

Working with Litigation Counsel in Nursing Home Litigation Cases

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Last year you prepared a Medicaid plan for John and Jane Jones. John had suffered a stroke; his doctor said John needed nursing home care. You assisted Jane in re-structuring the marital estate to gain Medicaid eligibility. From time to time, your staff fielded questions about John's rights in a nursing home. Now, Jane is in your office. John died last week when he aspirated on a large bolus of meat. Jane is furious and believes the nursing home killed John.

Jane's situation could occur at any time in any Elder Law office. How the office responds may determine whether Jane gets good advice concerning how to proceed or whether her case is mismanaged. Now, more than ever, our legal system is fragmented with specialists. Although many attorneys attempt to engage in a general practice, the reality is that our legal system has grown so complex that specialists abound. In Tennessee, for

example, attorneys can be certified as specialists in accounting malpractice, business bankruptcy, civil trial, consumer bankruptcy, creditor rights, criminal trial, DUI defendant, elder law, estate planning, family law, juvenile law, legal malpractice, medical malpractice and Social Security Disability. Beyond this, many attorneys represent that they are specialists in handling particular types of claims, such as asbestos or pharmaceutical claims. So how does Jane find the help she needs?

Fragmentation of our legal system leaves clients wondering where to turn and who to see when particulate advice is necessary. If there is a continuing relationship, the most likely place to turn is to a lawyer who provided competent representation in a related matter (e.g., the Elder Law Attorney who assisted the client in getting nursing home care paid for). Still, for lawyers fielding these questions, fragmentation means that the Elder Law Attorney may not have all of the expertise necessary to fully address a client's litigation needs. Referrals or joint representation agreements may be necessary to represent the client competently and to avoid malpractice claims.

Nursing home litigation lies at an interesting intersection of various specialties. Arguably, an attorney who holds himself or herself out as an Elder Law Attorney is telling the public that he or she is competent to give advice on issues related to the quality of nursing home care.¹ While this may or may not be the case, reasonable juries might differ in a legal malpractice case if the Elder Law Attorney fails to at least counsel an injured client concerning their rights and options. Likewise, nursing home litigators may be liable for failing to take into account public benefits issues, Medicare liens, Medicaid liens, estate recovery, structured settlement options, subrogation and tax issues when settling cases. The authors of *Negotiating and Settling Tort Cases* (ATLA Press 2007), take the position that trial lawyers "have a duty to provide information to their clients regarding these settlement-related topics."² The solution may be a type of symbiotic relationship between these lawyers since Elder Law Attorneys will, in most instance, need to refer injury cases out to litigation counsel, while litigation counsel may need the Elder Law Attorney's advice when the case reaches its resolution stage.

The case against the nursing home

Nursing home litigation differs from most other personal injury and medical malpractice litigation for a number of reasons. First, it often covers a broad period of time. Nursing home resident typically have chronic ailments when they are admitted to nursing homes and, thus, parsing existing conditions from new injuries can be problematic. Nursing home residents typically have no earning capacity, so damages for lost wages are seldom a factor.

¹ See *What is Elder Law?*, at <http://www.naela.com/public/whatisEL.htm>; see also Section 5.1.4.2.13 at National Elder Law Foundation's Rules and Regulations requiring Certified Elder Law Attorneys to document the provision of legal services in Litigation and Administrative Advocacy including "nursing home torts." <http://www.nelf.org/randregs.htm>.

² *Negotiating and Settling Tort Cases* § 13.3 (ATLA Press 2007). The authors go on to say: "This is not just the author's opinion – ethics opinions issues in several states go so far as to declare that a lawyer has a fiduciary duty to refer a client to appropriate resources when the lawyer ascertains that a client needs financial/settlement-related services."

Nursing home cases are expensive and the results are often difficult to forecast. Thus, case screening and selection are critical. This paper covers several issues practitioners should consider when evaluating cases where nursing home neglect or abuse is alleged.

Who is the client?

In nursing home cases, the initial call rarely comes from the nursing home resident. Typically, the resident is in a nursing home because he or she is frail and requires assistance with activities of daily living (ADLs),³ which include the ability to communicate. Thus, the resident's communication with the outside world generally comes through family. Further, if the resident is deceased, then absent a séance, the resident is not making that call. Initially, the inquiry is "who is the client?"

One way of addressing the issue is by asking who has standing to assert a claim. If the resident is living, then in most cases only the resident has been harmed and can assert a claim for damages.⁴ If the resident is deceased, then the Estate⁵ and surviving relatives have a claim.⁶

Most often, the contact will be through a surrogate. Under such circumstances, the lawyer must determine whether the surrogate has legal authority to enter into an attorney-client relationship. Legal authority may come from the resident herself (if she can sign the fee agreement), or may come through an agency agreement such as a power of attorney.⁷ Alternatively, if there is a guardianship, then, the client will be the guardian, as the guardian is the proper Plaintiff to pursue claims on behalf of the resident.

Where the resident is deceased, those persons who have standing to revive a claim, or who have standing to assert a wrongful death or loss of consortium claim (usually family members) are the Plaintiff(s) and, thus, will be the client(s).

At the outset, you should determine whether a case involving a deceased resident is a wrongful death action or whether it is simply a personal injury action.⁸ If the case is merely a personal injury action, then the client is the living resident or the estate of the deceased resident. You should determine whether an estate has been opened or must be determined, and should identify the individual who will serve as personal representative.

³ 42 C.F.R. 483.25(a)(1).

