

With Fee Sharing, Strict Compliance is Required

by
Mary L. Galvin, Assistant Director
Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Minnesota Lawyer* (July 23, 2001)

The California appellate court has recently addressed the enforceability of a fee sharing agreement and has determined that the failure to strictly comply with the applicable ethical rule precluded an attorney from enforcing the agreement against another attorney. In *Chambers v. Kay*, 2001 WL 433519 (Cal. Ct. App. April 30, 2001), the court held that the attorney's failure to obtain the client's written consent to a fee sharing agreement between two attorneys who were not members of the same firm made the agreement unenforceable.

The parties to the fee dispute were two attorneys who had separate law practices. The plaintiff rented a conference room in the defendant's office building, and used defendant's office services. The defendant attorney was retained by a client to bring a sexual harassment lawsuit, and asked the second attorney, the plaintiff in the later fee dispute case, to assist. The attorneys agreed in writing that the second attorney (the plaintiff in the later fee dispute) would receive one-sixth of the contingency fee. The defendant notified the client of the agreement by sending a copy to the client, but did not ask the client for her written approval. A dispute later developed between plaintiff and defendant and defendant removed plaintiff from the case, but promised to pay him the contingency fee they agreed upon.

The client's case went to trial and resulted in a large damages award.

Despite the earlier agreement, the attorney who actually tried the matter refused to pay the second attorney the one-sixth fee that had been agreed upon. The plaintiff attorney then sued for breach of contract. The trial court granted summary judgment in favor of the defendant attorney as to the breach of contract claim and the appellate court affirmed.

The California appellate court noted that the applicable California rule prohibits any division of legal fees with another lawyer who is not a member of the same firm unless the client consents in writing to the division of fees. The court noted that the purpose of the rule was to protect the public and to promote respect and confidence in the legal profession.

Because the attorneys had failed to obtain the client's written consent, the fee splitting agreement violated public policy and was unenforceable. (It is worth noting that the court held that the plaintiff attorney was entitled to obtain quantum meruit recovery for his services.)

The Minnesota Supreme Court also has ruled on this issue and also requires close compliance with the applicable rule. In *Christensen v. Eggen*, 577 N.W.2d 221 (Minn. 1998), two attorneys agreed to a fee splitting arrangement on a malpractice claim. Initially, the attorneys planned to share the responsibility on the case with one attorney acting as a consulting attorney during the potential litigation. They agreed that the referring attorney would receive one-third of the total fees that the actual trial attorney received from the case. The client was neither told of the share that each attorney would receive of the fees, nor did he

consent to the fee split and joint representation in writing.

However, the referring attorney died before the majority of the pretrial work was done and two years prior to the actual trial. It was undisputed that the deceased attorney performed no actual work on the case other than making the referral. The client was awarded approximately \$1.4 million in the malpractice case and the deceased attorney's widow attempted to recover the approximately \$132,000 in attorney fees that would have been paid to her husband under the agreement.

The Minnesota Supreme Court noted that the applicable rule of professional conduct is Rule 1.5(e), which provides that a division of fee between lawyers who are not in the same firm may be made only if:

- 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;
- the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and
- the total fee is reasonable.

The court determined that because the client was not informed of the share of the fees that each attorney would receive and did not consent to the fee split and joint representation in writing, the fee sharing agreement was inconsistent with public policy and unenforceable.

The court noted that the purpose of the rules governing fee splitting agreements is to protect the client's best interests. Each client has a right to choose the attorney she prefers and to be knowledgeable about the specifics of her case, especially with respect to the payment of fees. To permit attorneys to proceed with fee splitting arrangements without the client's written consent or knowledge would put the client at a severe disadvantage in the lawyer-client relationship.

In summary, both Minnesota and California rules and caselaw require that attorneys strictly comply with the applicable fee splitting rules. Under rule 1.5(e), MRPC, the client must be informed and give consent to the arrangement. Attorneys also should note that both the referring and receiving attorneys are potentially liable in malpractice as well as in terms of professional discipline to manage the client's case appropriately.

Rule 1.5(e), MRPC, is intended to provide incentive for a referring attorney to refer matters to a competent attorney rather than to the attorney who would pay the highest referral fee.