

Referrals by a Retired Attorney

OPINION 22-02

NOVEMBER 16, 2022

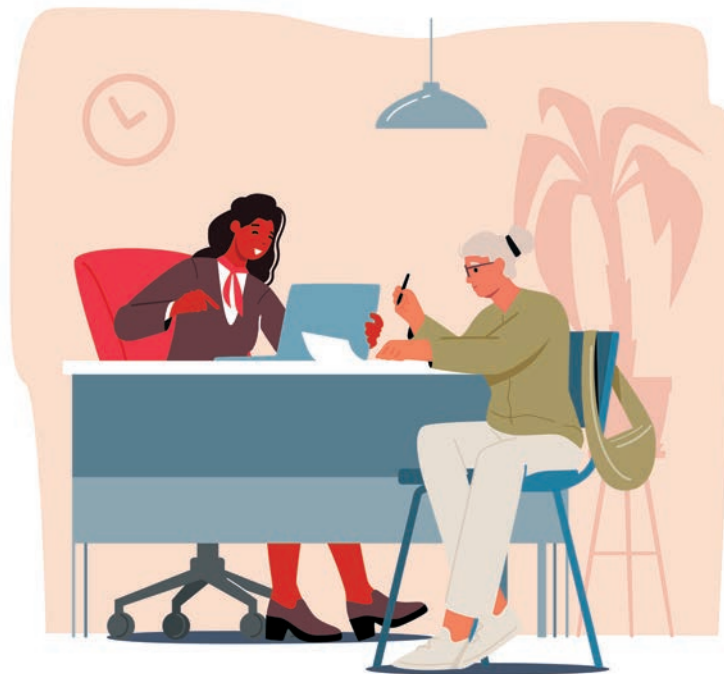
A lawyer has requested an opinion on whether a retired lawyer who is no longer practicing and has a “judicial department status of retired or inactive,” may still be paid referral fees for new matters he refers to other lawyers.¹ We conclude that the answer is no. Regardless of whether the lawyer is retired, permanently retired, or on inactive status, payment of a referral fee for matters referred post-retirement would not be permissible.

There are two angles from which to look at the issue: (1) the retired lawyer’s conduct in receiving the fee; and (2) the active lawyer’s conduct in paying the fee for the referral. While the question is framed with respect to only the retired lawyer’s conduct, as a practical matter, both issues are relevant to analyzing the ethical issues in question. Because the second question provides helpful insight into analyzing the first, we address it first.

I. A Lawyer Generally May Not Pay a Referral Fee to a Non-Lawyer for Recommending the Lawyer’s Services

Subject to certain enumerated exceptions, Rule 7.2(c) of the Rules of Professional Conduct provides that “[a] lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer’s services....” Subsection (4) provides an exception allowing a lawyer to “refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if: (A) the reciprocal referral agreement is not exclusive; and (B) the client is informed of the existence and nature of the agreement....” The Commentary to the Rule explains that “a lawyer who receives referrals from a lawyer or nonlawyer professional [pursuant to this provision] must not pay anything solely for the referral” except as permitted by Rule 1.5(e).

Rule 1.5 addresses attorneys’ fees and Section (e) allows “[a] division of fee between lawyers who are not in the same firm...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.”



Thus, taken together, Rule 7.2(c) and Rule 1.5 permit a lawyer to pay an individual a referral fee for recommending the lawyer *only* where the individual providing the referral is also a lawyer (who has undertaken a limited representation of the client to provide the referral) and where the arrangement is explained to the client and the total fee is reasonable.

As we have previously explained,

[A]n attorney who uses his or her legal expertise to gather relevant information about a case, to evaluate both liability and damages,

and, if appropriate, to attempt to match a case with an appropriate legal specialist is rendering legal services whether those services are advertised under the heading of ‘Attorney Referral Services’ or under ‘Attorneys,’ and whether those services are performed by a law firm or by lawyers employed by a business entity which calls itself something other than a law firm.

Informal Opinion 01-03.²

Thus, here, a lawyer could not pay a fee to the retired attorney unless that attorney is still considered a lawyer capable of forming an attorney-client relationship and is one who could be paid for legal services rendered. As discussed below, we conclude a retired or inactive lawyer could not.

II. A Retired or Inactive Lawyer Is Not Permitted to Receive Compensation for Referrals

In addressing the question presented, we first clarify that there are several potential lawyer statuses at issue in Connecticut.

The Connecticut Practice Book distinguishes among retired, permanently retired, and inactive attorneys. A retirement granted pursuant to Practice Book Section 2-55 is revocable at any time upon notice to the Hartford judicial clerk and statewide bar counsel. Upon retirement, an attorney will be exempt from paying the client security fund fee required by Practice Book Section 2-70(a), but the attorney must continue to comply with the registration requirements required by Practice Book Sections 2-26 and 2-27(d). Such retirement “shall not constitute removal from the bar or the roll of attorneys.” Practice Book Section 2-55(a). While the retired lawyer will not be eligible to practice law for compensation, she may thereafter engage in uncompensated services to clients under the supervision of an organized legal aid society, a state or local bar association project, or a court-affiliated pro bono program. See Practice Book Section 2-55(e).

