5 Ways to Lose Referral Fees; 10 Ways to Keep Them

By Patrick J. Higgins

Lawyers referring cases to other lawyers are part of a tradition as old as the bar. An equally old tradition is lawyers losing those referral fees.

Telling another lawyer that a client will be calling is a professional courtesy. It is not a referral agreement. To share a fee, the lawyers must agree to that, and do so in a way meeting the criteria of the New York Rules of Professional Conduct (New York's Model Rules) and supporting case law. The courts have made this clear. The question is, how can lawyers validly agree to share fees, and thereby ensure that their mutual client is best served without dispute?

The Law

New York statutory law recognizes that lawyers may share fees with other lawyers.[1] But lawyers cannot divide a fee with a lawyer who is not associated with the same law firm unless (1) the fee is in proportion to the services rendered by each lawyer *or* by a writing given to the client, each lawyer assumes joint responsibility for the representation; (2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and (3) the total fee is not excessive.[2]

In the tort field, whether a fee is excessive is generally not in dispute. Personal injury and medical malpractice contingency fee agreements meeting the statutory requirements are not excessive.[3] Neither are court-approved infant or wrongful death settlements.

Rather, lawyers lose referral fees, or become entangled in referral fee disputes, in five historical ways. We discuss each below, and provide ten ways to avoid these scenarios.

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Scenario 1 – "I never agreed to share fees"

In this scenario, there is no express written fee-sharing agreement. The case settles. One lawyer claims an agreement to share fees, and the other denies it. These cases vary in result. They turn on evidence of an agreement in the writings between the lawyers, custom and practice, or parol evidence.

A case on point is *Mills v. Chauvin*.[4] The lawyers were former friends and business partners. The referring lawyer, Chauvin, sent a case over to Mills, who handled the case (the receiving lawyer). The case settled, and the referring lawyer claimed that the case was sent to Mills for him to handle on a *quantum meruit* basis. The receiving lawyer argued that he was entitled to one third of the fee, based on his agreement to that effect with Chauvin. The trial court and the appellate division found for the receiving lawyer. Emails between the lawyers clearly and concretely established their intent to share the fee as the receiving lawyer indicated, thereby forming a binding agreement.[5]

Sometimes custom and practice and parol evidence establish a fee-sharing agreement, as in *Carter v. Katz, Shandell, Katz & Erasmous*.[6] Mrs. Carter was the widow of the deceased referring lawyer Bernard Carter. He had referred a medical malpractice case to the defendant receiving firm on a 50% fee-sharing agreement. The dispute arose when he died, the case settled, and no fee issued to his estate.

Mrs. Carter sued the firm for the estate's 50% of the fee and won. The trial court found that (1) Bernard Carter had in the past referred 10 cases to the defendant firm and had received a 50% fee split on all of them; (2) the retainer statement filed with the Second Department listed Bernard Carter and the defendant lawyers as retained lawyers; and (3) Bernard Carter had worked jointly on the case with the defendant law firm. These factors unequivocally demonstrated that Bernard Carter had referred the case under a 50% fee-sharing agreement and that his estate was entitled to that share of the fee.

Scenario 2 – "You didn't do enough work or share responsibility"

The receiving lawyer argues that the referring lawyer only did 20% of the work, even though the referring lawyer was due 50% of the fee under the fee-sharing agreement. The receiving lawyer argues that the referring lawyer should receive a fee based on *quantum meruit*.

As between these lawyers, the law favors the referring lawyer. A written agreement between lawyers to divide legal fees is valid and will be enforced according to its terms, if the lawyer who seeks a share of the fee (generally the referring lawyer) contributed some work, labor or service toward earning the fee.[7] The courts will not inquire into the precise value of "some work";[8] therefore, the fee split need not be proportional to the work performed.[9] This is particularly true where the referring lawyer has not refused a request to contribute more substantially.[10] Thus, where a written fee-sharing agreement called for one third of the fee to the referring lawyer, and that lawyer performed 10% of the work on the case, the referring lawyer was entitled to the one-third fee share in the agreement.[11] The referring lawyer, however, must show that he or she did some work.[12]

Sometimes, the referring lawyer does not work on the case. In this instance, the lawyer still may share the fee according to the fee-sharing agreement if the lawyer has agreed to be jointly responsible to the client for the case, and the client has agreed to that.[13] Without this joint responsibility, the referring lawyer is doing nothing but recommending a lawyer and cannot share the case fee.[14]

A valid agreement to share fees precludes an action for *quantum meruit*.[15] However, if the referring lawyer does not work on the case, or share responsibility for it, the courts have voided such an agreement and set fees based on *quantum meruit*.[16]

