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Standing Committee on Professional Ethics

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Informal Opinion 18-04

Transfer of Workers' Compensation Files From "Accredited Representative" to Attorney

A lawyer asks whether it is permissible for a lawyer to accept "transfers" of workers' compensation files from a non-attorney "accredited representative" ("Accredited Representative") who represents injured workers before the Workers' Compensation Commission without running afoul of Rule 5.4's prohibition of splitting or sharing fees with a non-attorney. Key factual representations underpinning the inquiry include:

1. The Accredited Representative's fee is based on an hourly, not a contingency, arrangement;
2. The lawyer's fee will be a percentage of the client's ultimate recovery, if any;
3. None of the lawyer's fee will be shared, split with, or used to pay the Accredited Representative; and
4. The lawyer will not pay a referral fee to the Accredited Representative, either directly or indirectly.

The lawyer asks whether this arrangement is in compliance with the Rules of Professional Conduct ("the Rules"). The inquiry raises issues related to fee splitting/sharing, referral fees, referral arrangements, client independence and client loyalty. We conclude that the arrangement, as described, and with certain safeguards, is permissible under the Rules.

In workers' compensation matters an injured claimant may be represented by a non-lawyer "accredited representative"¹ if, after thorough examination, the Commissioner finds that the applicant is qualified to represent the claimant in a particular case, that the claimant is "knowingly and intelligently waiving his [sic] right to representation by professional legal counsel, and that there may be no recourse available to him [sic] if the representation proves to be ineffective or inappropriate."² For purposes of this opinion, we assume that the Accredited

¹ Conn. Gen. Stat. § 31-298 ("Conduct of hearings. Both parties may appear at any hearing, either in person or by attorney or *other accredited representative*, and no formal pleadings shall be required, beyond any informal notices that the commission approves." (emphasis added)).

² *Cutler v State of Connecticut/DMR Region 4*, 3506 CRB-07-96-12, 1998 WL 220047 (Conn. Work. Comp. Comm. 1998).

Representative has been qualified by the Commissioner. Whether or when such representation may involve the unauthorized practice of law, and the conduct of non-attorneys generally, are not issues within this Committee's remit, and will not be addressed in this opinion, except to note that a lawyer may not assist another in the unauthorized practice of law.³

With limited exceptions not applicable to these facts, "a lawyer or law firm shall not share legal fees with a non-lawyer."⁴ Since the Accredited Representative's fee arrangement with the injured worker is based upon an hourly fee and none of that fee will be paid out of the lawyer's contingency fee, there does not appear to be a prohibited sharing of fees in this fact pattern. Presumably the Accredited Representative's fee can be quantified and established as of the time that the lawyer takes over responsibility for the transferred matter. Since all fees are "subject to the approval of the commissioner,"⁵ any uncertainty concerning the Accredited Representative's fee can be resolved before the Commission.⁶

A lawyer is also prohibited from giving "anything of value to a person for recommending the lawyer's services," except for permissible advertising.⁷ The Official Commentary to Rule 7.2 provides that any communication that "endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities" is a recommendation. When a non-attorney has an arrangement to transfer files to an attorney it is safe to assume that a recommendation is involved – directly or by implication. Paying or rewarding a non-attorney for bringing a client to an attorney or inducing a person to seek an attorney's services, or receiving such reward or payment, may also be a felony for the both the payer and the payee.⁸ Since the

³ See Conn. Gen. Stat. § 51-88 (Practice of Law by Persons Not Admitted as Attorneys); and Conn. Practice Book § 2-44A (defining the practice of law); Rules of Professional Conduct, Rule 5.5(a) (Unauthorized Practice of Law).

⁴ Rules of Professional Conduct, Rule 5.4(a).

⁵ See Conn. Gen. Stat. § 31-327(b).

