

# When You Refer a Matter To Another Lawyer

BY LAZAR EMANUEL

John Adams has been your client for many years. You've represented him in a variety of matters, including the preparation of his prenuptial agreement with Jane, the purchase of his home, and most of his business matters. You receive a call from John one day. The call begins as a routine social call, but it soon becomes clear to you that John has been thinking seriously about the preparation of his Will and wants to begin discussing it with you. You have never prepared any testamentary documents for your clients but the most rudimentary of wills, and you soon realize that John is thinking of a very complicated and sophisticated estate plan involving a review of his assets and the creation of several trusts.

During your conversation, you begin to sense that you will be doing a disservice to John to undertake the preparation of his documents. You know that estate planning has become a specialized area of the law practiced by lawyers with extensive experience. (Under Rule 7.4, estate planners can become certified as specialists in their field by a private organization approved by the American Bar Association.) Considering the scope of John's needs, the last thing you want is to botch John's plans or to subject yourself to a claim of malpractice by an old friend and client. You've been around long enough to know that competence in a matter is the hallmark of a good lawyer.

## Finding a More Qualified Lawyer

While you're talking with John, you think of your friend and law school classmate, Henry James, who has, as you know, conducted a number of CLE programs in Estate Planning for the local bar association and is an acknowledged expert and authority in the field. You tell John about Henry and you suggest that you be permitted to refer John's estate planning to Henry. John replies, "I'd be happy to have you do that, but I want you to remain involved. You know me and Jane so well, and you can interpret and explain everything Henry does for us." You assure John that you will indeed remain involved and you tell him, "Not only will I remain involved; I will consider myself responsible to you for the quality of Henry's work."

You finish the call, and you begin to think: Did I promise John too much? What have I committed myself to do? What do I have to do next? What do the Rules say about referrals? What do they say about the mechanics of referral? What documents do I need to prepare?

Fortunately, the Rules of Professional Conduct adopted by the Appellate Divisions on April 1, 2009 have consolidated most of the answers you need into one Rule – Rule 1.5. In contrast, the Code of Professional Responsibility, which was replaced by the Rules, forced you to examine several DRs and a number of ECs.

## The Issue of Competence

But Rule 1.5 does not say anything about the relative competence of the lawyers in a referral matter. Instead, you have to refer to the most sacred of all disciplinary rules – Rule 1.1, which is entitled simply “Competence” and is first among all the Rules

Rule 1.1 says:

- (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 he is not competent to handle without associating with a lawyer who is competent to handle it.

You know that you will have very little lawyering to contribute to John’s matter. No matter how many lectures you attend or how many books you read, you will never reach the level of competence that Henry has now. There is, however, a vital contribution to the representation that you can make. You have represented John over so many years and in so many matters that you have instilled in John a reservoir of confidence and trust. You can serve in the role of counselor and confidante, ready to act as link and mediator between John and Henry. In other words, you can justify your continued participation in the matter and any fee you consider reasonable and appropriate under the circumstances by simply continuing to act as John’s advisor.

**Back to Rule 1.5.** Before you begin your analysis of this Rule, you will ask yourself: Am I permitted under the circumstances to refer the matter to Henry? What standards of competence do the Rules impose on me and on Henry? Do I have a duty to a continuing client to help him find a lawyer who is qualified in his particular matter? What if I refer the matter to Henry and I find it impossible to work with him? What if he ignores me and makes it difficult to fulfill my commitment to John to “remain involved”? What if I do nothing and let Henry do it all – am I still entitled to a share of the fees? And what happens if Henry makes a substantial mistake in drafting one of the documents by confusing John’s beneficiaries? Am I liable for his mistake?