Scenario 3 – "The fee-sharing agreement is void because it violates New York's Model Rules"

In this scenario, one lawyer resists sharing the fee because the fee-sharing agreement violates New York's Model Rules. If the dispute is only between lawyers, and does not impact the client, the courts frown on one lawyer wielding the ethics rules as a sword against a colleague. They look to see whether the client has been misled or deceived, and knows of – and has agreed to – the fee-sharing agreement.[17] If so, they are more likely to find that a lawyer resisting payment had freely agreed to be bound by the fee-sharing agreement and benefited from it.[18]

However, other cases hold that a fee-sharing agreement violating New York's Model Rules is unenforceable.[19] And the courts are not bound by fee-sharing agreements when setting fees in infant settlement or wrongful death cases – even if all lawyers agree on the sharing of fees.[20] Such agreements constitute only "non-mandatory guidance."[21]

Scenario 4 – "Your share of the fee is not calculated that way"

Sometimes, lawyers agree to share fees, but disagree on the fee. These disputes include whether the referring lawyer should also receive one third of the enhanced fee on a medical malpractice case,[22] whether the referring lawyer's one-third fee share should be reduced by the receiving lawyer's later fee-sharing agreement with another counsel,[23] and whether a successor lawyer was responsible for the fees of appellate counsel as part of the fee-sharing agreement.[24]

The courts have applied traditional contract principles to such issues. Specific, unambiguous language remains the coin of the realm. Thus, in *Samuel v. Druckman & Sinel*,[25] the Court of Appeals held that the referring law-

yer was entitled to one third of the entire legal fee in the case, just as the fee-sharing agreement said. This was so even though the receiving lawyer had retained another lawyer to help with *Frye* motions and to try the complex case, and the efforts of the receiving lawyer and his retained lawyer generated the enhanced fee.[26]

Scenario 5 – "Yes, we had a referral agreement, but you didn't refer this case"

In *Clark v. Vicinanzo*,[27] general practice attorney Clark referred a case to the firm of Vicinanzo and Wollman.[28] The case later settled, generating a $600,000 fee to that firm. Clark did not receive his referral fee and sued. Wollman answered the complaint and cross-claimed against Vicinanzo for 50% of the fee based on an oral fee-sharing agreement whereby Wollman would get salary and 50% of the fee for any work that he brought in.

Clark settled with Vicinanzo and Wollman. Wollman then tried his cross claim against Vicinanzo for 50% of the fee before a judge. The issue was not whether an enforceable fee-sharing agreement existed. Vicinanzo conceded that it did. Rather, the lawyers disagreed about whether Wollman had brought the case in to the firm. Vicinanzo said that while Wollman may have been involved peripherally, Vicinanzo brought the case in, so there was no referral and no 50% sharing of the fee.

The trial court ruled for Vicinanzo based on conflicting and contradictory evidence and self-serving statements by the parties.[29] The appellate division found no reason to disturb the finding of the trial court, which was best suited to observe and weigh the credibility of the lawyers.[30] This was a $300,000 lesson for Wollman, if he did refer the case to the firm, and an expensive lesson in legal fees and time for Vicinanzo if he didn't.

10 Ways to Avoid Disputing – or Losing – Referral Fees

No lawyer – or court – enjoys fee-sharing disputes and litigation. These disputes are best studied from afar. To ensure that vantage point:

1. Every fee-sharing agreement should be reduced to writing signed by the referring and receiving lawyer.
2. The fee-sharing agreement must set forth the specific percentage of the fee that each lawyer will receive.
3. The fee-sharing agreement should define the fee that will be shared, such as the entire fee recoverable in the action or, if less, words to that effect.
4. If the referring attorney is not going to work on the case, the fee-sharing agreement must state that the each lawyer assumes joint representation for the case.
5. The fee-sharing agreement should state that the client's fee for legal services will not be increased as a result of the fee and case sharing between lawyers.
6. The client must be advised in writing of the above, and execute a writing agreeing to the fee sharing.
7. For lawyers who must file retainer statements, the opening filed retainer statement should confirm that both lawyers will share the fee and set forth the percentages.
8. These written agreements should be executed when a fee-sharing agreement is executed.
9. If there is no fee-sharing agreement, this should be confirmed in writing so that the "referring" attorney understands this up front.
10. With in-house referrals such as in the *Clark* case above, the law firm should require that a written form for all such referrals be executed by the managing partner and the attorney bringing the case in. This form should be presented for signature when the case is first brought in. This will confirm that it is a referral pursuant to the existing fee-sharing agreement. If executed, that form should end disagreement as to whether a particular case qualifies or does not qualify as a referral. It will, of course, also bring that issue to a head at that time if the managing partner will not sign the form.

