REFERRALS
WHAT YOU NEED TO KNOW TO STAY OUT OF ETHICAL TROUBLE

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Referral marketing can be a very desirable source of new business for an attorney. The American Bar Association ("ABA") has noted that encouraging referrals in a systematic and structured way is the most cost-effective and productive marketing that an attorney can do.[1] Referring out a matter also can be beneficial to an attorney if a matter is outside of the referring attorney's usual practice area or outside the referring attorney's geographical location. The referring attorney may be able to share in the fees but does not have to learn a new area of law, obtain licensure in another jurisdiction or travel long distances to handle the matter.

While referrals can be beneficial to both the referring and receiving attorney, referrals are not without ethical risks. Before making or accepting a referral an attorney should ensure that the referral complies with the Rules of Professional Conduct. This article will set out some of the common ethical issues related to referrals.

Kickbacks Along With Nominal, Nonmonetary Gifts Are Prohibited

There is much written about what an attorney can do to develop and maintain a referral network to increase business. One of the most common suggestions for an attorney to keep and increase a referral network is for the attorney to show his or her appreciation to the referring client, third party, or attorney. Sending a thank you note to any of the above referring sources is ethically acceptable. However, sending a monetary fee or gift to an attorney, client or third-party for a referral is prohibited by Supreme Court Rule 4-7.2(c). It provides that a lawyer shall not give anything of value to a person for

[1] *Making Referral Marketing Work For You,* November/December 2013 ABA Law Practice Magazine available at https://www.americanbar.org/publications/law_practice_magazine/2013/november-december/referral-marketing/.

recommending the lawyer's services. [2] It does not contain an exception for nominal, nonmonetary gifts.[3] Thus, an attorney is prohibited from giving the referral source a " substantial monetary kickback" and from more innocuous activities such as taking the referral source to dinner or sending the referral source a nice bottle of wine to show his or her appreciation for the referral.

Fee Sharing With Non -Attorneys Is Prohibited By Rule 4-5.4(a)

An attorney should not agree to split or share a fee with a non-attorney. Rule 4-5.4(a) prohibits the sharing of fees with non-lawyers except in certain limited circumstances. This prohibition includes agreements with non-attorneys to solicit clients in return for a share of the fee.

Fee Sharing Between Attorneys Requires Strict Compliance With Rule 4-1.5(e)

Despite the limitations of Rule 4-7.2 (c), an attorney can split or share fees with another attorney if certain conditions are met. Missouri Supreme Court Rule 4-1.5(e) addresses the division of fees between attorneys who are not from the same firm. The first requirement of Rule 4-1.5(e) is that both attorneys must retain some level of responsibility for the representation. The courts are very strict in applying this requirement. Failing to comply with the responsibility requirement can subject an attorney to both disciplinary action and the loss of fees. For example, in *Risjord v. Lewis,* 987 S.W.3d 403 (Mo. Ct. App. W.D. 1999), an attorney who had handled a personal injury action brought a declaratory action to determine whether the referring attorney was entitled to any of the attorney fees. The fee agreement with the client provided that the referring attorney was entitled to 40 percent of the attorney fees. The Court struck down the fee agreement noting

[2] Missouri Supreme Court Rule 4-7.2 (c) contains exceptions which allow an attorney to pay for the reasonable cost of advertising and pay the usual charges of a qualified lawyer referral service or other not-for-profit legal services organization.

[3] Missouri's Rule 4-7.2 is based upon ABA Model Rule 7.2 . On August 6, 2018, the ABA amended Model Rule 7.2 to permit a lawyer to give a nominal gift as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The Comments to the amended rule specify that the gift cannot be any more than a token item as might be given for holidays or other ordinary social hospitality. The Missouri Supreme Court has not adopted the ABA's amendment to Rule 7.2 .

that "merely recommending another lawyer or referring a case to another lawyer and failing to do anything further" does not entitle the referring attorney to any portion of the fees. *Id.* at 405.

Rule 4-1.5(e) sets forth two situations whereby the referring attorney retains the requisite level of responsibility needed to share in the fees. The first situation is where the referring attorney continues to provide legal services to the client along with the other attorney. In other words, the referring attorney acts as co-counsel in the manner. In this situation, the division of the fees must be proportional to the services performed by each attorney. Rule 4-1.5 (e)(1). Courts generally look to see whether the division of fees bears a reasonable correlation to the amount or value of the services rendered by the attorney. Courts will strike down a fee division if there is a glaring imbalance between a lawyer's share of the fee and the value of his or her services. Fees: Division Among Lawyers, *Lawyer's Manual On Professional Conduct (ABA/BNA),* Section 41:712. (2018). For example, in *Eng v. Cummings, McClorey, Davis & Acho,* No. 08-4103-CV-C-NKL, 2009 WL 1543840 (W.D. Mo. 2009), *aff'd* 611 F.3d 428 (8th Circ. 2010), the referring attorney was seeking 1/3 of the attorney fees. The Court noted that passing on updates to the client from the trial attorney and providing counseling about the trial process did not constitute 1/3 of the work.

