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INTRA-ATTORNEY FEE SHARING ARRANGEMENTS

THOMAS J. HALL* AND JOEL C. LEVY**

INTRODUCTION

The ethical and legal considerations applicable to the division of legal fees between corresponding or cooperating attorneys stand ripe for comment and criticism. With ever-increasing negativism concerning the cost, competency and availability of legal services to the American public, our profession cannot stand idly by and permit once "customary" practices to continue, especially where those practices are often of questionable legality and almost surely unethical pursuant to applicable standards of professional responsibility.

Growing specialization within the Bar, coupled with new fears of challenges to attorneys' professional competency, would seem to indicate that even with the relaxation of restrictions on professional advertising by attorneys, the referral of clients to more qualified practitioners should logically be on the increase. With specialization, the incidence of referrals should expand beyond the historical scope of personal injury and commercial collection matters, both of which are generally contracted pursuant to contingent fee agreements.

Below, the writers survey the historical development of the legal and ethical controls placed upon intra-attorney fee arrangements with the intention of providing the reader with a review and analysis of the present state of substantive law and ethical considerations affecting the sharing and division of fees between attorneys. It is the writers' ultimate objective to provide the Bench and Bar with a critical analysis of the standards applicable to intra-attorney fee arrangements. It is hoped, in turn, that this will promote greater recognition of the considerations necessary in contracting and enforcing such fee arrangements and emphasize the connected ethical responsibility to the client.

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HISTORICAL PERSPECTIVE

Substantive Law

The "customs" of referral or finder's fees and the sharing of fees between cooperating attorneys have both long been a part of the practice of law in this country.

Historically, in America the sharing or division of fees between attorneys arose most often in two typical situations. In the first, an attorney referred a client along with every known aspect of a particular legal matter to another practitioner. This was often based upon the receiving attorney's location or trial expertise. The referring attorney often expected, and generally received, a referral or finder's fee. The genesis of such a referral or finder's fee in America may well be traceable to the practice of countryside solicitors in England who, when faced with litigation, would associate London solicitors as agents. An agent would in turn retain a barrister from the Inns of Court to take full charge of the litigation, with the custom being that the referring solicitor would share in one-third of the resulting fee.¹ In the second situation, the referring attorney engaged the receiving attorney as co-counsel, again possibly because of his trial expertise, and participated to some degree in the handling of the matter as well as in the resulting fee.

Established general rules evolved in early American substantive law to control disputes which resulted from such intra-attorney fee arrangements. In nearly every instance, the parties to such disputes were attorneys or their heirs, and the legal matter at issue had been contracted on a contingent fee basis. Where the effort of an attorney was limited solely to the referral of a legal matter to a receiving attorney, "custom" arguably required that the corresponding attorney remit a portion of the fee collected to the referring attorney as a referral or finder's fee.

This "custom" of compensating a referring attorney for the mere referral of business has often been recognized by American trial and appellate courts in their resolution of fee disputes between attorneys.² Recognition of referral fees has typically been made in an evidentiary context. The question has most often been the admissibility of evidence concerning the existence and recognition of such a "custom" presented to support a claim for a referral or

1. J. COHEN, *THE LAW: BUSINESS OR PROFESSION* 225 (1916).

2. See generally Annot., 73 A.L.R.2d 991 § 5 (1960); 1 R. SPEISER, *ATTORNEY'S FEES* § 6:18 (1973) [hereinafter cited as SPEISER].

finder's fee.³ Even of recent date, this "custom" has been elevated in status to include now-forsaken minimum fee schedules.⁴

In the second situation, involving some sharing by both or all cooperating counsel in the services performed or responsibilities assumed in connection with the referred legal matter, American substantive law provided definitive guidelines. The general rule permitted cooperating attorneys to agree expressly upon the division of the expected fee in any proportions which they deemed appropriate, regardless of their comparative expertise or their relative participation in the handling of the legal matter. If no such express agreement was made, the court implied an agreement to divide the resulting fee equally based upon the presumed existence of either a special partnership or joint venture between the attorneys.⁵

These general rules and capsulized observations concern attempts by American trial and appellate courts to apply only definitive substantive law to intra-attorney fee disputes. Clearly, the modern-day problems of intra-attorney fee arrangements involve questions of both substantive law and professional responsibility. As evidenced historically by these general rules, courts determining intra-attorney fee disputes most often viewed the issues before them as ones turning solely upon substantive law without consideration of ethical standards.⁶ More recently, some state appellate courts have ventured beyond the rote application of substantive law to recognize and apply ethical standards to such disputes as either pronouncements of public policy or as an equiva-

3. *Parker v. Gartside*, 178 Ill. App. 634 (1913); *Cost v. Dean*, 161 Pa. Super. Ct. 160, 54 A.2d 70 (1947).

4. *Compare Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955 (1975), with *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773 (1975).

5. For examples of the enforcement of contracts for the unequal sharing of fees without reference to or consideration of the proportionate sharing of services or responsibility, see *Monahan v. Heirich*, 4 Ill. App. 2d 373, 124 N.E.2d 39 (1955); *Sterling v. Miller*, 2 App. Div.2d 900, 157 N.Y.S.2d 145 (1956); *In re Allen St. in City of New York*, 148 Misc. 488, 266 N.Y.S. 277 (Sup. Ct. 1933); *Gagle v. Loeser*, 143 Ohio St. 362, 55 N.E.2d 580 (1944). For applications of a joint venture or special partnership theory without an express agreement, see SPEISER, *supra* note 2, at §§ 6:12, 6:13. *Compare Romine v. Frank*, 124 Ind. App. 465, 118 N.E.2d 900 (1954), and *Komisarov v. Lansky*, 138 Ind. App. 351, 219 N.E.2d 913 (1966).

6. See, e.g., *Swacher v. Pennroad Corp.*, 30 Del. Ch. 495, 57 A.2d 63 (1947), *cert. denied*, 333 U.S. 862 (1948); *English v. McConnell*, 23 Ill. 461 (1860); *In re Allen St. in City of New York*, 148 Misc. 488, 266 N.Y.S. 277 (Sup. Ct. 1933); *Gagle v. Loeser*, 143 Ohio St. 362, 55 N.E.2d 580 (1944). See also SPEISER, *supra* note 2.

lent of substantive law.⁷ Prior to reviewing and discussing these more realistic attempts to resolve intra-attorney fee disputes, some mention should be made of the historical development of ethical proscriptions concerning such fee-sharing arrangements.

