SUPREME COURT OF NEW JERSEY
DOCKET NO.: 089278

IN RE: ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION 745

REPLY BRIEF IN FURTHER SUPPORT OF NJAJ'S PETITION FOR REVIEW OF ADVISORY COMMITTEE ON PROFESSIONAL ETHICS OPINION 745

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

Cases

Committee Opinions

Court Rules

ARGUMENTS IN FURTHER SUPPORT OF REVIEW AND REVERSAL

Under the guise of a "plain language" interpretation, the Advisory Committee on Professional Ethics ("the Committee" or "ACPE") has adopted a view of referral fees as "fees for legal service" that stands contrary to more than half-a-century of its own guidance. The Committee presents no other basis for this interpretation, which as a practical matter bars out-of-state attorneys and some unknown percentage of licensed New Jersey attorneys from receiving payment for referral of a client to a Certified Trial Attorney. See, e.g., ACPEb7 ("Rule 1:39-6(d), as currently adopted . . ."). Instead, it concedes this Court could simply adopt the interpretation advocated by the Petitioners, while providing no non-semantics argument as to why the Court should not. As to its interpretation, the Committee simply presumes that all divided portions of a "fee for legal services" remain "fees for legal services," as if that was some immutable characteristic. See ACPEb6-7. Nothing in Rule 1:39-6(d) compels that result. In response, the NJAJ urges the Court to reject the ACPE's flawed interpretation and reverse Opinion 745.

POINT I THE COMMITTEE NEEDLESSLY TREATS ALL FEE DIVISIONS EQUALLY.

The Committee maintains that an attorney recipient of a referral fee pursuant to Rule 1:39-6(d) must be eligible to practice law in New Jersey under the "well-established law that precludes persons not authorized to practice law in New Jersey from receiving fees for unauthorized legal services." ACPEb3. However, no opinion,

case law, or other source is offered to support the view that a referral constitutes a legal service.

The Committee argues that the "similarity in language" between Rule 1:39-6(d) and RPC 1.5(e) to justifies its result. As RPC 1.5(e) states that "[e]xcept as otherwise provided by the Court Rules[,]" Rule 1:39-6(d)'s language controls. While the compensation paid for the referral emanates from the "fee for legal services," this "fee division may be made without regard to services rendered or responsibility assumed by the referring attorney[.]" See R. 1:39-6(d). Rule 1:39-6(d) unequivocally states the referral fee may be paid without any legal services performed or responsibility assumed by the referring attorney. The payment of referral fee does not convert the act of the referral to an unauthorized legal service.

In its petition brief, the NJAJ highlighted that the Committee's interpretation of a referral as "legal services" contradicts decades of the Committee's prior guidance. See NJAJb6-7. Years before the establishment of the Certified Trial Attorney program, the Committee considered and rejected referral fees as inappropriate because they were not rooted in a division of services or responsibilities. In ACPE Opinion 87, the Committee noted "it has been repeatedly held by the Committees that no right to a division arises from the mere recommendation" of an attorney by another attorney. Advisory Comm. Prof. Ethics Op. 87, 88 N.J.L.J. 779 (Dec. 2, 1965). ACPE Opinion 273 rejected the notion that

a referral, a "bare recommendation," entailed the necessary assumption of legal responsibility to be deemed "legal services." The "service and responsibility must, to be effective, relate to the handling of the case." Advisory Comm. Prof. Ethics Op. 273, 96 N.J.L.J. 1421 (Dec. 13, 1973). In its opposition brief, the Committee fails to address these Opinions.

The Committee also fails to address the case law that similarly finds a referral fee is not a fee for legal services. In Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588, 594-595 (App. Div.), certif. denied 195 N.J. 418 (2008), our Appellate Division concluded a Rule 1:20-19 Trustee is required to pay referral fees to a disbarred attorney as "other compensation" rather than as "fees for legal services." The entire reason the suspended or disbarred "could still receive referral fees" is *because* they were not fees for legal services.

Unquestionably, a non-New Jersey licensed attorney can recommend to a client that he or she retain a New Jersey lawyer. This does not constitute the unauthorized practice of law in New Jersey by the out of state attorney. The Certified Trial Attorney program did not convert the referral to legal services. Instead, it explicitly made compensation for the referral proper without a requirement of "services performed or responsibility assumed by the referring attorney."