These 10 points should prevent lawyers from losing referral fees and help them avoid Pyrrhic fee disputes with colleagues. It is better for the client, bench, and bar that the involved lawyers enjoy the successful client outcome they originally intended. ■

If the referring lawyer does not work on the case, or share responsibility for it, the courts have set fees based on *quantum meruit*.

1. Judiciary Law § 491.
2. Rules of Professional Conduct (22 N.Y.C.R.R. § 1200.0) rule 1.5(g).
3. Judiciary Law § 474-a.
4. 103 A.D.3d 1041, 1047 (3d Dep't 2013); *see also Krug v. Offerman, Fallon Mahoney & Cassano*, 214 A.D.2d 889, 890–91 (3d Dep't 1995) (ruling on whether an agreement existed to share fees based on an of-counsel relationship to perform workers compensation services for an injured plaintiff represented by the defendant firm).
5. *Mills*, 103 A.D.3d at 1047–48.
6. 120 Misc. 2d 1009 (Sup. Ct., Queens Co. 1983).
7. *Oberman v. Reilly*, 66 A.D.2d 686, 687 (1st Dep't 1978), *lv. dismissed*, 48 N.Y.2d 602, 654 (1979); *Grasso v. Kubis*, 198 A.D.2d 811 (4th Dep't 1993).
8. *Samuel v. Druckman & Sinel, LLP*, 12 N.Y.3d 205, 210 (2009).

9. *Id.* at 210; *Mills* at 1048; *Nicholson v. Nason & Cohen*, 192 A.D.2d 473, 474 (1st Dep't 1993).

10. *Benjamin v. Koeppel*, 85 N.Y.2d 549, 556 (1995).

11. *Graham v. Corona Grp. Home*, 302 A.D.2d 358, 359 (2d Dep't 2003).

12. *A. Stanley Proner, P.C. v. Julien & Schlesinger*, 134 A.D.2d 182 (1st Dep't 1987).

13. *Samuel*, 12 N.Y.3d at 210.

14. *Nicholson*, 192 A.D.2d at 474.

15. *Oberman*, 66 A.D.2d at 687; *Jontow v. Jontow*, 34 A.D.2d 744, 745 (1st Dep't 1970).

16. *Calcagno v. Aidman*, 20 Misc. 3d 1132(A) (Sup. Ct., Richmond Co. 2008); *see also In re Levy*, 16 Misc. 3d 1106(A) (Sur. Ct., Nassau Co. 2007).

17. *Samuel*, 12 N.Y.3d at 210; *Benjamin*, 85 N.Y.2d at 556; *Mills*, 103 A.D.3d at 1047; *Reich v. Wolf & Fuhrman*, 36 A.D.3d 885, 886 (2d Dep't 2007); *Ballow Brasted O'Brien & Rusin, P.C. v. Logan*, 435 F.3d 235, 242–43 (2d Cir. 2006); *Weiser & Assoc. v. Anthony C. Donofrio & Assocs., P.C.*, 2009 N.Y. Slip Op. 31393(U) (Sup. Ct., N.Y. Co. 2009).

18. *Cook-Zwiebach v. Oziel*, 2011 N.Y. Slip Op. 52194(U) (Sup. Ct., N.Y. Co. 2011).

19. *Hirsch v. Bashian & Farber, LLP*, 79 A.D.3d 971, 972 (2d Dep't 2010); *Ford v. Albany Med. Ctr.*, 283 A.D.2d 843, 845–46 (3d Dep't 2001); *Law Offices of K.C. Okoli, P.C. v. Maduegbuna*, 2008 N.Y. Slip Op. 31142(U) (Sup. Ct., N.Y. Co. 2008). The rule violated in these cases was DR 2-107, which was in effect at the time.

20. *Wagner & Wagner, LLP v. Atkinson, Haskings, et al.*, 596 F.3d 84, 89–90 (2d Cir. 2010).

21. *Id.* at 90.

22. *Samuel*, 12 N.Y.3d at 208–10.

23. *Borgia v. City of N.Y.*, 259 A.D.2d 648 (2d Dep't 1999).

24. *Gair, Gair, & Conanson, P.C. v. Stier*, 123 A.D.2d 556, 557 (1st Dep't 1986).

25. 12 N.Y.3d at 210.

26. *Id.*

27. 151 A.D.2d 951, 953 (3d Dep't 1989).

28. This was apparently not a partnership (*see Clark*, 151 A.D.2d at 953, n.2).

29. *Id.* at 953.

30. *Id.*

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