SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089278

IN RE: ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION 745

REPLY PETITION IN SUPPORT OF A REVIEW OF ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION 745

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[1] This unpublished decision was previously supplied with Petitioner's Appendix. Pa19

PRELIMINARY STATEMENT

Respondent Advisory Committee on Professional Ethics ("ACPE" or "Respondent")'s opposition fails for three reasons: 1) it continually confuses what constitutes a fee for legal services versus a fee for a referral; 2) it does not acknowledge that a prohibition of referral fees provided to conflicted attorneys was unwarranted and beyond logic; and 3) it does not appreciate the recognition our Supreme Court bestowed upon certified trial attorneys, and how Opinion 745 creates a harm to the public. Respondent does not offer any consideration for the privileges associated with a certified attorney.

Of critical importance is the fact that Respondent states that Opinion 745 "disincentive[s] out-of-state attorneys from referring clients to the certified attorney program" and suggests that the Court "amend" Rule 1:39-6(d) to clarify that certified trial attorneys can indeed pay referral fees to out-of-state attorneys. ACPEb19. *This concession would render Opinion 745, as to referral fees paid to out-ot-state attorneys, moot.* Respondent also concedes that conflicts are waivable (ACPEb14), but broadly asserts that a conflicted-out referring attorney should not be permitted to profit from making a referral because it is ultimately a "legal fee." This argument is not only incorrect in its categorizing of a referral as a "legal fee," but it turns a blind eye to the basic fact that Opinion 745 was published allegedly in response to the issue of an out-of-state attorney receiving

a referral fee and had nothing to do with a conflicted attorney making a referral. Lastly, Respondent asserts that all referral agreements entered into prior to Opinion 745 should be honored and upheld. Of course, Petitioner agrees, but this third concession underscores that no actual "harm" was cured by Opinion 745 and there is no reason why referrals should not continue in the future, as Respondent does not object to those in the past.

The fact remains that Opinion 745 attempted to resolve an issue that did not exist, only creating pitfalls which will serve as a detriment to New Jersey litigants, practitioners and courts. Petitioner respectfully urges this Court to grant the underlying Petition for Review and nullify and reverse Opinion 745.

LEGAL ARGUMENT

I. Respondent's Primary Argument, And Opinion 745, Are Based Upon The Fundamentally Inaccurate Premise That A Referral Fee Is A Fee For Legal Services Performed (ACPEb3-13; Pa1-Pa6).

The Respondent's arguments in support of Opinion 745 are inherently flawed, as all mentions of referral fees to out-of-state attorneys are based upon the premise that a referral fee is a "legal fee" for legal work performed. See ACPEb3-4, 10 (citing to various case decisions pertaining to *legal fees* for "unauthorized practice of law" or "ineligib[ilty] to practice law"). Respondent's assertions mirror the sparse support provided in Opinion 745 itself, mischaracterizing and misinterpreting the plain language of Rule 1:39-6(d).

Respondent cites Rule 1:39-6(d), which permits certified trial attorneys to provide a referral fee to any attorney for a referral "without regard to services performed or responsibility assumed by the referring attorney." ACPEb6. Curiously, Respondent emphasized language from the Rule that the ultimate fee earned on the referred case is where the percentage portion of the referral fee is derived. Ibid. (citing Rule 1:39-6(d), stating "a certified attorney who receives a case referral from a lawyer . . . may divide a fee for legal services with the referring attorney"). Respondent argues that a plain reading of the Rule "clearly characterizes the referral as a 'fee for legal services.'" ACPEb7. This is false.

A referral fee is derived from the underlying recovery from the referred case, which inherently must be earned by virtue of legal services rendered *by the certified trial attorney*. The "legal services" referenced in the Rule pertains to the work the certified trial attorney performs on the case to obtain a recovery to then apportion some percentage to the referring attorney, and has absolutely nothing to do with legal work performed by the referring attorney. To assert this language as "clearly characteriz[ing]" a referral fee as a fee for legal services is wholly without merit and simply incorrect. The language Respondent bases its argument upon grants the certified trial attorney the authority to determine a portion of the recovery in the case to be provided as a referral fee – it is *not* deeming a referral fee as a fee for legal services in the slightest. While a plain

reading of the Rule clearly indicates the foregoing, the Rule further makes clear that a referral is not a fee for legal services when stating that same can be provided "without regard to services performed or responsibility assumed by the referring attorney[.]" R. 1:39-6(d). Since the Rule provides that the referral fee may be provided without any legal work performed, it only further highlights the clear distinction between a referral fee and a fee for legal services.

