

SUPREME COURT OF NEW JERSEY  
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IN RE OPINION 745 OF THE	:	
NEW JERSEY SUPREME	:	<u>CIVIL ACTION</u>
COURT ADVISORY	:	
COMMITTEE ON	:	ON APPEAL FROM THE
PROFESSIONAL ETHICS	:	SUPREME COURT ADVISORY
	:	COMMITTEE ON PROFESSIONAL
	:	ETHICS

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BRIEF OF THE ADVISORY COMMITTEE ON PROFESSIONAL ETHICS  
**Date Submitted:** June 12, 2024

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## **COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS**<sup>1</sup>

The American Board of Trial Advocates, Northern New Jersey Chapter & Trial Attorneys of New Jersey (ABOTA & TANJ), Blume, Forte, Fried, Zerres & Molinari, P.C. (Blume), New Jersey Association for Justice (NJAJ), New Jersey State Bar Association (NJSBA), Bergen County Bar Association, Essex County Bar Association, Hudson County Bar Association, Middlesex County Bar Association, and Monmouth County Bar Association (collectively “Petitioners”) challenge Opinion 745, published on March 12, 2024, by the Advisory Committee on Professional Ethics (ACPE). (ABOTAa1-6).<sup>2</sup>

Referral fees are generally prohibited in New Jersey<sup>3</sup> to ensure that any recommendation to “a potential client to seek the services of a particular lawyer is made in the client's interest, and not to serve the business impulses of either

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<sup>1</sup> Because they are closely related, these sections are combined for efficiency and the Court’s convenience.

<sup>2</sup> “ABOTAb” and “ABOTAa” refers to the brief and appendix filed by ABOTA & TANJ. “BLUMEb” and “BLUMEa” refers to the brief and appendix filed by Blume. “NJAJb” and “NJAJa” refers to the brief and appendix filed by NJAJ. And “NJSBAb” refers to the brief filed by NJSBA.

<sup>3</sup> RPC 7.2(c) provides that lawyers “shall not give anything of value to a person for recommending the lawyer’s services.”). RPC 7.3(d) provides that lawyers “shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer’s employment by a client, or as a reward for having made a recommendation resulting in the lawyer’s employment by a client.”

the lawyer or the person making the referral.” In re Weinroth, 100 N.J. 343, 349-50 (1985). That said, there are some limited exceptions which permit attorneys to pay for the reasonable costs of advertising regarding their services via public media or other written communication or to pay fees to not-for-profit referral services. See RPC 7.2(c)(1)-(3); RPC 7.3(d). The New Jersey certified attorney program also permits certified attorneys who receive a referral from another lawyer that is not a partner or associate in the same firm or law office to “divide a legal fee for legal services with the referring attorney or the referring attorney’s estate.” R. 1:39-6(d).

The ACPE and the attorney ethics research assistance hotline frequently receive inquiries about whether New Jersey certified attorneys can pay referral fees to out-of-state attorneys. (ABOTAa1-6). To answer that question, the ACPE reviewed New Jersey’s Rules for Professional Conduct (RPCs) on referral fees and the court rules governing the New Jersey attorney certification program. Ibid. Ultimately, the ACPE issued Opinion 745 which provides that certified attorneys<sup>4</sup> may not pay referral fees to out-of-state attorneys unless

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<sup>4</sup> Under Rule 1:39, New Jersey attorneys may be certified as a “civil trial attorney, a criminal trial attorney, a matrimonial law attorney, a workers’ compensation law attorney, or a municipal law attorney . . . on establishing eligibility and satisfying requirements regarding education, experience, and skill for each designated area of practice.”



those out-of-state attorneys are licensed and eligible to practice law in New Jersey. (ABOTAa2-3). The ACPE also concluded that certified attorneys may not pay referral fees to New Jersey lawyers who cannot accept a case, or must withdraw from a case, due to a conflict of interest. (ABOTAa4-5).<sup>5</sup>

