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

Opinion 1201 (08/31/2020)

Topic: Retired lawyers; referral fees

Digest: A lawyer who received a referral of a contingency-fee wrongful death matter from a lawyer who later retired under the rules of the Office of Court Administration before the conclusion of the case may share the legal fee with the retired lawyer if the latter assumed joint responsibility for the matter.

Rules: 1.5, 1.17(a), 5.4

FACTS

1. The inquirer is a New York lawyer who represents plaintiffs in personal injury actions on a contingency-fee basis. The inquirer recently settled a prolonged wrongful death action, and, conforming to State law, sought and obtained court approval of the settlement, including the amount of attorneys' fees. We understand that, in keeping with this court approval, the client has been paid the full amount of the settlement proceeds to which the client is entitled.

2. The inquirer came to the representation of the client as a result of a referral from another New York lawyer unaffiliated with the inquirer. According to the inquirer, an unwritten agreement between the two lawyers provided that the referral fee would be a fixed formula splitting any legal fee based on a statutory schedule established for the type of case at issue; the division was to be made without regard to the legal services that each lawyer actually performed. The client, it is said, knew of this oral agreement but not the specifics of the fee division. We are told that the agreement between the lawyers has no effect on the amount of the client's recovery in the wrongful death settlement, because only the gross amount of the approved legal fees would be subject to any division between the two lawyers.

3. The inquirer tells us that the referring lawyer did some work in the early stages of the matter and agreed at the outset to assume joint responsibility for the matter. Nothing in the inquiry suggests that the referring lawyer later disclaimed this joint responsibility. The referring lawyer now seeks payment consistent with the fixed formula in the oral agreement.

4. During the pendency of the wrongful death action, the referring lawyer retired from the practice of law. In doing so, the referring lawyer changed his/her registration status with the Office of Court Administration to "retired," and ceased paying the bi-annual attorney registration fees that the OCA collects. This change of status occurred five years before the settlement of the

long-running matter.

5. One of the requirements of "retirement" status for attorney registration is that the "retired" lawyer may not receive compensation for legal services rendered while retired. 22 N.Y.C.R.R. § 118.1(g). An OCA-retired lawyer, however, may render legal services for no compensation, and the retired lawyer remains a member of the bar. The change in registration does not strip the lawyer of a license to practice law but instead places parameters on the lawyer's practice.

QUESTION PRESENTED

6. May a lawyer pay a referral fee to a lawyer retired under the rules of the Office of Court Administration despite the provision in those OCA rules that a retired lawyer may not receive compensation for services rendered during retirement?

OPINION

7. The question before us is narrow. Our role is to interpret the N.Y. Rules of Professional Conduct ("Rules"). The enforceability of the unwritten agreement between the inquirer and the referring lawyer is ultimately a question of law, a question outside the ambit of our charter. A body of case law exists on the issue. *See, e.g., Benjamin* v. *Koeppel*, 85 N.Y.2d 549 (1995) (holding that the referring lawyer's registration status does not affect the enforceability of an otherwise valid fee-sharing agreement). The inquirer was free to present the matter of the fee division to the court that reviewed and approved the settlement, including the gross attorneys' fees, but the inquirer did not do so. This leaves a lingering ethical issue, and so, to address the issue, we assume without deciding that a valid and enforceable fee-sharing agreement exists between the inquirer and the referring, now-retired lawyer.

8. The ethical issue is whether the payment of the referral fee is an impermissible fee-sharing arrangement under Rules 1.5(g) and 5.4(a). Rule 1.5(g) addresses referral fees from lawyers not affiliated with the referring lawyer's firm. With exceptions not applicable here, Rule 5.4(a) prohibits sharing a fee with a non-lawyer. The question for us is whether sharing a legal fee with a lawyer holding "retired" status under the OCA rules is a disallowed fee-sharing arrangement under these Rules. We believe that it is not.

