Sharing Fees, Unintended Consequences

Agreements between lawyers concerning how they apportion fees they earn from the practice of law occasionally result in unintended consequences, particularly when lawyers in different firms refer cases to each other, or when lawyers disassociating from each other attempt to provide how a fee earned in the future is to be divided among them. These situations often call for a look at one of the ethical rules concerning fees, as found in Arizona's Rules of Professional Conduct.[1]

Lawyers who are in the same firm have the freedom to agree on how they share firm profits, including provision for payments to a departing lawyer[2] or to a deceased partner's estate.[3] That leeway is not available to lawyers who are not in the same firm, so it's important to determine initially whether the arrangement being considered is or is not between lawyers who are in "the same firm" as expressed in ER 1.5(e). Lawyers who practice in office-sharing groups are generally not considered to be practicing in the same firm[4] and may therefore be required to comply with the fee-sharing provisions set forth in ER 1.5(e), requiring them either to (1) divide the fee in proportion to the services each performs or (2) accept joint responsibility for the representation. The client also must agree to the arrangement, in a writing signed by the client.

A referring lawyer can't "sit on his hands" and count on the receiving lawyer to meet the requirements of the fee-sharing rule.

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

David D. Dodge provides consultation to lawyers on legal ethics, professional responsibility and standard of care issues. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court, and he practices at David D. Dodge, PLC in Phoenix.

Fee splitting or sharing used to require that the fee be apportioned according to the amount of services performed by each lawyer. This was eventually expanded to allow for different proportions as long as the lawyers involved accepted joint responsibility for the representation. This was meant to encourage referrals to lawyers with skills and experience who were better able to serve the interests of the referring lawyers' clients. Most of the cases today involving this rule concern disputes over referral fees and post-departure fee-sharing disagreements.

Another category of lawyer association is the arrangement referred to as "of counsel." A lawyer who is "of counsel" to a firm is generally considered, in Arizona at least, to be a member of the firm for purposes of ER 1.5(e), and therefore not subject to its constraints.[5] This was the conclusion reached in a recent Arizona ethics opinion that overruled a previous view on the issue that had been in effect for more than 30 years.[6] The opinion first discusses the meaning of "of counsel," recognizing that it might take one of several forms, but requiring that it always be evidenced by a "close, personal, continuous and regular relationship" with the parent firm. Such factors as use of the same staff, telephone number, file room, billing and conflict systems would be considered relevant. If the relationship doesn't qualify, regardless of the title used, the requirements of ER 1.5(e) must be honored.

Once you've determined that the arrangement proposed is not between lawyers in the same firm, it's just as important to ensure ER 1.5(e)'s provisions are followed to the letter. A recent case from Illinois[7] ruled that a referring lawyer who failed to get the client's written consent to a fee-sharing agreement could not recover against the receiving lawyer. The court said that under that state's version of ER 1.5(e) a referring lawyer can't "sit on his hands" and count on the receiving lawyer to meet

—continued

the requirements of the fee-sharing rule, even if the receiving lawyer promises to do what's required. The court held that each lawyer has the responsibility to get a written agreement to the arrangement, signed by the client, and that the referring lawyer can't recover a share of the fee unless that happens.[8]

Separate from the requirements of the rules of professional responsibility, there are occasionally other issues that arise in the fee-sharing context. An example can be found in a recent case from Pennsylvania[9] where it was held that a law firm could not recover against a former associate's new firm for the lawyer's failure to honor a post-departure fee-splitting contract with his former firm. The associate, who took a wrongful death case with him when he left the firm, agreed to give the firm two-thirds of the fees ultimately earned from the representation. Several members of the court, in concurring opinions, expressed concern over the failure of the majority to consider whether the lawyer's former firm had a quantum meruit claim against the successor law firm, which apparently got to keep the entire fee generated. The majority held that the claim for fees could only be pursued against the former associate, who had died pending the dispute. In Arizona, a charging lien asserted by the associate's former firm might have resolved the issue.[10]

Regardless of the contexts in which they appear, fee-sharing arrangements need to be carefully drawn and executed and, when part of an agreement with a departing lawyer, should probably be disclosed to that lawyer's new firm with a request that the new firm acknowledge the arrangement. Making the agreement conditioned on its acceptance by the departing lawyer's new firm might be considered.[11] In other instances, particularly with referral fees, lawyers should err on the side of caution if there is any question whether the agreement is truly one between lawyers "in the same firm."

endnotes

1. ER 1.5(e), Rule 42, Ariz.R.S.Ct., as amended effective Jan. 1, 2016.
2. *Post-Departure Fee Splitting Agreements*, Ariz. Att'y (April 2007) at 6.
3. ER 5.4(a)(1), Ariz.R.Prof. Conduct.
4. There's a good discussion of the cases dealing with office-sharing arrangements at ¶ 41:705, ABA/BNA Lawyers' Manual on Professional Conduct.
5. *Id*. Note that there does not seem to be much agreement on this point among the jurisdictions.
6. Ariz. Ethics Op. 16-01 (Of Counsel; Fee Splitting) (April 2016), withdrawing Op. 86-03 (Fees) (March 1986).
7. *Naughton v. Pfaff*, No. 2-15-0360 (Ill. Ct. App., 2d Dist., March 31, 2016).
8. A collection of cases where failure to meet the technical requirements of the rule affected the enforceability of fee-sharing agreements as between lawyers is found at Geoffrey C. Hazard, W. William Hodes & Peter R. Jarvis, The Law of Lawyering § 9.20 n.95 (4th ed. 2014); *see also* Annotated Rules of Professional Conduct, ABA Center for Professional Responsibility (8th ed. 2015) at 98.
9. *Meyer, Darragh et al. v. Law Firm of Malone Middleman*, No. 8 WAP 2015 (Pa. April 25, 2016).
10. *Enforcing Your Right To Get Paid*, Ariz. Att'y (Oct. 2005) at 26.
11. For further reading on this subject, *see* Ariz. Ethics Op. 99-04 (Fees; Division of Fees With Lawyers) (May 1999); and Lynda Shely, *Law Firm Changes: The Ethical Obligations When Lawyers Switch Firms*, Prof. L. (2006 Symposium Issue) at 69.