

REVISED

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF THE
ADVISORY COMMITTEE ON
PROFESSIONAL ETHICS
OPINION NO. 745

DOCKET NUMBER: 089278
ON APPEAL FROM:

ADVISORY COMMITTEE FOR PROFESSIONAL
ETHICS OPINION NO. 745

PUBLISHED ON: MARCH 12, 2024

NOTICE OF PETITION FOR REVIEW

AMERICAN BOARD OF TRIAL ADVOCATES NORTHERN NEW JERSEY CHAPTER
AND TRIAL ATTORNEYS OF NEW JERSEY'S BRIEF AND APPENDIX
IN SUPPORT OF PETITION FOR REVIEW

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SUPREME COURT
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TABLE OF CONTENTS

INDEX TO APPENDIX	ii
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE MATTER INVOLVED	2
QUESTIONS PRESENTED	3
COMMENTS AS TO THE ETHICS OPINION	3
CONCLUSION	14

INDEX TO APPENDIX

PAGE

Decision of the Advisory Committed of Professional Ethics, Filed March 12, 2024.....	Pa001-Pa006
Notice of Petition for Review Dated April 1, 2024	Pa007-Pa010
Supreme Court Committee on Trial Advocacy Specialization.....	Pa011-Pa056
J.A. Payton, <u>Certification of Specialization:</u> <u>Another Limit on Attorney Advertising is Peeled Away,</u> 25 INDIANA LAW REVIEW 589 (1991).....	Pa059-Pa090

TABLE OF AUTHORITIES

Citations:

<u>Appell v. Reiner</u> , 81 <u>N.J. Super.</u> 229 (Ch. Div. 1963).....	9
<u>DiProspero v. Penn</u> , 183 <u>N.J.</u> 477 (2005).....	11
<u>Douglas v. Harris</u> , 35 <u>N.J.</u> 270 (1961).....	11
<u>Eichen, Levinson & Crutchlow, LLP v. Weiner</u> , 397 <u>N.J. Super.</u> 588 (App. Div. 2008).....	1, 11
<u>First Resolution Inv. Corp. v. Seker</u> , 171 <u>N.J.</u> 502 (2002).....	11
<u>In Re Armorer</u> , 153 <u>N.J.</u> 358 (1998).....	9
<u>In re Introcaso</u> , 26 <u>N.J.</u> 353 (1958).....	4
<u>In re Pajerowski</u> , 156 <u>N.J.</u> 509 (1998).....	4
<u>In re Shaw</u> , 88 <u>N.J.</u> 433 (1982).....	4
<u>Stack v. P.G. Garage, Inc.</u> , 7 <u>N.J.</u> 118 (1951).....	9

Other Authorities:

Advisory Committee on Professional Ethics Opinion No. 694 and Committee on Attorney Advertising Opinion 28 (Joint Opinion).....	7
<u>Certification of Specialization: Another Limit on Attorney Advertising is Peeled Away</u> , 25 <u>Indiana Law Review</u> 589 (1991)...	5
https://business.tcnj.edu/business-faculty/kevin-michels	10
https://www.njcourts.gov/attorneys/certification	7
Michels, <u>New Jersey Attorney Ethics</u> , (2023).....	10
<u>R. 1:21-1</u>	12
<u>R. 1:39-2</u>	1, 7

<u>R.</u> 1:39-6(d)	1, 4, 5, 7, 10, 11, 12, 13
<u>RPC</u> 1.5(e)	2, 5, 7, 12
<u>RPC</u> 7.2(c)	4
<u>RPC</u> 7.2(c) (1)	4
<u>RPC</u> 7.2(c) (3)	4
<u>RPC</u> 7.3(d)	4

PRELIMINARY STATEMENT

Forty-five years ago, this Court established a Trial Advocacy Attorney Certification program that served two purposes: to foster excellence in trial advocacy and to assist the general public in selecting attorneys who were eligible for certification based on standards of professional fitness, competence and experience in a designated area of practice. See, R. 1:39-2.