A permanent retirement, granted pursuant to Practice Book Section 2-55A, is not revocable for any reason. Upon permanent retirement, an attorney will be exempt from paying the client security fund fee required by Practice Book Section 2-70(a) and will no longer have to comply with the registration requirements required

by Practice Book Sections 2-26 and 2-27(d). Practice Book Section 2-55A(a) provides that permanent retirement “shall not constitute removal from the bar or the roll of attorneys,” but a permanently retired attorney may no longer practice law in Connecticut under any circumstances without reapplying for admission to the bar pursuant to Practice Book Sections 2-8 or 2-13. Practice Book Section 2-55A(c).

Finally, an inactive attorney is an attorney placed on inactive status by court order pursuant to Practice Book Section 2-57, 2-58, or 2-59. An inactive attorney is considered among a class of “deactivated attorneys” under Practice Book Section 2-47B. Although not expressly stated in the pertinent Practice Book provisions, it is presumed that an inactive attorney remains a member of the Connecticut bar. See Practice Book Section 2-60 (inactive attorney may seek reinstatement). Pursuant to Practice Book Section 2-56, however, an attorney placed on inactive status “shall be precluded from practicing law” in Connecticut.

In summary, a permanently retired lawyer or a lawyer placed on inactive status may not engage in the practice of law. In comparison, a retired lawyer may engage in uncompensated services to clients when supervised by an organized legal aid society, a state or local bar association project, or a court-affiliated pro bono program.

Regardless of which status would apply to the requestor, however, it is clear that he could not continue to accept referral fees for cases. Because the provision of referrals by lawyers is considered the practice of law, as discussed above, and because permanently retired attorneys and attorneys on inactive status may not engage in the practice of law, these two classes of attorneys are prohibited from providing referrals in their capacity as lawyers. (Therefore, they cannot take advantage of Rule 1.5(e)’s fee-splitting exception to the prohibition against the payment of referral fees.) And, while a retired attorney is permitted to engage in certain uncompensated legal services post-retirement, the rules are clear that they must be just that—uncompensated. Thus, this category too would not permit the receipt of a referral fee post-retirement.

In sum, we conclude that the Rules of Professional Conduct would prohibit a retired or inactive attorney from continuing to receive referral fees for matters referred after he ceases practicing law.

NOTES

- 1 This Opinion only addresses the question of whether the retired lawyer may receive referral fees in connection with new referrals made after the lawyer has retired, not a scenario where the lawyer made the referral while in active practice, but would be paid subsequent to retirement.
- 2 See also Informal Opinion 13-04 (explaining that “[e]ven though a referring attorney is required neither to provide services in nor to assume joint responsibility for the representation in the referred case, ... Rule 1.5(e) by necessary implication requires that *each lawyer receiving a fee from the representation of a client establish a lawyer-client relationship with the client and, as an attorney for the client, be bound by the Rules of Professional Conduct, even if the scope of the lawyer-client relationship is the referral itself.*”) (emphasis added).

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Whether Prior Co-Counsel Relationship Presents a Conflict

OPINION 23-01

MARCH 15, 2023

The Committee has been asked whether a criminal defense lawyer (the “Requester”) who periodically serves as co-counsel with another defense attorney in serious criminal cases may represent an individual charged with conspiracy to commit murder, where the other attorney with whom he has co-counseled has been retained to represent a co-defendant in the same alleged conspiracy. The Requester explains that he and the other attorney maintain separate law practices in separate office locations. The request presents the following questions:

1. Would the representation create a conflict of interest or potential conflict of interest in violation of Rule 1.7 of the Rules of Professional Conduct (the “Rules”)?¹
2. If so, are there procedures to avoid violation of the Rules?

Rule 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, unless the conflict is waivable and the client provides his or her informed consent in writing to that representation. “A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

Rule 1.7(a)(1) would typically prohibit the same lawyer from representing both co-defendants in a criminal case, since there is

significant risk that the defendants might have incompatible defense strategies. As we have previously explained, “generally speaking, the risks attendant to such dual representation in a criminal case are so grave that ordinarily a lawyer should decline to represent more than one co-defendant....” Informal Opinion 94-09; *see also* Revised Formal Opinion 26 (1988) (concluding that it would be inappropriate to undertake common representation of co-defendants in a criminal matter given the risk that one defendant may elect to cooperate with the prosecution and become a witness against the other).

