

Fee Sharing Between Lawyers Under ABA Rule 1.5(e): How to Protect Yourself and the Client

Lawyers' Lawyer Newsletter

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I. Introduction

When done correctly, fee-sharing arrangements between lawyers can be lucrative for lawyers while simultaneously maximizing the quality of legal representation for the client without increasing the cost. However, lawyers who do not strictly follow the ethical rules on fee sharing may be subject to bar discipline, unable to enforce their fee agreement, or even sued by the referred client if the matter is subsequently mishandled.

II. Elements of ABA Rule 1.5

American Bar Association (ABA) Model Rule 1.5(e) provides that fee-sharing agreements between lawyers at different firms are permissible if:

- (1) the division is in proportion to the services performed by each lawyer, or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

The Rule permits lawyers to divide a fee either in proportion to the services they render, in which case, each lawyer is only responsible for his or her portion of the engagement. See Rule 1.5, Cmt. 7; ABA Rule 1.2(c) (“A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client

gives informed consent.”). Importantly, however, if the referring lawyer will not participate in the representation, he or she remains “jointly responsible” to the client for the *entire* representation. See Rule 1.5, Cmt. 7.

In either situation, the client must consent to the fee-sharing arrangement. See Rule 1.5(e)(2) & Cmt. 7. See also ABA Rule 1.1, Cmt. 7 (“When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them.”).

It is a best practice to obtain client consent before referring the client to the other lawyer, if you are the referring lawyer, and before accepting a referral if you are the referred lawyer. Once the client consents to the referral fee agreement, the parties need to confirm the arrangement in writing that clearly spells out how the fee will be split, how duties will be divided between the lawyers, and if the referring lawyer will not have any duties, that the lawyers remain jointly responsible for. In all instances, the confirmatory writing should be signed by the client, the referring lawyer, and the referred lawyer.

The factors to be considered in determining the reasonableness of a fee-sharing arrangement are the same factors that dictate the reasonableness of a fee in general. See Rule 1.5(a). A fee-sharing agreement is not reasonable if the total amount charged by the referring lawyer and referred lawyer exceeds what a single lawyer could have reasonably charged for the same representation by him- or herself

III. Duty to Ensure the Competence of the Referred Lawyer

A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.5, Cmt. 7. In making this determination, the referring lawyer should consult online public records provided by licensing and disciplinary authorities and speak with the referred lawyer to determine if they:

- (1) are licensed in the jurisdiction where the matter will be venued;
- (2) have any bar complaints;
- (3) have experience with the subject matter of the representation;
- (4) have a reputation for thoroughness and preparation;
- (5) are up-to-date with their continuing legal education requirements;
- (6) have the time and support staff to handle the matter and
- (7) have malpractice insurance.

Best practices dictate following up with a confirmatory email to the referred lawyer about your understanding of his or her ability to handle the matter.

IV. Violating Rule 1.5(e) Can Lead to Bar Discipline

It is relatively uncommon for a client to file a bar complaint for a Rule 1.5(e) violation because, typically, the client does not pay any more than they would have in the absence of the referral agreement. However, in fee disputes between the referring and referred lawyers, courts can and do refer lawyers for discipline when the requirements of the rule have not been met. See., e.g., *Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co.*, 2018 U.S. Dist. LEXIS 111409, at **427-439 (D. Mass. May 14, 2018) (referring firm to bar counsel for possible violation of Rules 1.4, 1.5(e) and 7.2(b) in connection with firm's failure to disclose the fee-sharing arrangement to the client).

V. Enforceability of Fee-Sharing Arrangements

A fee-sharing arrangement may be unenforceable if the lawyer fails to obtain the client's informed consent in writing or fails to obtain informed consent within the time period prescribed by jurisdiction. See, e.g., *Holstein v. Grossman*, 246 Ill. App. 3d 719, 734-735 (Ill. App. Ct. 1993) ("We believe that the signed writing requirement's significant public policy roots require a holding in this case that plaintiff is entitled to no referral fee. The client's right to counsel of his choosing must be preserved, and the signed writing requirement guarantees this result."); *Saggese v. Kelley*, 445 Mass. 434, 443 (2005) (holding that referring lawyers should disclose the fee-sharing agreement to the client before the referral is made and the client's consent in writing and referred lawyers should get consent before undertaking such representations, that there has been compliance with rule 1.5 (e).").

