NYPRR | April 2010

Court Denies Referral Fee To No-Show Lawyer

BY LAZAR EMANUEL

Instinctively, the draftsmen of our ethical rules and standards have been reluctant to recognize or confirm the right of a lawyer to collect an unearned referral fee. An unearned referral fee can be described as payment to a lawyer for the simple act of referring a client to another lawyer in another firm. In an unearned referral, without either confirming or assuming any responsibility to oversee or participate in the conduct of the matter, or even to perform any legal services in support of the matter, the referring lawyer shares in the legal fees paid by the client, usually in a fixed percentage of the total fees.

At the same time, we all know that referrals should be encouraged, because they often occur when a lawyer realizes either that he is too busy to do right by a client, or that another lawyer has knowledge or experience in that kind of matter superior to his own. Especially in the case of matters with issues we have never handled before, it's often prudent – indeed, mandatory – to assign a matter to another lawyer with superior expertise. Rule 1.1, the first rule in our new book of Rules, tells us:

Rule 1.1 Competence

> (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

To confirm their concern about the public reaction to lawyers who earn substantial fees by making a single phone call or writing a single letter, both the ABA and the authorities in New York have adopted rules that require a referring lawyer either to perform legal services in the matter or to observe all the following: (1) assume joint responsibility for the matter,

(2) obtain the client's consent after notice, and 3) ensure that the total fee is reasonable under the circumstances. (*See,* Simon's New York Code of Professional Responsibility Annotated, 2008 Edition, p. 436.)

Before the adoption in April 2009 of the new Rules of Professional Conduct, DR 2-107(A) of the New York Lawyer's Code of Professional Responsibility read as follows:

DR 2-107 Division of Fees Among Lawyers

A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:

1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

2. The division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.

3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

DR 2-107(A) was the controlling disciplinary rule when Eastern District Judge John Gleeson considered the distribution of legal fees in *Rodriguez v. Custodio*, 08-4988-cv. The case originated as a claim for personal injuries suffered by the two-year old daughter of Plaintiff Rodriguez during the operation of a paper shredder. Rodriguez contacted Daniel J. Baurkot, an attorney in Basking Ridge, New Jersey. Baurkot contacted Wagner and Wagner ("Wagner"), lawyers in Staten Island. Wagner met with Rodriquez and his wife, Plaintiff Custodio. At the meeting, which Baurkot does not seem to have attended, Wagner and Rodriquez/Custodio signed a retainer agreement under which Wagner would receive a one-third contingency fee of any recovery, whether by settlement or trial. Wagner and Baurkot then executed an agreement between themselves providing for distribution of any fees, 2/3 to Wagner and 1/3 to Baurkot. The client was not told of the agreement.

Enter the law firm of Atkinson, Haskins, Nellis, Brittingham, Gladd and Carwile ("Atkinson"), of Tulsa, Oklahoma. Atkinson, which had participated in similar cases, apparently contacted Wagner on its own initiative. After consultation with Baurkot, Wagner retained Atkinson. The agreement between Wagner and Atkinson provided that Atkinson would receive 35% of any fees recovered, and that Wagner and Baurkot would share the remaining 65% under their own agreement.

The lawyers began their action in the Eastern District, with Wagner as attorney of record and Atkinson as lead counsel. The action was settled for $975,000. After payment of the attorneys' fees, the balance was set aside by the court to fund an annuity in the name and for the benefit of the Rodriquez infant.

The matter was then referred by Judge Gleeson to Magistrate Judge Mann, with instructions to conduct an infant compromise hearing. At the end of the hearing, Judge Mann awarded $107,654.56 in attorneys' fees and $49,866.84 in expenses to Atkinson, and $133,286.60 in fees and $2,378.86 in expenses to Wagner. But Judge Mann refused to assign any share of the fees to Baurkot. Instead, she questioned *sua sponte* whether the agreement between Wagner and Baurkot violated DR 2-107(A) and whether that Rule precluded any award to Baurkot. She decided that the Wagner/Baurkot agreement did indeed violate the Rule, but instead of awarding Baurkot's share to Wagner, she ordered it paid directly to the Plaintiffs. In reaching this decision, she pointed to her concern that otherwise some of the Wagner fees would find their way from Wagner to Baurkot, and that Wagner agreed that the money it received was adequate compensation for its efforts.