⁴ See Rains v. Bend of River, 2003 WL 21766247 (Tenn.Ct.App. Jul 31, 2003) (loss of parental consortium limited to death cases).

⁵ T.C.A. § 20-5-101 through 20-5-105.; damages recoverable, T.C.A. § 20-5-113.

⁶ See Jordan v. Baptist Three Rivers Hospital, 984 S.w.2d 593 (Tenn. 1999).

⁷ The power of attorney should be reviewed.

⁸ Although malpractice affidavits are not presently required in Tennessee, it is good practice to have the case reviewed early. Early review will help you make these determinations.

In your discussions with the client, you should clearly outline the scope of your representation. MRPC Rule 1.2. Because the matter is expected to involve litigation, you should assume that defense counsel will expect to pierce the privilege and you should take proactive steps to ensure that the attorney-client privilege is maintained. Unrepresented persons should be excluded from meetings where you are discussing your opinions about how the case should be prosecuted or where you are sharing the results of your investigation.

After the proper “client” has been determined, it may be necessary to seek and obtain approval from the appropriate court to represent the client in pursuing a claim against the nursing home.

Prior to accepting the case, you should get to know your plaintiff. A recurring defense theme is that family members dropped Mom off at the nursing home and never came back to visit. Sometimes there are skeletons in the closet and the defense often exploits family conflict and other problems.⁹ In short, you should, as best you can, determine whether the jury will like your Plaintiff before you commit taking the case. This type of screening and case selection cannot be properly performed absent interviews. Your interviews should include all potential plaintiffs and other family members who are crucial to a successful outcome.

Preliminary Investigation

Although we recommend that you involve litigation counsel as early as possible in the investigation process, there are some facts you can begin gathering early. This information would be necessary for litigation counsel to evaluate the case so any information you can secure and deliver with your referral may help litigation counsel make a determination regarding the case in a more timely manner.

Recent Medical Condition

While nursing home cases differ from medical malpractice cases, review of the medical record is critical in evaluating the case. It is important to ascertain the most recent medical condition of the resident. Family members and friends, and even the patient, may be poor historians. However, they can provide some initial information. To ascertain the actual medical condition of the patient, records will be required detailed health history. The most important records for purposes of the review will be those close-in-time to the injury event and those related to the care, or lack of care, that resulted in the injury.

Detailed Health History

In the initial interview, a detailed **health history** of the resident will need to be obtained. Although the patient and family members should not be counted on to provide complete and accurate information, some information that can usually be

⁹ See P. Iyer, Nursing Home Litigation: Investigation and Case Preparation § 9.4 (Lawyers & Judges Publishing Co. 1999).

obtained from them is whether there has been any recent hospitalization. It is imperative to obtain a complete history of all **recent hospitalizations**.

Condition Prior to Admission

The admissions process is oftentimes critical to a nursing home case. Any individuals involved with admitting the resident to the nursing home should be interviewed at length. The length of the term of residence can be important. More importantly, the resident's **condition prior to residence** should be determined. If the patient or family have in their possession the signed Admission Agreement, it should be carefully reviewed to determine whether there are arbitration provisions. At present, the enforceability of an arbitration agreement is a fact issue in most States.

History of Prior Lawsuits

A **history of prior lawsuits** in which the resident was involved is important. If the person who will be the named plaintiff has been a plaintiff in prior lawsuits, the facts and circumstances surrounding each lawsuit should be investigated. This may be significant as allegations of physical injury made in prior claims may encompass some of the same injuries the resident may be alleged to have sustained from the current incident.

Resident's Family

In determining whether to accept a nursing home case, the family members of the resident and issues surrounding them are extremely important. All family members who came in contact with the resident while in the nursing home should be interviewed. You must determine whether the family was supportive of the resident and visited often. If there are family members or friends who can verify facts relevant to the litigation, their testimony will prove crucial. It is also important to determine whether there are family members who oppose any potential litigation.

In interviewing family members, you should determine whether there are issues of rage or guilt which need to be explored. You should also determine whether family members or friends made complaints to the nursing home staff regarding the care received by the resident. Furthermore, if members of the nursing home staff commented, either in response to complaints or otherwise, concerning the care received by the resident, those comments will prove invaluable. Family members and friends who visited the resident are also in a position to make observations concerning the environment in the nursing home as well as the direct care provided to the resident.

Finally, these family members or friends may have "smoking guns" which are beneficial. In most cases, the resident is unable to testify and the testimony of family members and friends is vital to proving the case. If family members and friends cannot be relied upon, it should weigh heavily on the determination as to whether to pursue claims against the nursing home.

Documents/Medical Records

To determine the proper claims to allege should you decide to take the case, the mechanism of injury must be ascertained. The determination of the mechanism of injury can prove difficult and in most States will involve an expert evaluation. The first step in this process is to obtain relevant documents, including medical records.

Document procurement can also prove to be difficult. Since implementation of the HIPAA privacy regulations, more specific release forms are required and an estate must usually be opened to secure records for deceased residents.¹⁰ Nursing home often refuse to release records to personal representatives who are acting without letters testamentary despite the requirement set forth in the Nursing Home Care Act¹¹ to provide a copy of the chart to the responsible party within 48 hours.¹² Thus, your action in opening the estate quickly may assist litigation counsel in securing necessary records in time to review the case prior to expiration of the statute of limitations. It may become a time consuming and laborious process, but document procurement is essential in determining whether a nursing home case is worthwhile. The most crucial document in evaluating a nursing home negligence or abuse case is a complete copy of the nursing home chart.

