



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1018 (8/6/2014)

Topic: Conflict of interest; withdrawal of representation; referral to new attorney.

Digest: A law firm that has a conflict of interest and withdraws from representation may provide the former client with a good faith referral to other attorneys the law firm believes appropriate to represent the client.

Rules: Rule 1.1(c)(2), 1.7, 1.9(c)(1), 1.16

FACTS

1. The inquiring law firm has determined that it has a conflict of interest with an existing client and is moving to withdraw as attorneys of record for the client. The law firm states that it is not retaining any financial interest in the client's case.

QUESTION

2. The question posed by the inquiring law firm is whether, after withdrawing as the client's attorneys, it can refer the former client to specific attorneys that it believes would be appropriate counsel for the former client or whether it can only recommend that the former client seek other counsel.

OPINION

3. At the outset, we note that lawyers are not required under the New York Rules of Professional Conduct to provide former clients with specific referrals when a conflict of interest arises. In the event that a lawyer decides to provide such a referral in good faith, this opinion addresses the ethical considerations that a lawyer faces.

4. While the Rules do not directly address the question posed, Rule 1.16(e) provides that upon termination of representation a lawyer shall take steps to avoid foreseeable prejudice to the rights of a client, including allowing time for the client to employ other counsel.

5. Accordingly, providing a recommendation concerning new counsel to the former client is consistent with Rule 1.16(e). For example, such a recommendation reduces the potential for prejudice to the rights of the former client because the former client will have available to it "appropriate" new counsel that can take over representation of the client's interests. As another example, a recommendation will likely result in the former client finding new counsel that can handle its matter more quickly than it otherwise might in the absence of the referral.

6. Further, such a recommendation provides the former client with the benefit of the law firm's judgment of the appropriateness of the recommended new counsel based on information the law firm possesses about the client and the client's case, and depriving the former client of the benefit of such a recommendation could potentially cause prejudice to the client, contrary to Rule 1.16(e).

7. The former client is free to accept or reject the recommendation or to consider the recommended attorney as one option in the search for new counsel. Ultimately, it will be up to the client to decide which attorney to retain to represent its interests.

8. It is also worth noting that our prior opinions have assumed referrals were permitted where representation by the referring attorney was not permitted under the governing ethical standards. *See, e.g.*, N.Y. State 338 (1974) (discussing that an attorney disqualified from representing a client may not accept a referral fee from the lawyer he recommended to handle a matter).

9. Consideration must also be given to whether such a referral runs afoul of Rules 1.1(c)(2) and 1.7 with respect to the rights of any continuing client whose representation caused the conflict that led to the withdrawal.

10. Rule 1.1(c)(2) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of representation. However, we do not believe that a good faith recommendation of competent counsel to a former client under these circumstances is the type of prejudice or damage encompassed by Rule 1.1(c)(2).

11. Rule 4.3 supports this interpretation by allowing lawyers to advise unrepresented persons with potential conflicts with the lawyers' clients to seek counsel. Arguably, a lawyer's clients would be prejudiced by such a recommendation and in a better position had the unrepresented person remained uninformed about potentially needing counsel. Yet, the rules do not ban such a recommendation nor is the effect on the lawyer's client a factor in determining if the recommendation can be made.

12. This opinion is also consistent with D.C. Opinion 326 (2004) holding that a lawyer may recommend a specific attorney to a prospective client whose matter is adverse to that of an existing client. The D.C. Bar likewise opined that providing a specific referral did not violate the District of Columbia's equivalent to Rule 1.1(c)(2):

We assume that in making the referral, the lawyer will act in good faith and will recommend competent and independent counsel. First, the person would almost certainly find a lawyer even in the absence of a recommendation. Second, it would be mere speculation to conclude that the lawyer the person might find on his own would not be as competent as the one recommended by the conflicted lawyer. The lawyer could be as good, better, or not as good as the one that the conflicted lawyer might recommend. Moreover, we cannot assume that it is disadvantageous to the referring lawyer's existing client for its adversary to be represented by competent counsel.

Competent opposing counsel is likely in many cases to contribute to reaching a reasonable resolution of the dispute.

D.C. 326 (2004).

13. Before making a specific referral, the lawyer should also consider whether his or her professional judgment is affected, as set forth in Rule 1.7(a)(2). Ordinarily, we do not believe that providing a referral under these circumstances will impair a lawyer's professional judgment for purposes of Rule 1.7. However, should a lawyer reasonably believe that his or her professional judgment is affected, it would then be impermissible for the lawyer to provide a specific referral.

14. Likewise, Rule 1.9(c)(1) also prohibits an attorney from acting in a way that would disadvantage the former client.

15. The D.C. Bar also noted a few practical considerations that lawyers should consider before making a specific referral. For example, some clients may not understand why their lawyer helped an opposing party obtain other counsel and therefore client relations may impact whether a lawyer provides a specific referral. A lawyer may also want to provide several referrals "to avoid recriminations from the inquirer, should the recommended lawyer prove unsatisfactory, or from her client, should the recommended lawyer turn out to be vexatious." D.C. Opinion 326 (2004).

16. Ultimately, "each lawyer must decide for herself whether under the particular circumstances this is a wise thing to do." *Id.*

17. Of course, the referral itself must comply with the rules. *See* Rule 7.2; N.Y. State 745 (2001).

CONCLUSION

18. A law firm that withdraws from representation of a client due to a conflict of interest may provide the client with a good faith referral to attorneys the law firm believes appropriate to handle the client's matter.

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