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The Referral Fee and the ABA Rules of Model Conduct: Should States Adopt Model Rule 1.5(e)?

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THE REFERRAL FEE AND THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: SHOULD STATES ADOPT MODEL RULE 1.5(e)?

I. Introduction

The practice of fee splitting,[1] whether in the form of a referral, forwarding or finder's fee,[2] between cooperating attorneys has long been a part of the practice of law in this country.[3] Typically, a referral fee situation occurs when an attorney (Attorney A) meets with a client, and after some discussion advises the client to engage the services of another attorney (Attorney B) whom he specifically recommends.[4] Attorney A then enters into an agreement with Attorney B under which he is to receive some portion of the fee that

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1. A division of fees has been defined as:

> [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.

NEW YORK STATE BAR ASSOCIATION SUMMARY REPORT OF SPECIAL COMMITTEE TO CONSIDER ADOPTION OF ABA MODEL RULES OF PROFESSIONAL CONDUCT 6 comment 4 (Aug. 7, 1985) [hereinafter SUMMARY REPORT]. A forwarding fee is "[t]he part of the fee for handling a matter of legal business forwarded by one attorney to another attorney to which the forwarder is entitled." BALLENTINE'S LAW DICTIONARY 493 (3d ed. 1969).

2. For the purpose of this Note, the terms "referral fee," "forwarding fee" and "finder's fee" are interchangeable.

3. *See* V. COUNTRYMAN, T. FINMAN & T.J. SCHNEYER, THE LAWYER IN MODERN SOCIETY 206 n.1 (2d ed. 1976) [hereinafter COUNTRYMAN]; G. GREENWOOD & R.F. FREDERICKSON, SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS 137 (1964) [hereinafter GREENWOOD]; *see also* R. ARONSON, ATTORNEY-CLIENT FEE ARRANGEMENTS: REGULATION AND REVIEW 59 (Federal Judicial Center 1980) [hereinafter Aronson]; Hall & Levy, *Intra-Attorney Fee Sharing Arrangements*, 11 VAL. U.L. REV. 1, 2 (1976) [hereinafter Hall & Levy]. For many years it was customary within the legal profession for referred attorneys to pay a "finder's fee" or "forwarding fee." GREENWOOD, *supra*, at 137.

4. *See* Webb, *Referral Fees and the Effect of Disciplinary Rule 2-107*, 8 J. LEGAL PROF. 225 (1983) [hereinafter Webb].

Attorney B collects.[5] Attorney A has no further contact with the client or Attorney B in this matter.[6] As a result, a significant amount of money paid by the client goes to a lawyer who arguably has done very little work for the client.[7]

Few situations arise in which the client brings a complaint about this practice to the court or to the bar.[8] The problems concerning referral fees generally arise either when Attorney A anticipates a referral fee even though he has never discussed it with Attorney B, or when a fee has been discussed, but Attorney B has refused to pay it.[9] Historically, courts have been unwilling to enforce referral fee agreements[10] unless Attorney A has indeed contributed more services to the case or the two attorneys have made an express contract between themselves.[11] The primary reason espoused for this refusal is that enforcement of such arrangements is generally against public policy[12] and specifically violates the Code of Professional Responsibility (Code).[13] Disciplinary Rule 2-107 (DR 2-107) of the

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5. *See* GREENWOOD, *supra* note 3, at 137 (stating that customary forwarding fee is one-third of fee earned). The client ultimately executes an agreement with the referred attorney for his services as well as with the first attorney. *See* Webb, *supra* note 4, at 225.

6. For a discussion of the typical referral fee situation, see J. CARLIN, LAWYERS' ETHICS 200 (1966) [hereinafter CARLIN].

7. The typical referral fee agreement occurs in tort cases. Forwarding lawyers customarily send their cases to tort specialists and receive a fee based on a percentage agreement regardless of each lawyer's comparative efforts and cost disbursements. *See* Halstrom, *Referral Fees are a Necessary Evil*, 71 A.B.A. J. 40, 42 (Feb. 1985) [hereinafter Halstrom]; *see also* Webb, *supra* note 4, at 226.

8. *See* Note, *Attorneys: The Referral Fee: A Split in Opinion*, 33 OKLA. L. REV. 628, 629 (1980) [hereinafter *The Referral Fee*]; *The Great Debate*, 49 TEX. B.J. 896, 897 (Sept. 1986). See cases and opinions cited in text.

9. *See The Referral Fee, supra* note 8, at 629.

10. *See* Webb, *supra* note 4, at 227.

11. *See, e.g.*, Oberman v. Reilly, 66 A.D.2d 686, 411 N.Y.S.2d 23 (1st Dep't 1978); Jontow v. Jontow, 34 A.D.2d 744, 310 N.Y.S.2d 145 (1st Dep't 1970); Sterling v. Miller, 2 A.D.2d 900, 157 N.Y.S.2d 145 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 778, 143 N.E.2d 789, 164 N.Y.S.2d 32 (1957); *see also* R. SPEISER, ATTORNEYS' FEES § 6:3, at 243-44 (1973) [hereinafter SPEISER]; Hall & Levy, *supra* note 3, at 5.

12. *See* SPEISER, *supra* note 11, § 6:3, at 244. *See generally* Note, *The Determination of Professional Fees From the Ethical Viewpoint—A Panel Discussion*, 7 U. FLA. L. REV. 433 (1954) [hereinafter *The Determination of Professional Fees*]. "The lawyer is not supposed to get paid for anything but the legal services that he renders, and selling a man a client is not a legal service . . . . [I]t is beneath the dignity of the profession to take money for something that is not a legal service." *Id.* at 434.