Early Ethical Standards and Their Application

Ethical standards have long forbidden the practice of remitting referral fees to forwarding attorneys based solely upon the brokerage of legal business and clients. The American Bar Association's first official condemnation of referral or finder's fees took the form of Canon 28 of the Association's Canons of Professional Ethics, adopted in 1908. Canon 28 generally proscribed the payment of consideration to anyone for the referral of legal work.⁸ In 1928 the American Bar Association added Canon 34 which more particularly concerned the division of fees between attorneys. In its original form, Canon 34 provided:

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility. But the established custom of sharing commissions at a commonly accepted rate, upon collection of commercial claims between forwarder and receiver, the one being a lawyer and the other not (being a compensation for valuable services rendered by each), is not condemned hereby, where it is not prohibited by statute.⁹

This initial provision specifically permitted the "customary" payment for the mere referral of commercial collection claims even where the forwarder is not an attorney.¹⁰ A 1933 amendment to Canon 34 deleted the term "established custom" and the parenthetical provision in its second sentence. It also restricted the term "commercial claim" by requiring that such commercial claims be "liquidated" for a referral fee to be permitted. Another major revision of Canon 34 in 1937 deleted the entire second sentence restated above, leaving Canon 34 to read in its entirety as follows:

7. *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955 (1975); *Moffat v. Cresap*, 33 App. Div. 2d 54, 304 N.Y.S.2d 719 (1969); *McFarland v. George*, 316 S.W.2d 662 (Mo. App. 1958).

8. ABA CANONS OF PROFESSIONAL ETHICS No. 28, as adopted by the American Bar Association House of Delegates in 1908.

9. ABA CANONS OF PROFESSIONAL ETHICS No. 34, as adopted by the American Bar Association House of Delegates in 1928.

10. Compare the present schedule of commissions and fees promulgated by the Commercial Law League of America, reviewed in *SPEISER*, *supra* note 2, at § 6:22.

"No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility."¹¹

Thus, subsequent to 1937, the ethical standards promulgated by the American Bar Association condemned without question one attorney's payment of a referral or finder's fee to another. Commenting upon this revised version of Canon 34 in his treatise on Legal Ethics, Henry S. Drinker stated:

There was long at the bar a practice or custom whereby, when a lawyer, with authority from his client, forwarded a case to another lawyer for attention in the latter's jurisdiction, or merely recommended one, the forwarding attorney was allowed 1/3 of the fee earned by his correspondent. This was in the nature of a "Finder's Fee," and was payable irrespective of any real service performed or responsibility assumed by the forwarding lawyer. It was obviously the purpose of Canon 34 to condemn this [practice]. . . .¹²

The mandate of revised Canon 34 further required that henceforth, all sharing of fees between attorneys was to be based upon the division of service or responsibility. Left unanswered by Canon 34 was the manner or means by which a conscientious attorney, court or ethical committee could comparatively measure the respective services performed or responsibilities assumed by cooperating attorneys in attempting to effect a proper division of fees or evaluate one already contracted or performed.

A review of the decisions of state appellate courts rendered during the second and third quarters of this century reflects partial recognition of the basic principles of Canon 34 and at least superficial attempts by courts to integrate its provisions into the judicial resolution of intra-attorney fee disputes. However, as a general rule the courts continued to enforce strictly express intra-attorney fee arrangements without regard to the proportion of services rendered or responsibility assumed by each attorney. They also found implied agreements for equal division of fees where no such express agreement could be pinpointed, provided that the claiming attorney had rendered any recognizable service other than the referral itself.

11. ABA CANONS OF PROFESSIONAL ETHICS No. 34, as adopted by the American Bar Association House of Delegates in 1937.

12. H. DRINKER, *LEGAL ETHICS* 186 (1953) [hereinafter cited as DRINKER]. See also Drinker, *Brokerage v. Law Profession*, 7 U. FLA. L. REV. 433 (1955).

Nevertheless, whether as a response to the tightening standard of Canon 34 or as a matter of public policy, a number of state appellate court decisions seemed to recognize and enforce the basic premise of Canon 34, requiring that an attorney sharing in a fee also share in the services and responsibilities which generate it.¹³ Courts' recognition of this requirement of participation in the handling of legal matters may perhaps be explained by an apparent effort by unrewarded forwarding attorneys to guise their expected referral fee as compensation for "services rendered."¹⁴ In denying such claims for referral fees, courts regularly looked to substantive law. For example, courts based their reasoning upon contractual concepts such as a lack of consideration¹⁵ or the failure of one contracting party to perform the obligations imposed upon him pursuant to a bilateral contract which impliedly required that both or all attorneys contribute to the services performed.¹⁶ These exemplary holdings reflect the understandable tendency of most appellate courts to continue to resolve intra-attorney fee disputes by relying upon principles of substantive law rather than delving into the rationale or interpretation of the ethical standards which clearly apply.

In contrast to the foregoing courts' reliance upon substantive law alone, the appellate courts of New York established an approach to intra-attorney fee disputes which essentially incorporated the proscriptions of Canon 34 as a principle of public policy having the equivalent status of substantive law. In 1937, a New York Supreme Court decision held that an attempt to enforce a contract for a "commission" based upon a referral of a legal matter contravened New York public policy.¹⁷ Thereafter, New York appellate courts upheld dismissals of actions brought by an attorney, or his estate, in an effort to share in a legal fee where the complaint failed to allege that the cause of action was based upon the actual sharing of services or responsibility in the handling of the underlying legal matter.¹⁸ More recently in 1969, the New York Supreme Court

13. *Swacher v. Pennroad Corp.*, 30 Del. Ch. 495, 57 A.2d 63 (1947); *Gagle v. Loeser*, 143 Ohio St. 362, 55 N.E.2d 580 (1944); *Cost v. Dean*, 161 Pa. Super. Ct. 160, 54 A.2d 70 (1947).

14. *Swacher v. Pennroad Corp.*, 30 Del. Ch. 495, 57 A.2d 63 (1947); *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955 (1975); *Doherty v. Ginsburg*, 346 Mass. 421, 193 N.E.2d 677 (1963); *Krinsky v. Smith*, ___ Mass. App. Ct. ___, 312 N.E.2d 591 (1974).

15. See note 14 *supra*.

16. *Doherty v. Ginsburg*, 346 Mass. 421, 183 N.E.2d 677 (1963).

17. *Clark v. Robinson*, 252 App. Div. 857, 299 N.Y.S. 474 (1937).

