**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**
**COMMITTEE ON PROFESSIONAL ETHICS**

# Formal Opinion 2016-1: REFERRING A PROSPECTIVE CLIENT TO OTHER COUNSEL, WHEN THE REFERRING LAWYER HAS A CONFLICT OF INTEREST

**TOPICS:** Conflicts of Interest, Prospective Clients, Unrepresented Persons

**DIGEST:** Where an attorney is unable to represent a prospective client due to a conflict of interest with an existing client in a matter in which the attorney's firm is not representing the existing client, the attorney is ethically permitted to refer the prospective client to another attorney or list of attorneys who are competent in the field. In doing so, the attorney should consider a number of ethical limitations, including the attorney's duty to act in good faith towards the prospective client, avoid conflicts of interest, maintain confidentiality, limit communications with unrepresented adverse parties, and abide by the rules governing reciprocal referral agreements and fee sharing. Additionally, attorneys are not obligated to refer prospective clients to counsel and may choose, for professional or other reasons, not to make the referral.

**RULES:** 1.1(c)(2), 1.3, 1.4, 1.5(g); 1.6, 1.7, 1.10, 1.18, 4.3; 7.2; 8.4(c)

**QUESTION:** Is an attorney ethically permitted to refer a prospective client to another competent lawyer, if the attorney cannot take on the representation due to a conflict of interest with an existing client?

**OPINION:**

This opinion considers the ethical implications of the following scenario:

> A prospective client contacts a lawyer seeking representation on a legal matter. After running a conflict check, the lawyer learns that another attorney in the firm represents a client who is also involved in the legal matter and has "differing interests" from the prospective client, as defined under Rule 1.0(f) of the New York Rules of Professional Conduct (the "Rules"). Although the law firm has not been retained to represent the client in that same legal matter, the law firm concludes that the existence of those "differing interests" precludes the firm from taking on the representation of the prospective client. When the lawyer notifies the prospective client that the firm cannot take on the representation due to a conflict of interest, the prospective client asks if the lawyer can suggest another attorney who might be qualified to handle the matter. Is the lawyer ethically permitted to refer the prospective client to another attorney or list of attorneys in the relevant practice area? [1]

[1] We express no opinion on whether it is ethically permissible for a lawyer to make a referral, where the law firm already represents the current client in the same legal matter. This Opinion also does not consider any restrictions on a lawyer's ability to make a referral under principals of fiduciary duty or other substantive law. This Opinion also does not address any legal or

In our view, the lawyer is ethically permitted to refer the prospective client to another attorney, subject to the limitations discussed below.

## I. THE DUTY OF LOYALTY DOES NOT PROHIBIT MAKING REFERRALS TO COMPETENT COUNSEL

One of the most important fiduciary duties that a lawyer owes to her current clients is the duty of undivided loyalty. That duty is reflected primarily in three rules: Rule 1.7, Rule 1.10, and Rule 1.1(c)(2). As noted above, Rule 1.7(a)(1) prohibits a lawyer from taking on a representation if it would involve the lawyer in representing "differing interests," absent an effective conflict waiver from the affected clients. Rule 1.10 imputes that obligation to other lawyers in the same firm. "Differing interests" is defined broadly as including "every interest that will adversely affect either the judgment or the loyalty of the lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest." R. 1.0(f). In the scenario described above, the lawyer fulfills her duties under Rules 1.7 and 1.10 by declining to represent the prospective client.

Rule 1.1(c)(2) states that "a lawyer shall not intentionally . . . prejudice or damage the client during the course of the representation except as permitted or required by these Rules." As Professor Roy Simon explains in his treatise, "Rule 1.1(c)(2) generally prohibits a lawyer from intentionally harming a client in the course of the professional relationship," but "[t]he literal language is broader than its actual meaning." Roy D. Simon with Nicole I. Hyland, *Simon's New York Rules of Professional Conduct Annotated* 87 (2016). A lawyer is permitted to engage in activities outside the scope of the representation that may harm the client, such as campaigning or voting against a politician the lawyer represents as a client or posting a negative online review of a client's products. *See id.* at 87-88. What the lawyer must not do is "engage in conduct that directly undermines or erects obstacles to the goals the lawyer is trying to achieve while representing the client." *Id.* For example, "a lawyer representing a client in seeking a zoning variance could not show up at a hearing to testify against the client's petition, and a lawyer helping a client develop a mall could not send a letter to the editor opposing the mall." *Id.* at 88.

