

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Op. 2024-02
Issued April 11, 2024**

FACTS

The inquiring attorney represents clients in real estate matters as part of his or her practice. He or she reports that recently, attorneys representing buyers in real estate closings have added certain new so-called “seller” fees to the settlement statements they prepare including, but not limited to, a disbursement fee, a discharge tracking fee, a wire fee, and courier fees. The inquiring attorney elaborates that the wire fee pertains to the transfer of fees from his or her IOLTA account, even though financial institutions do not normally charge fees to transfer funds from IOLTA accounts.

Whenever the inquiring attorney represents a seller in a matter in which these fees appear, the inquiring attorney states, he or she objects to the fees and seeks to have them removed or reduced. In matters in which the fees are not removed or reduced, the inquiring attorney’s clients pay the fees in order to complete the closing transactions. The inquiring attorney represents that in none of the matters in which these fees appear does the buyer’s attorney provide any legal services or advice to the sellers.

ISSUE PRESENTED

The inquiring attorney asks whether these fee practices violate the Rules of Professional Conduct?

OPINION

It is the Panel’s opinion that the fee practices as described by the inquiring attorney violate the Rules of Professional Conduct.

REASONING

Before delving into its analysis of the instant inquiry, the Panel pauses to express its disappointment with the fee practices as described by the inquiring attorney. Rarely has the Panel encountered a situation in which Rhode Island attorneys have leveraged their unique professional knowledge and experience to enrich themselves at the expense of others who are without serious recourse. It is the Panel’s opinion that these practices violate the Rules of Professional Conduct.

Matters pertaining to attorney’s fees and expenses are governed by Rule 1.5 of the Rules of Professional Conduct.

Rule 1.5(a) commands that attorney’s fees and charges for expenses must be “reasonable under the circumstances.” Rule 1.5, Comment [1]. The reasonableness of a fee is determined on a case-by-case basis. See id. With regard to expenses, “[a] lawyer may seek reimbursement for

the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.” Id.

In addition, Rule 1.5(b) requires that lawyers convey fee and expense information to new clients in writing prior to or as near as possible to the beginning of the representation. See also Rule 1.5, Comment [2] (encouraging “an understanding as to fees and expenses” to be “promptly established” between attorney and client). The written notice should set forth, at a minimum, “the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation.” Id.

From its review of the closing documents submitted by the inquiring attorney with his or her inquiry, it is clear to the Panel that these fees all constitute charges for expenses ostensibly related to the distribution of the funds necessary to complete the real estate transaction in question—“disbursement,” “discharge tracking,” “wire,” and “courier” charges. To be reasonable, these charges must either reflect “a reasonable amount to which the client has agreed in advance” or “the cost incurred by the lawyer.” Neither condition is met here. As will be discussed in greater detail below, the inquiring attorney’s clients do not receive advance notice of these expenses. Nor is it clear that these charges reflect costs actually incurred by the buyers’ attorneys. For example, as the inquiring attorney notes in his or her inquiry, financial institutions do not charge wire fees to transfer funds out of attorney IOLTA accounts. Therefore, the buyers’ attorneys cannot properly pass on such a nonexistent expense to the inquiring attorney’s clients. See Rule 1.5, Comment [1]. Accordingly, fees of this type are *ipso facto* unreasonable. Cf. Rhode Island Supreme Court Ethics Advisory Opinion No. 2023-12 (determining that the inquiring attorney could pass credit card processing fees to his or her clients in both flat fee and hourly billing matters, as well as in situations when the client has paid fees to the inquiring attorney in connection with issuance of payment to a third party, because they reflected no more than the costs actually incurred by the inquiring attorney during the representation).

The Panel further finds that these fee practices also violate Rule 1.5(b) because the buyers’ attorneys fail to provide the inquiring attorney’s clients with notice of their intention to charge these expenses prior to the real estate closing transactions at which the clients are expected to pay them. Thus, there is no prior “understanding as to fees and expenses” between the parties as required under the Rule. See Rule 1.5, Comment [2]. This leaves the inquiring attorney in the disadvantaged position of attempting to reduce or eliminate the fees immediately before or during the transactions themselves, circumstances which both limit the inquiring attorney’s negotiating options and create the risk of undermining the sale, thereby increasing the likelihood that the fees are paid. It follows, then, that these fee practices would violate Rule 1.5 even if the fee themselves were deemed reasonable under the circumstances. See North Carolina State Bar Formal Ethics Opinion 2021-3 (noting that “[n]othing in the Rules of Professional Conduct permits or empowers a lawyer to charge a third or opposing party for legal services performed for the benefit of her client without that party’s consent”).

The Panel concludes by reminding those Rhode Island attorneys and law firms that “a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.” Preamble to the Rules of Professional Conduct, Paragraph [6].

The fee practices cited in this inquiry constitute unprofessional conduct. They manifest a goal of self-enrichment at the expense of others. Those adversely affected by this conduct have limited recourse, at best, other than to acquiesce to these practices or risk jeopardizing the purchase and sale of a home. Therefore, the Panel finds that the conduct identified by the inquiring attorney violates Rule 1.5.