



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1004 (4/1/14)

Topic: Attorney's Obligations Regarding Excessive Fee of Counter-Party's Attorney

Digest: Where a contract provides that one party pay the counter-party's attorney's fee and that fee is excessive, the attorney for the first party is not ethically prohibited from participating in the transaction. Whether the attorney has an obligation to report the excessive fee of another attorney depends on the circumstances.

Rules: 1.5(a), 8.3, 8.4(a).

FACTS

1. The inquirer's client is entering into a commercial loan with a bank, and one of the standard terms of the loan is that the borrower pay the bank's attorney's fee. The inquirer characterizes the contemplated transaction as "standard with some nuances." He states that the nuances will not require a great deal of extra drafting beyond the boiler plate document. The inquirer believes that the bank attorney's proposed fee is "at least double the normal fee" charged for this type of transaction. He asked the bank's attorney to reduce his fee, but that attorney refused.

QUESTIONS

2. Assuming that an attorney's fee – to be paid by the counter-party – is excessive, can the counter-party's lawyer continue to participate in representing his client in this transaction and must that lawyer report the conduct of the fee-charging attorney?

OPINION

3. As the question of whether the bank's attorney's fee is excessive does not involve the inquirer's own conduct, we are not in a position to resolve that issue. It is worth noting, however, that Rule 1.5(a) sets forth the ethical standard governing the amount of legal fees that can be reasonably charged. It provides that

A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the

fee is excessive. The factors to be considered in determining whether a fee is excessive *may* include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Cmt. [1] to Rule 1.5 observes that the factors specified in paragraphs (a)(1) through (a)(8) are not exclusive and that each factor will not always be relevant. While it has been noted that factor (a)(3) (“the fee customarily charged in the locality for similar legal services”) is an important factor, *see* Simon's New York Rules of Professional Conduct Annotated, 2013 Edition, p. 131, it has also been noted that factor (a)(7) (“the experience, reputation and ability of the lawyer or lawyers performing the services”) is usually “the most important factor.” *Id.* at 134.

4. We further note that the fact that the fee sought by the bank’s attorney is roughly double the fee often charged for similar transactions does not render the fee *per se* excessive. A high fee is not necessarily an excessive fee. That is because the excessiveness determination requires a consideration of all the relevant factors. For example, we know nothing about “the experience, reputation and ability of the lawyer” performing the services (*see* Rule 1.5(a)(7)), a critical factor. And the inquirer acknowledges that the prospective transaction does involve “some nuances”; Rule 1.5(a)(1) indicates that the “novelty and difficulty of the questions involved” is relevant to the appropriateness of the fee. An experienced attorney handling a difficult nuance has more leeway to charge a higher fee.

5. Even if the fee is excessive, the inquirer can still ethically participate in the transaction. While Rule 8.4(a) prohibits an attorney from assisting or inducing another to violate the Rules of Professional Conduct, the inquirer did not provide any such assistance or inducement. In Opinion 809, this Committee concluded that a lawyer did not aid in the unauthorized practice of law (as then prohibited by DR 3-101(A) of the Code of Professional Responsibility) where the lawyer, to carry out the representation of one client in a transaction, dealt with a non-lawyer who had been engaged by the client’s counter-party. We reasoned that the inquiring lawyer had not

caused or encouraged the counter-party's representational situation and was merely continuing to represent his own client in the transaction. The same logic applies to the present inquirer. He did not cause or encourage the counter-party's lawyer to charge a potentially excessive fee. On the contrary, he attempted to negotiate a lower fee.

6. Moreover, even if the fee is excessive, the inquirer does not necessarily have to report the conduct of the bank's attorney. That is because attorneys need not report all ethical violations of which they become aware. Instead, Rule 8.3, which governs the reporting of professional misconduct, provides, in relevant part, that "(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct *that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer* shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation" (emphasis added). Cf. Cmt. [2] to Rule 8.4 ("Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation"). Thus, even if the inquirer concludes that the bank's attorney's fee is excessive, he is only obligated to report the conduct of the bank attorney if he concludes, under all the circumstances, that the setting of the fee reflects adversely on that attorney's fitness to practice law or involves dishonesty.¹

CONCLUSION

7. Where a contract provides that one party pay the counter-party's attorney's fee and that fee is excessive, the attorney for the first party is not ethically prohibited from participating in the transaction. Whether the attorney has an obligation to report the excessive fee of another attorney depends on the circumstances

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¹ Of course, if the inquirer believes that the bank's attorney's fee is excessive, he is permitted to report the bank's attorney.