FORMAL OPINION NO. 24*

The Committee has been requested to express its views concerning a question arising out of the facts hereinafter stated and which for the want of a better term has been designated as a breach of trust and confidence as between attorneys associated in a matter of common interest.

Briefly the facts are as follows:

Attorney A representing Mrs. X in a divorce action obtained a judgment in her favor in Idaho, which included a provision for temporary alimony and child support, and also an award for attorney's fees and costs. The judgment was awarded in January, 1956, and nothing was paid thereon except the sum of $200.00. In September, 1958, Attorney A referred the matter, with the consent of Mrs. X, to Attorney B in the State of Oregon, furnishing a certified copy of the decree and offering to get any other part of the judgment roll that might be needed. Attorney B accepted the matter on a contingent basis with his fee to be 40% of the amount collected and one-third thereof to be returned to Attorney A as forwarder. Attorney B immediately made written demand upon the judgment debtor using the post office address furnished him by Attorney A, and received a return receipt through the post office showing that the judgment debtor, Mr. X, had received the demand on September 24, 1958. On November 17, 1958, Attorney B filed a complaint in the circuit court in the name of Mrs. X against Mr. X based upon the Idaho judgment. This was done apparently after receipt of an inquiry from Attorney A under date of October 23, 1958, as to progress in the matter and on November 20, 1958, Attorney B wrote Attorney A advising that an action had been commenced and that Attorney B had learned that Mr. X, the judgment debtor, had died on November 11, 1958. In the filing of the action, Attorney B incurred filing and service costs of $16.25.

As a result of a letter written by Attorney B to Mr. X's former employer under date of November 20, 1958, Attorney B learned that Mr. X was covered by a life insurance policy in the amount of $2,000.00 which policy named Mrs. X, his former wife, as beneficiary. A claim for payment of the insurance money to Mrs. X had already

been initiated by the employer when Attorney B learned of the existence of the insurance. Attorney B then obtained a certified copy of the record of death of Mr. X at a cost of $2.00 and presumably presented it to the insurance company. In due course, the insurance company handed Attorney B a check payable to Mrs. X in the amount of $2,000.00, which he forwarded to Attorney A on December 10, 1958, with his statement for attorney's fees and costs in a total amount of $218.80, stating in his letter, among other things "This was sent to us on a 40 percent basis with one-third to be returned to you. The 40 percent, of course, would be much higher than the bill I have rendered, and I leave this matter to your discretion." Attorney A delivered the check to Mrs. X upon her promise to make direct payment of the statement to Attorney B. No payment was received and on April 1, 1959, Attorney B wrote Attorney A detailing what work he had done and requesting payment of his statement of December 10, 1958. This letter was answered by Attorney A on May 11, 1959, stating what Attorney A had done, with reference to delivery of the check and requesting direct payment to Attorney B, and stating also that he had mailed Attorney B's letter of April 1, 1959, to Mrs. X with the request that she pay Attorney B's claim. Attorney B wrote Attorney A again on June 8, asking that he exert his sincere efforts in obtaining payment of the fee, and hearing nothing further from Attorney A, Attorney B referred the matter to the Board of Commissioners of the Idaho State Bar with the request for help, but confined his request at that time to a claim of $18.80 for costs expended in behalf of Mrs. X, and makes complaint that Attorney A is guilty of a breach of trust and confidence in refusing to reimburse him for the costs.

It appears from the file handed the Committee that Attorney B's efforts were in the first instance directed at obtaining payment of his statement of $218.80, but that upon reconsideration of his position he complains upon the refusal of Attorney A to reimburse him for the costs expended in the amount of $18.80. From the file furnished, it appears that the costs paid were $16.25 for filing a complaint and as fees to the sheriff, and $2.00 to the State of Oregon for a death certificate. It is concluded from the file and from those facts that an additional charge of 55 cents was made by the sheriff for a not found return, no receipt for which appears in the file.

Nothing is found in the correspondence between the Attorneys which could be construed as an instruction on the part of Attorney A to Attorney B to incur any costs, nor which can be deemed a promise on the part of Attorney A to reimburse Attorney B for any costs. If any such promise exists, it must be reached by implication, or by customs existing between attorneys in the matter of the forwarding of business. No citation of canons or opinions is needed to support the statement that attorneys in dealing with each other should at all times be fair, honest, and candid whether they are associated together in a business or whether they are opposing counsel; and in this circumstance, no doubt Attorney B feels that the trust which he has reposed in Attorney A by forwarding the insurance check was violated by the release of the check without collecting the fee and costs claimed. Some doubt arises, however, as to his own belief in the matter from the fact that his complaint is confined to the non-payment of the costs only and contains no mention of the fee claimed nor does it properly identify the source of the check for $2,000.00, which was in fact the insurance money rather than a collection upon the judgment which was the basis of the relationship between the attorneys in the first instance. Without having access to the file of correspondence, it might be assumed from a reading of the complaint that Attorney B had been successful in collecting $2,000.00 on the judgment. It is our opinion that the complaint is not a fair statement of the situation exemplified by the correspondence furnished the Committee.

