August 1, 2013

The Perils of Outside Referrals by Lawyers

Barry R. Temkin, Mound Cotton Wollan & Greengrass
Robert J. Usinger

Available at: https://works.bepress.com/barry_temkin/38/
THE PERILS OF OUTSIDE REFERRALS BY LAWYERS

Robert J. Usinger & Barry R. Temkin*

Most lawyers have occasion to refer cases to unaffiliated lawyers at other law firms. In fact, professional ethics rules require lawyers to avoid handling matters for which they lack the professional competence and experience. As a consequence, referring attorneys should consider whether they have a duty to conduct due diligence on or investigate the credentials, background, moral character and competence of the attorney selected to assist the prospective client. In other words, can an attorney be found liable for malpractice for negligently referring a matter to another attorney outside the referring attorney's firm? While lawyers who refer cases out to other lawyers often stay active in the handling of the case, frequently the actual work is done by the counsel to whom the file is referred, sometimes referred to as the working attorney.

Lawyers may have a duty to investigate the working attorney to whom they refer a client, and may have joint responsibility for the conduct of the working attorney even after the referral. Three are three general paradigms for referrals: 1) the referring attorney recommends a working attorney to do all the legal work and will not receive a fee; 2) the lawyer will receive a fee, but will not be doing any of the work; and 3) the referring attorney will continue to work on the file along with the working attorney. Each of these presents different risks for the referring attorney. Those risks make it critical for a referring attorney to conduct due diligence on the working attorney.

Generally, a referring attorney who receives no fee and does no work on the file does not

* Robert J. Usinger is a Claims Director at Everest National Insurance Company, where he focuses on professional liability claims. Barry R. Temkin is a partner at Mound Cotton Wollan & Greengrass in New York and Chair of the Professional Ethics Committee of the New York County Lawyers’ Association. The opinions expressed in this article are those of the authors only, and do not reflect the views of NYCLA, Mound Cotton or Everest National Insurance Company.
guarantee the performance of the working attorney, and therefore cannot be held liable for the latter's malpractice. However, according to the courts, a referring attorney must exercise "due care" when making a referral.

Of course, for a referring attorney to be liable for negligent referral, there must be an attorney-client relationship. Only an actual client of the attorney can bring an action for legal malpractice against that attorney, even though there may be other grounds for liability against the attorney by a non-client.2 Unfortunately for practitioners, there is no bright-line definition of what constitutes an attorney-client relationship.

Although the courts have found the existence of a formal retainer agreement sufficient to establish the attorney-client relationship, the existence of a relationship is not dependent on an engagement agreement or the payment of a fee to the attorney for legal services. It should be noted, however, that the absence of any engagement agreement or payment, though not determinative, may be an indicator that an attorney-client relationship was never intended.3

The courts generally hold that it is the act of directly rendering legal advice, services or assistance that gives rise to an attorney-client relationship. This results in a totality of the circumstances approach that takes into account such factors as the presence of a retainer agreement, the payment of attorneys’ fees, the plain language and scope of any agreement executed between the lawyer and the prospective client, and any representations explicitly made by the attorney to the prospective client. For example, in \textit{Togstad v. Vesley, Otto, Miller & Keefe}, the Minnesota Supreme Court upheld a legal malpractice verdict against an attorney who never entered into a written letter of engagement with or accepted a fee from a medical malpractice client.4 Rather, the attorney merely voiced his opinion, which turned out to be disastrously mistaken, in a meeting with the prospective client, that he didn’t think she had much of a medical
malpractice case, and that he would discuss the case and get back to her. Unfortunately for the lawyer in that case, the client understood the lawyer to be advising her that she had no case, advice that she subsequently learned, after the statute of limitations expired, to be woefully incorrect. A jury award in favor of the erstwhile client was upheld.

Referring counsel should not be accountable for knowledge of non-public information about working counsel. However, if the referring lawyer is aware of any evidence of unprofessional conduct by working counsel, referring counsel must undertake further investigation and alert the client. For example, a New York lawyer made an ill-fated referral of a negligence case to a New Jersey colleague in *Tormo v. Yormark.* While the referring attorney described his New Jersey friend as “a good, well-qualified attorney,” he was unaware that prospective working counsel was under indictment in New Jersey for fraud. When New Jersey counsel absconded with the client’s funds, the client successfully sued the referring attorney for negligence. The court determined that there were sufficient red flags about receiving counsel’s ethics—including evidence of solicitation—to put referring counsel on notice of a need for further inquiry.

In the internet age, public data about attorneys is more readily available, and might be found to trigger a duty further to investigate the credentials of working counsel. The duty to investigate is likely to depend, like so much in the law, on the facts. For example, a court is more likely to find a duty to investigate a first-time referral than in the case of a longstanding relationship where the attorneys knew each other over the course of many years. An interesting analogy can be made from a recent reported decision which suggested that, in some circumstances, a lawyer may have a professional obligation to perform an internet search on prospective jurors. In that case the court chided an attorney for failing to perform internet
research on the venire. It seems likely that a lawyer who fails to detect prominent negative news stories about working counsel prior to making a referral may receive a similarly chilly judicial reception in the event of a subsequent legal malpractice suit.

