

The Supreme Court of Texas Professional Ethics Committee
for the State Bar of Texas
Opinion Number 568
April 2006

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer share a contingent fee with a suspended or disbarred lawyer?

STATEMENT OF FACTS

Lawyer A refers a contingent fee case to Lawyer B pursuant to a signed referral agreement that calls for the two lawyers to share the contingent fee. Subsequently, Lawyer A is suspended from the practice of law. While Lawyer A is suspended from the practice of law, a contingent fee becomes payable with respect to the contingent fee case.

DISCUSSION

With exceptions not relevant here, Rule 5.04(a) of the Texas Disciplinary Rules of Professional Conduct provides that "[a] lawyer or law firm shall not share or promise to share legal fees with a non-lawyer" The primary rationale behind this rule is to prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting non-lawyers in the practice of law. See Comment 1 to Rule 5.04.

The Committee previously addressed a similar issue under Disciplinary Rule 3-102 of the Texas Code of Professional Responsibility, the predecessor to current Rule 5.04(a) of the Texas Disciplinary Rules of Professional Conduct. Disciplinary Rule 3-102 provided that "[a] lawyer or law firm shall not share legal fees with a non-lawyer" In Professional Ethics Committee Opinion 432 (October 1986), the Committee held that payment of fees to a lawyer who is disbarred prior to the completion of a contingent fee contract violates Rule 3-102 because the disbarred lawyer is not entitled to collect either on the contract or quantum meruit for the services that have been rendered. Relying on the Texas Supreme Court's decision in *Royden v. Ardoin*, 331 S.W.2d 206 (Tex. 1960), the Committee concluded that the disbarment or suspension of the lawyer is tantamount to voluntary abandonment by the lawyer, which disqualifies the lawyer from compensation because the lawyer is unable to complete the work the lawyer was hired to perform. The Committee, however, expressly did not address the question of payment to a lawyer where there was no abandonment because the services had been completed prior to the disciplinary action.

Two opinions of the Fourteenth District Court of Appeals have addressed the specific question left unresolved by Opinion 432. In *Lee v. Cherry*, 812 S.W.2d 361 (Tex. App. - Houston [14th Dist.] 1991, writ denied), the court held that a disbarred lawyer may receive referral fees provided that the lawyer completed the legal work on the case prior to disbarment. In *Lee*, the court refused to extend the holding of *Royden v. Ardoin*, supra, to a case in which the lawyer had completed all of the work expected of him. The court reasoned that voluntary abandonment only applies to those situations where the

lawyer has not completed the legal services prior to disbarment. See 812 S.W.2d at 363. The *Lee* decision was followed in *A.W. Wright & Associates, P.C. v. Glover, Anderson, Chandler & Uzick, L.L.P.*, 993 S.W.2d 466 (Tex. App. - Houston [14th Dist.] 1999, pet. denied). Both cases involved forwarding lawyers in referral fee arrangements.

Lee and *A. W. Wright* were decided before the amendments to Rule 1.04 of the Texas Disciplinary Rules of Professional Conduct, which became effective March 1, 2005. The amendments abolished the pure referral fee. Under the amended Rule as currently in effect, fee divisions between lawyers not in the same firm must be made either in proportion to the professional services performed by each lawyer or based on the lawyers' assumption of joint responsibility for the representation. See Rule 1.04(f). Under the amended rule, a referring lawyer's duties cannot end with the referral. Although *Lee* and *A. W. Wright* were decided before the 2005 amendment of Rule 1.04, the Committee is of the opinion that the underlying rationale of these decisions is correct and that under the Texas Disciplinary Rules of Professional Conduct a lawyer may share a contingent fee with a suspended or disbarred lawyer if the suspended or disbarred lawyer has fully performed all work in the matter prior to the lawyer's suspension or disbarment. The Committee, however, notes that under other principles of Texas law a suspended or disbarred lawyer may be prohibited from receiving some or all of the fees generated from a matter that forms the basis of the disciplinary action against the lawyer. See *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

CONCLUSION

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may share a contingent fee with a suspended or disbarred lawyer if the fee-sharing agreement existed before the suspension or disbarment and the suspended or disbarred lawyer fully performed all work in the matter before the suspension or disbarment.