

---

## Wisconsin Formal Ethics Opinion E-00-01: Dividing Fees Between Lawyers Not in the Same Firm

---

*Professional ethics opinion E-00-01 considers the division of fees between lawyers not in the same firm and defines "[j]oint responsibility for the representation" in SCR 20:1.5(e).*

When a lawyer forwards a client matter to a lawyer in another firm and the two lawyers agree to share any fee generated in the matter other than in proportion to the services provided by each, what must the forwarding lawyer do to comply with the requirement of "assuming joint responsibility for the representation" as defined in [SCR 20:1.5\(e\)](#)?

### **Opinion**

[SCR 20:1.5\(e\)](#) provides as follows:

(e) A division of fees between lawyers who are not in the same firm may be made only if:

1. the division is in proportion to the services performed by each lawyer or, by written agreement with the client, *each lawyer assumes joint responsibility for the representation*;
2. the client is advised of and does not object to the participation of all lawyers involved and is informed if the fee will increase as a result of their involvement; and
3. the total fee is reasonable (emphasis added).

The only hint at a definition of the phrase "joint responsibility for the representation" provided by the Rules of Professional Conduct is a reference in the *Comment* to [SCR 20:1.5](#) that "[j]oint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved."

[SCR 20:5.1](#) addresses the responsibilities of a partner or supervisory lawyer and identifies that responsibility as making *reasonable efforts* to ensure that other lawyers conform to the Rules of Professional Conduct. This duty may be breached if the supervisory lawyer has knowledge of conduct that violates the Rules and either ratifies the conduct or having the opportunity to avoid or mitigate the consequences of such conduct fails to do so.

ABA Informal Opinion 85-1514 defines responsibility under DR2-107(A) which is used to similar effect as joint responsibility is used in MR 1.5(e).

That opinion states that:

- joint responsibility does not require substantial services to be performed since the assumption of joint responsibility is an alternative to a division of fees in proportion to the services performed; and
- joint responsibility does include responsibilities comparable to that of a partner in a law firm for other partners (as in MR 5.1) under similar circumstances, including:
  - (a) financial responsibility; and
  - (b) ethical responsibility such as to assure adequate representation and adequate client communications.

**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\(e\)](#), 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](#). 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 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](#). While the sharing of fees and the imposition of joint responsibility under [SCR 20:1.5\(e\)](#) does not create a legal partnership, lawyers should be mindful of these enhanced obligations created when the lawyer receives more than the value of the services provided as a referral fee.