Here, it appears the sole basis for finding that an out of state attorney is engaged in the practice of law is the receipt of compensation for the referral. That

fact converts an action clearly in the public interest, referral to an attorney certified by the New Jersey Supreme Court as competent and experienced, to an action now subject to sanction. This is notwithstanding the clear dictates of Rule 1:39-6(d) that permit payment of a fee for case referral without rendering any services and without taken on any responsibility.

Even if the Court were to determine that a referral was some form of legal service, the line is not as rigid as the Committee suggests. While the Committee cites to Appell v. Reiner, 43 N.J. 313, 317 (1964), it ignores the result mandated by this Court that permitted a New York attorney to receive payment for legal services rendered on a New Jersey matter.

In Appell, the Court reversed the Chancery Division ruling that the New York practitioner engaged in the unauthorized practice of law in New Jersey when he sought to resolve various debts and obligations in both New York and New Jersey, where he was not licensed to practice. The Court observed that the "generally controlling principle that legal services to be furnished to New Jersey residents relating to New Jersey matters may be furnished only by New Jersey counsel[,]" but "[a]n inflexible observance of the generally controlling doctrine may well occasion a result detrimental to the public interest." Appell, 43 N.J. at 316. Its reason is applicable here – there are simply contextual and practical considerations that

warrant payment for New Jersey legal services that are ancillary to the overall representation of the client. Id. at 316.

Opinion 745 does not identify any clear harm or defined danger that justifies excising some untold number of out-of-state and New Jersey attorneys from the receipt of referral fees. In its own words, "New Jersey attorneys have duties of competence and diligence in their representation of clients or prospective clients[,]" a duty that extends to "what kind of referral will be in the client's best interests[.]" ACPEb17. The Committee offers no basis to conclude that this duty will somehow be less faithfully carried out by New Jersey attorneys who do not meet the "private practice" requirements, a position the Committee does not mention let alone defend in its opposition. Likewise, the Committee concedes "[t]here is no basis to assume that attorneys from other jurisdictions are held to a lesser professional standard" than New Jersey attorneys. ACPEb17. Why then bar their access to the referral fees authorized under the Certified Trial Attorney Program? The Committee does not provide actual justifications for either restriction. Instead, it inferentially second guesses the wisdom of the entire referral fee scheme, while also conceding (apparently without objection) that this Court could simply adopt the interpretations of Rule 1:39-6(d) outlined by NJAJ and the other Petitioners. See ACPEb16-17, 19.

The NJAJ respectfully requests that the Court grant the Petitions for Review of Opinion 745 and reverse the Opinion as it pertains to referrals by out of state attorneys and New Jersey attorneys who do not maintain Rule 1:21-6 accounts.

POINT II AS THE COMMITTEE CONCEDES, ANY SURVIVING RESTRICTIONS ON REFERRAL FEES SHOULD BE APPLIED PROSPECTIVELY

The Committee concludes its opposition brief with an important acknowledgment of the many referral fees owed or to-be-owed to now-ineligible attorneys. Given the "ethics violations" if these contracts are honored (which are certain, not a "risk"), the Committee concedes that its interpretation of Opinion 745 should only be applied prospectively. ACPEb19-20. Needless to say, NJAJ and the other Petitioners agree. But the Committee's concession aside, each of the normal factors point toward prospective application of Opinion 745's new restrictions. While NJAJ urges the Court to eliminate these restrictions entirely, if any were to survive they should not be applied to existing referral fee contracts (or any referral fee contracts entered into prior to the expiration of any to-be-issued stay of the Opinion).

This Court has long-recognized "[s]ound policy grounds may justify limiting the retroactive effect of overruling precedent":

> The most significant ground is the avoidance of the unfair surprise that may be visited upon persons who had justifiably relied upon prior decisions. Substantial justice might be achieved only by respecting these expectations.

> A second reason supportive of a rule of only prospective application is the adverse effect retrospectivity may have on the administration of justice. A third factor requires identification of the purposes of the new rule and their relationship to retrospectivity: will those purposes be advanced by retroactive application of the new principle? We have applied the same reasoning when considering the retrospective application of a new interpretation of a statute.
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> [Mirza v. Filmore Corp., 92 N.J. 390, 397 (1983).]

