

Joint Responsibility Under DR 2-107(A) Harbors

BY ROY SIMON

What is the meaning of the phrase "joint responsibility" in DR 2-107(A) of the New York Code of Professional Responsibility, the Rule which controls the division of fees among attorneys in different law firms? This is an unsettled question. Unfortunately, as so often happens in New York, none of the Ethical Considerations sheds any light on the meaning of "joint responsibility." The American Bar Association, the New York State Bar Association, the New York County Lawyers' Association, the courts, and several commentators have all weighed in on the question, but there is no consensus. This article surveys the conflicting authorities on the question.

The question of "joint responsibility" arises when lawyers in different law firms agree to share a legal fee on a basis other than the proportion of work performed by each lawyer. This may occur when lawyers in different firms serve as co- counsel, but it more commonly occurs when one lawyer attracts a potential client but refers the matter to another lawyer to handle the work in exchange for a referral fee. For example, suppose the law firm of Finder & Finder attracts and interviews a client who has a significant medical malpractice claim against a hospital and several doctors, but Finder & Finder does not handle cases of that type. Finder & Finder will want to refer the case to the firm of Minder & Grinder, a firm concentrating in medical malpractice, in exchange for a referral fee (typically one-third of the receiving lawyer's fee).

This arrangement is permissible in New York provided the conditions set forth in DR 2-107(A) are satisfied. Specifically, the client must consent to the employment of Minder & Grinder after a full disclosure that a division of fees will be made, the total fee must be reasonable, and if the division is not in proportion to the services performed by each lawyer (and we are assuming here that the fee division is not in proportion to the work), then "by a writing given the client," each lawyer must assume "joint responsibility for the representation." The purpose of permitting a lawyer to obtain a referral fee in exchange for referring a case to another lawyer is to encourage lawyers to refer cases to another lawyer who has greater competence and expertise in the particular type of matter at hand.

Complying with the "writing" requirement of DR 2-107(A)(2) is relatively easy. A good way to comply is for the referring lawyer to write a letter to the client that includes language something like this:

This arrangement is permissible in New York provided the conditions set forth in DR 2-107(A) are satisfied. Specifically, the client must consent to the employment of Minder & Grinder after a full disclosure that a division of fees will be made, the total fee must be reasonable, and if the division is not in proportion to the services performed by each lawyer (and we are assuming here that the fee division is not in proportion to the work), then "by a writing given the client," each lawyer must assume "joint responsibility for the representation." The purpose of permitting a lawyer to obtain a referral fee in exchange for referring a case to another lawyer is to encourage lawyers to refer cases to another lawyer who has greater competence and expertise in the particular type of matter at hand.

Complying with the "writing" requirement of DR 2-107(A)(2) is relatively easy. A good way to comply is for the referring lawyer to write a letter to the client that includes language something like this:

Dear Client:

You originally came to my law firm, Finder & Finder, with your medical malpractice claim. I discussed the claim with you, but told you that my firm does not handle claims of this type and that we would like to refer the case to another law firm, Minder & Grinder, which has substantial experience handling cases like yours. I also advised you that if Minder & Grinder agreed to take your case, then Minder & Grinder would be doing all or substantially all of the work on your case, but that my law firm would be sharing in the legal fees. After I made these disclosures, you consented to the referral to Minder & Grinder.

Minder & Grinder has now agreed to accept your case and, as planned, will be doing all or most of the work on the case. However, my law firm will be assuming joint responsibility for your case.

Defining the phrase "joint responsibility" is more difficult.

The Broad Approach

ABA Model Rule 1.5(e), which is the model for New York's DR 2-107(A), does not define the phrase "joint responsibility," but Comment 4 to Model Rule 1.5 states:

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.... Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership...[Emphasis added.]