Respondent also analyzes the unauthorized practice of law in New Jersey and the impact of same on out-of-state attorneys providing referrals to certified New Jersey attorneys. ACPEb10-13. Again, as above, this argument is fundamentally flawed because a referral fee from a certified trial attorney is payment for the referral alone, without any "services performed or responsibility assumed by the referring attorney." R. 1:39-6(d). Thus, the unauthorized practice of law cannot and does not occur because the out-of-state referring attorney is not providing any legal services.

Respondent criticizes Petitioner's citation to Weiner & Mazzei P.C. v. The Sattiraju Law Firm P.C., A-1079-14 (App. Div. May 25, 2016), claiming that "Weiner actually supports the ACPE's analysis in Option 745[,]" but such a statement is misguided. ACPEb8. Weiner holds that "in the case of certified attorneys, R. 1:39-6(d) eliminates only the requirement that the division of fees be in proportion to the services performed by each lawyer, or that each assumes

joint responsibility for the representation under R.P.C. 1.5(e)(1)." Weiner, A-1079-14 at slip op. at 6-7; see Pa20-Pa21. This stands in stark contrast to Opinion 745 and is not at all "actual support" for what Opinion 745 stands for, as Weiner makes the distinction that Rule 1:39-6(d) referral fees are not legal services fees, since the referring attorney need not perform any work or assume any responsibility in relation to the case file to receive a referral fee.

Additionally, Respondent incorrectly asserts that Petitioner's citation to Goldberger, Seligsohn & Shinrod, P.A. v. Baumgarten, 378 N.J. Super. 244 (App. Div. 2005) is misplaced, and the decision has no bearing on Opinion 745 because it does not specifically address Rule 1:39-6(d). ACPEb8-9. At the outset, a case decision does not have to explicitly cite a Rule to provide guidance. To be sure, Respondent concedes the point in its brief (ACPEb9), stating that the Goldberger Court did indeed hold that "payment of referral fees ha[d] no application" to fee-sharing arrangements or payment for legal services. Goldberger, 378 N.J. Super. at 251. The Goldberger Court's distinction is relevant, as it further highlights that there is a clear difference between referral fees and fees for legal services provided.

Ultimately, Respondent seems to concede the issue of certified trial attorneys being permitted to provide referral fees to out-of-state attorneys, suggesting that "the Court could amend Rule 1:39-6(d) to expand the pool of

lawyers who certified attorneys can pay referral fees to, including out-of-state attorneys." ACPEb19. While Petitioner disagrees with Respondent that Rule 1:39-6(d), as presently constituted, needs to be "expanded" upon to permit referral payments to out-of-state attorneys, since there is no such restriction in place as the Rule currently stands, Petitioner appreciates Respondent's implicit acknowledgement that Opinion 745 devalues the certified attorney designation, and that continuing to allow referral fees to be provided to out-of-state attorneys is of critical importance to common litigants and practitioners alike.

II. Opinion 745's Restriction Of Payment Of Referral Fees To Lawyers Who Have A Conflict Of Interest Was Unnecessary, Unwarranted And Unrequested (Pa1-Pa6; ACPEb13-16).

Respondent asserts that Opinion 745 was correct to conclude that referral fees cannot be provided to referring attorneys who had a conflict of interest at the time of the referral. ACPEb13. Respondent further argues that providing a referral fee to such conflicted attorneys is "paramount to allowing the conflicted lawyer to collect legal fees for services that the conflicted lawyer could not ethically render." Ibid. Again, this assertion erroneously blurs the distinction between the provision of a referral fee for no work performed and the recovery of a legal fee for actual services performed by the certified attorney.

Momentarily putting that critical point aside, Respondent ignored that the ACPE went far beyond the scope of the inciting "issue" which Opinion 745 set

out to answer: an inquiry to the attorney ethics research assistance hotline "about whether New Jersey certified attorneys can pay referral fees to out-of-state attorneys." ACPEb2; ACPEb18 (stating that "[t]he question before the ACPE in Opinion 745 was payment of referral fees by New Jersey certified attorneys to out-of-state attorneys" and not referral fees to conflicted attorneys from any state). By restricting referral fees to conflicted attorneys, the ACPE unilaterally raised an "issue" on its own without curing any harm, as nothing of the sort was before the ACPE. A fee provided to an attorney who referred the matter due to a conflict is separate and distinct from this hotline "issue" pertaining to out-of-state attorney referrals. To be sure, Opinion 745 cited no authority in support of its position that conflicted attorneys cannot receive a referral fee.