Don't overlook the value of qualified probate counsel

Nat'l Heritage Realty, Inc. v. Estate of Boles, 947 So. 2d 238 (Miss. 2006). Prior to filing suit, Plaintiff opened an estate for resident in Tallahatchie County. After suit was filed, Defendants filed a motion to render appointment of the administrator void ab initio, contending the estate should have been filed in Leflore county. Plaintiffs then filed a petition for appointment of administrator in Leflore county and the Tallahatchie county probate was transferred to Leflore county. The chancery court denied Defendants' motion to render the appointment void ab initio, but certified an interlocutory appeal. While Defendants pursued their interlocutory appeal, they also pursued summary judgment contending the administrator had no authority to file a wrongful death action, that she was no a spouse, child, parent or sibling, and that the appointment as administrator in the original estate was void ab initio. The trial court denied the motion for summary judgment and interlocutory appeal was granted. On appeal, the cases were consolidated. On appeal, the court found that Defendants had standing to challenge the jurisdictional basis of the probate proceeding.¹³ The court then found that the nursing home resident was a resident of Leflore county (where the nursing home was located). The court found that Miss. Code Ann. § 91-7-63(1) is an

¹⁰ 45 C.F.R. § 164.508.

¹¹ The Nursing Home Reform Act, often called "OBRA 87," is codified at 42 U.S.C. § 1395i-3 (Medicare); and 42 U.S.C. § 1396r (Medicaid). The regulations are at 42 C.F.R. Part 483. Related Tennessee Statutes are codified at _____, and regulations are found at Tenn. Comp. R. & Regs. 1200-8-6-.01 et seq.

¹² 42 C.F.R. § 483.10(b).

¹³ The Court distinguished an earlier case, *In re Estate of Johnson*, 779 So.2d 164 (Miss. Ct. App. 2000), where a doctor sued for malpractice did not have standing to intervene in a paternity and heirship suit on behalf of "all known heirs."

exclusive venue statute, making it jurisdictional in nature and that the original probate case should have been dismissed; transfer of the probate action failed to cure the underlying jurisdictional problem. As a result, the administrator had no authority to bring the suit and the trial court erred in not granting Defendants' motion for summary judgment on that basis.

Diaz v. PARCC Health Care, 2006 Conn. Super. LEXIS 286 (Conn. Super. Ct. 2006). Suit was brought in the name of a deceased nursing home resident for negligence and carelessness, alleging violations of 42 C.F.R. § 483.25(h)(1) and because Defendants did not prevent accidents. Defendant brought it to the court's attention that the resident was deceased and moved to dismiss. Plaintiff moved for an extension of time to respond to the motion and to appoint an executrix so that a motion to substitute the executor as a party could be filed. Defendant objected, claiming the plaintiff was deceased, could not properly bring a lawsuit and therefore, could not amend the complaint. "It is elemental that in order to confer jurisdiction on the court the plaintiff must have an actual legal existence, that is he or it must be a person in law or a legal entity with legal capacity to sue." (Internal quotation marks omitted)... [A] dead person is a nonexistent entity and cannot be a party to a suit." Plaintiff's counsel contended he was unaware that the Plaintiff was dead and that naming the deceased as a Plaintiff was a mistake. "The court is not satisfied that the present action was commenced "through mistake," and that the plaintiff's attorney named the wrong plaintiff. Although the plaintiff's attorney claims that he was unaware of the plaintiff's death at the time the present action was commenced, he was charged with the responsibility to keep his client reasonably informed about the status of this matter." The court indicated that after an executor is appointed, the executor could bring a new action not later than February 10, 2006 (this decision being dated January 30, 2006); however the current action is not valid. The motion to dismiss was granted.

Why you want litigation counsel: What is "legal malpractice?"

We briefly discuss the nature of legal malpractice to underline its significance. At its core, legal malpractice is failing to properly address a client's legal needs when there is a duty to do so. The bedrock principle in examining legal malpractice claims is competence.

Rule 1.1 of the Model Rules of Professional Conduct provides that "A lawyer shall provide **competent** representation to client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Emphasis added). Comments to Rule 1.1 indicate that a lawyer should consider his or her ability to provide competent representation and whether it is feasible to refer the matter to a lawyer of established competent in the field of question. *See* Comment 1. Expertise in a particular field of law may be required in some circumstances. *Id.* The most fundamental skill, though, consists of determining what kind of legal problems a situation may involve. *See* Comment 2.

According to the American Board of Professional Liability Attorneys, legal malpractice is violation of the standard of professional conduct, which results in a negative outcome,

resulting in significant damages. This definition of legal malpractice is more fully parsed on the ABPLA website as follows:

There was a violation of the standard of professional conduct – The law acknowledges that there are certain legal standards that are recognized by the profession as being acceptable conduct. These standards of professional conduct are largely determined by the ethics rules of the state bar association. Attorneys have an obligation to their clients and the bar to operate within these standards. Clients have the right to expect attorneys will follow the law, behave in an ethical and honest manner, act in the best interests of their clients with integrity, diligence and good faith, and will execute their matters **at a level of competency that protects their legal rights**. Lawyers must also maintain and supply clients with full and detailed reports of all money and/or property handled for them. Finally, attorneys must not inflict damage on third parties through frivolous litigation or malicious prosecution. If it is determined that the standards of professional conduct have been violated, then negligence may be established.