The ACPE reasoned that referral fees permitted under Rule 1:39-6(d), as currently adopted, amount to legal fees not in proportion to actual services rendered, and as such, require the recipient of the legal fees to be eligible to practice law in New Jersey. Ibid. To support this conclusion, the ACPE relied on well-established law that precludes persons not authorized to practice law in New Jersey from receiving fees for unauthorized legal services. See, e.g., Stack v. P.G. Garage, Inc., 7 N.J. 118, 120, 123 (1951) (nonlawyer suit to obtain fee for legal services dismissed because unauthorized practice of law is illegal); In re Armorer, 153 N.J. 358 (1998) (New Jersey lawyers cannot recover fee for services rendered while ineligible to practice law); Slimm v. Yates, 236 N.J. Super. 558, 564 (Super. Ct. 1989) (“Recovery of compensation for legal services by one not authorized to practice law will not be permitted by our courts.”) (citing to Appell v. Reiner, 81 N.J. Super. 229, 239 (Ch. Div. 1963), rev’d on other grounds 43 N.J. 313 (1964)). The ACPE also relied upon several of its past opinions, which addressed the payment of fees for legal services in other

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<sup>5</sup> Only Blume challenges that portion of the opinion. (BLUMeb8-11).

contexts, such as when a lawyer is unable to represent a party due to a conflict of interest. (ABOTAa4-5).

For example, it looked to Opinion 304 which concluded that a firm could seek legal fees for services rendered prior to withdrawal due to an unforeseen conflict. ACPE Opinion 304, “Conflict of Interest – Multiple Parties Fees Upon Withdrawal,” 98 N.J.L.J. 449 (May 22, 1975). It also considered Opinion 613, which held that a lawyer could be paid for services rendered in good faith prior to a conflict arising that required withdrawal. ACPE Opinion 613, “Withdrawing Attorney Claiming Referral Fee Under R. 1:39-6(d),” 121 N.J.L.J. 1037 (May 19, 1988). But, in that opinion, the ACPE also advised that a referring attorney compelled to withdraw from a case due to a conflict is precluded from receiving a referral fee under Rule 1:39-6(d). Ibid. The ACPE reasoned that as the “attorney may not continue in a conflict situation, [the attorney] may not profit through the referral.” Ibid. Conversely, as the ACPE acknowledged in Opinion 745, referral fees may be paid to lawyers who were in good standing and eligible to practice law in New Jersey at the time of the referral, but who were later suspended or disbarred. (ABOTAa4-5).

Thus, the ACPE issued Opinion 745, advising that certified attorneys may not pay referral fees to a lawyer who cannot handle a matter due to a conflict of interest. (ABOTAa1; ABOTAa4-5). But certified attorneys may pay referral

fees to lawyers who referred a case when they were authorized to practice law in New Jersey, but were later suspended or disbarred at the time the referral fee became payable. Ibid.

Between April 1 and 11, 2024, Petitioners each filed separate Notices of Petition seeking review of Opinion 745 under Rule 1:19-8. Shortly thereafter, ABOTA & TANJ, Blume, NJAJ, and NJSBA filed briefs in support of their petitions for review. The remaining petitioners filed letters noting their intent to rely on the brief filed by NJSBA.

## **ARGUMENTS**

### **POINT I**

#### **THE ACPE CORRECTLY INTERPRETED RULE 1:39-6(d). (Addressing NJSBA's Point I, ABOTA & TANJ's Argument, BLUME's Point I.A., and NJAJ's Point I).**

According to Petitioners, Opinion 745 misinterprets the plain language of Rule 1:39-6(d) and conflates paying a referral fee under Rule 1:39-6(d) with dividing a legal fee under RPC 1.5(e). (ABOTAb3-15; BLUMEb5-8; NJAJb4-13; NJSBAb6-15). In Petitioners' view, referral fees are not fees for the performance of legal services governed by RPC 1.5(e). Ibid. Rather, referral fees are compensation only for the referral itself and not for any legal service rendered by the referring attorney. Ibid. But Petitioners ignore the similarity

in language about the division of legal fees between Rule 1:39-6(d) and RCP 1.5(e), which forms the basis for the ACPE's analysis in Opinion 745.