13. *See* Prandini v. National Tea Co., 557 F.2d 1015 (1977) (court refused to

Code[14] essentially states that if a lawyer is not going to put some effort into and take some responsibility for a case, then he should not receive any compensation.[15]

In 1983, the American Bar Association (ABA) adopted a set of rules substantially different from that of the Code. The new rules are known as the Model Rules of Professional Conduct (Model Rules or MR) and the ABA has offered them to the states for consideration and adoption.[16] Section 1.5(e) of the Model Rules, unlike DR 2-107 of the Code, permits a division of fees without regard to the services rendered by each lawyer, if both lawyers assume joint responsibility for the representation, the client consents to the arrangement, and the total fee is reasonable.[17]

Nineteen of the fifty states have already adopted Model Rule 1.5(e) with little or no modification.[18] The provision, as part of the Model

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approve fee based upon percentage agreement because the division of fees violated Code of Professional Responsibility DR 2-107), *vacated*, 585 F.2d 47 (3d Cir. 1978). *See generally* Aronson, *supra* note 3, at 59-77.

14. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1969). New York adopted the Code of Professional Responsibility in 1970. *See* N.Y.S.B.A. CODE OF PROFESSIONAL RESPONSIBILITY (McKinney 1970).

15. *See id.*

16. The new Model Rules were drafted by the ABA Commission on Evaluation of Professional Standards. This Commission consisted of lawyers, non-lawyers, critics, and established members of the organized Bar. *See* Stark, *Review Essay, The Model Rules of Professional Conduct*, 12 CONN. L. REV. 948, 950 n.12 (1980); *see also* Kaufman, *A Critical First Look at the Model Rules of Professional Conduct*, 66 A.B.A. J. 1074, 1075 (Sept. 1980) (it is intended that Model Rules be adopted by legislatures and courts); Kutak, *The New Model Rules of Professional Conduct: A Report to the Bar*, 68 A.B.A. J. 1019, 1023 (Aug. 1982) (A.B.A.'s adoption of Model Rules is invitation to bar-governing bodies to do same) [hereinafter Kutak].

17. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983).

18. Thirteen states have adopted Rule 1.5(e) of the ABA Model Rules of Professional Conduct without modification. *See* Ariz. Sup. Ct. Rules, Rule 1.5(e) (amended Sept. 7, 1984); ARK. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (adopting *In re* Ark. Bar Ass'n Petition for the Adoption of the Model Rules of Professional Conduct, No. 83-187, slip op. (Ark. filed Dec. 16, 1985)); FLA. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (adopting The Florida Bar Rules *In re* Rule Regulating the Bar, Nos. 65-197, 65-877, 67-085, 68-293 (Fla. filed July 17, 1986)); MONTANA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (adopting *In re* Adoption of the American Bar Association Model Rules of Professional Conduct, No. 84-303 (Mont. filed June 6, 1985)); NEW MEXICO RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (adopting *In re* Adoption of the Code of Professional Responsibility and Specialization Plan (N.M. filed June 26, 1986)). All of the above cases and statutes are reprinted in the National Reporter on Legal Ethics and Professional Responsibility. *See generally* NATIONAL REPORTER ON LEGAL

Rules, is now pending before several other states.[19] In April of 1987, New York adopted Model Rule 1.5(e).[20] This adoption is significant in that it represents the endorsement by a leading legal community of a rule frequently criticized as tarnishing the practice of law. This Note analyzes both the change in New York and the alternative views with respect to fee referral arrangements in order to ascertain whether the Code Rule, the Model Rule, or some variation of one of them is preferable.[21]

Initially, this Note examines the history behind DR 2-107 and the reasons for the ABA's adoption of Model Rule 1.5(e).[22] It then analyzes DR 2-107 in depth to determine whether it has been effective in terms of advancing the policies and purposes it was designed to

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ETHICS AND PROFESSIONAL RESPONSIBILITY (1987).

Eight other states have adopted the ABA Model Rules of Professional Conduct so recently that to date, opinions have not been filed with these states' highest courts. The relevant sections of the Delaware, Idaho, Maryland, Michigan, Missouri, New Jersey, New York, and North Carolina Model Rules of Professional Conduct are reprinted in the National Reporter on Legal Ethics and Professional Responsibility. *See id.*

Six states have adopted Rule 1.5(e) of the ABA Model Rules of Professional Conduct in amended form. *See* MINN. CODE OF PROFESSIONAL CONDUCT Rule 1.5(e) (adopting No. C8-84-1650 (Minn. filed June 13, 1985)); NEV. RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (adopting *In re* Repeal of Supreme Court Rules 163 through 204 and Adoption of Rules 150-203.5 (Nev. filed Jan. 27, 1986)); WASH. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (adopting Rules of Professional Conduct, 104 Wash. 2d 1102 (1985)). All of the above cases and statutes are reprinted in the National Reporter on Legal Ethics and Professional Responsibility. *See generally* NATIONAL REPORTER ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY (1987).

Three other states have adopted amended forms of the ABA Model Rules of Professional Conduct so recently that to date, opinions have not been filed with the respective highest state courts. The relevant sections of the Connecticut, New Hampshire and Virginia Model Rules of Professional Conduct are reprinted in the National Reporter on Legal Ethics and Professional Responsibility. *See id.*

19. Mississippi and Ohio have recommended adoption of Model Rule 1.5(e) of the ABA Model Rules of Professional Conduct without modification. *See generally* Memorandum from Amy Weber, Staff Assistant to Special Committee on Implementation of the Model Rules of Professional Conduct (Nov. 11, 1986). The District of Columbia and Illinois have recommended adoption of Model Rule 1.5(e) of the ABA Model Rules of Professional Conduct in amended form. *See id.*

Model Rule 1.5(e) of the ABA Model Rules of Professional Conduct is currently pending before the Oregon, Pennsylvania, Vermont and Wisconsin Supreme Courts in amended forms, *see id.*, and before the Indiana, the District of Columbia (voluntary bar), Kansas, Louisiana, Nebraska, South Carolina, Utah and West Virginia Supreme Courts without modification. *See id.*

20. *See supra* note 18.

21. *See infra* notes 47-137 and accompanying text.