18. *Silver v. Paulson*, 285 App. Div. 1059, 139 N.Y.S.2d 456 (1955); *Abrahamson v. Sperling*, 162 Misc. 813, 295 N.Y.S. 165 (1937).

applied Canon 34 to conclude that, as a matter of public policy, the estate of a deceased attorney could not rely upon a partnership agreement which provided for the surviving partner's sharing of a fee with the decedent's estate based solely upon the fact that the business had "originated" with the decedent.¹⁹

The New York appellate courts' approach and rationale in applying Canon 34 is exemplified by the following statement from the 1965 opinion rendered by the Second Department for the Appellate Division of the New York Supreme Court:

This Canon is designed, in part, to keep the profession of law from becoming an ordinary business. It gives substance to the admonition of Canon 12 that "the profession is a branch of the administration of justice and not a mere money-getting trade." Canon 34 thus condemns both the "finders fee," payable regardless of the services performed or responsibility assumed by a finding attorney, as well as the unearned divided fee, taken by an attorney who has assumed the role of an "attorney of record" but who, in fact, has neither rendered services nor assumed responsibility in the handling of the case.²⁰

The New York appellate courts clearly have interpreted and applied the basic mandates of Canon 34 which abhors referral or finder's fees and which requires that for an attorney to share in a fee, he must perform *some* legal service. Furthermore, the New York appellate courts stand alone as the first to apply uniformly Canon 34 as public policy which seemingly carries the import of substantive law. Nevertheless, the New York courts have avoided any application of Canon 34 which required that they comparatively evaluate legal services performed or responsibilities assumed by cooperating attorneys. The most recent New York Supreme Court decision citing Canon 34 states its interpretation and application of that provision as follows:

Under Canon 34 of the former Canon of Ethics, in effect when this fee division agreement was made . . . , there was no professional impropriety in agreeing to an equal division of the net fee without a concomitant agreement for an equal division of the work and responsibility, provided there was *some* division of services and responsi-

19. *Moffat v. Cresap*, 33 App. Div. 2d 54, 304 N.Y.S.2d 719 (1969).

20. *Greenwald v. Zyvith*, 23 App. Div. 2d 201, 259 N.Y.S.2d 387 (1965).

bility, and the party seeking to enforce the agreement actually performed some substantial services.²¹

The court held that the performance of some initial joint research of legal authorities and the preparation and securing of court approval of a minor's compromise order constituted "substantial" services justifying the court's enforcement of an express oral agreement between two attorneys to share equally in the fee generated in a wrongful death action.²²

In the final analysis, the case law decisions of the New York appellate courts and those of other jurisdictions footnoted above only prohibit sharing of fees between attorneys where there has been absolutely no sharing of services or responsibility. The decisions prohibit a referral or finder's fee where an attempt has been made to justify the claimed fee as one based upon the rendering of legal services which are, upon close scrutiny, of little or no value. So long as the attorney seeking to share in the fee can establish that he participated in any measure with his co-counsel in the services rendered or responsibilities assumed, it would seem that every jurisdiction reviewed above would continue to enforce an implied agreement for the equal sharing of fees between cooperating attorneys, absent an express agreement to the contrary. No effort was made in these decisions to proportionately evaluate legal services rendered by cooperating attorneys or to define the scope of the "services or responsibility" contemplated by Canon 34.

A 1958 decision of the Missouri Court of Appeals goes beyond the decisions of other jurisdictions in applying the dictates of Canon 34 by its attempt to provide a definition of such "services or responsibility" and its factual application of that definition. In *McFarland v. George*,²³ the St. Louis Court of Appeals considered the claim of Attorney William C. McLaughlin to recover a portion of a fee allowed by a probate court to Attorney Lovell W. George as a result of a will contest. McLaughlin asserted that he and George had entered into an agreement to jointly represent an incompetent, Mrs. Hauser, in her efforts to contest here deceased aunt's will. The defendant, George, contended that McLaughlin's claim was based solely upon his referral of Mrs. Hauser to George. Subsequent to McLaughlin's death, the trial court entered judgment in favor of his administrator for one-third of the fee earned, based at least in part

21. *Bohm v. Goltzberg*, 69 Misc. 2d 469, 329 N.Y.S.2d 907 (Sup. Ct. 1972) (emphasis added).

22. *Id.*

23. 316 S.W.2d 662 (Mo. App. 1958).

upon the trial court's finding of a "special partnership or joint venture existing by and between the plaintiff's decedent and defendant, George"24

In the appellate court, George contended that the trial court had erred in implying a promise to share any fee awarded in the Hauser will contest and based his argument essentially upon the dictates of Canon 34, adopted by the Missouri Supreme Court as its Rule 4.34. The Missouri court noted that two attorneys can enter into such a special partnership and agree to the division of fees, "provided there is a sharing of services or responsibility and the agreement provides that the division of the fees is based upon a division of the services rendered or responsibility assumed."²⁵ Continuing, the court held, without further explanation, that it had "some doubt" that the concept of joint venture could be applied to agreements between attorneys who associate professionally to represent a client.²⁶ This statement contravenes what had previously been an accepted rationale for justifying the equal division of fees where attorneys had not struck an expressed bargain to the contrary.

Interpreting Canon 34, the Missouri Court of Appeals pointedly stated that the mere referral or recommendation of a legal matter to another lawyer, without the referring attorney's further participation in the matter, cannot be construed as the performing of services or the discharging of responsibilities. Although this conclusion can be implied from prior decisions in other jurisdictions, it had not previously been verbalized in such express terms.

In reaching its result, the court made an exhaustive review of the facts presented to the trial court and referenced a number of similar decisions rendered by the New York appellate courts in interpreting and applying Canon 34. In attempting to define the actual meaning of an attorney's service and responsibility within the context of Canon 34, the Missouri Appellate Court held:

In construing Supreme Court Rule 4.34 (Canon 34) little difficulty is found in dealing with the word "service," but the word "responsibility" on first blush seems to offer more difficulty. The primary meaning of "responsibility" as found in the dictionaries is the state of being answerable for an obligation. (Citations omitted). The term "responsibility" includes judgment, skill, ability and

24. *Id.* at 669.

25. *Id.*

26. *Id.*

capacity. (Citations omitted). Legal responsibility is the state of one who is bound or obligated in law and justice to do something. (Citations omitted). . . . The word "responsibility" means the doing of something. Any other meaning would render the rule meaningless. We agree with the statement of Henry S. Drinker, in his work, *Legal Ethics*, when discussing the rule at p. 186, where he said: "The service and responsibility must, to be effective, relate to the handling of the case." If the division of fees is to be placed on the basis of how much service or responsibility each contributed in connection with the legal services rendered in the case, obviously, the responsibility called for under the rule must be related to the legal services rendered in the actual handling of the case.²⁷

In applying these principles to the facts before it, the Missouri Appellate Court noted that no express contract existed between McLaughlin and George for the sharing of fees or for the sharing of services and responsibility concerning Mrs. Hauser's will contest. The court observed that at trial, McLaughlin had presented no evidence which established his participation in the actual handling of the will contest or any assumption of responsibility concerning it. Therefore, the court reversed the trial court and held that no joint venture or special partnership could be implied. Thus, for the first time, a state appellate court appeared to render an opinion which provided substance to the clear mandate of Canon 34 and which went beyond a mere restatement of its underlying rationale.