The next thing you need to do is make sure that you have studied and understood all the provisions of Rule 1.5 and of any court orders or rules the Rule refers to. You will find that the Rule refers tangentially to (but does not specifically cite) several existing and critical rules of the courts. The reference to court rules is contained in Rule 1.5(b), which reads as follows:

A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. ...Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client. [Emphasis supplied]

Because the applicable court rules requiring a writing are not cited in Rule 1.5(b), you have to search for them. Ultimately, you will find that the references in Rule 1.5(b) are to the following Parts of 22 NYCRR:

- 22 NYCRR Part 137 (Fee Dispute Resolution Program) – a rule adopted by the courts in 2002 which expanded the requirement for arbitration of client fee disputes to most civil actions “at the election of the client”.
- 22 NYCRR Part 1215 (Written Letter of Engagement – a court rule promulgated two months after Part 137. Section 1215.1(a) provides:

Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter. ...

Section 1215.1(b) provides: The letter of engagement shall address the following matters:

. ... (3) Where applicable, notice of the client’s right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator.

- Part 1215.1(c) permits an alternative to the Written Letter of Engagement:

Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation, provided that the agreement addresses the matters set forth in subdivision (b).

So now you know that you have to draft an agreement with John, whether a Letter of Engagement or a Retainer Agreement, defining all the terms controlling your relationship with him. You should view Part 1215 as a mandate to prepare a written document signed by both you and John. Because Rule 1.5(g) anticipates and provides for referrals and the division of fees between lawyers, you need to include in your agreement with John the basic terms of your referral agreement with Henry.

Under 1.5(a), your agreement with John must indicate that in assessing the reasonableness of your fees and of Henry’s fees, you have considered:

- The time and labor required, the novelty of the questions involved, and the skill required from each of you
- possible disputes over fees between John and either Henry or you or with both of you
- the resolution of fee disputes and the relevance of “arbitration” to these disputes
- the proportion of services to be supplied by you and by Henry
- a definition of the term, “I assume responsibility” as you intended it to be understood by John
- confirmation by means of John’s signature that he has read and agrees to the terms of the agreement between you
- Whether or not the fee is contingent on the outcome of the matter.

Any agreement you may enter into with Henry is not covered by Rule 1.5 except to the extent that the Rule, in Section (g) requires that your agreement with John include the following provisions relative to the referral:

A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

- (1) the division is in proportion to the services performed by each lawyer, or by a writing given to the client, each lawyer assumes joint responsibility for the representation (it's clear that both lawyers have to supply a writing to the client; can they both join in the same writing, or must each give his own writing?);
- (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; and

The total fee is not excessive.

Thus, if either (1) you assume joint responsibility for the representation, or (2) you agree with Henry on a reasonable division of fees, John must be so advised and, though it's not clear from the language of the Rule, he should be asked to confirm his agreement in writing to those sections of the agreement which provide either for joint responsibility or the division of fees.

[Note that Rule 1.5 supplies the answer to one of your first questions, i.e., referral agreements between lawyers are permitted, provided 1) the fees are not excessive; AND 2) the division of fees is in proportion to each lawyer's services OR (by a writing given to the client) each lawyer assumes joint responsibility for the representation.]

In my judgment, the best way to deal with all of these requirements is to prepare an agreement with Henry first, and then to incorporate into your agreement with John those sections of your agreement with Henry which John is required to confirm. Before you begin drafting Henry's agreement, you need some background into facts and details you have probably never had to know or use before. You will conclude that you must address all the following in your agreement with Henry:

**The fee to be charged John by each of you.** Neither your fee nor Henry's, nor the total of both, may be excessive or illegal. "A fee is excessive when, after review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive." Rule 1.5(a). Your fee will be measured under a different standard than the standard for Henry's fee. In view of the matters you've handled for John and your limited experience in estate work, you are not expected to have or to supply the skill and knowledge required for a complicated estate plan; Henry is.

**Confirming that a fee is not excessive.** Rule 1.5(a), which replaces DR 2-106, adopts the "reasonable lawyer" standard in judging whether a fee is excessive, in place of the standards of a "lawyer of ordinary prudence." Both standards can lead to a futile search similar to Diogenes' endless search for the elusive honest man. We all suspect that it's as difficult or impossible to define a "reasonable" lawyer as it is to find an honest man.

