



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

Opinion 1244 (10/06/2022)

Topic: Referral fees paid to retired lawyers

Digest: A retired lawyer may receive a referral fee as long as the retiree maintains joint responsibility for the referred matter.

Rules: 1.5, 5.1, 5.4

FACTS:

1. The inquirer was a sole New York lawyer who practiced contingency-fee personal injury law in New York. While in practice, the inquirer handled cases only in the venue where the inquirer had an office, and referred matters outside that venue to other unaffiliated lawyers (A and B). Last year, in contemplation of retirement, the inquirer reached agreement with another unaffiliated lawyer (C) to take over the inquirer's remaining unresolved matters. This agreement provided for the inquirer to receive a third of the C's net recovery from each of the referred cases, that is, a third of C's legal fee. The inquirer's arrangements with A and B, made before retirement was considered, are not materially different.

2. About a year ago, the inquirer closed the office the inquirer had maintained. Before doing so, the inquirer communicated with each current and former client about the impending retirement. Separately, the inquirer wrote to those clients whose matters had been referred to C, together with an invitation to contact the inquirer about the client's matter with any questions or concerns. According to the inquirer, no client has complained about C's services. Meanwhile, C has entered engagement letters with each of the referred clients, as have A and B.

3. The inquirer is currently registered with the Office of Court Administration (OCA) as an active lawyer. The inquirer wishes to change his status to "retired." The inquirer is concerned, however, that this change of status may adversely affect the fee arrangements on the referred cases or insurance coverage if the inquirer receives compensation for the referred cases.

QUESTIONS:

4. May a retiring lawyer end "joint responsibility" for a matter upon retirement in order to share in a legal fee the claim for which arose before retirement?

5. Does a lawyer's duty to share "joint responsibility" to share a legal fee depend on whether successor counsel enters into a separate engagement letter with the referred client?

6. Does a retired lawyer's receipt of a legal fee for previously referred cases affect the retired lawyer's insurance coverage?

OPINION:

7. Rule 1.5(g) of the N.Y. Rules of Professional Conduct ("Rules") says:

(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.

8. In N.Y. State 1201 (2020), we considered issues similar to those in this inquiry. There, the inquirer had received a referral in a contingency-fee matter from a lawyer with whom the inquirer had agreed to share in any legal fee but who later retired under the OCA rules. Those rules provide that a "retired" lawyer may not receive compensation for legal services rendered while retired. 22 N.Y.C.R.R. § 118.1(g); see N.Y. State 1201 ¶ 5. The issues we addressed, among others, were whether paying the referral fee was an impermissible fee-sharing arrangement under Rule 5.4(b), which forbids sharing legal fees with non-lawyers, or under the above-quoted Rule 1.5(g), which regulates fee-sharing between unassociated lawyers. N.Y. State 1201 ¶ 8.

9. In that opinion, we concluded that Rule 5.4(b) was "inapposite" because an OCA-retired lawyer is still a lawyer; only the courts may strip of a person of a law license. *Id.* ¶ 17. An individual's status with the OCA does not alone affect the person's membership in the bar, and expressly allows a retired lawyer to perform legal services for no compensation. Thus, no issue arises about sharing fees with a non-lawyer. As for Rule 1.5(g), we decided that the retired recipient of the referral fee must continue to bear "joint responsibility" for the matter, and modified prior opinions suggesting that an OCA-retired lawyer could not discharge that responsibility. *Id.* ¶¶ 12, 18. We adhere to these views.

10. Accordingly, the answer to this inquiry's first question – whether the inquirer may end "joint responsibility" for the referred matters upon retirement – is no, at least as long as the inquirer wishes to share in the legal fees that the referred cases may generate. In N.Y. State 1201, drawing on lessons from N.Y. State 961 (2013), we likened the assumption of "joint responsibility" to the duties of a supervisory lawyer under Rule 5.1. "As a member of the bar, for example, such a [retired] lawyer could remain available for consultation, could oversee case developments to assure compliance with the Rules, and would remain jointly responsible to the client for the matter, with continued exposure to any financial and ethical repercussions." N.Y. State 1201 ¶ 18.

11. The answer to the inquirer's second question – whether successor counsel's engagement letters with the referred clients ousts the duty of "joint responsibility" – is likewise no. Rule 1.5(g) proscribes sharing a fee with an unassociated lawyer unless the division is in proportion to the services each provides (not applicable here) or the unassociated lawyer assumes "joint responsibility" for the matter. That successor counsel may also bear responsibility for the matter does not allow for fee-sharing with an unassociated lawyer unless the latter remains jointly responsible. Indeed, Rule 1.5(g) requires that the client consent to the division of fees in a writing that discloses both the referring lawyer's joint responsibility and anticipated share of the fee. This language would be meaningless if successor counsel's engagement letter eviscerated the referring lawyer's continuing duty to the client.

12. Finally, the inquirer's third inquiry – about the impact of receiving a referral fee on the inquirer's insurance coverage – is outside our jurisdiction. Nothing in the Rules addresses this

issue. As we have said, both its own rules and our opinions allow an OCA-retired lawyer to continue to perform legal services. Nevertheless, insurance coverage is a contract issue and thus a question of law, on which we do not opine.

CONCLUSION:

13. If a retired lawyer wishes to receive a referral fee on matters now handled by successor counsel, the retired lawyer must continue to bear “joint responsibility” for the matters of which clients are informed and to which they consent.

(11-22)