ETHICS AND REFERRALS
OUTLINE

(1) RULES ON CLIENT REFERRALS FROM A NON-LAWYER

- N.Y. DR 3-102(A) .....Page 1

(2) RULES ON CLIENT REFERRALS FROM ANOTHER LAWYER

- Rules of Prof. Con. Rule 1.5 Fees and Division of Fees .....Pages 2, 3, 4

(3) LAW REGARDING COMPENSATING THE REFERRING ATTORNEY WHO REFERS A CASE TO YOU

- Rules of Prof. Con. Rule 1.5(g) .....Pages 3, 4

(4) LAW REGARDING ATTORNEY COMPENSATION IF CLIENT DISCHARGES ATTORNEY DURING THE CASE..... Page 5

(5) LAW REGARDING DETERMINING ATTORNEY COMPENSATION BETWEEN INCOMING AND OUTGOING ATTORNEYS Page 7

(6) RULES ON REFERRING YOUR CLIENTS TO A NON-LAWYER

- Example – Investment firm..... Pages 8-12

(7) PITFALLS TO AVOID IN PRACTICE WHEN DEALING WITH REFERRING COUNSEL

- Legal malpractice
- Contingency fee cases
- Florida oranges
- Juror Sympathy
- Defendant in a lawsuit

DISCIPLINARY RULES

DR 3-102 [1200.17] Dividing Legal Fees with a Non-Lawyer

A. A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

1. An agreement by a lawyer with his or her firm, partner, or associate may provide for the payment of money, over a reasonable period of time after a lawyer's death, to the lawyer's estate or to one or more specified persons.

2. A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

3. A lawyer or law firm may compensate a non-lawyer employee, or include a non-lawyer employee in a retirement plan, based in whole or in part on a profit-sharing arrangement.

RULE 1.5:
FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify

the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) 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;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. *See* Rule 1.15(j).

ATTORNEY COMPENSATION IF CLIENT DISCHARGES ATTORNEY DURING THE CASE

If a client discharges their attorney **with cause**, the attorney has no right to compensation or to a retaining lien; however, if the client discharges their attorney without cause before completion of services, then the amount of attorney's compensation must be determined on a quantum meruit basis. Teichner by Teichner v. W&J Holstenis, Inc., 1985, 64 N.Y.2d 977, 489 N.Y.S.2d 36, 478 N.E.2d 177.

WHAT CONSTITUTES "WITH CAUSE"

The New York Rules of Professional Conduct do not explicitly define what "with cause" or "without cause" means. However, case law infers that "with cause" simply means that the attorney has violated one of the New York Rules of Professional Conduct. If the attorney is fired, but did not violate a Rule of Professional Conduct, then it is without cause and he/she is entitled to a fee on a quantum meruit basis. See generally, Teichner by Teichner v. W&J Holsteins, Inc., 64 N.Y.2d 977 (1985); In re Weitling, 266 N.Y.184, 187 (1935).

"A client has an absolute right to discharge an attorney at any time. If the discharge is with cause, the attorney has no right to compensation or to a retaining lien (Matter of Weitling, 266 N.Y.184, 194 N.E. 401; Marschke v. Cross, 82 A.D.2d 944, 440 N.Y.S.2d 740; 7 N.Y.Jur.2d, Attorneys at Law, §144, at 43-44). If the discharge is without cause before the completion of services, then the amount of the ***38**179 attorney's compensation must be determined on a quantum meruit basis (Crowley v. Wolf, 281 N.Y.59, 64-65, 22 N.E.2d 234; Matter of Shaad, 59 A.D.2d 1061, 399 N.Y.S.2d 822)." Teichner by Teichner v. W&J Holsteins, Inc., 64 N.Y.2d 977, 979 (1985).

HOW IS QUANTUM MERUIT CALCULATED

Quantum Meruit is a Latin phrase meaning "what one has earned". In fixing an award of legal fees in quantum meruit, a trial court should consider evidence of the time spent and skill required in that case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit from the services, and the fee usually charged by other attorneys for similar services; award should be made after weighing all the relevant factors. DeGregorio v. Bender (2 Dept. 2008) 52 A.D.3d 645, 860 N.Y.S.2d 193, on remand 28 Misc.3d 1236(A), 958 N.Y.S.2d 60.

CAN AN ATTORNEY RETAIN THE CLIENT'S FILE AFTER DISCHARGED BY THE CLIENT

An attorney who was relieved of his representation of clients at time when clients allegedly owed in excess of $6,000 in legal fees was entitled to retain clients' file pending hearing to determine appropriate compensation in quantum meruit where there was no evidence that attorneys were relieved for cause or that any other exigent circumstances required immediate surrender of file. Fields v. Casse (2 Dept. 1992) 182 A.D.2d 738, 582 N.Y.S.2d 738.

DIVISION OF ATTORNEY FEES BETWEEN INCOMING AND OUTGOING COUNSEL

Where the dispute is not between the client and counsel but between incoming and outgoing attorneys, the outgoing attorney may elect that he will take his compensation on the basis of a presently fixed dollar amount quantum meruit, or that he will take a contingent percentage instead to be determined at the conclusion of the case, also on the basis of quantum meruit. Paulsen v. Halpin, 1980, 74 A.D.2d 990, 427 N.Y.S.2d 333. See also, Michels v. Drexler (2 Dept. 1990) 166 A.D.2d 695, 561 N.Y.S.2d 484.

