Fee Splitting Between Referring and Receiving Attorneys

By the NHBA Ethics Committee
Practical Ethics Article: April 15, 1993

A. Scope of Article.

This article will cover fee splitting only in the context of referrals between lawyers. Readers interested in other fee splitting issues, such as those involving of counsel attorneys or retired attorneys, or nonlawyers such as staff, may wish to consult more general works. See, e.g., ABA/BNA Lawyers’ Manual on Professional Conduct (“Lawyers’ Manual”) 41:701 et seq. and 41:801 et seq.; Fischer, Why Can’t Lawyers Split Fees? Why Ask Why, Ask When!, 6 Geo. J. Leg. Ethics 1 (Summer 1992); Annotation, Attorney Splitting Fees with Other Attorney or Layman as Ground for Disciplinary Proceeding, 6 A.L.R.3d 1446 (1966).

B. General Rules.

The portions of New Hampshire’s Rules of Professional Conduct (“RPC” or “Rules”) which govern solicitation generally prohibit a lawyer from paying another person for channeling professional work. Thus, under RPC Rule 7.2(c), with a few limited exceptions, a lawyer may not “give anything of value to a person for recommending the lawyer’s services.” In addition, RPC Rule 5.4 generally prohibits sharing legal fees with a nonlawyer.

RPC Rule 1.5(f), however, permits a lawyer to share fees with another lawyer:

A division of fee between lawyers who are not in the same firm may be made only if:

(1) client consents to employment of the other lawyer after a full disclosure that a division of fees will be made;

(2) the division is made in reasonable proportion to the services performed or responsibility or risks assumed by each; and

(3) the total fee of the lawyers is reasonable.

The ABA comment to Rule 1.5 suggests the following rationale for allowing fee sharing between lawyers.

A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

The Committee observes that a referral serves the client’s interests especially well when the receiving attorney has relevant expertise or experience that exceeds that of the referring attorney.

The remainder of this article will examine a number of issues raised by RPC Rule 1.5(f)(2). A recent column in the ABA Journal discussed this topic generally from an ABA perspective. Garwin, Take My Client, Please, ABA J. 96 March (1993).

C. Specific Situations.

1. Pure referral fee.

The first issue involves whether a referring attorney may receive a portion of fees earned by the receiving attorney simply for having referred the work. See generally Annotation, Validity and Enforceability of Referral Fee Agreements Between Attorneys, 28 A.L.R. 4th 665 (1984). This relatively straightforward inquiry has engendered much debate within the Ethics Committee.

Pure referral fees have often found opponents:

[A]ttorneys have long been ethically and legally prohibited from sharing with other members of the profession fees generated from the disposal of a legal matter when the only ‘service’ rendered by the claimant attorney is the referral of the case. Profiting from the solicitation of professional employment is injurious to the legal profession and to the public. As the various authorities reveal, this practice is injurious to the legal profession since the public loses confidence in those who treat clients as merchandise in a market place rather than the recipients of the attorneys’ skills and abilities. More importantly, the best interest of the clients are [sic] jeopardized by the arrangements when it becomes more profitable for attorneys to sell clients than to give them a legal service.

Corti v. Fleisher, 417 N.E.2d 764, 775 (Ill. App. 1981). Despite these arguments, however, “a few states have modified the ABA’s model provisions to allow referral fees by eliminating the reference to proportionality or responsibility.” Lawyers’ Manual, supra, 41:709 (listing the following states: California, Connecticut, Kansas, Maine, Michigan, Oregon, Penn
On its surface, Rule 1.5(f)(2) seems to prohibit a division of fees based upon the mere referral of work, since the rule establishes a requirement of reasonable proportionality. If pure referral fees were permitted, the argument goes, there would be no purpose in requiring proportionality. Thus, many on the Committee conclude that one need not establish the precise scope of the proportionality requirement in order to determine that it precludes pure referral fees.

Proponents of a more restrictive position, however, point to the changes made when New Hampshire adopted Rule 1.5(f)(2). For a number of years, the corresponding rule in the prior Code of Professional Conduct for New Hampshire Lawyers provided:

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

1. . .

2. The division is made in proportion to the services performed and responsibility assumed by each: . . .

Disciplinary Rule 2-107(A), 25 NHBJ 149, 162-3 (Spring 1984)(emphasis added). In the initial Proposed New Hampshire Rules of Professional Conduct, this fee-splitting rule was somewhat relaxed:

A division of fee between lawyers who are not in the same firm may be made

1. . .