The negligence caused a negative legal outcome – It is not sufficient that an attorney simply was negligent for a legal malpractice claim to be valid. The plaintiff must also prove that there were legal, monetary or other negative ramifications that were caused by the negligence. An unfavorable outcome by itself is not malpractice. There must be a direct causative link between a violation of the standard of professional conduct and the negative result.

The negligence resulted in significant damages - Legal malpractice lawsuits are expensive to litigate. For a case to be viable, the plaintiff must show significant damages that resulted from the negligence. If the damages are small, the cost of pursuing the case might be greater than the eventual recovery. To be worth pursuing, the plaintiff must show that the outcome resulted in losses far in excess of the amount of legal fees and expenses necessary to bring the action.¹⁴

(Emphasis added).

It would almost certainly be malpractice for an Elder Law Attorney unfamiliar with current trends in nursing home litigation to serve as trial counsel in an injury claim. Damages resulting from negligent representation could be significant.¹⁵ Likewise, trends in malpractice litigation indicate that nursing home litigators unfamiliar with public benefits issues risk malpractice claims by failing to associate competent counsel.

¹⁴ <http://www.abpla.org/index.php?d=legalmalpractice>.

¹⁵ Although it might be viewed as a landmark case, a recent \$54 million verdict in *Barber v. Manor Care, Inc.*, Case No. CV-2005-08066, 2nd Judicial Dist., Bernalillo County, New Mexico, might also be evidence of the measure of damages.

However, if these lawyers work together, the relationship may be complimentary as each lawyer provides those skills within his or her field of expertise.

Responsibility and Fee-sharing Arraignments

Most States permit fee-splitting based on a variation of the Model Code of Professional Responsibility,¹⁶ or the Model Rules of Professional Conduct. The Code provided for division of fee based on a division of responsibility; the Rules expressly take that concept further allowing fee splitting where each lawyer assumes joint responsibility for the representation. Although there is much variation,¹⁷ most States continue to permit fee-splitting where the referring lawyer retains joint responsibility (liability) for the representation. As shown below, only a two States prohibit referral fees where there is client consent and a joint assumption of responsibility for the representation.¹⁸

Although some State prohibit referral fees or limit them, we are not aware of any State that prohibits the division of fees based on shared or joint labor – working together. In States that require joint responsibility or that prohibit referral agreements, it makes sense to limit malpractice exposure by assigning settlement/public benefits issues to the Elder Law Attorney, while the litigators handle case preparation and trial work. Initially, though, an agreement on a division of responsibility and a division of fees is necessary so in this paper, we review the rules governing those agreements.

Model Rule of Professional Conduct Rule 1.5(e) provides:

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

Comment 7 to Model Rule of Professional Conduct 1.5 provides:

¹⁶ Model Code § DR2-107 provides: (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his firm or law office, unless: (1) the client consents to employment of the other lawyer after 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 for the client. See ABA Model Code of Professional Responsibility, at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

¹⁷ Rule 1.5(e) has been described as one of the “most polarized” of the Model Rules. See L. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 Okla. City U.L. Rev. 637 (2005).

¹⁸ The two exceptions appear to be Colorado, which prohibits any referral fee, and Wyoming, which requires fee division based on proportional work AND joint responsibility for the representation; most State permit fee division based on proportional work OR joint responsibility.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

Rule 7.2 prohibits payments for recommending a lawyer's services "except that a lawyer may Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provided for the other person to refer clients or customers to the lawyer if the reciprocal referral agreement is not exclusive and the client is informed of the existence and nature of the agreement." Rule 7.2(b)(4). Comment 8, which references Rule 1.5(e) as an exception, indicates this means must not pay anything *solely for* the referral.

Referral Agreements must be disclosed to clients

Virtually every State permitting fee-division requires that the terms of the arrangement be fully disclosed to the client.

In *Marcus v. Garland, Samuel & Loeb, P.C.*, 441 F. Supp. 2d 1227 (S.D. Fla. July 20, 2006), the court found a fee sharing agreement unenforceable because it was not communicated or disclosed to the client.

In *Margolin v. Shemaria*, 102 Cal. Rep.2d 502 (2000), the court refused to enforce a fee sharing agreement that was not disclosed to the client where a family lawyer made a referral to a personal injury lawyer. *See also Chambers v. Kay*, 29 Cal. 4th 142 (Cal. 2002); *Christensen v. Eggen*, 577 N.W.2d 221 (Minn. 1998).

Dismissal of suit on a referral agreement was reversed in *Mink v. Maccabee*, 121 Cal. App. 4th 835 (Cal. Ct. App, 2nd Dist. 2004), where client consent was secured after the case was resolved. Although early consent is preferable, late consent technically complied with the rule. This would not be the result in States like Virginia where client consent must be secured before services are rendered.

California Bar Resolution 2-01-03 recommended disallowing fee-sharing agreements absent client disclosure and agreement. The resolution indicated that failure to secure

client consent undermines the attorney-client relationship because the client has the right to determine who will work on his or her case.

<http://www.cdcba.org/pdfs/R2003/02-01-03.pdf>.

<http://www.cdcba.org/pdfs/R2003/02-02-03.pdf>.

Referral Agreements should be in writing

In *Marcus v. Garland, Samuel & Loeb, P.C.*, 441 F. Supp. 2d 1227 (S.D. Fla. July 20, 2006), the court refused to enforce a fee-sharing agreement that was not reduced to writing.

A close reading of most versions of Rule 1.5 indicates that the writing should be an agreement signed by the client and by a lawyer from each law firm. Ideally, it should outline the responsibilities of each law firm and should state how fees will be divided.

