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Payment of a Referral Fee to Administrator of Decedent's Estate

Informal Opinion 16-03

A lawyer ("Inquirer") inquires whether it is permissible, under the Connecticut Rules of Professional Conduct, for the Inquirer to accept a referral fee from a wrongful death action when the Inquirer serves as administrator of the estate of the decedent.

The decedent was a client of the Inquirer. After the decedent's death, the Inquirer consulted with the family of the decedent and recommended that the matter be referred to an attorney experienced in wrongful death claims. The family agreed and the Inquirer has made such a referral. The Inquirer intends to participate in the prosecution of the wrongful death action and attend each of the major events of the litigation including settlement conferences, depositions, pre-trials and trial.

The executors named in the decedent's will were either ineligible or declined to serve. None of the family members could conveniently serve as administrator. The court appointed the Inquirer as administrator.

The decedent's son and daughter are the beneficiaries of the estate. The son and daughter have no objection to the Inquirer receiving a referral fee.

The narrow issue that we consider is whether a lawyer who serves as the administrator of the estate of a decedent may ethically receive a referral fee from the decedent's wrongful death action.[1] We assume that the total legal fee[2] charged in the wrongful death case is reasonable and complies with all statutory requirements,[3] and, therefore, that Rule 1.5(e)(2) is satisfied. We assume that both the Inquirer and the lawyer to whom the case is referred are duly licensed lawyers,[4] to whom the matter has been referred has entered a written fee agreement as required by Rule 1.5(c).[5]

Rule 1.5(e), governs the sharing of fees between lawyers who are not in the same firm. Rule 1.5(e) provides:

> A division of fee between lawyers who are not in the same firm may be made only if:
> (1) The client is advised in writing of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and
> (2) The total fee is reasonable.

Rule 1.5(e)(1) requires that the client be advised in writing of, and not object to, the compensation sharing agreement and the participation of all of the lawyers. Under the facts presented, the Inquirer, as administrator, is the client.

The opportunity to earn a referral fee presents a potential conflict of interest for a lawyer serving as an administrator of a decedent's estate: when selecting counsel to bring the wrongful death claim, the interest of the lawyer in earning the referral fee could conflict with the obligation of the administrator to serve the best interests of the estate.[6] We believe, however, that the interests of the lawyer referring the case are aligned with the interests of the estate: the best interests of both the attorney and the estate are served by obtaining a fair recovery in the wrongful death claim.[7] Thus, there would be no conflict between the referring lawyer and the estate: both are best served by a fair recovery in the wrongful death action and both would benefit by the referral of the case to an attorney suited to obtaining a fair recovery.

We conclude that the Inquirer is not prohibited under the Rules of Professional Conduct from accepting a referral fee from a lawyer to whom the decedent's wrongful death claim is referred. CL

Notes

1. Our analysis here is limited to the application of the Connecticut Rules of Professional Conduct to this inquiry. We express no opinion about the requirements for the receipt of a referral fee by a fiduciary (such as an administrator) or whether the Inquirer is required to obtain the approval of the probate court for the receipt of a referral fee.
2. The total legal fee includes the fee of the attorney to whom the case is referred and the referral fee. It is our understanding that in contingent fee matters the referral fee is generally a portion (defined by a percentage) of the fee charged by the lawyer to whom the case is referred. Since the referral fee is paid out of the standard contingent fee charged by the lawyer to whom the matter is referred, the payment of a referral fee does not generally increase the total fee paid by the client.
3. See Conn. Gen. Stat. §52-251c.
4. Rule 5.4(a) prohibits sharing of fees with non-lawyers except in certain enumerated circumstances.
5. Rule 1.5(c) requires that an agreement for a contingent fee be signed by the client. Since the administrator of the estate is the client, the fee agreement would be signed by the Inquirer. It may be prudent to seek approval of the fee agreement by the probate court.
6. Rule 1.7 (Conflict of Interest: Current Clients) provides: "(a). . .a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation will be materially limited by a

lawyer's responsibility to . . . a third person or by a personal interest of the lawyer." In the facts presented, the Inquirer intends to participate as a lawyer in the wrongful death action, so that Rule 1.7 applies to the Inquirer as a lawyer representing a client. We do not address the impact of the potential conflicts of interest faced by the Inquirer as a fiduciary (administrator) because that is a question of law beyond the mission of this committee.

