



## It's OK to share — but not too much

*May 13, 2011*

*BY: Carol Lundberg*

The Michigan Supreme Court is considering an amendment to rules governing how — and how much — lawyers can pay other lawyers referral fees.

Michigan has one of the most liberal fee division rules in the country, said Marcia Proctor, principal in Proctor Legal Consulting PLLC. She concentrates her practice in professional responsibility matters.

Michigan Rules of Professional Conduct 1.5 doesn't govern how fees are to be divided when one lawyer refers work to another, and states only that a client must be made aware that there is a sharing arrangement. Most states have instead adopted the ABA model rule, which the Michigan Supreme Court rejected in 1998 when it adopted the state's own unique rule.

The ABA rule allows fee division only if the division "is made in proportion to the services performed and responsibility assumed by each" lawyer. It also requires that a client must be advised of the arrangement and agree in writing.

But a proposed amendment to the rule would go a step beyond that, and would limit referral fees to 25 percent. It would also require that attorneys disclose to clients how the fees would be split, and the client would have to approve the arrangement in writing.

"The only problem with that is that I don't know how many non-attorneys really understand fee division arrangements," Proctor said.

Southfield solo practitioner Richard J. Dimanin said he wonders why the Supreme Court is taking up the issue at all.

"It looks like it's just another way of limiting competition, limiting litigation, consolidating power and limiting juries," he said. "This whole thing bothers me."

### **An abused rule?**

Dimanin usually pays one-third of what he recovers for a client to the lawyer who referred the case to him. Sometimes he pays as high as 40 or 50 percent, particularly if the referring lawyer has done some of the work, or is footing some of the litigation costs.

And he's happy to pay it, he said.

Dimanin said he worries about what will happen to his practice if the Court adopts the amendments (see sidebar at right). He also worries about what will happen to clients when their lawyers, no longer incentivized to refer cases to people with more expertise in personal injury law, start "taking cases they really shouldn't be doing rather than sending them to me."

But Madison Heights attorney Michael T. Materna argues that rule 1.5, which was intended to encourage lawyers to pass along cases to qualified lawyers, has created a profession that doesn't best serve clients.

More than a year ago, though he doesn't remember exactly when, Materna wrote a letter to the Michigan Supreme Court, asking the justices to consider amending the rule.

"I think the rule is being abused," he said.

He's most worried about a handful of law firms "who advertise constantly. They don't go to court. They never write briefs. They just don't practice personal injury law. They really are brokers."

When the public calls, he said, they expect that they'll be represented by one of the lawyers they see on television.

"But they never are," Materna said. "They are just told to call another lawyer. Then that first lawyer that's on TV makes one-third, or even 40 or 50 percent, of the contingency fee, all for doing nothing."

In many cases, he said, the arrangement is made to the detriment of the client.

He cites first-party auto-negligence benefits, for example.

"So a lawyer who gets a case referred to him asks the plaintiff what they're getting for attendant care," Materna said. "And let's say it's \$12 per hour. The lawyer might say that's just not enough. He's under pressure because of that fee sharing to litigate, rather than to work out a compromise with the insurance company.

"He's able to get a couple of dollars an hour more, but the client, who's now paying one-third of the recovery, is going to get even less than he was getting before. And the referring attorney is getting a monitoring fee for life.

"That's a huge annuity for doing nothing but saying, 'Call this guy up.'"

### **Are justice, clients hurt?**

Materna doesn't mind paying a referral fee, as long as it's reasonable, which he said is 25 percent to one-third of his share of the recovery.

But at the same time, he doesn't like what he calls the "brokers," who he said do nothing but advertise.

"Other states have put these brokers right out of business," Materna said. "If all you're getting is 25 percent, you can't be a broker. These guys pay millions and millions in advertising."

But Steven M. Gursten, of Farmington Hills-based Michigan Auto Law, said that the "brokerage" problem doesn't exist in Michigan.

"Think about the firm that is known for doing the most advertising, The [Sam] Bernstein Law Firm," Gursten said. "Sam Bernstein has two dozen lawyers, and these are some of the best lawyers in the state. That's huge. In personal injury, that's unheard of. And while they do refer a lot of cases, that's really the opposite of a brokerage. They're working up cases all the time. Michigan just doesn't have the problem with brokerage."

But, Proctor said, even if there are firms in Michigan that do little but advertise and refer cases to other lawyers, she asks where the harm is to clients.

"It was contemplated in 1988 that there would be fee sharing. I don't think it was contemplated then that a firm would make a business of doing nothing but referring cases," she said. "But I'm not sure that it hurts the administration of justice."

Big law firms often have, for example, attorneys who are considered rainmakers, who do nothing but bring in business.

"They bring in the work," Proctor said, "but they don't actually do it themselves. They hand it off to other lawyers. And no one bats an eye when that lawyer gets paid for bringing in the work."

### **Getting client to understand**

More than 80 percent of Gursten's cases come to him by way of referrals.

And he said he wants to pay more than 25 percent for the referrals, in order to give other lawyers a direct incentive to give him their biggest personal injury cases.

Changing the rule would only hurt the plaintiffs, he said.

"Let's say I take a case, and I get a \$1 million recovery. I get a third, and pay the referring attorney one-third of that," Gursten said. "To make the same amount, that lawyer could take the case, but only have to win a \$500,000 recovery and keep one-third. The only person who was hurt by that was the client."

Equally troublesome to Gursten is the client disclosure aspect, which he said would have a damaging effect on the attorney-client relationship.

“I’m aware of the reputation we have as lawyers, and, in particular, as personal injury lawyers,” he said. “People are wary of trial lawyers. Now imagine that, rather than the lawyers being able to enter a contractual arrangement, negotiated at arm’s length, the attorney has to have this awkward conversation about fee sharing with a client, who doesn’t know anything about fee sharing, and who hasn’t even retained me yet.”

Though Proctor said she doesn’t know whether that’s awkward, requiring a client to sign off on the fee split does put clients in the position of being dragged into fee disputes, on the rare occasion that they arise.

The Michigan Supreme Court Clerk will take comments on the proposal until Sept. 1, 2011. Comments may be sent by email to [MSC\\_clerk@courts.mi.gov](mailto:MSC_clerk@courts.mi.gov), or in writing to: P.O. Box 30052, Lansing, MI 48909.

## Proposed amendments to Michigan Rules of Professional Conduct 1.5

The proposed changes are highlighted below:

(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. ... A contingent fee shall be in writing and shall state the method by which the fee is to be determined. **The agreement also shall state the amount or percentage of fees to be divided or sheared among or between lawyers who are not in the same firm.** Upon conclusion a contingent-fee matter, the lawyer shall provide the client with a written statement of the outcome of the matter and, if there is a recovery, show the remittance to the client and the method of its determination. ...

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised of and does not object to the participation of all the lawyers involved, **and approves the amount or percentage of fees to be divided or shared among the lawyers;** and

(2) the total fee is reasonable ...

(f) **Except as otherwise allowed under this rule, a lawyer who refers a case to another lawyer in exchange for a portion of any award under subsection (e) is limited to a maximum referral fee of 25 percent of the amount recovered. However, if the referring attorney participates in the case to an extent that a greater percentage of the amount recovered should be allowed as a reflection of the referring attorney’s substantial input of time or cost, or assumption of risk, the referring attorney’s share of fees may exceed the maximum referral fee as agreed by the receiving attorney and as approved by the court in which the proceeding takes place.**