Once the working attorney has taken on representation of the client, the referring attorney who is not performing any work or receiving a fee generally has no duty, absent agreement otherwise, to monitor or supervise the work of the working attorney. The courts have largely defined the supervisory duties of referring counsel in the negative. For example, simply receiving, forwarding or monitoring e-mails and correspondence from working counsel does not, without more, give rise to a professional liability claim against the referring attorney. A New York court, in *CVC Capital Corp. v. Weil Gotshal and Manges*, declined to impose liability on a New York law firm for an alleged failure to supervise bankruptcy work performed in Puerto Rico by local counsel situated there. According to the court in that case: “Even if sufficient evidence existed to demonstrate defendants owed a duty to supervise the Puerto Rico-based counsel, no independent duty exited to independently verify factual reports made by those attorneys concerning the timeliness of pleadings filed, their court appearances, and representations made concerning the actions of a bankruptcy trustee . . .” Although reviewing correspondence and memoranda from working counsel will not give rise to liability, referring counsel should take affirmative steps to clearly communicate to the client the scope of referring counsel’s representation and supervisory authority over working counsel. Referring counsel should also use reasonable diligence to investigate any known irregularities or obvious questionable conduct on the part of the working counsel that could cast doubt on her competence or professionalism.

The rules of ethics applicable in each state set forth the rights and responsibilities of
counsel who split fees with another lawyer in another firm. The sharing of fees among lawyers must comply with the Rules of Professional Conduct, and, if not handled appropriately, could result in professional liability as well as discipline.

The American Bar Association Model Rules of Professional Conduct specifically regulate fee sharing among counsel who are not affiliated, either as partners or counsel, in a law firm. According to ABA Model Rule 1.5 (e):

(e) 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.¹⁰

Several authorities have opined that lawyers who share contingent fees in handling personal injury litigation may be responsible for each other’s negligence in handling the case. For example, in Norris v. Silver, a Florida court upheld a legal malpractice claim against a Florida attorney who referred a case to out of state counsel, who proceeded to miss the statute of limitations.¹¹ Although (and perhaps because) there was no written agreement between the two lawyers allocating fees, the court held that the fee-sharing in Norris gave rise to liability for the Florida attorney for the out-of-state lawyer’s negligence. And in Reed v. Finkelstein Levine Gittelsohn & Tetenbaum, a New York court upheld a legal malpractice claim against a law firm that referred a medical malpractice claim to another firm, which failed to timely file a notice of claim on behalf of a brain-damaged infant.¹² Although there was no written fee-sharing agreement between the two firms, the court held that a pattern of fee-sharing between the referring
and working firms created potential liability for each other’s negligence in the handling of the case.

A 1996 bar association ethics opinion interpreted the former New York Code of Professional Responsibility—the predecessor to the current Rules of Professional Conduct—as permitting fee sharing among unaffiliated attorneys, provided that they share in ethical and civil liability for any misconduct or malpractice. According to NYCLA Ethics Opinion 715, although referring counsel has no obligation to supervise the work of a specialist to whom a legal matter is referred, the former should be prepared to indemnify a client for working counsel’s malpractice, because joint ethical responsibility is synonymous with joint and several liability.¹³

Division of fees among non-associated lawyers should comply with the Rules of Professional Conduct for the given jurisdiction, such as informing the client in writing of the fee allocation and assuring that the total fee is reasonable. But these ethical and professional liability principles also suggest some common sense procedures to prevent exposure to the referring attorney. Prior to referring a case, an attorney should undertake some basic investigation. First, referring counsel should confirm that the working attorney is admitted to practice and in good standing with the bar of the jurisdiction at issue. This can be done in most jurisdictions by a simple search of the jurisdiction’s state bar website to verify that the attorney is admitted and current in admission to that state’s bar. Second, verify that the working attorney has adequate errors and omissions insurance by requesting a copy of her insurance declarations page or a certification of insurance. This decreases the likelihood of the referring attorney’s being pulled into a malpractice action against the working attorney, who may not have resources to pay any settlement or judgment. A basic Google search of working counsel should reveal any red flags requiring further investigation. Networking sites, such as LinkedIn, can also provide a wealth of
information on a prospective working attorney, as they often contain entire resumes as well as publications, references, and links to decisions the attorney was involved in. Informal inquiries of other attorneys or judges about the reputation and history of a prospective working attorney provide yet another source for referring attorneys to verify the qualifications and reputation of a prospective working attorney. These basic suggestions can help reduce the risk involved in a referral to another law firm.

1 See, American Bar Association (ABA) Model Rules of Professional Conduct, RPC 1.1; New York Rule of Professional Conduct 1.1 (b).
3 See, Leon v. Martinez, 84 N.Y. 2d 83 (1994).
4 291 N.W.2d 686 (1980).
6 398 F. Supp. at 1166.
7 See Johnson v. McCullough, 306 S.W. 3rd 551 (Mo. 2010).
8 192 A.D.2d 324, 595 N.Y.S.2d 458 (1st Dept. 1993)
9 595 N.Y.S. 2d at 548.
10 ABA Model Rule 1.5.
11 Norris v. Silver, 701 So. 2nd 1238 (FL 1997)
12 304 A.D. 2d 329, 756 N.Y.S. 2d 577 (1st Dept. 2003)