

THE PHILADELPHIA BAR ASSOCIATION  
PROFESSIONAL GUIDANCE COMMITTEE  
Inquiry 2016-1  
(March 2016)

“S.A.,” at the time a Pennsylvania licensed attorney, represented Client in an ongoing civil action relating to a dispute between business associates. S.A. consulted with Inquirer for assistance with the matter. S.A. introduced Inquirer to Client. Inquirer prepared, and Client signed, a contingent fee agreement, retaining Inquirer’s firm to represent Client in the matter and providing for both S.A. and Inquirer to act as co-counsel and share the contingent fee (the “Original Contingent Fee Agreement”). Inquirer entered into a separate fee agreement with S.A. to share the contingent fee and the work in the case on a 50/50 split (“the Co-Counsel Agreement”).

S.A. and Inquirer worked together under the Original Contingent Fee Agreement for about five months and received weekly payments on an interim basis for their work from the proceeds of interim payments being made to Client by opposing party. The fee was evenly split between S.A. and Inquirer. S.A. and Inquirer both entered their appearance as co-counsel in Client’s litigation.

S.A. then received a notice of suspension of his law license which suspension remains in effect. After receipt of that notification, but before the effective date of the suspension (30 days later), Inquirer was asked by S.A. to modify their agreement to provide S.A. a straight one-third referral fee, since S.A. would not be able to do work on the case moving forward.

Inquirer asks if the Co-Counsel Agreement, entered into before the suspension, whereby Inquirer and S.A. were to share the work and fee equally, can be converted into an agreement under which S.A. receives a one-third referral fee but renders no service after the effective date of S.A.’s suspension (the “Referral Fee Agreement”).

### APPLICABLE RULES

The following Pennsylvania Rules of Professional Conduct (“the Rules”) apply to this inquiry.

Rule 1.5 Fees provides in part that

(e) A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless:

- (1) the client is advised of and does not object to the participation of all the lawyers involved, and
- (2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

Rule 5.4. **Professional Independence of a Lawyer** provides in part that

(a) A lawyer or law firm shall not share legal fees with a nonlawyer...

[The Rule provides for a number of exceptions none of which are applicable to this inquiry.]

Rule 8.4. **Misconduct** provides in part that

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

Pennsylvania Rule of Disciplinary Enforcement 217 ("Pa RDE") **Formerly Admitted Attorneys** provides in part that

(d)(1) Orders imposing suspension, disbarment, administrative suspension or transfer to inactive status shall be effective 30 days after entry. The formerly admitted attorney, **after entry of the disbarment, suspension, administrative suspension or transfer to inactive status order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature.** However, during the period from the entry date of the order and its effective date the formerly admitted S.A. may wind up and complete, on behalf of any client, all matters which were pending on the entry date. [Emphasis added]

## ANALYSIS

The Committee finds that the answer to the Inquirer's question depends upon S.A.'s standing to practice law during the following three distinct periods:

1. The period of time before the Court's entry date of the suspension (the "Entry Date")
2. The interim period spanning from Entry Date to the suspension's effective date (the "Interim Period")
3. The Court's effective date of the suspension (the "Effective Date")

Prior to the Entry Date, S.A. would have been considered, for purposes of the Rules, a "lawyer" fully authorized to practice law in Pennsylvania. Therefore, consistent with Rules 1.5(e) and 5.4(a), there was no ethical impediment to S.A. and Inquirer substituting the first agreement with S.A. with the Referral Fee Agreement. S.A. and Inquirer would have been permitted to modify, substitute or otherwise renegotiate the valid Co-Counsel Agreement prior to the Entry Date and there would have been no violation of Rule 5.4(a).

As Rule 1.5 requires only that the client consent to a division of fees and not to the exact terms of the division, client consent would not have been required.

A suspended or disbarred attorney is permitted to receive fees from successor counsel for services provided prior to the suspension or disbarment.<sup>1</sup> By sharing in the fees generated under the Original Contingent Fee Agreement, S.A. has been paid for his work done prior to his suspension.

However, the Committee believes that during the Interim Period it would have been improper for S.A. and Inquirer to substitute the Original Co-Counsel Agreement with the New Referral Fee Agreement, because during the Interim Period, S.A. would have been considered a "formerly admitted lawyer," under PaRDE 217(d)(1). While orders imposing suspension are normally effective 30 days after the entry date of the Court's order of suspension, a formerly admitted attorney is permitted to engage in very limited law-related activities. Specifically, a suspended attorney may wind up and complete, on behalf of any client, all matters which were pending on the suspension entry date, but during the Interim Period a suspended attorney shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. Entering into an agreement for payment of a straight referral fee requires that an individual act as an attorney. Under Inquirer's facts, the Committee finds that executing the New Referral Fee Agreement during the Interim Period constitutes engaging in a new legal matter.

Further, Rule 5.4 prohibits a lawyer or law firm from sharing legal fees with a nonlawyer. Since S.A. during the interim period cannot enter into any agreement for provision of legal services, and is considered "a formerly admitted attorney" – i.e., a nonlawyer - Rule 8.4(a), which prohibits a lawyer from violating a Rule of Professional Conduct or assisting another to do so, prohibits Inquirer from entering into the New Referral Fee Agreement or otherwise sharing with S.A. any part of the income that is attributable to services rendered after the Entry Date (including the Interim Period). Under the facts presented in the inquiry, it is clear that the sole purpose of voiding the Original Contingent Fee Agreement and writing the New Referral Fee Agreement is to thwart the Rules of Professional Conduct, and the provisions of Pa RDE 217. Therefore, the Committee concludes that after the Effective Date, the Inquirer and S.A. may not substitute the Original Contingent Fee Agreement with the New Referral Fee Agreement.

**CAVEAT:** The foregoing opinion is advisory only and is based upon the facts set forth above. The opinion is not binding upon the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. It carries only such weight as an appropriate reviewing authority may choose to give it.

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<sup>1</sup> A disbarred or suspended attorney is entitled to a division of fees in proportion to the services rendered prior to disbarment or suspension. See *Philadelphia Bar Association Professional Guidance Committee Opinions 86-3, 84-61, 83-101, 78-95, 75-63*; see also *Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Informal Opinion, May 16, 1986*; *South Carolina Bar Opinion 21-78, (Maru, 12727)*; *Maryland State Bar Association Committee on Ethics, Opinion 76-49*.