NEW YORK COUNTY LAWYERS' ASSOCIATION
Committee on Professional Ethics

OPINION 715

TOPIC: REFERRALS; DIVISION OF FEES AMONG LAWYERS; LIMITING LIABILITY TO CLIENT; INDEMNIFICATION AGREEMENTS

DIGEST: A LAWYER WHO REFERS A MATTER TO ANOTHER LAWYER AND RECEIVES A PORTION OF THE FEES GENERATED BASED ON THE ACCEPTANCE OF JOINT RESPONSIBILITY FOR THE REPRESENTATION IS ETHICALLY OBLIGATED TO ACCEPT VICARIOUS LIABILITY FOR ANY ACT OF MALPRACTICE THAT OCCURS DURING THE REPRESENTATION, BUT IS NOT REQUIRED TO SUPERVISE THE ACTIVITIES OF THE RECEIVING LAWYER. AN AGREEMENT WHEREBY THE RECEIVING LAWYER AGREES TO HOLD HARMLESS AND INDEMNIFY THE REFERRING LAWYER FOR ANY CLAIM OF MALPRACTICE ARISING OUT OF THE REPRESENTATION IS PERMITTED PROVIDED THAT THE AGREEMENT DOES NOT LIMIT THE CLIENTS' RIGHTS AGAINST THE REFERRING LAWYER.

CODE: DR 1-102; DR 2-107(A)(2); DR 6-102(A); DR 7-101; EC 6-6; EC 7-1

QUESTION:

Lawyer "Able" represents client "Charles" on various estate and tax matters, but does not handle all of Charles' legal matters. Able refers Charles to lawyer "Baker" to handle a personal injury litigation on a contingent fee basis. Baker agrees that Able will receive 25 percent of any fees paid by the client.

The client agrees to retain Baker in the litigation and is advised that Able and Baker will divide the fees generated by the matter. Able will do no work on the matter, but Able and Baker provide Charles with a writing in which both lawyers assume

joint responsibility for the representation. Able and Baker also execute an agreement in which Baker agrees "to indemnify and hold harmless Able for any costs or liability arising out of the representation." The existence of the indemnity agreement is not disclosed to the client.

The inquirer asks the following questions with regard to the fact scenario outlined above:

> (1) Does a lawyer who refers a matter to another lawyer have a continuing responsibility to the client to supervise the manner in which a matter is handled where: (a) the two lawyers agree to divide the fees generated without regard to the work performed by each and (b) both lawyers assume joint responsibility to the client in writing?
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> (2) Does a collateral agreement between two lawyers violate the Code of Professional Responsibility (the "Code") where: (a) the lawyers divide a fee without regard to the amount of work performed in a manner that is otherwise permitted by DR 2-107 and (b) the lawyer to whom the matter was referred undertakes to hold harmless and indemnify the referring lawyer for all claims arising out of the matter?

OPINION

The indemnity and hold harmless agreement between the referring lawyer and the receiving lawyer is not in itself a violation of DR 2-107, which permits a division of fees among lawyers provided that certain conditions are met.[1] The lawyers' agreement, however, may not be used to attempt to limit Able's own liability to Charles for malpractice arising out of the representation. See DR 6-102 ("A lawyer shall not seek . . . to limit prospectively the lawyer's individual liability to a client for malpractice . . . ."). Thus, while Able may seek to enforce the indemnity and hold harmless agreement against Baker, Able may not attempt to use the agreement to limit or avoid her liability to Charles. For example, if Charles brings a lawsuit against Able alone for malpractice committed during the course of the representation, it is unethical for Able to use or attempt to use the agreement to avoid or reduce her contractual liability to Charles.

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[1] The failure to disclose the existence of the indemnity and hold harmless agreement is immaterial for the reasons discussed below.

The Code prohibits a lawyer from dividing a fee with another lawyer who is not an associate or partner of his or her firm unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is in proportion to the services performed by each lawyer, or, by a writing given to the client, each lawyer assumes joint responsibility for the representation.

(3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

DR 2-107. The current version of the Code, amended in 1990, incorporates language from Rule 1.5(e) of the Model Rules of Professional Conduct ("Model Rules") and represents a substantial liberalization of earlier ethical prohibitions on the payment of referral fees (i.e., a division of fees generated by a matter) among lawyers. Under the prior provision of our Code, a reasonable fee could be shared by attorneys with the client's consent only "in proportion to services performed and responsibility assumed by each." See N.Y. State Op. 535 (1981)(citing DR 2-107(A) before the 1990 amendments).[2] Although New York has not adopted the Model Rules, interpretations of the analogous language of Rule 1.5(e) provides some guidance.