Fee agreement, in which law firms agreed to "work jointly" in lawsuit and share equally in fees, was disproportionate to services performed by second law firm and unenforceable, and thus second law firm could only be compensated according to quantum meruit in light of professional rule regarding division of fees among lawyers which provided that division of fees must be in proportion to services performed; second law firm's claim that it followed lawsuit from missives sent by first firm and that firms discussed case with client periodically at golf club did not equate to joint responsibility as would support award of half of fees recovered. Lynn v. Purcell, 2005, 11 Misc.3d 400, 812 N.Y.S.2d 760, affirmed as modified 40 A.D.3d 729, 835 N.Y.S.2d 664.

ETHICS OPINION 1086

REFERRING YOUR CLIENT TO A NON-LAWYER

Digest: An attorney may not accept a fee or commission from an investment firm for referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict. (Rules: 1.7(a)(2), 1.7(b), 1.8(f).

Facts: The inquiring attorney represents clients in workers' compensation and personal injury matters. Some of the attorney's clients receive large sums of money as a result of their cases, and when that happens, clients commonly ask the attorney for advice regarding how to manage the settlement funds.

When clients ask about managing their settlement funds, the inquiring attorney would like to refer them to a licensed investment professional with whom he has a relationship and receive a fee or commission from the investment firm. The inquirer represents that he may receive such a fee or commission because he holds a number of securities and insurance licenses.

The inquirer states he would make the referral only after all legal work has concluded, the client's case has closed and the inquirer has fully disclosed to the client that the inquirer will financially benefit from the referral.

Question: May an attorney refer clients to an investment firm with whom the attorney has a professional relationship and receive a fee or commission from the investment firm for the referral?

Opinion: We note at the outset that the Committee does not opine on questions of law, and thus, does not opine on whether the proposed fee or commission violates any statute or regulation. In the event the proposed fee or commission is illegal and reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, it would violate Rule 8.4(b). See also N.Y.S. 845 (2010); N.Y.S. 667 (1994); N.Y.S. 595 (1988); N.Y.S. 576 (1986); N.Y.S. 461 (1977). For purposes of the following analysis, we assume that the investment firm may legally pay the attorney a fee or commission and that such payment is not otherwise illegal.

Applicable Rules Provisions: Whether a lawyer may accept a referral fee from a third party service provider generally involves analysis of New York Rules of Professional Conduct (the "Rules") 1.7(a)(2) and 1.8(f).

Rule 1.7(a)(2) governs conflicts involving a lawyer's personal interests and generally prohibits a representation in which there is a significant risk that the lawyer's personal interests would have an adverse effect on the lawyer's exercise of professional judgment, unless the conflict can be and is waived under Rule 1.7(b).

Rule 1.8(f) provides that "a lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6."

A number of our prior opinions have permitted a lawyer to accept a referral fee or commission from a third-party service provider for referring a client to the service provider under very limited circumstances. See e.g., N.Y.S. 981 (2013) (referral fee not prohibited by Rule 1.7 where the service is not related to the lawyer's legal services and the lawyer makes no recommendation to use the service); N.Y.S. 667 (1994) (lawyer may accept referral fee from mortgage broker notwithstanding predecessors to Rules 1.7(a) and 1.8(f) as long as client consents and all proceeds are credited to client if client so request(s); N.Y.S. 626 (1992) (lawyer for lender may retain fees from a title insurance company as long as client consents and amount of the fee is disclosed to the borrower who will pay the cost of the insurance and the total amount of the lawyer's fee is not excessive); N.Y.S. 576 (1986) (lawyer may act as agent for title insurance company and also represent the buyer, seller or mortgagee in a real estate transaction consistent with the predecessors to Rules 1.7(a) and 1.8(f) as long as lawyer credits client with amount received from title insurer or the client expressly consents to the lawyer retaining the fee paid by the insurer); N.Y.S. 461 (1977) (lawyer may accept part of a fire adjuster's commission consistent with predecessor to Rule 1.7(a) if client consents and all proceed thereof are credited to client); and N.Y.S. 107 (1969) and N.Y.S. 107(a) (1970) (both permitting lawyer to accept a referral fee from a financial company where the lawyer invest the client's funds in certificate of deposit, if client consents after disclosure and lawyer remits the fee to client if client so requests).

On the other hand, a number of our prior opinions have prohibited a lawyer from accepting a referral fee or commission from a third-party service provider for referring a client to the service provider. Where our opinions have held that a lawyer may not accept a fee from a third-party service provider, we often have found that the lawyer's personal conflict of interest is so great that disclosure to and consent form the client will not cure the conflict. See, e.g., N.Y.S. 682 (1996) (lawyer may not accept a fee from an investment adviser for referring a client under predecessor

to Rule 1.7 because disclosure and consent would not cure the lawyer's direct and substantial conflict); N.Y.S. 671 (1994) (lawyer engaged in estate planning may not accept referral fee from insurance company for referring client under predecessor to Rule 1.7 because disclosure and consent could not cure the direct and substantial conflict between the client's and the lawyer's interests); N.Y.S. 619 (1991) (where estate planning lawyer's remuneration from the third party would vary with the quantity of the product or services recommended, receipt of the referral fee was impermissible under predecessors to Rules 1.7 and 1.8(a) (business transaction with client) because the lawyer's substantial financial interest conflict could not be cured by disclosure and consent).