Although *McFarland v. George* represents a major effort by a state appellate court to weigh relative participation in the handling of a legal matter, much of its informative discussion can arguably be viewed as dicta. In reality, the claim before it amounted to one for a referral fee based solely upon the referral of Mrs. Hauser to George. Neither has the Missouri Court of Appeals subsequently expanded upon *McFarland v. George* to establish any procedure to assess the relative proportionate contributions of cooperating attorneys where a later dispute arises concerning the right to share in a fee. In the 1964 decision of *Witherton v. VanZandt*,²⁸ the same court distinguished *McFarland v. George* on the grounds that it concerned a claim for a mere referral by an attorney who had neither performed legal services nor assumed responsibility in the handling of the subject legal matter; the appellate court affirmed the trial court's division of fees between attorneys on a sixty per cent/forty

27. *Id.* at 671.

28. 374 S.W.2d 631 (Mo. App. 1964).

per cent basis. In reaching this result, the court provided little analysis concerning the relative contributions of the cooperating attorneys.

ETHICAL OPINIONS

Understandably, the state trial and appellate courts feel more comfortable in the realm of substantive law. For this reason, the courts' avoidance of applying ethical proscriptions to intra-attorney fee disputes is at least explainable, if not justifiable. Thus, it would seem that the ethical opinions of the American Bar Association and various state bar associations should provide a more studied approach and analysis to guide the concerned practitioner.

Much to the contrary, the formal and informal ethical opinions of the American Bar Association's Standing Committee on Professional Ethics (Committee) are found to be equally evasive and analytically scant where the Committee has been queried regarding the appropriate division of fees between cooperating counsel. In a formal opinion issued in 1930, the Committee opined that it would not be unethical for a corresponding attorney, to whom a case had been referred pursuant to an agreement providing that the corresponding attorney share in two-thirds of the fee, to fix the entire fee, deduct his share, and remit the remainder to his referring co-counsel. Commenting upon the proportionate division of fees, the Committee took what has now become its established position in stating, "The Committee will not pass upon questions concerning the amount of an attorney's fee nor upon what constitutes a proper division of fees between attorneys unless the fee is so excessive as to constitute a misappropriation of the client's funds."²⁹

Ten years later, in its Formal Opinion 204, issued subsequent to the final revision of Canon 34, the Committee rendered its most extensive opinion on the issue of the division of fees between attorneys. Pertinent portions of that opinion provide:

When an attorney merely brings about the employment of another attorney but renders no services and assumes no responsibility in the matter, a division of fees is improper. Measuring the relative division of fees and responsibility between associate attorneys is not within the province of this Ethics Committee unless the resulting fee to the client is flagrantly excessive

29. ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS No. 27 (May 5, 1930) [hereinafter cited as ABA FORMAL OPINIONS].

. . .

[W]e adhere to our previous ruling that where a lawyer merely brings about the employment of another lawyer but renders no services and assumes no responsibility in the matter, a division of fees is improper. . . .

. . .

Any suggestion that the word "responsibility" may have been intended to frustrate the intent of the canon, or may properly be resorted to for that purpose, must be rejected. The canon clearly states that the basis of the exception permitting division of fees between lawyers is the division of service or responsibility. . . . If, however, there be no division of service or responsibility, a division of fees will violate the canon.

. . .

It is assumed that the bar, generally, understands what acts or conduct of a lawyer may constitute "services" to a client within the intendment of Canon 12. Such acts or conduct, invariably, if not always, involve "responsibility" on the part of the Lawyer, whether the word "responsibility" be construed to denote the possible resultant legal or moral liability on the part of the lawyer to the client, or to others, or the onus of deciding what should or should not be done in behalf of the client. The word "services" in Canon 12 must be construed in this broad sense and may apply to the selection and retainer of associate counsel as well as to other acts or conduct in the client's behalf. . . .

. . .

In the letter of inquiry, *ante*, it is stated that the inquiring firm is frequently "retained by other lawyers" and a doubt is expressed whether there is involved any "responsibility" on the part of the lawyer instructing us.

. . .

These statements seem to suggest an unwarrantedly restricted construction of the word "responsibility" even if the inquiry be confined to the act of retaining counsel.³⁰

Thus, although continuing its abhorrence of the finder's or referral fee in its most basic form, the Committee promotes what is,

30. ABA FORMAL OPINIONS No. 204 (November 28, 1940).

at best, a broad application of the terms "services" and "responsibility" as found in Canon 34. No effort is made in the opinion to evaluate proportionate contributions to the handling of legal matters. Furthermore, the Committee expressly suggests that the mere selection and retention of associate counsel constitutes at least some form of service or responsibility and that to justify a division of fees, a referring attorney might well rely upon some vague, if not contrived, "responsibility." This conclusion is clearly contrary to the Missouri Appellate Court's holding in *McFarland v. George*.³¹ The Committee's approach would seem to indicate that any sharing of service or responsibility would justify a disproportionate sharing in the resultant fee, a conclusion similar to that reached by the appellate decisions of New York reviewed above.

Admittedly, any effort to value comparatively respective services rendered or responsibilities assumed by cooperating attorneys is extremely difficult. Assuming this fact as a premise, the lack of concrete guidance provided by the Committee remains classifiable as the proverbial "cop-out."

Other opinions of the Committee provide little additional help. A formal opinion of the Committee issued prior to its Formal Opinion 204, partially quoted above, stated that a former member of a New York law firm could justifiably accept a percentage of the gross fees received by his former firm from his former clients whom he referred to the firm. This position was based upon the fact that the attorney, in some fashion, directed the rendering of those services by correspondence.³² In a more recent informal opinion issued in 1960, the Committee, relying upon Formal Opinion 204, stated the following in response to an inquiry concerning the proportionate sharing of fee: ". . . it is the position of this Committee that any good faith division of fees between lawyers based upon the extent of the services rendered by each, and the degree of responsibility assumed by each, is proper."³³ Although this would seem to indicate that the Committee suggests a proportionate sharing of fees based upon the proportionate sharing of services and responsibilities, the Committee continued to take the position that it would neither measure the proportionate contributions of cooperating attorneys nor provide guidelines of any sort to the cautious practitioner.³⁴

Many of the formal and informal opinions issued by the Committee make the practical suggestion that cooperating attorneys

31. See note 7 *supra*.

32. ABA FORMAL OPINIONS No. 97 (May 13, 1933).

33. ABA FORMAL OPINIONS No. 391 (November 28, 1960).

34. *Id.*

strike an agreement concerning the division of potential fees at the initiation of their association.³⁵ This suggestion represents an exercise of common sense. Additionally, an ethical tribunal would most probably enforce, as would a court of substantive law, any such express agreement without comment or analysis based upon an underlying presumption that, as attorneys, the parties to the agreement negotiated it at arm's length. A rationale also evident in Committee opinions provides for a similar presupposition where an express contract has been struck between attorney and client.³⁶

Other Committee opinions hold that where no express agreement exists between cooperating attorneys, the attorney accepting the referral of the matter is justified in billing the client directly and assuming that the referrer will do likewise.³⁷ Such a recommendation must be based upon the conjecture that following the referral, the attorneys did not cooperate in the handling of the legal matter. It is submitted that this approach also rejects the special partnership or joint venture presumption so often relied upon in courts of law when resolving intra-attorney fee disputes.

