

Wisconsin Formal Ethics Opinion EF-10-02: Ethical Responsibility of Lawyers When Referral Fees are Received

October 27, 2010

Synopsis: *When a lawyer refers a matter to another lawyer in return for a referral fee, each lawyer assumes certain ethical responsibilities. The referring lawyer is obligated to obtain the client's informed consent to discuss the possible referral with another lawyer, must refer matters only to competent counsel, must obtain the client's signed consent in writing to the terms of the referral, must monitor the progress of the matter and must remain available to the client. These duties stem from the fact that the referring lawyer maintains a lawyer-client relationship with the client throughout the course of the matter. The receiving lawyer is obligated to cooperate with the referring lawyer in fulfilling these duties. Ethics Opinion E-00-01 is withdrawn.*

Opinion

Introduction

In Ethics Opinion E-00-01, the State Bar's Standing Committee of Professional Ethics (the "Committee") discussed the respective responsibilities of lawyers in matters in which a referral fee was paid by one lawyer to another. In a typical referral fee matter, a lawyer is approached by a prospective client seeking representation on a matter that the lawyer does not wish to undertake, but the lawyer knows another lawyer who would be willing and able to undertake the representation. The lawyer will then, with the client's permission, refer the client to the other lawyer, who agrees to pay the referring lawyer an agreed upon portion of the fee in return for the referral. Referral fees are common in personal injury matters, in which the receiving lawyer typically agrees to pay the referring lawyer an agreed upon percentage of the final contingent fee.

A referral fee is distinguished from a division of fees in which the lawyers involved each work on the matter and the client receives one bill representing the fees of all lawyers involved, in that a lawyer receiving a referral fee normally performs little if any substantive legal work on the matter. This opinion is limited to a discussion of referral fees and will not address ethical responsibilities in other fee sharing arrangements.

Shared Responsibility

Under Wisconsin's Rules of Professional Conduct for Attorneys (the "Rules") in effect at the time E-00-01 was issued, SCR 20:1.5(e) imposed "joint responsibility" for the representation on both the referring and the receiving lawyers, and that opinion focused on explaining the

requirements of “joint responsibility” under the prior Rule. When Wisconsin’s new Rules were adopted in 2007, SCR 20:1.5(e) was revised to read as follows:

(e) A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or

(2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or

(3) pursuant to the referral of a matter between the lawyers, each lawyer assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm, the client is informed of the terms of the referral arrangement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.

Thus, the requirement under the previous Rule that both lawyers assume “joint responsibility for the representation” has been replaced with the requirement that each lawyer “assumes the same responsibility for the representation as if the lawyers were partners in the same firm.” The question then is whether the new Rule imposes a different standard of ethical responsibility on lawyers.

The Wisconsin Committee Comment to SCR 20:1.5 provides no guidance on this issue. However, ABA Comment, paragraph [7] provides as follows:

[7] *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.

ABA Model Rule 1.5(e)(1), which governs referral fees under the ABA Model Rules and which the above Comment is intended to explain, still mandates that lawyers assume “joint responsibility” for the matter when a referral fee is paid.¹ Thus, the phrase “joint responsibility” was originally intended to impose the same ethical responsibility as if the lawyers were partners in the same firm. Therefore, the current SCR 20:1.5(e)(3) does not, in the opinion of the Committee, impose a different standard of ethical responsibility on lawyers than the previous Rule.

SCR 20:5.1 defines the ethical responsibilities of partners in the same firm and provides as follows:

SCR 20:5.1 Responsibilities of partners, managers, and supervisory lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

SCR 20:5.1 thus requires that partners must make reasonable efforts to ensure that measures are in place to assure compliance with the Rules and imposes responsibility upon partners for another lawyer's misconduct if they direct or order that misconduct or are aware of the conduct and fail to take reasonable remedial measures in a timely fashion.

In Ethics Opinion E-00-01, the Committee discussed the responsibilities of referring and receiving lawyers in light of SCR 20:5.1 as follows:

¹ The Comments are not adopted by the court but are published to provide guidance interpreting the Rules. See Wisconsin Supreme Court Rules Order 04-07.

Referring attorney must maintain contact with the progress of a matter. The Professional Ethics Committee opines that when a lawyer refers a matter to a lawyer not in the same law firm under the fee sharing arrangement permitted by SCR 20:1.5(e)(3), the referring lawyer need not be involved in the day-to-day substantive handling of the matter including such activities as making tactical decisions regarding the representation or providing the legal services necessary to achieve the objective of the representation.

However, the referring lawyer in assuming joint responsibility for the representation must maintain contact with the progress of the matter in the following regards.

