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SUPREME COURT OF NEW JERSEY  
DOCKET NO. 089278

IN RE SUPREME COURT  
ADVISORY COMMITTEE ON  
PROFESSIONAL ETHICS  
OPINION NO. 745

ON PETITION FOR REVIEW  
UNDER RULE 1:19-8

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**REPLY BRIEF OF NEW JERSEY STATE BAR ASSOCIATION  
IN FURTHER SUPPORT OF ITS PETITION FOR REVIEW OF  
ACPE OPINION 745**

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## PRELIMINARY STATEMENT

The New Jersey State Bar Association (NJSBA) respectfully submits this reply brief in further support of its Petition for Review of Advisory Committee on Professional Ethics (ACPE or the Committee) Opinion 745 seeking its summary reversal.

The key to interpreting rules and statutes is the plain language of the words therein. Here, the ACPE ignores the plain language in the relevant Rules of Court in order to conclude that, under Rule 1:39-6(d), certified attorneys may only pay referral fees to attorneys eligible to practice law in New Jersey. As the ACPE concedes, Rule 1:39-6(d) does not contain *any* qualifiers on the type of referring attorney, such as specifying that the referring attorney means “New Jersey attorney” or “out-of-state” attorney. (AGb9).

The ACPE also argues that it appropriately considered “related” provisions to interpret the limits of the Rule and that “its opinion flowed from its interpretation of a referral fee as a legal fee[.]” (AGb10). The NJSBA respectfully submits that the ACPE ignores the plain language of the relevant Rule. As Rule 1:39-6(d) states, an attorney who receives a referral fee is not sharing fees with another lawyer, as the “fee” is earned without performing legal services and permissibly arises as a result of a referral to a Certified Trial Attorney.

The NJSBA submits that if there was an intent to make a distinction between New Jersey attorneys and out-of-state attorneys, then the Rules would have clearly stated that distinction as it does so in other instances. Furthermore, the ACPE does not explain what purpose such a distinction would serve. Rather the ACPE concedes that it does not oppose an amendment to Rule 1:39-6(d) to expressly provide that out-of-state attorneys may receive referral fees from certified attorneys. (AGb19).

In response to the concern of immediate harm to certified attorneys with pre-existing referral fee arrangements with out-of-state attorneys, the ACPE suggests that the Court essentially permit attorneys to honor contractual obligations that pre-exist Opinion 745, notwithstanding the ACPE's position that such arrangements are impermissible. Such a result is not beneficial to the legal community as Opinion 745 itself arbitrarily excludes duly licensed out-of-state attorneys from receiving a referral fee and stands in direct conflict with the spirit and intent of the Rule and existing case law – as well as the plain language of the Rule.

For the reasons set forth in its initial brief, as well as those herein, this Court's timely intervention is necessary to summarily reverse Opinion 745 and permit attorneys certified by this Court to pay referral fees to out-of-state attorneys in accordance with the Rules of Court.

## LEGAL ARGUMENT

### POINT I

#### OPINION 745 IS UNSUPPORTED BY THE PLAIN LANGUAGE OF RULE 1:39-6(d).

**A. The ACPE Concedes that Rule 1:39-6(d) Does Not Contain Qualifiers on the Type of Referring Attorney Entitled to Receive a Referral Fee.**

In opposition, the ACPE admits that “[p]etitioners are correct that Rule 1:39-6(d) does not contain any qualifiers on the type of referring attorney, such as specifying that the referring attorney means ‘New Jersey attorney’ or ‘out-of-state’ attorney.” (AGb9). The ACPE claims instead that, “to the extent this lack of specificity causes ambiguity, this Court can consider related provisions and extrinsic evidence for interpretive guidance.” (AGb9-10).

The NJSBA respectfully submits that, given the plain language of the Rule, the only ambiguity here is that created by the ACPE’s interpretation of Opinion 745. The Rule is clear and unambiguous on its face. It does not contain the term “New Jersey attorney,” nor any other reference to a requirement of being licensed to practice law in this state, nor does it except out-of-state attorneys from its purview. The ACPE does not refute in a meaningful way the contention that because the terms “out-of-state attorney” and “New Jersey attorney” appear elsewhere in the Court Rules, the fact that Rule 1:39-6(d) does not have these qualifications indicates that the intent was to apply to “all attorneys” *without* qualification.