To promote the policy that encourages the referral of clients to attorneys specialized in trial advocacy, certified attorneys were granted the right to pay a referral fee. R. 1:39-6(d). This exception to the general prohibition against referral fees provided a valuable means of facilitating the assistance to consumers that was a goal of the certification program.

The plain language of Rule 1:39-6(d) provides for the payment of a referral fee "without regard to services performed or responsibility assumed by the referring attorney." Indeed, an attorney entitled to a referral fee is "not required to have performed any legal work." Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 595 (App. Div. 2008) (emphasis added).

Despite the plain language of the Rule and the decades-long history of its application, Ethics Opinion 745 adopts the erroneous premise that a "referral fee" paid pursuant to this Rule

constitutes a "legal fee" subject to the restrictions of RPC 1.5(e). This assumption, unsupported by any legal authority, eviscerates the effectiveness of the referral fee as a means of promoting access to attorneys who have been certified as specialists in trial advocacy. In short, Ethics Opinion 745 gets it wrong.

It is from this perspective that ABOTA and TANJ respectfully submit that Ethics Opinion 745 be overturned for the following reasons: (1) the Opinion is wrongly predicated on an incorrect definition of a referral fee; (2) implementation of Ethics Opinion 745 will impede the ability of clients to obtain representation from certified trial advocacy specialists; and (3) the Opinion inexplicably denies certified attorneys the incentive program of offering referral fees to attorneys, simply because they are from out-of-state.

STATEMENT OF THE MATTER INVOLVED

Pursuant to Ethics Opinion 745, this matter arose out of "inquiries about out-of-state lawyers seeking payment of referral fees from New Jersey certified attorneys" left on the attorney ethics assistance hotline. (Pa001). The Opinion offers no further insight into why or by whom this issue was raised. Petitioners

reserve the right for further comment on the Statement of the Matter should more information become available.

QUESTIONS PRESENTED

Whether the Ethics Advisory Committee erred when it held, without legal citation or support, that a "referral fee" constitutes payment for legal services rendered.

Whether the Ethics Advisory Committee erred when it required that, in order for the benefit contemplated by the program for attorney certification and adopted by the New Jersey Supreme Court to function in its most effective way for client consumers, an out-of-state attorney must be eligible and actively participating in the case in New Jersey.

COMMENTS ON THE ETHICS COMMITTEE OPINION AND ERRORS COMMITTED

Ethics Opinion 745 prohibits certified attorneys from paying referral fees to out-of-state attorneys who are ineligible to practice law in New Jersey. The Opinion predicates its analysis upon two incorrect bases: 1) it defines a referral fee as a fee for legal services rendered, and 2) it requires an attorney to be eligible to practice law in New Jersey to receive a referral fee.

These legal misstatements conflict both with the historical context of the origin of the referral fee within the program for attorney certification and with the plain language of the rule.

In New Jersey, referral fees are generally prohibited. See, RPC 7.2(c); RPC 7.3(d). The prohibition is grounded in consumer protection and meant to dismantle profit-oriented schemes where clients may rely upon unregulated representations of legal superiority. See, e.g., In re Pajerowski, 156 N.J. 509 (1998) (the use of a non-attorney "runner" with whom an attorney split fees, in part, constitutes misconduct worthy of disbarment); In re Introcaso, 26 N.J. 353 (1958) (involving the employment of a runner by an attorney to produce criminal cases); In re Shaw, 88 N.J. 433 (1982) (involving an employee of an attorney who went to a hospital to secure a case).

Referral fees, or compensation to someone who has recommended a particular attorney to a client, are permitted in a few specific situations: 1) where the attorney recommended is a certified attorney as permitted by R. 1:39-6(d); 2) for payment for advertising as permitted by RPC 7.2(c)(1) and (2); and for payment of the charges for a not-for-profit lawyer referral service as permitted by RPC 7.2(c)(3) and RPC 7.3(d).