First, the referring lawyer must remain sufficiently aware of the performance of the lawyer to whom the matter was referred to ascertain if that lawyer's handling of the matter conforms to the Rules of Professional Conduct. This may be achieved by periodically reviewing the status of the matter with that lawyer, the client or both. It also requires being available to the client regarding any concerns of the client that the lawyer to whom the matter has been referred is handling the matter in conformity with the Rules. This is not to say that the referring lawyer is the final arbiter of whether the lawyer to whom the matter is referred is complying with the Rules, such as acting competently. See SCR 20:1.1 However, it does involve the informed professional judgment of the referring lawyer being available to the client and acting on the client's behalf. It must be remembered that in such a referral arrangement, the referring lawyer still maintains an attorney-client relationship with the client. It is the ongoing protection of the client's interests by the referring lawyer that justifies the referring lawyer receiving a fee that is beyond the proportion of the services actually provided by that lawyer.

Second, the referring lawyer has the supervisory duty to refer legal matters only to lawyers who are competent to handle the matter in question. In this regard, a lawyer referring a matter to another lawyer, especially in circumstances in which the referring lawyer may have a financial stake in the referral, must select that lawyer solely for that lawyer's ability to provide the legal services that the client needs and not because that lawyer may be willing to enter into a fee sharing arrangement with the referring lawyer.

Third, the referring lawyer must assume financial responsibility for the matter though this may be secondary to the financial responsibility assumed by the lawyer to whom the matter was referred. Typically, financial responsibility will involve the responsibility for paying or advancing payment of costs associated with the handling of the matter (for example, court costs, expert fees, discovery costs, and so on). Whether this involves advancing costs or the assumption of responsibility for paying costs by the responsible lawyers is a matter for agreement with the client subject to the Rules of Professional Conduct. See SCR 20:1.8(a), (e) and (j).

The committee also opines that "joint responsibility for the representation" implies that both the referring lawyer and the lawyer to whom the matter was referred must reach a common understanding of their respective joint responsibilities as well as their individual responsibilities to the client. This understanding is fundamental to the proper exercise of

their respective obligations to the client. The client should be informed of that common understanding, preferably in writing. See SCR 20:1.4.

The Committee now reaffirms this analysis and opines that it is applicable to the current Rule. The Committee also takes the opportunity to expand upon this prior analysis. E-00-01 did not address explicitly the responsibilities of the referring lawyer should concerns arise with respect to the conduct of the receiving lawyer. For example, what are the responsibilities of a referring lawyer if a receiving lawyer becomes unable to act, whether through illness, suspension or other reasons?

As noted above, when matters are referred, it is often contemplated that the referring lawyer will perform little or no substantive legal work on the matter. Further, it is common for lawyers to refer matters to other lawyers which are outside the referring lawyer's area of expertise. Thus an estate planning lawyer, with no trial experience may properly refer a personal injury matter to an experienced trial lawyer. Lawyers also commonly refer matters when the referring lawyer lacks the resources of the receiving lawyer or firm. These practices are not inappropriate and such situations do not preclude a lawyer from receiving a referral fee. Given, however, that the referring lawyer has the same responsibility for the matter as if he or she were partners with the receiving lawyer, the referring lawyer has a responsibility to act under SCR 20:5.1(c)(2) if necessary to mitigate or correct the adverse consequences of misconduct of the receiving lawyer.

Shared responsibility does not require the referring lawyer to have the same resources, expertise or experience as the receiving lawyer. However, shared responsibility does require that the referring lawyer must be able to step in, if circumstances require, and take reasonable actions to protect the interests of the client. It must again be emphasized that the client remains the client of the referring lawyer in such a situation.

Thus, if the receiving lawyer in a litigated matter becomes unable to act due to illness, the referring lawyer must be prepared, if necessary, to enter an appearance, request adjournments or take other measures to protect the client and assist the client in locating other counsel if necessary. The referring lawyer is not necessarily required to attain the same level of competence to act in the matter as the receiving lawyer, and need not, for example, be capable of assuming sole responsibility for a complex litigation matter. The referring lawyer must, however, be prepared and competent to undertake limited actions such as seeking adjournments, assisting the client in seeking new counsel and dealing with opposing counsel should unusual circumstances so require.

With respect to the requirement of shared financial responsibility for the matter, it should be noted that the respective degree of financial responsibility of both the referring and receiving lawyer is the subject of agreement between the lawyers and the client. Lawyers may agree with a client that the client will be responsible for all costs and must pay those costs in advance, or lawyers may agree to advance costs or make repayment of advanced costs subject to the outcome of the matter [see SCR 20:1.8(e)]. The requirement of shared financial responsibility for the

matter simply requires that both the referring and receiving lawyers reach an agreement as to respective responsibility for costs with the client and abide by that agreement.

Requirement of Client Consent in Writing

SCR 20:1.5(e)(3) also requires that the lawyer inform the client of the terms of the referral, including the share that each lawyer will receive and whether the overall fee will increase as a result of the referral and that the client consent, in writing, to those terms.

