HOYT & BLEWETT PLLC

ATTORNEYS AT LAW

ALEXANDER (ZANDER) BLEWETT, III
KURT M. JACKSON
JOSEPH P. COSGROVE
DREW BLEWETT
ANDERS BLEWETT

501 SECOND AVENUE NORTH
POST OFFICE BOX 2807
GREAT FALLS, MONTANA 59403-2807
(406) 761-1960
FAX (406) 761-7186
h&b@hoytandblewett.com

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Hon. Mike McGrath
Hon. Patricia Cotter
Hon. W. William Leaphart
Hon. Brian Morris
Hon. James C. Nelson
Hon. Jim Rice
Hon. Michael Wheat

Supreme Court Justices
Montana Supreme Court
Room 414, Justice Building
P.O. Box 203001
Helena, MT 59620-3001

AF 09-0688

Re: *Rules 7.1, 7.2, and 8.5 of the Montana Rules of Professional Conduct*

Dear Justices:

Thank you for giving members of the Bar an opportunity to make comments or suggestions to proposed Rules 7.1, 7.2, and 8.5 of the Montana Rules of Professional Conduct. Both proposed Rules 7.1 and 7.2 have an impact on Rule 1.5(e) regulating the division of attorneys' fees between lawyers who are not in the same firm. As you all know, the State of Montana has been inundated by lawyers from around the United States who have obtained Montana clients by nationwide advertising methods with the sole intent of referring the case to a Montana lawyer to handle in exchange for one-third of any contingency fee. These out-of-state lawyers have no intention whatsoever of performing any legal work for the clients who hire them. They have no intention of doing anything on the case, except to collect a fee on a case they obtained through their advertising, mainly on the internet and on TV The variations they use are almost countless, i.e., injurylawyer.com, injury.com, truckingaccidents.com, etc., along with massive TV advertising campaigns. The clients have no idea that the lawyers they are contacting because of these ads are from out-of-state. In our first contact with the client, the client invariably expresses amazement with the process which made him a client.

Rule 7.2 states:

> A lawyer shall not give anything of value to a person for recommending the lSawyer's services, except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this rule; (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and (3) pay for a law practice in accordance with Rule 1.19 [Sale of a Law Practice]. (emphasis added).

Since none of these three exceptions are relevant to the existing situation, this rule arguably prohibits any Montana lawyer from giving one-third of the attorneys' fee to the advertiser who, in effect, recommended the Montana lawyer's services. To my knowledge, none of the Montana lawyers and none of the out-of-state advertising lawyers are reading this rule to prohibit this conduct. Actually, these lawyers are assuming that they can divide an attorney's fee pursuant to Rule 1.5(e), in spite of Rule 7.2(b).

Rule 1.5(e) states as follows:

> 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.

All of this brings us to the question of what does Rule 1.5(e)(1) mean when it says "or each lawyer assumes joint responsibility for the representation?" I feel this is an issue which should be clarified or rectified. Interestingly, the *Annotated Model Rules of Professional Conduct, Sixth Edition*, generated by the American Bar Association, contains a comment to this rule. I have attached the cover sheet and pages 65, 66, and 67 for your review. The comment partially answers this question, stating:

> Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.

Again, I am not certain what this means, but it arguably attempts to prohibit what is occurring in this day and age. I have also attached pages 86 and 87 of the *Annotations* concerning Rule 1.5(e) and the meaning of "joint responsibility." As you will see, the Court have routinely found that "joint responsibility" means much more than these out-of-state advertising lawyers seem to think it means. A Georgia case, *In Re Babies*, has developed what appears to be a very sound rule to the effect that *pro hac vice* admission in each state is required to create "joint responsibility." The *Elane* case, out of Illinois, holds to the contrary, but appears to have properly received extreme criticism.

Having practiced in Montana for 39 years, I feel we have a serious problem with the manner in which these out-of-state advertising lawyers are "selling" the cases to Montana lawyers. In many circumstances, the out-of-state advertisers are giving the case to the lawyer who will pay them the highest percentage of a referral fee. I think the easiest fix for this serious problem is to amend Rule 1.5(e)(1) to add a clause after the semicolon following the word "representation," to wit:

> Joint responsibility can only be satisfied by both lawyers appearing as attorneys of record for the client, which necessitates *pro hac vice* admission for lawyers not admitted to practice in Montana.

Another remedy for this problem might be to amend Rule 7.2(b) by adding the following language after "[Sale of a Law Practice]":

> This rule is meant to apply to any attorneys' fee division or fee splitting agreements which are expressly covered by Rule 1.5(e) of these rules.

I thank you in advance for this opportunity to present my view. If you have any further questions, I would be more than happy to attempt to answer them.

Sincerely yours,

Zander Blewett

Alexander (Zander) Blewett, III

AB:jj
Enclosures

Annotated Model Rules of Professional Conduct

Sixth Edition

Center for Professional Responsibility
American Bar Association

http://www.abanet.org/cpr

Rule 1.5
Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(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.

COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Misc. Docket No. 03-9207, Proposed Rule 8A of Tex. Rules of Civil Procedure, published at 67 Tex. B.J. 116 (2004).

