

# GETTING BY – WITH A LITTLE HELP FROM OUR FRIENDS (FEE SHARING OPPORTUNITIES AND OBLIGATIONS)

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LAWYERS OFTEN LEAN ON EACH OTHER; THEY OFTEN ASK OTHER LAWYERS TO SERVE AS LOCAL COUNSEL OR FOR SECOND OPINIONS. MANY TAKE BIGGER STEPS, SETTING UP JOINT REPRESENTATIONS AS CO-COUNSEL. SOME LAWYERS EVEN ADVERTISE THEIR PRACTICE BY FOCUSING ON OTHER LAWYERS AS MUCH AS TO THE PUBLIC. THOSE LAWYERS HOPE THEY HAVE EARNED A PROFESSIONAL AND COLLEGIAL REPUTATION AMONG THEIR PEERS, ESPECIALLY IN COMPLEX PRACTICE AREAS. COMMON EXAMPLES OF JOINT REPRESENTATION OCCUR IN TORT CLAIMS ON BEHALF OF PLAINTIFFS, BUT JOINT VENTURES CAN BENEFIT LAWYERS – AND THEIR CLIENTS – IN ANY AREA OF THE LAW.

This article offers references to court rules and judicial decisions to help lawyers navigate the ethical risks and opportunities when sharing fees with other lawyers not in the same firm.

## Guidance from the Rules of Professional Conduct

Rule 4-1.5(e) and Rule 4-7.2, and their Comments, provide key guidance. Rule 4-1.5(e) lets lawyers from different firms share fees, but sets three conditions: (a) the total fee remains reasonable; (b) the client is aware of and agrees to the lawyers' plan – which must be confirmed in writing; and (c) the lawyers

either “assume joint responsibility” or divide the fees “in proportion to the services performed.” Rule 4-1.5(e).

By plain language, Rule 4-1.5 does not allow lawyers to pay or receive a fee for a mere referral. To remove any doubt, Rule 4-7.2(c) explicitly prohibits lawyers from giving “anything of value to a person for recommending a lawyer’s services.”

The total fee for all lawyers and law firms working on a contingent fee matter may not exceed the contract the client had with one of the attorneys; it must also be reasonable as determined by application of these factors, found in Rule 4-1.5(a):

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
  - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
  - (3) the fee customarily charged in the locality for similar legal services;
  - (4) the amount involved and the results obtained;
  - (5) the time limitations imposed by the client or by the circumstances;
  - (6) the nature and length of the professional relationship with the client;
  - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
  - (8) whether the fee is fixed or contingent.
- Rule 4-1.5(a).

Lawyers disputing fees should assure that clients receive undisputed portions of a recovery as soon as possible. In other words, lawyers' fee disagreements with other lawyers should not adversely impact clients, even temporarily. Rule 4-1.15(e).

## Guidance from Judicial Application of the Rules in Civil Matters

Missouri courts have further clarified the rules related to fee splitting. Most judicial application of the rules occurs when lawyers go to court to dispute each other's claims. Other relevant Missouri cases address fee splitting consequences when firms dissolve, and court holdings reinforce the rule-based



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prohibition against referral fees; still others apply and define the quantum meruit (added value) analysis in claims between prior and successor counsel. Courts impose costly consequences when lawyers don't fully comply with the rules and seek compensation without written proof that the client has agreed to joint representation. And, courts deny fee claims for attorneys who abandon their clients or violate rules of professional conduct during their representation.

Ten key points from those decisions include:

1. Lawyers may neither demand nor receive fees for merely referring a client to another lawyer. *Londoff v. Vuyksteke*, 996 S.W.2d 553 at 557-558 (Mo. App. E.D. 1999). And, neither implicit nor oral agreements for referral fees are enforceable. *Londoff v. Vuyksteke*, at 557-558.

2. Enforceable fee sharing agreements require writings, written notice to clients, and that the lawyers either share responsibility or are paid in proportion to work performed. Rule 4-1.5(e); *Londoff v. Vuyksteke*, 996 S.W.2d at 557-558. As used in Rule 1.5(e), the term "responsibility" includes "judgment, skill, ability and capacity." In this instance, "responsibility" requires significantly more than mere shared professional liability for malpractice. *Londoff v. Vuyksteke*, 996 S.W.2d at 557-558.

In another case, the 8th Circuit found inadequate shared responsibility, and denied a share of the recovery. The court noted that although the firm claiming a fee had occasional telephone calls with one of the several clients, they had not filed an appearance, had not paid any portion of court fees, did not assist the primary firm in creating trial strategy, and did not take depositions. *Eng v. Cummings, McClorey, Davis & Acho, PLC*, 611 F.3d 428, 435-436 (8th Cir.2010).

In a 1999 state court of appeals case, the court rejected an attorney's claim for fees after he, but not his co-counsel, was discharged by the client. In this case, the discharged lawyer had the initial relationship with the client, but did not conduct research, did not obtain essential medical records, and did not pay any portion of the expenses. Neither his initial involvement nor his agreement with co-counsel sufficed to justify a fee. The court held instead that:

the client's right to discharge an attorney is greater than the attorney's claim of right to an interest in an agreement with another attorney. Once a client asserts his right to discharge an attorney, there is no longer a special partnership between the attorneys, and the discharged attorney is only entitled to fees as he would be entitled to absent the agreement.

*Risjord v. Lewis*, 987 S.W.2d 403, 406 (Mo. Ct. App. 1999).

The appellate court got to the heart of the issue, explaining: "If [the attorney] wanted a share of the fees, he should have done a share of the work. Fees are not owned, they are earned." *Risjord v. Lewis*, 987 S.W.2d at 406.