2. The division is made in proportion to the services performed or responsibility assumed by each: . . .

Proposed RPC Rule 1.5(f), 26 NHBJ 61, 78 (Winter 1985)(emphasis added). Rule 1.5(f)(2) underwent further relaxation between its initial proposal and its adoption with the addition of the phrase “or risks” following the word “responsibility”.

Some on the Committee view this final amendment as particularly significant. They argue that the referring lawyer always takes the risk that the receiving lawyer will make a mistake and that the referring lawyer will be subject to legal liability for any malpractice of the receiving attorney. As long as an injured client always has the right to make a claim against the referring attorney for the receiving attorney’s malpractice, it does not really matter whether the risk of that malpractice is great or small; it will, by definition, be as great for the referring lawyer as for the receiving lawyer. Therefore, they argue, the risk assumed by the referring attorney could theoretically justify a referral fee of up to fifty percent.

The Committee could find no case law to establish that the referring attorney assumes the risk of liability coequally with the receiving attorney. Such coequal liability would seem to require a strict liability standard for referrals, rather than a simple negligence standard. The argument in favor of strict liability is bolstered, ironically, by a certain amount of self-fulfilling circularity. The argument runs as follows: If the referring attorney agrees to accept a referral fee without agreeing to perform any services or assume any responsibility, the referring attorney must necessarily agree to assume risk, or be in violation of Rule 1.5(f)(2). Having agreed to assume risk, the referring lawyer will be stopped from denying liability for the malpractice of the receiving attorney. Having impliedly accepted liability, the referring attorney has assumed risk, and is therefore in compliance with Rule 1.5(f)(2).

If this analysis is tested and prevails in Court, the Committee takes some comfort from the notion that the client will necessarily receive a measure of extra protection from the referring attorney having assumed the risk of the receiving attorney’s malpractice. Given this assumption of risk, the referring lawyer should probably consider the referred client to be, at least at some level, a client of both the referring lawyer and the receiving lawyer, even if the referring lawyer does not provide other services or assume responsibility. This attorney-client relationship would bring into play the conflict of interest provisions of RPC Rules 1.7 through 1.9, the implications of which are discussed below in section 2.

Those who take a more restrictive reading of Rule 1.5(f)(2) and would hold the referring attorney to a proportionality standard are not persuaded by these arguments. They point out that the referring attorney would likely have an action against the receiving attorney, if the referring attorney is found secondarily liable for the receiving attorney’s primary negligence. Indeed, as a practical matter, the referring attorney can reduce the risk of actual loss to near zero by making sure that the receiving attorney has adequate professional liability insurance. Accordingly, the referring attorney’s risk is necessarily proportionally much less than the receiving attorney’s risk.

Advocates of the more restrictive reading also point out that the word “risk” could refer to the more affirmative (and frequent) risk of loss of litigation expenses rather than the passive (and relatively small) risk of suit. See RPC Rule 1.8(e)(1)(“a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter”). They point of that the receiving attorney likely bears all the risk of loss of such expenses. They conclude that no matter how the Court defines the risk, the referring attorney simply does not bear much of the risk.
The New Hampshire rule differs somewhat from the ABA Model Rule, at least in wording. The corresponding ABA Rule provides:

A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; . . .

ABA Model Rules of Professional Conduct Rule 1.5(e).

ABA Model Rule 1.5(e) . . . reinstates the principle of Canon 34 of the Canons of Professional Ethics [which preceded the Model Code], which provided: “No division of fees for legal services is proper, except with another lawyer, based upon a division of services or responsibility.” Id. (as amended 193) (emphasis added); see ABA Formal Opinion 204 (Nov. 23, 1940) (“Where an attorney merely brings about the employment of another attorney, but renders no service and assumes no responsibility in the matter, a division of fees is improper.’’) . . .


Under the Model Rules, a lawyer must still retain “joint responsibility” for the case in order to justify the lawyer’s referral fee, at least to the extent that the referral fee exceeds the value of the referring lawyer’s actual services. The comments to the Model Rules state:

Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved.

Rule 5.1 deals with the responsibilities of a partner or supervising attorney. Under these rules, then, the referring lawyer would essentially have to make “reasonable efforts” to ensure that the receiving attorney behaved in accordance with the Rules of Professional Conduct.