Respondent concedes that most conflicts are waivable, but does not give further consideration to this common scenario in practice. Under RPC 1.7(b), clients can waive conflicts, but despite same, Respondent makes the general assertion that a conflicted attorney, perhaps even with written informed consent of the waiver from the client, should not "profit through that referral." ACPEb14-15. Permitting the conflicted attorney to refer a litigant to a certified attorney is in the best interest of the litigant and provides an assurance to the referring attorney that the client is going to receive competent representation based upon an informed recommendation.

Respondent also states that a conflicted attorney is still permitted to refer a case out, just without a referral fee being provided. ACPEb15. Respondent further argues that Petitioner's assertion that Opinion 745 encourages referring attorneys not to disclose a conflict, or to keep the case for themselves, "seems to fly in the face of the RPCs[.]" Ibid. This argument indicates that Respondent fails to see the forest for the trees. Part of the significance of the certified attorney program is that other attorneys have the reassurance and confirmation from our Supreme Court that a certified attorney is rigorously tried, tested and vetted to be of the highest caliber of ability and competency. The ability of a certified attorney to provide a referral fee incentivizes other attorneys to ensure that they are referring the public to receive qualified, diligent representation.

Unilaterally deciding to prohibit referral fees to conflicted attorneys, or any attorneys for that matter, only acts as a disservice to litigants, as it implicitly directs the public to lesser skilled attorneys without the safeguards and assurances of the certified attorney program in place. Respondent pontificates that withholding conflict information or keeping a conflict case would violate the public's trust in the legal profession, but the more readily apparent violation of the public's trust in the legal profession is the devaluing of the certified attorney designation to deprive the public of the best possible representation.

III. Opinion 745 Offers No Benefit To Any Party, Only Serving To Harm Litigants And Practitioners (Pa1-Pa6; ACPEb16-20).

Respondent argues there is "no evidence" to support Petitioner's argument that Opinion 745 undermines the certified attorney program by disincentivizing out-of-state attorneys to make referrals, which Respondent deems as "wholly speculative." ACPEb16. At the outset, of course it is speculative; Opinion 745 was only published three months ago. Rather than sitting on our hands and waiting for the inevitable deluge of procedural inefficiencies, and for the public to be adversely impacted, Petitioner made rational extrapolations based upon decades of experience in handling referrals from out-of-state attorneys.

Respondent asserts that there is "no basis to assume that attorneys from other jurisdictions are held to a lesser professional standard" and would not "render competent and diligent representation" if they were to keep a referral case for themselves or refer it to any attorney in New Jersey, certified or not. ACPEb17. Respondent fails to appreciate that certified attorneys are tested and regulated by our Supreme Court and the New Jersey Board on Attorney Certification, and such a certification relays extensive "education, experience, knowledge, and skill for each designated area of practice." R. 1:39. A referring attorney is acting diligently when making a referral, furthering a client's greatest opportunity for qualified representation. Removal of the referral fee from the certified attorney program no longer encourages attorneys to refer clients to the best possible representation. Rule 1:39-6(d) inherently directs referrals to

attorneys designated with such expertise, while allowing a fee to the referring attorney, incentivizing a referral to not just any attorney better suited to handle the matter, but to an attorney tested and certified by our Supreme Court.

As previously stated, Opinion 745 does not serve the public in the slightest, as out-of-state lawyers, comparatively lacking local knowledge and experience, will now represent claimants, or cases will simply be filed in other states in applicable instances. The bottom line is that the public was not remotely penalized under the Rule 1:39-6(d) referral system, but instead protected and afforded the most qualified representation. On the other hand, Opinion 745 does not promote any public good or provide any benefit for litigants. Thankfully, Respondent agrees that referral fees should continue to be provided to out-of-state attorneys, and that all referral agreements entered into prior to Opinion 745 should be honored and upheld.

CONCLUSION

For the foregoing reasons, as well as those asserted in Petitioner's initial Petition, Petitioner respectfully requests that its Petition be granted, and Opinion 745 be reversed and nullified.

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