

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by email to journal@nysba.org.**

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To the Forum:

I'm a personal injury attorney practicing at a boutique law firm that offers legal services across multiple specialties, including financial services, intellectual property, and trusts and estates (just to name a few). Recently, and very sadly, a friend from law school – who was also a personal injury attorney, but with a solo practice – passed away. Through the years, we kept in touch personally and professionally and would occasionally reach out to one another for advice on particular issues. Unbeknownst to me, before he died, my friend informed his secretary that he wanted to refer two of his cases to me. The secretary in turn gave the clients my name and information, and they contacted me to discuss taking over their cases. I'm still in the process of clearing conflicts and evaluating how far each case has progressed. In one of the matters, my friend had conducted a preliminary investigation and gathered some medical records, but had not yet filed the lawsuit. I'm still not sure how much work was done in the other matter. In any event, my friend and I did not have a referral or fee-sharing arrangement, and nothing was written in his will – it was just his verbal instruction to his secretary. If I accept either of these cases, should I pay a referral fee to my friend's estate for the matters I accept? Or, if I determine that I cannot accept these cases and pass them on to a third attorney, can I accept a referral fee?

While I'm on the topic of wills and estates, there's another question I'd like to ask *The Forum*. A physician I regularly consult and use as an expert in my practice asked me if my firm's trusts and estates group would draft a will for him and his wife. Assuming that the trusts and estates attorneys draft the will, if I use this doctor as an expert in a future case, will I be required to disclose my firm's representation of him as a client? Will that disqualify him?

Sincerely,
May B. Fee

Dear May B. Fee:

Unfortunately, the death of a colleague or business partner is something many of us will have to deal with during our careers. When the time comes, there are certain professional and ethical considerations to bear in mind.

Rule 7.2(a) of the New York Rules of Professional Conduct (RPC) provides that a lawyer may not pay a fee for the referral of business (although certain exceptions apply, which we have previously discussed (*See* RPC 7.2(a); Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, Attorney Professionalism Forum, N.Y. St. B.J., March/April 2017, Vol. 89, No. 3). RPC 7.2(a) specifically provides that “[a] lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client.” However, RPC 1.5(g) *does allow lawyers* to divide legal fees between themselves and other lawyers not associated in a firm as long as the total fee is not excessive, the client acknowledges the division of payments in writing, and the division is either proportionate to the work performed by each lawyer or the lawyers assume joint responsibility for the representation in writing. *See* RPC 1.5(g).

There is another exception under RPC 5.4(a)(2) which provides for the sharing of legal fees. While RPC 5.4(a) generally prohibits lawyers from sharing legal fees with non lawyers, subparagraph (a)(2) allows a division of fees between a lawyer who completes the work of a deceased lawyer and the *estate* of the deceased lawyer. RPC 5.4(a)(2) specifically states: “[A] lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that portion of the total compensation that fairly represents the services rendered by the deceased lawyer.”

The RPC are somewhat vague when it comes to the logistics of assuming a deceased lawyer's case. RPC 1.4 offers some guidance and requires an attorney to explain a matter to the extent reasonably necessary to

permit the client to make informed decisions regarding the representation. The New York State Bar Association Committee on Professional Ethics (“Committee”) has interpreted this rule to require the attorney left in charge of the matter to inform the deceased lawyer’s clients that they are free to choose any lawyer to represent them and to have copies of the file with respect to the matter. *See* NYSBA Comm. on Prof’l Ethics, Op. 1128 (2017). This is consistent with RPC 1.17(c), which requires that a joint written notice from the buyer and seller be given to a law firm’s clients when that law firm is sold, advising, the clients that they may seek other representation and collect their case file.

Based on the facts you describe, RPC 1.5(g) does not apply; under RPC 1.5(g), the client must first consent to the arrangement, including the division of fees between the attorneys, and that consent must be in writing. *Id.* Because you stated that you and your friend did not have a fee-splitting or referral arrangement, the prerequisites of RPC 1.5(g) are not met. At best, because the “referring” attorney (your friend) is deceased, you would be sharing the fee with his estate, which is, by definition, a “non-attorney.” Therefore, RPC 1.5(g) does not apply here. *See* Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 210 (2016 ed.)