In ABA Informal Op. 85-1514 (1985), the ABA ethics committee elaborated slightly on this comment, saying that the "assumption of joint responsibility includes assumption of responsibility comparable to that of a partner in a law firm under similar circumstances." This responsibility includes "financial responsibility, ethical responsibility to the extent a partner would have ethical responsibility for actions of other partners in a law firm in accordance with Rule 5.1, and the same responsibility to assure adequacy of representation and adequate client communication that a partner would have for a matter handled by another partner in the firm under similar circumstances." What does the ABA mean? How are "financial responsibility" and "ethical responsibility" for the representation defined, if we treat the referring lawyer and the receiving lawyer as if they were associated in a partnership?

"Financial responsibility" for the representation plainly refers to malpractice liability. If a referring lawyer assumes "joint responsibility" then the lawyer must assume full financial responsibility for the receiving lawyer's malpractice even if the referring lawyer does not work on the matter at all. On this point, at least, all authorities agree.

"Ethical responsibility" for the representation is a more complex concept. In New York, the ethical responsibilities of lawyers associated in a partnership are set forth in DR 1-104, which provides, in relevant part, as follows:

DR 1-104 [22 NYCRR § 1200.5] Responsibilities of a Partner or Supervisory Lawyer and Subordinate Lawyers.

- A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.
- B. A lawyer with management responsibility in the law firm or direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the disciplinary rules.
- C. A law firm shall adequately supervise, as appropriate, the work of partners....The degree of supervision required is that which is reasonable under the circumstances....
- D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer... if:
 - 1. The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or
 - 2. The lawyer is a partner in the law firm in which the other lawyer practices ... and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

If we take the ABA's broad approach literally, we would conceive of the referring lawyer and the receiving lawyer as a law firm in which two partners (the referring lawyer and the receiving lawyer) are handling a single case. DR 1-104 would then impose significant responsibilities on the referring lawyer. (DR 1-104 imposes little or no responsibility on the receiving lawyer because our hypothetical referring lawyer is not doing any work on the case.) Specifically, DR 1-104(A) would obligate the referring lawyer to "make reasonable efforts to ensure" that the receiving lawyer conforms to the Disciplinary Rules. DR 1-104(B) either does not apply or imposes precisely the same duty as DR 1-104(A), but DR 1-104(C) goes a step further and would obligate the referring lawyer to = "supervise, as appropriate, the work of" the receiving lawyer. Finally, DR 1-104(D) would make the referring lawyer responsible for a violation of the Disciplinary Rules by the receiving lawyer in certain circumstances, including situations in which the referring lawyer (1) learns of and then "ratifies" the receiving lawyer's misconduct, or (2) knows of the conduct in time to take "reasonable remedial measures" but fails to do so.

The legislative history of New York's DR 2-107 supports the ABA's broad theory. The leading source of the history of the 1990 amendments to the New York Code of Professional Responsibility is Marjorie E. Gross, *The Long Process of Change: The 1990 Amendments to the New York Code of Professional Responsibility*, 18 Fordham Urban L. J. 283 (1991), a fifty page rule-by-rule analysis of the extensive changes that took

effect in 1990. Ms. Gross, who served as a member of the Jones Committee (which recommended most of the 1990 amendments), says the State Bar feared that "courts would be reluctant to impose liability on a referring lawyer who did not engage in affirmative wrongdoing." But the Jones Committee believed - and the State Bar's House of Delegates apparently agreed - that while referring lawyers could not be held liable for every mistake made by a receiving lawyer, "they should be held liable for failure to supervise adequately." This same expansive view of "joint responsibility" also apparently overcame an argument by the City Bar that lawyers would use DR 2-107 to refer cases not to the best lawyers but to the highest bidders (i.e., the lawyers willing to pay the highest referral fees). But lawyers would still have a strong incentive to refer cases to good lawyers because, as the Jones Committee argued, "the referring lawyer would remain responsible for supervising the work of the receiving lawyer...." This legislative history of DR 2-107 strongly suggests that the drafters of DR 2-107(A)(2) agreed with the ABA's expansive view of the phrase "joint responsibility."