In our view, referring a prospective client to a competent lawyer does not fall within the prohibitions of Rule 1.1(c)(2). While we recognize that certain clients may prefer that their attorneys not make such referrals, we are not persuaded that facing an adversary or other interested party who is competently represented by counsel necessarily constitutes "prejudice" or "damage" to a client under Rule 1.1(c)(2). Attorneys commonly provide referrals to prospective clients when they are unable to take on the representation themselves for any number of reasons, including conflicts of interest. Attorneys are particularly well-positioned to provide this service to the community as they are often the most knowledgeable about other competent lawyers in a given field. Additionally, this service enables attorneys to provide benefits to society and enhances the administration of justice by increasing the likelihood that parties who require legal advice are represented by competent counsel.

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contractual duties that in-house counsel or government lawyers may have that would prohibit them from referring potentially adverse parties to other counsel.

Enhancing the public's awareness of available legal services is an important policy goal, which animates several of our ethics rules. For example, Rule 4.3 provides, *inter alia*, that a lawyer communicating with an unrepresented person on behalf of a client "shall not give legal advice . . . *other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client*." (emphasis added).[2] In an opinion analyzing Rule 4.3's predecessor in the New York Code of Professional Responsibility, the New York State Bar Association Committee on Professional Ethics explained that "'[t]he legal system in its broadest sense functions best when persons in need of legal assistance or advice are represented by their own counsel.'" N.Y. State Op. 728 (2000) (quoting EC 7-18). Further, the duty of loyalty does not require an attorney "to exploit" an unrepresented party's "ignorance about the need for legal assistance." *Id.*; *see also* R. 1.3, Cmt. [1] ("A lawyer is not bound . . . to press for every advantage that might be realized for a client.").

Our conclusion is supported by ethics opinions in New York and in the District of Columbia. N.Y. State Op. 1018 (2014) addressed a slightly different question than we address here. There, the inquiring law firm determined that it had a conflict of interest between two existing clients and was required to withdraw as attorney of record for one of those clients. The law firm asked whether it could ethically refer that former client to another lawyer. The Opinion concluded that the firm was ethically permitted to make the referral, relying in part on Rule 1.16(e), which requires a law firm withdrawing from a representation to take steps to avoid foreseeable prejudice to the client. Unlike N.Y. State Op. 1018, our scenario involves the rejection of a potential representation due to a conflict, as opposed to the withdrawal from an existing representation. Thus, Rule 1.16 is not relevant to our analysis. However, Opinion 1018 also relied on Rule 1.1(c)(2), stating that "a good faith recommendation of competent counsel to a former client under these circumstances" is not "the type of prejudice or damage encompassed by Rule 1.1(c)(2)." We concur.

D.C. Ethics Op. 326 (Dec. 2004) also concluded that a lawyer faced with a conflict of interest may refer the prospective client to competent counsel.[3] The opinion observed that referring the prospective client to competent counsel does not violate the lawyer's duty of loyalty, because, as Rule 1.3 makes clear, "zealous representation does not require a lawyer to press for every advantage that might be realized for a client." (quoting Cmt. [1] to D.C. R. Prof. Conduct 1.3). Opinion 326 also reasoned that lawyers regularly advise potentially adverse parties to retain counsel under Rule 4.3, and thus "[w]e do not believe that the further step of recommending a

[2] This policy goal of assisting the public to find competent legal counsel also animates the attorney advertising rules. *See, e.g.*, R. 7.1, Cmt. [1] ("The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of competent counsel. Hence, *important functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available*.") (emphasis added).

[3] The D.C. Opinion assumed that the lawyer "does not represent the existing client in that particular matter," as we do here.

specific lawyer or list of lawyers prejudices the referring lawyer's existing client." Finally, the Opinion noted that "inherent in our adversary system is the principle that persons ought to be represented by competent lawyers and that disputes ought to be resolved on their merits. Assisting a person to obtain competent representation is entirely consistent with that principle."

## II. ETHICAL LIMITATIONS ON REFERRING PROSPECTIVE CLIENTS TO COUNSEL

If an attorney chooses to refer an unrepresented adversary to competent counsel, she must do so within the bounds of the Rules. Below, we discuss various conditions and limitations that accompany such a referral.

### A. An Attorney Who Refers a Prospective Client to Counsel Must Do So in Good Faith

Our conclusion that attorneys are ethically permitted to refer prospective clients to counsel is based, in part, on our belief that the purpose of such referrals is to provide members of the public with useful information that will help them make important decisions about retaining counsel. That goal would not be served if attorneys do not act in good faith when referring prospective clients to counsel. For example, an attorney should not seize the opportunity to sabotage her client's adversary, by referring that person to a lawyer she believes is incompetent or dishonest. Likewise, the attorney must not make any material misrepresentations about the lawyers to whom she is referring the prospective client. *See* R. 8.4(c). If the attorney is not willing to abide by these limitations, she should simply decline the prospective client's request for a referral. There is no ethical obligation to refer a nonclient to another lawyer, even if the attorney believes that the nonclient needs legal representation.[4] *See* § III, below.

