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THE FLORIDA BAR ETHICS DEPARTMENT

**OPINION 90-8**  
**(March 1, 1991)**

The committee discusses situations in which it is or is not permissible for a Florida attorney to divide a fee with an out-of-state attorney who is not admitted to The Florida Bar.

**RPC:** 4-1.5; 4-1.5(F); 4-1.5(F)(1) and (2); 4-1.5(F)(3)(b); 4-1.5(F)(4)(d); 4-1.5(G)  
4-1.5(G)(1) and (2); 4-5.4(a)

**Opinions:** 60-18, 62-3, 88-10

**Case:** *The Florida Bar re Amendments to the Rules Regulating The Florida Bar*, 519  
So.2d 971 (Fla. 1987)

The Committee has been asked to render an opinion whether a Florida attorney may ethically divide a fee with a non-Florida attorney. This inquiry has been made by a number of Florida Bar members who have questioned the propriety of sharing, usually in a referral context, a fee with an attorney who is not admitted to The Florida Bar.

Four possible fee division scenarios will be discussed. They are:

1. A member of an out-of-state bar lives in a condominium in Florida. A resident of the condominium who needs legal advice talks to the out-of-state attorney. The attorney refers the resident to a Florida attorney.
2. A resident of another state consults an attorney out of state regarding a criminal matter in Florida. The out-of-state attorney decides that a Florida attorney must be associated on the matter.
3. A resident of another state is injured in Florida while on vacation. The injured person consults with an attorney in the person's home state. That attorney refers the case to a Florida attorney who charges a contingent fee.
4. A Florida attorney refers a case to a non-Florida law firm to be prosecuted in a foreign jurisdiction. That jurisdiction has a rule which permits a 50% "referral fee."

(In this opinion, the term "Florida attorney" is used to mean a Florida Bar member who resides in Florida.)

Rule 4-1.5 of the Rules Regulating The Florida Bar, (hereinafter "the Rule"), governs attorney's fees. Specifically, paragraph (G) sets forth the requirements governing the division of fee in any type of case:

Subject to the provisions of paragraph (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.

Paragraph (G)(1) of the Rule permits a division of fee on a quantum meruit basis, and does not require a written agreement with the client. The comment to the Rule, however, states that the division of fee must be disclosed to the client. Paragraph (G)(2) of the Rule permits attorneys who are not in the same firm to divide a fee provided that the client agrees to the division in writing and further provided that each attorney agrees in writing to assume joint legal responsibility and to be available for consultation with the client.

The division of a fee in a contingent fee case is subject both to the provisions of paragraph (G) and to additional restrictions found in paragraph (F) of the Rule. Unlike the division of fees governed solely by paragraph (G), the division of any contingent fee between lawyers who are not in the same firm must be pursuant to a written agreement with the client in which the attorneys agree to assume joint legal responsibility. Rule 4-1.5(F)(1) and (2). This requirement applies to a division of a contingent fee in any matter. Thus, paragraph (G)(1), which does not require a written agreement, is superseded by paragraph (F) in any contingent fee case.

In certain types of contingent fee cases, paragraph (F)(4)(d) of Rule 4-1.5 sets forth further restrictions on any division of fee between attorneys who are not in the same firm. Specifically, paragraph (F)(4)(d) of the Rule applies to:

[a]ny fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof[.]

Regarding the division of a fee in these contingent fee personal injury-type cases, paragraph (F)(4)(d) provides in pertinent part:

As to lawyers not in the same firm, a division of any fee within paragraph (F)(4) shall be on the following basis:

1. To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.
2. To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.
3. The 25% limitation shall not apply to those cases in which two (2) or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply for circuit court authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel which shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this section shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending approval.

Only in a case governed by paragraph (G)(1) (i.e., in a case in which the fee is not a contingent fee and both attorneys actually work on the case), may attorneys divide a fee without entering into a written agreement with the client which discloses how the fee will be divided and states that the attorneys agree to assume joint responsibility.