New Jersey courts “apply the same canons of construction to a court rule” that they apply to statutes. Cadre v. Proassurance Cas. Co., 468 N.J. Super. 246, 263 (App. Div. 2021). The analysis starts with the plain language of the rules and gives words their ordinary meaning. Ibid.; see also Wiese v. Dedhia, 188 N.J. 587, 592 (2006); Robertelli v. N.J. Off. of Att’y Ethics, 224 N.J. 470, 484 (2016) (citing Bridgewater-Raritan Educ. Ass’n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., 221 N.J. 349, 361 (2015)). Courts also “read the language of a rule ‘in context with related provisions so as to give sense to the [court rules] as a whole.’” Robertelli, 224 N.J. at 484 (alteration in original) (quoting Wiese, 188 N.J. at 592). And “if the text of the rules is ambiguous, [courts] can turn to extrinsic evidence . . . for guidance.” Ibid. (citing Cast Art Indus., LLC v. KPMG LLP, 209 N.J. 208, 222 (2012)).

Rule 1:39-6(d) provides that:

a certified attorney who receives a case referral from a lawyer who is not a partner in or associate of that attorney's firm 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 . . . .

[emphasis added.]

The plain language of this rule clearly characterizes the referral as a “fee for legal services.” This language indisputably mirrors the language in RCP 1:5(e), which states:

[e]xcept as otherwise provided by the Court Rules, a **division of fee** between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and (2) the client is notified of the fee division; (3) the client consents to the participation of all lawyers involved; and (4) the total fee is reasonable.  
[emphasis added].

Importantly, Rule 1:39-6(d), as currently adopted, acts as an exemption from the fee-sharing requirements set forth in RPC 1.5(e), only eliminating the requirement that the “division of fee” be in proportion to the services performed or responsibility assumed by each lawyer. Opinion 694, 4 N.J.L. 1487 (July 17, 1995). Thus, the ACPE’s interpretation of Rule 1:36-6(d) accords with the plain language of the rule and is clearly supported by a related provision—RCP 1.5(e).

Similarly, Blume’s reliance on a non-precedential decision, Weiner & Mazzei, P.C. v. Sattiraju Law Firm, PC, 2016 N.J. Super. Unpub. LEXIS 1203 (App. Div. May 25, 2016),<sup>6</sup> and on Goldberger, Seligsohn & Shinrod, P.A. v. Baumgarten, 378 N.J. Super. 244 (App. Div. 2005) is misplaced. Blume points

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<sup>6</sup> Blume cites to and includes a copy of this unpublished decision in its appendix. (BLUMEa20).

to Weiner and Goldberger to argue that referral fees under Rule 1:36-(d) “are distinct from participation fee division agreements, and that out-of-state attorneys are entitled to such referral fees.” (BLUMeb5-6; BLUMeb17). Blume misreads those decisions.

In Weiner, the court reviewed a referral fee dispute under Rule 1:39-6(d). Ibid. The court analyzed the referral fee agreement as a fee sharing agreement subject to the requirements of RPC 1:5(e), and noted that a “fee sharing agreement between attorneys that does not satisfy the requirements of R.P.C. 1:5(e) is not enforceable.” Id. at \*4-5 (citing Goldberger, 378 N.J. Super. at 252). Because the referral fee dispute arose under Rule 1:39-6(d), the court noted that while Rule 1:39-6(d) abrogates some requirements of RPC 1.5(e)(1), it does not remove the remaining requirements of consent and reasonableness under RPC 1.5(e)(2) and (3). Id. at \*5-6. Thus, Weiner actually supports the ACPE’s analysis in Opinion 745.