7. There could be circumstances in which other criteria would determine the best interests of the estate. For example, it could be more beneficial for the estate to settle for a smaller recovery at an earlier time. It can be imagined that the referring attorney might prefer a greater recovery at a later date. However, this situation is no different from any case in which the fee is contingent: the referring attorney must accept the client's decisions in these matters. When the attorney is also the administrator, the attorney has the ability to accept or reject the settlement. In such unusual circumstances, the attorney's role as administrator might create a conflict under Rule 1.7(a)(2).

Payment of a Referral Fee to Attorney for Conserved Person

Informal Opinion 16-04

A lawyer ("Attorney 1") inquires whether it is permissible, under the Connecticut Rules of Professional Conduct, for Attorney 1 to accept a referral fee from Attorney 2, who has been hired to investigate and prosecute a medical malpractice action on behalf of a conserved person who is the client ("Client") of Attorney 1.

Attorney 1 was appointed by the probate court to represent the Client as the respondent in an application for the appointment of a conservator. The application was brought by the Client's mother. Client had suffered a serious stroke that left the Client immobile and non-verbal. After investigation, Attorney 1 determined that the appointment of the mother as conservator was in the best interests of the Client and recommended the same to the probate court. After a full hearing, the probate court appointed the mother as conservator ("Conservator") for the Client.

The Conservator explained to Attorney 1 the circumstances under which the Client suffered the stroke. Attorney 1 concluded that the best interests of the Client were served by investigating the prosecution of a malpractice claim. Upon the recommendation of Attorney 1, the Conservator consulted with and hired Attorney 2.

The narrow issue that we consider is whether a lawyer who serves as the attorney for a conserved person may ethically receive a referral fee from the client's medical malpractice action. In answering this question, we assume that the total legal fees[1] are reasonable and comply with all statutory requirements.[2] We assume that both Attorney 1 and Attorney 2 are duly licensed lawyers.[3] Finally, we assume that Attorney 2 has entered a written fee agreement as required by Rule 1.5(c).[4]

Rule 1.5(e), governs the sharing of fees between lawyers who are not in the same firm. Rule 1.5(e) provides:

> A division of fee between lawyers who are not in the same firm may be made only if:
> (1) The client is advised in writing of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and
> (2) The total fee is reasonable.

To be allowed to share a fee, it is not necessary that Attorney 1 participate in the representation.[5] To comply with Rule 1.5(e) it is only necessary that the participants sharing the fee be lawyers and that the fee sharing agreement meet the other requirements of Rule 1.5(e). The wording of Rule 1.5(e) as adopted in Connecticut omits the requirement of the ABA Model Rule 1.5(e) that a division of fees must be made in proportion to the services performed by each lawyer or that each lawyer must assume joint responsibility for the representation.[6] Thus, a lawyer with no other attorney-client relationship with a person may refer such person to another lawyer and receive a referral fee (upon compliance with the other requirements of the rule).[7]

As adopted in Connecticut, Rule 1.5(e) provides an incentive for a lawyer who is consulted by a prospective client with a matter in an unfamiliar area of law to refer the matter to a lawyer better able to handle the matter. Clients benefit from such a referral because the case is handled by a lawyer with greater knowledge, skill, and experience in the area of law pertinent to the client's needs. The referring lawyer earns a fee without accepting a case in an area of law with which the referring lawyer is less familiar.

We believe that both the language and purpose of Rule 1.5(e) permit Attorney 1 to receive a referral fee. Attorney 1 represents the Client in the conservatorship proceedings. There is no reason why Attorney 1 cannot represent the Client in matters outside of the conservatorship proceedings. Because of the Client's limitations, it may