I suggest the following simple ten ways to avoid malpractice in litigation:

Professional Liability
September 2014

In this issue
This month’s Newsletter examines a lawyer’s potential liability for referring client matters to other law firms, as well as how malpractice defense attorneys may want to defend a lawyer client who is sued as a result of a referral.

Defending the Outside Referral Case

About the Author
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About the Committee
The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact

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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

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“I can’t believe they are trying to pin this on me when I didn’t do anything wrong!” your lawyer client exclaims when you meet with him or her for the first time. Your client is rightly upset, having referred a matter to another lawyer who allegedly committed malpractice in pursuing the case. Unfortunately, while your client may not have been the one who messed up, he or she could still be on the hook for some or even all of the damages suffered by the plaintiff, who is now suing over the malpractice.

It’s not uncommon or unethical for lawyers to refer potential clients to attorneys at other firms if the client matter is outside of their practice experience or they are simply too busy to handle the matter themselves. These referrals generally take one of three forms: 1) the referring attorney recommends another lawyer and does not retain any interest in the matter, financial or otherwise; 2) the referring lawyer will not do any work on the matter but will receive a referral fee once the matter is concluded; or 3) the referring attorney continues to work on the file along with the referred lawyer, albeit in a more limited capacity. The referring attorney’s potential liability for malpractice committed by the working attorney will depend in large part on which one of these scenarios applies.

Continuing interest

Few jurisdictions currently recognize a cause of action for negligent referral – where a lawyer simply refers a matter to another lawyer without more – but that doesn’t mean that it won’t gain wider acceptance, particularly if courts are given the right set of facts. Malpractice defense attorneys say that to prove such a claim against a referring lawyer, the plaintiff would need to show that the referring attorney knew or should have known that the referred lawyer was incompetent or incapable of properly handling the case.

“It’s got to be foreseeable,” said Dennis Quinn, who handles legal malpractice claims in Virginia, Maryland and the District of Columbia. If the referred attorney has a known reputation as being sloppy, missing deadlines and had been disciplined by bar counsel, then that might be a negligent referral. But if the referral is to a good lawyer who simply makes a mistake, there is no liability, he said.

Denver, Colo., attorney Daniel McCune agreed. “There would have to be outrageous facts,” he said, adding that referring attorneys generally do not have a duty to non-clients where they have no continuing involvement in the case.

The way attorneys get into trouble is by agreeing to remain involved in or responsible for the client matter, or by maintaining an interest in the case, usually financial. The rules of professional conduct in each state set forth the responsibilities of lawyers who accept referral fees or share in fees earned by another firm. American Bar Association Model Rule 1.5(e) states that 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.

While some states have adopted the model rule outright and others have approved an
altered version of the rule, for a referral fee to be permissible in most jurisdictions, the referring attorney must continue to work on the matter or agree to be jointly responsible for the representation, which ultimately will include liability for errors made by the referred lawyer.

“If there is a fee-sharing agreement and it’s not based on the work each is doing, both lawyers have to agree to be jointly responsible to the client,” said Baltimore, Md., malpractice attorney Alvin Frederick. “If there is no fee agreement, but the lawyers have agreed to [a referral fee] for the referring attorney … you’d be putting the referring attorney at risk ethically to argue against liability.”

In states that don’t require lawyers to be jointly responsible for accepting a referral fee, the facts and circumstances surrounding the referral will be closely examined to determine if the referring attorney is liable for the erring attorney’s acts. In Pennsylvania, for example, the ethical rules only require that the client be advised of and not object to the referral arrangement and that the total fee of the lawyers not be illegal or clearly excessive.

Philadelphia defense attorney Matthew Marrone said that it’s common practice in Pennsylvania for lawyers to refer cases to other lawyers and expect to be compensated once the case is completed, even though there is no writing to that effect. Whether the referring attorney will be liable for an error by the referred lawyer will depend on the facts of the case rather than on whether the referring attorney simply maintained a financial interest in the outcome of the matter, he said.

A court would look at whether the referring attorney stayed involved in the case, maintained contact with the client or entered an appearance as co-counsel, Marrone explained. If so, then it may be tough for the referring attorney to argue he or she has no liability to the client, he said.

Malpractice defense attorneys say that the client’s belief that both lawyers were representing him or her is another important consideration in whether liability will attach to both lawyers when only one makes the error.