DEPARTING LAWYERS

Comment [8] was added in 2002 to explain that Rule 1.5(e) does not apply if the fee is being divided between lawyers who used to be associated in a firm but have gone their separate ways. *See Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266 (Colo. Ct. App. 2004) (agreement to share fees with departing lawyer enforceable and not void as against public policy; court found Comment [8] persuasive: "[Model Rule 1.5(d)] does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm"); *Fox v. Heisler*, 874 So. 2d 932 (La. Ct. App. 2004) (affirming oral 50/50 fee division agreement made between lawyers when one lawyer left other's employment; public policy behind fee-division rule not contravened when parties had thirteen-year history of adherence to agreement); *Frasier, Frasier & Hickman, L.L.P. v. Flynn*, 114 P.3d 1095 (Okla. Civ. App. 2005) (Rule 1.5(e) does not prohibit law firm from sharing fees with former partner under separation agreement when matters entrusted to firm before partner's departure); *Piaskoski & Assocs. v. Ricciardi*, 686 N.W.2d 675 (Wis. Ct. App. 2004) (upholding equal division of fees between law firm and departing associate; Rule 1.5(e) does not apply when lawyers were in same firm when representation began); Ill. Ethics Op. 03-06 (2004) (partner who left firm to become state's attorney may share fees for cases he brought to firm before departure; lawyer need not retain responsibility for cases, take fee in proportion to services rendered, or obtain client consent when division of fee pursuant to separation agreement); *cf. Walker v. Gribble*, 689 N.W.2d 104 (Iowa 2004) (agreement between lawyer and former partner about division of lucrative contingent-fee permissible as part of overall separation from firm).

JOINT RESPONSIBILITY

Rule 1.5(e) accords with what New York County Ethics Opinion 715 (undated) called "the modern trend that permits a lawyer to receive a portion of the fees generated by a matter solely in consideration for a referral if the lawyer assumes joint responsibility." But while the referring lawyer is not required to perform any legal services, the meaning of "joint responsibility" is not always clear. *See Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364 (Mich. Ct. App. 2002) (agreement that allows firm to receive payment for referring client with which it had conflict is unenforceable); Ariz. Ethics Op. 04-02 (2004) (requirement of joint responsibility satisfied if referring lawyer assumes financial responsibility for any malpractice during representation; referring lawyer not necessarily required to have "substantive involvement"); N.Y. State Ethics Op. 745 (2001) (lawyer disqualified due to conflict of interest cannot assume joint responsibility and thus may not be paid referral fee); Wis. Formal Ethics Op. E00-01 (2000) (though referring lawyer need not be involved in day-to-day tactical decisions or provide legal services, duty of joint responsibility is "not a mere hand-off of the case"; referring lawyer must maintain "active concern" as would supervising partner in law firm). *Compare Elane v. St. Bernard Hosp.*, 672 N.E.2d 820 (Ill. App. Ct. 1996) (referral agreement providing that lawyer would "remain legally responsible for the

performance of services to the extent required under Rule 1.5" did not involve improper practice of law by referring lawyer after she became judge; directed finding in favor of receiving law firm on lawyer's petition for adjudication of her entitlement to attorneys' fees reversed), *with In re Babies*, 315 B.R. 785 (Bankr. N.D. Ga. 2004) (absent pro hac vice admission, fee-sharing arrangement between Georgia lawyer and Illinois lawyers did not satisfy Georgia's Rule 1.5(e), which requires that lawyers who share fees assume joint responsibility if fee not shared in proportion to work performed; distinguishing *Elane* and concluding that joint responsibility requires more than financial responsibility; Illinois lawyers could not lawfully assume joint responsibility without pro hac vice admission to Georgia bar). For a scathing critique of *Elane*, see Rotunda, *Judges as Ambulance Chasers*, 8 Prof. Law., no. 3, at 14 (1997) (opinion's logic "should allow a disbarred lawyer" or even lay corporation to collect referral fees, if referrer's only purpose is to serve as "back-up malpractice insurer").

WRITTEN CONSENT TO FEE DIVISION REQUIRED

The 2002 amendments to Model Rule 1.5 add a requirement that the client agree in writing to the participation of each lawyer, including the share each will receive. *See In re Storment*, 786 N.E.2d 963 (Ill. 2002) (failure to obtain written client consent to fee division not "mere technical violation"; imposing suspension); *In re Stochel*, 792 N.E.2d 874 (Ind. 2003) (without client consent, lawyer paid $16,000 to referring lawyer whose only contact with client had been initial consultation, for which he already received fee of $250); *In re Hart*, 605 S.E.2d 532 (S.C. 2004) (lawyer disciplined for, inter alia, not putting his standard 50/50 fee split with referring lawyers in writing in seventy cases; no client complained, all clients consented, and lawyer self-reported); *see also Saggese v. Kelley*, 837 N.E.2d 699 (Mass. 2005) (Rule 1.5(e)'s requirements of disclosure and written client consent must be met before lawyer makes any referral); *cf.* Rudnick & Mulvey, *Splitting Hairs in Fee Splitting*, 50 B.B.J., Mar./Apr. 2006, at 14 (criticizing *Saggese* and noting that Rule 1.5(e) itself is silent about method and timing of disclosure).

ENFORCEABILITY OF FEE-SHARING AGREEMENT THAT VIOLATES RULE 1.5(E)

The enforceability of fee-division agreements that do not comply with Rule 1.5 varies among jurisdictions. The different approaches are thoroughly analyzed in *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 178 F. Supp. 2d 9 (D. Mass. 2001), which notes that courts in Alaska, California, Illinois, Minnesota, Missouri, New Hampshire, and Texas have refused to enforce oral fee-splitting agreements as a matter of public policy, but courts in Delaware, Florida, Georgia, Indiana, New York, and West Virginia have enforced them. In a subsequent decision in *Daynard*, the court found a distinction between contracts that are illegal and contracts that are void on public policy grounds. Crafting its own test, the court concluded that a law professor seeking to enforce a handshake agreement for a 5 percent cut of millions of dollars in attorneys' fees in tobacco litigation could recover in quantum meruit, even if the agreement was unenforceable as a matter of public policy. *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 188 F. Supp. 2d 115 (D. Mass. 2002); *see also Potter v. Pierce*, 688