While the analysis of the ABA mods provisions may help understand what takes to assume “responsibility”, it does not further the analysis of what it means to assume “risk”. The Committee remains split as to whether the addition of this language in the final New Hampshire rule was intended to essentially condone a pure, or naked, referral fee.

The Committee strongly recommends - that the rule be changed to clear up the ambiguity. This issue has important consequences on the way many lawyers in this state practice in certain areas of law; and these lawyers should know with certainty whether the rules condone, or condemn, such referral fees.

2. Conflict of interest.

An attorney should give special consideration before negotiating a referral fee of any sort when the case is referred because of a conflict of interest. As discussed above, the referred client should be considered a client of the referring lawyer, even if the referring lawyer does not provide services or assume responsibility. In such case, the referring lawyer would have to comply with the provisions of Rules 1.7 through 1.9 prior to referring the client. While the Committee cannot say that the RPC bans fee-splitting under every circumstance where the client is referred because of a conflict, the Committee believes that in most case the lawyer either cannot not, or should not, even attempt to seek client approval for fee splitting.

The Committee has frequently espoused a “harsh reality test” in conflict of interest situations. The test was originally advocated by George Kuhlman of the ABA Center for Professional Responsibility for use in determining:

. . . whether a lawyer properly could request the consent of a client or clients to adverse or materially limited representations pursuant to Rule 1.7. Under this test, a lawyer attempting to resolve such an issue should ask himself or herself whether, if a disinterested lawyer were to look back at the inception of this representation once something goes wrong, would that lawyer seriously question the wisdom of the first attorney’s requesting the client’s consent to this representation or question whether there had been full disclosure to the client prior to obtaining the consent . . . . If this “harsh reality” test may not be readily satisfied by the . . . attorney, the . . . attorney and other members of the . . . attorney’s firm should decline representation of the . . . client.


3. Disciplined attorney.

It may occasionally happen that the referring attorney becomes disbarred or suspended while the case is pending. This may create something of a dilemma for the receiving attorney.
RPC Rule 5.4 specifically prohibits sharing fees with a nonlawyer. A disbarred attorney is, by definition and judicial order, a nonlawyer. The Committee has considered this issue and concluded that the referring attorney could receive a share of the fees, but only to the extent that the right to those fees accrued prior to disbarment. Advisory Opinion 1992-93/1 (NH, November 19, 1992). See generally Dolan and Uchida, Disbarred or Suspended Attorneys: Resources or Pariahs?, N.H.B. News, June 17, 1992, at p 35.

Unfortunately, this may simply throw the practitioner back into the prior analysis to the extent that one may argue that the right to the fees accrues at the time of referral so long as the disbarred attorney remains at risk. To the extent that sharing fees with a disciplined attorney tends to undermine the Supreme Court’s disciplinary order, however, the receiving attorney would probably be better advised to split fees based upon services rendered and/or responsibility assumed by the referring attorney prior to disbarment or suspension.


A problem may arise if an out-of-state attorney, who is not admitted in New Hampshire, refers a case to a New Hampshire attorney. If the out-of-state attorney would be considered a nonlawyer, within the meaning of RPC Rule 5.4, then the receiving attorney would be barred from sharing fees with that out-of-state attorney. See also Rule 5.5(b) (“A lawyer shall not...assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”)

Whether out-of-state attorneys are nonlawyers for purposes of Rule 5.4 is not readily apparent either from the New Hampshire Rules of Professional Conduct or from other sources. In New Hampshire, out-of-state attorneys are not quite lawyers and not quite nonlawyers. For example, Superior Court Rule 19 clearly forbids an out-of-state attorney from appearing in court, while at the same time providing a straightforward mechanism for allowing the attorney to move for admission pro hac vice.

At least one court has concluded that an out-of-state attorney is a nonlawyer for fee-splitting purposes.

[The out-of-state lawyer] argues he is a non-member [of the Arizona bar] rather than a non-lawyer and the prohibition against sharing fees with a non-lawyer in DR 3-102 does not apply to him. . . . Although there may be a distinction between non-lawyer and non-member, we believe the phrases as used in the Code of Professional Responsibility and Supreme Court Rules may be used interchangeably.


The Peterson Court considered, but found unpersuasive, the reasoning of Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979). In that case, the Tenth Circuit concluded:

A lawyer in State I is not, for the purposes of dividing fees with a lawyer in State II, a layman in State II.