Here, however, there are two lawyers—one representing each defendant. The issue presented under Rule 1.7(a)(1) is thus whether the potential adversity between the two co-defendants is imputed to the lawyers based on the fact that the two lawyers have served as co-counsel together in various other criminal cases. Rule 1.10 governs imputation of conflicts and provides that “while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so.” The term “firm” is defined under the Rules as “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” Rule. 1.0(d). The Commentary further explains:

Whether two or more lawyers constitute a firm ... can depend on the specific facts. For example, two practitioners who share office space and occasional-

ly consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. ... A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer should be attributed to another.

Thus, the Commentary suggests that there may be some informal arrangements among lawyers that may rise to the level of constituting a “firm” for purposes of imputation. However, the Commentary also explains that, even where two practitioners share office space and consult with one another from time to time, this would ordinarily *not* be regarded as a firm unless other factors were present—such as operational integration or if they held themselves out to the public in a way that suggested that they were a firm. Here, the Requester indicates that he and the other lawyer maintain separate office space and periodically work together as co-counsel to clients in specific cases (approximately two cases per year). In the Committee’s view, this type of co-counseling arrangement does not transform the lawyers into a “firm” for purposes of imputation under Rule 1.10. Thus, based on the facts presented, the Committee concludes that there is no conflict under Rule 1.7(a)(1) that would preclude the Requester from taking on the representation.

The representation is therefore permissible unless, under Rule 1.7(a)(2), there is a significant risk that the Requester's representation of his client would be materially limited by the lawyer's responsibilities to his former co-counsel or by his personal interest in his relationship with this other attorney. In the absence of unique factors (such as reliance on the other lawyer for a significant portion of the Requester's business or an extremely close personal relationship), the Committee's view is that a periodic co-counseling arrangement such as the one described here would not rise to the level of creating a material limitation conflict. In fact, in some circumstances, it may benefit the client for a lawyer in the Requester's position to have knowledge about a co-defendant's counsel. Ultimately, however, as described below, the Requester is in the best position to make the determination of whether the relationship with the other lawyer creates a material interest conflict.

While not directly analogous, this Committee previously addressed the question of whether one attorney's representation of his opposing counsel in another lawsuit would violate the "material limitation" provision of Rule 1.7(a)(2). See Informal Ethics Opinion 2012-10. There, the Committee noted that "the relevant inquiry is highly fact-specific" and explained that, given the limited factual record, it could not offer an opinion. Nevertheless, in pointing out the factual circumstances that might be relevant to that analysis, the Committee cited ABA Formal Opinion 97-406 (Conflicts of Interest: Effect of Representing Opposing Counsel In Unrelated Matter), in which the ABA addressed whether a conflict in violation of Rule 1.7(a)(2) would arise "when one lawyer has formed or proposes to form a lawyer-client relationship with another lawyer, at a time when the two lawyers represent clients whose interests are adverse." The ABA pointed to the following considerations to determine whether the relationship between the two lawyers would present a conflict for the representation of their third-party clients:

These include: (1) the relative importance of the matter to the represented lawyer; (2) the relative size of the fee

expected by the representing lawyer; (3) the relative importance to each lawyer and to his client, of the matter involving the "third-party" clients; (4) the sensitivity of each matter; (5) the substantial similarity between the subject matter or issues of the two representations; and (6) the nature of the relationship of one lawyer to the other and of each lawyer to his third-party client. No one of these considerations is necessarily dispositive, nor does this list encompass every circumstance that may create a material limitation. One lawyer's duty to, or interest in the work of the other lawyer may materially limit the lawyer's representation of his third-party client in any case in which the relationship between the lawyers might cause either or both of them to temper advocacy on behalf of their opposing third-party clients.

These factors should also bear on the analysis of how the lawyers' relationship might affect their ability to represent the co-defendants in question.

Moreover, the Commentary to Rule 1.7 provides that "[w]hen lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment." It therefore recommends that the lawyers 'seek clients' informed consent to proceed with representation in these circumstances. Similarly, while there are no facts in this request that would suggest that the relationship between the two attorneys here would give rise to a violation of Rule 1.6 (concerning confidentiality), the possibility of improper disclosures given the proximate working relationship between the two attorneys should also be considered in assessing whether the representation of the co-defendants would be materially limited by the lawyers' prior engagement.

Ultimately, however, "Connecticut authority instructs that it is the attorney himself who is in the best position to determine

whether there exists a conflict of interest in his representation of two clients." Informal Ethics Opinion 2012-10 (internal quotations omitted). The requesting attorney must therefore undertake the analysis of whether his historic co-counsel relationship with the other attorney presents a material limitation to the representation of his client in the case at hand, with all of these considerations in mind.

