Issues raised by working with co-counsel

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Regardless of your area of practice, most lawyers have received (or sent) an email or telephone call proclaiming: "I have a case I want to refer to you." Of course, any size law practice can benefit tremendously from having a healthy amount of "referral" work from other attorneys and law firms. These requests may come from a colleague down the street in your city or town or from a law school friend or a connection from another state. Whatever the source, these referrals are made for a variety of practical and ethical reasons.

Irrespective of the reason for the referral, lawyers should exercise discretion and give careful consideration to the risks presented by referral business before agreeing to share clients and fees, i.e., agreeing to "share and share alike." This is true because while new business development is an important component of any law practice, and referral cases can contribute to a firm's economic viability, the law imposes strict and sometimes complex rules on "sharing" clients. Such rules are applicable to both the referring and the receiving lawyer alike. Traps for the unwary range from ethics issues arising from taking prohibited or unauthorized fees to malpractice liability relating to the referral of a matter to a lawyer who mishandles the case. Making matters more complicated, rules in different jurisdictions vary significantly, so referrals that are allowed in the referring lawyer's jurisdiction may be banned in the receiving lawyer's jurisdiction.

Because of the complexity and diversity of the rules found in various jurisdictions, this article will examine only the rules set forth in the ABA Model Rules of Professional Conduct ("Model Rules"). The Model Rules recognize that referrals between lawyers occur for a variety of reasons, each of which can implicate ethical considerations broader than the economics of fee sharing, and each of which warrant different consideration. For example, the Model Rules distinguish between these referral situations:

- A case that involves legal issues outside the referring lawyer's area of expertise. (Model Rule 1.1 "Competence").
- Where a client requires legal services in another state. (Model Rule 5.5 "Unauthorized Practice of Law").
- When the referring lawyer has a conflict with a current or former client. (Model Rule 1.7, 1.8, 1.9 "Conflict of Interest").
- Where a referring lawyer is too busy or otherwise lacks the resources to handle a particular case. (Model Rule 1.3 "Diligence").

In addition to the Model Rules, the "comments" to each rule provide guidance. Model Rule 1.1 provides a good starting point in this analysis:

Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

Model Rule 1.1, Comment 6. In other words, not only must the client be consulted and consent be obtained, the referring lawyer must reasonably believe that the receiving lawyer is competent, and that his or her services will contribute to the representation. Thus, the referring lawyer would be advised to document his/her file with the information that leads to the referral including the competence and need for the receiving lawyer.

After the referral is made, fee sharing between lawyers can be ethically problematic. Model Rule 1.5(e) addresses the most common "referral fee" situation, and provides that lawyers who are not in the same firm may share fees only if the division of the fee is "proportionate to the services performed" by each lawyer, or both the referring and accepting lawyer assume "joint responsibility for the representation." Model Rule 1.5(e)(1). Moreover, the total fee paid must be reasonable and the client must agree to the arrangement, in writing, including "the share [of the total fee] each lawyer will receive." Model Rule 1.5(e)(2)-(3).

While these requirements seem relatively straightforward, again, the "comment" to this fee sharing rule is instructive and should be consulted for further guidance:

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

Model Rule 1.5, Comment 7. An important consideration in "fee splitting" cases is joint responsibility. The attorney who sends the case to another lawyer to handle (doing no work on the matter but entitled to a fee from any recovery), may not simply rely on the competence of co-counsel to avoid liability. Because each attorney "assumes joint responsibility," both may be sued for the malpractice. As such, irrespective of fee issues, much care should be taken in deciding who you will refer a case to and in crafting the terms and conditions of the "fee split."

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Another ethical consideration involves the lawyer advertising rules and what are referred to as "reciprocal referrals." Model Rule 7.2(b) prohibits a lawyer from giving "anything of value to a person for recommending the lawyer's services." Of course, almost every rule has exceptions, and an attorney may ethically enter into reciprocal referral arrangements with another attorney or a non-attorney professional so long as the arrangement does not violate any other Model Rule, the agreement is not exclusive, and the client is informed of the nature of the agreement. Model Rule 7.2(b)(4) and Comments 5 and 8. Additionally, any fee sharing under these types of "reciprocal" agreements must comply with the provisions of Model Rule 1.5(e), discussed above.

Finally, the Model Rules generally prohibit fee splitting with non-lawyers. This limitation is meant to protect the lawyer's professional independence of judgment. Model Rule 5.4 extends to any agreements with non-lawyer "runners" to solicit clients in exchange for a share of the fee.

In conclusion, to "share and share alike" with lawyers from other firms can greatly benefit the attorneys and their client alike. However, great care should be taken in understanding the rules that govern these relationships and in selecting the lawyers to whom to send or receive referrals. Reviewing the Rules of Professional Conduct and related comments in your jurisdiction when that call referring a case comes in can make referral work…work.

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