



## Alerts

### Absent a Fee-Sharing Agreement Signed by Client, Referring Attorney Cannot Recover Fees From Receiving Attorney

April 20, 2016

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*Naughton v. Pfaff*, 2016 IL.App (2nd) 150360

#### Brief Summary

A referring attorney sought to recover under an oral fee-sharing agreement with another attorney, alleging that their agreement constituted a joint venture and that the receiving attorney breached his fiduciary duty by failing to obtain the client's signed consent. An Illinois appellate court held that both attorneys have a non-delegable ethical obligation to ensure that the client agrees in writing to a fee division. Absent the client's signed consent, the attorneys' agreement violates the Rules of Professional Conduct and thereby precludes recovery, regardless of the theory asserted or whether the client subsequently approves.

#### Complete Summary

Plaintiff had an oral fee-sharing agreement with another attorney, the defendant. According to plaintiff, the defendant agreed to pay him one-third of any fees defendant received from representing a client referred by plaintiff. Plaintiff agreed to assume the same legal responsibilities for defendant's services as he would if defendant were his partner. Defendant allegedly agreed to prepare and have the client sign a contract identifying plaintiff as the referring attorney and the agreed upon fee share. Plaintiff thereafter referred several potential clients to defendant. For those cases accepted by defendant, he obtained the clients' signature on a written retainer agreement, detailing plaintiff's role as the referring attorney and his fee.

In 2003, plaintiff referred his friend and client, Pete Mateljan, to defendant regarding personal injuries sustained by Mateljan's daughter, Elizabeth Frankenfield, following a medical procedure. Defendant declined to take the case. In 2006, Mateljan asked plaintiff for the name of a medical malpractice attorney for injuries sustained by Elizabeth's daughter, Julianna Frankenfield, during Julianna's birth. Again, plaintiff referred Mateljan to defendant.

Based on the referral Mateljan obtained from plaintiff, Elizabeth subsequently met with defendant regarding Julianna's case. At that time, she allegedly told defendant of the referral by plaintiff. Defendant accepted the case, but failed to disclose in his written retainer agreement with Elizabeth that plaintiff would

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receive one-third of the attorney's fees. Instead, Elizabeth signed defendant's standard retainer agreement.

In 2008, defendant settled Julianna's case for \$7.9 million. Because the case had not required large expenses before settlement, defendant voluntarily reduced his fee to 18% so that an extra \$900,000 could go to Julianna's estate. Plaintiff learned of the settlement when Mateljan called him to thank him for the referral to defendant. Plaintiff then called defendant to confirm the settlement and to inquire about the status of his referral fee. Defendant confirmed the settlement and allegedly told plaintiff that he was embarrassed by omitting plaintiff from the retainer agreement and that he would "make it right." Defendant subsequently denied the referral.

In January 2010, plaintiff filed suit against defendant, alleging that his referral agreement with defendant constituted a joint venture and that defendant breached his fiduciary duty to him by failing to include plaintiff as the referring attorney in the retainer agreement with Elizabeth. Plaintiff sought damages in the sum of one-third of the attorney fees from Julianna's case. Both Mateljan and Elizabeth supported plaintiff's claim, each attesting that plaintiff was the reason Elizabeth retained defendant for Julianna's case. Elizabeth understood that any referral fee paid to plaintiff would be paid by defendant, although she did not know how the referral was specifically supposed to work or what percentage of the fee plaintiff was to receive. It was her understanding that the referral fee would not cost her or Julianna's estate any money.

After several motions, the trial court ultimately granted summary judgment in favor of defendant, ruling that an attorney who refers an individual to another attorney may not prevail on a claim of breach of fiduciary duty against the receiving attorney if the client did not sign a contract complying with Rule 1.5 of the Illinois Rules of Professional Conduct. The appellate court affirmed.

At the outset, the court considered defendant's argument that the absence of an attorney-client relationship between plaintiff and Elizabeth or her husband, as guardians and/or next friend of Julianna, barred plaintiff from recovery. The court rejected the argument, finding that a referring attorney need not have an attorney-client relationship with the referred individual prior to making the referral. While the rule provides that fees may not be divided unless the client consents to employment of the other lawyer and the rule discusses the situation where the primary service performed by one lawyer is the referral of the client to another lawyer, the court found that use of the word "client" can be understood to mean the individual who becomes the client of the receiving attorney. Thus, fees may be divided even absent an attorney-client relationship between the referring attorney and the referred individual.

The court next addressed who has disclosure obligations under the rule. The 2010 version of Rule 1.5 is silent as to which attorney should obtain the signed writing required by the rule. Plaintiff argued that under the 1990 version, the obligation rests with the receiving attorney, citing Rule 1.5(g) which gives the receiving attorney an obligation to disclose the amount of money the referring attorney has received or will receive. The court disagreed, noting that subsection (f), which requires that the client sign a written disclosure in the first place, does not place this burden solely on the receiving attorney, and subsection (h), which requires that the total fee of the lawyers be reasonable, clearly applies to both attorneys. Accordingly, the court held that both the referring and receiving attorneys are ethically obligated to ensure that the client agrees in writing to a fee division.

Regardless of the theory pursued, the court held that a fee-sharing agreement cannot be enforced without the client's signed consent. Further, the fact that Elizabeth subsequently agreed that plaintiff should obtain a portion of the fees as the referring attorney was not helpful to plaintiff.

### **Significance of Opinion**

The professional rules regarding fee-sharing agreements are mandatory, obligating both the referring and receiving attorneys to ensure that the client agrees in writing to a fee division. The failure to comply bars the referring attorney from recovering fees.

For more information, please contact [Terrence P. McAvoy](#).