As for Goldberger, 378 N.J. Super. at 251-52, the matter is distinguishable from the circumstances contemplated by Opinion 745. In Goldberger, the plaintiff, who was a lawyer representing the child of a decedent sued the defendant, another lawyer who represented the decedent’s estate in a wrongful death action. Id. at 246-50. The plaintiff alleged, among other things, that the defendant breached a fee-sharing agreement contract. Ibid. Under the fee-

sharing agreement, the plaintiff was to receive twenty-five percent of the fee earned in the wrongful death action. Ibid. The defendant argued that the fee-sharing agreement contravened RPC 1:5(e) because it was not in writing, did not divide fees in proportion to work performed, and the client never consented to the joint representation. Id. at 247. Agreeing with the defendant, the court found that the plaintiff was not entitled to relief on the breach of contract claim because the fee-sharing agreement failed to conform to the requirements of RPC 1.5(e). Id. at 251-52. The court further noted that the “rules pertaining to the payment of referral fees ha[d] no application to this dispute” because the Plaintiff did not seek a fee on the basis of a referral, but rather on joint work performed on behalf of their clients. Ibid. Goldberger neither addresses referrals under Rule 1:39-6(d) nor pertains to certified trial attorneys. Thus, it has no bearing on the ACPE’s analysis of Rule 1:39-6(d).

Finally, the ACPE’s conclusion that under Rule 1:39-6(d) certified attorneys may only pay referral fees to attorneys eligible to practice law in New Jersey neither violates the plain language of the rule nor defies the canons of statutory construction. Petitioners are correct that Rule 1:39-6(d) does not contain any qualifiers on the type of referring attorney, such as specifying that the referring attorney means “New Jersey attorney” or “out-of-state” attorney. (ABOTAb13; NJSBAb8-10). But to the extent this lack of specificity causes

ambiguity, this Court can consider related provisions and extrinsic evidence for interpretive guidance. Robertelli, 224 N.J. at 484.

As noted above, the ACPE considered related provisions to interpret the limits of Rule 1:39-6(d) and its opinion flowed from its interpretation of a referral fee as a legal fee, exactly as it was guided to do so through the plain language used in Rule 1:39-6(d). Because a referral fee is a legal fee under Rule 1:39-6(d), the same restrictions that apply to payments of legal fees also apply to referral fees in this context. Thus, under Rule 1:39-6(d), a certified attorney may only pay a referral fee to an attorney eligible to practice law in New Jersey. See, e.g., Stack v. P.G. Garage, Inc., 7 N.J. 118, 120, 123 (1951) (non-lawyer suit to obtain fee for legal services dismissed because unauthorized practice of law is illegal); In re Armorer, 153 N.J. 358 (1998) (New Jersey lawyers cannot recover fee for services rendered while ineligible to practice law); Slimm v. Yates, 236 N.J. Super. 558, 564 (Super. Ct. 1989) (“Recovery of compensation for legal services by one not authorized to practice law will not be permitted by our courts.”) (citing Appell v. Reiner, 81 N.J. Super. 229, 239 (Ch. Div. 1963), rev’d on other grounds 43 N.J. 313 (1964)).

The NJSBA correctly points out that there is no statute or rule that defines what constitutes the unauthorized practice of law. (NJSBA12); see also N.J. Const. art. VI, § II, ¶ 3; In re Op. No. 24 of Comm. on Unauthorized Practice Of



Law, 128 N.J. 114, 122 (1992). But there are established guidelines which instruct that “[t]he practice of law is unauthorized when conducted by persons not licensed to practice in New Jersey or not specially admitted under our court rules.” Johnson, 468 N.J. Super. at 581 (citing In re Jackman, 165 N.J. 580, 585-86 (2000)); see also R. 1:21-1(a) (qualifications for practice of law in New Jersey); R. 1:21-2 (pro hac vice admissions); R. 1:21-3 (requirements for law students and graduates to practice law in New Jersey). “The unauthorized practice of law may be committed by both laypersons and out-of-state attorneys.” Johnson, 468 N.J. Super. at 582. Importantly, these rules are grounded in the State’s fundamental interests to protect the public and to assure “the proper, orderly, and efficient administration of justice in New Jersey.” In re Jackman, 165 N.J. 589, 585 (2000).

