

## Additional Proposal to Draft ER 1.5 Rule Change Petition

One subcommittee member proposes that in addition to the proposed ER 1.5(f) as outlined in the draft rule change petition, that the Committee add subsection 1.5(g) which would read:

(g) The payment of a referral fee by a receiving lawyer to a referring lawyer does not constitute a division of fees if:

- (1) the referral agreement is solely between the referring lawyer and the receiving lawyer;
- (2) the referral fee is based on the final allocation of attorney's fees to the receiving lawyer (after any fee disputes);
- (3) the agreement expressly states that the referring lawyer does not have an interest in the fee amount until the matter is concluded and the final attorney's fees allocation is determined; and
- (4) the receiving attorney's total fee is not increased solely by reason of the agreement to pay a referral fee.

This subcommittee member provided the following justification:

I think the Rule petition looks good. I would like add language to this version or (if the two of you do not agree with the addition) provide an alternative version for the Committee to consider that removes a referral agreement that complies with certain conditions from being considered as a "division of fees." I think the current language would still be problematic for a referring lawyer that has a conflict of interest and because a lawyer cannot accept a fee that is unreasonable (considering the referring lawyer's only contribution is referring the client).

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I think that these conditions mitigate the policy concerns requiring consent. It would also simplify the arrangement whereas the referring lawyer can collect a fee even if he or she otherwise has a conflict of interest.

Of the other two subcommittee members, one disagreed with adding this language as an additional subsection to ER 1.5 and believes this information and explanation would be more appropriate for an explanatory comment to ER 1.5. The other subcommittee member did not express an opinion either way.