### B. The Attorney Should Limit the Information She Receives from the Prospective Client

Attorneys have ethical obligations to prospective clients, even if an attorney-client relationship is never formed. Specifically, Rule 1.18 requires an attorney to safeguard any confidential information she receives from the prospective client and to refrain from representing "a client with interests materially adverse to those of a prospective client in the same or a substantially

[4] In some instances, attorneys may face civil liability for making a negligent referral. *See Bryant v. State*, 23 A.D.3d 592, 593 (2d Dep't 2005); *Martini v. Lafayette Studio Corp.*, 273 A.D.2d 112, 113 (1d Dep't 2000). Although this Committee cannot opine on matters of substantive law, such as the standard of care for making a negligent referral, we simply caution lawyers that they should comply with the governing legal standards as well as the ethics rules when making referrals. Concerns about liability for a negligent referral may be alleviated by providing the prospective client with several options, instead of just one name. Providing several names gives the prospective client more information to make an informed decision and arguably avoids the inference that the lawyer has "steered" the prospective client to a particular lawyer.

related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter." R. 1.18(b), (c). This disqualification rule is imputed to all other attorneys in the firm, unless the firm meets certain conditions. R. 1.18(c), (d). Thus, in the scenario described above, if the initial communications between the attorney and the prospective client are not handled prudently, there is a risk that the entire firm could be disqualified from representing its existing client in the dispute with the prospective client.

Although an exhaustive discussion of Rule 1.18 is beyond the scope of this Opinion, lawyers should be circumspect in their communications with prospective clients, until they have run a conflict check and concluded that the potential representation does not create any conflicts with the firm's existing or former clients. Until that is done, the lawyer should refrain from having any substantive discussions with the prospective client about the matter, other than gathering the minimal information needed to run a conflict check. R. 1.18, Cmt. [4] ("[A] lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose."). Limiting the initial communication with the prospective client reduces the risk that the lawyer will receive confidential information that "could be significantly harmful" to an existing client. R. 1.18(c). If the attorney does receive disqualifying information under Rule 1.18, the firm should take immediate steps to limit the transmission of that information to other attorneys at the firm, by following the steps in Rule 1.18(d). These steps include (a) prohibiting the disqualified lawyer from participating in the representation of the existing client; (b) screening the disqualified lawyer to prevent the flow of information about the matter to others at the firm; (c) ensuring that the disqualified lawyer does not receive a portion of the fees from the matter; and (d) promptly notifying the prospective client about the firm's compliance with these steps.[5]

Another reason why the lawyer should limit her initial communication with the prospective client is to avoid a situation where she has conflicting duties to the current client and the prospective client. Rule 1.4(a)(1)(iii) requires the lawyer to "promptly inform the client of … material developments in the matter…." If the lawyer learns of information from the prospective client that is material to the current client's case, the lawyer may have a duty to inform the current client about this information. However, as explained above, Rule 1.18(b) requires the lawyer to keep that same information confidential. In such a situation, the lawyer's duty of confidentiality to the prospective client will likely trump the lawyer's general obligation to inform the current client of material developments in the matter. *See, e.g.*, D.C. Ethics Op. 326. We emphasize, however, that the lawyer should make every effort to avoid this situation by limiting her communications with the prospective client until she has run a conflict check.

### C. The Attorney Must Safeguard the Existing Client's Confidential Information When Communicating With the Prospective Client

[5] The law firm may also limit its risk of disqualification by having the prospective client agree in writing that any information shared in the initial consultation shall not be used to disqualify the law firm from representing an adverse party in the matter, if an attorney-client relationship is not formed for any reason. R. 1.18, Cmt. [5]. What constitutes an effective advance conflict waiver with a prospective client is beyond the scope of this Opinion.

Rule 1.6(a) prohibits a lawyer from knowingly revealing confidential information "gained during or relating to the representation of a client" or from using such confidential information "to the disadvantage of the client or for the advantage of the lawyer or a third person" unless certain exceptions apply. Information "gained during or relating to the representation of a client" means information that "has any possible relevance to the representation or is received because of the representation." R. 1.6, Cmt. [4A]. This prohibition also extends to information that is not, in itself, confidential information, but "could reasonably lead to the discovery of such information by a third person." R. 1.6 Cmt. [4]. In the scenario described above, the lawyer should be careful not to reveal to the prospective client any confidential information about the firm's existing client. Thus, in addition to limiting the substance of the lawyer's initial communication with the prospective client, once the lawyer has identified the conflict, she should refrain from any further substantive discussions.