N.Y.S. 682 identifies two factors that determine whether the lawyer's financial interest in a referral fee is so great that disclosure and client consent will be ineffective. A client may give informed consent for a referral fee when (1) the transaction at issue concerns a product or service that is fairly uniform among providers and is required in an objectively determinable quantity or (2) when the product or service is fairly uniform among providers and is unconnected to any particular legal services.

Application to the Inquirer's Proposal: The first questions under our prior opinions are (1) whether the products or services that are the subject of the referral are fungible in nature, (2) whether the required amount is objectively determinable, and (3) whether the product or service is unconnected to the legal services provided by the lawyer.

In N.Y.S. 682 (1996), we determined that an attorney may not accept a fee from an investment advisor for referring a client to the advisor, because the services of advisors vary substantially among different providers and the amount of funds that should ideally be entrusted to any particular adviser is not objectively determinable. Consequently, we said, the potential exists that "the attorney might increase the referral fee by recommending that more of the client's funds be entrusted to the advisor without appropriate regard to the client's interests." Accordingly, we found that meaningful consent was not possible, even where the client is offered the choice to claim the referral fee and the attorney purports to exercise independent judgment in framing the initial recommendation to consult an advisor.

Similarly, in N.Y.S. 1043 (2015), we opined that a lawyer representing a client in a real estate transaction could not ethically accept a referral fee from the real estate broker in lieu of charging legal fees. Opinion 1043 followed from our prior opinions generally holding that a lawyer may not act as a lawyer and a broker in the same real estate transaction because the "lawyer's pecuniary interest in the broker's success

and attendant commission...irredeemably interferes with the lawyer's distinct obligation to exercise independent professional judgment on the client's behalf."

Here, as in N.Y.S. 682, the services of the investment advisors are not uniform nor is the amount of funds that should ideally be entrusted to any particular adviser objectively determinable. The lawyer here, when asked by the client to recommend an investment advisor, should be making that recommendation based on the needs of the client. That means recommending an advisor based on the services the advisor provides or even recommending more than one advisor in order to meet the client's needs. However, under these circumstances, we do not believe that the lawyer will be able to exercise independent judgment in making a recommendation given the prospect of receiving a referral fee based on recommending a particular advisor. Further, under these circumstances, our prior opinions provide that disclosure to and consent of the client is impermissible because the interests of the client and attorney are in such direct conflict that the client cannot give meaningful consent.

Thus, a non-waivable conflict under Rule 1.7(b) exists here. Accordingly, we need not reach the issue of whether the lawyer could meet the requirements of Rule 1.8(f), which include both informed consent and the absence of interference with the lawyer's independent professional judgment, in order to accept a payment in connection with representing a client from one other than the client.

Additional facts present under the circumstances here also support our conclusion that a non-waivable conflict exists. For example, in the course of the representation, the attorney might decide to recommend a settlement rather than risk going to trial because a settlement will not only produce a definite legal fee, but also is likely to produce a referral fee from the investment advisor. Conversely, if the attorney sees the possibility of a large jury verdict but the client prefers the "bird in the hand" of a settlement, the attorney might steer the client toward trial in hopes of generating a larger pool of funds on which to collect a commission from the investment advisor. Thus, where the lawyer is counseling (or should be counseling) a client on whether the client should settle or proceed to trial, the prospect of a larger referral fee from an investment advisor produces exactly the kind of conflict that we have said is non-consentable in other contexts.

Similarly, when counseling a client about the payment options for a potential settlement, the attorney may be likely to steer the client toward a lump sum payment rather than another option, such as a structured settlement, in order to maximize the opportunity for a referral fee. Again, the lawyer's advice to a client would be affected by the prospect of a referral fee, rather than the course that is in the best interest of the client.

We recognize that the inquiring attorney ahs stated that the referral to the investment firm would only be made after the representation of the client concluded. However, if clients frequently ask the lawyer to recommend an investment advisor, the lawyer's judgment in structuring a settlement maybe affected even if the recommendation is not made until after the settlement has been agreed upon. Moreover, in some instances, particularly, as we understand it, in workers' compensation matters, the client's case remains subject to review at future proceedings, and the client therefore may require representation on an ongoing basis over an extended period of time. Under these circumstances, it would be difficult to identify a particular moment when the representation concludes. Thus, our holding in N.Y.S. 1043, that a conflict exists regardless of whether the referral fee is offered before or after the representation concludes, also applies to the facts here.

Conclusion: An attorney may not accept a fee or commission from an investment firm for referring the client to such firm where the money to be invested arises from an engagement in which the lawyer represented the client because the fee creates a non-consentable conflict.