

By Constance L. Rudnick and Elizabeth N. Mulvey

Splitting Hairs

in Fee Splitting



Constance L. Rudnick is a professor of law at Massachusetts School of Law in Andover, Massachusetts, and Elizabeth N. Mulvey is a partner at Crowe & Mulvey, LLP. Both authors are former members of the Board of Bar Overseers. The opinions expressed are their own and not those of the Board.

In the recent case of *Saggese v. Kelley*, 445 Mass. 434, 837 N.E.2d 699 (2005), the Supreme Judicial Court significantly amended the requirements of Rule 1.5(e), Mass.R.Prof.C., relating to the sharing of fees between lawyers not in the same firm. *Saggese* arose when the defendant lawyers refused to share fees in a case referred to them by Saggese. The client, referred to in the opinion as Jan Doe, had originally consulted Saggese, who referred her to the defendants, Kathleen and James Kelley.

The Kelleys entered into a written hourly fee agreement with Doe, a copy of which was sent to Saggese. During the initial period of the representation, the Kelleys paid Saggese one-third of the fees received from Doe. The Kelleys eventually tried the case to a verdict, and were awarded a significant sum for attorney's fees. They did not inform Saggese of this result, were not forthcoming when he inquired about the status, and refused to share the fee when he learned that it had been paid. Doe, who had not previously been informed of the referral fee arrangement, authorized the Kelleys to pay a referral fee to Saggese after the award was made, but the Kelleys continued in their refusal to pay Saggese.

Saggese sued the Kelleys on the oral contract to pay a referral fee. The Superior Court found that, despite the absence of a writing, an enforceable agreement existed between Saggese and the Kelleys, which entitled Saggese to one-third of the fee. The Supreme Judicial Court affirmed the judgment of the Superior Court, but in the process, imposed new obligations on lawyers who

share fees pursuant to Rule 1.5(e). Although Rule 1.5(e) as written is silent with respect to the method and the timing of the disclosure of fee sharing agreements, the Court imposed a new requirement that the disclosure be made to the client in writing *before* the referral is made. The Court reasoned that, if consent was not sought until a later time, a client might feel pressured to assent to an otherwise objectionable fee-sharing arrangement because of the difficulty of changing lawyers once the representation is underway. The Court noted that even if failure to secure the client's consent in writing does not render the fee uncollectible as between the lawyers, it may subject the attorney to disciplinary sanction.

The Court imposed the primary obligation to insure compliance with Rule 1.5(e) on the referring lawyer, who, it said, "is usually in the best position to secure compliance," although it emphasized that the lawyer who receives the referral shares in the responsibility to insure compliance with Rule 1.5(e), and should confirm that the referring attorney has done so. The Court noted that, although lack of compliance might not render the fee sharing agreement unenforceable, it might subject *both* lawyers to disciplinary action.

The new requirement can be fairly easily met with a letter sent to the client at the time of the referral, confirming that the referral has been made, and that the legal fee will be shared between the referring and the receiving lawyers. According to Comment 4 to Rule 1.5, disclosure of the specific share to be received by each lawyer is not required, and the case does not appear to add such

an obligation. The referring lawyer should request that the client sign a copy of the letter to indicate his consent, and include a stamped self-addressed envelope for the return of the letter to the referring lawyer.

Because the responsibility to insure compliance with Rule 1.5(e) is shared by the receiving lawyer, the receiving lawyer should insist on receiving a copy of the client's consent. If the referring lawyer has not obtained the client's written consent, it will fall to the receiving lawyer to obtain such consent before the representation is commenced.

Although the Court recognized that the purpose of Rule 1.5(e) is to protect clients from unreasonable fees, the new requirements seem only to burden lawyers with no practical benefit to clients. The *Saggese* decision arose not in the context of any complaint by a client, but rather as a dispute between two lawyers. Further, the Court's imposition of the primary obligation on the referring

lawyer is questionable because the referring lawyer often has only minimal and isolated contact with the client, and usually plays no role in determining the terms of the actual representation or the amount of the fee to be charged. More often, it is the receiving lawyer who decides whether to accept the engagement and under what terms, and who actually enters into the fee agreement with the client. If the Court feels it necessary to impose additional requirements beyond those set forth in Rule 1.5(e), it would be more in keeping with the realities of practice to place the responsibility on the lawyer who will be handling the case, having ongoing contact with the client, and actually receiving the fee. ■

Heads Up focuses on statutory enactments, new case law, regulatory changes, new guidelines and protocols.

Aimed at keeping the practitioner in the know, *Heads Up* seeks to help readers stay on top of the ever-changing landscape that is the practice of law.



Hire a student from a
Boston Public High School for the
summer...

...provide a
lifetime
experience

Boston Bar Association's
Summer Jobs Program

For more information,
contact Paul Dullea, Director of Community Affairs
at (617) 778-1934
or pdullea@bostonbar.org



Boston Bar
ASSOCIATION