne & Gaston v. Keltner, 50 Cal. App. 3d, 560, 566-67, 123 Cal. Rptr. 430 (1975). The Moran court held that a pure referral fee is "far from necessary to the injured person's recovery." Id.

particular matter or matters is a division of fees under Rule 2-200, and that it would be improper for the Firm to pay the Attorney the bonus in question without client consent, unless the Attorney were a partner, associate, or shareholder of the Firm.

2. Rule 2-200 as Applied to the Attorney.

From the facts presented to this Committee, the Attorney is not a partner or shareholder, since the Attorney holds no ownership interest in the Firm. Nor should the Attorney be considered an associate, under California Rules of Professional Conduct, Rule 1-100(B)(4), which defines an "associate" as "an employee or fellow employee who is employed as a lawyer."³

Since the Attorney is not a partner, shareholder, or associate, the provisions of Rule 2-200(A) are applicable unless each of the following criteria are satisfied: (1) the amount paid to the Attorney is neither bargained for nor based on any fees paid by the client; (2) the Attorney has no expectation of receiving a percentage fee; and (3) the amount paid to the Attorney is compensation for work performed and is paid whether or not the Firm is paid by the client. See, Los Angeles County Bar Association Formal Opinion No. 457 (1989).

Since the amount paid to the Attorney is based on a percentage of the profits of the business referred to the Firm

³ The determination of status as an "employee" is a legal question that depends both on factors not presented to this Committee as well as the purpose for which such status is being sought. For purposes of this opinion, the Committee has assumed that the Attorney is not an employee of the Firm.

from the Attorney and is not compensation for work performed, conditions (1) and (3) above are not satisfied. It is unclear whether the Attorney had any expectation of receiving the bonus. Accordingly, the Attorney should receive a bonus only with client consent and in accordance with the other provisions of Rule 2-200.

This issue was squarely discussed in State Bar Formal Opinion No. 1986-88. In a literal reading of Rule 2-200 (then, Rule 2-108), the State Bar advised that an out of state law firm that had an "of counsel" relationship with a California law firm was subject to the rule and client consent was required, since the out of state firm was neither a partner nor an associate of the California firm. The State Bar noted that the out of state firm could avoid the provisions of Rule 2-200 (then, Rule 2-108) only if it were compensated at straight hourly rates by the client either directly or indirectly.

The reasoning in this opinion is as applicable to an "of counsel" attorney as it is to an "of counsel" firm. Accordingly, the Attorney may still bill a client for his or her time on a matter referred to the Attorney by the Firm. Nonetheless, the payment of a bonus to the Attorney in addition to the Attorney's hourly fees would be improper, unless client consent were obtained, since the Attorney is not an associate, partner, or shareholder of the Firm.

This opinion is advisory only. The Committee acts on specific questions submitted ex parte and its opinion is based only on such facts as are set forth in the inquiry submitted.