In opposition, the ACPE suggests that “the Court could amend Rule 1:39-6(d) to expand the pool of lawyers who certified attorneys can pay referral fees to, including out-of-state attorneys.” (AGb19). The NJSBA submits that an amendment is unnecessary as the language of Rule 1:39-6(d) is clear and unambiguous. Advocating for a rule change to remedy a problem that the Opinion itself creates is circuitous and puzzling. The process to effectuate a rule amendment is by its nature time-consuming, whereas this Court can reverse and vacate Opinion 745 to return the legal community to the status quo. This is appropriate where the ACPE has not alleged that the prevailing interpretation of Rule 1:39-6(d) causes harm to the public or that there is any reason to treat out-of-state attorneys differently. The ACPE has also not demonstrated any substantial justification or need for amending a longstanding court rule that practitioners have relied on without issue for decades. By proposing an amendment, the ACPE ostensibly acknowledged that paying referral fees to an out of state lawyer is not subject to any inherent ethical prohibition.

**B. Payment of a Referral Fee under Rule 1:39-6(d) is Distinct from the Division of a Legal Fee under R.P.C. 1.5(e).**

The ACPE’s opposition fails to articulate how it concluded that a referral fee constitutes a “legal fee” or “fee for legal services.” (AGb7). Rather, the ACPE argues that the “similarity in language about the division of legal fees between Rule 1:39-6(d) and R.P.C. 1.5(e)” undergirds its analysis in Opinion

745. (AGb6). This interpretation, however, erroneously conflates the payment of a referral fee in the context of Rule 1:39-6(d) with the division of a legal fee under R.P.C. 1.5(e).

The plain language of Rule 1:39–6(d) provides that a referring attorney is entitled to a referral fee “without regard to services performed or responsibility assumed by the referring attorney.” The ACPE’s argument that a Rule 1:39-6(d) referral fee is “a division of the legal fee, paid for legal services rendered” collapses given this distinction because an attorney who receives a referral fee under Rule 1:39-6(d) is not *sharing* fees with another lawyer, as the “fee” is earned without performing legal services. In Eichen, Levinson & Crutchlow, LLP v. Weiner, 397 N.J. Super. 588 (App. Div. 2008), the Appellate Division recognized this distinction as one in which an attorney who receives a referral fee does not share the fee with the other attorney because the fee is earned without the performance of legal services. Id. at 594-95.

Nevertheless, the ACPE presses its position and argues that “[b]ecause a referral fee is a legal fee under Rule 1:39-6(d)” a certified attorney “may only pay a referral fee to an attorney eligible to practice law in New Jersey.” (AGb10). The case law relied upon in Opinion 745 and reproduced in the ACPE’s opposition is misplaced and does not apply to out-of-state attorneys receiving a referral fee from a certified attorney. For example, in Stack v. P. G.



Garage Inc., 7 N.J. 118, 121 (1951), the Court voided a contract for the handling of a tax appeal because “it constitute[d] the practice of law” and involved a non-lawyer’s attempt to recover payment for legal services rendered.

The ACPE also attempts to steer the focus away from the inevitable conclusion that Opinion 745 stands for the proposition that an out-of-state attorney’s referral of a case to a New Jersey attorney constitutes the unauthorized practice of law. (AGb11). In Opinion 60, the Committee on the Unauthorized Practice of Law (CUPL) provided guidance to out-of-state attorneys seeking to practice under R.P.C. 5.5 and set forth three ways to do so within New Jersey: 1) consulting with a New Jersey lawyer regarding a client’s needs; 2) registering as a multijurisdictional lawyer for occasional practice in New Jersey; and 3) seeking *pro hac vice* admission. See Comm. Unauth. Prac. Op. 60 (Dec. 19, 2022). As the CUPL explained, if a “consultation is lawyer-to-lawyer and does not involve direct interaction with the client, this activity is not considered the unauthorized practice of law and generally does not require registration as a multijurisdictional practitioner.” Id. Here, a referral by an out-of-state attorney and the subsequent payment of a referral fee under Rule 1:39-6(d) falls squarely within the CUPL’s description of a “lawyer-to-lawyer” interaction regarding a client’s needs.