In the second situation, the referring attorney generally is not required to perform any actual work on the referred matter.[4] However, the referring attorney must assume "joint responsibility" for the representation. Comment 7 to Rule 4-1.5 states "joint responsibility entails both financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." Missouri courts have not defined what "financial responsibility" or "ethical responsibility" means. However, courts from other jurisdictions have defined "financial responsibility" to mean that the referring attorney would be jointly liable in a malpractice suit. *See Kummerer v. Marshall,* 971 N.E.2d 198 (Ind. Ct. App. 2012*)*. Because of the joint financial liability imposed by Rule 4-1.5(e), the referring attorney may want to ascertain whether the receiving attorney has malpractice insurance and whether the referring attorney's malpractice insurance policy covers malpractice of co-counsel.

[4] As explained below, if the attorney who receives the referral becomes incapacitated, the referring attorney would need to step in and do enough to ensure that the client's interests are protected until new counsel is obtained.

"Ethical responsibility" is somewhat more difficult to ascertain as no court has opined on its meaning. In addition, Missouri has not addressed the issue via a formal or informal ethic's opinion. However, the Wisconsin State Bar Professional Ethics Committee Formal Ethics Opinion EF-10-02 ("the Opinion") is instructive.[5] The Opinion provides clear cut and practical advice on the issue of "ethical responsibility." It emphasizes that "the duty of joint responsibility imports a serious responsibility as a lawyer and is not a mere hand off of the case to another lawyer to handle in his or her own fettered discretion."

The Opinion provides that while the referring attorney need not be involved in the day-to-day handling of the case, the referring attorney must periodically review the status of the matter and maintain enough contact to ascertain whether the attorney handling the matter is abiding by the Rules of Professional Conduct. It also sets forth that the referring attorney has a duty to ensure the attorney who receives the referral is competent to handle the matter.[6] These requirements make clear that the referring attorney needs to be very careful in the selection of the attorney to handle the matter and should not base his or her selection merely upon which attorney offers the referring attorney the best fee sharing deal.

The Opinion also explains that while the referring attorney need not have the same resources or expertise as the receiving attorney, the referring attorney must be willing, and able, to step in if the receiving attorney cannot complete the matter. For example, per the Opinion, the referring attorney must step in if the receiving attorney becomes unable to act due to illness. The referring attorney must take whatever action is necessary to protect the client's interests. This could mean entering an appearance and requesting a continuance or helping the client to find new counsel.

Besides requiring the referring attorney to share some level of responsibility in the case, Rule 4-1.5(e) requires that the fees charged be reasonable. In this context "reasonable" means that the total fee should not be significantly greater

[5] The language of Wisconsin's rule is different than Missouri Supreme Court Rule 4-1.5(e). Wisconsin's rule states that the lawyers must "assume the same responsibility for the representation as if [they] were partners in the same firm." In contrast, Missouri Supreme Court Rule 4-1.5(e) merely provides that "each lawyer assumes joint responsibility for the representation." However, Comment 7 to Missouri's rule provides that ethical responsibility entails "responsibility for the representation as if the lawyers were associated in a partnership." Thus, because of the clarification provided by Comment 7, it appears that both rules require the same thing.

[6] Comment 7 to Missouri's rule sets out the same requirement.

than it would have been if there had been no association with another attorney. Fees: Division Among Lawyers, *Lawyer's Manual On Professional Conduct (ABA/BNA),* Section 41:702. (2018). Thus, it is important that the attorneys do not "double charge" for doing the same work.

Finally, and very importantly, Rule 4-1.5(e) provides that the client must agree to the association between the two attorneys and the agreement must be "confirmed in writing.[7] "Confirmed in writing" means either that the client consents to the referral in writing or that the lawyer promptly sends a writing to the client confirming the client's oral informed consent to the referral. Rule 4-1.0(b). While the client must consent to the association, the attorneys are not required to disclose to the client what share of the fees each attorney will receive. Comment 7 to Rule 4-1.5(e).[8] However, to avoid fee disputes between the attorneys it is recommended that the attorneys have a written agreement which sets out both party's responsibilities in the matter and the fee division between the attorneys.

The rule is silent as to which lawyer must obtain the written consent from the client. Missouri Courts have not addressed the issue but some courts in other jurisdictions have suggested that the responsibility falls on both the referring and receiving attorney. *See Kentucky Bar Association v. Chesley,* 393 S.W.3d 584 (Ky. 2013*).* Thus, to avoid any potential problem concerning this issue it is best for both attorneys to obtain the consent

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Conclusion

In summary, referrals can be beneficial to an attorney whether the attorney is making the referral or receiving the referral. However, before an attorney makes a referral or encourages others to make referrals to the attorney, an attorney should review Missouri Supreme Court Rules 4-1.5(e), 4-5.4(a), and 4-7.2(c) and then ensure that his or her conduct is in accordance with the rules.

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[7]The client's written consent to the referral can easily be incorporated into the fee agreement. If the case is a contingent fee matter, a written fee agreement is required. Rule 4-1.5(c).

[8] Missouri's rule differs from the Model Rules of Professional Conduct. Model Rule 1.5(e) requires the client to "agree to the arrangement, including the share each lawyer will receive."