

RISK MANAGEMENT CORNER

Lawyer-to-Lawyer Fee-Splitting Arrangements

by John J. Brandt

Prior to a 2000 change in Virginia's Rules of Professional Conduct, an attorney could not ethically receive a fee for referring a client to another attorney unless the referring attorney participated in the work effort and remained responsible to the client. Now, a Virginia attorney may ethically participate in a "division of fees" for doing nothing other than referring a client to another lawyer. Furthermore, an attorney no longer assumes ethical responsibility for the lawyer accepting the referral. As might be expected, there are certain conditions which must be met. The applicable disciplinary rule is Rule 5(e) which reads as follows:

A division of a fee between lawyers who are not in the same firm may be made only if:

- The client is advised of and consents to the participation of all the lawyers involved;
- The terms of the division of the fee are disclosed to the client and the client consents thereto;
- The total fee is reasonable; and
- The division of fees and the client's consent are established in advance of the rendering of legal services, preferably in writing.

In reviewing Legal Ethics Opinion 1739, which analyzed 5(e), the Committee on Legal Ethics reasoned that the change was made to "encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement."

So, if Joe Client comes to Attorney Smith with a serious bodily injury case

and wishes Smith to represent him, Smith may decide to refer Joe to Lawyer Jones—which before the rule change seemed counterintuitive to lawyers who were interested in a contingent fee for a good case. However, Attorney Smith—particularly if he is concerned about his own competency to handle a sizable bodily injury case—now can refer the case to Lawyer Jones, who has extensive experience in bodily injury cases, and it becomes a win-win-win situation: Joe Client obtains a top-flight attorney; Attorney Smith avoids the ethical hurdle of not competently representing a client (Rule 1:1); and Lawyer Jones earns a fee. Attorney Smith also achieves monetary success by receiving a referral fee and is not required to perform any legal services for the client. Furthermore, he has no ethical responsibility for the new lawyer's conduct in representing Joe Client. Thus, Smith may earn as much as fifty percent for simply referring a client to another attorney.

There are four conditions which must be met to pass the disciplinary rules' muster: Joe Client must agree, preferably in writing, to the roles of the lawyers; to the fee-splitting; to the reasonableness of the overall fee; and in advance to the legal work. Typically, this agreement is memorialized in the new attorney's representation agreement; i.e., "Joe Client agrees that his 33 1/3 percent contingent fee to Lawyer Jones will be divided: 25 percent to Attorney Smith and 75 percent to Lawyer Jones, to be paid after the case settles or results in a plaintiff's verdict/judgment which is eventually paid by the defendant or his/her insurer."

There can be pitfalls. Attorney Smith should be cautious to refer Joe Client to a very competent attorney. If not, Attorney Smith is exposed to a potential civil lawsuit. Perhaps it is better for

Attorney Smith to refer Joe Client to three possible attorneys who all agree in advance to a division of fees. This way, the final choice of lawyers is Joe Client's and not



Attorney Smith's. In a contingency fee case, such as Joe Client's matter, if Lawyer Jones loses the case, Attorney Smith obtains no referral fee at all because of Rule 7.3(d).

If you decide to seek a referral fee, nothing in the disciplinary rules limits you to plaintiff bodily injury cases. You may seek a referral fee for a traffic case referral; the defense of a contract action; or the prosecution of a divorce action.

Of course, nothing in the rules requires that Attorney Smith be compensated in some way for referring Joe Client to a good lawyer. Some attorneys are pleased to be able to find a competent and well-qualified attorney for their client and ask no referral fee. They are happy if the new attorney is knowledgeable and does his or her best for the client. In such a case, Attorney Smith hopes Joe Client will feel well-represented and will retain Smith for continued representation on other matters which Attorney Smith feels comfortable handling.

The new disciplinary rule seems to send this message: Always refer a client to another attorney if you feel inadequate and you believe another lawyer can better represent your client. You are entitled to a "referral fee," as described above, for using good judgment, and it becomes a win-win-win situation for the client and attorneys.