

**The Obligations of the Referring Lawyer:  
The Dos, the Don'ts, and the What-If-I-Already-Dids**

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**Introduction**

“So-and-so called and has a potential case, BUT...” It is not uncommon for an attorney to have a potential case that would best be handled by another lawyer. This presentation will be addressing the duties of the referring lawyer who intends to take a referral fee. The very nature of taking a referral fee invokes the lawyer-client relationship, and all of the duties that follow. The best rule of thumb to remember for attorneys intending to take a referral fee is that your representation of a client as the referring attorney should follow the same ethical guidelines you already follow in ordinary attorney-client relationships.

The duties that fall under SCR 20:1.5(e)(3) fall on both the attorney referring the matter as well as the attorney receiving the matter, but generally it is expected that the referring lawyer take the initiative in keeping updated on the course of the matter. For clarity, I will refer to the attorney making the referral as the “referring lawyer” and the attorney to whom the referral is made as the “receiving lawyer.” For further research, reference Ethics Opinion EF-10-02, which is an in-depth discussion of the duties of the referring lawyer.

**I. The Dos and Don'ts**

Ethically, how do you go about entering into a referral-type relationship with a client and a receiving attorney? First, obtain permission from the client to discuss the case with the receiving attorney. Then discuss the case with a competent attorney and determine whether that attorney is willing to take the case. Finally, get the client's consent in writing as to the fee and the details of the representation by both the referring attorney and the receiving attorney.

- a. **DO** Ask the client's permission before disclosing confidential information to the receiving lawyer
  - i. Remember that under SCR 20:1.18, attorneys have a duty to keep a potential client's discussions confidential:
    1. “Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not

use or reveal information learned in the consultation...”  
SCR 20:1.18

2. Moreover, as will be discussed later, if a referral relationship is established, the referring lawyer does maintain a lawyer-client relationship with the client, and as such confidentiality is also required by SCR 20:1.6:
  - a. “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation...”
  3. A client’s consent should be obtained prior to disclosing information about the case to the receiving attorney
- b. **DO** explain to the client the nature of the relationship upon or prior to the referral
  - i. Including that you:
    1. Maintain a lawyer-client relationship with the client
    2. Remain ethically and financially responsible for the matter
    3. Will be available to the client throughout the representationEthics Opinion EF-10-02
- c. **DO** obtain the client’s informed consent in writing upon or prior to starting the relationship
  - i. “Informed Consent” is defined by SCR 20:1.0(f) as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”
  - ii. “Confirmed in Writing” – “denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent... If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.” SCR 20:1.0(c)
  - iii. The Professional Ethics Committee noted that this requirement “can include an acknowledged e-mail or other electronic recording.” Ethics Opinion EF-10-02.
- d. **DO** have the client sign a fee agreement with you
  - i. “A division of a fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and... **the client is informed of the terms of the referral arrangement**, including the share each lawyer will receive and whether the overall fee will increase, **and the client consents in a writing** signed by the client.” SCR 20:1.5(e)(3)
    1. In informing the client of the terms of the referral arrangement, the client should also be informed in the

agreement of the cost-sharing responsibilities of each attorney.

- ii. Moreover, as a lawyer-client relationship is established with a contingent fee relationship, the standard rule relating to contingent fees applies:
  - 1. “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 by par. (d) or other law. A contingent fee agreement shall be in a writing signed by the client, and shall state the method by which the fee is to be determined...” SCR 20:1.5(c).
- e. **DO NOT** take a referral fee if you would be ethically unable to take on the case yourself
  - i. By taking a referral fee, you are establishing an attorney-client relationship with the client, and must be able to step in on representing the client in case of an emergency. The ordinary rules governing conflicts of interest apply, so you should not take a referral fee on any cases where you would be conflicted out of representing the client yourself:
    - 1. “the representation of one client will be directly adverse to another client,” or
    - 2. “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” SCR 20:1.7.
    - 3. As with any other potential client, some conflicts are possible to waive. If the conflict is one that could be waived, then get the client’s informed consent in writing consenting to the representation (along with any other client whose interests may be affected by the representation).
  - ii. The Professional Ethics Committee noted that while you must be prepared to intervene in case of an emergency, you are not expected to be an attorney experienced in a specialty area of law before agreeing to take a referral fee, as often that is the very basis of the referral itself. So, while you could not take a referral fee if you would be conflicted out of a case, you *could* take a referral fee if you refer a case to an experienced workers’ compensation attorney, even if you are not experienced in that area of law. Ethics Opinion EF-10-02.
- f. **DO NOT** refer to an incompetent attorney, or put an expectation of receiving a fee ahead of the duty to refer to a competent lawyer
  - i. “A lawyer referring a matter to another lawyer, especially in circumstances in which the referring lawyer may have a financial stake in the referral, **must select that lawyer solely for that lawyer’s ability to provide the legal services that the client**

**needs** and not because that lawyer may be willing to enter into a fee sharing arrangement with the referring lawyer.” Ethics Opinion EF-10-02, *quoting* Ethics Opinion E-00-01.