After Judge Gleeson confirmed the findings of Magistrate Judge Mann, the lawyers appealed, and the Circuit Court issued an order affirming the lower court's decision. At the same time, the Court manifested its displeasure with the lawyers by appointing pro bono counsel to represent the plaintiffs and by forbidding any of the lawyers from contacting the clients except through pro bono counsel. The Court was visibly disturbed that none of the lawyers had taken any steps to establish the infant's annuity, as it had instructed. When it appointed pro bono counsel, the Court announced that its decision would follow. The Court's decision, written by Circuit Judge Winter, was released on February 18, 2010.

Issues before the Court

Several issues confronted the Circuit Court. We take each issue up in order:

1. *Did the agreement between Wagner and Baurkot violate DR 2-107(A)?*

It's interesting that although all of the judges involved in the matter – Judge Gleeson, Magistrate Mann, and Judge Winter – concluded that the agreement between Wagner and Baurkot "violated" DR 2-107, none of them imposed any sanctions or penalty on Wagner. On the contrary, the "price" for the violation fell only on Baurkot, who received nothing, while Wagner was awarded $133,286.60 in fees and $2,378.86 in expenses.

It's true that Bardot's putative share of the fees was paid not to Wagner but to the plaintiff, but that would not seem to justify the initial finding by Judge Mann that the payment to Wagner was "reasonable." It's also true that Judge Winter seemed to recognize that the payment to Wagner was problematic:

> We turn to a final matter. Given that Wagner & Wagner and Baurkot appeal from a judgment benefitting their clients while still claiming to represent those clients and given that said judgment found Wagner & Wagner and Baurkot committed ethical violations, the court made various inquiries at oral argument regarding the legal representation given the plaintiffs. The answers made it apparent that appellants had not obtained written consent from the plaintiffs for this appeal. Moreover, none of the plaintiffs' lawyers knew whether the annuity called for in the settlement agreement, the funding of which did not involve monies at stake in the present dispute, had been established…
>
> Concerned by the overall context of the proceeding and the failure to establish the annuity ….[O]n September 1, 2009, we entered an order affirming the judgment of the district court, directing that the mandate [to pro bono counsel] should issue forthwith, and indicating that an opinion would follow. In that order, we appointed Robert J. Guiffra, Jr., Esq., to represent the plaintiffs on a pro bono basis and instructed Baurkot, Wagner & Wagner, and the Atkinson firm to communicate with plaintiffs only through the pro bono counsel. Finally, the order remanded to the district court to: (i) inquire into whether the district court's order of September 26, 2008, was complied with; (ii) ensure that plaintiffs receive the benefits to which they are entitled; and (iii) take any appropriate remedial and disciplinary actions.

In time, pro bono counsel Guiffra will submit his report and Judge Gleeson will carry out the instructions of the Circuit Court.

2. *Had Baurkot performed any legal services in the matter?* And

3. *Would the payment of a referral fee to Baurkot constitute a violation of DR 2.107(A)?*

It's clear that neither Magistrate Judge Mann nor Judge Gleeson thought that Baurkot had rendered any services in the matter and that in failing to do so, he had forfeited any claim to share in the contingent fees. As stated by Judge Winter:

> The magistrate judge then denied any portion of the attorneys' fees to Baurkot because DR 2-107 prohibited it.
>
> First, she found that DR 2-107 was violated because plaintiffs never received the required disclosure of the fee-sharing agreement. The judge rejected Wagner & Wagner's and Baurkot's contentions that they had orally sought and received the required consent. Instead, the magistrate judge relied on the plaintiffs' testimony indicating they were unaware that Baurkot would be working on the case.
>
> Second, the magistrate judge concluded that DR 2-107 was violated because the requirement that either the work done be in proportion to the fee received or that the attorneys agree in a writing to undertake joint responsibility was not met. In so finding, she relied on several pieces of evidence, including: (i) Wagner & Wagner's initial failure to disclose Baurkot's share of the fee to plaintiffs; (ii) Wagner & Wagner's and Baurkot's failure to show specific work he performed on the case; and (iii) the lack of any documents in Wagner & Wagner's file to corroborate the claim that Baurkot performed services on the case.

