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Professional Errors and Omissions

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The authors of this article are Ken Breitbeil and Richard Wilson, both of whom are shareholders of McFall, Sherwood & Breitbeil, P.C. Their firm specializes in all aspects of civil litigation, with a particular focus on fiduciary duty and professional liability. McFall, Sherwood & Breitbeil is located in Houston, Texas (www.mcfall-law.com).

The IADC

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Legal Malpractice Risks from Referral Arrangements

By Kenneth R. Breitbeil and Richard Wilson

In the search for deep pockets in legal malpractice litigation, plaintiffs' lawyers will sometimes cast blame on a non-handling attorney for negligently referring the underlying case to an incapable handling lawyer. If your client is the referring lawyer and his/her response is "how can I be sued for negligence, I didn't do anything" you might want to read this article.

A common practice among attorneys is the referral of matters outside of one's area of expertise to other attorneys that hold themselves out as possessing the requisite expertise. Referrals and associated "referral fees" are common in litigation, but referrals also take place in commercial business transactions where the necessary service or advice is outside of one's specialization. Referring lawyers should be aware of their continuing responsibility to the client, and the malpractice risks in selecting an attorney to whom the matter is referred and in continuing to work for or communicate with the client on the referred matter.

General Legal Rules Address Professional Obligations for Referred Matters

Many arrangements fall within the description of a referral. Referrals may occur where one attorney sends a matter to another attorney and takes no responsibility or fee for the referred matter, or, in the more common circumstance, where one attorney refers a matter to another attorney, but retains some degree of responsibility for the matter and shares in the fee.

Both the Model Rules of Professional Conduct, propounded by the American Bar Association, and the Restatement (Third) of the Law Governing Lawyers provide some guidance for referrals. Model Rule 1.5 concerns the division of fees between lawyers from different firms:

> 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.[1]

The Model Rule provides two manners in which an attorney may share fees on a referred matter: (1) a proportionate fee based on the work done, or (2) a fee based on an assumption of joint responsibility by the lawyers. As the Rule explains, "[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."[2] A majority of jurisdictions adopting some form of the Model Rule require that the fee split bear a reasonable correlation to the amount or value of the services rendered by the attorneys.[3] The apparent minority view provides that an agreement between attorneys dividing a fee is valid and is enforceable under the terms of the agreement as long as the attorney who seeks his share of the fee contributed *some* work, labor or service toward the earning of the fee.[4] Under either view, the straight referral fee appears to be a thing of the past. For a fee to be permissible under the rules of professional responsibility, a referring attorney must continue to work on the referred matter or accept joint responsibility for the referred matter.

Model Rule 5.1 touches upon the responsibility of attorneys for the work of another in a referral arrangement as well. Specifically, Rule 5.1 provides that a referring lawyer shall be responsible for another lawyer's violation of the Rules if the referring lawyer orders or, with knowledge of the specific conduct, ratifies the conduct.[5] This Rule is a broad Rule that may also be applied to referrals where responsibility for the matter is shared, and both attorneys have full disclosure of the actions being taken.

The Restatement (Third) of the Law Governing Lawyers follows the Model Rule with respect to fee splitting arrangements between lawyers in different firms.[6] The key difference between the Restatement and the Model Rules is in their intended application. The Model Rules recognize an intention to be used solely for enforcing issues of professional responsibility, and provide, "Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules."[7] The Restatement, on the other hand, in commenting on the responsibility assumed by lawyers where they assume joint responsibility, reads, "[e]ach lawyer can be held liable in a malpractice suit and before disciplinary authorities for the others' acts to the same extent as could partners in the same traditional partnership participating in the representation . . . Such assumption of responsibility discourages lawyers from referring clients to careless lawyers in return for a large share of the fee."[8] From a practical standpoint, courts often permit attorneys to refer to their state's professional responsibility rules for guidance in the malpractice context. So, both the Restatement and the rules of professional responsibility may be employed to determine the duties of a referring attorney in a malpractice context.

Lawyer Liability for Negligent Referrals

A referring attorney has a duty, when referring a matter to another attorney for handling, to exercise care in retaining the other attorney in order to ensure that the new lawyer handling the matter is competent and trustworthy.[9] In the ordinary referral arrangement, the referring attorney brings the client into contact with persons whom the client does not know, and the client consents, often, based on the assurances of the referring attorney.[10] Under such a circumstance, the referring attorney, under general principles of agency law, *assumes a duty* to select other competent agents to handle those matters for the principal that were originally entrusted to him.[11] The question, from a malpractice standpoint, is whether, at the time the referring attorney referred the matter to another attorney for handling, he had or should have had knowledge about the other attorney that would have kept a reasonable lawyer from referring the matter to the other lawyer.[12] This basis for responsibility does not appear to depend upon the referring lawyer retaining any control of the matter or financial interest in the matter after its referral. Rather, the referral itself is the negligent act that gives rise to the client's damage. This standard would apply to a circumstance where the handling attorney is not competent by experience, expertise or ability to handle the assigned matter, rather than a circumstance where the handling attorney is competent but misses a deadline or commits some other discreet act or omission.