22. *See infra* notes 30-46 and accompanying text.

promote.[23] The Note concludes that DR 2-107 is deficient for the following reasons: (1) members of the legal profession oppose and flagrantly violate the rule[24]; (2) except in a few jurisdictions, violators of the rule are rarely prosecuted[25] while even in those jurisdictions that do enforce the rule, the courts are vague in their interpretation of what the rule really prohibits;[26] and (3) the rule ignores current business realities.[27] In addition, this Note analyzes the Model Rule and concludes that the Model Rule ameliorates the shortcomings of the Code Rule.[28] Finally, based on this analysis, this Note recommends that other states follow New York's lead and adopt Model Rule 1.5(e) or at least a version of it that is substantially the same.[29]

II. History of DR 2-107 and MR 1.5(e)

Both DR 2-107 and MR 1.5(e) have their genesis in Canon 34 of the ABA Canons of Professional Ethics adopted in 1928.[30] Canon 34 in its original form provided in relevant part:

> No division of fees for legal services is proper, except with another lawyer, based upon a division of service *or* responsibility . . . .[31]

The ABA originally drafted the Canon to ban the customary forwarding fee among lawyers when the main responsibility assumed by the referring attorney was merely the recommendation of another lawyer.[32] As the practice of law became more com-

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23. *See infra* notes 47-100 and accompanying text.
24. *See infra* notes 49-54 and accompanying text.
25. *See infra* notes 55-91 and accompanying text.
26. *See id.*
27. *See infra* notes 92-100 and accompanying text.
28. *See infra* notes 101-37 and accompanying text.
29. *See infra* notes 138-46 and accompanying text.
30. *See* Richardson, *Division of Fees Between Attorneys*, 3 J. LEGAL PROF. 179, 185 (1978) (discussing history of both rules) [hereinafter Richardson]; Hall & Levy, *supra* note 3, at 4 (discussion of history of Canon 34); *see also* Cady, *Canons to the Code of Professional Responsibility*, 2 CONN. L. REV. 222 (1969) (discussion of history of DR 2-107) [hereinafter Cady].
31. ABA CANONS OF PROFESSIONAL ETHICS No. 34 (1928) (as adopted by American Bar Association House of Delegates) (emphasis added). In 1937, the Canon was amended to eliminate a provision excepting commercial claims and divisions of fees between attorneys and laymen. *See* ABA CANONS OF PROFESSIONAL ETHICS No. 34 (1937) (as adopted by American Bar Association House of Delegates). Those amendments are outside the scope of this Note.
32. *See* W.M. TRUMBELL, MATERIALS ON THE LAWYER'S PROFESSIONAL RESPON-

plex,[33] however, the Canons of the ABA in general and Canon 34 in particular became "increasingly inadequate" as a standard of professional responsibility.[34] The Canon was vague, especially with regard to the means by which an ethics committee, when evaluating a division of fees, could measure services performed or responsibility assumed.[35]

In an attempt to rectify this vagueness, the ABA adopted DR 2-107, intending that it would be a stricter and better defined alternative to Canon 34.[36] DR 2-107 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 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, *and*
> (2) The division is made in proportion to the services performed *and* responsibility assumed by each, *and*
> (3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.[37]

DR 2-107 now provided the safeguards of client consent to the division of fees, the requirement of performing services, the assumption of responsibility and the insurance that the fee charged to the client would be reasonable.[38] Although the rule was still unclear as to the definition of "services performed and responsibility assumed," the ABA envisioned that this stricter rule requiring both

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SIBILITY 287 (1957) (citing H. DRINKER, LEGAL ETHICS 186-88 (1953)) (discussion of Canon 34 and the intentions behind its adoption).

33. *See* Cady, *supra* note 30, at 236. The legal profession now includes large and small firms, corporate legal departments, and government lawyers. The legal profession is not simply the solo practitioner. *See generally* GREENWOOD, *supra* note 3; *see also* Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction,* 48 TEX. L. REV. 255, 265 (1970) [hereinafter Sutton].

34. Wright, *The Code of Professional Responsibility: Its History and Objectives,* 24 ARK. L. REV. 1, 3 (1970) [hereinafter Wright].

35. *See id.* at 6.

36. *See* Sutton, *supra* note 33, at 264. The Code was needed to give fair and complete notice of forbidden conduct. The Committee's effort was devoted to finding a suitable expression for standards and putting that expression in specific form. *See* Wright, *supra* note 34, at 17-18 (Code in general was considered substantial improvement over former canons; guidance given by Code was intended to be more complete and more structured than most canons); *see also* Palmer v. Breyfogle, 217 Kan. 128, 141, 535 P.2d 955, 965 (1975).

37. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1969) (emphasis added).

38. *See id.*

services and responsibility as a joint entity would provide an ethics committee with a clearer standard for evaluating violations of the rule and in the long run would eliminate the custom of receiving fees for little or no work.[39] The ABA also hoped that the rule would solve the common problem lawyers often faced: choosing between the attorney who offered the highest fee and the attorney who would best protect the client's welfare.[40]

Problems with the Code emerged, however, when the ABA realized that a provision prohibiting such a customary practice was neither realistic nor in keeping with the realities of the legal community.[41] Lawyers constantly—albeit covertly—violated the rule[42] and, as a result, effectively defeated the intentions and goals behind the drafting of the Code Rule. In 1983, the ABA, recognizing the futility of such a strict prohibition, adopted Model Rule 1.5(e), which in effect reinstated the liberal Canon 34 while retaining the safeguard provisions (client consent and reasonable fee) of DR 1-207.[43] This rule provides:

> 1.5(e) 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 responsiblity 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.[44]

In effect, the Model Rule allows referral fees by making the performance of services an alternative to the assumption of responsibility instead of an addition to this assumption as stated in the Code

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39. Aronson, *supra* note 3, at 61 (stating that "Disciplinary Rule 2-107 (A) . . . was adopted to clarify and to elaborate Canon 34").

40. *See id.* at 65.

41. Telephone interview with George A. Kuhlman, Special Counsel, ABA Center for Professional Responsibility (Jan. 29, 1987).

42. *See infra* note 49 and accompanying text.

43. "A.B.A. Model Rule 1.5(e) . . . . reinstates the principle of Canon 34 of the Canons of Professional Ethics . . . ." AMERICAN BAR ASSOCIATION COMMITTEE ON EVALUATION OF PROFESSIONAL STANDARDS ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 57 (1st ed. 1985). See *infra* notes 115-21 and accompanying text for a discussion of these safeguards.