Also worthy of note is a 1966 Committee opinion issued in response to an inquiry by a medical malpractice "specialist" who stated that he commonly divided any fee obtained in a case referred to him on a two-thirds/one-third basis with the referrer and expressly provided for such a division in the fee agreement signed by the client. The Committee's response to the inquiry concerning the propriety of such an arrangement was that, as it had opined in the past,³⁸ "on its face" such client consent to such an agreement took the matter outside the proscriptions of Canon 34. Nevertheless, the Committee did state that, ". . . Canon 34 would be involved, irrespective of the 'agreement,' if the division of services and responsibilities between you does not warrant the 33-1/3% — 66-2/3% division of the fee, or the cooperation between you and the forwarding attorney was no more than the referral."³⁹

This observation seemingly requires that there be at least some variance in the proportion of services or responsibilities performed by the attorneys which correlates, in relative degree, to the fee-

35. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS No. 351, unpublished, but annotated in ABA OPINIONS ON PROFESSIONAL ETHICS (1967) [hereinafter cited as ABA INFORMAL OPINIONS]. Cf. ABA INFORMAL OPINIONS No. 936 (April 26, 1966).

36. ABA INFORMAL OPINIONS No. 353.

37. ABA INFORMAL OPINIONS No. 351.

38. *Id.*

39. ABA INFORMAL OPINIONS No. 936 (April 26, 1966).

sharing arrangement; i.e. the attorney sharing in the greater portion of the fee must have performed the greater portion of the legal services. It is likely, however, that if a referring attorney performed the slightest service, other than the referral itself, the Committee would not look further in reviewing the comparative value of their contributions.

A review of the reported disciplinary decisions of state courts based even in part upon the tenets of Canon 34 reflects that in the few decisions found, it has been unnecessary for disciplinary tribunals to consider the ultimate application of Canon 34, since the cases before them provided clear violations of established ethical standards.⁴⁰

A glimpse of the Bar's compliance with the mandate of Canon 34 can be seen in a 1951 report issued under the auspices of the American Bar Association.⁴¹ That report reflected that over one-quarter of the attorneys surveyed still felt that the division of fees between attorneys based upon disproportionate sharing of services and responsibilities was either a common practice or not unprofessional.

Thus, at the time the American Bar Association commissioned its Special Committee on Evaluation of Ethical Standards in 1964, neither the state courts in their resolution of intra-attorney fee disputes or in disciplinary proceedings, nor the American Bar Association's Standing Committee on Ethics in its formal and informal opinions on legal ethics, had made any concerted effort to apply the standard of Canon 34 mandating that any division of fees between attorneys be proportionate with their respective sharing of services rendered or responsibilities assumed. But in defense of the courts and committee, it is also true that Canon 34, in common with many of the aspirational Canons of Professional Ethics, provided no concrete standards for a tribunal to apply when confronted with a case concerning cooperating attorneys. Furthermore, it is logical to assume that courts have long felt it outside their function and jurisdiction to judge intra-attorney fee disputes based upon ethical standards except where those standards, by court rule or judicial fiat, have been elevated to the status of public policy or substantive law.⁴² Disciplinary tribunals and agencies, however, felt more

40. See Annot., 6 A.L.R.3d 1446 (1966).

41. McCracken, *Report on Observance by the Bar of Stated Professional Standards*, 37 VA. L. REV. 399 (1951).

42. See *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955 (1975); *McFarland v. George*, 316 S.W.2d 662 (Mo. App. 1958); *Clark v. Robinson*, 252 App. Div. 857, 299 N.Y.S. 474 (1937).

comfortable in condemning the obvious ethical transgressor. Consequently, only the referral or finder's fee was unequivocally condemned.

CODE OF PROFESSIONAL RESPONSIBILITY

Dissatisfaction with the organization, practicality and standards established by the amended Canons of Professional Ethics generated the commissioning of a Special Committee on Evaluation of Ethical Standards in 1964 (Special Committee). Special Committee efforts resulted in the promulgation of a new Code of Professional Responsibility adopted by the House of Delegates of the American Bar Association on August 12, 1969.⁴³ This proposed Code of Professional Responsibility incorporated "ethical considerations" as aspirational standards for the practitioner and "disciplinary rules" mandating a minimum level of required professional responsibility. Both were organized under very general principles of professional responsibility which maintained the label, "Canons." It was the intent of the Special Committee to provide a complete embodiment of legal ethics in one reference source.⁴⁴

The Code of Professional Responsibility as now enacted includes both Ethical Considerations and Disciplinary Rules which purport to control the division of fees between attorneys. The majority of these guidelines and minimum requirements of professional conduct fall under the superfluous mandate of Canon 2, which provides that, "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."⁴⁵

In general, the applicable Ethical Considerations [EC] and Disciplinary Rules [DR] of the Code of Professional Responsibility parallel the mandate of prior Canon 34 which required that the division of fees between attorneys be based upon the sharing of services and responsibility.⁴⁶

Most directly concerned with the issue of attorneys' sharing of fees is DR 2-107 which provides:

43. ABA CODE OF PROFESSIONAL RESPONSIBILITY, adopted by the ABA House of Delegates on August 12, 1969, and as amended by the ABA House of Delegates in February 1970, February 1974, and February 1975.

44. See Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1 (1970); *Symposium—The American Bar Association Code of Professional Responsibility*, 48 TEX. L. REV. 255 (1970).

45. See generally ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2. See also Ethical Considerations 2-7, 2-8, 2-22, 2-30 [hereinafter cited as EC]; Disciplinary Rules 2-106, 2-107, 3-102, 6-101 [hereinafter cited as DR].

46. DR 2-107.

DR 2-107 Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-107 appears to require that attorneys must first obtain their client's prior and express consent to the employment of co-counsel, fully advise the client of any intended division of fees, make any such division of fees only in proportion to the services performed and responsibilities assumed by the respective attorneys and, lastly, assure themselves that the total fee charged the client does not exceed reasonable compensation for all legal services rendered to him before they can justify any division of a total fee in fact.⁴⁷

The provisions of DR 2-107 clearly go beyond Canon 34 in the requirements of client disclosure and consent. Still, DR 2-107 does not provide guidelines or standards to define, quantify or value the proportionate amounts of legal services rendered or legal responsibilities assumed.