The Narrow Approach

The narrow view of "joint responsibility" is exemplified by N.Y. County Lawyers' Association Op. 715 (1996). There, Lawyer "Able" represented client "Charles" on various estate and tax matters, but referred Charles to lawyer "Baker" to handle a personal injury case on a contingent fee basis. Baker agreed to give Able 25% of any fees paid by the client. Lawyer Able's question to the NYCLA ethics committee was: "Does a lawyer who refers a matter to another lawyer have a continuing responsibility to the client to supervise the manner in which a matter is handled where: (a) the two lawyers agree to divide the fees generated without regard to the work performed by each and (b) both lawyers assume joint responsibility to the client in writing?" The committee said "no." In its view, the "joint responsibility" requirement "is financial and does not create an ethical obligation of the referring lawyer to supervise the activities of the receiving lawyer."

The NYCLA Committee gave two reasons for this narrow reading. First, the "writing" requirement indicated that the rule was intended to give the client "a contractual remedy in addition to the remedy available under the law of negligence." Since the lawyer performing the work would be liable for negligence with or without a writing in which he assumed "joint responsibility" for the matter, the writing "must create some additional vicarious liability on the part of the referring lawyer in order to satisfy DR 2-107." Second, the Committee said it was "not logical that a lawyer would be expected to supervise the handling of a matter by a specialist, who presumably is more competent in the type of matter than the referring lawyer." The Committee realized that the "harsh financial consequences" of assuming joint responsibility under DR 2-107 might "create an incentive" for the referring lawyer to find out how the receiving lawyer was handling the matter, but "the rule does not create an ethical obligation to supervise the receiving attorney's work."

The New York State Bar Ethics Committee has not yet written an opinion fully exploring the phrase "joint responsibility," but in N.Y. State Op. 745 (2001), the committee rejected the narrow view, saying: "Without now deciding what the precise contours of joint responsibility are, we conclude that joint responsibility is more than financial accountability and malpractice liability."

The Bronx Supreme Court Sides With the Narrow View

A recent Bronx County Supreme Court opinion, *Aiello v. Adar* (N.Y.L.J., Nov. 4, 2002), is the first court opinion to discuss the meaning of "joint responsibility" in depth. In *Aiello*, two attorneys had agreed to

split legal fees equally in a personal injury case rather than splitting fees in proportion to the amount of work done by each attorney. That triggered the "joint responsibility" requirement of DR 2-107, and the court's task was to determine whether the referring lawyer (who now wanted his share of the fee) had in fact assumed "joint responsibility." After reviewing all of the authorities set out earlier in this article, the court adopted the narrow view espoused by the New York County Lawyers' Association. "Besides being consistent with the plain language of the Code," the court said, "the narrower definition, in this Court's view, is the more pragmatic approach. ...[I]t does not make much pragmatic sense that a lawyer would be expected to supervise the handling of a matter by a specialist, who is more familiar with the case and generally more competent in the type of action involved than the referring attorney." Parroting N.Y. County Op. 715, the court held that joint responsibility "is synonymous with joint and several liability. ...[T]he rule does not create an ethical obligation to supervise the receiving attorney's work."

Who is right?

Now that we have reviewed the major authorities bearing on "joint responsibility," how do we decide which view is right? I think we need to ask two closely related questions. First, are the responsibilities imposed by DR 1-104 so onerous that they will discourage the very referrals to more competent lawyers that the "joint responsibility" exception under DR 2-107(A) was intended to encourage? Second, even if the responsibilities imposed by DR 1-104 are not too onerous, are they illogical, unnecessary, or otherwise undesirable as a matter of policy? The answer to these questions suggests that the best approach is somewhere in between the broad and the narrow approaches, and will vary with the facts of each particular case.

