Connecticut Bar Association

Standing Committee on Professional Ethics

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INFORMAL OPINION 16-04

Payment of a Referral Fee to Attorney for Conserved Person

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]

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[1] It is our understanding that in this matter the referral fee will be a portion of the fee charged by Attorney 2. Since the referral fee is paid out of the standard contingent fee charged by Attorney 2, the payment of a referral fee does not increase the total fee paid by the client.

[2] See Conn. Gen. Stat. §52-251c.

[3] Rule 5.4(a) prohibits sharing of fees with non-lawyers except in certain enumerated circumstances.

[4] Rule 1.5(c) requires that an agreement for a contingent fee be signed by the client. If the probate court has assigned the Conservator the responsibility to enter contracts of this type for

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

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the Client, the Conservator would be empowered to sign the fee agreement on behalf of the Client.

[5] *See Falvey v. O'Brien, Shafner, Stuart, Kelly & Morris, P.C.*, Superior Court of Connecticut at New London, Docket Number 543675, (November 12, 1998); *Ryder v. Farmland Mutual Insurance Co.*, 248 Kan. 352, 807 P.2d 109 (1991). Attorney 1 is bound by the Rules of Professional Conduct in the transaction because the act of making the referral establishes an attorney-client relationship between Attorney 1 and the Client. Informal Opinion 13-04.

[6] ABA Model Rule 1.5(e) provides:

> A division of a fee between lawyers who are not in the same firm may be made only if:
> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> (3) the total fee is reasonable.

Note also that the ABA Model Rule requires client agreement, confirmed in writing, of the fee sharing arrangement and the share that each lawyer will receive; the rule in Connecticut requires that the client be advised in writing and not object to the fee sharing arrangement and the participation of each lawyer.

[7] "A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter." Comment to Rule 1.5.

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 be necessary for the Conservator to join in the litigation.[8] However, the client remains the real party in interest.[9] We believe that Attorney 1 is not precluded by conflict of interest rules from representing the conserved person in the medical malpractice action. Therefore, Attorney 2 may pay, and Attorney 1 may accept, a referral fee.

However, the Client's inability to communicate presents a problem. 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. Because of the Client's limitations, we believe that written advice of the fee sharing agreement and the participation of all lawyers involved must be given to the Conservator, provided, the probate court has given the Conservator the authority to control the litigation and hire an attorney.[10] If the Conservator does not have the authority to control the litigation and hire an attorney, we believe that permission to receive the referral fee should be obtained from the probate court. If either the Conservator objects, in the first situation, or the probate court refuses to give permission, in the second situation, Attorney 1 would not be permitted to accept a referral fee.

We conclude that Attorney 1 is not prohibited under the Rules of Professional Conduct from accepting a referral fee from Attorney 2 provided that the Conservator is advised in writing of, and does not object to, the fee sharing agreement and the participation of all attorneys and has the authority to prosecute the litigation and hire an attorney or, if the Conservator does not have

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[8] *Cf. Lesnewski v. Redvers*, 276 Conn. 526, 886 A.2d 1207 (2005).

[9] Rule 1.14 requires that an attorney maintain as normal a relationship as possible with a client with impaired capacity.

[10] The comment to Rule 1.14 states: "If a legal representative has already been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client only when such decisions are within the scope of the authority of the legal representative." *See also, Gross v. Rell*, 304 Conn. 234, 40 A.3d 240 (2012), in which the Connecticut Supreme Court addressed in considerable detail the ethical obligations of attorneys for respondents in conservatorship proceedings and attorneys for conserved persons. Note that, apropos of this inquiry, and citing the Rule 1.14 commentary, the *Gross* court held that "attorneys for conservatees *ordinarily* are required to act on the basis of the conservator's decisions . . . ." *Gross*, at 264 (emphasis supplied). Note, too, that the court also opined that "[i]f the conservator's decision is contrary to the conservatee's express wishes . . . and the attorney believes that the conservatee's expressed wishes are not unreasonable, the attorney may advocate for them" (not a consideration here because Attorney 1's conserved client has been and remains unable to communicate her wishes); and that "if an attorney knows that the conservator is acting adversely to the client's interest, the attorney may have an obligation to rectify the misconduct." *Id.* (citation omitted).

authority to prosecute the litigation and hire an attorney, provided the probate court approves the fee sharing agreement and the participation of all attorneys.

THE COMMITTEE ON PROFESSIONAL ETHICS

BY _____
Marcy Tench Stovall, Chair