

Opinion 490
October 1993
Tex. Comm. on Professional Ethics, Op. 490, V. 57 Tex. B.J. 563 (1994)

[PEC No. 91-12]

QUESTION PRESENTED

Do the Texas Disciplinary Rules of Professional Conduct permit an arrangement under which a bank charges a fee to loan applicants for the preparation of mortgage loan documents by an in-house lawyer who is paid a salary by the bank but does not receive any part of the fees paid by loan applicants?

STATEMENT OF FACTS

A bank that has recently opened a mortgage department has been preparing loan documents to meet Federal National Mortgage Association ("FNMA") guidelines and has then had the loan documents approved by outside counsel. The bank now proposes to have its in-house attorney, who is a member of the State Bar of Texas and who is paid a salary by the bank, prepare the loan application documents. The attorney would not seek to advise the loan applicant concerning the loan transaction; the attorney's sole obligation would be to prepare the loan documents in a form that would be acceptable to the bank, the FNMA and any subsequent purchasers of mortgages in the secondary market. The bank proposes to charge a fee for the in-house lawyer's preparation of documents.

DISCUSSION

It is entirely appropriate for a lawyer who is a member of the State Bar of Texas to work as a full-time employee of a corporation, to render legal services to that corporation, and to assist in providing services to customers that are not specifically legal services. However, the Texas Disciplinary Rules of Professional Conduct do not permit a corporation that employs a lawyer to charge for the lawyer's services a fee that is retained in whole or in part by the corporation. Such an arrangement would be a violation of Rule 5.04(a) [FN1], which provides that, with exceptions not here relevant, "A lawyer or law firm shall not share or promise to share legal fees with a non-lawyer. . . ." Comment 1 to this Rule explains that "The provisions of Rule 5.04(a) express traditional limitations on sharing legal fees with nonlawyers. The principal reasons for these limitations are to prevent solicitation by lay persons of clients for lawyers and to avoid encouraging or assisting nonlawyers in the practice of law."

In this case, the loan application is an application of the loan applicant and not of the bank. Hence, even though the bank's lawyer does not provide legal advice to a loan applicant, the preparation of the loan document by the lawyer is itself a legal service for the applicant if the applicant is specifically billed for the service. [FN2] Accordingly, if the loan applicant pays a fee to the bank specifically for the lawyer's preparation of loan documents, this fee is a fee for legal services. It is contrary to Rule 5.04(a) for the lawyer to provide the service and allow the bank to retain some or all (in this case all) of the fee. A similar conclusion was reached in Texas Professional Ethics Committee Opinion No. 417 (*Texas Bar Journal*, June 1984). That opinion held that, under Disciplinary Rule 3-102(A) of the Texas Code of Professional Responsibility as in effect prior to 1990 (which is similar to the current Rule 5.04(a)), a lawyer could not participate in an arrangement where a collection agency retained fees paid by a creditor to the collection agency for the lawyer's services.

It should be noted that this conclusion would not apply if the bank did not charge a fee

specifically for the lawyer's preparation of loan documents. A bank's receipt of fees and interest income relating to mortgage loan applications on which an in-house lawyer has worked does not involve the lawyer's sharing legal fees with the bank. As a result there would not be a violation of Rule 5.04(a) if the bank charged a blanket fee for document processing that included the costs of lawyer and non-lawyer personnel involved in the preparation of documents, copying charges, delivery services, etc.

CONCLUSION

A lawyer who is a salaried employee of a bank may not under the Texas Disciplinary Rules of Professional Conduct participate in the preparation of loan application documents for bank customers if the bank charges the customers a specific fee for the lawyer's services with respect to the loan application documents. However, it is permissible for lawyer employees of a bank to assist in the preparation of loan application documents for bank customers so long as there is no specifically identified fee charged to the loan applicants for the lawyer's preparation of the documents.

FN1 All references to Rules are to the Texas Disciplinary Rules of Professional Conduct.

FN2 It should be noted that, although a lawyer's preparation of application documents for a person generally constitutes the practice of law, in many cases corporate personnel, whether or not lawyers, may assist a person in filling in forms related to the corporation's business without causing the corporation to be itself engaged in the practice of law.