In any other type of fee division, (i.e., a fee division to which paragraph (G)(1) is not applicable) each attorney who shares in the fee must agree in writing to assume legal responsibility for the representation and to be available to consult with the client. Therefore, in such cases, it would be unethical to divide a fee with an attorney who does not at a minimum agree in writing to accept legal responsibility for the representation and to be available for consultation with the client.

With that background in mind, the above four scenarios will now be discussed. The first hypothetical scenario may be resolved by application of prior Professional Ethics Committee opinions and the preceding summary of Rule 4-1.5. Opinions 60-18 and 62-3 are relevant to the first scenario. In these opinions the Committee concluded that it would be improper for a Florida attorney to divide a fee with a non-Florida attorney who resides in Florida and refers a case to the Florida lawyer. The Committee stated that it may constitute aiding the unauthorized practice of law to accept cases referred by the non-Florida attorney. Additionally, the Committee stated that the restriction on dividing a fee

with a non-lawyer prohibits a Florida attorney from sharing a fee with an inactive non-Florida lawyer residing in Florida. Opinion 60-18. See also Rule 4-5.4(a) (prohibiting an attorney from sharing fees with a non-lawyer).

In Opinion 62-3 the Committee determined that it would be unethical for a Florida Bar member to divide a fee with an out-of-state attorney residing in Florida because there could not legitimately be a division of services or responsibility in the matter.

As noted above, the fee division provisions of Rule 4-1.5 require an attorney to either work on a matter or assume joint legal responsibility in order to receive a portion of a fee (depending upon whether the fee is on a contingent or non-contingent basis). Therefore, in hypothetical scenario one the Florida attorney could not divide a fee with the resident non-Florida attorney who refers a case because, as discussed in Opinions 60-18 and 62-3, the non-Florida attorney cannot practice law in Florida or agree to assume joint responsibility as is required by the rules. A division of fee in such a case would constitute improper fee-sharing with a non-attorney and could constitute aiding in the unlicensed practice of law.

Regarding the second and third hypothetical scenarios, in which a Florida attorney accepts a referral from an out-of-state attorney, the Florida attorney may divide a fee with the referring attorney provided the division is in compliance with Rule 4-1.5. Any case referred to a resident Florida Bar member practicing Florida law presumably will be related to Florida or Florida law. A member of The Florida Bar is obligated to comply with the Rules Regulating The Florida Bar, including the fee division rules. Therefore, it would be unethical for a Florida attorney to pay a referral fee to an out-of-state attorney absent compliance with the applicable fee division rules, regardless of whether the referring attorney is a member of The Florida Bar.

In the second scenario the fee division is specifically governed by paragraph (G) of the Rule. Paragraph (F) is inapplicable because a fee in a criminal case cannot be contingent. See Rule 4-1.5(F)(3)(b). Thus, the Florida attorney ethically may share a fee with the out-of-state attorney in this case either based on work done or by written agreement with the client in accordance with the requirements of paragraph (G). Unlike the non-Florida attorney who resides in Florida, a practicing out-of-state attorney would be able to legitimately provide some legal services to the out-of-state client, thereby avoiding the problems cited in Opinions 60-18 and 62-3.

The third scenario triggers the application of paragraphs (F)(1), (F)(2) and F(4)(d) of Rule 4-1.5 because a contingent fee is involved. Accordingly, the attorney who assumes primary responsibility must receive a minimum of 75% of the total fee and the attorney assuming secondary responsibility may receive a maximum of 25% of the total fee. The fee division agreement must be reduced to writing and the client must consent in writing to the agreement. As in the second scenario, presumably the out-of-state attorney can provide services to the out-of-state client thus avoiding the problems noted in the cited ethics opinions.

