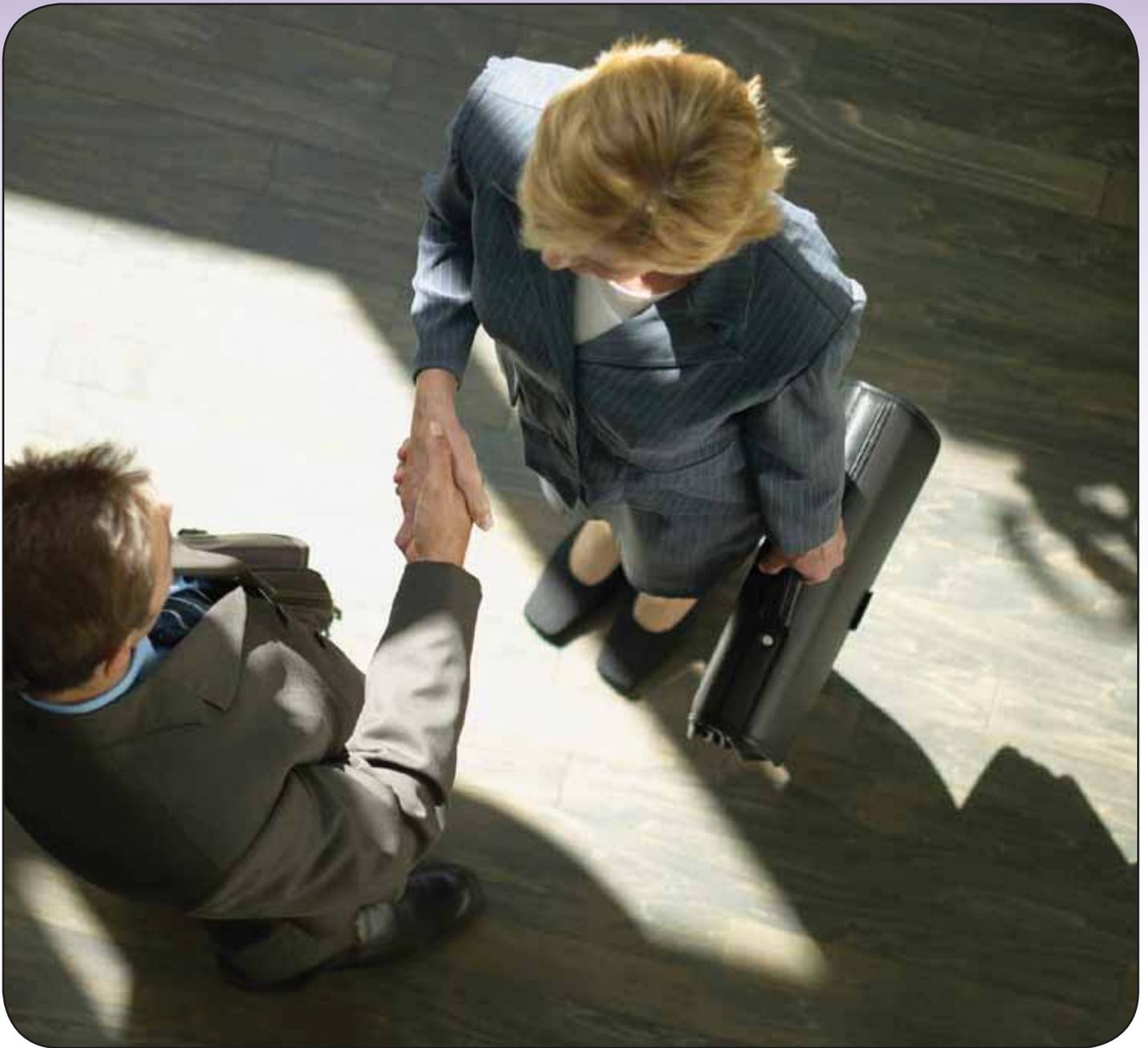


Giving Credit Where It's Due



Handling Referrals

By Wendy Wen Yun Chang

As professionals, we do not exist in a vacuum. A vibrant and healthy practice can often be, in part, the result of some sort of “sharing” between attorneys from different firms. These situations can arise in a variety of circumstances. Sometimes there are aspects to a case that are outside one’s immediate area of expertise. Sometimes a case is larger than one can handle on one’s own, or might otherwise require an associated outside attorney. Sometimes one needs to associate local counsel. In each of these instances, another lawyer from outside the firm is involved in a client matter.