The modern trend permits a lawyer to receive a portion of the fees generated by a matter solely in consideration of the referral if the lawyer assumes joint responsibility. The fee division is intended to permit an association of more than one lawyer, as when a matter is referred to a trial specialist, "in a matter in which neither alone could serve the client as well." 1 Laws. Man. Prof. Conduct (ABA/BNA) 112 (Comment, Model Rule 1.5). Thus, it eliminates the disadvantage to lawyers in small firms who may be unable to refer matters to a more qualified partner

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[2] The amount of work needed to be performed by the referring attorney to satisfy the requirement that the fee be for "services performed" was a matter of dispute. Compare Carter v. Katz, Shandell, Katz & Frasmus, 120 Misc. 2d 1009, 1017-20, 465 N.Y.S.2d 991, 997-98 (Sup. Ct. 1983) (referring attorney entitled to equal share of fee upon showing of some work on the matter) with N.Y. State Op. 609 (1990)(division of fees must be in proportion to the work performed and the responsibility assumed by each attorney).

and receive a share of the fees. See Marjorie E. Gross, The Long Process of Change: The 1990 Amendments To The New York Code of Professional Responsibility, 18 Fordham Urb. L.J. 283, 307 (1991).

The question then arises as to the substance of the obligations imposed by acceptance of "joint responsibility" that is a prerequisite to a fee-sharing agreement permitted by DR 2-107. The term "responsibility" is not defined either by the Code or the Model Rules. The commentary to the Model Rules refers to the obligations contained in Rule 5.1, the analogous provisions of which are found in the Code at DR 1-104. The ABA Committee on Ethics and Professional Responsibility, in Informal Opinion 85-1514, interpreted this responsibility broadly, holding that the "assumption of joint responsibility includes assumption of responsibility comparable to that of a partner in a law firm under similar circumstances."[3]

The Illinois Judicial Ethics Committee, on the other hand, interpreting an analogous rule, held that a referring lawyer in a fee-sharing arrangement is required only to accept financial responsibility for errors or omissions committed by the attorney to whom the matter was referred. Ill. Jud. Eth. Comm. Op. 94-16 (1994) (acceptance of "legal responsibility" required by Illinois professional ethics rule "consists solely of potential financial responsibility for any malpractice action against the recipient of the referral").

During debate on the revisions to DR 2-107 before the New York State Bar's House of Delegates in 1987, some attention was given to this "responsibility" requirement.[4] However, it is unclear whether the State Bar intended joint responsibility to entail broad supervisory duties over the receiving lawyer's activities or to consist primarily of financial liability.

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[3] This "comparable" responsibility includes "financial responsibility, ethical responsibility to the extent a partner would have ethical responsibility for actions of other partners in a law firm in accordance with Rule 5.1, and the same responsibility to assure adequacy of representation and adequate client communication that a partner would have for a matter handled by another partner in the firm under similar circumstances." ABA Inf. Op. 85-1514 (1985).

[4] See Gross, The Long Process of Change, 18 Fordham Urb. L.J. at 308 ("Because the referring lawyer would remain responsible for supervising the work of the receiving lawyer, however, a strong incentive to send the case to the best lawyer exists").

In our view, the "joint responsibility" requirement is financial and does not create an ethical obligation of the referring lawyer to supervise the activities of the receiving lawyer. Our interpretation is based on the requirement in the Code of a writing, which indicates the rule was intended to add to the protection otherwise available to the client, i.e., to provide a contractual remedy in addition to the remedy available under the law of negligence. Since a lawyer is liable for his or her own failure to exercise due care, the writing given to the client must create some additional vicarious liability on the part of the referring lawyer in order to satisfy DR 2-107. Moreover, it is not logical that a lawyer would be expected to supervise the handling of a matter by a specialist, who presumably is more competent in the type of matter than the referring lawyer. Our view, therefore, is that joint responsibility is synonymous with joint and several liability. When lawyers assume "joint responsibility" in order to share a fee under DR 2-107 without regard to work performed, they are ethically obligated to accept vicarious liability for any act of malpractice that occurs during the course of the representation. Although the harsh financial consequences of DR 2-107 may create an incentive for the referring lawyer to attempt to apprise himself or herself of the manner in which the matter is being handled by the receiving lawyer, the rule does not create an ethical obligation to supervise the receiving attorney's work.

Able is permitted to receive a portion of the fee generated by Charles' lawsuit only if she agrees to accept the full financial consequences of the referral. The hold harmless and indemnity agreement between Able and Baker is not unethical because it does not alter Able's own financial obligation to Charles. Any attempt to use the indemnity agreement to the detriment of Charles would, however, thwart the joint responsibility requirement of DR 2-107 and is unethical.

CONCLUSION:

A lawyer who refers a matter to another lawyer and who will receive a portion of the fees generated by the matter due to the acceptance of joint responsibility for the representation is ethically obligated to accept vicarious liability for any act of malpractice that occurs during the course of the representation. The referring lawyer, however, is not required to supervise the activities of the receiving lawyer. An agreement whereby the receiving lawyer agrees to hold harmless and indemnify the referring lawyer for any claim of malpractice arising out of the representation is ethical provided that the agreement does not limit the client's rights against the referring lawyer.