Historically, referral fees were not considered a form of

payment for services rendered like *quantum meruit*, or fee-division pursuant to RPC 1.5(e). Rather, the referral fee contemplated by R. 1:39-6(d) was an incentive to direct attorney referrals to trial attorneys deemed qualified by Supreme Court standards.

Recognition of trial advocacy as a specialty can be traced to the increase in legal specialization during the twentieth century. In the 1950's, the American Bar Association (hereinafter "ABA") began studying the implications of recognizing and regulating legal specialties. By the 1970's, several states initiated experimental certification programs to better regulate qualifications and/or to better advise the public of attorneys' specialties. J.A. Payton, Certification of Specialization: Another Limit on Attorney Advertising is Peeled Away, 25 INDIANA LAW REVIEW 589 (1991). In 1979, the American Bar Association issued a Model Plan of Specialization with the purpose:

To assist in the delivery of legal services to the public by:

- 1.1 Providing greater access by the public to appropriate legal services;
- 1.2 Identifying and improving the quality and competence of legal services; and
- 1.3 Providing appropriate legal services at reasonable cost.

ABA Model Plan of Specialization, 1979 (**Pa083**).

Similarly, in response to a growing concern regarding attorney competency and its effects on the general public, the New

Jersey Supreme Court initiated a study to determine "whether the public interest calls for our establishing some form of trial advocacy certification. . . ." (Pa011). The thrust of the study was to ensure that "the public was being adequately served by the trial bar . . . to identify problem areas . . . and [to make] suggestions for correcting the problems." (Pa012). Ultimately, the Supreme Court Committee on Trial Advocacy Specialization recommended adopting a program of certification based upon the ABA Model Program because it "is in the public interest and will tend to improve the quality of trial advocacy." (Pa018).

It has long been recognized that the integrity of our legal system depends upon maintaining high ethical and professional standards. The public's trust in our profession and in the integrity of the judicial system depends to a large degree upon the perception that, at the end of a trial, the result will represent a just and fair resolution of the controversy. It is beyond cavil that the competence of the attorney trying the case will have a significant, if not decisive, impact on whether that ideal is realized.

In New Jersey, the attorney certification program "is designed to help consumers make an informed decision when seeking and selecting a lawyer." See

<https://www.njcourts.gov/attorneys/certification> (last visited on March 24, 2024).

To be certified as a civil or criminal trial attorney, an attorney must:

- Be a member in good standing of the New Jersey Bar for at least five years;
- Take a specific number of continuing legal education courses in the three years prior to filing an application;
- Demonstrate substantial involvement in preparation of litigated matters;
- Demonstrate an unblemished reputation by submitting a list of attorneys and judges who will attest to the applicant's character and ability;
- Pass a written examination covering various aspects of practice in the designated specialty.

R. 1:39-2.

The attorney certification program offers a financial incentive to attorneys lacking appropriate experience to refer a client to a duly qualified attorney who is in a better position to serve the client's needs at trial. The client's position is further protected by Rule 1:39-6(d), RPC 1.5(e) and the reasoning advanced by the Committees in Advisory Comm. Op. 694 & Advertising Comm. Op. 28 (Joint Op.) which requires the client's consent to the referral and which mandates that the client's total recovery is not impacted by the referral fee. In sum, the attorney

certification program encourages the Bar to refer trial matters to qualified attorneys - with the client's consent - enhancing the client's likelihood of success and protecting the full scope of the client's recovery.

Ethics Opinion 745 strikes a blow to the effectiveness of the consumer protection afforded by the attorney certification program by eliminating the incentive for out-of-state attorneys to refer trial matters to certified trial attorneys. Moreover, it does so without advancing any objective of either the attorney certification program initiated by this Court or the Rules of Professional Conduct. Rather, it inflicts this wound solely upon the basis of an obviously flawed rationale.