It is not the function of this Committee to pass upon judicial questions; and though the question of Attorney B's right to reimbursement for costs necessarily enters into the consideration of the ethical problem involved, it is not the purpose or intent of this Committee to attempt to say in this Opinion that Attorney B is entitled to recover the sum of $18.80 or any sum whatever from Attorney A.

An analysis of the ethical situation, however, seems to require that consideration be given particularly to the following facts:

1. That the business was forwarded, and accepted, without instruction or request as to the method of collection; and that an understanding was had between the attorneys as to division of any fees collected; and that fees were to be contingent upon recovery of any sum whatever based upon the Idaho judgment.

2. That Attorney B learned, about September 25, 1958, that the judgment debtor was in the jurisdiction

of Attorney B's area, and he took no further action in the matter until more than seven weeks later.

3. The file does not disclose the date upon which Attorney B learned of the death of Mr. X, except that it was sometime before November 21, 1958. Presumably this information could have been obtained at any time between November 12 and November 17, the date of the filing of the complaint against Mr. X.

4. At no time between September 16, when the matter was forwarded, to the date of the filing of the complaint did Attorney B request a deposit for costs and expenses of filing the suit.

5. Upon learning of the death of Mr. X, Attorney B assumed the prerogative of handling the collection of the insurance money without permission or consent of either Attorney A or Mrs. X and with full knowledge that the process of making the claim for the insurance money had already been initiated by Mr. X's employer, and with the further knowledge that Mrs. X was named as beneficiary in the insurance policy. It seems reasonable to say that Attorney B could have assumed that the process of claiming the insurance payment would have been continued to completion without his intervention and that payment would have been received by Mrs. X without his help.

6. That Attorney A upon receipt of the insurance check and the statement rendered by Attorney B did by implication at least accept the trust of seeing that Attorney B's statement was paid or taking other steps for the protection of Attorney B until the question of payment of his statement could be settled. The file did not disclose whether Attorney A demanded payment from Mrs. X as a condition to the release of the check, but it is assumed that he did not, and that he had concluded that neither he nor Attorney B had a right to withhold the check in the absence of payment of the statement; and that, therefore, he accepted the statement of Mrs. X that she would take care of the statement directly with Attorney B. In this connection it is the opinion of the Committee that neither Attorney B or B had any lien upon the proceeds of the insurance policy nor any right to demand payment of the fee for collection of the same in the absence of any prior agreement with Mrs. X to employ them for that purpose.

7. In connection with the insurance money, Attorney B advised Attorney A of the existence thereof and of his intention to attempt to secure the proceeds of the policy and of attempting to locate any assets belonging to judgment debtor X. Attorney A by letter of November 28 apparently approved of Attorney B's actions.

After careful study of the file and of the facts represented thereby, it appears to us that this situation is one in which one attorney, being unable to handle a matter to its completion because of the non-resident factor with respect to the judgment debtor, forwards the matter to an associate in another state, under an arrangement whereby the forwarding attorney is to receive one-third of the net as a forwarder's fee. In such instances it is our understanding that usually the attorney receiving the business is expected to prosecute the same and use his own judgment, and that the services of the forwarding attorney are simply in the nature of a contact or, at most in an advisory capacity. It seems also that the attorney in the position of Attorney B is usually expected to do such investigating as is necessary in his jurisdiction and to use his own judgment as to whether or not a suit is purposeful in obtaining the desired end. In this instance, Attorney B apparently thought that a suit was advisable and backed his judgment in that respect by commencing suit and advancing the filing fees and the service costs. This advance no doubt was made with the expectation that it would be deducted from any amount recovered. It does not appear to us that at any time prior to the discovery of the death of the judgment debtor did Attorney B expect to ask for reimbursement of his advances from Attorney A. It may be that he considered that Mrs. X, their client, would ultimately pay the advances. The question then is did Attorney A violate a trust and confidence by delivering the insurance money check without obtaining payment from Mrs. X of the advances, or of the advances and the fee claimed by Attorney B. As we have already indicated, it is our opinion that neither attorney had any claim for fees on the insurance check. We also believe that Attorney A had no right to withhold delivery of the insurance money check if Mrs. X demanded delivery thereof without paying the fee; since the law does not require a useless thing to be performed, it would then appear useless for Attorney A to demand payment of the fee or the advances as a condition to the delivery of the check. Attorney A had not requested institution of the suit, nor had he in any manner guaranteed payment of costs. Attorney B had not requested any deposit either of A or of their client to cover his costs, and presumably advanced the costs with the expectation, as above indicated, of deducting those costs from the net received from any payment to be made by judgment debtor X.

We do not presume to pass upon the legal question of whether or not any recovery could be had from Mrs. X for the advances made, but it is our opinion that Attorney B is not in a position to demand reimbursement from Attorney A.

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*This is an undated opinion. As to division of fees with lawyers generally, see DR 2-107, Idaho Code of Professional Responsibility. See also, I.S.B. Opinion No. 27 (December 5, 1960) relating to responsibility as to fees between attorneys in the case of substitution of counsel.