Moreover, Opinion 745 is not contrary to the guidance issued by the Committee on the Unauthorized Practice of Law (UPL Committee) in December 2022, concerning multijurisdictional practice under the New Jersey RPCs. See UPL Committee Opinion 60, “Multijurisdictional Practice Under Rule of Professional Conduct 5.5(b)(3)(iv) as Applied to Out-of-State Lawyers Who Provide Legal Services in New Jersey Court Cases” (Dec. 19, 2022). In Opinion 60, the UPL Committee found that “out-of-state lawyers who participate in New Jersey court cases under the direct supervision of an admitted lawyer, or who

consult with admitted counsel on specialized issues, need not register as a multijurisdictional practitioner” under RPC 5.5(b)(3). As the NJSBA and NJAJ correctly state (NJSBA b3-14; NJAJ b11), the UPL Committee further explained that “[o]ut-of-state lawyers who provide lower-level assistance, such as researching legal issues . . . **under the direct supervision of an admitted attorney** need not register” under RPC 5.5(b)(3). Ibid. (emphasis added). But in those circumstances, the UPL Committee noted that while those out-of-state attorneys may be practicing New Jersey law, those attorneys are not generally considered to be engaged in the unauthorized practice of law because they are being supervised by attorney’s admitted in New Jersey.

The ACPE also recognizes, as the NJSBA and NJAJ notes, that the UPL Committee advised that an out-of-state attorney who “merely consults with an admitted lawyer on specialized legal issues need not register as a multijurisdictional practitioner.” Ibid. But consulting on a specialized area of law is not the same thing as referring a case to another lawyer. And significantly, Opinion 60 is silent on the narrow question answered by the ACPE in Opinion 745—whether a New Jersey certified attorney can pay referral fees to out-of-state attorneys. As discussed above, because a referral fee is deemed a legal fee for purposes of Rule 1:39-6(d), out-of-state lawyers must be eligible to practice law in New Jersey, such as holding a plenary license or obtaining pro

hac vice admission in order to be paid a referral fee from a New Jersey certified attorney.

Thus, the ACPE's interpretation of a referral fee as a "legal fee" is consistent with the plain language of Rule 1:39-6(d) and RPC 1.5(e), and its analysis in Opinion 745 should be upheld.

## **POINT II**

### **THE ACPE CORRECTLY CONCLUDED THAT A CERTIFIED ATTORNEY CANNOT PAY REFERRAL FEES TO LAWYERS WHO HAVE A CONFLICT OF INTEREST AT THE TIME OF A REFERRAL. (Addressing Blume's Point I.B.)**

The ACPE correctly concluded that certified attorneys may not pay referral fees to lawyers who cannot represent a party at the time of referral due to a conflict of interest because referral fees are the same as legal fees under Rule 1:39-6(d). (ABOTAa4-5). Permitting otherwise would be paramount to allowing the conflicted lawyer to collect legal fees for services that the conflicted lawyer could not ethically render.

Blume argues this guidance is wrong, but its argument simply disagrees with the basic proposition that referral fees are legal fees. (BLUMEb8-11). Blume also argues that the ACPE ignored that "most conflicts are waivable" and claims that Opinion 745 encourages referring attorneys to withhold information

as to a conflict or to keep a case despite a conflict. Ibid. Blume's arguments are unavailing.

With regard to Blume's first argument, this issue is addressed in Point I above. The plain language of Rule 1:39-6(d) refers to the referral fee as a "legal fee," which supports the ACPE's analysis in Opinion 745.

