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Trials&TRIBULATIONS

Fee-splitting without client OK can short-change attorneys

The age-old practice of attorney fee-splitting is still common today, but attorneys participating in such arrangements must be careful to comply with their ethical obligations with respect to those arrangements or risk receiving much less in attorneys' fees than they bargained for.

Fee-splitting is the subject of Rule 1.5(g) of the Rules of Professional Conduct (old rule DR 2-107), which specifically prohibits fee-splitting with another attorney who is not associated in the same firm unless "(1) the division of fees is proportionate to the amount of work each lawyer performs;" and "(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made … and the client's agreement is confirmed in writing; and (3) the total fee is not excessive."

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However, despite this rule's mandates, it appears, at least in light of the recent holding in *Hiller v. Lo*, 603200/2007, NYLJ 1202499582143, at *1 (Sup., NY, June 21), that a lack of the client's consent to the fee-splitting arrangement will not necessarily void a fee-splitting arrangement.

In *Hiller v. Lo*, two attorneys who shared office space but did not work in the same firm orally agreed that defendant Lo would refer certain personal injury cases to plaintiff Hiller and Hiller would receive one-third of any attorneys' fees recovered. Almost 10 years later, Hiller commenced an action seeking his share of the attorneys' fees paid to Lo by Hiller's clients.

Lo attacked Hiller's allegations on two fronts: First, he argued that there was no valid, enforceable fee-splitting agreement to begin with, and, second, even if there was a valid agreement, it was not enforceable in part because it violated the ethical cannon that attorneys cannot agree to fee-splitting without the consent of the client involved in the matter.

The court noted in its decision that, generally, a fee-splitting agreement is void as against public policy where it violates the Code of Professional Responsibility. The court also noted that the purpose of requiring a client's consent to a fee-splitting arrangement is to keep the client apprised of which attorney is actually handling his or her case, but that all that is really necessary to satisfy this ethical mandate is to inform the client that another attorney will be representing his or her interests at no additional expense.

In *Hiller v. Lo*, no client consent for the fee-splitting arrangement was obtained, which would lead one to conclude that the arrangement between Hiller and Lo was unethical and thus void, right? Well, that conclusion is wrong based upon the holding in this particular case.

The court found that even though Hiller clearly did not obtain the consent of the clients affected by the fee-splitting arrangement, he was still entitled to enforce the arrangement because Lo failed to demonstrate that those clients were not advised by other means of Hiller's involvement in their cases. The court also appeared to suggest that even if no consent was obtained from the affected clients, the fee-splitting arrangement can still be valid because a "defendant, who is bound by the same Code of Professional Responsibility as a plaintiff, cannot be heard to argue that the fee-sharing agreement and the obligations thereunder must be voided on ethical grounds [if it is proven that the agreement existed] by which he freely agreed to be bound and from which he reaped the benefits."

Basically, the court disallows defendant Lo to use the ethical rule as both a shield and a sword.

While such a conclusion appears equitable in the two-dimensional view of the situation involving just the attorneys, where does that leave the rights of the client?

There is a dearth of New York state cases holding fee-splitting arrangements void due to a failure to obtain a client's consent to that arrangement. However, *Matter of Levy*, 16 Misc 3d 1106(A) (Nassau County Sur Ct 2007) at least suggests that a fee-splitting arrangement between attorneys could be rendered void if the relevant clients involved in the cases at issue did not consent to such an arrangement.

Moreover, the court in *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, PC*, 596 F.3d 84

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(2d Cir. 2010) relied upon New York's DR 2-107 when it held that lack of informed consent from the client for a fee-sharing agreement barred recovery for the referring attorney. In that case, clients contacted an attorney for the purposes of commencing a personal injury action on behalf of their two-year-old daughter who was injured by a paper shredding machine.

The attorney that was contacted referred the case to the plaintiff law firm, who took the case. Meanwhile, the referring attorney and the plaintiff law firm entered into a fee-sharing arrangement whereby the plaintiff law firm would retain two-thirds of any attorneys' fees recovered and the referring attorney would receive one-third.

The clients' case settled for $975,000. Despite the fact that the plaintiff law firm did not dispute its arrangement with the referring attorney, the court sua sponte questioned whether sharing the fee with the referring attorney in this case violated DR 2-107. After hearing testimony from the clients indicating that they were unaware that the referring attorney would be working on their case, the judge denied attorneys' fees to the referring attorney due to a failure to comply with DR 2-107.

Courts in other states have also found fee-splitting arrangements invalid due to a failure to obtain client consent. California in particular has a very similar rule to that of New York. Rule 2-200 of California's Rules of Professional Conduct requires written notice to a client and the client's consent where attorneys in different firms seek to share fees.

In the case of *Strong v. Beydoun*, 166 Cal.App.4th 1398, 83 Cal.Rptr.3d 632 (2008), an attorney approached another attorney not associated with his firm for the purposes of helping him with the prosecution of several cases. With respect to one particular case, the attorneys entered into a fee sharing agreement and the first attorney promised that he would obtain the consent of his clients to permit the second attorney to work on their case and share in any resulting fees.

The second attorney worked on the clients' case for over a year until the first attorney "abruptly" terminated her services. Thereafter, the clients were awarded $550,000 in damages. The second attorney made it clear that she expected payment for her services, but received none. As a result, the second attorney commenced suit against both the first attorney and the clients.

However, the trial court found that the attorney could not maintain a claim against the clients or enforce the fee-sharing agreement as against the first attorney because she had failed to comply with Rule 2-200 by obtaining the consent of the clients for such an agreement. The attorney's only recourse was to seek to recover the reasonable value of the services she rendered from the first attorney in quantum meruit.

Similarly, in the case of *Huskinson & Brown, LLP v. Wolf*, 84 P.3d 379 (2004), a client approached the plaintiff law firm with a medical malpractice case and the plaintiff, whose practice consisted of defending health care providers, referred the case to the defendant law firm. The defendants (the law firm and one of its partners named in the suit) orally promised to share 25 percent of any attorneys' fees recovered in the matter with the plaintiff.

In addition to referring the matter, the plaintiff paid a medical expert $800 to work on the client's case and also spent about 20 hours working on the case, even though the defendants prosecuted the case. The client's case resulted in a judgment of $250,000, and the client paid the defendants.

However, the defendants did not render any payment to the plaintiff and the plaintiff commenced an action for breach of contract, unjust enrichment and recovery in quantum meruit. The court held that the plaintiff was barred from recovering for breach of contract, finding that the fee-sharing agreement was unenforceable because the parties did not disclose the agreement to the client and did not obtain the client's written consent. Therefore, the plaintiff was relegated to recovery in quantum meruit from the defendants.

In conclusion, although the recent holding of *Hiller v. Lo* appears to fly in the face of the ethical mandates of old DR 2-107 and current Rule 1.5(g), allowing the enforcement of a fee-sharing arrangement without the client's consent, the safest practice is to ensure that clients are fully aware of any fee-sharing agreement and to document their consent to that arrangement in writing, or risk limiting your recovery to quantum meruit, or maybe nothing at all.

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