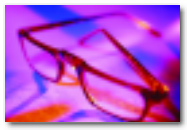

Post-Departure Fee Splitting Agreements

The departure of lawyers from firms raises a number of ethical considerations, and is a subject about which there is plenty of advice for Arizona lawyers.[1]

There is one aspect of departing lawyers, however, that has in the past generated considerable controversy. This is when the departing lawyer takes a client with her after working on the case at the "old" firm (most often a contingent fee case) and where it has been agreed that, when the fee is finally earned, the "old" firm is entitled to a portion of it. The problem arose because, when the fee is divided between the departing lawyer and the "old" firm, there is technically a division of a fee between lawyers who are not in the same firm, something that may be accomplished only under certain conditions.

Among the requirements for ethically dividing fees between lawyers who are not in the same firm are that the "old" firm remain "jointly responsible" to the client with the departing lawyer, and that the client agree to the division in a writing signed by the client.[2]

These injunctions can be awkward after a lawyer departs from the old firm, especially if the parting was not particularly amicable. So how do lawyers plan for division of unearned fees in the event a lawyer leaves a firm so that the client, the departing lawyers and the "old" firm are treated fairly?

Prior to December 1, 2003, ER 1.5 (Fees) provided that fees could not be divided between lawyers who were not in the same firm unless the division was (1) in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumed joint responsibility for the representation; (2) the client was advised of and did not object to the participation of the lawyers involved, and (3) the total fee before division was reasonable.

An Arizona ethics opinion based on the former ER 1.5(e) made it very clear that agreements between lawyers before departure (i.e., while still in the same firm) seeking to provide for division of fees on cases a departing lawyer took with her would be subject to the provisions of the rule.[3] In other words, you looked at where the lawyers were when the fee was paid, instead of where the lawyers were when the agreement was made, in determining whether the lawyers involved were "in the same firm."

When ER 1.5(e) was amended in 2003, the requirement that the fee had to be split in proportion to the work actually done by the participating lawyers was eliminated, but the requirement that the participating lawyers had to assume "joint responsibility" for the representation was not.[4] In addition, the client still has to agree to the participation of the lawyers involved, but now has to do so in a writing *signed by the client*. But the most striking addition to the new rule is found in Comment 9 to ER 1.5, which states, "Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm."

Although the comment seems to deal only with fees earned by the participating lawyers for work done before departure, and not for work done after departure, the authorities that have opined on the new rule have not made this distinction.[5] With one exception, they seem to focus on where the participating lawyers were at the time the agreement to divide fees was made to determine whether they were "in the same firm."[6] There is even authority to the effect that the agreement to divide fees can be made after departure of the departing lawyer, so long as it was part of the "winding up" process of determining who gets what concerning cases the departing lawyer takes with her.[7]

There are some limitations on what is allowed in post-departure fee division agreements.

- First, and most obvious, is that the fee to be divided should be reasonable and hopefully no larger than the client agreed to pay in the first place.
- Second, the division of fees should attempt to have some rational and fair basis, taking into consideration the work to be done by the participating lawyers, which lawyer remains responsible for cash advances and which lawyer "originated" the client. This to prevent the agreement from violating the proscriptions of ER 5.6(a) (Restrictions on Right to Practice), which prohibits a lawyer from participating in offering or making an agreement that in effect might restrict his right to practice after departure, something that could be argued if the agreement to divide fees is really unfair to the departing lawyer in view of his continuing responsibilities in the cases he takes with him.

The general consensus is that law firms have significant latitude in dividing fees among the firm's lawyers. In these cases, it really is none of the client's concern what happens to the fees they pay once received by the firm.

"Bar Counsel Insider," insights from the State Bar's own Lawyer Regulation Department attorneys, is on p. 86.

Ethics Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics

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This same philosophy seems to have been adopted by courts interpreting the new rules as pertain to agreements concerning post-departure divisions of fees.[8] It is the same concept expressed in ER 1.17 (Sale of Law Practice) where work will presumably be done by a "new" lawyer and where the client only needs to be notified of the transaction.

It is wise to remember that the rule against fee-splitting was designed and intended to prevent the brokering of legal sources—the forwarding of cases to lawyers not because of their ability to handle the client's problems, but because they paid the highest referral fees to the referring lawyer. The new rules departing lawyers concerning fees to be paid in the future.

endnotes

1. Lynda Shely, *Law Firm Changes: The Ethical Obligations When Lawyers Switch Firms,* PROF. LAW. (2006 Symposium Issue), at 69.
2. See ER 1.5(e), Rule 42, ARIZ.R.S.CT.
3. Arizona Ethics Op. 9904 (Fees; Division of Fees with Lawyers), May 1999.
4. *See* Arizona Ethics Op. 04-02 (March 2004) for a discussion of what "joint responsibility" means in this context.
5. GEOFFREY C. HAZARD, JR. AND W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE RULES OF PROFESSIONAL CONDUCT, § 47.5 (3d ed. 2000) (former employers have legitimate business and financial concerns where former employees continue to serve former firm clients: as long as total fee charged is reasonable, contractual arrangements for dividing resulting fees are not within the purview of ER 1.5(e)); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47, cmt. g (under rule similar to new ER 1.5(e), law firm may share fees in making payments to former employees under a separation agreement). *See also Norton Frickey, P.C. v. James B. Turner, P.C.,* 94 P.3d 1266 (Colo. App. Ct. 2004) and cases cited.
6. *See, e.g., Tomar, Seliger, Simonoff, Adourian & O'Brien, P.C. v. Snyder,* 601 A.2d 1056 (Del. Super. Ct.) *appeal refused,* 571 A.2d 788 (Del. 1990). *But see* the recent case of *Law Office of Gary Green, P.C. v. Morrissey,* 210 S.W.3d 421 (Mo. Ct. App. 2006) (agreements between lawyers in same firm regarding post-departure fee splits must comply with Missouri equivalent of ER 1.5(e); no mention made of new provision in the comments).
7. *Piaskoski & Associates v. Ricciards,* 686 N.W. 2d 675 (Wis. 2004); *Walker v. Gribble,* 689 N.W. 2d 104 (Iowa 2004).
8. *Anderson, McPharlin & Connors v. Yee,* 37 Cal. Rptr. 3d 627, 630 (Ct. App. 2005).