The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

41 SOUTH HIGH STREET-SUITE 3370, COLUMBUS, OH 43215-6105
(614) 644-5800 FAX: (614) 644-5804

OFFICE OF SECRETARY

OPINION 90-22
October 12, 1990

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent rule amendments to DR 2-101, eff. Jan. 1, 1993 and Aug. 16, 1993; DR 2-103, eff. Jul. 1, 1996.]

SYLLABUS: A lawyer may represent a grantor of a trust, and at the same time, receive a portion of his fee from the third party trustee bank after the client has knowledge of the entire transaction and consents to such a fee arrangement.

OPINION: We have before us your request for an opinion concerning the propriety of an attorney informing his clients of a bank's small trust program and receiving his fee for advice in connection with the administration of the trust, a percentage of the trustee fee that the grantor (client) pays the bank. The bank, it is contemplated, would remit a percentage amount directly to the lawyer. The bank now markets such a small trust program and it wishes to provide and help pay for such a lawyer assisted option when the grantor (client) chooses it.

In your request letter you pose these questions:

1. Is it ethically proper to inform my clients of the availability of the bank's small trust program?

2. Is it ethically proper to agree with my client that the amount of compensation and fee agreed to between lawyer and client can be paid directly to the lawyer, upon the client's instructions, from the bank that is managing the client's trust?

If the establishment and operation of such a small trust program comes within the legal and ethical guidelines discussed herein, an attorney may inform his clients of any such service offered by the bank. There are a number of ethical concerns that would define and limit the attorney's role in such a program. An attorney is not permitted to authorize the bank to recommend the use of his services to those persons who are without legal counsel but who may receive solicitations or marketing information directly from the bank. DR 2-103(C). The bank is not an organization recognized under DR 2-103 (D) that may operate a lawyer referral service. In a similar vein, the lawyer could not agree to share his fees with the bank (a non-lawyer) without violating DR 3-102 (A).

A more serious question arises in considering whether the lawyer's relationship with the bank may impair his independent, professional judgment. The lawyer must in consultation with his client (the grantor under a trust agreement) come to the conclusion that participation in the bank's small trust program is of benefit to the client and that the lawyer has independent, professional judgment and legal advice to offer the client that is not available from the bank or its trust department. DR 5-101 (A) requires the lawyer in this situation to disclose fully to the client the role of the bank and his own financial and personal interest in the payment of this fee by the bank.

Your second question involving the payment of attorney's fees by the bank to the lawyer by the means of returning a portion of the percentage fee it charges the client-grantor raises certain ethical problems.

DR 5-107 (A) and (B) provide as follows:

> A. Except with the consent of his client after full disclosure, a lawyer shall not:
>
> 1. accept compensation for his legal services from one other than his client,
>
> 2. accept from one other than his client anything of value related to his representation of or his employment by his client.
>
> B. A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

The Disciplinary Rules set forth above reveal a two-fold concern. First, prohibited conflicts of interest may arise when fees are paid to a lawyer by a third party whose interest may be adverse to the client's. Secondly, the receipt of a fee from a third party may undermine the independence of the attorney's advice and counsel or affect the advice he renders to his client during the course of representation. These concerns are not treated lightly by the original Canons of Professional Ethics, the current Code of Professional Responsibility, or the ABA Model Rules of Professional Conduct.

In ABA Committee on Ethics and Professional Responsibility, Formal Opinion 196 (1939), the Committee examined the relationship between a lawyer and his client for title examination when such attorney retained one-fourth of the fee for abstract examination. Apparently the arrangement was carried out without the knowledge or consent of the client. The Opinion states that such an arrangement is improper unless it comes about with the full knowledge and consent of the client.

In ABA Committee on Ethics and Professional Responsibility, Formal Opinion No. 304 (1962), the ABA again examined an attorney who received a commission for recommending or selling title insurance without full disclosure to the client. The Committee rendered the following opinion:

> A lawyer who receives a commission (whether delayed or not) from a title insurance company or guaranty fund for recommending or selling the insurance to his client, or for work done for the client or the company, without either fully disclosing to the client his financial interest in the transaction, or crediting the client's bill with the amount thus received, is guilty of unethical conduct. Such conduct would be a direct violation of Canon 38.

The small trust program that you have outlined in your question will remit to the lawyer a percent of its service fee that the client incurs. The client's selection of the bank's services as trustee will often occur only because of the attorney's advice that such management services are important to the client as grantor of the trust. It is imperative that the lawyer inform the client in advance that his fee will be paid by the bank. The client must give his consent, with knowledge of the entire transaction, before an attorney can ethically continue his representation. Then during the course of the advice the attorney renders to the client-grantor, he must take care that his professional advice is not clouded in any respect by the bank. There can be no interference with the relationship between attorney and client.

In conclusion, it is our opinion that only when these conditions are satisfied can the attorney ethically agree to receive all or part of his fee from the bank managing the client's trust.

This advisory opinion expressly does not treat related issues of public communication, marketing and advertising of the small trust program (DR 2-101(A)) or any questions relating to the unauthorized practice of law (DR 3-101) by the bank or any of its personnel. **This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.**