Recent ethical opinions and court decisions concerning DR 2-107 are generally similar to those issued under Canon 34. The sole opinion rendered by the American Bar Association's Standing Committee on Professional Responsibility relying upon DR 2-107 states only that a division of fees with a referring attorney without client consent and based upon no apparent service by the referring attorney falls within the prohibition of the rule.⁴⁸ Likewise, in a 1975 decision along the lines of the Missouri Appellate Court's ruling in *McFarland v. George*, the Kansas Supreme Court relied upon DR 2-107 to condemn a referring attorney's effort to collect a

47. *Id.*

48. ABA INFORMAL OPINIONS No. 1239 (August 29, 1972).

referral or finder's fee which was allegedly justified by his reliance upon a local minimum fee schedule which followed the "custom" of permitting such fees.

In *Palmer v. Breyfogle*,⁴⁹ the Kansas Supreme Court reviewed the claim of an attorney for a portion of a fee which had resulted from his referral of a casual acquaintance to the defendant's law firm for the handling of a divorce action. In reversing the trial court's award of a one-quarter fee to the referring attorney, the Kansas court meticulously studied the facts and concluded that DR 2-107 had not been complied with. The court reasoned that the plaintiff had failed to perform legal services or assume any responsibility even though he had originally acquired the client and allegedly attempted to "keep her happy" while the litigation was in process.⁵⁰ In reaching its conclusion, the court noted that the plaintiff had not prepared any of the pleadings, had not appeared in court and had absolutely no participation in the trial or settlement of the matter, although he assertedly felt "responsible" for the conduct of the case.⁵¹ The Kansas court also noted that the plaintiff had never submitted a statement for the payment of fees and that he kept no time records. Plaintiff based his claim for relief solely upon his referral of the client to the defendant. The court rejected evidence presented by the plaintiff and relied upon by the trial court which indicated that the plaintiff had attempted to "counsel" the client during the process of litigation. Moreover, the court weighed heavily the testimony of the client which characterized the plaintiff's efforts as providing only "moral support" of a "friendly, supportive nature."⁵²

In attempting to define the terms "services" and "responsibility" found in DR 2-107 and to apply these findings to the facts before it, the Kansas court held:

We are convinced that merely to recommend another lawyer or to refer a case to another lawyer and to do nothing further in the handling of the case cannot be construed as performing a legal service or discharging responsibility in the case. The service and responsibility referred to in DR 2-107, before a lawyer is entitled to a division of the fees, must relate to an act or participation in or the handling of the case. The rule would be meaningless if it were not so. The word legal "services" is

49. 217 Kan. 128, 535 P.2d 955 (1975).

50. *Id.* at 969.

51. *Id.*

52. *Id.*

not difficult for the members of the legal profession to understand, but the meaning of the word "responsibility" requires careful analysis.⁵³

Finally, the court concluded that a referral alone did not constitute a responsibility assumed.⁵⁴

The court's holding in *Palmer v. Breyfogle* clearly excluded a mere referral from the "services" and "responsibility" referred to in DR 2-107. Additionally, the court assigned importance to actual involvement in the legal proceedings and rejected any guise of "responsibility" which the plaintiff attempted to assign to his casual social contacts with the client subsequent to the referral. Every reasonable interpretation of the facts before the court led to the conclusion that the plaintiff's claim for compensation was based solely upon his referral.⁵⁵

In an interesting 1973 decision, the First District of the Illinois Appellate Court denied an attorney's claim for a fee resulting from personal injury litigation. The claim was based upon the conclusion that his failure to disclose and obtain his client's consent to the underlying fee-sharing arrangement with co-counsel constituted a breach of fiduciary responsibility owed to the client. In *Kravis v. Smith Marine, Inc.*,⁵⁶ the claimant attorney had initially been contacted by Alan Kravis to pursue potential personal injury claims resulting from a boating accident which had taken the lives of his wife and unborn child and which had left his four-year-old son permanently disabled. No fee arrangement between Kravis and the referring attorney was either made or discussed in their initial consultations. Prior to any referral, the claimant attorney remained active in the handling of the probate and insurance matters connected with the potential negligence claims. Thereafter, the claimant referred the matter to a receiving attorney specializing in personal injury litigation, who agreed that the referring attorney would share in one-third of any fee recovered.

The initial receiving attorney later withdrew as a result of a dispute over the fee arrangement made with the referring attorney, and substitute co-counsel was obtained pursuant to an intra-attorney agreement to share equally in any fee generated. At this juncture, and for the first time, the substitute co-counsel prepared a fee

53. *Id.* at 967.

54. *Id.*

55. *Id.*

56. 15 Ill. App. 3d 494, 304 N.E.2d 720 (1973), *rev'd*, 60 Ill. 2d 141, 324 N.E.2d 417 (1975).

contract for signature by the client and specifically included a reference to both the referring attorney and himself as contracting parties.

Two years later, a partial recovery was effected, and the client inquired about the sharing of fees. The claimant-referring attorney explained his requested share in the fee as "customary." A dispute arose with the client, who claimed that the referring attorney was violating applicable ethical standards. The client then formally terminated his relationship with the referring attorney and made a request to the court that the referring attorney's services be found of no value. In the resulting trial, the trial court held that Kravis had ratified the referring attorney's conduct and that the referring attorney had rendered valuable legal services.

On appeal, the Illinois Appellate Court held that as a matter of law, the referring attorney had violated the fiduciary relationship existent between attorney and client. The appellate court went further to conclude that the referring attorney's failure to disclose the fee-sharing arrangement justified an inference that he did so *intentionally*. Rejecting the trial court's finding of ratification, the appellate court held finally that the client's subsequent signing of a fee contract did not vitiate the prior concealment and breach of fiduciary responsibility.

In 1975 the Illinois Supreme Court reversed the decision of the Illinois Appellate Court and reinstated the trial court's judgment.⁵⁷ As grounds for its reversal of the appellate court, the Illinois Supreme Court relied upon a standard principle of appellate review mandating that an appellant must rely upon a theory properly presented and preserved in the trial court for reversal on appeal.⁵⁸ The court also relied upon a written fee agreement between the client, the referring attorney and the second co-counsel to conclude that the client knew, or should have known, that the referring attorney would participate in the division of any resultant fee.⁵⁹

It is important to note in *Kravis v. Smith Marine, Inc.* that neither the supreme court nor the appellate court referred to DR 2-107 or any other provision concerning the sharing of fees, nor did they discuss the referring attorney's justification that such fee-sharing agreements were "customary." The failure of either court to cite ethical standards might be explained by the parties' approach to the

57. *Kravis v. Smith Marine, Inc.*, 60 Ill. 2d 141, 324 N.E.2d 417 (1975).

