In September of 1994, the Professional Ethics Commission was asked whether an attorney, who is conflicted from representing a party, may nonetheless refer the party to another lawyer and share in the fee charged by the lawyer to whom the case was referred. While the specific rule references relied upon by the Professional Ethics in 1994 have changed, the substance of both the rules and resulting opinion have not. Now, as then, a lawyer may not receive a referral fee nor divide a fee from a lawyer to whom a matter is referred when the first lawyer was prevented from taking the case because of a conflict of interest.

The issue presented to the Commission in Opinion #145 is as follows:

Attorney A is approached by Company X which wishes to engage Attorney A to bring litigation against Company Z. A represented Z in a past real estate matter, and determines that she is prevented from taking X's case because of a conflict of interest from her former representation of Z. A will, instead, refer X to Attorney B in another firm. A will also share in B's fee provided X, after full disclosure, consents to employment of B, to the terms for the division of the fee and the total fee does not exceed reasonable compensation for all the legal services rendered the client. May A refer X to B and share in B's fee as outlined above?

Opinion #145 held that division of a fee between a referring lawyer who is conflicted from direct representation with a lawyer to whom the matter is referred and actually handles the matter is barred for two reasons, both arising from what was then Bar Rule 3.3(d). That rule is now incorporated into Rule 1.5(e) of the Maine Rules of Professional Conduct which states as follows:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office unless:

1. After full disclosure, the client consents to the employment of the other lawyer and the terms for the division of the fees, confirmed in writing, and

2. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client.

This language in Rule of Professional Conduct 1.5 is identical to the old Bar Rule 3.3(d) with the exception that additional language now requires that the client's consent to the division of fees be confirmed in writing. See M. R. Prof. Conduct 1.5(e)(1). Therefore, the basis articulated in Opinion #145 still applies. First, the language of current Rule 1.5(e), including the reference to "the other lawyer" in subparagraph (1) and the use of the pronoun "they" in subparagraph (2) render inescapable the conclusion that the rule contemplates that both lawyers were employed in some sense by the client. This is true even though the referring lawyer did not expect time proportional to the fee, nor spend any
time at all on the matter, and/or that the referring lawyer did not expect to be consulted about the litigation after the referral.

The Commission further based its decision in Opinion #145 on its conclusion that a compensated referral to a particular lawyer is in and of itself representation of the client in the matter on which it proposes to commence litigation. The lawyer's determination that a conflict existed precluded her from undertaking any representation of Company X without former Client Z's consent. The Commission found that exercising a judgment about the lawyer most capable of handling the litigated matter in question was such representation. It required at least a minimal analysis of the appropriate litigation theory, strategy and tactics, which was then followed by a judgment as to the lawyer to be recommended as being an appropriate referral to pursue the requested course of action. The recommendation of a particular lawyer with the expectation of compensation would necessarily be tainted by the conflict that the referring attorney has already determined to exist.

The latter consideration is specifically addressed in Comment [7] to Rule 1.5, which notes that a lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. Although not articulated in Opinion #145, this last reason would also implicate a possible violation of Rule 1.9, Duties to Former Clients, since the Opinion finds that the referral itself would be representation of another person in a matter which gives rise to a conflict of interest with the former client.

Accordingly, under current M. R. Prof. Conduct 1.5(e), a conflict of interest still exists and prohibits a lawyer from sharing fees with a subsequent lawyer when the original representation is barred by a conflict of interest. Thus, Opinion #145 endures today.