

# New York State Bar Association

## Committee on Professional Ethics

Opinion 745 – 7/18/01

Topic: Conflict of Interest; referral fee

Digest: A lawyer who is disqualified from a matter on non-consentable conflict of interest grounds may not receive a referral fee. A lawyer with a consentable conflict of interest who nevertheless refers the matter to another attorney may receive a referral fee.

Code: DR 2-107(A) and (D); DR 6-101

### QUESTION

When a lawyer is disqualified from a matter due to a conflict of interest, may the disqualified lawyer receive a referral fee from the lawyer to whom the matter is referred? Would the result be any different if the conflict were consentable by the client?

### OPINION

From the time the New York Lawyers' Code of Professional Responsibility was adopted until it was significantly amended in 1990, DR 2-107(A) prohibited a lawyer from receiving a referral fee merely for "forwarding" a matter to another lawyer. In its pre-amendment form, the Code allowed a lawyer to divide fees with a lawyer in another firm only "in proportion to the services performed and responsibility assumed by each" See N.Y. State 535 (1981) (citing DR 2-107[A] before the 1990 amendments). The amended version of DR 2-107(A), however, now permits a division of legal fees where the following three conditions are satisfied:

- (1) The client consents to employment of another lawyer after a full disclosure that a division of fees will be made.

(2) The division is in proportion to the services performed by each lawyer or, *by a writing given the client, each lawyer assumes joint responsibility for the representation.*

(3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

(Emphasis added).

Similarly, EC 2-22 provides:

Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer's firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed by each lawyer or, *by a writing given to the client, each lawyer assumes joint responsibility for the representation* and if the total fee is reasonable.

(Emphasis added).

In our view, where a lawyer is unable to assume *sole* responsibility for a matter due to a conflict of interest, that lawyer is also disqualified from assuming *joint* responsibility and, therefore, the referring lawyer may not accept a referral fee from the receiving lawyer. See, Nassau County Bar Op. 98-07 (1998) (an attorney who is barred from handling a matter due to a conflict of interest may not share in the fee for that matter after the attorney refers the matter to another lawyer); *accord*, ABA Informal Op. 1088 (1968); Florida Ethics Op. 89-1 (1989); Illinois Advisory Op. 9026 (1990); The State Bar of Michigan Standing Committee on Professional and Judicial Ethics RI-116 (1992); N.J. Ethics Op. 629 (1989); Philadelphia Ethics Op. 89-12 (1989); Virginia Ethics Op. 1160 (1988); *but see*, Iowa Ethics Op. 87-32 (1988). Without now deciding what the precise contours of joint responsibility are, we conclude that joint responsibility is more than financial accountability and malpractice liability.

This leaves one remaining issue for our consideration. There are a variety of factual circumstances in which a lawyer may accept or continue employment notwithstanding a conflict of interest. See, *e.g.*, DR 5-101(A) ("A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.") In the case of such a "consentable" conflict, if the lawyer nonetheless chooses to refer the matter – for example, to a more skilled or experienced practitioner in conformity with DR 6-101(A)(1) – we

see no reason why the referring lawyer may not ethically receive a referral fee from the receiving lawyer, provided the standard for obtaining client consent is fully met.

### **CONCLUSION**

A disqualified lawyer cannot assume “joint responsibility” for a matter and therefore, may not be paid a referral fee, unless the referring lawyer obtains client consent under the same standard that would have allowed the lawyer to accept or continue “sole responsibility” for the matter.

(20-00)

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