44. ABA MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 1.5(e) (1983) (emphasis added).

Rule.[45] The substitution of the word "or" in the Model Rule for "and" as provided in the Code Rule[46] makes Model Rule 1.5(e) more flexible than DR 2-107. As is discussed below, the new rule has proved to be the appropriate middle ground between the Canon and Code rules.

III. Inadequacies of DR 2-107

One of the major difficulties with the Code Rule as it now stands is that it does "very little good."[47] If the purpose of the rule is to lessen the number of paid referrals between attorneys, then surely the rule has not achieved its intended purpose.[48] Members of the legal profession oppose and flagrantly violate the rule.[49] Attorneys do not use the rule as a self-policing mechanism.[50] Indeed, one study found that "[t]he so-called forwarding fee of 33-1/3 percent has . . . come to have been observed by the Bar as an accepted practice."[51] Another study determined that at least sixty-seven percent of the lawyers surveyed said they would accept a referral fee.[52] And, in a recent poll, a majority of the legal profession clearly favored referral fees.[53] A rule thus "provoking such disrespect should be reexamined [and revised] to determine whether its value is sufficient to overcome the disadvantages of its unpopularity."[54]

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45. *Compare* ABA MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 1.5(e) (1983) *with* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1969).

46. *See id.*

47. *See The Referral Fee, supra* note 8, at 633.

48. *See id.* at 634.

49. *See* ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE, ETHICS AND ADVOCACY FINAL REPORT 17 (June 1978) [hereinafter FINAL REPORT].

50. *See id.*

51. McCracken, *Report on Observance by the Bar of Stated Professional Standards,* 37 VA. L. REV. 399, 416-17 (1951) [hereinafter McCracken]. The author sent a questionnaire to one or more representative lawyers in forty-eight states. *See id.* at 399.

52. *See* CARLIN, *supra* note 6, at 200.

53. *See Law Poll, Forwarding Fees Are Fine With Most Lawyers,* 71 A.B.A. J. 48 (Feb. 1985). A majority of the lawyers (62%) surveyed approved of the practice of charging a referral or forwarding fee when sending a case to another lawyer—so long as the client was fully informed and the total fee was reasonable. *See id.* These conditions are very similar to Model Rule 1.5(e). *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 1.5(e) (1983).

54. Richardson, *supra* note 30, at 192. It is not suggested that all laws that attorneys find undesirable and frequently violate should be amended to suit their subjective preferences. The additional problem caused by courts ignoring the rule as well as the problem caused by lawyers violating the rule, however, may necessitate changing the rule to conform to the realities of legal practice.

Along with the problem of attorneys refusing to follow and enforce the rule is the problem of how courts have dealt with the Code provision in ethical and substantive opinions.[55] The confusion is concentrated around the interpretation of DR 2-107(A)(2), which requires a division of both services and responsibility between each attorney.[56] Part of this confusion stems from the inability and refusal of courts to set forth a standard for determining what constitutes a "proportionate" amount of services,[57] or at least how much service is necessary to justify a division of fees without giving the appearance of condoning a referral fee.[58] The remaining confusion stems from the refusal to define the meaning of "responsibility" to give attorneys some standard they can follow when attempting to refer cases.[59]

With regard to the division of services, the ABA (before its adoption of the Model Rules) shunned any type of in-depth inquiry into the apportionment of fees between two lawyers.[60] Its opinions, in fact, made no effort at assigning a quantitative value to the services performed by a lawyer.[61] Thus, by failing to set guidelines on the amount of "services" necessary to conform to the rule, the ABA on the one hand was condemning a practice (being paid for no services) it considered unethical, while on the other hand it was unwilling to advise attorneys on how they could avoid this unethical practice. In one sentence the ABA stated: "Where an attorney merely brings about the employment of another attorney but renders no service and assumes no responsibility in the matter, the division of fees is improper,"[62] while in the next sentence it said: "[m]easuring the relative division of service and responsibility between associate

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55. *See infra* notes 83-91 and accompanying text.

56. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1969).

57. *See infra* notes 60-91 and accompanying text.

58. *See infra* notes 83-91 and accompanying text.

59. *See infra* notes 60-91 and accompanying text; *see also* Kutak, *supra* note 16, at 1020. The enforcement of disciplinary regulations can be accomplished only with the existence of clear, workable rules. *See id.*

60. *See* Webb, *supra* note 4, at 226; Hall & Levy, *supra* note 3, at 17. For purposes of this Note, opinions concerning Canon 34 and DR 2-107 will be treated similarly.

61. *See* Webb, *supra* note 4, at 226; *see also* ABA Comm. on Professional Ethics, Informal Op. 932 (1966) (opinion fails to quantify division of services); ABA Comm. on Professional Ethics, Informal Op. 391 (1960) (same); ABA Comm. on Professional Ethics and Grievances, Formal Op. 204 (1940) (same).

62. ABA Comm. on Professional Ethics and Grievances, Formal Op. 204 (1940); *see also* ABA Comm. on Professional Ethics, Informal Op. 932 (1966); ABA Comm. on Professional Ethics, Informal Op. 936 (1966).

attorneys is not within the province of this ethics committee unless the resulting fee to the client is flagrantly excessive."[63] Such a response set a standard allowing for only the broadest interpretation of the terms "services" and "responsibility."[64] In effect, these words became a synonym for "no service and no responsibility,"[65] thus prompting the many violations of the Code.

With respect to state court and substantive law definitions of responsibility, two opinions are significant for their stance on referral fees.[66] These cases are important not only for their policy views on referral fees but also because they represent the first major effort by state appellate courts to weigh relative participation and responsibility in the handling of a legal matter. First, the court in *McFarland v. George*[67] held that when an attorney merely refers or recommends a legal matter to another lawyer and has performed no services and assumed no responsibility in the case, a court should not permit a division of attorney's fees.[68] The action in *McFarland* involved a will contest in which the plaintiff, an attorney, referred his client to the defendant, also an attorney, because the plaintiff was running for public office at the time and could not give the case the time and attention it needed.[69] The plaintiff took very little interest in the case other than inquiring about its progress from time to time.[70] The defendant was successful in settling the suit and received a court-approved fee of twenty thousand dollars.[71] The lower court had originally granted the plaintiff a portion of the fee based on the idea that the two attorneys were involved in a joint venture, but on appeal the Missouri Court of Appeals reversed that holding.[72]

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63. ABA Comm. on Professional Ethics and Grievances, Formal Op. 204 (1940).