If, as in scenario four, a Florida attorney refers a case to an out-of-state attorney and participates in the fee, the referring attorney must comply with paragraph (G) of the Rule. In contingent fee cases paragraphs (F)(1) and (2) also apply. Furthermore, paragraph (F)(4)(d) is applicable in personal injury-type contingent fee cases. If the applicable fee division rules are followed, it will be ethical for the Florida attorney to divide a fee with the out-of-state attorney. In adopting the fee division limitations set forth in Rule 4-1.5(F)(4)(d), the Supreme Court of Florida stated that those limitations “will not apply to nonresident bar members unless those nonresidents practice in matters of Florida law.” 519 So.2d 971, 972. That is the only exception to the 25% limitation allowed by the court (aside from the exception contained in the rule itself for true co-counsel who obtain circuit court authorization for a different fee-division arrangement). Nothing in the Supreme Court's order, the rule, or the comment to the Rule suggests that the 25% limitation is inapplicable when a Florida Bar member refers a case to an attorney in another state.

Nevertheless, in cases where the referring Florida Bar member participates in the trial of the out-of-state case, choice of law principles should determine whether the Florida contingent fee rule applies. See Opinion 88-10. In example number 7 of Opinion 88-10, the Committee considered a situation in which an out-of-state attorney with an out-of-state client and an out-of-state lawsuit sought to have a Florida attorney (who was either licensed in the other state or admitted there pro hac vice) participate in the trial of the case. The Committee opined that the other state had a more significant relationship to the client and the cause of action than did Florida; therefore, the Committee concluded that the other state's contingent fee rules were applicable.



**OPINION 90-3**  
**(July 15, 1990)**

Payment of referral fee to attorney who, subsequent to execution of fee-division agreement, has become suspended, disbarred, or resigned from The Florida Bar, is to be made on a quantum meruit basis.

**RPC:** 4-1.5(G)  
**Opinions:** 65-21, 66-20, 72-16  
**Misc:** Rule 3-7.11, Rules Regulating The Florida Bar

A client with a personal injury claim was referred to the inquiring attorney by another attorney in early 1988. The inquirer agreed to represent the client on a contingent fee basis. The inquirer also agreed to pay to the referring attorney 25% of the total attorney's fees received in the case.

In late 1988 or early 1989 the inquirer learned that the referring attorney was no longer a member of The Florida Bar. The client's case was settled in July 1989. The inquirer is now concerned about the propriety of paying the 25% referral fee to the referring attorney, who is not presently licensed to practice law in Florida.

The regulations governing division of fees between attorneys who are not in the same firm are set forth in Rule 4-1.5 of the Rules Regulating The Florida Bar. Section (G) of Rule 4-1.5 provides:

(G) Subject to the provisions of paragraph (F)(4)(d) [which limits a referring attorney's share of the fee in a personal injury-type case to 25% absent court approval], 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.

Presumably the inquirer and the referring attorney entered into the written agreement with the client described in section (G)(2).

The former Code of Professional Responsibility provided that the only permissible way in which

attorneys not in the same firm could share a legal fee was in proportion to the work performed by each attorney. Referral fees were not authorized. When the Rules Regulating The Florida Bar became effective on January 1, 1987, this long-standing absolute prohibition on referral fees was modified. Rule 4-1.5(G), quoted above, now permits attorneys not in the same firm to divide legal fees either: (1) in proportion to the work performed by each; or (2) pursuant to a written agreement, signed by the client and all attorneys who are to participate in the fee, that sets forth the manner in which the fee is to be divided and provides that each attorney will assume joint legal responsibility for the representation and be available for consultation with the client. In situations where the fee is to be divided other than in proportion to the work performed (e.g., the typical referral situation), an attorney's acceptance of joint legal responsibility for the case and agreement to be available to consult with the client is the quid pro quo for the attorney's receipt of a portion of the fee that does not represent payment for work performed.

As noted, the former Code allowed attorneys who were not in the same firm to divide fees only in proportion to the work performed by each attorney. In various advisory opinions issued under the old rule, the Professional Ethics Committee stated that it was not unethical for an attorney to pay a suspended or disbarred attorney for services that the suspended or disbarred attorney performed prior to suspension or disbarment. See Florida Opinions 72-16; 66-20; 65-21.

