

## New Focus on Referral Fees

Two recent decisions by the Minnesota Supreme Court have renewed interest in and focus on the ethical aspects of attorneys referring cases to other lawyers in a different firm, and the ability to receive a fee or a portion of a fee in return, i.e., fee splitting and the payment of referral fees. In *In re McCollister*,<sup>1</sup> the supreme court suspended for 30 days an attorney for “referring potential clients to a lawyer outside his firm and receiving payments of referral fees on some of those matters without remitting the fees to his firm.” The lawyer was found to have violated Rule 1.5(e) and 8.4(c) (misrepresentation, dishonesty), Minnesota Rules of Professional Conduct (MRPC). A corresponding matter against the second lawyer was pending at the time this column was written.<sup>2</sup>

Rule 1.5(e), MRPC, is the rule governing the division of fees between lawyers not in the same firm. It allows such a division of fees if the division is 1) in proportion to the services each lawyer actually performed on the matter, or 2) if each lawyer assumes joint responsibility for the representation. The latter situation is the only one in which what is usually deemed a true referral fee is permitted. A referral fee arrangement in common usage would be a situation in which an attorney refers her already existing client to another lawyer to

perform particular legal services (maybe the first lawyer does not do litigation and her client needs a trial lawyer, or the first lawyer is inexperienced in an area of law and seeks a more qualified attorney to handle the client’s case) and in return will receive a portion of the fees collected by the second lawyer, essentially just for having referred the client and doing nothing more.

In both situations (division of fees in proportion or by joint responsibility), Rule 1.5(e) requires that the client must agree to the arrangement, including being told the share each lawyer will receive, the agreement must be confirmed in writing, and the total fee must still be reasonable. Failure to comply with these requirements has been found to void and make unenforceable as against public policy any fee-sharing understanding between lawyers in Minnesota.<sup>3</sup>

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In the recent public cases discussed above, the fact that referral fees were being paid was not so much the issue as were the steps that the lawyers undertook to not disclose the referral arrangements to *McCollister*’s law firm, thus allowing the referring lawyer to retain the entire referral fee as if he had been a solo practitioner. The retainer agreement that the second attorney had with the clients informed the clients generally that fees may be shared with another lawyer, but did not disclose that the other attorney was not a member of the same firm and did not set forth the percentage division of fees between the two attorneys, as required by Rule 1.5(e).

### Requirements

Lawyers who are not in the same firm who divide fees according to their actual share of the work (the so-called in-proportion method) have not participated in a referral fee; rather they are fee splitting or fee sharing; perhaps cocounsel would be a more accurate description of such an arrangement. Lawyers may use the services of and pay lawyers outside their firm for many reasons: heavy work

load, special expertise, etc. and there is no issue in doing so as long as the client is informed and approves the arrangement. If the client has not approved the use of the services of a lawyer from outside the principal lawyer’s office/firm, then providing some or all of the client’s file to the second lawyer is in all likelihood improper disclosure of confidential information by the principal lawyer. Minnesota’s Rule 1.6 (Confidentiality) permits disclosure of confidential client information if such disclosures are impliedly authorized in order to carry out the representation; hiring an attorney from outside a lawyer’s firm should not be considered such a necessity—thus client consent remains essential.

The only way in which what is usually considered a true referral fee is permitted is if both lawyers assume joint responsibility for the representation. As indicated above, the first lawyer refers her client to another lawyer—the lawyer with more experience in the particular area of law involved in the case or greater litigation experience—and then shares in the fee of the matter despite personally performing no further legal services. Personal injury litigation is perhaps the most common area of law for such referrals, the classic arrangement being that the referring lawyer receives “a third of a third” of the fee, or one-third of the contingent (one-third percentage) fee that the lawyer will receive who actually handles and resolves the case, if there is in fact a recovery. The client’s informed written approval is necessary for the arrangement, but since the client’s overall fee should not be affected, most clients will not object and will agree.

The rule does not directly specify whether the written agreement must be made prior to the referral and the second attorney commencing representation. Thus some attorneys have attempted to argue that informing the client at the time of settlement of a case satisfied the rule requirements. Left unanswered in such a situation is what occurs if the client does not agree. The better reading of the rule is that the referral agreement must be approved by the client in writing before the second attorney actually becomes involved.<sup>4</sup>



MARTIN COLE is director of the Office of Lawyers Professional Responsibility. An alumnus of the University of Minnesota and of the University of Minnesota Law School, he has served the lawyer disciplinary system for 25 years.



### Reciprocal Agreements

The Rules of Professional Conduct permit an additional kind of referral agreement, that being a reciprocal referral agreement between lawyers or between a lawyer and a nonlawyer professional (maybe a chiropractor?). Rule 7.2, MRPC, is normally thought of as an advertising rule, but also contains within it Rule 7.2(b)(4), which prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services (meaning situations other than Rule 1.5(e) referral agreements). Rule 7.2(b)(4) does allow a lawyer to refer clients to another lawyer or nonlawyer professional pursuant to an agreement that provides for the other person to refer clients to the lawyer, if such a reciprocal agreement is not exclusive and the client is informed of the existence and nature of the agreement. Note that since no portion of the fees charged to the client is involved in such an arrangement, notice to the client is sufficient and written approval is not required.

### Conclusion

Properly employed, referral-fee and other fee-sharing agreements can be a benefit to clients and to both attorneys involved. The requirements of Rule 1.5(e) and Rule 7.2(b) are not just a technical nuisance. It is critical that lawyers comply with them fully if the lawyers wish to ensure that their agreement will be enforceable. And recall that the client's written consent is critical to any fee-sharing agreement. ▲

### Notes

<sup>1</sup> 830 N.W.2d 440 (Minn. 2013).

<sup>2</sup> See, *In re Petition for Review of Panel Decision against Respondent, Panel Case No. 35104, A13-1912* (Minn. 08/06/2014). Slip op. at <http://mn.gov/lib/archives/supct/2014/OPA131912-080614.pdf>

<sup>3</sup> *Christensen v. Eggen*, 577 N.W.2d 221 (Minn. 1998), in which the referring lawyer died before any agreement was formalized. The widow's attempt to enforce an oral understanding was rejected.

<sup>4</sup> See, e.g., *Saggese v. Kelley*, 837 N.E.2d 699 (Mass. 2005).

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