As to its second argument, the ACPE concedes that some conflicts may be waivable. See RPC 1.7(b); RPC 1.8; RPC 1.9; RPC 1.10. But the ability to waive or cure a conflict is not dispositive of whether an attorney, who has a known conflict at the time of making a referral, should be permitted to profit from that referral in the form of legal fees. The ACPE has previously issued guidance about whether a lawyer, who is unable to represent a party due to a conflict of interest or due to a suspension or disbarment, is entitled to payment for legal services rendered, including referral fees. See, e.g., ACPE Opinion 304, "Conflict of Interest – Multiple Parties Fees Upon Withdrawal," 98 N.J.L.J. 449 (1975); ACPE Opinion 613, "Withdrawing Attorney Claiming Referral Fee Under Rule 1:39-6(d)," 121 N.J.L.J. 1037 (1988). While the ACPE has found that a lawyer can be paid for legal services provided in good faith before a conflict arises, it also found that a referring attorney compelled to withdraw from a case due to a conflict can no longer participate in the case and thus, is

precluded from receiving a referral fee under Rule 1:39-6(d) because the attorney may not profit through that referral. Opinion 613.

Additionally, this premise is consistent with the reasoning in Eichen, Levinson & Crutchlow, LLP v. Weiner, which held that lawyers who were in good standing and eligible to practice law in New Jersey **at the time of the referral**, but who were later suspended or disbarred, could still receive referral fees. 397 N.J. Super. 588, 594-95 (App. Div. 2008); see also ACPE Opinion 273, “Fee Sharing – Forwarding Attorney Suspended,” 96 N.J.L. 1421 (Dec. 13, 1973) (“The subsequent disbarment of [a] referring attorney is immaterial if the referral was made before disbarment and if the disbarment was not caused by the manner by which the referring attorney obtained the case.”).

Moreover, nothing in Opinion 745 prevents a conflicted attorney from referring the case to a certified attorney under Rule 1:39-6(d). Opinion 745 merely precludes a referring attorney from profiting from that conflict. And Blume’s suggestion that Opinion 745 encourages referring attorneys to withhold information or keep the case despite a conflict seems to fly in the face of the RPCs, which serve to “guide attorneys and the courts with regard to proper conduct . . . [and] ‘set forth the minimum standard of competence governing the profession.’” Meisel v. Fox Rothschild LLP, 240 N.J. 286, 299 (2020). Indeed, while conflicts in certain circumstances are waivable, the RPCs require, among

other things, informed consent from each affected client in order to do so. See RPC 1.7(b)(1); RPC 1.8(a)(3); RPC 1.9(a). Attorneys in New Jersey must also be able to provide competent and diligent representation. See RPC 1.1; RPC 1.3; RPC 1.7(b)(2). Thus, allowing attorneys to withhold information about a conflict to obtain a referral fee or to keep a case, despite their prior knowledge of a conflict, would violate those duties and violate the public's trust in the legal profession.

### **POINT III**

#### **OPINION 745 DOES NOT INHIBIT PUBLIC ACCESS TO THE NEW JERSEY CERTIFIED ATTORNEY PROGRAM (Addressing NJSBA's Point II and III; NJAJ's Point II and III; Blume's Point II and III).**

Notwithstanding the arguments in Points I and II above, the ACPE supports the Supreme Court's attorney certification program. To that end, the ACPE recognizes and agrees with Petitioners that it is better for out-of-state attorneys to refer cases to certified attorneys. But ACPE disagrees with Petitioners' claims that Opinion 745 undermines the program by disincentivizing out-of-state attorneys to make such referrals.

