

RE: Advisory Opinion 95-02

DATE: September 26, 1995

SUBJECT: Role of a Middleman in the Distribution of Clients' Funds

This committee has been presented with the following situation by a law firm: the law firm performs foreclosure activities for mortgage companies, in recent years middleman companies have become involved in the process by referring foreclosure files to law firms and intervening between the law firm and the mortgage company. The middleman company acts as a third party independent contractor by providing services between the law firm and the mortgage company. One middleman company has notified the law firm that in the future, upon the settlement of a foreclosure lawsuit, all monies associated with the settlement are to be forwarded directly to the middleman. The middleman will then distribute the funds to the mortgage company and to others who are entitled to a portion. The law firm asks whether it may comply with the request of the middleman.

Without doubt the attorney-client relationship is between the mortgage company and the law firm. The mortgage company has the right under the substantive law to bring foreclosure proceedings. The mortgage company has selected, either directly or indirectly, the law firm to assert its claims. The law firm has accepted the offer and agreed to represent the mortgage company. There is no attorney-client relationship between the middleman and the law firm.

The client determines the objectives of representation. Ark. R. Prof. Cond. 1.2(a). As the Comment emphasizes "the client has ultimate authority to determine the purposes to be served by legal representation . . . [and] the right to consult with the lawyer about the means to be used in pursuing those objectives." Although the attorney has responsibility for technical and tactical issues, the attorney "should defer to the client regarding such question as the expenses to be incurred and concern for third persons who might be adversely affected." All those decisions are made by the law firm and the client, here the mortgage company. The middleman participates in those decisions only upon the request of the client.

By providing assistance, the middleman plays, at best, a collateral role to the attorney-client relationship. The middleman has no authority to exercise any control, direction or regulation of the law firm's rendition of legal services for the client. Rule 5.4(c). The attorney-client relationship also mandates that the duties of confidentiality and loyalty, see Rules 1.6 and 1.7, are owed to the client, without interference by the middleman. The client may waive confidentiality, and such waiver may be necessary if the settlement is confidential.

The distribution of settlement funds may be done by a law firm, but nothing suggests that it falls into that elusive definition of the practice of law. See Smith v. National Cashflow Systems, Inc., 309 Ark. 101, 827 S.W. 2d 146 (1992). Distribution does not necessarily require the giving of legal advice or the providing of court services, see Undem v. State Board of Law Examiners, 266 Ark. 683, 587 S.W. 2d 563 (1979), or the preparation of prohibited legal documents. Pope County Bar Association v. Suggs, 274 Ark. 250, 624 S.W. 2d 828 (1981). Their services appear to be ministerial in nature. Accordingly, Rule 5.5(b) does not bar the firm from forwarding the settlement proceeds to the middleman.

Rule 1.15 sets forth the standards for attorney handling of clients' funds. Section (b)

states: "except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third persons any funds or other proper that the client or third person is entitled to receive. . . ." The mortgage company has a right to the proceeds of the foreclosure action, and the attorney is obligated to forward those funds to the mortgage company. But as the rule expressly indicates, the client and the attorney may agree otherwise. This permissive clause is the governing rule for the question posed to this committee.

Another area of the practice of law offers analogous support. It is not uncommon in personal injury litigation for the attorney to distribute settlement proceeds to physicians, hospitals and others with a claim. But such distribution should only be done with disclosure to the client and with consent from the client. See Ark. R. Prof. Cond. 1.4(b).

If the mortgage company, which is the client, and the law firm agree that upon settlement of a foreclosure action, the funds are to be forwarded to a middleman, that agreement is binding upon the law firm. On the other hand, in the absence of such an agreement, the funds are to be forwarded directly to the client.

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ARKANSAS BAR ASSOCIATION

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