

## Is Your Association Lawyer Splitting Fees?

### *What to Ask and What to Know*

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**P**icture this: The association you manage discovers construction defects affecting the association's property, and the association's corporate counsel has recommended that the board hire a law firm that specializes in construction defect litigation. However, unbeknownst to you, the association's corporate counsel has made a deal with the construction defect law firm to divide the law firm's legal fees, with 90% of the fee going to the construction defect law firm and 10% to the corporate counsel.

Is this legal? Is this right? If the association's counsel is receiving a referral fee in addition to receiving the fees for association legal services, is the association's corporate counsel being overpaid by the association? And, is the corporate counsel's judgment in recommending the law firm clouded by a conflict of interest because of his or her interest in receiving 10% of the attorneys' fees? These are all good questions, and they should be asked.

California attorneys must comply with the California Rules of Professional Conduct ("Rules"). Under the Rules, an attorney may divide a legal fee with another lawyer who may or may not actually perform work on the client's matter, but only with full written disclosure and written consent of the client. The client must be informed, in writing, of the fee division and the terms of the division. An attorney who fails to fully disclose the terms of a fee division to his or her client, or who fails to obtain the client's written consent, is subject to discipline by the California State Bar, and may also be exposed to civil liability for legal malpractice and breach of fiduciary duty.

The Rules also state that if fees are to be divided, the total fee charged to the client by all lawyers may not be increased solely because of the fee division. Further, the total fee charged may not be unconscionable. Also, note that a referral fee may not be paid to a nonlawyer for recommending an attorney.

The California Rules requiring full disclosure and written client consent to a fee-splitting arrangement make

good sense. The client ought to know how the fees paid to the attorney are being spent. Secret fee splitting arrangements raise concerns and are inherently suspect. For example, your board may ask whether the association has been referred to the best and most experienced attorney for the job, or simply to the attorney who has agreed to pay the referring attorney the largest referral fee. An attorney who recommends another attorney for a particular assignment in exchange for a percentage of the fee may be motivated by his or her own financial interests, and not by whether the recommended lawyer is right for the job.

An association might also be able to strike a better economic bargain if the board is informed of a proposed referral fee payment. The terms of almost every legal fee agreement are negotiable. When an attorney proposes that the client agree to divide a fee with another attorney who will actually do the work, the client should consider whether the association should receive some financial benefit.

In our example of a construction defect lawsuit, if the defect attorney proposes to pay a referral fee equal to 10% or more of the attorney's total legal fee to the association's corporate counsel, perhaps it would be appropriate for the board to ask that the percentage of the proposed referral fee be reduced, with the discount inuring to the association's benefit. Obviously, if the association's counsel neglects to advise the association of the division of fees, the association will not even have the opportunity to evaluate the reasonableness of the fee, and to consider whether the amount of the fee should be negotiated.

Whenever your association's lawyer recommends another lawyer, it would be wise to suggest that the board inquire whether there is a fee splitting or referral fee agreement between the attorneys. If there is such an agreement, the board should carefully scrutinize the terms and conditions of the fee agreements, and also consider whether other and possibly more qualified candidates have not been recommended (or have been passed over) simply because they did not offer the recommending attorney a referral fee or a split of the attorneys' fees.

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