58. *Id.*

59. *Id.*

case or the court's own understanding of the proper distinction between ethical considerations and substantive law. However, this rationale is not consistent with the Illinois Appellate Court's reliance upon a breach of fiduciary responsibility in its reversal of the trial court, nor with the approach of the New York appellate courts reviewed above which equates ethical considerations with public policy, nor with the more recent decisions in *McFarland v. George* and *Palmer v. Breyfogle*.⁶⁰

ALTERNATIVES

Often, criticism of the requirements of DR 2-107 and its predecessor, Canon 34, is centered on their conflict with what are identified as the "realities" of the practice of law. Normal practice seems to require the use of referral or finder's fees and require that cooperating attorneys be left alone to strike their own bargains concerning the sharing of fees. These "realities" are based upon the assumption that attorneys will not refer legal matters without the guarantee of a fee and that it is impossible to make comparative valuations of the legal services performed and responsibilities assumed by cooperating attorneys. For example, the authors of a work on lawyer-client employment agreements comment on DR 2-107 as follows:

As a practical matter, this [proportionate division of fees based upon sharing of services and responsibility] becomes a futile and unrealistic exercise in semantics. Certainly at the time you refer a case to another attorney you would, as a dedicated attorney, participate sufficiently to have learned enough of their problem to make a wise referral. Certainly you alone have an appreciation of the value of your services in such instances. The proportionate attorney fee to be allocated to you from the total fees can be justified accordingly.

. . .

It is not uncommon for the referring attorney to be required, on occasion, to further consult with counsel doing the bulk of the work on the case. Likewise this advice and availability for consultation is equally compensable to the referring attorney.⁶¹

60. *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955 (1975); *McFarland v. George*, 316 S.W.2d 662 (Mo. App. 1958).

61. I. ENT, LAWYER-CLIENT EMPLOYMENT AGREEMENTS (1967) [hereinafter cited as ENT].

In response, both ethical commentators and state courts have clearly and unequivocally concluded that the mere referral of a case, however "wise," cannot justify the sharing or division of a fee. The underlying premise of the comment above is sound if in fact the "not common" situation occurs where a referring attorney performs actual services in the handling of the legal matter referred. However, the implication that a mere referral coupled with a willingness to "consult" with a corresponding attorney justifies a division of fees must be rejected. It is this type of approach which opens the legal profession to criticism of being solely a "money-getting trade."

Recognizing these purported "realities" of the practice of law, a 1972 report by the Chicago Council of Lawyers suggests, as a more realistic and enforceable standard for the sharing of fees by attorneys, the following revised form for DR 2-107, the emphasized portions of which denote additions to the present rule:

DR 2-107 Division of Fees Among Lawyers

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents *in writing signed by him* to employment of the other lawyer *which writing shall fully disclose* (a) that a division of fees will be made, (b) *the basis upon which the division will be made, including the economic benefit to be received by the other lawyer as a result of the division, and* (c) the responsibility to be assumed by the other lawyer for performance of the legal services in question.

(2) The division is made in proportion to the services performed and responsibility assumed by each, *except where the only service performed by one lawyer is the referral of the client to another lawyer and* (a) *the receiving lawyer fully discloses that the referring lawyer has received or will receive economic benefit from the referral and the extent and basis of such economic benefit and* (b) *the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as if he were a partner of the receiving lawyer.*

(3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

(4) *For purposes of the Rule "economic benefit" shall include (a) the amount of participation in the fee received with regard to the particular matter; (b) any other form of remuneration passing to the referring lawyer, whether or not with regard to the particular matter; and (c) an established practice of referrals to and from or from and to the receiving lawyer and the referring lawyer.*

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(C) *Two or more lawyers, not partners in or associates of the same law firm or law office, may not jointly participate in the performance of legal services for a client unless they have entered into an agreement that complies with the provisions of subparagraphs (1), (2), and (3).⁶²*

The standards proposed by the Chicago Council of Lawyers require a more detailed disclosure to the client of any agreement between cooperating attorneys to share in a fee. The written client consent form must disclose the basis of the fee division, including the amount of economic benefit received by the referring attorney and the designation of the responsibility to be assumed by him in the performance of necessary legal services. This proposed version of DR 2-107 substantially permits the "custom" of referral fees so long as the corresponding or receiving attorney fully disclosed to the client that the first attorney referring the case to him is to receive a specific economic benefit for the referral. More importantly, it should be noted that this proposed revision of DR 2-107 would require the referring attorney to agree to assume the same legal "responsibility" for the performance of services as if he were a partner of the corresponding attorney. This would seem to imply that with the greater possibility today for legal malpractice claims, the referring attorney operating under this provision may well be susceptible to equal liability with his corresponding counsel for any error committed after the referral. Finally, sub-part (C) of the proposed version of DR 2-107 permits the implication that attorneys could not share in any fee produced by their joint efforts absent their adherence to the contractual requirements of the Rule. The question then arises whether such a rule would or should be applied in any attorney-client or intra-attorney fee disputes which are placed before a court of substantive law.

62. CHICAGO COUNCIL OF LAWYERS REPORT ON THE CODE OF PROFESSIONAL RESPONSIBILITY 23-24 (1972).

In the discussion following the proposed revision of DR 2-107, the Chicago Council of Lawyers observed that a considered prohibition of referral fees, including a provision stating that mere referrals do not alone constitute services performed or responsibilities assumed, was "both hypocritical and unenforceable in view of the actual practice of lawyers in paying referral fees"⁶³ The Council is of the view that any enforced prohibition against mere referral fees would encourage attorneys to attempt to handle legal matters in which they have had little or no expertise rather than to refer them to more experienced or specialized practitioners without the expectation of receiving a fee. This rationale directly contravenes the mandate of DR 2-107 (A), which provides that no attorney should assume the responsibility for the rendering of legal services which he is not qualified to perform without the employment of co-counsel. Furthermore, recognizing that referrals are often made on the basis of established "trades" of different types of matters or upon the basis of which attorneys pay the best price, the Council states that its requirement that the referring attorney assume joint "responsibility" for the providing of quality legal services somehow protects the client from the potential harm caused by these practices. Theoretically, this may be true. Practically, it would seem that foremost in the mind of the referrer is the availability and amount of a potential referral fee, not the possibility of a later assignment of joint responsibility for an error in the legal services rendered.

With state courts often being unwilling to resolve intra-attorney fee disputes requiring comparative valuation of attorney services, the growing field of arbitration may pose an alternative for the resolution of such disputes. An American Bar Association Special Committee recently tendered a report and model by-laws which incorporate arbitration as a means for the resolution of fee disputes between lawyers and clients.⁶⁴ Recognizing that the necessary element of attorney consent to arbitration often makes the arbitral process ineffective, the Special Committee recommended that if an attorney against whom a complaint has been made refused to submit to binding arbitration, the proposed arbitration committee would nevertheless proceed with a hearing to determine whether a legitimate complaint exists. The Bar Arbitration Committee would provide the assistance of counsel to the complaining client if a finding is rendered against the non-consenting attorney. Although the Supreme Court of Alaska adopted rules for attorney fee review

63. *Id.* at 25.

