



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

Opinion 1128 (7/10/17)

Topic: Referral fees; Division of fees with estate and with other attorneys

Digest: A lawyer who undertakes to complete unfinished legal business of a deceased attorney may pay the deceased lawyer’s estate that proportion of the total compensation that fairly represents the services (if any) that the deceased lawyer rendered in the matter. If the lawyer instead refers the matter to a third attorney, the lawyer and the third attorney may share legal fees provided they comply with Rule 1.5(g).

Rules: 1.5(g), 5.4(a)(2), 7.2(a)

FACTS

1. The inquirer’s friend, also a lawyer, recently passed away. The dying attorney had not made any agreement to share fees with the inquirer, but on his deathbed the dying attorney had informed his secretary that he wanted to refer three personal injury cases – Matters A, B and C -- to the inquirer. The deceased lawyer’s secretary gave the inquirer’s name to each of the clients, who then each called the inquirer to discuss taking over their matters. The inquirer is in the process of reviewing the matters and assessing whether he can undertake the representations, each of which is subject to a standard contingency retainer. In Matter A, the deceased attorney had conducted a preliminary investigation, obtained a copy of the police report, requested and obtained some medical records, and had taken several notes, but had not commenced suit. The inquirer is still reviewing the other matters and does not know what, if any, work the deceased attorney performed on Matters B and C.

QUESTIONS

- 2. A. If the inquirer accepts any of the matters, may he pay a referral fee to the deceased attorney’s estate for the matters he accepts?

- B. If the inquirer decides to refer any matters to a third attorney, may the inquirer receive a referral fee?

- C. If the inquirer refers any of the matters to a third attorney, may the third attorney pay the deceased attorney’s estate a referral fee?

OPINION

3. Rule 7.2(a) of the New York Rules of Professional Conduct (the “Rules”) provides that a lawyer may not pay a fee for the referral of business, with certain exceptions not relevant to this

inquiry. Specifically, Rule 7.2(a) provides:

(a) A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client.

4. Nevertheless, Rule 1.5(g) permits a division of legal fees between lawyers who are not associated in a firm when the division is in proportion to the services performed by each lawyer or the lawyers assume joint responsibility for the representation. Rule 1.5(g) provides:

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) 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;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

Moreover, although Rule 5.4(a) generally prohibits a lawyer from sharing legal fees with a nonlawyer, an exception in subparagraph (a)(2) allows a division of fees between a lawyer who finished the work of a deceased lawyer and the estate of that lawyer. Rule 5.4(a)(2) provides:

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer

Assuming a Matter from a Deceased Lawyer

5. The Rules do not specifically cover the mechanics for assuming a matter from the estate of a deceased lawyer. Rule 1.4 requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. We believe this requires the inquirer to inform the clients that they are free to choose any lawyer to represent them and to have copies of the file with respect to the matter. *Cf.* Rule 1.17(c) (where a law practice is being sold, the seller and buyer must give joint written notice to each of the seller's clients, which notice must inform the client that the client is entitled to retain other counsel or to take possession of the file). *See generally*, N.Y. State Bar Association, NYSBA Planning Ahead Guide: How to Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death (2016) (available at <http://www.nysba.org/PlanningAheadGuide2016/>).

Division of Fees Between the Inquirer and the Deceased Lawyer

6. Rule 1.5(g), quoted above, does not apply here. As the text of Rule 1.5(g) and Comment

[7] to Rule 1.5 explain, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Here, the deceased attorney and the inquirer did not enter into an agreement to divide fees in any fashion for Matters A, B, and C, so they cannot satisfy the elements of Rule 1.5(g). In any event, because the referring attorney is deceased, any fees to be divided by the inquirer would not be shared with an attorney, but would be shared with a nonattorney – *i.e.*, the estate of the deceased attorney. Rule 1.5(g) applies only to fee-sharing among lawyers, so it would not be applicable to any sharing of fees between the inquirer and the decedent's estate.

