

ETHICS OPINION

RO-92-13

[REDACTED]

QUESTION:

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"I have recently taken a position as in-house attorney with S [REDACTED] R [REDACTED] S [REDACTED], Inc. (SRS). Prior to that, I was an in-house attorney with USF&G Insurance Co. At USF&G, we litigated cases for their insureds. It was a salaried position, and we were paid directly by the insurance company. The time I spent on each file was recorded, and the insurance company made an adjustment against that file as an accounting entry. This was done on a rate determined by adding all expenses associated with the operation of the office, including salaries, rent, postage, electricity, etc., and dividing this figure by the number of hours in a given period. The legal expenses for each file were then shown in the loss ratio charged against that file, and ultimately reflected in the premiums charged.

The company for whom I now work is an administrator of self-insured programs. As such, they do not stand to lose money on a 'risk.' In most basis terms, they adjust claims for either self-insured companies or self-insured funds. As the sole member of the Legal Department, I will be reviewing contracts, researching, advising claims personnel on the handling of cases, meeting with clients, managing litigation, and other duties.

As a service to its clients, SRS would like to be able to offer my services for handling legal matters, such as walk-through Worker's Compensation settlements; however, to offset some of the expense of having me on staff, SRS would like to bill clients for this service.

Rather than going through some elaborate accounting measures involving my accepting the fee from the client, and giving a credit against my salary to SRS, with me in turn paying taxes and operating as a sole proprietorship, would it be permissible for SRS to bill clients directly for my services and receive a payment directly for same? It is not intended or anticipated that this would be a profit center, but merely a way to offset some of the expense of having me on staff. However, I am unable to determine if this is permissible under the Rules of Professional Conduct, including but not limited to Rule 5.4, which prohibits a lawyer sharing fee with a non-lawyer.

Please advise if the direct billing by SRS would be permissible."

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ANSWER:

It would be permissible for your employer to bill legal fees generated by you in performing legal services for the employer's clients if the charges only cover the employer's expenses in providing your services. The employer cannot make a profit on your work.

DISCUSSION:

Fee-splitting between a salaried lawyer and non-lawyer employer were recently addressed in two New York State ethics opinions. In New York County Lawyers Association Committee on Professional Ethics, Opinion 670 (1989), it was held that an in-house lawyer for a lending institution may participate in an arrangement in which a borrower pays a share of the lawyer's salary and overhead proportionate to expenses lender incurs in making the loan. That opinion concludes that:

"Thus, so long as the amount charged a customer by a lending institution is limited to the institution's reasonable costs incurred for legal representation, this committee sees nothing improper with a charge that includes an allocation for overhead in addition to the cost of an attorney's services."

A fee-splitting problem under Rule 5.4 exists only when a non-lawyer agency makes a profit from the rendition of legal services by one of its salaried lawyers.

Opinion 670 was reaffirmed in 1991 by another New York ethics committee. In New York State Bar Association Committee on Professional Ethics, Opinion 618 (1991), in-house corporate counsel who also served as lawyer for the corporation's pension plan could remit to the corporation itself compensation received as pension plan counsel, but only to the extent it reimbursed the corporation for expenses in providing in-house counsel's services to the plan.

In the situation you propose SRS may bill these clients for amounts not to exceed the costs associated with your salary and the other office overhead apportioned to the actual work performed for the client. It would be improper for you to participate in an arrangement where SRS can make a profit directly from your legal services to these third party clients.

MLM/vf

7/21/92