- g. **DO NOT** enter into the agreement without having first come to an agreement with both the receiving attorney and the client as to fees and responsibilities to the client
  - i. The Rules do not specify any particular arrangement between the attorneys for splitting the fees, and the Professional Ethics Committee acknowledges that sometimes the reason behind the referral is one firm’s ability to front expenses in a case. The Rules just require that both attorneys come to an agreement between each other and with the client:
    - 1. “The requirement of shared financial responsibility for the matter simply requires that both the referring and receiving lawyers reach an agreement as to respective responsibility for costs with the client and abide by that agreement.” Ethics Opinion EF-10-02

## II. The What-If-I-Already-Dids

So you have obtained the client consent to discuss the case with another attorney, have discussed the matter with a competent attorney who has agreed to take the case, and you have negotiated the fee and financial cost-sharing provisions with the receiving attorney and obtained client consent in writing... what next?

- a. Shared Responsibility
  - i. “It is the ongoing protection of the client’s interests by the referring lawyer that justifies the referring lawyer receiving a fee that is beyond the proportion of the services actually provided by that lawyer.” Ethics Opinion EF-10-02
    - 1. It is not the referral itself that generates the basis for the fee—it is the continued attorney-client relationship with the client.
    - 2. The referral fee is provided for the service rendered to the client, not for generating business for the other attorney
  - ii. “[P]ursuant to the referral of a matter between the lawyers, each lawyer **assumes the same ethical responsibility for the representation as if the lawyers were partners in the same firm**, the client is informed of the terms of the referral agreement, including the share each lawyer will receive and whether the overall fee will increase, and the client consents in a writing signed by the client.” SCR 20:1.5(e)(3)
    - 1. The above definition is the current rule, adopted in 2007. Prior to 2007 the rule used “joint responsibility for the representation” to describe the ethical requirements. The Professional Ethics Committee in Ethics Opinion EF-10-02

opined that “joint responsibility” imposes the same ethical responsibilities as the “partners in the same firm” requirement, so nothing substantive changed when the new rule was adopted in 2007

iii. Partners In the Same Firm

1. “A partner in a law firm... shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” SCR 20:5.1(a)
2. Imposes an affirmative duty on all shareholders in a firm to ensure compliance with the rules
3. In addition to the affirmative ethical duty to ensure reasonable measures are in place to ensure the ethical compliance of other lawyers in the firm, a partner can be held responsible for *another* lawyer’s ethical violation if that partner “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”

iv. Practically speaking...

1. “Referring attorney must maintain contact with the progress of a matter” EF-10-02 quoting Ethics Opinion E-00-01
  - a. Periodic status reviews with receiving attorney
    - i. While you are not expected to be making final calls as to how the case should proceed, nor are you expected to handle the substantive or day-to-day matters in the case, the Professional Ethics Committee notes:
      1. “The duty of joint responsibility imports a serious responsibility as a lawyer and is not a mere hand off of the case to another lawyer to handle in his or her own unfettered discretion.” Ethics Opinion EF-10-02 quoting Ethics Opinion E-00-01.
  - b. Being available to client regarding concerns as to the handling of the case
  - c. Assuming financial responsibility (ie, advancing costs for experts, court costs, etc) as agreed upon by both attorneys and client prior to start of relationship
  - d. Be able to take over for the receiving lawyer in the event of an emergency
    - i. You are not expected to be competent in the area of the case, but you do need to be

- prepared to take measures to protect the interests of the client in case of emergency.
- ii. “Thus, if the receiving lawyer in a litigated matter becomes unable to act due to illness, the referring lawyer must... be prepared and competent to undertake limited actions such as seeking adjournments, assisting the client in seeking new counsel and dealing with opposing counsel should unusual circumstances so require.” Ethics Opinion EF-10-02.
- e. Maintain confidentiality and all other aspects as you would in any other lawyer-client relationship
  - f. And, if you become aware of any ethical violations in the handling of the case on the part of the receiving attorney, be prepared to take steps to address those ethical violations
    - i. Just as if you were a partner in a law firm who became aware of an ethical violation on the part of another attorney in the firm, you need to step in and take action if you become aware of ethical violations occurring in the course of the receiving lawyer’s representation of the client.
    - ii. “[T]he referring lawyer has a responsibility to act under SCR 20:5.1(c)(2) if necessary to mitigate or correct the adverse consequences of misconduct of the receiving lawyer.” Ethics Opinion EF-10-02.

### **Conclusion**

The important point to remember in all of this is that the purpose behind the referral fee is not to benefit the other attorney by generating business; the referral fee is a form of payment for providing a service to the client. While you may not be handling the day-to-day responsibilities or choosing which direction a case may take, you are still ethically responsible to the client for the pendency of the relationship. If you treat your ethical duties to the client as you would in any other case, you will not be in danger of violating your duty to the client.