



Fee-Splitting Cautions

Has a lawyer sent a client of hers to you for representation? You should know that new rules regulate the payment of referral fees in that situation.

Referral fees have been common in the personal injury field for many years. To the extent they encourage lawyers to refer clients to other lawyers better able to handle a specific legal problem, referral fees arguably further the public's right to the best representation available.

ER 7.2¹ (Advertising) provides that a lawyer shall not give anything of value to a person (which would include another lawyer) for recommending the lawyer's services. Of course, this is the situation whenever a lawyer not in your firm recommends and sends to you a person, often the forwarding lawyer's client, for legal services.

However, ER 1.5(e) (Fees) provides that a division of a fee between lawyers who are not in the same firm may be made as long as three tests are met.

First, and most obvious, the total fee paid by the client must be reasonable. No lawyer can charge or participate in the charging of an unreasonable fee.²

Second, the client must agree to the participation of all the lawyers involved, and must do so in a writing signed by the client. Note that the client does not have to be advised of the way the fee is divided.³

Third, each lawyer receiving any portion of the fee must assume joint responsibility for the representation.

These provisions constitute a change from the ethical rules regarding referral fees as they existed prior to Dec. 1, 2003. Prior to that date, ER 1.5(e) allowed lawyers to divide fees in proportion to the services performed by each lawyer or, by written agreement with the client, when each lawyer assumed joint responsibility for the representation. What "joint responsibility" meant was not that clear.

The new rule eliminates any notion that a lawyer has to work on the case in order to collect a referral fee, and makes it easier for a lawyer to refer a client to another lawyer who is presumably better able to handle the client's matter—and to receive a referral fee in so doing.

What is meant by "joint responsibility"? An opinion of the Arizona Committee on the Rules of Professional Conduct⁴ sheds light on that question. After citing a num-

ber of examples of what other jurisdictions require, the opinion concludes that under Arizona's new ER 1.5(e), the requisite "joint responsibility" exists if the referring attorney assumes financial responsibility for any malpractice that occurs during the course of the representation. The opinion further states that a referring attorney may, but is not necessarily required to, have an ongoing supervisory responsibility or other "substantive involvement" in the matter.

The new rules and Opinion No. 0402 adopt a more realistic approach to referral fees between lawyers than was found in the old rules and in the old Code of Professional Responsibility. Together, they encourage lawyers to refer matters to colleagues better able or equipped to handle the representation and, with the heightened disclosure requirements concerning the participation of the lawyers involved, they benefit the client as well. **RD**

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Ethics Opinions are available at www.myazbar.org/Ethics



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endnotes

1. Arizona Rules of Professional Conduct, Rule 42, ARIZ.R.S.Ct.
2. ER 1.5(a).
3. Compare this provision with ABA's Model Rule 1.5(e), which requires that the client agree additionally to "the share each lawyer will receive." This clause was deleted by the Arizona Supreme Court when it adopted the new ethics rules.
4. See Op. No. 0402 (March, 2004), Committee on the Rules of Professional Conduct, State Bar of Arizona.