9. We have long said that the mere forwarding of a client to another lawyer is not a permissible basis for sharing in the legal fee thereby generated. N.Y. State 954 ¶ 9 (2013); N.Y. State 414 (1975). Rule 1.5(g) prohibits a lawyer from dividing a fee for legal services with another lawyer not associated in the same firm unless, among other things, "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." The Rule is disjunctive. Here, the proposed fee division is based not on a proportional share of the legal fee attributable to whatever preliminary work the referring lawyer performed, but rather on a set formula based on the latter's assumption of joint responsibility. The outcome of the ethical issue under Rule 1.5(g) thus turns on the meaning of "joint responsibility," at least in the context of an OCA-retired lawyer.

10. The Rules do not define "joint responsibility." The Comments accompanying the Rule say that "[j]oint responsibility for the representation entails financial and ethical responsibility as if the lawyers were associated in a partnership." Rule 1.5, Cmt. [7]. We have never delineated the precise contours of this "joint responsibility," save that "joint responsibility" involves "more than financial accountability and malpractice liability." N.Y. State 1128 ¶ 12 (2017); N.Y. State 745 (2001). Although others disagree, s*ee, e.g.*, *Aiello v. Adar*, 750 N.Y.S.2d 457 (Sup. Ct. Bronx Cty. 2002) (only financial accountability required); N.Y. County 715 (1996) (to the same effect), we abide by our prior opinions.

11. The text of Rule 1.5(g) offers some direction on the content of "joint responsibility." The Rule distinguishes between, on the one hand, legal services performed by the referring lawyer directly on the client's matter, for which the Rule provides for compensation on a proportional basis, and, on the other, the assumption of "joint responsibility" to the client for the rendition of legal services by the lawyer(s) handling the matter, for which the Rule dictates no compensation formula. *See* ABA 474 (2016) (interpreting parallel provision in the ABA Model Rules of Professional Conduct). This distinction means that "joint responsibility" entails something other than some active engagement in the day-to-day handling of the matter; it means, instead, as Comment [7] says, having "financial and ethical responsibility for the matter" in the way partners in a firm do. *See* ABA 487 (2019) (ditto). Rule 5.1(a) requires a law firm to "make reasonable efforts to ensure that all lawyers in the firm conform to" the Rules. At a minimum, therefore, we think "joint responsibility" under Rule 1.5(g) coincides with this Rule 5.1(a) duty.

12. This conclusion is in harmony with our discussion of "joint responsibility" in N.Y. State 961 (2013). There, the question was whether a retired lawyer could receive a fee for referring new matters to a lawyer buying the retired lawyer's practice. The Opinion equated "retirement" under Rule 1.17 with "retirement" under the OCA rules. *Id.* ¶ 13 & fn. 9. We corrected this position in N.Y. State 1168 ¶ 7 (2019), in which we explained that, in contrast to the statewide application of the OCA rules, "retirement" under Rule 1.17 was explicitly a geographic matter, that is, that a lawyer selling a law practice could be "retired" under Rule 1.17 if the selling lawyer ceased practicing within the county or adjacent counties where the selling lawyer had previously offered legal services. Thus, a lawyer who sold a Bronx-based law practice could be "retired" under Rule 1.17 even if the selling lawyer opened a new law office in, say, Columbia or Tompkins County, where a registered lawyer continued to practice law for compensation, and could assume joint responsibility for a matter; in that circumstance, the OCA rules are irrelevant. In any event, in Opinion 961, the selling lawyer did not intend to assume "joint responsibility" for any matters, so we did not resolve the issue of what constitutes "joint responsibility" under Rule 1.5(g). N.Y. State 961 ¶ 13.

13. Nevertheless, we think Opinion 961 offers some insight into the meaning of "joint responsibility" under Rule 1.5(g). There, we said that "the selling lawyer would need to supervise, at least to some extent, the work of the buying lawyer." *Id.* ¶ 13. On the (mistaken) premise that the OCA rules applied, we did not "foreclose the possibility that, under some factual circumstances, a retiring lawyer [under OCA rules] could meet" the requirements of Rule 1.5(g) by assuming a supervisory role consistent with Rule 5.1(a). *Id.* The "degree of supervision required is that which is reasonable under the circumstances." Rule 5.1(c).