A fee-sharing agreement may also be unenforceable if the referring lawyer has a conflict of interest that would preclude them from representing the referred client directly. See, e.g., *Polland & Cook v. Lehmann*, 832 S.W. 2d 729, 740-743 (Ct. App. Tex. 1992) ("Here, Polland did not and could not have had an attorney-client relationship with the clients because, as he recognized, he had a conflict of interest."); *Evans & Luptak v. Lizza*, 251 Mich. App. 187, 201-203 (2002) (after discovering a conflict of interest, which prevents a lawyer from taking a case, the lawyer may not refer a potential client to another lawyer and accept a referral fee).

Furthermore, a fee-sharing agreement may be unenforceable if the referring lawyer is not licensed in the jurisdiction where the matter is pending. See, e.g., *Peterson v. Anderson*, 155 Ariz. 108, 110-113 (1987) (Arizona lawyer could not pay referral fee to Illinois attorney that was neither licensed in Arizona, nor admitted pro hac vice, and the Illinois lawyer could not accept the referral fee, which was unenforceable).

Lastly, a fee-sharing agreement may be unenforceable if the referring lawyer fails to disclose that they lack professional liability insurance in a jurisdiction where such a disclosure is mandated. See, e.g., *Hance v. Super Stores Industries*, 2020 Cal. App. LEXIS 60 (Cal. App. Ct. Jan. 23, 2020) (written fee agreement was unenforceable because the attorney seeking enforcement of the agreement failed to disclose to his clients that he lacked professional liability insurance in violation of former Rule of Professional Conduct 3-410).

VI. Civil Liability in Fee-Sharing Arrangements

When a referring lawyer and referred lawyer both actively participate in the representation, they will typically divide the fee in proportion to the services each performs and will be liable for malpractice if they negligently perform their portion of the engagement. See Rule 1.2(c) & Cmt. 6.

When the referring lawyer does not participate in the representation, they remain “jointly responsible” for the *entire* engagement. Sometimes, the referring lawyer’s liability is described in terms of legal malpractice, based on either a residual attorney-client relationship or a referring lawyer’s vicarious liability for the legal malpractice of the referred lawyer.^[1] Other times, the referring lawyer’s liability is said to arise from a joint venture between the referring lawyer and the referred lawyer.^[2]

Other courts describe the referring lawyer’s liability in terms of negligent referral^[3] or negligent supervision.^[4] Alternatively, where a fee-sharing agreement is unenforceable based on noncompliance with Rule 1.5, the client may have an unjust enrichment claim against the referring lawyer, which can result in disgorgement of the referral fee.^[5] Finally, an attorney who withholds the referral fee from his or her firm opens themselves up to a claim for breach of the duty of loyalty and will typically be forced to disgorge the referral fee to the firm.^[6]

^[1] See, e.g., Wis. State Bar Comm. on Prof’l Ethics, Ethics Op. E-00-01 (2000) (“It must be remembered that in such a referral arrangement, the referring lawyer still maintains an attorney-client relationship with the client. It is the ongoing protection of the client’s interests by the referring lawyer that justifies the referring lawyer receiving a fee that is beyond the proportion of the services actually provided by that lawyer.”); *Scott v. Francis*, 100 Ore. App. 392, 396-397 (Ore. App. Ct. 1990) (referring attorney and receiving attorney liable for malpractice because “[b]oth attorneys failed in their duty to Scott to commence the action within the time permitted by law.”); *Noris v. Silver*, 701 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1997) (“Therefore, if Silver and Falk agreed to divide the attorney’s fee [by assuming joint responsibility], Silver would be liable for the malpractice committed by Falk.”).