See also Accountemps Div. of Robert Half of Philadelphia, Inc. v. Birch Tree Group, Ltd., 115 N.J. 614, 628 (1989) ("The primary concern with retroactivity questions is with 'considerations of fairness and justice, related to reasonable surprise and prejudice to those affected.'") (quoting New Jersey Election Law Enforcement Comm'n v. Citizens to Make Mayor-Council Gov't Work, 107 N.J. 380, 388 (1987)).

These factors, (1) unfair surprise, (2) impact on the administration of justice, and (3) whether retroactivity will advance the new rule's purposes, all militate strongly in favor of prospective-only application, while any one "may be pivotal." Fischer v. Canario, 143 N.J. 235, 245 (1996) (citing Rutherford Educ. Ass'n v. Rutherford Bd. of Educ., 99 N.J. 8, 23 (1985)).

Here, the "unfair surprise" is obvious. Opinion 745, without explanation or even acknowledgement, completely flips the Committee's decades-old position referral fees were not fees for legal services because the mere recommendation is

not a sufficient legal service. This factor, fittingly phrased elsewhere as "the reliance placed on the old rule by the parties and the community," is evidenced by the uproarious response to Opinion 745. Fischer, 143 N.J. at 245. NJAJ can certainly represent to the Court, as a body with many Certified Trial Attorney members, that there was no prior understanding or even suggestion that Rule 1:39-6(d) precluded payment of referral fees to out-of-state attorneys or New Jersey attorneys not eligible for private practice. In analogous circumstances, this Court has held a Rule of Professional Conduct should be applied prospectively only, where it would not have been anticipated by attorneys that its arbitration requirements were more onerous than the Atalese standard. Delaney v. Dickey, 244 N.J. 466, 500-01 (2020).

Second, disallowing payment on existing referral fee contracts would have an enormous deleterious effect on the administration of justice. Certified Trial Attorneys would be faced the impossible choice between honoring existing obligations and facing ethics violations for doing so, or not honoring existing obligations and facing civil suit and likely judgment. This Court has recognized that where retrospective application of a new rule is likely to lead to widespread disruption of settled issues and overwhelming litigation in the courts, prospective application may be appropriate. See Darrow v. Hanover Twp., 58 N.J. 410, 420 (1971) (applying the abrogation of interspousal immunity prospectively to avoid impacting many claims and cases and undermining the validity of large numbers of

judicial opinions); State v. Cerbo, 78 N.J. 595 (1979) (applying wiretap evidential ruling prospectively to avoid "incalculable costs" of litigation and re-litigation of the issue). The Court can neutralize the thousands of ethical and legal timebombs that Opinion 745 has formed existing referral fee contracts into by way of prospective only application.

Last, it is difficult to discern whether retrospective or prospective application will best advance the purposes of Opinion 745's new restrictions when the Committee hasn't advocated one. It acknowledges that the attorneys it now bars from receiving referral fees are no less ethical, whether out-of-state or ineligible for private practice here. In fact, the Committee concedes that the Court can simply expand Rule 1:39-6(d) to permit the payment of referral fees it now restricts without any argument against it. ACPEb19.

NJAJ opposes Opinion 745's new restrictions, however, if any survive, the Committee concedes and the analysis agrees they should only be applied prospectively.

CONCLUSION

Opinion 745 is a needless and inexplicable departure from decades of precedent and practice wherein referrals from out-of-state attorneys and New Jersey attorneys not in private practice were a common and important fixture of the Certified Trial Attorney program. In turn, these attorneys were paid referral fees as a matter of course, as these amounts have never been treated as "fees for legal services." The ACPE all but concedes here is has no basis for treating these attorneys differently, no actual reason they should not be entitled to referral fees, and apparently has no objection to the Court modifying the Rule as necessary to match Petitioners' interpretation.

For the foregoing reasons, the New Jersey Association for Justice respectfully requests that its Petition for Review be granted, and the challenged portions of Opinion 745 be reversed. Should any of the Opinion's new restrictions survive, NJAJ respectfully suggests that only prospective application is appropriate.

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