

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-366
Issued: June 1994

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, this opinion refers to Rule 1.5(e), which was amended to require that the agreement with the client be confirmed in writing. Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: (1) Under what conditions may lawyers who are not practicing in the same firm split a legal fee? (2) May an attorney divide a legal fee with a referring attorney where the latter performs no legal service **and** assumes no responsibility? (3) May an attorney divide a legal fee with a referring attorney where the latter performs no legal services **but assumes responsibility** for the case?

Answer: The conditions are set forth in Rule 1.5(e). The answer to the second question is “no”. The answer to the third question is “yes,” assuming that all conditions of Rule 1.5(e) are met.

References: Rule 1.5(e), partially overruling KBA E-55 (1971).

OPINION

Several lawyers have inquired as to the continued validity of KBA E-55 (1971). That opinion interpreted DR 2-107, which has been replaced by Rule 1.5(e).

Under the old Code section a division of fees between lawyers [not in the same firm] could be “made in proportion to the services performed **and** responsibility assumed by each lawyer.” DR 2-107(a)(2). Fee splitting is now governed by Rule 1.5(e). Lawyers may now split fees in proportion to services performed by each lawyer, **or** they may split them without regard to work performed, so long as the referring lawyer assumes responsibility for the work performed, there is written agreement with and consent of the client to the representation of the particular lawyers and the total fee is reasonable. The idea underlying the new rule seems to be that responsible brokering is in the client’s interests - it gets the case into competent hands by eliminating the economic disincentive to referral.

In ABA Informal Op. 85-1514 (1985) the ABA Committee interpreted the term responsibility in Rule 1.5(e). The Committee stated that “assumption of responsibility does not require substantial services to be performed by the lawyer since assumption of responsibility is the alternative to a division of fees in proportion to services performed. The Committee is also

of the opinion that assumption of ‘joint responsibility for the representation’ includes assumption of responsibility comparable to that of a partner in a law firm under similar circumstances, including financial responsibility, 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.”

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.