Division of Fees with Estate of Deceased Lawyer

7. Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer, with limited exceptions. The exception pertinent to this inquiry appears in subsection (a)(2) of Rule 5.4, quoted above, which permits a lawyer to pay to the estate of a deceased lawyer that portion of total compensation that fairly represents the services rendered by the deceased lawyer.

8. We apparently have never interpreted this Rule, or its predecessor in the Code of Professional Responsibility, DR 3-102(A)(2). Interpreting this provision in his book, Professor Simon quotes the language of the Rule – “pay the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer,” and says:

In the case of a contingent fee matter, Rule 5.4(a)(2) should permit the successor lawyer to agree to pay the estate either a fair proportion of the contingent fee at the conclusion of the matter or a *quantum meruit* payment at any time, before or after the matter is concluded. This parallels the law that applies to contingent fee matters when a client changes lawyers in the middle of a contingent fee matter.

Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 1424 (Thomson Reuters 2016) (analogizing to *Cohen v. Grainer, Tesoriero & Bell*, 81 N.Y.2d 655 (1993)). We agree with Professor Simon.

9. Regarding Matter A, in which the deceased attorney provided legal services before his death, the inquirer may ethically share legal fees with the referring lawyer's estate. Thus, under Rule 5.4(a)(2), the inquirer could, at the conclusion of Matter A, pay the estate a portion of the total compensation that represents the services rendered by the deceased attorney, or at any time pay an amount representing *quantum meruit* for those services. (As in the case of a lawyer who takes over a contingent fee case from a living attorney, the proportion of the total fees that fairly represents the services performed by the original attorney cannot be calculated until the matter ends, but the *quantum meruit* amount that represents fair compensation for those services could be calculated immediately.)

10. Regarding Matters B and C, however, if the deceased lawyer did not provide any legal “services” on those matters prior to his death, then the inquirer may not ethically pay the estate a portion of the fees. If there were such a division of fees between the inquirer and the estate when the deceased lawyer did not render any services, then the payment would constitute the payment of an improper referral fee under Rule 7.2(a) and a division of legal fees with a nonlawyer in violation of Rule 5.4(a). We do not take a position on whether merely executing and filing a

retainer agreement, and thus assuming liability for a matter, constitutes “services rendered by the deceased lawyer” within the meaning of Rule 5.4(a)(2) that may be taken into account in calculating an amount that “fairly represents” the estate’s reasonable share of legal fees.

Matters Referred to Another Attorney

11. If the inquirer decides to refer one or more matters to another attorney, the inquirer may ethically receive a share of the fees for such matters if the inquirer and the successor counsel comply with Rule 1.5(g).

12. To comply with Rule 1.5(g)(2), the inquirer must ensure that the clients in each particular matter agree to the employment of the other lawyer after disclosure that a division of fees will be made, including the share each lawyer will receive, confirmed by each client in writing, and the overall fee would have to be reasonable. In addition, any division of fees with the lawyer to whom a matter is referred either must be “in proportion” to the services each lawyer performs, or, in a writing given to the client, the inquirer and the new lawyer must assume “joint responsibility” for the representation. Comment [7] to Rule 1.5 provides: “Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. In N.Y. State 745 (2001), we said, without elaboration, that the joint responsibility standard in the predecessor to Rule 1.5(g) entailed more than financial accountability and malpractice liability.

13. Whether the successor lawyer (*i.e.*, the lawyer to whom the inquirer refers the matters) could ethically share fees with the estate of the deceased lawyer depends on the same analysis contained in paragraphs 7 - 10 above.

14. The situation described here indicates that it would be helpful if the Rules of Professional Conduct (or court rules) addressed the question of succession planning by sole practitioners. Proposals for court rules regarding succession planning have been made in past years but have not been adopted.

CONCLUSION

15. A successor lawyer who undertakes to complete unfinished legal business of a deceased attorney may pay the deceased lawyer’s estate that proportion of the total compensation that fairly represents the services that the deceased lawyer rendered. If the inquirer refers the matter to a third attorney, the inquirer and the third attorney may share legal fees provided they comply with Rule 1.5(g). If the inquirer and the third attorney comply with Rule 1.5(g), the division of fees would not be an improper referral fee under Rule 7.2(a).

(14-17)