⁶ We have not been asked to address the question of whether a similar transfer arrangement would be permitted if the Accredited Representative's fee were based upon a percentage of the ultimate recovery. In that situation the fee would be dependent upon and determined, at least in part, by the success of the lawyer's efforts in establishing the ultimate recovery, with the Accredited Representative receiving payment based not solely on the services he or she provided, but based, at least in part, on the legal services the lawyer performed after taking over the matter. Because such a scenario has, at the very least, the appearance of fee sharing with a non-lawyer, the Committee believes that there is a risk that such an arrangement would violate the Rule prohibiting fee sharing with a non-lawyer. The Committee does not express any opinion on the propriety of a contingent fee arrangement between the injured worker and the Accredited Representative.

⁷ Rules of Professional Conduct, Rule 7.2(c).

⁸ See Conn. Gen. Stat. § 51-87 (Solicitation of Cases for Attorneys).

arrangement described by the inquiring lawyer includes no referral fee, directly or indirectly, it is acceptable under the Rules even assuming that a recommendation leads to the transfer.

The use of the phrase “transfer files” raises a concern that the injured worker’s independent judgment in choosing his or her attorney may not be respected and accommodated within the arrangement between the Accredited Representative and the lawyer. An Accredited Representative may not simply transfer a file without the injured worker’s informed consent. An understanding that the Accredited Representative may recommend and encourage an injured worker to engage a particular lawyer must not infringe upon the injured worker’s freedom to make his or her own informed choice of legal representation when the matter progresses to the point where legal representation is necessary. The Accredited Representative may not create, suggest, or imply a requirement that the injured worker engage the lawyer with whom the Accredited Representative may have a referral arrangement. The client worker must have the freedom to explore other options and take his or her file to whichever lawyer he or she chooses. The decision to retain the lawyer must be made by the worker.

If the referral arrangement is a significant source of business for the lawyer, there is the potential for conflicts of interest, particularly if the Accredited Representative attempts to control the post-transfer handling of the file or interfere with the lawyer’s relationship with the worker-client. Once a file has transferred, the lawyer must maintain a normal attorney-client relationship and treat the worker-client as he or she would any other client that came to the lawyer in some other manner. Rule 5.4(c) provides that “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” It is foreseeable that the Accredited Representative may be tempted to interfere in this regard. The lawyer must exercise loyalty to the lawyer’s client and independent legal judgment in the representation.⁹ The lawyer must communicate with and keep the client informed.¹⁰ The lawyer must consult with the client and abide by the client’s decisions as to objectives and settlement.¹¹ The lawyer must maintain confidentiality unless the client authorizes disclosures.¹² The lawyer must not permit the Accredited Representative to make decisions that the worker-client must make or direct the handling of the file.

The Committee concludes that it is permissible for a lawyer to accept transfers of Workers’

⁹ The Official Commentary to Rule 1.7 provides that “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or *from the lawyer’s own interests.*” (emphasis added)

¹⁰ Rules of Professional Conduct, Rule 1.4.

¹¹ Rules of Professional Conduct, Rule 1.2.

¹² Rules of Professional Conduct, Rule 1.6.

Compensation files from an Accredited Representative if the Accredited Representative's fee is based upon an hourly rate agreed to between the injured worker and the Accredited Representative, qualified by the commissioner¹³; no part of the Accredited Representative's fee comes from the lawyer's contingent fee; no referral fee or other item of value is given to the Accredited Representative for his or her recommendation of the lawyer; the decision whether to transfer the file is freely and independently made by the injured worker knowing that he or she may choose to engage a different lawyer; the lawyer maintains a normal attorney-client relationship with the injured worker consistent with all of the Rules of Professional Conduct; the Accredited Representative does not interfere with the lawyer's professional obligations to the lawyer's client; and the lawyer is diligent to avoid any personal conflict of interest that might arise out of the lawyer's interest in securing future referrals from the Accredited Representative so as to compromise the lawyer's duties of loyalty and independent judgment necessary to the attorney client relationship.

THE COMMITTEE ON PROFESSIONAL ETHICS

BY 

Marcy Tench Stovall, Chair

¹³ The Accredited Representative's fee might also be based on a per hearing charge up to the time the file is transferred, subject to a Commissioner's approval, since the fee in that arrangement would also be independent of the lawyer's efforts and the ultimate recovery.