Dietrich Corp. v. King Resources Co., supra at 426 quoting Opinion 316 (ABA 1967).

The Florida Ethics Committee also has ruled that a Florida lawyer may not share fees with an out-of-state lawyer; but Florida limited this prohibition to out-of-state lawyer who resided in Florida:

[I]t would be improper for a Florida attorney to divide a fee with a non Florida attorney who resides in Florida and refers a case to the Florida lawyer. The Committee stated that it may constitute aiding the unauthorized practice of law to accept cases referred by the non-Florida attorney.... See also Rule 4-5.4(a) (prohibiting an attorney from sharing fees with a non-lawyer).

Opinion 90-8 (199) reprinted in the National Reporter on Legal Ethics. The Opinion went on to observe, however, that the out-of-state attorney who resided in Florida could neither provide services nor share responsibility in the matter, as required by Florida’s fee-splitting rule.

Unlike the non-Florida attorney who resides in Florida, a practicing out-of-state attorney would be able to legitimately provide some legal services to the out-of-state client, thereby avoiding the problems cited in [prior opinions of the committees].

Id. Opinion 90-8 does not indicate, however, why the Rule 5.4 analysis does not also apply to the non-resident out-of-state attorney.

Virtually every other jurisdiction that has examined the issue, however, allows its attorneys to divide fees with out-of-state lawyers or law firms, provided the instate ethical requirements are satisfied. Lawyers’ Manual, supra, 41:713. It appears from the summaries of the opinions which appear in the Lawyers’ Manual that several of these opinions did consider Rules 5.4 or 5.5, or their predecessors, in the analysis. Opinion 88-58 (Maryland 1988); Opinion 86-18 (South
Carolina); Opinion 1983-2 (New Mexico 1983). Many of the cases appear, however, to have ignored, or to have at least failed to mention, Rules 5.4 or 5.5 or their predecessors. Advisory Opinion 1984-5/19 New Hampshire 19851; Opinion 197 (District of Columbia 1989); Opinion 1130 (Virginia 1988); Opinions 82-66 and 82-28 (New York City); Opinion CI-938 (Michigan 19831; Informal Opinion 91-7 (Connecticut).

The Lawyers’ Manual attempts to distinguish the two lines of cases by observing that the two jurisdictions which barred the fee splitting faced a referring lawyer who was licensed out-of-state happened to reside, but was not licensed, in the same state as the attorney who received the case. Lawyers’ Manual, supra, 41:713. While the distinction is factually correct, however, the Arizona case attaches no particular significance to the residency of the out-of-state attorney; and the Florida opinion does not discuss the relevance of residence to the Rule 5.4 analysis.

The analysis may turn on the amount or sufficiency of the contacts that the out-of-state attorney has with the subject jurisdiction. Where those contacts are regular or prolonged (as where the lawyer refers a lot of work to, or perhaps resides in, the jurisdiction) the jurisdiction may be more likely to prohibit the conduct. In cases of isolated referrals, however, the trend established by the majority of opinions seems to run in favor of allowing fee sharing, provided the attorneys otherwise comply with Rule 1.5.

This Committee has considered these issues and declined to resolve any ambiguity that these two lines of cases may leave since such resolution may involve issues relating to the unauthorized practice law under RSA 311:7. Formal Opinion 1989-90/14 (NH, June 14, 1990). See also Formal Opinion 1988-89/20 (NH, April 6, 1989)(inquiring attorney who sought to establish of-counsel relationship with Massachusetts cautioned “to be careful about fee-splitting arrangements generally, and in particular with a person who is not admitted to practice law in this jurisdiction.”); Opinion 4 (Nev. 1987) summarized in Lawyer’s Manual 901:5601-2 (lawyers cautioned to make sure that participation in case by out-of-state attorney “will not violate this state’s admission and unauthorized practice of law rules”). Accordingly, a New Hampshire attorney who receives a case from an out-of-state lawyer who seeks to participate in the case should carefully review the above analysis together with any subsequent opinions and decisions in this area, and may wish to consider having the out-of-state lawyer admitted pro hac vice, especially if the referring lawyer resides in New Hampshire.

A New Hampshire attorney who refers a case to an attorney in another jurisdiction, and expects to share in the fee, should review the ethical rules applicable to that jurisdiction to make sure the agreement is in all respects proper, and enforceable, in the receiving state. As suggested above, rules relative to fee splitting vary substantially from state to state.