Joint Responsibility for the Representation

The comments to Rule 1.5(e) incorporate Rule 5.1 by reference. Model Rule 5.1 provides:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority 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.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Where attorneys with two different firms worked together on the file, with the second performing the function of an associate of the first, the rule against pure referral is not implicated and the agreement was enforced. *Sims v. Charness*, 86 Cal. App. 4th 884 (Cal. Ct. App. 2nd Dist. 2001).

Comments from DC RPR: [10] Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole. Joint responsibility for the representation entails the obligations stated in Rule 5.1 for purposes of the matter involved. Permitting a division on the basis of joint responsibility, rather than on the basis of services performed, represents a change from the basis for fee divisions allowed under the prior Code of Professional Responsibility. The change is intended to encourage lawyers to affiliate other counsel, who are better equipped by reason of experience or specialized background to serve the client's needs, rather than to retain sole responsibility for the representation in order to avoid losing the right to a fee.

[11] The concept of joint responsibility is not, however, merely a technicality or incantation. The lawyer who refers the client to another lawyer, or affiliates another lawyer in the representation, remains fully responsible to the client, and is accountable to the client for deficiencies in the discharge of the representation by the lawyer who has been brought into the representation. If a lawyer wishes to avoid such responsibility for the potential deficiencies of another lawyer, the matter must be referred to the other lawyer without retaining a right to participate in fees beyond those fees justified by services actually rendered.

[12] The concept of joint responsibility does not require the referring lawyer to perform any minimum portion of the total legal services rendered. The referring lawyer may agree that the lawyer to whom the referral is made will perform substantially all of the services to be rendered in connection with the representation, without review by the referring lawyer. Thus, the referring lawyer is not required to review pleadings or other documents, attend hearings or depositions, or otherwise participate in a significant and continuing manner. The referring lawyer does not, however, escape the implications of joint responsibility, see Comment [11], by avoiding direct participation.

[13] When fee divisions are based on assumed joint responsibility, the requirement of paragraph (a) that the fee be reasonable applies to the total fee charged for the representation by all participating lawyers.

[14] Paragraph (e) requires that the client be advised, in writing, of the fee division and states that the client must affirmatively consent to the proposed fee arrangement. The Rule does not require disclosure to the client of the share that each lawyer is to receive but does require that the client be informed of the identity of the lawyers sharing the fee, their respective responsibilities in the representation, and the effect of the association of lawyers outside the firm on the fee charged.

Four General Formats

Individual adoption of referral/fee-sharing rule general come in one of four varieties: (1) express approval of referral fees; (2) approval with full disclosure and consent; (3) approval so long as the referring lawyer assumes joint responsibility; or (4) express disapproval. The following chart groups those States with similar rules and the following section describes the rule, linking to its version of Rule 1.5(e).

Express Approval	Full Disclosure	Joint Responsibility	Disapproval
Illinois Kansas Wisconsin ¹⁹	California Connecticut Delaware Louisiana ²⁰ Maine Massachusetts Michigan Nevada Oregon Pennsylvania Virginia ²¹	Alabama Alaska Arizona Arkansas District of Columbia Florida Georgia Hawaii Idaho Indiana Iowa Kentucky Maryland Minnesota Mississippi Missouri Montana Nebraska New Hampshire ²² New Jersey New Mexico New York North Carolina North Dakota Ohio ²³ Oklahoma Rhode Island South Carolina South Dakota Tennessee Texas Utah Vermont Washington ²⁴ West Virginia ²⁵	Colorado Wyoming ²⁶

¹⁹ Although referral fees are expressly allowed, Wisconsin’s rules functions as a joint responsibility rule.

²⁰ Each lawyer must render “meaningful” legal services.

²¹ Client consent must be in advance of provision of legal services.

²² We understand that New Hampshire changed its rule in August to permit fee-splitting based on full disclosure.

²³ Each lawyer must be available for consultation.

²⁴ Referral fees made be paid to a duly authorized referral service.

²⁵ Rule is satisfied in contingent cases by case evaluation and referral to more experienced litigation counsel.

²⁶ The Wyoming rules requires that fee splitting be based on joint responsibility AND in proportion to services performed.

Individual States

Alabama: A division of fee between lawyers who are not in the same firm, including a division of fees with a referring lawyer, may be made only if: (1) either (a) the division is in proportion to the services performed by each lawyer, or (b) by written agreement with the client, each lawyer assumes joint responsibility for the representation, or (c) in a contingency fee case, the division is between the referring or forwarding lawyer and the receiving lawyer; (2) the client is advised of and does not object to the participation of all the lawyers involved; (3) the client is advised that a division of fee will occur; and (4) the total fee is not clearly excessive. See <http://www.alabar.org/public/ropc/rule1-5.htm>.

Alaska: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://www.state.ak.us/courts/prof.htm#1.5>.

Arizona: A division of a fee between lawyers who are not in the same firm may be made only if: (1) each lawyer receiving any portion of the fee assumes joint responsibility for the representation; (2) the client agrees, in a writing signed by the client, to the participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://www.myazbar.org/Ethics/ruleview.cfm?id=25>.

Arkansas: A division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://courts.state.ar.us/rules/profcond1.html#1.5>.