Should the requesting attorney conclude that the relationship between the lawyers would create such a material limitation, he may seek his client's informed consent to proceed with the representation only if he reasonably believes that he can provide competent and diligent representation in spite of his relationship with his former co-counsel, pursuant to Rule 1.7(b). See Informal Opinion Number 2013-06. Any such consent must be in writing. Moreover, assuming that the Requester concludes there is no material limitation and thus no conflict requiring consent, the Requester could still, out of an abundance of caution, disclose the relationship; explain that he does not believe there is a conflict; and advise the client if he or she has any concerns, the client may: (1) retain other counsel in the criminal case, and/or (2) obtain the advice of other counsel regarding the decision whether to continue with the Requester as counsel. As an additional precaution, it would be advisable to provide this information in writing, with the client's acknowledgement that he or she has received the information from the Requester.

NOTES

- 1 The Requester also asks whether the representation violates Rule 1.6 of the Rules of Professional Conduct regarding confidentiality of information. Given that the Requester does not share office space with the co-defendant's counsel, and there is no indication that the Requester and the other lawyer share any office staff or that they plan to jointly engage investigators and/or experts who may become privy to client confidences, we do not perceive any issue under Rule 1.6 that would bar the representation. Of course, the Requester remains obligated to maintain the confidentiality of information relating to the representation, as he would in any case (absent, for instance, client consent to share information with co-defendant's counsel based on a determination that there is a common interest in defending the matter).

Representation of Multiple Union Members

OPINION 23-02

MARCH 28, 2023

You are one of three staff attorneys who represent a public employee union with thousands of members. Under applicable union rules, the union is obligated to provide members with legal representation for certain types of matters, including investigations arising out of complaints concerning a member's alleged misconduct. You have asked whether you may represent a union member under investigation while other union staff attorneys simultaneously represent another union member who is a potential witness in the investigation. You note that the member who is a witness may have legal interests that are adverse to the subject of the investigation.¹

As a threshold matter, we conclude that under Rule 1.10 of the Rules of Professional Conduct, the conflicts of each union attorney would be imputed to all other attorneys in the organization. Specifically, Rule 1.10(a) provides that “[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.” The Official Commentary to Rule 1.10 in turn provides that “[f]or purposes of the Rules of Professional Conduct, the term ‘firm’ denotes lawyers in a law partnership, professional corporation, sole proprietorship, or other association, authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” See also Official Commentary to Rule 1.0 (“[W]ith respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct”). Accordingly, assigning different attorneys employed by the union to different individual clients would not resolve the conflict. Because the union attorneys are employed by the same organization, their conflicts would be imputed to each other.

The question then becomes whether under the circumstances described in the request, union staff attorneys may simultaneously represent both the subject and a witness to the same investigation, where the interests of each client may be adverse. Rule 1.7(a) of the Rules of Professional Conduct provides that “except as provided in subsection (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest,” which exists where “(1) the representation of one client will be directly adverse to another client” or “(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.”

Rule 1.7(b) in turn provides that, where there is a concurrent conflict of interest, simultaneous representation of multiple clients may only proceed if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or the same proceeding before any tribunal; and (4) each affected client gives informed consent, confirmed in writing. Lawyers considering whether to undertake joint representations should recognize that not all conflicts are waivable. See also Official Commentary to Rule 1.7 (explaining that “some conflicts are nonconsentable”).

Based on the admittedly limited facts presented in the inquiry, we believe that the conflict inherent in attempting to simultaneously represent both the target of the investigation and an individual witness with adverse legal interests likely is not waivable. We note that even where the target of the investigation and witness seem to be completely aligned at the outset, the direction and outcome of an investigation is impossible to predict. As this Committee recognized in Informal Opinion 07-10, “[c]oncurrent representation that appears permissible under Rule 1.7(b) and that is acceptable to the clients at the outset can be burdened by conflicts as new information becomes available, a possibility that one should fully discuss with potential clients from whom conflict waivers are requested.”

In conclusion, on the facts presented, we conclude that it likely would not be permissible under Rules 1.10 and 1.7 of the Rules of Professional Conduct for staff attorneys employed by the same union to simultaneously represent the subject of an investigation and a potential witness to the same investigation with potentially conflicting legal interests. ■

NOTES

- 1 We understand there is a body of substantive labor law holding that in some circumstances the union itself, and not its constituent members, is the union lawyer’s only client, even with respect to grievances and disciplinary proceedings in which the union is obligated to provide a defense to its members. See *Peterson v. Kennedy*, 771 F.2d 1244, 1258 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986); *Waterman v. Transport Workers’ Union Local 100*, 176 F.3d 150 (2d Cir. 1999); *Air Line Pilots Ass’n v. O’Neill*, 499 U.S. 51, 76 (1991); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967); Joseph L. Paller Jr., “The Duty of Fair Representation,” p. 168 n.26 (collecting cases); see also DC Bar Ethics Opinion 314 (noting cases). Because the premise of your inquiry is that the individual union members involved in the investigation would be the clients, we do not address a scenario where the union is your only client.