LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Lessons From Lawyer Fee-Sharing Agreements Gone Wrong

By **David Grossbaum** (June 23, 2022, 10:36 AM EDT)


David Grossbaum

The recent case of Edelson PC v. Girardi in the U.S. District Court for the Northern District of Illinois[1] shows what can happen when a fee-sharing agreement goes wrong.

Edelson claims that it acted as Illinois local co-counsel for California law firm Girardi Keese under an agreement to share the contingent fees for the handling of airplane crash cases. Girardi Keese **claims** that the 2019 fee-sharing agreement it had with Edelson did not comply with the applicable rules of professional conduct and state law governing these agreements and, therefore, Edelson is not entitled to its share of the fee.

Specifically, Girardi Keese alleges that the clients did not consent in writing to the fee-sharing agreement between the two law firms. When Girardi Keese raised this issue, Edelson **obtained** the clients' signed consents in 2021, after the cases had settled. Edelson also made claims for recovery under a quantum meruit theory.

There is nothing improper or unethical about lawyers from different firms sharing one fee. Many lawyers have done quite well for themselves and their clients by simply acting as a referral source for other lawyers, and doing no significant work on the cases. Other lawyers work hand in hand on cases.

As the clients are only paying one fee, which is being split between two or more lawyers, the clients benefit from having the best lawyers working on their cases at no additional cost.

Fee-sharing is specifically allowed by the rules of professional conduct in most states, and by the American Bar Association's Model Rule 1.5.

ABA Model Rule 1.5 says the following about fee-splitting:

> (e) A division of a fee 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 each lawyer assumes joint responsibility for the representation;
> >
> > (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> >
> > (3) the total fee is reasonable.

Most fee-sharing cases seem to involve contingent fee matters, but it is also possible to have a fee-sharing arrangement in hourly fee cases.

Not all fee-sharing rules are the same. For example, while the ABA model rule and most of the analogous state rules require that the fees paid to each lawyer be proportional to the actual work they do on the case or that each lawyer assume joint responsibility for the case, Massachusetts Rule of Professional Conduct 1.5 only requires that the client consent to this arrangement before or at the time the fee agreement is made, and that the total fee is reasonable.

This gives lawyers the opportunity to collect a referral fee without working on the case at all or assuming any responsibility for the way the case is handled.

As another example, California Rule of Professional Conduct 1.5.1 states:

> Lawyers who are not in the same law firm shall not divide a fee for legal services unless:
>
> (1) the lawyers enter into a written agreement to divide the fee;
>
> (2) the client has consented in writing, either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably practicable, after a full written disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms that are parties to the division; and (iii) the terms of the division; and
>
> (3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees.

Lawyers who do not strictly follow the applicable fee-sharing rules may risk a disciplinary complaint, lose their share of the fee, or wind up in costly fee litigation with co-counsel. Even with a valid fee-sharing agreement, one lawyer may be held liable to the client for the negligence or malfeasance of the other.

Because many of these fee-sharing agreements are made between lawyers in different states, the first issue is determining which ethical rule applies to the agreement. For example, in Daynard v. Ness Motley Loadholt Richardson & Poole PA, a case from the early 2000s, the U.S. District Court for the District of Massachusetts analyzed an oral fee-sharing agreement where five different state ethical rules were implicated.[2] Complying with the most restrictive potentially applicable rule may alleviate some conflict of law issues.

In all states, it appears that the client must be informed that there is a fee-sharing arrangement. This disclosure should include the identities of all lawyers working on the case, their respective responsibilities and the financial arrangements between the lawyers.

A number of states require that the fee-sharing agreement reflect the allocation between the lawyers and the services each lawyer will be performing.

Florida bar regulations sets a presumptive allocation in contingent fee cases, where the primary lawyer receives 75% of the fee and the secondary lawyer receives 25%, unless the lawyers "accept substantially equal active participation in the providing of legal services" and obtain court approval of the allocation.[3] The failure to strictly follow these rules will result in the inability to enforce the agreement.[4]

Next, the client must actually consent in writing to the fee-sharing agreement. This requires more than just notifying the client about the arrangement. In a California case, Chambers v. Kay, the California Supreme Court found in 2002 that, although the client had received a copy of a letter setting forth the fee-sharing arrangement, she never actually was asked to, nor did she, consent in writing.[5]

The Massachusetts and California rules require that the client's consent occur before or at the time of the initial engagement, or as soon as possible thereafter, which may make an after-the-fact written consent from the client ineffective.[6]

Another requirement of these rules is that the total fee be reasonable, and no greater than it would have been if there had been no fee-sharing. In other words, the contingent fee percentage, or the hourly rate, must be the same as it would have been if there had been a single lawyer or law firm working on the case.