### D. The Attorney Should Make Clear That She Does Not Represent the Prospective Client and Cannot Give Legal Advice

When dealing with an unrepresented person, the Rules place the onus on the lawyer to clarify the relationship. As noted above, Rule 4.3 states that when communicating with an unrepresented person adverse to the lawyer's client, the lawyer may not give legal advice beyond the advice to secure counsel. Additionally, the Rule requires that if the lawyer believes that the unrepresented person "misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." *Id.* A prospective client may not automatically understand whether – and at what point – an attorney-client relationship has formed. For example, the prospective client may think that by having one or two initial communications with the lawyer, they have formed an attorney-client relationship. At the outset, the burden is on the lawyer to make clear that she does not represent a prospective client until the matter has cleared conflicts and the parties have agreed to the terms of engagement. Where a conflict is identified, the lawyer should communicate to the prospective client that the firm will not take on the representation and that the lawyer cannot provide any legal advice.

### E. The Attorney Must Comply With the Rules Regarding Referral Fees and Reciprocal Referral Relationships

Rule 7.2 states that a lawyer shall not "compensate or give anything of value to a person … to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client" subject to certain exceptions not applicable here. The only type of payment a lawyer may receive for referring a potential client to another attorney is a division of fees under Rule 1.5(g). *See* R. 7.2(a)(2). Rule 1.5(g) allows lawyers to divide a legal fee only in two circumstances: (1) if the fee is shared in proportion to the amount of work done by each lawyer or (2) if both attorneys assume joint responsibility for the matter in writing. *See* R. 1.5(g)(1), (2). Rule 1.5(g) also requires the lawyer to disclose the division of fees to the client and secure the client's written consent. *See* R. 1.5(g)(2). In either case, the total fee must not be excessive. *See* R. 1.5(g)(3), (a). In our view, a lawyer who is prohibited from taking on a matter due to an unwaived or unwaivable conflict of interest cannot share in the legal fees generated by that matter, because she would be ethically prohibited from either performing any work on the matter or accepting joint responsibility for the matter. *See* ABA Formal Op. 474 (2016) ("Unless a client gives informed consent confirmed in writing, a lawyer may not accept a fee when the

lawyer has a conflict of interest that prohibits the lawyer from either performing legal services in connection with or assuming joint responsibility for the matter.").

The lawyer may, however, refer the prospective client to another attorney with whom she has a reciprocal referral relationship. *See* R. 7.2, Cmt. [4] ("A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer."). Such arrangements do not violate Rule 7.2, even though a referral could be construed on its face as something "of value." *See* Simon at 1730. A reciprocal referral relationship, however, is subject to certain conditions. Such arrangements "must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services" and must be "nonexclusive," such that both participants are free to make referrals that are "in the best interests" of the clients. R. 7.2, Cmt. [4]. In addition, the lawyer should disclose the existence of the reciprocal referral agreement to the prospective client when making the referral. *See id.*

There is a difference between a formal reciprocal referral agreement described in Comment [4] and the informal practice of maintaining and utilizing a network of referral relationships. We do not believe that two attorneys who regularly refer business to one another on an informal basis are parties to a reciprocal referral agreement. Thus, if a lawyer merely refers a prospective client to another lawyer in her referral network with whom she does not have a reciprocal referral relationship, she is not required to disclose her referral practices to the prospective client.

## III. ATTORNEYS ARE NOT ETHICALLY OBLIGATED TO REFER PROSPECTIVE CLIENTS TO COUNSEL

As stated above, an attorney owes a duty to preserve a prospective client's confidential information and to avoid certain limited conflicts of interest. R. 1.18(b), (c). There is no ethical obligation to assist a prospective client with obtaining counsel.

Indeed, there are several practical considerations that may weigh against making a referral. For example, the lawyer may anticipate that the firm's existing client will be displeased to learn of the referral. This reaction would be particularly understandable in highly adversarial matters. Under those circumstances, making a referral may sour the lawyer's relationship with the client, causing more harm than good. Choosing not to make the referral, while not an ethical decision, may be a prudent client-relations decision. Furthermore, the attorney may have her own personal or professional reasons for declining to make the referral. She may feel uncomfortable assisting her client's adversary or may not wish to assume potential liability for making a negligent referral. No matter the reason, a lawyer who chooses not to refer a prospective client to another attorney does not violate the ethics rules.

## IV. CONCLUSION

An attorney who is unable to represent a prospective client owing to a conflict of interest with an existing client is ethically permitted to refer the prospective client to another attorney or a list of attorneys who are competent in the field. In doing so, the attorney should consider a number of ethical limitations, including the attorney's duty to act in good faith towards the prospective client, avoid conflicts of interest, maintain confidentiality, limit communications with

unrepresented adverse parties, and abide by the rules governing reciprocal referral agreements and fee sharing. Additionally, attorneys are not obligated to refer prospective clients to counsel and may choose, for professional or other reasons, not to make the referral.

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