64. *See* Hall & Levy, *supra* note 3, at 12-13.

65. "[T]he lack of concrete guidance provided by the Committee remains classifiable as . . . [a] 'cop-out'." *Id.* at 13. The Committee seemed to indicate that to justify a division of fees a referring attorney might rely on some vague, if not contrived, "responsibility." In other words, the mere selection and retention of another lawyer justified a disproportionate sharing in the resultant fee—thus the synonym of "no services" and "no responsibility." *Id.*

66. To date, the Supreme Court has made no ruling on what constitutes a proper standard for the receipt of a referral fee.

67. 316 S.W.2d 662 (Mo. Ct. App. 1958) (although Canon 34 is discussed, for present purposes the decision may be read as analyzing DR 2-107).

68. *See id.* at 674.

69. *See id.* at 664.

70. *See id.* at 664-68.

71. *See id.* at 665.

72. *See id.* at 664.

The court reasoned that the referring attorney had to perform some service *or* assume some responsibility to justify his fee.[73]

Furthermore, in construing Missouri Rule 4.34 (the equivalent of DR 2-107), the court held that "the service and responsibility referred to in the rule . . . must relate to an actual participation in or handling of the case."[74] Specifically, the court stated that it found little difficulty dealing with the meaning of the word "service," and defined "responsibility" as "the doing of something."[75] Although the opinion was a forceful attempt at defining the rule, the Missouri court never specified in detail the actual meaning of the term "service." Moreover, as an explanation for responsibility, "the doing of something" was equally vague. Thus, like the older ABA opinions, the Missouri court in theory condemned the use of referral fees, but in reality, refused to set a clear standard for the legal community to follow in the future. Indeed, commentators have noted that much of the material discussed in *McFarland* can be viewed only as dicta[76] because no procedure was established "to assess the relative proportionate contributions of cooperating attorneys where a later dispute arises concerning the right to share in a fee."[77]

The other prominent case in terms of state law is *Palmer v. Breyfogle*.[78] In *Palmer*, the suit was between two attorneys, one of whom wanted to recover one-third of a fee awarded in a divorce case.[79] The plaintiff sued the defendant law firm for part of the fee on the ground that in referring his client to the defendant and in "keeping her happy" by providing friendship and support throughout the case, he had performed services within the meaning of DR 2-107.[80] In finding for the defendant, the Kansas Supreme Court ruled that the plaintiff had assumed no responsibility for the case or performed any legal services meriting a portion of the fee.[81] This court's definition of the terms "services" and "responsibility" required "an actual participation in or the handling of the case."[82]

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73. *See id.* at 670.
74. *Id.*
75. *Id.* at 671.
76. *See, e.g.*, Hall & Levy, *supra* note 3, at 10.
77. *Id.*
78. 217 Kan. 128, 535 P.2d 955 (1975).
79. *Id.* at 129, 535 P.2d at 958.
80. *Id.* at 132-36, 535 P.2d at 961-69.
81. *Id.* at 147, 535 P.2d at 969.
82. *Id.*

Although *Palmer* was more emphatic than *McFarland* in rejecting a division of fees for minimal or no work done and no responsibility assumed, it still left the standard for a proper division of fees vague. The idea that "services" must be an act of participation in the case is clear, but again, the idea of "responsibility" in that same definition is uncertain and abstract. Once again, the importance of this court's holding in terms of its policy view toward the referral fee is diluted because of the vague guidelines it sets for the legal profession.

In addition to the difficulty the ABA and the Kansas and Missouri state courts have had in defining service and responsibility, New York courts, before adoption of Model Rule 1.5(e), had also paid only lip service to DR 2-107.[83] The courts usually found for the referring attorney but based their holdings on standards different from those of "service" and "responsibility." When the referring attorney had performed no apparent services and had assumed no responsibility, the courts allowed the referral fee arrangement while camouflaging the reasoning for this allowance in the finding of a "joint venture" or "partnership agreement"[84] between the cooperating attorneys.[85] In *Bohm v. Holzberg*,[86] for example, the court held that two lawyers handling the same case would be treated as "special partners" if there was *some* division of services and responsibility and the party seeking to enforce the agreement actually

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83. *See infra* notes 84-91 and accompanying text.

84. Lawyers between whom no general partnership exists may sometimes be regarded as "joint venturers" or "special partners" for the particular transaction when they jointly undertake to represent a client in a case. *See* Underwood v. Overstrat, 188 Ky. 562, 223 S.W. 152 (1920); McCann v. Todd, 203 La. 631, 14 So. 2d 469 (1943); Daspit v. Sinclair Refining Co., 199 La. 441, 6 So. 2d 341 (1942); *see also* Annotation, *Division of Compensation Between Attorneys Who Co-operate in Legal Services*, 10 A.L.R. 1352 (1920). For more discussion on joint partners, see SPEISER, *supra* note 11, §§ 6.12, 6.13.

85. *See* Webb, *supra* note 4, at 227-28. "In the absence of agreement between the attorneys express or implied by custom, on how fees will be divided, several courts have applied the general rule of joint undertakings and allowed the attorneys equal shares, regardless of disparities in labor or skill provided." COUNTRYMAN, *supra* note 3, at 207; *see* Orenstein v. Albert, 39 Misc. 2d 1093, 242 N.Y.S.2d 505 (Sup. Ct. Westchester County 1963) (application of joint venture rationale), *aff'd*, 20 A.D.2d 720, 247 N.Y.S.2d 563 (2d Dep't 1964); *see also* Sterling v. Miller, 2 A.D.2d 900, 157 N.Y.S.2d 145 (2d Dep't 1956) (enforcement of contracts for unequal sharing of fees without reference to proportionate sharing of services or responsibility), *aff'd*, 3 N.Y.2d 778, 143 N.E.2d 789, 164 N.Y.S.2d 32 (1957); *In re* Allen St., 148 Misc. 488, 266 N.Y.S. 277 (Sup. Ct. N.Y. County 1933) (same).

