

## Banning Out-of-state Referral Fees Harms Attorneys and the Public Alike



Attorney referrals are indicators of a healthy and vibrant legal profession.

When workloads weigh heavy or an attorney finds themselves out of their depth with a client's issue, they can always rely on a trusted colleague to give the case the attention it deserves. Referrals are key to building camaraderie, trust and respect in the profession. In the

end, the referring attorney is relieved, a peer has found new business, clients get representation better suited to their needs and the system of justice churns more smoothly.

A new development in New Jersey legal practice, however, has upended a decades-old convention for how attorneys have approached referrals. In March, the Advisory Committee on Professional Ethics (ACPE) issued Opinion 745, a rule that prohibits the payment of referral fees from certified attorneys to out-of-state lawyers. The directive is based on the ACPE's interpretation that under the New Jersey Rules of Court, referral fees constitute payment for legal services.

Virtually every attorney has always interpreted the plain language of the rule to permit payment of referral fees, without regard to services performed or responsibility assumed by the referring attorney. For many years, this provision was universally understood to include all attorneys—both in-state and out—as the rule makes no distinction between admitted attorneys versus non-admitted attorneys, unlike other court rules. The greatest cause for concern, however, is the potential damage this opinion will inflict on attorneys in practice, their clients and the public.

Begin with the reality that for many attorneys, referrals represent a significant portion of their business. In the civil trial space where I practice, it's hard to find an attorney who hasn't entered into a contractual relationship with out-of-state attorneys in good faith to pay a referral fee. Opinion 745 casts a

wave of uncertainty over all these preexisting referral arrangements. If an attorney abides by the opinion and declines to pay a promised referral fee, they will certainly face a lawsuit alleging breach of contract. On the other hand, honoring a fee arrangement could result in an ethics violation being pursued. As an alternative, attorneys can escrow the referral funds until the ambiguity in the opinion is resolved. But there are tax implications to this approach. It would create potential conflict for the law firm who receives the referral fee and the law firm who initiated the referral, as neither will have received the benefit of the actual funds when the tax obligation is due. From every angle, the opinion places attorneys in an untenable situation.

Putting aside all the drawbacks for attorneys, clients and the public stand to lose the most over Opinion 745. Without the incentive of referral fees, attorneys across state lines will be less inclined to send clients to knowledgeable New Jersey attorneys, even when the case requires procedural and substantive knowledge of New Jersey law.

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*Continued on page 7*

holder, but doing so without earning the potentially damaging label of “trademark bully.” On the heels of the TRUMP TOO SMALL decision is Alice Denenberg’s article presenting strategic considerations for filing trademark applications that include the name of a person.

Rounding out the issue are three patent-related articles. Andrew J. Hollander addresses the careful considerations for developing a commercial strategy using both trade dress and patent design rights as complementary tools. John A.

Stone provides practical tips for determining how biotechnology and life science companies can use trade secret, patent law, or both. Finally, Amirali Y. Haidri tackles whether U.S. law has extraterritorial reach for U.S. registered patents.

Buckle up. We hope you enjoy the ride. ■

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### Endnotes

1. *Jack Daniel’s Props., Inc. v. VIP Prods.*

*LLC*, 143 S.Ct. 1578 (2023)

2. *Warner Chappell Music, Inc. v. Nealy*, 144 S.Ct. 1135 (2024)
3. See [supremecourt.gov/oral\\_arguments/audio/2023/22-1078](https://supremecourt.gov/oral_arguments/audio/2023/22-1078)
4. *Hearst Newspapers v. Martinelli*,— S.Ct.—, 2024 WL 2262332 (May 20, 2024)
5. *Vidal, Under Secretary of Commerce for IP and Director, USPTO v. Elster*,— S.Ct.—, 2024 WL 2964139 (June 13, 2024).

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## PRESIDENT’S PERSPECTIVE

*Continued from page 5*

ney, who is not best suited to represent a New Jersey client, will seek pro hac vice admission to handle the matter anyway. In that circumstance, a fee will only be earned based upon actual work on the matter, meaning a less competent attorney will be financially incentivized to work on a matter they would have otherwise referred to a more qualified attorney. In the alternative, a client will seek out legal representation in New Jersey on their own, at the risk of letting time-sensitive filings lapse, such as the need to file a tort claims notice or an affidavit of merit. In the end, public confidence in the justice system will erode if clients can’t get adequate legal representation in a timely manner.

It’s also worth noting the incongruity of an opinion that allows referral fees to be paid to disbarred attorneys in New

Jersey—who have lost the privilege of practicing law through their bad conduct—because the payment is not considered the practice of law. Yet, attorneys in good standing in other jurisdictions—who have their client’s best interests at heart by referring their case to someone capable of handling it—are participating in the unauthorized practice of law.

The New Jersey State Bar Association has been joined by a chorus of county bar associations and statewide legal organizations in seeking a stay of Opinion 745 pending review by the state Supreme Court. On that issue, it is telling that in a recent brief, the state Attorney General’s Office suggested that the Court allow attorneys to honor preexisting referral fee arrangements, seemingly a tacit admission that the longstanding interpretation of rule was acceptable.

Given this opinion’s heightened importance on the practice of law, it is imperative that the Court provide a swift

review of the ACPE’s interpretation. As of this writing, the Supreme Court has granted the NJSBA’s petition seeking review, while the motion seeking a stay of the opinion is still pending. One possible outcome is for the Supreme Court to refer the issue to the Court’s Civil Practice Committee to revise the rule and address the issues created by Opinion 745. Doing so, however, will potentially delay resolution for up to two years, a setback that attorneys and their clients can ill afford. There is no need for an amendment and the rule is clear—the payment of referral fees by certified attorneys to out-of-state attorneys is and has always been ethically permitted. The NJSBA will continue to build upon the court briefs submitted on the Association’s behalf drafted by NJSBA Treasurer Diana C. Manning, Kyle A. Valente and Christina Vassiliou Harvey. Thanks to their efforts, the Association is well positioned to advocate for a fair result on behalf of New Jersey attorneys. ■



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