^[2] See, e.g., *Duggins v. Guardianship of Washington*, 632 So. 2d 420, 426 (Miss. 1993) (attorney liable to the client as a result of his joint venture with co-counsel); *In re Johnson*, 133 Ill. 2d 516, 526 (Ill. 1989) (“[I]t appears well accepted in other jurisdictions that where lawyers between whom no general partnership relation exists jointly undertake to represent a client in a case, they may be regarded as joint venturers, or special partners, for the particular transaction”) (collecting cases); *Scott R. Larson, P.C. v. Grinnan*, 488 P.3d 202, 212 (Colo. App. 2017) (“[T]he undisputed evidence shows that Grinnan and Larson entered into a joint venture for the purposes of representing the Kelleys and sharing in the fee. From that arrangement flows vicarious malpractice liability. Therefore, we further conclude that Grinnan assumed financial responsibility for the case.”).

^[3] See, e.g., *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975) (“An attorney who knowingly entrusted his client’s business to a lawyer who he had reason to believe was guilty of [violating the rules of professional responsibility] would be clearly negligent either in making the referral at all, or in doing so without advising his client of his suspicions.”); *Duerr v. Brown*, 2007 Tex. Dist. LEXIS 3922, **37-38 (Tex. Dist. Ct. 2007) (“A referring attorney is under a duty to exercise care in retaining the successor lawyer to ensure that he or she is competent and trustworthy”);

Rainey v. Davenport (In re Davenport), 353 B.R. 150 (Bankr. S.D. Tex. (2006) (“A cause of action for negligent referral of one professional by another is a legitimate claim for a client to assert.”).

[4] See, e.g., *Young Hui Kim v. Christensen (In re Young Hui Kim)*, 2021 Bankr. LEXIS 1256, *38 (Haw. Bankr. Ct. April 21, 2021) (“In an action for negligent supervision and/or negligent referral, the Plaintiff must establish that [referring attorney] explicitly or implicitly agreed to supervise or assist the outside attorney and breached that duty by failing to do so.”); *Broadway Maintenance Corp. v. Tunstead & Schechter*, 487 N.Y.S.2d 799, (N.Y. Sup. Ct. App. Div., 1985) (referring law firm had no liability for negligent supervision of referred firm when the record did not contain any evidence that the referring law firm maintained any supervisory role over referred law firms).

[5] See, e.g., *Buntz v. Peperno*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 456, *30-31 (Pa. Ct. Common Pleas, Aug. 20, 2007) (a client who has not been appropriately informed of a referral fee agreement may seek restitution of the portion of the fee paid to the forwarding lawyer via a claim for unjust enrichment); *Booher v. Frue*, 86 N. C. App. 390, 394-395, 358 S.E.2d 127, 129-130 (1987) (a violation of a disciplinary rule can serve as grounds for an unjust enrichment claim relating to a fee-splitting agreement); *Buntz v. Peperno*, 2007 Pa. Dist. & Cnty. Dec. LEXIS 456, at *29-31 (C.P. Aug. 20, 2007) (“Since the payment of a referral fee to Gnull by Peperno is violative of federal law, . . . Gnull’s receipt and retention of such a fee would arguably be ‘unjust’ or ‘inequitable’”).

[6] See, e.g., *Barasch & McGarry, PC v. Marcowitz*, 2022 N.Y. Misc. LEXIS 2106, *9-14 (N.Y. Sup. Ct., April 20, 2022) (associate-attorney who failed to refer a case to his employer-firm breached his duty of loyalty to his firm under the “faithless servant doctrine”); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 197, 203 (Tex. 2002) (“We hold only that an associate may participate in referring a client or potential client to a lawyer or firm other than his or her employer without violating a fiduciary duty to that employer as long as the associate receives no benefit, compensation, or other gain as a result of the referral.”); *Bochetto & Lentz, P.C. v. Datz*, 2014 Phila. Ct. Com. Pl. LEXIS 398, *2 (Pa. Dist. Ct. Dec. 1, 2014) (associate-attorney violated duty of loyalty to employer-firm by referring personal injury matter to another lawyer and then accepting a referral fee without sharing that fee with his employer).

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