86. 69 Misc. 2d 469, 329 N.Y.S.2d 907 (1st Dep't 1972).

performed substantial services.[87] Here, the court allowed enforcement of an agreement for an equal division of the fee even though one of the attorneys had done at least eighty percent of the work.[88] The *Bohm* court is thus typical of those state courts, which continue to condemn the forwarding fee in theory, but in practice permit it through various justifications.[89] Moreover, like the ABA,[90] New York courts made no attempt to evaluate legal services "proportionately" rendered by referring attorneys or to define responsibility under DR 2-107.[91]

The third major problem with DR 2-107 is that it is not synchronized with the current business realities of the legal profession.[92] As one ethics committee noted, the Code "is out of date as compared to current practice."[93] The legal profession has become so specialized[94] that it is now impractical for any lawyer to keep all the cases that come to him.[95] Yet most lawyers, at least most small general practitioners,[96] will keep a case they are unqualified to handle if they

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87. *See id.* at 470, 329 N.Y.S.2d at 909.

88. *See id.*

89. *See supra* note 85. Some states expressly permit the payment of referral fees to lawyers who forward cases even if they provide no other services and assume no responsibility for the representation. *See* Moran v. Harris, 131 Cal. App. 3d 913, 922, 182 Cal. Rptr. 519, 523 (1982) (court upheld fee-splitting agreement between referring attorney and lawyer who rendered legal services). The court ruled that referral fee agreements were not then contrary to public policy, nor were they contrary to public policy before enactment of the rule prohibiting them. *See id.* at 920, 182 Cal. Rptr. at 523; *see also* Kuhn, Collins & Rash v. Reynolds, 614 S.W.2d 854 (Tex. Ct. App. 1981) (referring to DR 2-107 of Texas Code of Professional Responsibility, expressly permitting referral fees). One court has even held that a fee-splitting contract between lawyers cannot be deemed unenforceable merely because it violates the Disciplinary Rules of the ABA Model Code. *See* Foote v. Shapiro, 6 Pa. D. & C.3d 574 (C.P. Lehigh County 1978). In upholding the contract, the court reasoned that when two attorneys have entered into an unethical agreement for fees, one of them may not assert that fact against the other to avoid the agreement. *Id.* at 580.

90. *See supra* notes 60-65 and accompanying text.

91. *See* Hall & Levy, *supra* note 3, at 8.

92. Telephone interview with George A. Kuhlman, Special Counsel, ABA Center for Professional Responsibility (Jan. 29, 1987); *see* McCracken, *supra* note 51, at 400 (DR 2-107 is not "considered realistic and applicable to business and professional conditions of the modern world").

93. *See* N.Y.L.J., Feb. 4, 1985, at 6, col. 1.

94. *See generally* GREENWOOD, *supra* note 3, at 49-51.

95. *See id.*

96. *See* L. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW 276 (1971) (small practitioners make up 1/2 of the bar) [hereinafter PATTERSON & CHEATHAM]; AMERICAN BAR ASSOCIATION, SPECIAL COMMITTEE ON SPECIALIZATION, LEGAL SPE-

cannot receive a fee for referring it.[97] Disciplinary Rule 6-101 of the Code specifically states that a lawyer shall not take on a case that he is incompetent to perform.[98] Nevertheless, unlike a large law firm that can refer cases to other associates or partners, a small practitioner with no associate will be tempted to handle a case incompetently rather than refer it to a more qualified attorney who would keep the entire fee.[99] This practice often results in a lesser recovery than the client could have received had his attorney referred the case to a more qualified attorney.[100]

IV. Advantages of Model Rule 1.5(e)

The new and more flexible Model Rule 1.5(e) resolves the problems of the Code provision by giving attorneys a rule with which they can comply and the courts a provision they can more easily enforce.[101] The Model Rule addresses the problem of defining "services" and "responsibility," by stating that the performance of services is an alternative to an assumption of responsibility.[102] This rule is different from DR 2-107 which makes the performance of services an addition to the assumption of responsibility.[103] Such a difference makes de-

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CIALIZATION 222 (1976) (statement of Henry Wright III) ("those men who practice alone or in association with two or three others . . . represent about 75 to 80 percent of the practicing Bar").

97. *See* SUMMARY REPORT, *supra* note 1, at ii.

98. Disciplinary Rule 6-101 states, in pertinent part:

> (A) A lawyer shall not (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 (1969).

99. *The Referral Fee, supra* note 8, at 633.

100. *See id.*; FINAL REPORT, *supra* note 49, at 18.

101. "The new model rule enlarges the opportunity for the referring lawyer to earn a referral fee while assuring that the referred client derives some benefit for the payment beyond the referring lawyer's mere release of a matter that cannot or will not be undertaken." Franck, *No Referral Fee For No Work*, 71 A.B.A. J. 40, 44 (Feb. 1985) [hereinafter Franck].

102. Model Rule 1.5(e)(1) provides that "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 . . . ." A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT Model Rule 1.5(e) (1983) (emphasis added); *see* ABA Comm. on Professional Ethics and Grievances, Informal Op. 85-1514 (1985) [hereinafter Informal Op. 85-1514] (discussing use of preferred stock dividends or limited partner distribution as vehicle for division of fees; although these devices were impermissible under facts of case, Committee's discussion of Rules and Code provisions is helpful).

103. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1969).

fining "services" and "responsibility" easier because the two ideas are no longer thrown together into one concept. With this division, courts can analyze the performance of services and the assumption of responsibility individually according to the facts of each case, thus clarifying the standard that attorneys must follow.

