

# Three's a Crowd: Avoiding Problems with Third-Party Payers

by Wendy Inge

You take a new domestic case. It has its twists and turns, including mounting legal fees that are not being paid by the client. After several communications with the client about the need to pay the fees so that you can continue your efforts to protect her and get her a fair share of the marital estate, the client indicates a relative might be willing to help with the fees and costs. How do you respond?

Headline: *Virginia Lawyer's Weekly* 10/31/2011: Fairfax lawyer hit for fraud, legal malpractice and Attorney is tagged for malpractice, fraud- \$524,975.

*A Fairfax lawyer has been hit with a malpractice verdict in a claim brought by a divorce client who argued he convinced her to take an unfavorable settlement. And in the same case, her brother-in-law won a fraud verdict, including a punitive award, because the lawyer borrowed money to prosecute the case, then paid himself back fees, according to the lawyer who represented both plaintiffs.*

*Three months before trial, the defendant attorney spoke telephonically with his client's brother-in-law, plaintiff Wright, and misrepresented what work he intended to do on the case so as to induce the brother-in-law to immediately wire him \$150,000. The defendant promptly took for himself \$90,000 of these funds for what he alleged to be past, unpaid attorney's fees and costs.*

*The jury found fraud in the inducement by the attorney and returned a verdict against him for \$125,000 in compensatory damages, \$125,000 in punitive damages, and interest at 6 percent from the date of the divorce trial, March 2009.*

*The jury also awarded the former client \$206,500 plus interest from March 2009, on her claim of legal malpractice.*

## The Rules

For lawyers in private practice collecting fees from clients is an ongoing concern. Just like in the above case, when the client can't pay the bill, a third party such as a parent, other relative, or a friend who is willing to help the client may be the solution. The RPCs under **Rule 1.8(f)** permit a lawyer to accept fees from a third party provided the client consents, the lawyer continues to protect the client's confidential information, and the lawyer recognizes that the third party is not the client and should not direct the representation. And therein lie the problems. **Rule 1.8(f)** states:

(f) *A lawyer shall not accept compensation for representing a client from one other than the client unless:*

(1) *the client consents after consultation;*

(2) *there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and*

(3) *information relating to representation of a client is protected as required by Rule 1.6.*

## The Ethical Pitfalls

Are there ethical pitfalls here? Yes. The lawyer needs to focus on the requirements of **Rule 1.8(f)** before accepting the fee from the third party. Let's break down some of the issues the lawyer should be aware of when a third party will be paying the bill.

### • Conflict of Interest Affecting Lawyers

**Professional Judgment:** Before obtaining client consent the lawyer must determine whether there is a significant risk that the lawyer's representation will be materially limited by the lawyer's responsibility to the relative or friend paying the fee. Often the payer has a potential interest in minimizing the expense of the representation and this

issue should be discussed with the client. Will it affect the representation, and if so, how? Will the lawyer's representation be conditioned upon the payer's willingness to pay fees? These issues should be discussed with the client so the client understands the impact before the client consents. In the event the lawyer's analysis of the payer's conditions reveals that payment by the third party will interfere with the lawyer's ability to represent the client in a manner consistent with the lawyer's best judgment and consistent with the client's goals and objectives, it could be inappropriate to seek consent from the client.

### • Confidentiality and a Third Party

**Payer:** A third-party payer's desire or need to monitor the progress of the representation must be considered. Even among friends and relatives, few are willing to blindly pay another's legal fees without some degree of accountability. The payer may demand status reports as a condition of providing financial assistance to the client. When dealing with a third party, who is paying the bill but is not the client, the lawyer must be careful to continue to maintain confidentiality and the evidentiary (attorney-client) privilege (ACP). The duty of confidentiality under **Rule 1.6** applies to all information received by the lawyer relating to the representation, regardless of its source, and includes information protected by ACP. ACP applies generally only to information communicated by the client to the lawyer; the ethical rule of confidentiality applies to all situations in which a client's "confidences" might be disclosed. Thus, when talking to a relative who may be willing to pay the bill the lawyer needs to continue to protect both confidentiality and ACP. ACP can protect a lawyer's communi-

