



Committee on Professional Ethics

Opinion 926 (7/31/12)

Topic: Union-sponsored legal fee reimbursement plan; conflicts of interest

Digest: A lawyer who belongs to a union (1) may be a lawyer on the panel of a union-sponsored plan that reimburses legal fees, and (2) may represent a fellow employee in a real estate transaction where the client will ask the plan to reimburse the employee for the lawyer's fees.

Rules: 1.0(j); 1.7(a) & (b); 1.8(f)

FACTS

1. The inquirer is a practicing attorney licensed in New York State who is also an employee of a municipal corporation and member of its union. The union provides a benefit to its members in the form of reimbursement up to a maximum fixed amount for legal fees incurred by the member in connection with the purchase or sale of real estate. Reimbursement is made only if the member retains a lawyer from a panel of approved lawyers. The inquirer has applied to join the panel, but the union panel administrators asked the inquirer to obtain this Committee's opinion regarding any conflicts that might arise from the inquirer's service on the panel. The members of the panel have no control over admission to the panel; selection is made by a group including union and employer representatives.

QUESTION

2. This inquiry presents two related questions:

- A. May a lawyer who belongs to a union be a panel member of a legal fee reimbursement plan sponsored by the union for fellow employees?
- B. May a lawyer who belongs to a union represent another union member (*i.e.*, a co-worker) in a real estate transaction covered by the reimbursement plan?

OPINION

Question A: May the Inquirer Serve as a Panel Member?

3. This Committee has long recognized that payment of legal fees by third parties is a common practice. For example, in N.Y. State 825 (2008) we opined that no ethical bar exists to a lawyer providing legal services to a client referred and paid by an employee assistance plan.

4. Rule 1.8(f), however, sets three conditions on a lawyer's receipt of payment from a third party. First, the client must give informed consent; second, there must be no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; third, the client's confidential information must be protected as required by Rule 1.6. In addition, while Rule 1.8(f) does not mention it, we recommend that the client's consent be confirmed in writing.

5. The reimbursement plan at issue here differs slightly from the plan at issue in Opinion 825. There the recommendation and fee arrangement were made at the outset of the lawyer-client relationship. Here, the client selects and pays a lawyer but is eligible for reimbursement only if that lawyer is on the approved panel. But this difference is not significant and only makes compliance with Rule 1.8(f) simpler. The likelihood of compromising confidential information or undermining professional independence is reduced in the reimbursement model presented here because the representation takes place and is concluded before the client applies for reimbursement. Consequently, the union may not even be aware of the attorney-client relationship during the representation, and will thus have little or no opportunity to interfere with the relationship or to ask for confidential information.

6. Nevertheless, Rule 1.8(f)(1)'s requirement of "informed consent" raises special concerns. The term "informed consent" is defined in Rule 1.0(j) as follows:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks and reasonably available alternatives.

7. To obtain a client's informed consent in the context of the union-sponsored reimbursement plan before us here may require the lawyer to discuss the amount of fees, how the lawyer will charge for fees (e.g., flat, hourly, or percentage), the client's responsibility to pay the fees whether or not the plan approves reimbursement, and whether the lawyer will represent the client if any dispute arises with the union over the client's entitlement to reimbursement under the plan. The "material risks" would appear to be that the plan may for some reason decide not to reimburse the inquirer's fees (or may reimburse only part of them), and that the plan may take a long time to reimburse whatever portion of the fees it approves. The "reasonably available alternatives" would include hiring a lawyer outside the plan (with no chance for reimbursement) or not hiring a lawyer for the real estate deal at all.

8. The considerations in the preceding paragraph exist whether or not the lawyer providing services is a fellow employee and member of the union. Since the members of the panel have no say in the designation of new panel members, it is unnecessary to discuss any ethical implications that might arise if members of the panel had the right to exclude members.

Question B: May the Inquirer Represent a Fellow Employee and Union Member?

9. Rule 1.7(a)(2) governs personal conflicts of interest. Unless a lawyer satisfies the exceptions in Rule 1.7(b), Rule 1.7(a)(2) prohibits a lawyer from representing a client "if a

reasonable lawyer would conclude that ... there is a significant risk that the lawyer's professional

judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The facts necessary for a reasonable lawyer to determine whether there is (or is not) a significant risk of an adverse effect on the lawyer's professional judgment in representing a fellow employee in a real estate transaction are not presented in this inquiry. Such facts might include the inquirer's personal interest in maintaining a favorable employment relationship with the employer. For example, whether a "significant risk" exists might depend on (i) whether the client is in the lawyer's direct reporting structure (and, if so, whether the client is above or below the lawyer in rank), (ii) the likelihood that the lawyer will want the client's favorable recommendation for the lawyer's promotion or advancement, and (iii) the strength of the lawyer's desire to maintain membership on the union approved panel. If these or any other personal interests arising out of the lawyer's employment for their mutual employer raise a significant risk of adversely affecting the lawyer's professional judgment on behalf of a fellow employee, then the inquirer must comply with the requirements in Rule 1.7(b).

10. Rule 1.7(b), permits a lawyer whose personal interests might affect the lawyer's professional judgment under Rule 1.7(a) to represent the client in the matter if the lawyer meets two main conditions:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; ... and

(4) each affected client gives informed consent, confirmed in writing.

11. While we lack sufficient facts to determine whether the inquirer "reasonably believes" she can provide "competent and diligent representation" to the fellow employee, or whether the employee has given informed consent, confirmed in writing, we have drawn attention to some issues the lawyer may wish to address before accepting or continuing to represent a fellow employee who intends to seek reimbursement for the lawyer's fees under the union-sponsored reimbursement plan. If, after exploring these and any other relevant personal interests, the lawyer concludes that there is no significant risk to the lawyer's independent professional judgment in representing a fellow employee in a real estate transaction, then Rule 1.7(a) (2) does not apply and the inquirer may accept the representation without obtaining the client's consent. If the lawyer concludes there is a significant risk, then the lawyer may not accept or continue the representation absent compliance with Rule 1.7(b).

CONCLUSION

12. A lawyer who belongs to a union (1) may be a lawyer on the panel of a union-sponsored plan that reimburses legal fees, and (2) may represent a fellow employee in a real estate transaction where the client will ask the plan to reimburse the employee for the lawyer's fees.

(29-12)