In addition, in Informal Opinion No. 85-1514, the ABA defined responsibility under Model Rule 1.5(e) so that a referring lawyer would know exactly what would be expected of him if he received a forwarding fee.[104] The ABA defined the assumption of "joint responsibility for the representation"[105] as the assumption of responsibility comparable to that of a partner in a law firm under similar circumstances, including financial responsibility and ethical responsibility to the extent a partner would have ethical responsibility for the actions of other partners in a law firm in accordance with Rule 5.1. The definition also included the obligation to assure the adequacy of representation and adequate client communication that a partner would have for a matter handled by another partner in the firm under similar circumstances.[106]

The ABA realized in this opinion that, as a practical matter, quantifying a division of services would be difficult when an attorney had performed little or no work.[107] But the safeguard of joint responsibility for the case was not difficult to quantify. Under Model Rule 1.5(e) a referring lawyer doing absolutely no work could still be "responsible" for the case as if he had done the work himself,[108] *if* he had potential legal liability for everything, including the possibility of becoming a defendant in a malpractice action when the performing attorney has been negligent.[109] Conceivably, such a standard might prevent the opening of the floodgates that contain the practice of referral fees that some commentators have feared would

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104. *See* Informal Op. 85-1514, *supra* note 102.

105. ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983).

106. *See* Informal Op. 85-1514, *supra* note 102.

107. *See id.*

108. *See id.*

109. *See* Merrick, *The Jurisdictional Split on Referral Fees,* 3 COMPLEAT LAWYER 18(2), 19 (1986) ("it appears that the assumption of responsibility required for a division of fees also entails an assumption of liability for the representation afforded the client"); White, *The Referral Fee in Tort: Toward Shared Responsibility,* 64 MICH. B.J. 286, 287 (1985) ("should the client sue for malpractice, it would necessarily mean that the referring attorney stand ready to defend and, possibly, respond in damages should it be proven that either the receiving or the referring attorney committed professional negligence").

result from adoption of the Model Rule.[110] The notion that "responsibility" may mean "liability" might actually have the desired effect that was originally intended by the former Canon and the Code.[111]

Opponents of the Model Rule argue that even if courts are treating the Code lightly and allowing referral fees in practice, the idea of such a fee is still against public policy. Opponents say the rule focuses more on the interest of the attorney than on the welfare of the client, and that at least in theory, the Code Rule is an expression against that practice.[112] In response, proponents argue that in addition to the increased liability lawyers assume under Model Rule 1.5(e),[113] the Rule still safeguards the client by requiring that: (1) the client consent to the joint assumption of responsibility by each attorney; and (2) the total fee must be reasonable.[114]

The opinions of both the ABA and state courts illustrate that the presence or lack of client consent is pivotal in many referral cases:[115] once it has been ascertained that the client has consented to the agreement,[116] little or no discussion about services performed is necessary.[117] Underlying this omission is the inherent conclusion that the element of consent "goes right to the heart of one of the primary purposes of the rules regulating attorneys' conduct—assurance of fair treatment of the client."[118] Thus, with the consent of the client

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110. As a response to the argument that a lawyer will still be paid for doing no work, a lawyer who does no work will be liable in a malpractice action. *See* Informal Op. 85-1514, *supra* note 102.

111. See *supra* notes 31-40 and accompanying text for a discussion of the original intent behind the Canon and Code Rule.

112. *See supra* note 12.

113. *See supra* notes 106-11 and accompanying text.

114. *See* ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983).

115. *See* Webb, *supra* note 4, at 233; *see also* Belli v. Shaw, 98 Wash. 2d 569, 657 P.2d 315 (1983) (attorney could not recover fees based on "forwarding fee" arrangement with another attorney when no evidence showed that client had authorized and consented to such agreement, as required under ABA Code of Professional Responsibility).

116. "Without exception, clients assent to referrals to expert attorneys, so there is compliance with the . . . . rule." Halstrom, *supra* note 7, at 42; *see* Kuhn, Collins, & Rash v. Reynolds, 614 S.W.2d 854, 857-58 (Tex. Ct. App. 1963) (court determined that because client consented to fee division arrangement, conduct between two attorneys did not violate any rule, law or public policy).

117. *See* Webb, *supra* note 4, at 233; *see also* Graham v. Safir, 19 A.D.2d 600, 240 N.Y.S.2d 614 (1st Dep't 1963) (court granted payment of forwarding fee based on client's power to "ratify" such payment although fee not based on division of services and responsibility).

118. Webb, *supra* note 4, at 233.

to the fee arrangement, one can hardly argue that the attorneys are acting unethically.[119]

With regard to the reasonable fee requirement, it has been argued that even if the rule allowed fee-splitting based on a referral, the client would still be adversely affected because of an inevitable increase in the total fee.[120] The theory underlying this argument is basically that two lawyers are more costly than one.[121] To remedy this problem, the Model Rule provides the safeguard of a standard for a reasonable fee.[122] Thus, even if the other requirements of the rule are met, in the case of a clearly excessive fee, the division of fees would be improper. Furthermore, although no one has empirically studied this subject, proponents of this theory have yet to produce tangible evidence to show that referral fees increase the cost of legal services.[123] It seems more realistic to assume that fees charged to the client would be the same irrespective of whether the lawyer had paid a portion of the fee to his colleague.[124]

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119. The provision requiring client consent is so important to the ethical issue of the referral fee that some states have adopted even stiffer notice requirements than those in the Model Rule. At least two states, California and Illinois, allow fee splitting in a broader range of situations than do the Model Rules; but both states have stricter client notice requirements. *See The Right Choice,* 72 A.B.A. J. 79 (Oct. 1986).

120. *See* Weil v. Neary, 278 U.S. 160, 172 (1929); Palmer v. Breyfogle, 217 Kan. 128, 535 P.2d 955 (1975); McFarland v. George, 316 S.W.2d 662, 672 (Mo. Ct. App. 1958).

121. *See* Richardson, *supra* note 30, at 194; *see also* PATTERSON & CHEATHAM, *supra* note 96, at 276; Cady, *supra* note 30, at 236.

122. Model Rule 1.5(a) states:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service 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 charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing services; and
> (8) whether the fee is fixed or contingent.

ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1983).

123. *See* Richardson, *supra* note 30, at 194-95.

124. *Id.* (citing J. HANDLER, THE LAWYER AND HIS COMMUNITY 97-98 (1967)). Clients pay the same or almost the same amount. *See* Halstrom, *supra* note 7, at 42.

