NEW YORK STATE BAR ASSOCIATION
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New York State Bar Association
Committee on Professional Ethics

Opinion 1172 (10/03/2019)

Topic: Referral fees; retired lawyer

Digest: A retiring lawyer may ask for a referral fee, from the attorney who agrees to safe keep wills drafted by the lawyer, with respect to new representations of the testators or estates, if the retiring lawyer will assume joint responsibility for the subsequent representations, which may only occur if the lawyer maintains his registration as a lawyer.

Rules: 1.5(g), 1.17, 5.1, 5.4(a), 8.4(a).

FACTS

1. The inquirer is a practicing attorney who is about to retire. The inquirer has turned over to another attorney (the custodial attorney) several original wills the inquirer had prepared for clients. The inquirer's firm had been holding them for safekeeping, but the firm no longer handles wills and estate matters. The custodial attorney previously practiced with the inquirer's firm, but had moved to another firm by the time of the transfer.

QUESTION

2. If the wills the inquirer turned over to the custodial attorney evolve into estate work for the custodial attorney, may the custodial attorney pay the inquirer a referral fee, in the amount of a percentage of the fee that the custodial attorney receives?

OPINION

3. This Committee does not answer questions about the conduct of a lawyer other than the inquirer, and, technically, this inquiry concerns the conduct of the custodial lawyer, not the inquirer. Accordingly, we will consider the question to be whether the inquirer may ask for or accept such a referral fee. *See* Rule 1.5(g) (rule on sharing fees applies to both the payor and the recipient); Rule 8.4(a) (a lawyer shall not induce another to violate the Rules of Professional Conduct (the "Rules")).

4. This opinion assumes that the clients whose wills were turned over to the custodial attorney consented to that action, or that the custodial attorney will read the wills only to the extent necessary to notify the testators and ask for further instructions. *See* N.Y. State 1035 ¶¶ 11-13 (2014) (obligations of a lawyer who received wills when purchasing a law practice); N.Y. State 1002 ¶ 5 (2014) (obligations of lawyer who is executor of estate of deceased lawyer with respect to wills possessed by deceased lawyer).

Referral Fees

5. We have long held that the mere forwarding of a client to another lawyer is not a proper basis for fee splitting. *See, e.g.*, N.Y. State 414 (1975). Referral fees are explicitly restricted under the Rules. Rule 1.5(g) prohibits a lawyer from dividing a fee for legal services with another lawyer who is not associated in the same law firm unless the following conditions are met:

(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 fully 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.

6. Here, the inquirer has already drafted the wills and has been paid for those legal services. If the testators or their heirs ask the custodial attorney to provide additional legal services -- for example, amending a will or providing services in connection with the administration of the estate -- the inquirer, who will be retired, presumably will not be providing any services and therefore would not be entitled to a division of fees in proportion to the services performed for the new representation.

7. We therefore address whether the inquirer could become entitled to share in the legal fees for the new representation by assuming 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."

8. Whether the inquirer could assume joint responsibility under the facts here would depend on whether the inquirer is not only retiring from his law firm but also giving up the ability to practice law for compensation. There are three ways that an attorney who ceases the active practice of law may structure a relationship with the Office of Court Administration. The first (continued registration) is to continue his or her biennial attorney registration, filing the required form, paying the required fee, and completing the mandatory continuing legal education requirement. This allows the attorney to continue to undertake representations. The second method is by changing his or her registration status to "retired" under Section 118.1(g) of the Rules of the Chief Administrative Judge, 22 NYCRR §118.1(g). Such lawyers are exempt from payment of the biennial registration fee and from compliance with the mandatory CLE requirement, but they may render legal services only without compensation. The third method (voluntary resignation) involves filing an amendment to the attorney's registration form withdrawing his or her registration. Such a filer is no longer considered an attorney. *See, e.g.,* www.nycourts.gov/courts/ad2/attorneymatters_VoluntaryResignation.shtml.

9. We believe the inquirer could assume joint responsibility for a representation only if the lawyer opts for continued registration. Rule 5.4(a) generally prohibits a lawyer from sharing legal fees with a non-lawyer. Moreover, we have held that, in order to agree to joint responsibility for a representation, a lawyer must be able to provide legal services to the client. For example, a lawyer may not agree to joint responsibility with another lawyer if the other lawyer has a non-consentable conflict of interest (N.Y. State 745 (2001)), the other lawyer has been suspended (N.Y.

State 334 (1974)), or the other lawyer has been disbarred (N.Y. State 609 (1990)). Similarly, neither "retired" status nor voluntary resignation would enable the inquirer to provide legal services to a client. *See* N.Y. State 1160 ¶¶ 3-4 (2019) (not proper for a New York attorney to share fees with a lawyer who, though resident in New York, is not admitted to practice in New York, if the sharing of fees as a matter of law would constitute the unauthorized practice of law.)

10. Assuming that the inquirer's status is "continued registration" at the time the custodial attorney provides services to the client, we believe the inquirer could meet the requirements of the second clause of Rule 1.5(g)(1).

Sale of a Law Practice

11. Rule 1.17 authorizes a lawyer who retires from the private practice of law to sell his or her law practice, including goodwill, to one or more lawyers or law firms, as long as the lawyer complies with the conditions set forth in that rule. In N.Y. State 961 ¶¶ 3-5 (2013) we said that a retiring lawyer may sell his or her law practice contingent upon receiving a percentage of legal fees collected by the purchaser if the payment either (1) is in proportion to the services performed by the selling lawyer prior to the sale, or (2) fairly represents the value of the "goodwill" of the retiring lawyer. In particular, the payment for "goodwill" that is permitted by Rule 1.17 permits a payment that is made in the future after the fees that reflect "goodwill" are earned. Rule 1.17 does not apply here because the inquirer is not selling all or part of his law practice. The inquirer has already transferred the will files, in return for the custodial attorney's agreement to maintain the files.

CONCLUSION

12. A lawyer who drafted wills for clients and who, upon retirement, transferred the original wills to another lawyer outside the retiring lawyer's firm for custody, may request and accept a referral fee from the second lawyer if holding the wills results in a new representation for the second lawyer, but only if the retiring lawyer will assume joint responsibility for the subsequent representations within the meaning of Rule 1.5(g), which may only occur if the inquirer maintains his registration as a lawyer.

(19-19)