Courts differ as to whether the size of the fee for each lawyer is subject to the standards applicable in determining whether a legal fee is reasonable, or whether it is only the size of the entire fee.[7]

Lawyers who are parties to a fee-sharing agreement also need to make sure they comply with any other rules applicable to fee agreements.

Hance v. Super Store Industries, a California case from a couple of years ago, involved numerous deviations from the rules governing fee-sharing agreements, but the one that bothered the California Court of Appeal's Fifth Appellate District the most was that one of the attorneys failed to disclose his lack of professional liability insurance, as required by state rules.[8] The court refused to enforce the fee-sharing agreement in favor of that lawyer, although it allowed him a quantum meruit recovery.

Some of the more unusual issues are not squarely addressed by the rules.

First of all, courts have found that a lawyer cannot receive a referral fee if the lawyer would have been prevented from handling the case directly due to a conflict of interest.[9] Courts have also dealt with the question of whether there was sufficient consideration to support the payment of a referral fee where the referring attorney had already referred the client to the working attorney prior to the working attorney's agreement to pay the referral fee.[10]

One case, Johnson v. Brewer & Pritchard PC, before the Texas Supreme Court in the early 2000s, dealt with the question of whether an attorney can refer cases to another law firm without breaching his or her fiduciary duty to his employer.[11] As long as the attorney did not personally profit from referring the case to another firm, he did not breach his fiduciary duty to his own firm by referring the case to a firm that was better equipped to handle the case.

Problems may arise where one of the lawyers is fired before the client receives a judgment on which the contingency is based. At a minimum, the discharged lawyer may have a quantum meruit claim.[12] If the discharged lawyer was just the referring lawyer, it may be difficult to prove the value of the services where the lawyer did no actual work on the case.[13]

Fee-sharing arrangements do not come without risk. The joint responsibility for the representation may mean that each lawyer will be liable for the negligence or misconduct of the other as joint venturers.[14] There is also at least one case — Tormo v. Yormark before the U.S. District Court for the District of New Jersey in 1975 — imposing liability for negligent referral where the working attorney was clearly ill-qualified to do the work because of his history of embezzlement and other criminal acts.[15]

Important lessons can be gleaned from these rules and cases.

First, all referral fee agreements should be in writing, contain full disclosures, contain language that the client has the right to consent or refuse, and require the client's signature.

It is also best — and may be required by the applicable rules — to establish in writing a clear division of responsibility and fees between the lawyers and make sure the client is aware of this division. If the case involves a large damage exposure, both firms should make sure they are adequately insured if the case is unsuccessful and the client sues for malpractice.

Before entering a fee-sharing agreement, check with the local professional conduct committee to make sure that there are no complaints against the proposed lawyer. It is also advisable to work through a known network of contacts to find someone with credible references.

Due diligence should include asking whether the lawyer under consideration has been the object of any malpractice claims; confirming that he or she has some experience handling the type of matter that is being referred; and confirming that he or she has the time and the staff to handle the matter. A review of the other lawyer's errors and omissions policy, including the policy's declarations page, listing limits of coverage, is also important.

These fee-sharing agreements are good for lawyers and clients. But if not done right, the price of collecting a fee will be high.

David A. Grossbaum is a partner at Hinshaw & Culbertson LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Edelson, P.C. v. Girardi, et al., Case No. 20 C 7115 (United States District Court, N.D. Illinois, Eastern Division).

[2] Daynard v. Ness, 178 F. Supp. 2d 9 (D. Mass. 2001). See also Frost v. Lotspeich, 175 Or. App. 163, 30 P. 3d 1185 (Or. Ct. App. 2001) (analyzing whether the California or Oregon ethical rule applied to fee-sharing agreement).