Ethics Opinion 745 holds that "certified lawyers generally may not pay referral fees to out-of-state lawyers." (Pa001). In reaching this conclusion, the rationale proffered by the Advisory Committee presupposes that a referral fee is paid for legal services performed. In essence, Ethics Opinion 745 puts forth the following syllogism:

A referral fee is considered payment for legal services rendered.¹

¹ The Opinion puts forth this assertion without citation or legal support. See, e.g., "Referral fees are a division of the legal fee, paid for legal services rendered." (Pa002). "[A] referral fee is considered payment for legal services rendered in the case" (Pa003).

To receive a fee for legal services rendered, the recipient must be permitted to practice law in New Jersey.²

Therefore, an out-of-state attorney may not receive a referral fee from a New Jersey certified attorney.

This syllogism, cited on page 3 of the Opinion, is logically flawed, however.

First, the Opinion fails to provide legal support for its initial predicate that a referral fee is defined as a fee for legal services rendered. Ethics Opinion 745 does not cite any language, definition, case precedent, ethics opinion, or any other legal source to support the contention that a referral fee is for legal services rendered. The Opinion does not contend that the act of referring a case constitutes legal work. Even if it had, there is no support for such a claim. In point of fact, a referral fee is not for legal services rendered. Instead, a "referral fee" is

² The Opinion cites several cases for this premise, none of which clearly offer support. In Stack v. P.G. Garage, Inc., 7 N.J. 118, 120, 123 (1951), the case dealt with a non-lawyer who attempted to get legal fees for legal work performed. In Appell v. Reiner, 81 N.J. Super. 229, 241 (Ch. Div 1963), an out-of-state attorney was engaged in unauthorized practice within New Jersey. In In re Armorer, 153 N.J. 358 (1998), a lawyer sought a fee for legal services rendered while was she ineligible to practice in New Jersey. None of these cases address referral fees or that an out-of-state attorney need be eligible to practice in New Jersey to receive a referral fee.

defined as:

Monetary compensation or anything of value, given by a lawyer (or firm), to any person or organization to reward that person or organization for recommending the lawyer to a client, or otherwise securing a lawyer's employment by a client. The referral fee is therefore a fee or other compensation given to anyone, whether a laymen, firm, or individual attorney, solely for the recommendation of counsel, without the recipient of the fee having performed any legal services.

Michels, New Jersey Attorney Ethics, p. 608 (GANN, 2023) (emphasis added).³

Court Rule 1:39-6(d) further confirms that a referral fee is not meant for legal services performed. The Rule states in pertinent part:

A certified attorney who receives a case referral from a lawyer who is not a partner in or associate of that attorney's law firm or law office may divide a fee for legal services with the referring attorney or the referring attorney's estate. The fee division may be made without regard to services performed or responsibility assumed by the referring attorney, provided that the total fee charged the client relates only to the matter referred

³ When attorneys in New Jersey are faced with questions ethical in nature, there are four resources commonly available to answer questions: the New Jersey Court Rules, the Rules of Professional Conduct, the attorney ethics research hotline, and Kevin Michels' treatise, New Jersey Attorney Ethics. Mr. Michels has issued new editions every year since 2007. He is an accepted expert on ethics in our state.

<https://business.tcnj.edu/business-faculty/kevin-michels/> (last visited March 24, 2024).

and does not exceed reasonable compensation for the legal services rendered therein.

R. 1:39-6(d) (emphasis added)].

The absence of any obligation to perform legal services to receive a referral fee was also noted in Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 595 (App. Div. 2008) ("to be entitled to a referral fee from a certified civil trial attorney . . . he was not required to have performed any legal work."). Because the plain language of the rule holds that a referral may be paid without regard to services performed, the Opinion's definition that the referral fee is for legal services is in direct conflict.