Referring Attorneys May Also Have Vicarious Liability for the Acts of the Other Attorney

As explained previously, the most common referral involves contingent fees where the division is between a referring lawyer and a trial specialist.[13] Further, the fees retained by the referring lawyer must be proportionate to services performed.[14] Thus, a referring attorney should retain some control over the handling of a matter after its referral to a specialist if he expects to receive a fee. In doing so, the referring attorney assumes responsibility for those actions within his control, and may also assume vicarious liability for the acts of the other attorney to whom the case is referred.

Where fees and responsibility are shared by a referring attorney and the other attorney, courts focus on the delegation of responsibility between the attorneys with a particular focus on the alleged act or omissions that caused the client's loss. Thus, where the referring attorney has referred a case to another attorney and retained control over some functions, such as the timely filing of a lawsuit, the referring attorney will be found liable if the lawsuit is filed in an untimely fashion.[15] In determining what duties a referring attorney may owe to the client, a court will look at the facts of the referral and the referring attorney's continuing involvement in the matter in question.[16] Those facts include the manner of payment, the sharing of profits and losses from the matter, and the right to control the matter.[17]

If the referring attorney retains joint responsibility for a matter that is referred to another attorney, or is less than clear with respect to what responsibilities are being retained, the referring attorney may have vicarious liability for the acts and omissions of the other attorney to whom the case is referred.[18] Generally, an attorney can be liable for the negligent acts of a second attorney where they agree to share the work or divide a fee.[19] Beyond the general proposition, a court will focus on the facts and the *objective right to control* rather than the subjective acts of control exercised by the referring attorney.[20] If the referring attorney is sharing fees equally, and there are no other specifics to the relationship, the referring attorney will be jointly and severally liable.[21] If the referring attorney has a right to control the referred matter, the referring attorney may be jointly and severally liable even if he did not exercise that right.[22] If a referring attorney wants

to limit one's joint and several liability for the acts of a specialist to whom the case is referred, the manner in which the referring attorney may do so is by clearly dividing the responsibility for the legal representation of a client in an agreement with the client.[23]

Conclusion

Referring legal matters to another attorney is a necessary component of providing clients with the best legal representation available. In referring cases, an attorney must exercise reasonable care in selecting the other attorney who will represent one's client. Further, if the referring attorney retains some percentage of the fees to be earned from the referred matter, the referring attorney may also be accepting liability for the negligence of the attorney to whom the case is referred. In order to keep from becoming responsible for the acts of another attorney to whom a case is referred, and attorney must clearly set out the limits of his responsibilities for the referred matter in an agreement with the client, and must follow those limits in his continuing involvement in the referred matter.

1. American Bar Association Model Rules of Professional Responsibility Rule 1.5 (e)
2. American Bar Association Model Rules of Professional Responsibility Rule 1.5, Comment 7.
3. *See In re Potts*, 718 P.2d 1363, 1369 (Or. 1986)(explaining, under Oregon's Rules, that any fee split be proportionate to services rendered and responsibility assumed).
4. *Oberman v. Reilly*, 66 A.D.2d 686, 687, 411 N.Y.S.2d 23, 25 (N.Y. App. Div. 1978)(emphasis added).
5. American Bar Association Model Rules of Professional Responsibility Rule 5.1(c)(1).
6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 (2000).[1]
7. American Bar Association Model Rules of Professional Responsibility Rule 5.1, Comment 7.
8. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47, Comment d (2000).
9. *Tormo v. Yormark*, 398 F.Supp. 1159, 1170 (D.N.J. 1975).
10. *Id*.
11. *Id*. This legal principle for attorneys is similar to negligent hiring or negligent entrustment, wherein the principal/employer has a duty not to place others at risk by making unreasonable decisions in hiring employees or entrusting the operation of a vehicle to another person.
12. *Tormo v. Yormark*, 398 F.Supp. at 1171.
13. American Bar Association Model Rules of Professional Responsibility Rule 1.5, Comment 7.
14. American Bar Association Model Rules of Professional Responsibility Rule 1.5(e).
15. *Armor v. Lantz*, 535 S.E.2d 737, 745 (W.V. 2000); *Scott v. Francis*, 786 P.2d 1269, 1272 (Or. 1990).
16. *Boskoff v. Yano*, 57 F.Supp.2d 994, 1000 (D. Haw. 1998).
17. *Armor v. Lantz*, 535 S.E.2d 737, 745 (W.V. 2000).
18. *Duggins v. Guardianship of Washington*, 632 So.2d 420, 426 (Miss. 1994).
19. *Rieger v. Jacque*, 584 N.W.2d 247, 252 (Iowa 1998).
20. *See Duggins v. Guardianship of Washington*, 632 So.2d at 429 (focusing on the referring attorney's inaction in investigating the acts of the specialist and his ability to handle aspects of the case in imposing joint and several liability). *See also, McKernan v. DuPont*, 968 P.2d 623, 628 (Ariz. Ct. App. 1998)(focusing on the ability of the referring attorney to control a matter, outside of a malpractice context, in sustaining the dismissal of a case). Focusing on the objective right to control a matter appears to follow the responsibilities set forth in Model Rule 5.1, where an attorney may be responsible for the conduct of another attorney if he has knowledge of the conduct and ratifies it.
21. *Duggins v. Guardianship of Washington*, 632 So.2d at 426.
22. *Id. See also, McKernan v. DuPont*, 968 P.2d 623, 628 (Ariz. Ct. App. 1998)
23. *Duggins v. Guardianship of Washington*, 632 So.2d at 426.