California: A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless: (1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division; and (2) The total fee charged by all lawyers is not increased solely by reason of the provision for division of fees and is not unconscionable as that term is defined in rule 4-200. See http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?sImagePath=Current_Rules.gif&sCategoryPath=/Home/Attorney%20Resources/Rules%20%26%20Regulations/Rules%20of%20Professional%20Conduct&sFileType=HTML&sCatHtmlPath=html/RPC_Current-Rules-2-200.html. The California rule differs markedly from the ABA Model Rule because it allows so-called "naked" referral fees. The ABA Model Rule allows a division of a fee between lawyers not in the same law firm only where each lawyer actively participates in a matter or assumes joint responsibility and risk for the representation of the client. The California rule changes this requirement and allows a division of fee with a forwarding lawyer, regardless of the work performed or responsibility assumed, provided that the client consents in writing to the division of fees and the total fee is not increased because of the fee division and is reasonable. This

rule is intended to facilitate the association of alternate counsel in order to best serve the client and is often but not exclusively used when the division is between a referring lawyer and a trial lawyer. A number of other State have followed suit.

Colorado: (d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed and responsibility assumed by each lawyer; (2) the client consents to the employment of an additional lawyer after a full disclosure of the division of fees to be made; (3) the total fee is reasonable; and (4) the division is set forth in writing signed by the lawyers and by the client with informed consent. (e) Referral fees are prohibited. See

<http://www.cobar.org/group/display.cfm?GenID=2035&EntityID=CETH>.

Connecticut: A division of fee between lawyers who are not in the same firm may be made only if: (1) the client is advised in writing of the compensation sharing agreement and of the participation of all the lawyers involved, and does not object; and (2) the total fee is reasonable. See Rule 1.5(e) at

<http://www.jud.ct.gov/Publications/PracticeBook/PB1.pdf#page=124>.

Delaware: A division of fee between lawyers who are not in the same firm may be made only if: (1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and (2) the total fee is reasonable. See Rule 1.5(e) at <http://courts.delaware.gov/Rules/?DLRPC101905.pdf>.

District of Columbia: A division of a fee between lawyers who are not in the same firm may be made only if: (1) The division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) The client is advised, in writing, of the identity of the lawyers who will participate in the representation, of the contemplated division of responsibility, and of the effect of the association of lawyers outside the firm on the fee to be charged; (3) The client consents to the arrangement; and (4) The total fee is reasonable. See

http://www.dcbart.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/Rule_one/rule01_05.cfm.

Florida: Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and: (1) the division is in proportion to the services performed by each lawyer; or (2) by written agreement with the client: (A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made. Florida's rule includes a graduated schedule for contingent fees. See

<http://www.floridabar.org/divexe/rrtfb.nsf/FV/A8644F215162F9DE85257164004C0429>.

Georgia: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of the share that each lawyer is to receive and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_15_fees/.

Hawaii: A division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer and, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://www.hawaii.gov/jud/ctrules/hrpcond.htm#Rule%201.5>.

Idaho: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See Rule 1.5(e) at <http://www2.state.id.us/isb/PDF/IRPC.pdf>.

Illinois: (f) Except as provided in Rule 1.5(j), a lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm, unless the client consents to employment of the other lawyer by signing a writing which discloses: (1) that a division of fees will be made; (2) 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 (3) the responsibility to be assumed by the other lawyer for performance of the legal services in question. (g) A division of fees shall be made in proportion to the services performed and responsibility assumed by each lawyer, except where the primary service performed by one lawyer is the referral of the client to another lawyer and (1) the receiving lawyer 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 (2) the referring lawyer agrees to assume the same legal responsibility for the performance of the services in question as would a partner of the receiving lawyer. See http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/ArtVIII.htm.

Indiana: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See [http://www.state.in.us/judiciary/rules/prof_conduct/index.html# Rule 1.5. Fees](http://www.state.in.us/judiciary/rules/prof_conduct/index.html#Rule_1.5_Fees).

Iowa: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See Rule 32:1.5 at <http://www.judicial.state.ia.us/wfdata/frame2395-1066/File2.pdf>.

Kansas: A division of fee, which may include a portion designated for referral of a matter, between or among lawyers who are not in the same firm may be made if the total fee is reasonable and the client is advised of and does not object to the division. <http://www.kscourts.org/ctruls/rule1-10.htm#1.5>.

Kentucky: A division of a fee between lawyers who are not in the same firm may be made only if: (1) (a) The division is in proportion to the services performed by each lawyer or, (b) By written agreement with the client, each lawyer assumes joint responsibility for the representation; and (2) The client is advised of and does not object

to the participation of all the lawyers involved; and (3) The total fee is reasonable. See [http://www.kybar.org/documents/scr/scr3/scr_3.130_\(1.5\).pdf](http://www.kybar.org/documents/scr/scr3/scr_3.130_(1.5).pdf).

Louisiana: A division of fee between lawyers who are not in the same firm may be made only if: (1) the client agrees in writing to the representation by all of the lawyers involved, and is advised in writing as to the share of the fee that each lawyer will receive; (2) the total fee is reasonable; and (3) each lawyer renders meaningful legal services for the client in the matter. See

http://www.ladb.org/NXT/gateway.dll/rules/ropc.htm#id1_5.

Maine: A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or office; unless: (1) The client, after full disclosure, consents to employment of the other lawyer and to the terms for the division of the fees; and (2) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered to the client. See Rule 3.3 at

<http://www.mebaroverseers.org/Home/Code%20of%20Professional%20Responsibility.html>.

Maryland: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the joint representation and the agreement is confirmed in writing; and (3) the total fee is reasonable. See

http://www.law.cornell.edu/ethics/md/code/MD_CODE.HTM#Rule_1.5.