That claim is wholly speculative. There is no evidence that out-of-state lawyers who refer clients to New Jersey-certified attorneys do so to collect a referral fee. It is also cynical to suggest that attorneys will stop making the

appropriate referrals if they cannot profit from them. New Jersey attorneys have duties of competence and diligence in their representation of clients or prospective clients. See RPC 1.1 (competence); RPC 1.3 (diligence); ACPE Opinion 681, “Affiliation with Foreign Law Firm Based in Part Upon Referral of Clients with Pooling and Distribution of the Firms’ Respective Profits,” 14 N.J.L.J. 1540 (July 1, 1995). Embedded in the obligation to render competent and diligent representation, is “a duty to make an independent judgment concerning what kind of referral will be in the client's best interests, completely free from any economic or other incentive that might weigh on the lawyer's judgement.” Opinion 681; see also RPC 1.7(b); RPC 1.8(f); RPC 5.4(c). There is no basis to assume that attorneys from other jurisdictions are held to a lesser professional standard. Cf. Am. Bar Ass’n Model Rules of Prof. Conduct R. 1.7(b); Am. Bar Ass’n Model Rules of Prof. Conduct R. 1.8(f); Am. Bar. Ass’n Model Rules of Pro. Conduct R. 5.4(c).

And there is no evidence that Opinion 745 creates disadvantages for the litigants of New Jersey as compared to other Northeastern states. (BLUMeb15-16). Blume relies on guidance from Philadelphia and Connecticut as examples of other states permitting referral fees to be paid to out-of-state attorneys. Ibid. While other states may permit referral fees to out-of-state lawyers, that guidance is not binding on New Jersey and is not dispositive of the issue addressed in

Opinion 745, which narrowly addresses whether certified attorneys may pay referral fees to out-of-state attorneys under New Jersey's court rules. Indeed, while the Philadelphia guidance cited by Blume indicates that a Pennsylvania lawyer can pay a referral fee to or split a fee with an out-of-state lawyer, it notes that both the Pennsylvania lawyer and out-of-state lawyer are bound by the ethics guidance in their respective jurisdictions. Phila. Bar Ass'n Pro. Guidance Comm., "Ethics Opinion 93-15" (1993).

As for Connecticut, the inquiry before its ethics commission was whether a Connecticut lawyer could **collect** a referral fee when he refers clients to attorneys who practice law in other jurisdictions. Conn. Bar Ass'n Standing Comm. on Prof. Ethics Informal Op. 20-02, "Fees for Referral to Attorney in Another Jurisdiction," (May 20, 2020). The question before the ACPE in Opinion 745 was payment of referral fees by New Jersey certified attorneys to out-of-state attorney and limits on such payments, not whether there were any limitations on whether out-of-state attorneys could collect such fees. See Johnson, 468 N.J. Super. at 584 (noting that the while the RPCs impose a "prohibition upon the attorney providing funds to another, [t]he rules do not impose a corresponding prohibition against recipients of such funds."); see also Opinion 745 (noting that New Jersey lawyers can accept payment of a referral



fee from another jurisdiction “[i]f the law of the other state allows payment in the form of a referral fee to an out-of-state lawyer.”) (ABOTAA5).

Importantly, Opinion 745 does not stand for the proposition that out-of-state attorneys should stop referring clients to New Jersey’s certified attorney program, nor does it suggest that out-of-state attorneys should keep cases for themselves. Rather, Opinion 745 stands for the proposition that referral fees permitted under Rule 1:39-6(d), as currently adopted, are legal fees, not in proportion to actual services rendered, and as such, require the recipient of said legal fees to be eligible to practice law in New Jersey.

Though the ACPE does not believe Opinion 745 announces a new rule, to the extent that it could disincentive out-of-state attorneys from referring clients to the certified attorney program, 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. See DiFiore v. Pezic, 254 N.J. 212, 228 (2023) (the New Jersey “Constitution vests [the Court] with authority to ‘make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.’”) (citing N.J. Const. art. VI, § II, ¶ 3).

Additionally, if the Court has concerns that certified attorneys will risk ethics violations for contracts with out-of-state attorneys who are not eligible to

practice law in New Jersey that were entered into before the issuance of Opinion 745, the ACPE does not object to the Court authorizing certified attorneys to honor those contractual obligations.

### **CONCLUSION**

For these reasons, unless and until Rule 1:39-6(d) is amended, Opinion 745 should be upheld.

Respectfully submitted,

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