

LEGAL ETHICS OPINION 1739

RULE 1.5(e): DIVISION OF FEE:
DEGREE OF RESPONSIBILITY
ATTORNEY MUST HAVE IN CLIENT
MATTER TO ACCEPT REFERRAL FEE.

You have presented a hypothetical situation in which Law Firm A proposes to advise any referring attorney or firm that any new matters referred to Law Firm A will result in a division of any fees received by Law Firm A from the client referred to Law Firm A. The division of fees paid to the referring attorney or firm will be a percentage of the total fee received by Law Firm A, and Law Firm A will divide a percentage of fees received from the client with the referring attorney or firm on a monthly basis. As required by Rule 1.5(e), the client will be advised in writing in advance of the participation of all lawyers involved, client's consent to the participation of all lawyers involved will be sought after full disclosure to the client, and the fee will be reasonable. It will be disclosed to the client in writing and in advance that the referring attorney or firm will not be assuming any participation in or responsibility for the matter in which Law Firm A will be engaged.

Under the facts you have presented, you have asked the committee to opine as to whether it is ethically permissible under Rule 1.5(e) for Law Firm A to divide a fee received for representing a client referred to Law Firm A by a referring attorney or firm, when the referring attorney or firm assumes no responsibility to the client and will provide no services to the client.

The appropriate and controlling rule applicable to your inquiry is Rule 1.5(e) which states:

A division of a fee between lawyers who are not in the same firm may be made only if:

1. the client is advised of and consents to the participation of all the lawyers involved;
2. the terms of the division of the fee are disclosed to the client and the client consents thereto;
3. the total fee is reasonable; and
4. the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing.

Also pertinent to your inquiry is the Committee Commentary which follows Rule 1.5 of the Rules of Professional Conduct which states in pertinent part:

Paragraph (e) eliminates the requirement in the Virginia Code [of Professional Responsibility] that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing

participation. The requirement in the Virginia Code [of Professional Responsibility] was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.

Applying former DR 2-105(D)¹ of the Code of Professional Responsibility, the committee has previously opined that it is improper for an attorney to share legal fees with or pay an attorney merely for referring a client, where the referring attorney has no further responsibility to the client after the referral is made. LE Op. 1488 (1992). See also LE Op. 1111, LE Op. 1160, LE Op. 1232, LE Op. 1380, LE Op. 1459 and LE Op. 1572. The committee believes that these opinions are overruled, in part, by Rule 1.5(e) to the extent that they require the referring attorney to assume responsibility to the client, after referring a client to another lawyer, as a condition to sharing fees with the other lawyer. The committee believes that the drafters of the Rules of Professional Conduct intended to permit a lawyer to receive a share of the legal fees generated by another attorney or law firm to whom a client was referred, provided that the client consents to such an arrangement and the fee is reasonable. Unlike former DR:2-105(D), Rule 1.5(e) does not require the referring attorney to assume responsibility to the client. The new rule, in the committee's view, encourages a lawyer to fulfill other ethical obligations to a client by referring the client to another attorney if he or she believes they lack the required competence or if there is a conflict.

The committee warns, however, that Law Firm A's marketing efforts, which include promises to compensate or reward any lawyer or law firm for a referral of clients to Law Firm A, could be viewed as an attempt² to engage in improper solicitation under Rule 7.3(d)³ or "running and capping" in violation of Chapter 39, Article 7 of Title 54.1 of the Code of Virginia. The

¹ Former DR2-105(D) of the Code of Professional Responsibility stated:

A division of fees between lawyers who are not in the same firm may be made only if:

- (1) The client consents to the employment of additional counsel;
- (2) *Both attorneys expressly assume responsibility to the client*; and
- (3) The terms of the division of the fee are disclosed to the client and the client consents thereto. (Emphasis added).

² Under the Virginia Rules of Professional Conduct, it is professional misconduct to *attempt* to violate the Rules. Rule 8.4(a).

³ Rule 7.3(d) — A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that the lawyer may pay for public communications permitted by Rule 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service and any qualified legal services plan or contract of legal services insurance as authorized by law, provided that such communications of the service or plan are in accordance with the standards of this Rule or Rule 7.1, as appropriate.

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committee recommends that Law Firm A publicize its availability for referrals without reference to compensation for the referral being made.

In the facts you present, the committee concludes that it is not improper under Rule 1.5(e) for Law Firm A to divide a fee with a referring attorney as a result of representing a client referred to Law Firm A by a referring attorney or firm, when the referring attorney or firm assumes no responsibility to the client and will provide no further services to the client. When involving another attorney in the client's matter, the referring attorney should take reasonable steps to ensure that competent representation can be provided through the association of a lawyer of established competence in the field in question. Comment [2], Rule 1.1. Thus, a fee division under Rule 1.5(e) is not proper if the referring attorney simply makes a referral without assessing the client's legal matter and without determining whether a referral is appropriate or necessary.