

FORMAL ETHICS OPINION NO. 125

The Idaho State Bar Committee on Ethics and Professional Responsibility has received an inquiry from a Deputy Attorney General regarding various ramifications of Formal Opinion No. 117, issued on March 8, 1986. Specifically, the Deputy has asked:

1. Is Formal Opinion No. 117 limited to contingent fee cases, or does it also apply to cases in which the attorney is paid an hourly rate?

2. Does Formal Opinion No. 117 prohibit either Deputy Attorneys General or private attorneys retained by the Bureau of Child Support Enforcement of the Department of Health and Welfare from requesting awards of attorney fees in actions handled by the Bureau? and

3. If Deputy Attorneys General or private attorneys retained by the Bureau may request awards of fees, may their requests for fees exceed the actual expenses to the Bureau of prosecuting the action?

The Committee answers these questions as follows:

1. Formal Opinion No. 117 applies to any case, regardless of the nature of the contract between the client and attorney. The Committee sees nothing in the language of Formal

Opinion No. 117 that would justify a limitation based upon the nature of the attorney's fee. Nor does it see any policy reasons for so limiting it. Accordingly, the opinion applies to any case, regardless of how the attorney is paid.

2. Either Deputy Attorneys General or private attorneys retained by the Bureau may submit requests for attorney fees under any applicable statute or theory of law relevant to cases handled by the Bureau. Nothing within the Idaho Rules of Professional Conduct precludes either Deputy Attorneys General or private attorneys retained by the Bureau from requesting awards of fees under any applicable statute or theory of law. Moreover, the Committee sees no public policy that should preclude such requests for fees. Therefore, such requests may ethically be submitted to the court.

3. Requests for fees may exceed the actual expenses to the Bureau of prosecuting the action. In Formal Opinion No. 117, we evaluated the propriety of an attorney signing a request for an award of attorney fees when the requested fees:

1. Would be retained by the lay organization rather than the lawyer or law firm;

2. Were based upon work performed, not by the attorney, but by the client, which was a lay organization rather than a private law firm or its public counterpart; and

3. Exceeded the amount due the attorney under his contract with the client.

The Committee's conclusion in Formal Opinion No. 117 was that it would be inappropriate for the attorney to involve himself in such an arrangement. A complete answer to the pending question requires the Committee to explain that conclusion in greater detail than was provided in Formal Opinion No. 117.

That the requested fees were intended from the outset to be the property of the lay organization was pivotal to the result of Formal Opinion No. 117. From this fact, the Committee concluded that the plan described there was intended simply to increase the profits of the lay organization, in that case a collection agency. This conclusion was reinforced by the fact the collection agency was actually doing all of the work necessary to prosecution of the action.

It was in this context that the Committee examined the proposed request by the attorney for fees exceeding what he had been paid by the collection agency. The Committee concluded that the collection agency intended to have the attorney represent its work to be his own, with the result that its profits would be enhanced by the award of fees. Hence, the Committee's determination that the attorney could not involve himself in the plan described in Formal Opinion No. 117 without making a false statement of law or fact to the court, assisting in the unauthorized practice of law and sharing fees with a non-lawyer, in violation of the predecessors to Rules 3.3(a), 5.5(b) and 5.4(a), respectively, of the Idaho Rules of Professional

conduct. The Committee now reaffirms that result under the cited provisions of the current Idaho Rules of Professional Conduct, which went into effect shortly after issuance of Formal Opinion No. 117.

In this case, the Deputy has asked whether a Deputy Attorney General acting on the Bureau's behalf or a private attorney retained by the Bureau may request fees in excess of the legal expense to the Bureau of prosecuting the action. We answer this question affirmatively. It is not a violation of the Idaho Rules of Professional Conduct for any attorney, whether he represents the Bureau, a collection agency or anyone else, to request a fee in excess of what his client owes for his professional services, so long as the fact that the requested fee exceeds the client's obligation is fully and clearly disclosed and the basis for the "excess" fee is set forth in the request or a supporting document.

Moreover, in view of Formal Opinion No. 117, an attorney may not represent the work of a layman to be his own or that of another attorney for purposes of the request for fees. He may, however, request compensation for the work of paralegals or other laymen acting under his supervision, so long as his request fully and clearly specifies the fact that laymen performed the work, and so long as the request articulates the basis on which it is made.

Finally, the Committee notes that this opinion is intended to complement rather than supplant the requirements of

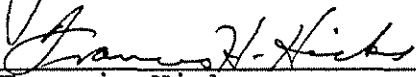
the federal and state law. Thus, the basis for any request for "excess" fees or for the work of paralegals must satisfy the requirements of Rule 11 of the Idaho Rules of Civil Procedure or the corresponding federal provision.

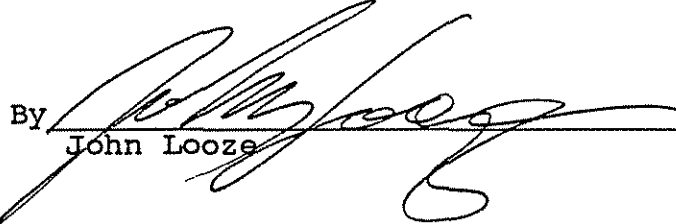
The Committee emphasizes that this opinion speaks only to the ethical bounds upon a request for fees. That an honest request for fees argued in good faith may be ethical does not mean that it must be granted. That remains for the courts to decide, and this Formal Opinion is not intended, and must not be construed, to indicate any opinion on that issue.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1988.

IDAHO STATE BAR COMMITTEE ON ETHICS  
AND PROFESSIONAL RESPONSIBILITY

By   
Jeffrey A. Strother, Chairman

By   
Francis Hicks

By   
John Looze