Court's Role in Infant Compromise Hearing

4. *What is the proper role of the fact-finder in an infant compromise hearing?*

Although both Wagner and Baurkot offered proof to Judge Mann that Baurkot had performed legal services in the *Rodriguez* matter, she found their testimony "self-serving" and less than compelling. Her analysis lead Judge Winter into a discussion of the proper role for a fact-finder in an infant compromise hearing. He concluded that the guiding policy was protection of the infant's interests. This enabled Judge Gleeson to authorize Judge Mann to inquire into the fee arrangements among the lawyers and, specifically, to "look beyond the retainer agreement between Wagner and Wagner and the plaintiffs to the actual work performed by the various attorneys."

5. *Did the clients have adequate notice that Baurkot would share in the fees?*

Judge Winter also adopted Judge Mann's conclusion that neither client had been given any notice of the agreement between Wagner and Baurkot to share fees. Judge Mann had found, and Judge Winter confirmed, that neither plaintiff had received adequate notice of the fee-sharing agreement or of the intended distribution of fees: …"the district court was well within its role of fact-finder when it rejected appellants' self-serving affidavits and statements, which were notably unsupported by any documentary evidence, in favor of the plaintiff's testimony. …The evidence demonstrated that Baurkot performed no

services of value on the case, and thus the agreed fee division was not 'in proportion to the services performed by each lawyer.'"

6. *Should the Court adjust the fees of Atkinson and the fees of Wagner to reflect the forfeiture of fees by Baurkot?*

Wagner argued that Judge Gleeson's decision to distribute Baurkot's fee to the plaintiffs instead of to them was wrong. They insisted that this would undo the split in fees the two firms had agreed to. Otherwise, they argued, the distribution would favor Atkinson, which would receive more than its proportionate share of the total, i.e., 35% of 100% minus Baurkot's share, instead of 35% of 100%. Judge Winter disposed of the Wagner argument summarily:

> The district court did not abuse its broad discretion when it determined that Baurkot's fee should not go to Wagner and Wagner because that firm engaged in an ethical violation by failing to get the proper consent from the plaintiffs.

He also dismissed Wagner's argument that the new total of fees (minus Baurkot's share) should be redistributed 65% to Wagner and 35% to Atkinson, on the ground that Wagner had waived that argument in stating its objections to the Report and Recommendation by Judge Mann.

It's obvious from Judge Winter's opinion in *Rodriguez* that the Court was influenced by an instinctive aversion to approving a fee for a lawyer who refers a matter and does nothing else, especially when there has been no notice to the client. But the Court was construing old DR 2.107, which is no more. How would it have construed our new Rule 1.5(g). Let Roy Simon tell us:

Dividing Fees with a Lawyer in another Firm

Rule 1.5(g). A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless …

> (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.*

Rule 1.5(g) carries forward the intent of DR 2-107(A) to require the client's consent to an agreement to share fees with a lawyer in another law firm – but there are two important differences.

First, under DR 2-107(A)(1), a lawyer merely had to obtain a client's consent to employment of another lawyer "after a full disclosure that a division of fees will be made." The content of that full disclosure was not specified. Under Rule 1.5(g), the lawyer must reveal how much of the fee each lawyer will be receiving. This disclosure will enable the client to gauge the magnitude of each lawyer's incentive to work hard on the case or, if the referring lawyer is not working on the case, the magnitude of the referring lawyer's incentive to monitor the performance of the receiving lawyer, to influence how the receiving lawyer is handling the case, and to influence the decision whether and when to recommend a settlement. The larger a referring lawyer's share of the fee, the greater the referring lawyer's incentive to do all of these things.

Second, under DR 2-107(A)(2), a writing was required only if the fee was not being shared in proportion to the services performed by each lawyer and the sharing lawyers were each assuming "joint responsibility" for the representation. Under Rule 1.5(g), a writing confirming the client's agreement is required in every matter in which there is a fee-sharing arrangement. [Simon, *Comparing the New York Rules of Professional Conduct to the New York Code of Professional Responsibility*, © NYPRR, 2009.

© Copyright 2008 –The New York Professional Responsibility Report (NYPRR)