

June 16, 2021

Arizona Attorney Ethics Advisory Committee  
c/o Supreme Court of Arizona  
Court Clerk's Office  
1501 West Washington, Suite #402  
Phoenix, AZ 85007-3231

Re: Ethics Opinion Request – Rule 1.5(e)

Dear Chair McMurdie and Members:

Pursuant to Arizona Supreme Court Rule 42.1 I respectfully request guidance from the Attorney Ethics Advisory Committee regarding an interpretation of amended Arizona Rule of Professional Conduct, Ariz.R.S.Ct. 42 (“ERs”) 1.5(e) as it may or may not apply to an Arizona lawyer who wants to pay another Arizona lawyer a percentage of legal fees simply for the referral of a case.

As you know, effective on January 1, 2021, among other changes, the Arizona Supreme Court eliminated ER 7.2(b)(giving anything of value for recommending a lawyer) and ER 5.4(sharing legal fees with nonlawyers). One of the consequences of these changes is that Arizona lawyers now may pay for referrals of cases. This change was an intentional update of the Rules to afford lawyers more flexibility in disseminating information about the availability of legal services. Moreover, there was no discipline data suggesting that there is a significant problem with lawyers taking cases they should not (either for competence or diligence reasons) just because they pay a referral fee to someone.

Under the 2021 amendments to the Ethical Rules, Arizona lawyers are not required to disclose to clients when they pay a referral fee to a *nonlawyer*. There is no requirement to make such a disclosure. Rule 7.2(b)'s antiquated prohibition against giving “anything of value” was eliminated, in part, because, as the *Petition to Amend Rules 7.1 to 7.5, R-20-0030*, at p. 3-4 explained:

Anecdotally, it has been observed that this provision is violated daily because, taken literally, this provision prohibits taking an existing client golfing to say thank you for a referral or giving a firm paralegal a gift card or sending flowers for referring a family member to the firm. Similarly, there are many ethics opinions issued both in Arizona<sup>2</sup> and around the United States that provide convoluted attempts to distinguish between what is permissible “group advertising” versus what is an impermissible “referral service.” Not only do these technical interpretations serve no productive regulatory purpose,

June 16, 2021

AEAC Request on ER 1.5(e)

Page 2 of 3

but the unnecessary complexity in the regulations stifles lawyers' ability to embrace more efficient online marketing platforms for fear the website or service may be deemed a for-profit referral service.

<sup>2</sup> See State Bar of Ariz. Ops.05-08 (2005), 06-06 (2006); 10-01 (2010), and 11-02 (2011).

A client really does not care who receives a portion of a legal fee, or that a lawyer paid for a referral – as long as the overall fee charged to the client for the actual legal services is “reasonable” under the factors set forth in ER 1.5(a).

However, even though lawyers do not need to disclose to clients the sharing of a legal fee with a *nonlawyer*, it is unclear whether Arizona lawyers nevertheless must comply with ER 1.5(e) when sharing a fee for a referral with another *lawyer*.

The most common situation is that Lawyer “A” speaks with a potential client about a legal matter that Lawyer A does not handle. Lawyer A informs prospective client that Lawyer “B” – at another firm – does handle the type of legal matter for which client needs representation. Lawyer A merely refers potential client to Lawyer B and for that referral Lawyer A now (post-January, 2021) wants to receive a portion of the legal fees Lawyer B earns on the case.

Historically, because of the prohibition in ER 7.2(b) against giving “anything of value” to someone for recommending a lawyer, lawyers in Arizona could only pay for a referral if Lawyer A was willing to be “jointly responsible” for the case with Lawyer B. See *Ariz. Op. 04-02* (Arizona lawyers may not pay straight referral fees – they must follow ER 1.5(e)).

As of January, 2021 ER 7.2(b) is gone and ER 1.5(e), as amended, provides:

(e) Two or more firms jointly working on a matter may divide a fee paid by a client if:

(1) the firms disclose to the client in writing how the fee will be divided and how the firms will divide responsibility for the matter among themselves;

(2) the client consents to the division of fees in a writing signed by the client;

(3) the total fee is reasonable; and

(4) the division of responsibility among firms is reasonable in light of the client's need that the entire representation be completely and diligently completed.

ER 1.5(e) clearly contemplates that two firms are “jointly working on a matter.” This is *not*, however, what is contemplated when Lawyer A refers a case to Lawyer B and Lawyer A just wants to receive a portion of Lawyer B's fees, simply for the referral. In other circumstances where lawyers are not “jointly” responsible for a case, the Rule does not apply. For instance, when lawyers change firms (and their prior firm wants a portion of the fees ultimately earned) and clients terminate one firm to retain another firm, ER 1.5(e) does not apply. See, e.g., *ABA Op. 487* (2019) (“The successor counsel is not bound by the requirements of Rule 1.5(e), either at the time of engagement or upon a recovery, because Rule 1.5(e) addresses situations where two lawyers are working on a case together, not situations where one lawyer is replacing another.”).

June 16, 2021

AEAC Request on ER 1.5(e)

Page 3 of 3

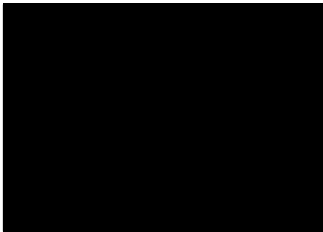
Similarly, if Lawyer B did not give Lawyer A any portion of the legal fees earned on the matter, but instead Lawyer B paid Lawyer A just a flat amount that was not tied to the amount of fees earned on the referral, ER 1.5(e) would not be implicated at all.<sup>1</sup>

Accordingly, there are at least two arguments to find that ER 1.5(e) should not apply to the situation when one Arizona lawyer wants to be paid for referring a case to another lawyer: 1) the referring lawyer will *not* be jointly responsible for the matter; and 2) lawyers do not need to disclose to clients if the lawyer pays a referral fee to a *nonlawyer*. Why then should a lawyer be required to disclose if they are paying a referral fee to another lawyer? As long as the overall fee is reasonable for the work performed, the client is protected.

Nevertheless, I inquire of the Committee whether Arizona lawyers still need to comply with ER 1.5(e) when simply paying a portion of the fees earned on a matter to another lawyer, in a different firm, just for referring the case.

The Committee's guidance on this issue would be useful for the Arizona legal community. If you have any questions about this issue, I would be happy to discuss them with the Committee.

Best regards,



---

<sup>1</sup> Inquiries regarding the interpretation of these Rule changes indicate that Arizona lawyers are not willing to just pay a flat amount for a referral, but instead would like the option of offering a percentage of earned fees to the referring lawyer. Hence the need for this opinion request.