What we really mean to describe when we talk of the standards of a “reasonable” lawyer is “those standards generally acceptable to the legal community,” or “those standards which do not outrage or offend the community of lawyers and judges.” We can’t allude to the public as a whole because lawyers are expected to maintain higher standards than other people.

In the final analysis, you can probably rely on reciting Henry’s usual hourly fee for comparable work, unless you have reason to suspect that he is charging John more than any of his other clients. As for your own fee, you have to consider whether you can justify charging John at the same rate as always, or whether, in the light of your limited contribution to the services required, John would expect a reduction in your usual rates. Above all, you know that you would not be justified in charging more than you have usually charged John for other work.

May you add your usual fee to Henry’s usual fee and expect John to pay both? Rule 1.5 ignores this question. Perhaps it never occurred to the courts to ask it. The only guide we have is in Rule 1.5(g), the Section dealing with referral agreements and the division of fees between lawyers. The Section does not impose any limits on fees except the limit imposed by Section (a) that they not be excessive. Section (g) deals only with the division of fees, so presumably, if the total of both fees is in proportion to your usual charges and is not excessive, both you and Henry are entitled to bill and collect your usual rates.

**The meaning of “Joint Responsibility”.** By telling John that you would be jointly responsible for Henry’s services, you have taken on the same responsibility to John as one partner has for the actions of another partner in his law firm. This responsibility may include liability for Henry’s ethical lapses and for his malpractice. If you are now worried that your impetuous outburst during your phone call with John may impose burdens you cannot bear, you may want to tell John that you can’t manage the possible financial consequences of joint responsibility, and that you will relinquish your fees. Henry will probably not object to assuming the representation alone. He’s obviously experienced and confident in his work, and he is not likely to need or expect your help.

Rule 1.5(g) helps to resolve this dilemma. It appears to give you a choice. Do you want to assume joint responsibility with Henry? Or, instead, will you agree that you will share your fee with Henry in proportion to the services you both perform. In either event – whether you assume joint responsibility or you agree to divide your fee in proportion to your services, you and Henry should define in your agreement exactly what services each of you is expected or required to perform, and you should express that same division of services between you in the agreement you tender John.

If you decide to share in the fees, you and Henry should consider and define:

- the time and services required from each
- the skills involved in estate planning and the preparation of testamentary documents
- the fees each of you customarily charges his clients for similar work
- the amount involved in John’s matter and the results each of you intends to achieve
- any time limitations on either of your services
- the nature and length of the relationship between each of you and John
- the experience, reputation and ability of each in similar matters

**The scope of services by you and Henry.** You are required to define and communicate to John the scope of your own services and, separately, of the services to be performed by Henry. Rule 1.5(b). If you share in the fees, your services will probably be as associate to Henry, offering him help, perhaps, in attending meetings with the clients, in reviewing and discussing Henry's documents, and in promoting a sound and cooperative relationship between Henry and John. Henry's services will be those of an experienced practitioner in the specialized area of estate planning, presumably including extended consultation with John and Jane, and the drafting and execution of testamentary documents, powers of attorney, and other instruments.

**The mandate to arbitrate.** All three of the relevant documents – 22 NYCRR Part 137, 22 NYCRR Part 1215, and Rule 1.5 – confer upon John the right to select arbitration as the means of resolving fee disputes. Rule 1.5(f) provides:

Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

Because Rule 1.5 doesn't tell us what the fee arbitration program is and because 22 NYCRR Part 1215 refers back to Part 137 as the source of the client's right to arbitrate, we have to look to Part 137 to see what the courts intended. Section 137 tells us the Scope of the Arbitration Program:

This Part establishes the New York State Fee Dispute Resolution Program, which provides for the informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged.

Section 137(2) tells us.

Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.

Part 137 doesn't say so, but both you and Henry, as the lawyers in a referral agreement, would be obliged to submit any fee dispute with John to arbitration.

---

*Lazar Emanuel is the publisher of NYPRR.*