The current fee-division rule, however, allows an attorney who does not perform services to receive a portion of the fee in exchange for his or her written agreement to assume joint legal responsibility and to be available for consultation. In view of this rule, the Committee concludes that it is ethically permissible for an attorney to pay, pursuant to a properly executed fee-division agreement, a suspended or disbarred referring attorney for the responsibility that the attorney did assume and the time that he or she was available for consultation prior to suspension or disbarment.

This quantum meruit approach is both logical and reasonable. Because the Florida Supreme Court decided that it is permissible for an attorney to receive a portion of a fee simply for agreeing in writing to assume joint responsibility for a representation and to be available for consultation with the client, a referring attorney who is suspended or disbarred during the course of the representation should not be denied all of his or her portion of the fee. On the other hand, a referring attorney who is suspended or disbarred at some point during the representation becomes unable to fulfill the contractual obligations of responsibility and availability and, therefore, should not receive the entire portion of the fee that he or she contracted for in the required written agreement. Instead, the suspended or disbarred referring attorney ethically may receive payment on a quantum meruit basis for the responsibility that he or she did assume and the time that he or she was available for consultation while licensed to practice.

This opinion also applies to attorneys who resign from The Florida Bar pursuant to Rule 3-7.11.

#### **OPINION 89-1**

(March 1, 1989)

Attorney who refers personal injury case to another lawyer because of conflict of interests may not take 25 percent referral fee authorized by fee rule.

**RPC:** 4-1.5(F)(4)(d); 4-1.5(G)

**Opinions:** 67-21, 73-2

The Committee has been asked whether a lawyer who refers a personal injury case to another lawyer because of a conflict of interests can ethically receive or be paid a 25 percent referral fee pursuant to Rule 4-1.5(F)(4)(d). The answer is no; it is impermissible for a lawyer who refers a case because of a conflict to receive any part of the fee for legal services performed, or to be performed, after the emergence of the conflict.

In Opinion 67-21 this Committee concluded that a lawyer who cannot ethically accept employment in the first instance because of a conflict cannot ethically participate in a division of the fee. In Opinion 73-2 this Committee similarly stated that a law firm precluded by conflict rules from participating in the representation or sharing responsibility for it likewise is precluded from sharing in the fee; the only compensation the referring firm can ethically receive is for the reasonable value of services rendered to the client before the conflict emerged.

Both of the cited opinions were issued at a time when referral fees as such were strictly prohibited. The ethics rules at the time permitted a division of fees between lawyers not in the same firm only in proportion to services performed *and* responsibility assumed. The rule against fee divisions has since been relaxed, but the results remain the same in conflict referral situations.

Currently Rule 4-1.5(F)(4)(d) of the Rules Regulating The Florida Bar expressly permits a referring lawyer (or “the lawyer assuming secondary responsibility for the legal services”) to be paid up to 25 percent of the fee in a personal injury case. This fee division is subject to the additional requirements set forth in paragraph (G) of the rule. Paragraph (G), which applies to all fee divisions between lawyers not in the same firm, regardless of the type of matter, provides that

. . . 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[.]

It is clear that a lawyer who performs some legal services for a client before the conflict requiring withdrawal emerges is permitted to receive *only* reasonable compensation for services actually performed before emergence of the conflict, as in Opinion 73-2. A lawyer who is obligated to decline employment in the first instance because of a conflict cannot ethically receive *any* portion of the fee. The reason is apparent: from the outset the lawyer is ethically proscribed from performing any legal services in the matter, and the lawyer cannot ethically assume any responsibility for the representation or consult with the client or the client's attorney. Thus a lawyer who is obligated to refuse employment in the first instance fails both of the Rule 4-1.5(G) tests. The result is the same as in Opinion 67-21.

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