We believe your question is answered by RPC 5.4(a) (2), cited above, which tells us that you may – but are not obligated to – pay to your friend’s estate “either a fair proportion of the contingent fee at the conclusion of the matter or a *quantum meruit* payment at any time, before or after the matter is concluded.” NYSBA Comm. on Prof’l Ethics, Op. 1128 (2017), quoting Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1424 (2016 ed.). Therefore, should you take over the matter in which your friend did some work before his death, you may pay his estate an amount commensurate with the work he completed. On the other hand, if you assume the case in which your friend had not yet done anything, you may *not* pay his estate any portion of the fees, since this would constitute improper fee-sharing

with a non-lawyer in violation of RPC 5.4(a). It is important to note that RPC 5.4(a)(2) allows you to pay the “estate” of the deceased lawyer but not his individual family members. Roy Simon, *Simon’s New York Rules of Professional Conduct Annotated*, at 1424 (2016 ed.).

Finally, should you decide not to take either of the matters your friend left you before he passed, and instead decide it is best to refer one or both to another lawyer, you may receive a share of the fees so long as you and the successor attorney comply with the mandates of RPC 1.5(g) discussed above. *See* NYSBA Comm. on Prof’l Ethics, Op. 1128 (2017). As the Committee noted, it would be helpful if there was more guidance on succession planning for sole practitioners in the RPC or in court rules which would assist attorneys and clients when an attorney passes away. *Id.*; *see also* Vincent J. Syracuse, Maryann C. Stallone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., January 2017, Vol. 89, No. 1 (addressing the unraveling of files of a deceased solo practitioner).

Moving on to the dilemma with your expert (and potential new client), RPC 1.7(a) provides that “a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer’s professional judgment on behalf of a client will be adversely affected by the lawyer’s own financial, business, property or other personal interests.” “Differing interests,” a term defined by RPC 1.0(f), means “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest.”

This is an issue that we covered in prior Forums (Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9; Vincent J. Syracuse & Matthew R. Maron, *Attorney Professionalism Forum*, N.Y. St. B.J., February 2015, Vol. 87, No. 2). Attorneys owe duties of loyalty and independent judgment to their current clients. A conflict of interest may undermine and



impair a lawyer's loyalty or ability to exercise independent judgment on behalf of a client. The comments to RPC 1.7 establish that resolution of a conflict of interest first requires a lawyer "to identify clearly the client or clients," and, second, "determine whether a conflict of interest exists, *i.e.*, whether the lawyer's judgment may be impaired or the lawyer's loyalty may be divided if the lawyer accepts or continues the representation." RPC 1.7 Comment [2]. Comment 8 to Rule 1.7 clarifies that the "mere possibility of subsequent harm does not itself require disclosure and consent." Rather, the critical inquiry is "the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." RPC 1.7 Comment [8].

The Committee recently opined on a predicament similar to the one you face. In NYSBA Comm. on Prof'l Ethics, Op. 1140 (2017), the Committee determined that drafting a will for an individual that the inquiring attorney occasionally uses as an expert witness "is not discordant with the firm's concurrent representation of clients whom the service provider treats and on whose behalf the service provider may testify." In that specific situation, the law firm already represented patients of the expert physician in workers compensation matters. The Committee went on to explain that the legal services solicited by the expert (drafting a will) does not necessarily implicate "differing interests" and was not factually or legally related to the claims of the firm's other clients (*i.e.*, workers compensation claims). *See id.* The Committee affirmed that "[n]o reason emerges to suppose that drafting of estate documents for [the expert] will adversely affect the firm's professional judgment in representing any other current client (unless the [expert's] testamentary plans affects one of the [current clients] – a situation we imagine would rarely if ever arise)." *Id.*