In my view, the responsibilities imposed by DR 1-104 are not so onerous as to discourage referrals to lawyers who are more competent in the particular matter. The key is the limiting language of DR 1-104. Under DR 1-104(A) and (B), a lawyer need make only "reasonable" efforts to ensure that the other partners in the firm conform to the disciplinary rules. When a lawyer refers a matter to a specialist, it is not "reasonable" to expect the referring lawyer to second-guess the specialist's approach to the case. Similarly, DR 1-104(C) requires a law firm to "adequately supervise, as appropriate," the work of the firm's partners, and the degree of supervision required is merely "that which is reasonable under the circumstances"

In a portion of the rule not quoted above, DR 1-104(C) sets out various factors to determine what is "reasonable," including (1) "the experience of the person whose work is being supervised," (2) "the likelihood that ethical problems might arise in the course of working on the matter," and (3) "the amount of work involved in a particular matter;" and if the receiving attorney is highly experienced and has an excellent reputation for ethical conduct, and if the case and the client do not appear to raise unusual ethical issues (e.g., client perjury or conflicts of interest), then it will be reasonable for the referring attorney to engage in very little supervision over the receiving attorney's work.

The third factor in DR 1-104(C), however, suggests that the referring attorney will retain some duty of supervision in virtually every "joint responsibility" case even if the receiving attorney is a highly regarded specialist. That third factor, "the amount of work involved," will come into play because the receiving attorney will be doing all or most of the work. That makes sense. A partner who delegates almost all work in a case to an associate will need to engage in more supervision over the associate than a partner who does the bulk of the work himself and delegates only a small part of the work to the associate.

Moreover, in some cases the first two factors will militate in favor of greater supervision. If the client's story is suspect, or if the client has a questionable past, or if the receiving attorney has a history of disciplinary charges or court-imposed sanctions, then the likelihood that ethical problems may arise which will require the intervention of the referring lawyer increases significantly. Likewise, if the receiving attorney is not a specialist, more supervision will be required. Thus, the supervision requirement demanded by the broad approach to "joint responsibility" may discourage referrals to attorneys who are not specialists, and may discourage referrals in cases where ethical problems are likely to arise (either because of the client or because of the receiving attorney), but I do not think we will discourage routine referrals to specialists where both the client and the receiving attorney seem highly ethical.

Of course, we should never expect the referring attorney to monitor every move or pay for every mistake the receiving attorney makes. But some ethical violations should be quite obvious and can arise whether or not the receiving attorney is a specialist. We should not expect a referring attorney to supervise a receiving attorney's work in the same way that a partner supervises an associate's work, but if the referring attorney receives information suggesting a possible ethical violation - including neglect, the use of perjured evidence or testimony, or a conflict of interest on the part of the receiving attorney - why should the referring attorney be exempt from a duty to investigate or correct the matter? Why should the referring attorney be permitted to profit from the receiving attorney's unethical conduct? After all, while a client is likely to bring a malpractice suit against a lawyer who obtained poor results because he was negligent or incompetent, the client is not likely to bring a malpractice suit against a lawyer who achieved unusually good results because he used unethical methods. And the referring lawyer may be in a much better position than the client to know whether the receiving lawyer is using unethical methods - and since the referring lawyer may be the only person besides the client with a financial interest in the outcome of the matter, the referring lawyer is a better candidate than anyone else to engage in at least minimal supervision.

All of these considerations persuade me that the broad approach to "joint responsibility" is the right approach. An attorney who receives a referral fee in exchange for accepting "joint responsibility" should be jointly responsible for the ethical conduct of the receiving lawyer in the same manner that partners in a law firm are responsible for each other. The phrase "joint responsibility" in DR 2-107 does not call for aggressive or intensive supervision of the receiving attorney, but it does call for supervision where actual or likely ethical problems come to the attention of the referring attorney. The 1990 amendment to DR 2-107 permitting lawyers to receive a referral fee without doing any significant work on a case was a substantial change that gave lawyers new rights to make money by referring matters to more competent lawyers. Those new rights should entail greater continuing responsibility for a referred matter than simply passive financial responsibility for the receiving attorney's legal malpractice. In my view, the broad approach will ensure that DR 2-107(A) works to benefit clients, not just lawyers.

Roy Simon is a Professor of Law at Hofstra University School of Law and the author of SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, published annually by West. The 2003 edition will soon be available.