Moreover, under Model Rule 1.5(e) fewer attorneys will keep cases they are unqualified or barely qualified to handle. Because they will receive some type of compensation, the rule encourages small practitioners currently unable to refer matters to others without providing services to refer their clients to more specialized and more competent attorneys.[125] It has been suggested that under the Model Rule a referring attorney might have the incentive to refer a case, not to the most qualified attorney, but instead to that attorney who would pay the greatest fee.[126] The increased liability associated with the Model Rule,[127] however, will provide the incentive for attorneys to refer their clients to the person who will most competently handle the case.

In addition, only a lawyer who could actually do a better job at the same or lower cost as the referring attorney has any incentive to pay for referrals in the first place.[128] The second lawyer would not be able to offer a satisfactory fee to bid the work away from the referring attorney unless he could do so.[129] Alternatively, if DR 2-107 were completely abolished and all attorneys could remit a customary one-third fee to a referring attorney, no lawyer would be forced to choose between his economic benefit and the welfare of his client.[130] Moreover, referrals between lawyers in different firms would accomplish the common custom practiced among lawyers in the same firm, under which the lawyer who first attracted a client may refer the client to a colleague with a different specialty but still "get credit" for fees generated when firm income shares are allocated.[131]

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125. *See* FINAL REPORT, *supra* note 49, at 17. The Model Rule will not only aid the referring attorney but the specialized attorney as well. A lawyer, however specialized, is not able to publicize himself as a specialist under the Code. The referral thus provides a much needed service to the specialist. *See* Cady, *supra* note 30, at 238; *see also* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-14, DR 2-105 (1969). "Assistance based on a percentage division efforts encourages forwarder to retain the expert attorney as soon as possible." Halstrom, *supra* note 7, at 42; *see* McKay, *In Support Model Rules of Professional Conduct*, 26 VILL. L. REV. 1137, 1152-53 (1980-81); *see also supra* note 89.

126. *See* Aronson, *supra* note 3, at 65; *see also* Reilly v. Beekman, 24 F.2d 791, 794 (2d Cir. 1928); Linnick v. State Bar, 62 Cal. 2d 17, 21, 396 P.2d 33, 35, 41 Cal. Rptr. 1, 3 (1964) (per curiam); Richardson, *supra* note 30, at 195.

127. *See supra* notes 106-11 and accompanying text.

128. *See* McChesney, *Commercial Speech in the Professions: The Supreme Court's Unanswered Questions and Questionable Answers,* 134 U. PA. L. REV. 45, 70 n.132 (1985) [hereinafter McChesney].

129. *See id.*

130. *See* Richardson, *supra* note 30, at 196.

131. *See* McChesney, *supra* note 128, at 70 n.132. The Code expressly approves

Adoption of Model Rule 1.5(e) is wise not only for the reasons mentioned above but also for uniformity.[132] It is in the interest of not only the national bar but also the legal community as a whole that rules governing the conduct of lawyers be as consistent as possible in all jurisdictions.[133] As of the date of this publication, nineteen states have adopted Model Rule 1.5(e) with little or no modification.[134] In twelve, the rule is pending before state supreme courts.[135] New York, as a trend setter in the legal profession,[136] has set an example for the rest of the country. As one commentator has stated:

> Members of the New York Bar work with lawyers from all across the nation. Because New York practice has a national orientation, New York lawyers have an interest in substantial uniformity of the rules that govern that practice . . . . If New York votes to continue the Code, the prospect is that other states will divide between the Model Rules and the Code and there will not be even a semblance of uniformity. New York's leadership can be highly influential, not only in its adoption of the Model Rules, but, equally important, in the text of the provisions it adopts.[137]

Thus, New York's lead is yet another reason for advocating adoption of the Rule by other states.

V. Conclusion

State Bar Associations should favorably consider proposals to adopt section 1.5(e) of the Model Rules of Professional Conduct. The ABA adopted this rule because DR 2-107 of the Code of Professional Responsibility was unenforceable, unrealistic, and too rigid.[138] This premise is equally true for the legal communities in

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of the division of fees with a "partner in or associate of his law firm or law office." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107 (1969); *see In re* Agent Orange Product Liability Litigation, 611 F. Supp. 1452, 1458 (E.D.N.Y. 1985) ("[b]usiness realities of law practice often require that those who bring clients and capital to a law firm be better compensated than those whose talents lie in the area of preparing legal papers and arguments").

132. *See* Kutak, *supra* note 16, at 1023.

133. *See Bar Keeps Issue Open on Adoption of Model Rules*, N.Y.L.J., Feb. 4, 1985, at 6, col. 1 [hereinafter *State Bar*]. "Lawyers find the new rule appropriate and workable." Franck, *supra* note 101, at 44.

134. *See supra* note 18.

135. *See id.*

136. *See State Bar*, *supra* note 133, at 6, col. 1.

137. *See id.*

138. *See supra* notes 41-44 and accompanying text.

the fifty states. Lawyers constantly violate the rule,[139] and courts have either been unable to enforce it[140] or have been contradictory in their theoretical interpretation and practical application of it.[141] Model Rule 1.5(e) is stricter than Canon 34, but more flexible than DR 2-107.[142] In essence, the rule provides a happy medium between the two.[143]

No rule is protected from moral and ethical attack when confronted with the practical effects of its application. The recent support for Model Rule 1.5(e), however, demonstrates that the policies behind its adoption have a great deal of validity. It is not suggested that a bare referral fee paid for no work is proper. Rather, if the courts apply the rule as suggested in this Note, using the ABA's new definition of responsibility[144] and relying more on the provisions mandating client consent[145] and reasonable fees,[146] a more practical approach to referral fees will be effectuated and welcomed by all.

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139. *See supra* notes 47-54 and accompanying text.
140. *See supra* notes 55-91 and accompanying text.
141. *See id.*
142. *See supra* notes 45-46, 101-03 and accompanying text.
143 *See* Kutak, *supra* note 16, at 1023. The rule is a "reasonable way of encouraging competent representation while recognizing the realities of practice." *Id.*
144. *See supra* notes 104-10 and accompanying text.
145. *See supra* notes 115-19 and accompanying text.
146. *See supra* notes 122-23 and accompanying text.