64. ABA SPECIAL COMM. ON RESOLUTION OF FEE DISPUTES, A REPORT AND MODEL BYLAWS: THE RESOLUTION OF FEE DISPUTES [undated publication].

committees by court rule in February, 1974,⁶⁵ the authors have not obtained any specific information concerning the results of Alaska's, or any other jurisdiction's, arbitration procedure. As in other areas of dispute resolution, arbitration may well prove itself to be a viable alternative to placing such disputes in the jurisdiction of either ethics committees or courts of substantive law, which are both already overburdened. It should be noted, however, that the arbitral system proposed by the ABA Special Committee does not expressly contemplate resolution of intra-attorney fee disputes, but is rather attuned to those arising between client and attorney.

OBSERVATIONS AND CONCLUSIONS

Conclusory observations concerning the ethical and legal precepts affecting the sharing of legal fees by attorneys necessitate a bifurcated approach. Clear distinctions must be made in differentiating the consideration of referral or finder's fees from the more complex questions surrounding the sharing of fees by cooperating attorneys.

The "custom" of compensating referring attorneys by payment of a referral or finder's fee has been unethical since 1937. Nevertheless, every practitioner is aware of the fact that adherence to this practice continues among attorneys to at least some degree. A question then arises whether ethical prohibitions of this practice remain justifiable in light of the avowed "realities" which are cited in defense of payment of such brokerage fees. The Chicago Council of Lawyers' proposed revision of DR 2-107 suggests that the most practical alternative to prohibition of referral or finder's fees is to recognize the necessity of such payments and require disclosure of such arrangements.

The writers submit that the same considerations compelling the enactment and limitation of Canon 34 apply today; the brokerage of clients and legal business is unprofessional, and any argument supporting the practice of bare referral or finder's fees can be based only upon purely economic self-interest. But such a practice cannot be condemned when a conscientious attorney can, within the dictates of DR 2-107, easily justify participation in an agreed and disclosed fee arrangement by performing valuable legal services or assuming responsibility in the handling of a legal matter, so long as his contribution to the effort is not contrived and can be competently rendered within the limits of his professional capabilities.

65. See ALASKA BAR RULES, PART II: RULES OF DISCIPLINARY ENFORCEMENT (1974).

The request and payment for such referral or finder's fees probably continues to arise most often in connection with personal injury litigation conducted pursuant to contingent-fee agreements. Similarly, problems concerning the division of fees by cooperating attorneys probably most often arise in such contingent fee litigation. The concept of the contingent fee contract as a remunerative mechanism for legal services itself presents a topic of longstanding dispute, the consideration of which goes beyond the limitations of this work.⁶⁶ However, it would appear that with increasing specialization within the Bar and the seemingly unending expansion of state and federal law, the incidence of intra-attorney referrals should continue and expand where legal services are generally contracted for fixed or hourly compensation.

The division of fees between cooperating attorneys who all participate in the actual handling of a legal matter presents more difficult problems. DR 2-107, as did its predecessor Canon 34, states only that such division of fees is to be accomplished in proportion to the services performed and responsibilities assumed by each attorney. No guidance is provided as to how this proportionate evaluation is to be accomplished, giving rise to the argument that such an effort is futile and unrealistic.⁶⁷

The comparative valuation of the respective services performed and responsibilities assumed by cooperating attorneys is admittedly difficult, as evidenced by the reluctance of both ethical committees and courts of substantive law to accomplish such a valuation. It should be noted, however, that neither forum has often been presented with a factual situation which necessitates the comparative valuation of attorneys' efforts. The typical dispute submitted for resolution involves what is truly one attorney's claim for a referral or finder's fee. Only in *Kravis v. Smith Marine, Inc.*⁶⁸ did a court reveal a factual situation presenting a potentially difficult problem of comparative valuation, and there the dispute was one between attorney and client and was decided on other grounds.

Attorneys attempting to avoid fee disputes with their brethren and courts or ethical committees attempting to resolve such disputes are not without some guidance in doing so. DR 2-106 provides the following considerations for determining the reasonableness of legal fees:

66. See F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964).

67. See ENT, *supra* note 61.

68. 15 Ill. App. 3d 494, 304 N.E.2d 720 (1973), *rev'd*, 60 Ill. 2d 141, 324 N.E.2d 417 (1975).

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily involved and the results obtained.

These considerations go beyond the presumption, often expressed in ethical opinions, that all attorneys appreciate the value of their legal services.⁶⁹ Additionally, the decisions in *McFarland v. George*⁷⁰ and *Palmer v. Breyfogle*⁷¹ provide practical considerations such as the following to guide in the valuation of an attorney's services: preparation of pleadings, client contact and control, participation in pre-trial discovery and investigation, court appearances, participation in settlement efforts, and actual presence and participation at trial.

The ultimate question then arises. Can a more definite standard than DR 2-107 be provided to guide or control cooperating attorneys in their division of fees generated by joint effort, and if so, what enforcement mechanism should be employed to implement it? It would seem from past experience that no matter how definite a standard is provided, courts and ethical tribunals are not readily disposed to accomplish such comparative evaluations. An additional question arises whether any ethical standard governing the division of legal fees between attorneys can or should be interpreted as substantive law in the resolution of fee disputes which result in litigation. The courts of New York, Missouri, and Kansas have answered this question in the affirmative.⁷²

An obvious means for avoiding such determinations is for attorneys to agree expressly at the initiation of their relationship on the exact division of any expected fee, or on their respective responsibilities concerning the handling of the particular legal matter and its connection with the ultimate division of the fee. All of this can and must be accomplished within the present requirements of the Code of Professional Responsibility.⁷³ The writers opine that

69. See ABA FORMAL OPINIONS No. 27 (May 5, 1930); ABA FORMAL OPINIONS No. 204 (November 28, 1940).

70. 316 S.W.2d 662 (Mo. App. 1958).

71. 217 Kan. 128, 535 P.2d 955 (1975).

72. See notes 4, 7 and 17-21 *supra*.

73. ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2. See also EC 2-19, 2-22; DR 2-106, 2-107.

no more definitive standards would further aid in the avoidance of intra-attorney fee disputes than would the Bar's general recognition of the requirements of DR 2-107 and its sincere effort to arrive at an understanding concerning fees at the initiation of the relationship.

For the resolution of those intra-attorney fee disputes which still occur, an arbitral system similar to that proposed for attorney-client fee disputes by the Special Committee on Resolution of Fee Disputes is suggested.⁷⁴ Courts of substantive law and ethics committees are already overburdened in attempting to resolve disputes of greater import.

Most importantly, prudence and a general sense of professional responsibility require that conscientious attorneys avoid any request for or payment of referral fees. Practicing attorneys must be aware of the apparent difficulties which surround any joint handling of legal matters without first advising their clients of the requirement for co-counsel and disclosing to them the fee-sharing arrangement which has been contracted.

74. ABA SPECIAL COMM. ON RESOLUTION OF FEE DISPUTES, A REPORT AND MODEL BYLAWS: THE RESOLUTION OF FEE DISPUTES [undated publication].