cations with the client (and in certain very limited circumstances, their agents), but only if the communication relates to the lawyer providing legal advice and if the communication is not later shared with anyone other than the client. Lawyers forget that even having a client's relative present during an otherwise protected communication can destroy the privilege. Under **Rule 1.6**, a lawyer can share/disclose confidential information of a client only with the consent of the client or, in certain circumstances, upon order of a court. Thus, the lawyer and the client need to discuss confidentiality and ACP so that the client understands and avoids discussing details of the representation, even with the third-party payer. The lawyer needs to limit the confidential information to be shared with the payer to only what is necessary and consented to by the client. The lawyer should make it clear to both parties, at the outset of representation, that disclosures cannot include any information that will waive attorney-client privilege. Any information provided will be tailored to accommodate the payer's desire for accountability without risking waiver of attorney-client privilege. In some representations, this may require the lawyer to generate two sets of billing statements; a detailed invoice for the client, and a more general progress-oriented statement for the payer.

• **Clear Communication:** When accepting fees from a third-party, should there be a fee agreement with the payer? Yes. The lawyer needs to be clear in communicating with the client and the payer what the fees will be used for and the terms and conditions of the fee arrangement. The agreement should also make it clear to the payer that he or she is not the lawyer's client. If we consider the facts from the court case above, the lawyer claimed the fees were to be used to pay outstanding bills so the lawyer could continue to work on the matter, and the brother-in-law claimed the fees were to be used to retain an expert and for additional discovery. One thing is clear: it would have

been in everyone's best interest for the lawyer to have documented what the lawyer and the brother-in-law agreed to regarding the amount and the use of the fees. Finally, some may think that the simple solution here is to have the client procure the financial assistance from the payer with as little involvement as possible from the lawyer. However, even where the lawyer's contact with the third-party payer is minimal, communication problems and concerns under **Rule 1.8(f)** can still arise. Consider the below example from a Minnesota disciplinary complaint:

*The lawyer had been retained by an adult son to represent him in an emergency post-decree visitation motion. The motion sought to terminate the son's visitation rights with his children and the son was without the ability to pay the lawyer's fee. Because the son still owed the lawyer for fees incurred in the divorce, the lawyer declined to represent the son in the visitation motion without first being paid a \$2,500 retainer. The son later called his father and related the lawyer's demand for a retainer. The father confirmed the retainer amount by telephone with the lawyer and provided the lawyer a \$2,500 check. The firm provided the father with a receipt for the funds.*

*Three days later, the son terminated the lawyer and demanded that the unused portion of the retainer (i.e., \$2,250) be refunded to the son. The lawyer refunded the retainer to the son, who then failed to remit any of the funds to his father. The father later filed an ethics complaint against the lawyer for refunding the balance of the retainer to the son instead of the father. The lawyer said it was his understanding that the funds were a loan to the son.*

*"Bench Bar of Minnesota" (2/2005) by Kenneth Jorgensen.*

While the ethics complaint against the lawyer was ultimately dismissed, the lawyer could likely have avoided this complaint by clearly documenting and communicating with the client and the father what his understanding was regarding the funds. Additionally, this complaint may involve release of funds in violation of **Rule 1.15(b)** where both a

client and a third party claim ownership of the funds.

• **Other Rules that Apply:** Finally, regardless of who the fee comes from, be aware there are other ethics rules that should be considered and that continue to apply when handling fees, specifically, **Rules 1.5 Fees**, and **1.15 Safekeeping Property**. Regardless of the source, client or third-party payer, the trust accounting rules continue to apply to the handling of unearned fees. And as the disciplinary example above illustrates, **Rule 1.15(b)** can easily present problems if the client terminates the representation and wants the unused fees to be returned to them rather than the payer. A few facts one way or the other can make a big difference in determining to whom the lawyer should return the unused portion of the fees. Was it a loan by the father to the client? Was it specific to this representation? Who does that lawyer return them to? The lawyer must be careful not to violate **Rule 1.5(b)(4)** and **(5)** in refunding the fees.

Getting paid is but one challenge among many in the practice of law. And while a third-party payer can be a viable source of payment, the lawyer needs to clearly document the terms of the fee arrangement and should follow **Rule 1.8(f)** before accepting the payment from the third party. Hopefully, the insights in this article will help you safely navigate such an arrangement involving fees.



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