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Standing Committee on Professional Ethics

May 20, 2020

Informal Opinion 20-02

Fees for Referral to Attorney in Another Jurisdiction

The inquiring attorney is a Connecticut attorney who has relationships with many foreign companies. These companies need representation in the United States for a whole range of legal services. The attorney would like to know if, as a Connecticut attorney, he may collect a referral fee when he refers these clients to attorneys who practice law in other jurisdictions. Specifically, he asks the following;

1. May a Connecticut lawyer collect a pure referral fee from an out-of-state lawyer who practices in a jurisdiction that has adopted a Rule of Professional Conduct substantially similar to our Rule 1.5(e)? The short answer is yes: under Rule 1.5(e) a Connecticut lawyer may collect a referral fee under those circumstances.
2. May a Connecticut lawyer collect a pure referral fee from a client directly if the attorney to whom the Connecticut lawyer refers the client's work practices in a jurisdiction that would prohibit such fee sharing? The short answer to this question is that the lawyer may enter into a fee agreement with a client for making a referral, but such an arrangement is governed by Rule 1.5(a) and (b), not Rule 1.5(e).

In responding to these questions, we presume that the Connecticut attorney has advised the client that a referral to another attorney or firm is in the client's best interest and the client has agreed.

"Rule 1.5 of the Rules of Professional Conduct generally governs fees charged to clients. Although the Rule does not define 'fee,' it is clear that the Rule uses the term, as it is commonly used, to refer to the amount charged to a client for legal services performed for that client." Informal Opinion 07-04.

Rule 1.5(e) governs fee sharing between attorneys, and requires, *inter alia*, that the foreign entity or individual in these scenarios be a "client" of both of the law firms involved. It provides as follows:

(e) 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.

The Commentary to Rule 1.5(e) explains that:

> a division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter

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> in which neither alone could serve the client as well and most often is used when the fee is contingent, and the division is between a referring lawyer and a trial specialist.

Connecticut's Rule 1.5 does not require that the Connecticut attorney participate in the representation in order to share a fee. Compliance with Rule 1.5(e) requires only 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. 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). 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.

Informal Opinion 16-04.

> We have opined previously that
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> [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. . . . We do not believe [a lawyer may receive a referral fee] simply because lawyers possess a license; rather we believe that referral fees are permitted . . . because the referring lawyer has a lawyer-client relationship and because the referring lawyer owes the client the duties prescribed by the Rules of Professional Conduct.

Informal Opinion 13-04.[1]

The Committee also has approved fee splitting between Connecticut attorneys and out-of-state attorneys. *See e.g.* Informal Opinion 91-7 and Informal Opinion 92-09. The Rule does not require that the counsel to whom the case is referred be a Connecticut-admitted attorney. It requires only that the referring attorney

[1] *See also* Informal Opinion 01-03 ("The committee believes that an 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.).

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reasonably believe that the new counsel is competent[2]; that the attorney advise the client in writing of the compensation sharing agreement and of the participation of the new counsel and the client does not object; and that the total fee to be paid by the client be reasonable.[3] If the fee-sharing agreement meets all the requirements of Rule 1.5, then an attorney may enter into a fee sharing arrangement with another attorney or firm, even if that firm is outside the Connecticut jurisdiction.

The second question assumes that the attorney to whom the matter is referred cannot, under the rules of the other jurisdiction, enter into a fee-sharing arrangement with the referring attorney, and therefore cannot make payment to the referring attorney from fees received in the client matter. Not to be dissuaded, the inquiring attorney asks if he may ask the client to pay a referral fee.

Because this arrangement would not involve a "division of [a single] fee between lawyers who are not in the same firm," it would not constitute fee sharing, and therefore would not be governed by Rule 1.5(e). Rather, the Connecticut lawyer would bill the client directly, and separately, for the legal services provided to the client in making the referral (identifying the client's legal needs, assessing the qualifications of lawyers in the subject jurisdiction, and referring the client to a lawyer competent to provide the legal services the client requires), just as the lawyer accepting the referral and handling the client's matter would bill the client directly, and separately, for the legal services that lawyer provided to the client.

The inquiring attorney and the client are free to negotiate an appropriate contract for engagement for a representation where the scope of the representation is limited to assessing the client's legal needs, identifying a competent lawyer in the subject jurisdiction, and making the referral, provided that the fee charged by the Connecticut lawyer for the legal services provided to the client is reasonable as required by Rule 1.5(a), and the written engagement agreement complies with Rule 1.5(b) in identifying the scope of the matter and the basis of the fee.

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[2] Per the Rule 1.5(e) Commentary, Connecticut counsel "should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter."

[3] Rule 1.5(a) sets out a non-exhaustive list of "factors to be considered in determining the reasonableness of a fee," as follows:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) The likelihood, if made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) The fee customarily charged in the locality for similar legal services;
> (4) The amount involved and the results obtained;
> (5) The time limitations imposed by the client or by the circumstances;
> (6) The nature and length of the professional relationship with the client;
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services; and
> (8) Whether the fee is fixed or contingent.

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If these requirements are met, the lawyer may charge the client directly for providing a referral.

THE COMMITTEE ON PROFESSIONAL ETHICS

Kim E. Rinehart

BY Kim Rinehart, Chair

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