14. We think this analysis was correct. Every day, law firm partners commonly meet this Rule 5.1(a) standard by vesting responsibility over matters to other lawyers in the firm whom, through experience, they have come to trust as meeting the standard of competence. *See* Rule 1.1. The partners remain responsible for each such matter – they retain "financial and ethical responsibility" for it – including, to the reasonable degree Rule 5.1(c) requires, for compliance with Rule 5.1(a)'s supervisory duties. Among other things, a lawyer who remains available for consultation on the matter, or who keeps generally abreast of developments on the matter to assure adherence to the Rules, may well fulfill the duties of a supervisory counsel. *See generally* N.Y. State 864 ¶¶ 8, 12 (2011). In assuming "joint responsibility" under Rule 1.5(g), a referring lawyer is in the same position as these partners.

15. In the absence of a full understanding of the referring lawyer's role in the matter at issue over time, we decline to opine on whether that role meets the standard of "joint responsibility" in this specific inquiry. For now, we say only that a lawyer "retired" with the OCA, in some circumstances, may bear the "joint responsibility" that Rule 1.5(g) contemplates, notwithstanding the lawyer's change of registration status to "retirement," and may do so by fulfilling the role akin to a supervisory lawyer in a law firm as outlined in Rule 5.1(a), Rule 5.1(c), and Comment [7] to Rule 1.5.

16. This conclusion requires us to revisit language in our Opinion 1172 (2019). There, the inquirer, anticipating retirement, transferred wills to a former law partner. The question was whether the custodial lawyer could pay fees to the now-retired inquirer in the event that any of the wills matured into fee-generating estate matters. *Id.* ¶ 2. We answered the question in the negative, based in part on the view that "the inquirer could assume joint responsibility for a representation only if the lawyer opts for continued registration" with the OCA. *Id.* ¶ 9. Coloring that view were concerns that the fee division might run afoul of Rule 5.4(a)'s prohibition on dividing fees with non-lawyers, and that a retired lawyer could not perform the services that comprise the requisite joint responsibility. *Id.* On further reflection, we think this answer was overbroad, and so modify the Opinion accordingly.

17. Our concern in Opinion 1172 with Rule 5.4(a) on dividing fees with non-lawyers was misplaced. A lawyer who elects to retire under the OCA rules is still a member of the bar, *see* Judiciary Law § 90 (the Appellate Divisions, not the OCA, are responsible for lawyer admission), and indeed the retired lawyer may continue to render legal services for no compensation without fear of engaging in the unauthorized practice of law, s*ee Benjamin*, 85 N.Y.2d at 554 ("a person is authorized to practice law if that person has been admitted to practice and has taken the requisite oath"). Thus, Rule 5.4(a), which is pertinent only to sharing fees with non-lawyers, is inapposite, because an OCA-retired lawyer is still a fully-licensed lawyer.

18. Our other concern in Opinion 1172 – that an OCA-retired lawyer could not perform the requisite legal services of "joint responsibility" – was too sweeping. We are unwilling to say that the supervisory role that Opinion 961 envisioned is beyond the capacity of an OCA-retired lawyer to satisfy, especially when the lawyer, as here, has done nothing to disclaim the lawyer's initial assumption of "joint responsibility." As a member of the bar, for example, such a 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 handling of the matter, with continued exposure to any financial and ethical repercussions. We do not mean to exhaust the ways in which an OCA-retired lawyer may bear "joint responsibility," for the duties of a supervisory lawyer under Rule 5.1(a) may vary with the facts. We say only that, on our view, an OCA-retired lawyer may in some circumstances meet the requirements of "joint responsibility" of Rule 1.5(g).

CONCLUSION

19. A lawyer may pay a referral fee to a lawyer who is retired within the meaning of the rules of the Office of Court Administration if the referring lawyer assumed joint responsibility for the referred matter.

(04-20)