The conclusions and determinations reached in CUPL Opinion 60 are contradicted by and in conflict with Opinion 745. The ACPE disagrees, arguing that: “Opinion 60 is silent on the narrow question answered by the ACPE in Opinion 745 - whether a New Jersey certified attorney can pay referral fees to out-of-state attorneys.” (AGb12). Here, the ACPE’s position is one that favors form over substance and ignores that: (1) Opinion 745 states that an out-of-state attorney who refers a case to a certified New Jersey lawyer is in fact engaging in the practice of law in New Jersey; and (2) CUPL Opinion 60 supports the proposition that the act of referring a case does not constitute the practice of law in New Jersey. The inherent conflict in these two opinions cannot be reconciled.

In light of the above, the NJSBA submits that its petition for review should be granted and Opinion 745 reversed and vacated.

## POINT II

### **OPINION 745 UNDERMINES THE GOALS OF THE ATTORNEY CERTIFICATION PROGRAM AND HARMS CERTIFIED ATTORNEYS WITH EXISTING REFERRAL FEE AGREEMENTS WITH OUT-OF-STATE ATTORNEYS.**

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The ACPE acknowledges that “it is better for out-of-state attorneys to refer cases to certified attorneys,” but maintains that by precluding payment of a referral fee to an out-of-state attorney, Opinion 745 does not undermine the attorney certification program nor disincentivize out-of-state attorneys to make such referrals. (AGb16). The ACPE asserts that any claim to the contrary “is wholly speculative[.]” (*Id.*). When viewed as merely an intellectual exercise divorced from the actual experiences of practicing attorneys, such a position may be worthy of consideration and debate; however, the NJSBA represents certified attorneys who have practical day-to-day experience with and have relied in good faith on the plain language of Rule 1:39-6(d) in connection with the practice of law. There is no speculation for the assertion that one way of encouraging attorneys to refer matters that fall outside of their experience and knowledge to certified attorneys is by allowing the payment of a referral fee as in Rule 1:39-6(d).

In its initial brief in support of the petition for review, the NJSBA urged this Court to reverse Opinion 745 and expedite its review of the Opinion because

any delay would further exacerbate the ethical and contractual dilemmas faced by certified attorneys with agreements in place to pay referral fees to out-of-state attorneys. In opposition, the ACPE recommends that the Court permit attorneys to honor contractual obligations that pre-exist Opinion 745, notwithstanding the ACPE's position that such arrangements are impermissible (and have always been). (AGb19-20). According to the ACPE, an out-of-state attorney who refers a case to a certified New Jersey lawyer is engaging in the practice of law in New Jersey by virtue of having referred the underlying case and receiving a referral fee under Rule 1:39-6(d). The ACPE's concession regarding honoring contracts that predate Opinion 745 further demonstrates that the practice caused no harm, was consistent with attorneys' reading of the Rules, and that the Opinion should be vacated.

The natural effect of Opinion 745 is to place two competing obligations of a certified attorney in conflict: the ethical obligation under R.P.C. 1.5(e) to divide fees only as permitted by the Rule, and the contractual obligation to pay referral fees under Rule 1:39-6(d) that arose at the time a matter was referred to a certified civil trial attorney. In light of the foregoing and to prevent this harm to the public and the NJSBA's members, the NJSBA respectfully requests the Court grant its Petition and reverse Opinion 745.

## CONCLUSION

The NJSBA's membership is troubled by Opinion 745 and its impact on the practice of law in New Jersey and resulting harm to the public. As such, the NJSBA respectfully requests that this Court grant its Petition and hold that certified attorneys may pay, and out-of-state attorneys may accept, referral fees as contemplated by the plain language of Rule 1:39-6 to avoid harm to both the lawyers of this state and their clients.

Respectfully submitted,  
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