With respect to this requirement, the Committee first notes that a “signed writing,” as defined by SCR 20:1.0(q), can include an acknowledged e-mail or other electronic recording. Thus, the lawyer has options beyond paper and pen to fulfill the requirement of signed written consent. Second, in the opinion of the Committee, informing the client of the terms of the referral arrangement includes informing the client explicitly that the referring lawyer maintains a lawyer-client relationship with the client and therefore remains ethically and financially responsible for the matter and will be available to the client throughout the matter. The client should also be informed in writing of the respective, agreed-upon responsibilities for costs assumed by each lawyer. This is in addition to the requirement that the client be informed of the share of the fee that each lawyer will receive and whether the overall fee will increase. Normally this responsibility falls on the referring lawyer, although both lawyers are responsible for ensuring that the requirements of SCR 20:1.5(e)(3) are met. Third, as discussed above, the client should be informed of the understanding between the two lawyers as to their respective responsibilities for the matter. Finally, because client consent is required for the referral, the written consent of the client must be obtained upon or prior to the referral.

Confidentiality

When considering the referral of a matter, the lawyer must be mindful of his or her obligations under SCR 20:1.6, which requires lawyers to keep confidential all information relating to the representation of a client unless the client gives informed consent. This requires that the lawyer wishing to discuss a possible referral with a lawyer in another firm must first obtain the client’s informed consent prior to contacting the other lawyer to discuss the possible referral.

Conflicts and other considerations

The referring lawyer maintains a lawyer-client relationship with the client throughout the matter, and the existence of this lawyer-client relationship prohibits a lawyer from receiving a referral fee (or seeking to receive such a fee) whenever such a lawyer-client relationship cannot be established or maintained. Thus, if the referring lawyer would have a conflict of interest in accepting the matter, the lawyer may not receive a referral fee in the matter. Some conflicts,

however, are waivable and a lawyer may receive a referral fee if the client's signed informed consent to the conflict is obtained. See SCR 20:1.7(b). In such a situation, the requirement that the lawyer obtain the client's informed consent in a writing signed by the client is in addition to the requirement that the lawyer obtain the client signed consent in writing to the referral of the matter.

Other situations which prohibit a lawyer from forming or maintaining a lawyer-client relationship and thus preclude the lawyer from receiving a referral fee include if the lawyer's license is under suspension (for either disciplinary or administrative reasons), the lawyer's license is on inactive status or the lawyer is otherwise unable to act as a lawyer in the matter. As discussed above, the referring lawyer must remain capable of stepping in to protect the client's interests should such actions become necessary, and thus must be able to legally and ethically represent the client in the matter.

Sharing of Legal Liability

The Rules do not establish standards for civil liability of lawyers (See Preamble, paragraph [20]). In E-00-01 the Committee did, however, discuss shared legal liability in referral matters as follows:

The question of the legal liability of a referring lawyer for the manner in which the client's matter is handled to completion is a question of law. However, the committee notes that the requirements of joint responsibility imply an active concern and attention on the part of the referring lawyer for the competent handling of the matter to completion. The referring lawyer is still the client's lawyer, even though the lawyer to whom the matter is referred will usually be the lawyer responsible on a day-to-day basis for the handling of the matter. 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 unfettered discretion. This opinion earlier noted the Comments to SCR 20:1.5 that relate the duty of joint responsibility for a referring lawyer to the responsibility of a partner or a lawyer having supervisory authority of another lawyer in a law firm. See SCR 20:5.1. In a law firm, that responsibility is one of vicarious liability unless that liability is adjusted by the implementation and operation of limited liability law. See SCR 20:5.7.

The Committee hereby reaffirms this portion of E-00-01 and, while noting that a violation of SCR 20:1.5(e)(3) does not *ipso facto* establish liability of any lawyer, urges referring lawyers to be mindful of all responsibilities which are attendant to a lawyer-client relationship.

Summary

In summary, lawyers who seek to receive or agree to pay a referral fee assume the following ethical responsibilities:

- When considering the possible referral of a matter in return for a fee, the lawyer must first discuss the matter with the client and obtain the client's informed consent to contact the potential receiving lawyer.
- The referring lawyer has a duty to refer matters only to lawyers who the referring lawyer reasonably believes are competent to handle the matter.
- The referring lawyer must obtain the client's consent in a writing signed by the client, to the terms of the referral.
- The referring lawyer retains a lawyer-client relationship with the client, and so has a responsibility to monitor the progress of the case and remain available to the client. This may be achieved by regular, periodic contacts with the receiving lawyer, the client or both.
- Should the referring lawyer become aware of unethical or otherwise improper conduct by the receiving lawyer, or if there is reason to believe that the receiving lawyer is not providing competent representation to the client, the referring lawyer must take reasonable steps to address the problems.
- The referring lawyer maintains financial responsibility for the representation.
- The receiving lawyer is obligated to cooperate with the referring lawyer in fulfilling these responsibilities.

E-00-01 is hereby withdrawn