Unquestionably, sharing is one of the practical hallmarks of our profession, and the importance of sharing has become even more striking during the current economic downturn. But in a professional setting, sharing is much more than that kindergarten golden rule we all learned so long ago. Because we must be paid for our services to survive economically, how to facilitate payment when attorneys from different firms are involved can be ethically complex. The law has a historical abhorrence of any hint of the commercialization of the act of entering into the attorney-client relationship for any reason other than finding the best attorney for the client’s needs, completely free of extraneous issues such as financial concerns and/or bias. Thus, the law places strict restrictions on when attorneys may share fees, when attorneys

may compensate others for recommending the lawyer’s services, and how reciprocal referrals are to be handled. These rules vary quite dramatically from jurisdiction to jurisdiction, so it is important for both the referring attorney and the accepting attorney to consult the rules of their jurisdiction carefully. Jurisdictional practice varies from outright prohibition of referral fees, to the requirement of having to work on a case to receive a fee, to the requirements of the assumption of joint responsibility for the outcome of the matter, and/or to client consent, and many variations in between. This article discusses the approach of the ABA Model Rules of Professional Conduct.

The Model Rules generally prohibit an attorney from paying another to recommend an attorney’s services (“channeling”), unless the exceptions under Rule 7.2(b)(1) apply. Model Rule 7.2, Comment 5.

For example, Rule 7.2’s proscription does not apply to an attorney’s payment for advertising and communications to “channel” work, so long as the advertising and communications otherwise comply with the Model Rules. Model Rule 7.2, Comment 5.

The classic “referral fee,” whereby an attorney receives a fee for the referral of a case to another, is a form of fee sharing/fee splitting. Attorneys who are not in the same firm may share/split fees only if (1) the division is proportionate to the work performed, or each attorney assumes joint responsibility; (2) the client agrees in writing, including agreement about the share to be received by each attorney; and (3) the total fee is reasonable. Model Rule 1.5(e).

An attorney may enter into reciprocal referral arrangements with another attorney

or a non-attorney professional so long as the arrangement does not violate any other Rules, including interference with the attorney’s professional independence. To comply with Rule 7.2 for a reciprocal referral agreement, the agreement must not be exclusive, and the client must be informed of the existence and nature of the agreement. Model Rule 7.2(b)(4). Any fee sharing/splitting under these agreements must comply with Rule 1.5(e) (see preceding paragraph).

Relatedly, an attorney may pay the “usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service.” Rule 7.2(b). The attorney may similarly participate in a for-profit prepaid legal service plan if the arrangement does not involve improper fee sharing and the plan sponsor does not interfere with the attorney’s independence of judgment. Model Rule 5.4(c); ABA Formal Ethics Opinion 87-355 (1987).

Model Rule 5.4 generally prohibits sharing fees with non-lawyers. This extends to agreements with non-attorneys to solicit clients in return for a share of the fees (i.e., the use of “runners” or “cappers”).

Finally, irrespective of fee issues, the Model Rules caution that a lawyer should take care to refer a case only to a lawyer whom the referring lawyer reasonable believes is competent to handle the matter. Model Rule 1.5, Comment 7. This is especially pertinent where there can be liability issues related to reckless referrals that result in damage to the client.

In the end, professional referrals can be a principal cornerstone of the practice of the law. Use them responsibly and ethically, and build your practice to last. **GPSOLO**

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