

RE: Advisory Opinion 92-01
DATE: December 2, 1992
SUBJECT: Referral Fees

Referral fees are historically defined as fees that are apportioned between lawyers, or are paid by one lawyer to another lawyer. Such fees have traditionally been looked on askance by the legal profession as being a "finder's fee" or "forwarding fee" for attorneys who are perceived as merely scouting for desirable clients. Such a view, if ever appropriate, is certainly not justified now.

The ethical law on referral fees changed dramatically on January 1, 1986, with the adoption of the Arkansas Rules of Professional Conduct. Rule 1.5(e) provides for three basic scenarios.

1) The referring attorney may assist the client in locating an attorney who is able to represent the client. Typically attorneys do this on a gratis basis, accepting no fee from the client, accepting no responsibility for the work subsequently performed by the accepting attorney, and performing no other work for the client in the matter. However, the referring attorney may charge the client a fee, reasonable under Rule 1.5 (a), for the services provided in locating the accepting attorney. Any fee received would come from the client directly, and therefore would not fall into the commonly defined category of a "referral fee." in this scenario the only responsibility accepted by the referring attorney is to carry out competently the task of selecting the second attorney.

2) The referring attorney may recommend to the client that the matter be handled by, or in connection with, another attorney, whether a larger firm, another lawyer in the same community, or a "specialist" in a metropolitan area. Implicit in that recommendation is that the first lawyer will be paid out of the fee to be received by the second lawyer. Rule 1.5(e) places three requirements on a proper fee. (1) The client must be properly and timely informed of the participation of the second attorney and must not raise any objection consent. The attorney should counsel the client as to the advantages and disadvantages of bringing in a second attorney. (2) The total fee must be reasonable. If the first attorney had accepted the matter on a 30% contingency fee, presumably that percentage is reasonable. To increase that percentage because of the addition of a second attorney would likewise, presumably, be unreasonable. The referral fee is to be paid out of the attorneys' share, not to be an additional charge against the client. (3) The distribution of the fee between the attorneys is in proportion to the services performed by each lawyer. For example, one attorney may handle pleading and discovery; the other, hearings and the trial. On the other hand, one attorney may simply provide as a hometown conduit of information to the client, and the second attorney may be entrusted with the entire litigation. The client need not be informed as to the manner of distribution between the attorneys.

If the attorneys adopt this approach, that is the division of the fee based upon the time and effort put into the case, the attorneys are responsible, from a standpoint of malpractice liability and disciplinary sanctions, for their own efforts, but are not responsible under rule 1.5(e) for the work of the other attorney. (Whether they might be responsible for the acts or omissions of the other attorney based upon their knowledge or their involvement according to principles of the common law is a question not to be answered by this opinion, for questions of law are outside the scope of this committee).

3) This approach is perhaps the most common and, since 1986, has been specifically authorized by Rule 1.5(e). This approach is identical to the second except for the third element. The attorneys may divide the fee on any basis they wish, regardless of how much or how little work (if any) either attorney does, provided that the two attorneys enter into a written agreement with the client. The agreement should expressly state and clearly notify the client that each lawyer accepts joint responsibility for the complete representation. See Wolfram, Modern Legal Ethics 512 (1986). The agreement should be signed by the client. The statement provides a legal basis for the client to sue either attorney for alleged malpractice committed by the other. The statement in effect says that the attorneys are treating themselves as ad hoc partners in a single 'firm for this particular representation. In particular, the referring attorney remains fully responsible to the client for any deficiencies in the representation by the lawyer who has been brought into the representation. Again, the ultimate distribution of the fee between the attorneys need not be disclosed to the client.

In both the second and third scenarios, the attorneys are also acting as part of a single firm for purposes of disciplinary responsibility for the particular matter. See the fourth paragraph of the Comment to Rule 1.5. Rule 5.1 requires that an attorney with supervisory authority over another attorney must take reasonable efforts to ensure that the other conforms to the ethical standards. The comment to Rule 5.1 states in the fourth paragraph: ". . . a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. . . . The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred." Comparable standards apply when the lawyers are linked by a referral agreement.

Although typically analyzed in terms of the commencement of personal injury cases, division of fees among lawyers may also be appropriate when the lawyer withdraws from a case and is replaced by another, when one lawyer is professionally disciplined during the life of the agreement, or when an out-of-state co-counsel is involved. See ABA/BNA Lawyers' Manual on Professional Conduct 41:701 (1991).

Referral fees can play a valuable role in service to the public. Without referral fees, younger attorneys or attorneys in small communities or smaller firms may be reluctant to accept cases perceiving themselves inadequate to serve the client effectively. Conversely, such attorneys may be reluctant to associate another lawyer or refer to another lawyer,

because of the loss of a fee or a reduced fee. Such a decision may deprive the client of a more qualified attorney. See Hazard, The Law of Lawyering (2d Ed. 1991) page 121. With proper knowledge and use of referral fees, those attorneys may have a role in litigation, may continue to serve their clients, may benefit from the tutelage of more experienced attorneys, and may be compensated.

NOTICE

"This is an opinion only of the Arkansas Bar Association which is a voluntary association of attorneys licensed to practice in the State of Arkansas, and reliance thereon is voluntary and relieves any Association member from liability for the content hereof. This opinion is intended to be the Association's best interpretation of the Model Rules of Professional Conduct as promulgated by the Supreme Court of Arkansas as that code applies to the written facts presented to the Committee."

ARKANSAS BAR ASSOCIATION

By: _____
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Reporter for Professional Ethics
and Grievances Committee