Therefore, it is not enough that there exists a "mere possibility" of a future conflict between the firm's existing clients and the expert witness – that alone "does not require disclosure and consent from the respective clients." *Id.* Speaking specifically to any "significant risk" potentially presented by the concurrent representation, the Committee stated that "[n]either the law firm's interest in receiving its routine fee for drafting wills or any follow-on work, nor its longstanding social relationship with the [expert], poses a 'significant risk' of impairing the lawyer's ability to exercise professional judgment on behalf of its clients . . . so as to engender a 'personal interest' within the meaning of Rule 1.7(a)." NYSBA Comm. on Prof'l Ethics, Op. 1140, citing NYSBA Comm. on Prof'l Ethics, Op. 901, n. 3 (2011) (concurrent representation of a corporation on business matters and of a

corporate officer in acquiring a summer home in which the corporation has no stake does not constitute a personal interest conflict).

Moreover, the Committee noted that nothing in the Rules requires a lawyer to disclose that he or she has represented one of his or her expert witnesses unless expressly asked. When an existing client or opposing counsel inquires about any relationships between the law firm and the expert witness, however, the attorney has an affirmative obligation to give a truthful response pursuant to RPC 4.1 (a lawyer "shall not knowingly make a false statement of fact" to a third person). *Id.* Even if the need to respond is triggered by such an inquiry, however, the obligation to be truthful is subject to the confidentiality constraints of RPC 1.6(a), which may require the expert witness's consent. *Id.* This is especially true when the nature of the representation concerns estate planning, which is often a sensitive subject. *Id.*

When an inquiry comes from the court, however, attorneys have different disclosure obligations. Should a tribunal ask about any prior-existing relationship between the expert witness and the lawyer or law firm, the lawyer must be forthcoming about any attorney-client relationship with the expert, and, if necessary, correct any misstatements or false statements made by his or her witness. *See* NYSBA Comm. on Prof'l Ethics, Op. 1140; RPC 3.3(a)–(b) (an attorney "shall not make a false statement of fact" to a tribunal, and must take "reasonable remedial measures" if the lawyer comes to know that a witness offered by the lawyer has testified falsely). If the expert witness does not disclose his or her relationship with the attorney or otherwise lies about it, the confidentiality safeguards of RPC 1.6(a) yield to RPC 3.3(a)–(b) which "apply even if compliance requires disclosure of information otherwise protected by Rule 1.6." NYSBA Comm. on Prof'l Ethics, Op. 1123 (2017) (noting that the obligation to disclose confidential information may be necessary to correct false information submitted to a tribunal). Notwithstanding the above rules regarding confidentiality and candor before the tribunal, however, there is no obligation for you to voluntarily disclose that your law firm provided estate planning services to your expert witness and his wife unless you are asked.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

My firm recently began providing *pro bono* services for a not-for-profit organization that assists individuals with mental health issues. In most of the cases we have handled, we had an immediate impact, the work was extremely gratifying for the attorneys, and the clients were thrilled to receive assistance. Recently, however, we began representing one individual in a criminal matter where we have faced significant communication issues. Although the client receives treatment for his mental health issues, this client has become aggressive on occasion, is often non-responsive, and has occasionally been verbally abusive to the attorneys on the case. The attorneys in my firm are becoming frustrated because they are trying to act professionally, but are concerned that they are not getting through to the client and, on occasion, are fearful of the client.

I thought that if I placed some limitations on the client's communications with our attorneys, it might resolve

some of these issues. For example, we could inform the client that his communications with us are limited to pre-arranged meetings or calls. If that doesn't work, I might possibly limit communications outside the courtroom only to writing. Although I think this might help the situation, and still allow us to provide competent legal advice, I don't want to run afoul of my ethical obligations to the client. Is it acceptable to place limitations on communications with our own client? I think that if I had some assistance from a staff member at the organization we are working with in future client meetings, it might also help. But I am concerned about waiving attorney-client privilege. In the event that I can't resolve the communication issues, is there any reason we can't withdraw as counsel? Are there any other ethical issues our firm should consider when providing legal services to individuals with mental health problems going forward?

*Sincerely,
Mo Bono*



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