Massachusetts: A division of a fee between lawyers who are not in the same firm may be made only if, after informing the client that a division of fees will be made, the client consents to the joint participation and the total fee is reasonable. See

<http://www.mass.gov/obcbbo/rpc1.htm#Rule%201.5>.

Michigan: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the client is advised of and does not object to the participation of all lawyers involved; and (2) the total fee is reasonable. See Rule 1.5 at

<http://www.michbar.org/generalinfo/pdfs/mrpc.pdf>.

Minnesota: A division of a fee between lawyers who are not in the same firm may be made only if (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See Rule 1.5 at

<http://www.courts.state.mn.us/rules/professionalConduct/MRPC.DOC>.

Mississippi: A division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. See

<http://www.mssc.state.ms.us/rules/RuleText.asp?RuleTitle=RULE+1%2E5+FEES&IDNum=7>.

Missouri: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the association and the agreement is confirmed in writing; and (3) the total fee is reasonable. See

<http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/6ebe0456bcc45d6186256ca6005211df?OpenDocument>.

Montana: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See Rule 1.5 at <http://www.montanabar.org/attyrulesandregs/pdfs/rpc.pdf>.

Nebraska: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See Rule 1.5 at <http://court.nol.org/rules/pdf/rulesprofconduct-34.pdf>.

Nevada: A division of a fee between lawyers who are not in the same firm may be made only if: (1) Reserved; (2) The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) The total fee is reasonable. See Rule 1.5 at <http://www.leg.state.nv.us/CourtRules/RPC.html>.

New Hampshire: A division of fee between lawyers who are not in the same firm may be made only if: (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 reasonable proportion to the services performed or responsibility or risks assumed by each; and (3) the total fee of the lawyers is reasonable. See http://www.courts.state.nh.us/rules/pcon/pcon-1_5.htm. We understand this Rule changed in August, 2007, to one that allows division based on client disclosure and agreement.

New Jersey: Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and (2) the client is notified of the fee division; and (3) the client consents to the participation of all the lawyers involved; and (4) the total fee is reasonable. Rule 1.5 at <http://www.judiciary.state.nj.us/rules/apprpc.htm>.

New Mexico: A division of fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://www.conwaygreene.com/nmsu/lpext.dll/nmsa1978/22710/298ee/29913/29922?f=templates&fn=document-frame.htm&2.0>.

New York: A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, 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 in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.

3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client. See DR 2-107 at

http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Lawyers_Code_of_Professional_Responsibility/Lawyers.Code.pdf.

North Carolina: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See <http://www.ncbar.com/rules/rules.asp?page=8>.

North Dakota: A division of fee between lawyers who are not in the same firm may be made only if: (1) the division of fee is in proportion to the services performed by each lawyer or each lawyer, by written agreement, assumes joint responsibility for the representation; (2) after consultation, the client does not object consents in writing to the participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://www.ndcourts.com/court/notices/20050353/adopted/rule1.5.htm>.

Ohio: Lawyers who are not in the same firm may divide fees only if all of the following apply: (1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client; (2) the client has given written consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation; (3) except where court approval of the fee division is obtained, the written closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule; (4) the total fee is reasonable. See http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/rules/default.asp#Rule1_5.

Oklahoma: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement and the agreement is confirmed in writing; and (3) the total fee is reasonable. See

<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448843>.

Oregon: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the client gives informed consent to the fact that there will be a division of fees, and (2) the total fee of the lawyers for all legal services they rendered the client is not clearly excessive. See Rule 1.5 at <http://www.osbar.org/docs/rulesregs/orpc.pdf>.

Pennsylvania: A lawyer shall not divide a fee for legal services with another lawyer who is not in the same firm unless: (1) the client is advised of and does not object to the participation of all the lawyers involved, and (2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client. See Rule 1.5 at <http://www.padisciplinaryboard.org/documents/Pa%20RPC.pdf>.

Rhode Island: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the

participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://www.courts.state.ri.us/supreme/disciplinary/rules/rule1-5.htm>.

South Carolina: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See <http://www.sccourts.org/courtReg/newrules/RULE407RULE1.5.htm>.

South Dakota: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. See Rule 1.5 at http://www.sdbar.org/Rules/Rules/PC_Rules.htm.

Tennessee: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written consent of the client, each lawyer assumes joint responsibility for the representation; and (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. See <http://www.tba.org/ethics/rule1.5.html>.

Texas: A division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless: (1) the division is: (i) in proportion to the professional services performed by each lawyer; (ii) made with a forwarding lawyer; or (iii) made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation; (2) the client is advised of, and does not object to, the participation of all the lawyers involved; and (3) the aggregate fee does not violate paragraph (a). See http://www.txethics.org/reference_rules.asp?view=conduct&num=1.041.

Utah: A division of a fee between lawyers who are not in the same firm may be made only if: (e)(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (e)(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (e)(3) the total fee is reasonable. See http://www.utcourts.gov/resources/rules/ucja/13_proco/1_5.htm.

Vermont: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. Rule 1.5 at <http://www.vermontjudiciary.org/PRB1.htm>.

Virginia: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the client is advised of and consents to the participation of all the lawyers involved; (2) the terms of the division of the fee are disclosed to the client and the client consents thereto; (3) the total fee is reasonable; and (4) the division of fees and the client's consent is obtained in advance of the rendering of legal services, preferably in writing. See Rule 1.5 at http://www.vsb.org/docs/rules-pc_2006-07pg.pdf.

Washington: A division of a fee between lawyers who are not in the same firm may be made only if: (1) (i) the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation; (ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (iii) the total fee is reasonable; or (2) the division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state. http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruid=garpc1.05.