When interpreting Rules of Court, canons of statutory construction ordinarily apply. E.g., First Resolution Inv. Corp. v. Seker, 171 N.J. 502, 511 (2002); Douglas v. Harris, 35 N.J. 270, 278 (1961). Accordingly, as with a statute, the analysis must begin with the plain language of the rule. DiProspero v. Penn, 183 N.J. 477, 492 (2005). The Court must "ascribe to the [words of the rule] their ordinary meaning and significance . . . and read them in context with related provisions so as to give sense to the [Rules] as a whole" Id. at 492 (citations omitted). Here, the Court Rule is clear as day: a referral fee is

not for legal work performed.

The Opinion's second proposition is that an attorney must be permitted to practice law in New Jersey to receive a legal fee. This statement is accurate but inapposite to the issue. Our Rules proscribe anyone from practicing law in New Jersey unless licensed and admitted to do so. See, R. 1:21-1. But fees for legal work require legal work to be performed.

Where attorneys have either performed joint work on a case pursuant to RPC 1.5(e) or in circumstances where proportional payment is due pursuant to *quantum meruit*, legal work has been performed. Fees paid pursuant to these circumstances are legal fees and would require attorneys eligible to practice in New Jersey for payment thereof.

In contrast, the referral fee permitted by R. 1:39-6(d) is for making a referral to a certified attorney and not for performing legal work. Referral fees are addressed in a completely different set of regulations from the division of legal fees subject to RPC 1.5(e). From a structural perspective, R. 1:39-6(d) does not fall under the umbrella of RPC 1.5(e). It is accepted as an exception thereto. These are two separate provisions of different codes addressing different types of fees.

Further, the plain language of R. 1:39-6(d) does not require

that a referring attorney be eligible to practice law in the State of New Jersey in order for a certified trial attorney to pay a referral fee. R. 1:39-6(d) states that, "[a] certified attorney who receives a case referral from a lawyer . . . may divide a fee for legal services with the referring attorney" R. 1:39-6(d) (emphasis added). The language simply limits the referral payment to a "lawyer." There is no express requirement that the "lawyer" be eligible to practice law in New Jersey. There is no explicit requirement that the "lawyer" be a New Jersey attorney. There is no requirement that the "lawyer" participate in rendering legal services. If this Court had intended that out-of-state attorneys need to be eligible and participating in the referred case in New Jersey, the Rule would have been drafted accordingly.

For the last forty-five years, no question has ever been proffered about whether certified attorneys may pay out-of-state attorneys referral fees. Our certification regulations have been amended five times since their adoption in 1979, and at no point has this issue been raised or even debated.

Left as is, Ethics Opinion 745 upends over forty years of accepted practice and leaves the Bar in a state of confusion. The Opinion presents no timing for application of its new pronouncement of ethical liability. If the opinion applies retroactively,

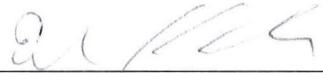
certified attorneys with agreements in place to pay referral fees are left in the unsavory position of backing out on their obligations to out-of-state attorneys or committing an ethics violation. The hundreds, if not thousands, of agreements upset by the Opinion could result in reputational damages, at best, and additional litigation, at worst.

Regardless of whether the Opinion is retroactive or prospective, from a consumer perspective, this Opinion is disastrous. The entire intent underlying our attorney certification program is to ensure that clients are referred to practitioners this Court has deemed qualified for their needs. Ethics Opinion 745 undoes the work of this Court to promote higher standards of trial advocacy and provide better access to qualified representation to the general public.

CONCLUSION

For all of the foregoing reasons, Petitioners ABOTA and TANJ respectfully submit that this Petition for Review should be granted, and the Ethics Opinion 745 should be overturned.

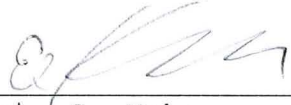
Respectfully submitted,
JAVERBAUM WURGAFT HICKS KAHN
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Eric G. Kahn, Esq.
Attorney for Petitioners

Dated: April 9, 2024

I hereby certify that this Petition presents a substantial question and is filed in good faith and not for the purposes of delay.



Eric G. Kahn