[3] Fla. Bar Reg. R. 4-1.5(f)(4)(D)(ii) & (iii); Fla. Bar Reg. R. 4-1.5(g) ("Subject to the provisions of subdivision (f)(4)(D), a division of 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 in proportion to the services performed by each lawyer; or (2)by written agreement with the client: (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made").

[4] Parker v. Santek Mgmt., LLC, 311 So. 3d 224, 229 (Fla. Dist. Ct. App. 2020), review denied, Santek Mgmt., LLC v. Harmon Parker, P.A., No. SC20-1773, 2021 Fla. LEXIS 749, at *1 (May 13, 2021).

[5] Chambers v. Kay, 29 Cal. 4th 142, 56 P 3d 645 (2002). See also Bertucci v. McIntire, 693 So. 2d 7 (La. Ct. App. 1997) (client was not informed in writing of precise amount paid to each lawyer, even though she knew that original lawyer had brought in additional lawyers to work on the case and she did not object; lawyer limited to quantum meruit award).

[6] See Kaplan v. Pavalon & Gifford, 12 F.3d 87, 92 (7th Cir. 1993) ("In Illinois, a fee-sharing agreement between attorneys for referrals, which is neither in writing nor signed by the client, is unenforceable as a matter of public policy. Therefore, the oral fee-sharing agreement between Kaplan and Pavalon & Gifford is unenforceable because, as all parties agree, it was not in writing and not signed by the Cohns").

[7] Frost v. Lotspeich, 175 Or. App. 163, 30 P. 3d 1185 (Or. Ct. App. 2001) (Oregon disciplinary rule relating to reasonableness of fees did not apply as to split of fees between lawyers, but the California statute at the time did require that the fee received by each lawyer be reasonable).

[8] Hance v. Super Store Indus., 44 Cal. App. 5th 676, 682-83, 257 Cal. Rptr. 3d 761, 765 (2020) (lawyer seeking to void the agreement alleged the following violations of the California rules: "(1) there was never a final agreement to terms because Waisbren [lawyer4 seeking to enforce the agreement] did not clearly accept all terms of the September 27, 2012 proposal; (2) any agreement for division of fees among the attorneys required the written consent of all the clients (Rules Prof. Conduct, former rule 2-200 (4) and, while Waisbren initially obtained a written consent from each class representative, Helfgott subsequently retracted his consent; and (3) if the fee division agreement was valid, it was rendered invalid by Waisbren's breach. Miller [lawyer seeking to void the agreement] also contended the consents to the fee division agreement, which Waisbren obtained from the clients, were invalid because Waisbren failed to advise the clients that he lacked professional liability insurance, in violation of former rule 3-410").

[9] Polland & Cook v. Lehmann, 832 S.W. 2d 729 (Ct. App. Tex. 1992); Evans & Luptak v. Lizza, 251 Mich. App. 187, 650 N.W. 2d 364 (2002).

[10] Crill v. Bond, 76 S.W. 3d 411 (Ct. App. Tex. 2001) (consideration found); Fleming v. Campbell, 537 S.W. 2d 118 (Ct. App. Tex. 1976) (no consideration).

[11] Johnson v. Brewer & Pritchard, P.C., 73 S.W. 3d 193 (Tex. 2002).

[12] See Barwick, Dillian & Lambert, P.A. v. Ewing, 646 So. 2d 776 (Dist. Ct. App. Fla. 1995) (attorney could collect under quantum meruit for unenforceable referral fee agreement, but did not make that argument).

[13] But see Bertucci v. McIntire, 695 So. 2d 7 (La. Ct. App. 1997) (based on frequent contact with client during the case, referring lawyer awarded a 10% fee not the 20% agreed upon orally between the lawyers).

[14] See e.g., Fitzgibbon v. Henry A. Carey, P.C., 70 Or. App. 127, 688 P 2d 1367 (1984) (even though the work of the two firms was not exactly equal, they were entitled to equal fees as joint venturers); Noris v. Silver, 701 So. 2d 1238 (Fla. Dist. App. 1997) (where there was no valid fee-sharing agreement signed by the client, the referring attorney was still liable for negligence of the working attorney where they agreed to share the fee).

[15] Tormo v. Yormark, 398 F. Supp. 1159 (D.N.J. 1975).