3. When lawyers cannot collect a fee under a contract because, for example, the client discharges them, claims for fees are limited to recovery under quantum meruit. Lawyers must establish the actual value of their services to collect any

fee. The fee under quantum meruit is not established by hourly rate or the contract's terms except that a quantum meruit fee may not exceed the contract. Of course, before any contingent fee is claimed (whether under contract or quantum meruit), the contingency must have occurred. *Int'l Materials Corp. v. Sun Corp.*, 824 S.W.2d 890, 895 (Mo. 1992).

The quantum meruit recovery of attorneys employed under a contingent fee contract who are discharged without cause before settlement or judgment, but who have rendered valuable services to the reasonable value of the services rendered, may recover an amount not to exceed the contracted amount, payable only upon occurrence of the contingency. *Int'l Materials Corp. v. Sun Corp.*, 824 S.W.2d at 895, citing *Plaza Shoe Store, Inc., v. Hermel, Inc.*, 636 S.W.2d 53 (Mo. banc 1982).

4. The client should not have to pay for duplicative services. *Int'l Materials Corp. v. Sun Corp.*, 824 S.W.2d at 895.

5. After termination of representation or dissolution of a firm, an ousted lawyer's claim for a contingent fee can no longer be based on a contract. A claim for quantum meruit recovery, "not the terminated contingent-fee agreement, is the asset of the dissolved partnership." *Welman v. Parker*, 328 S.W.3d 451, 458 (Mo. App. S.D. 2010).

6. Clients and their cases are not business assets to be owned by lawyers or law firms. Instead, causes of action, as well as the physical and electronic files, belong to clients. *In the Matter of Cupples*, 952 S.W.2d 226, 235 (Mo. banc 1997). That concept – that clients own files and causes of action – is associated with clients' rights to choose and discharge their attorneys:

The modern rule, whereby the discharged attorney's recovery is limited to the reasonable value of his services on a quantum meruit theory, is optimal because it evidences a greater sensitivity to the desired public policy of allowing a client to discharge his attorney at any time, without undue burden, in a manner that is not cost prohibitive.

*Plaza Shoe Store, Inc., v. Hermel, Inc.*, 636 S.W.2d at 60.

Under Missouri law, a client may discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Mo. Rules of Professional Conduct 4-1.16(c), cmt. 4.

*Miess v. Port City Trucking, Inc.*, 2012 WL 401041, at 3 (E.D. Mo. Feb. 8, 2012).

7. Fee splitting arrangements may be enforced in court, but only if the arrangements fully comply with the Rule 4-1.5(e), *Eng v. Cummings, McClorey, Davis & Acho, PLC*, 611 F.3d 428, 435-436 (8th Cir. 2010).

8. Factors used in determining multiple attorneys' relative value to clients' ultimate recovery in quantum meruit include:

- (1) the time, nature, character and amount of services rendered;
- (2) the nature and importance of the litigation;
- (3) the degree of responsibility imposed on or incurred by the attorney;

- (4) the amount of property or money involved;
- (5) the degree of professional ability, skill and experience that was called for and used; and
- (6) the result that was achieved.

*Welman v. Parker*, 328 S.W.3d at 458

9. A discharged attorney's successful effort to collect a fee will include proof of that attorney's contribution of value to the client's ultimate recovery, relative to contributions by co-counsel, predecessor counsel, and successor counsel. *Miess v. Port City Trucking, Inc.*, WL 401041, at 3. In the *Miess* case, the successor lawyers' extensive work, contribution of resources and case development, as well as the initial (discharged) lawyers' faulty client contracts, conflicts of interest and limited resource contribution were weighed against the discharged lawyers' initial investigation.

10. All involved counsel must avoid conflicts of interest. An attorney with a conflict with a client is unlikely to recover a fee in quantum meruit. Rule 4-1.7, *Reid v. Reid*, 950 S.W.2d 289, 292 (Mo. App. E.D. 1997).

Partial recovery may be available, even if the attorney claiming the fee caused the attorney-client relationship to break down. Complete forfeiture of fees occurs only when a lawyer's clear and serious violation of a duty to a client is found to have destroyed the attorney-client relationship. *Int'l Materials Corp. v. Sun Corp.*, 824 S.W.2d at 895.

### **Sharing Fees: The Bottom Line**

Readers will note the court decisions in this article result from civil disputes over fees. Although discipline was not the aim in these cases, the courts deciding those cases applied the Rules of

Professional Conduct to reach their conclusions. Discipline can be a consequence of violations related to fees, but those cases are much less common than cases involving client communication, diligence, and safekeeping property.

Lawyers' fee disputes with clients are often resolved by participation in fee dispute resolution programs sponsored by The Missouri Bar and by the Kansas City Metropolitan Bar Association. The Missouri Bar's Lawyer-to-Lawyer Dispute Resolution Program may be used by lawyers disputing fee splits with other lawyers.

Lawyers can likely identify many acceptable ways to get paid while working with other lawyers. But, to justify a fee, lawyers must do more than simply recommend another lawyer. They must reduce agreements to writing, and they must either share responsibility or get paid in proportion to the work performed. Written notice of fee sharing agreements must be provided to clients.

If the relationship with the client or co-counsel falls apart, lawyers hoping for a fee will want to be prepared to show both the work they completed and the value they added to the ultimate recovery. In other words, lawyers should not wait until relationships fail to keep track of their participation. Successful recovery often requires proof of contemporaneous records of tasks intended to benefit the client, including timely investigations and contributions of ideas and resources.

When lawyers join together to help clients, they also help each other get by, as long as they follow the Rules of Professional Conduct and the tenets described in these court decisions. 

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