West Virginia: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representations; (2) the client is advised of and does not object to the participation of all the lawyers involved; and (3) the total fee is reasonable. (4) The requirements of "services performed" and "joint responsibility" shall be satisfied in contingent fee cases when: (1) a lawyer who is regularly engaged in the full time practice of law evaluates a case and forwards it to another lawyer who is more experienced in the area or field of law being referred; (2) the client is advised that the lawyer who is more experienced in the area or field of law being referred will be primarily responsible for the litigation and that there will be a division of fees; and, (3) the total fee charged the client is reasonable and in keeping with what is usually charged for such matters in the community. See <http://www.wvbar.org/BARINFO/rulesprofconduct/rules1.htm#Rule%201.5.%20Fees>.

Wisconsin: 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: (1) the division is based on the services performed by each lawyer, and the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; or (2) the lawyers formerly practiced together and the payment to one lawyer is pursuant to a separation or retirement agreement between them; or (3) pursuant 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 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. See Rule SCR 20:1.5 at <http://www.legis.state.wi.us/rsb/scr/5200.pdf>.

Wyoming: A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer and, each lawyer assumes joint responsibility for the representation; (2) the client is informed of the arrangement; and (3) the total fee is reasonable. See Rule 1.5 at http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=AttorneysConduct.xml.

Links for all State Professional Rules and Codes are at <http://www.abanet.org/cpr/links.html>.

Form of Fee Agreement with Joint Responsibility

We have this day employed _____ (hereinafter referred to as the "LAW FIRM"), to represent me/us in investigating and, as appropriate, in a suit or settlement of a claim against _____, and any other responsible parties relating to _____ and agree to pay them for their services on a contingent fee basis of ____ (%) of this contract. Payment of fee is not due until the time of actual recovery. We understand that under all circumstances the contingent fees due and payable are taxable to the gross amount recovered and we understand that we have responsibility for and that our attorneys will charge us, or deduct from the gross amount received, all expenses of trial and trial preparation not taxed to the opposing party, including, but not limited to (where applicable): court costs including clerk's fees, sheriff's fees, docket and filing costs, deposition costs, court reporter fees, medical costs, witness expense for reports and depositions, travel expense, postage, photocopy, long distance telephone, photographs and plats, witness fees including subpoena costs per diem, and expert witness fees, and any other reasonable miscellaneous expenses incurred, all of which are hereby authorized.

Court Awarded Attorney's Fees: We understand that this contract sets forth the fee agreement between us and our attorneys, and that under the law, each party generally pays his/her own attorney's fees. However, should attorney's fees or litigation expenses be awarded to us by the Court or jury, any such award will be added to the total recovery and the contingent fee stated herein will be applied to the total sum awarded to us collectively. In this way, we understand that no conflict will arise between us and our attorneys with respect to the collection of judgment debt, and we understand that we will receive full credit against our contractual obligation for attorney's fees and expenses of litigation which may be awarded and collected, as and when collected. We also understand that should any attorney's fees be awarded from us to the opposing party based upon any claim or assertion for which we have provided factual information determined not to be truthful or correct, or which we have approved, we will be fully responsible for such attorney's fees and/or expenses and will indemnify our attorneys with respect to any such award.

Punitive Damages: Should a court and jury award punitive damages, we agree to assign, transfer and convey to the Law Firm so much of any punitive damages award as will pay attorney's fees and expenses of litigation in whole or in part. Should any punitive damages award exceed contractual attorney's fees and expenses of litigation, we understand that we will receive all such excess sums without other or further obligation to my/our attorneys. Punitive damages shall be added to the total damage award for the purpose of fee calculation.

We understand and agree that my retained attorney may designate any members(s) of the firm to render legal services on my/our case and to attend any depositions, hearings or trials on our behalf as they may deem appropriate.

We understand that certain conditions of employment may be a part of this contract and that the same have been initialed by us (as applicable) concurrent with the execution of the contract. [ATTACH ANY SPECIAL STIPULATIONS]

ALL EXPENSES ARE DUE AND PAYABLE NET UPON RECEIPT OF INVOICE.
HOWEVER, NO FEE IS DUE AND PAYABLE UNLESS A RECOVERY IS OBTAINED.

We authorize the Law Firm to engage _____ as co-counsel in this case, authorize them to pay expenses on my behalf which will be reimbursed by me, and authorize a division of the attorney fee stated above between the Law Firm and _____. We also consent to and authorize the Law Firm to pay a fee to _____. Each law firm engaged shall be paid from the total fee agreement provided for above, and each law firm shall be jointly responsible for the representation in this matter. We agree that the Law Firm shall be primarily responsible and may delegate specific responsibility for various aspects of the representation among the lawyers working on our case depending on their respective skills and expertise. The proposed division of fee is as follows: _____.

We understand and agree that our lawyers may be required to hold back, and may hold back, a portion of my recovery, if any, that would satisfy claims asserted by Medicare, Medicaid, private insurers, or others who hold valid and enforceable liens against the recovery. We consent to our lawyers taking those steps which are necessary to satisfy these claims, if applicable.

Each party signing below represents that he/she has authority to enter into this Agreement and do so of my own accord. This is our entire agreement with my lawyers, which shall be interpreted under Tennessee law.

This __ day of _____, 20____.

CLIENT²⁷

[Signature line for each law firm]

²⁷ Each person who would be entitled to a share of the recovery should sign the agreement. In wrongful death cases, this will generally require the signature of all heirs at law.