“The client’s perception does matter,” said Marrone, “especially if it’s supported by documentation.”

A unified front

In most cases, the referring lawyer is sued alongside the erring lawyer, particularly where the client viewed both as their lawyer. Representing the referring lawyer in this situation can be tricky.

At the time the suit is served, the non-erring lawyer has none of the relevant documents or information and is most likely unable to confirm or deny the alleged malpractice, said Chicago defense attorney Kimberly Blair. The lack of information makes the referring lawyer dependent on the erring lawyer’s attorney, if he or she has one, to set forth the defenses and make the primary arguments against the claimed malpractice, she explained.

The referring attorney also often has no idea what the working attorney will testify to or whether he or she will be a good witness,
Blair continued. “Hopefully the lawyer for the erring attorney will work with you, but that’s not a guarantee,” she said.

Malpractice attorneys say that the best strategy in this situation is to put on a unified front from the beginning.

“You need to jump in bed with the error-making lawyer to keep the numbers down as best you can,” said Frederick. “To point the finger is to explode the damages.”

Cleveland, Ohio, defense attorney Alan Petrov agreed. “The conventional wisdom, and I agree with it, is that the best thing for the plaintiff’s case is to have defendants shooting at each other,” he said. “The two lawyers should cooperate to the extent possible to minimize the plaintiff’s claim.”

Mark Laughlin, who handles professional liability claims in Omaha, Neb., said that it’s tough to go in front of a jury and argue that the plaintiff’s case has no merit or she has no damages, but then also claim that if she does, it’s the other lawyer’s fault. “I wouldn’t want to make that argument,” he said.

The existence or non-existence of liability insurance may also play in to the defense strategy for the referring lawyer. If the erring lawyer has no insurance and is judgment proof, he or she may have little incentive to adequately defend the malpractice claim, thereby putting the non-erring attorney at risk.

Blair said that the attorney for the non-erring lawyer may want to “take the laboring oar” in that situation out of concern that the erring attorney could prejudice the defense.

Minneapolis defense attorney Richard Thomas agreed. If the referring lawyer has insurance but the erring lawyer does not, it might be worth it for the carrier to get a conflict waiver and provide the erring lawyer with a courtesy defense so he or she is not out there “flopping in the wind,” he said.

**Contribution claims**

While both lawyers will likely be held jointly liable to the client for the referred attorney’s error, the non-erring lawyer does have recourse in the form of a contribution or indemnification claim. Defense attorneys say that because it is so important to present a unified front to the jury, however, it’s generally best to wait to seek contribution or indemnification from the erring lawyer until after the malpractice action is completed.

“If [the lawyers] are fighting with each other, the plaintiff will sit back and let the cash register ring,” said Thomas.

If the statute of limitations in a particular jurisdiction makes it necessary to file the contribution or indemnification claim while the malpractice action is pending, defense lawyers suggest the parties sign a tolling agreement that allows the referring attorney to put off initiating a contribution action until the underlying claim is resolved.

Another option is to bring the contribution claim right away, but settle it privately rather than in a forum where the malpractice plaintiff will benefit from it.

Laughlin said he has had some success in these situations by working out an allocation of liability between the attorneys before the malpractice case is resolved. The erring attorney may agree to pay 90% of the judgment while the non-erring attorney agrees to pay 10%, he said. If an agreement on allocation can’t be arranged, Laughlin
advised deferring the contribution action until after the malpractice claim is litigated. In his experience, the contribution claim is then mediated and settled prior to being tried.

Admittedly, resolution of the contribution claim can be challenging as well.

Blair pointed out that often the non-erring attorney doesn’t want to pay out anything for what he or she views strictly as the erring attorney’s malpractice. Getting the non-erring attorney to accept even a portion of the fault can be tough, she said.

Unfortunately, there are times where the referring lawyer is left with no choice but to go in front of a jury and attempt to place all, or at least most, of the blame on the referred lawyer, either because the referred lawyer won’t agree to toll the statute of limitations on a contribution claim or the parties are unable to work out an allocation of fault on their own.

“[In that case], fight like hell to show the error was committed by the other attorney,” said McCune. “Divorce your client from any supervisory authority over the erring lawyer and argue that your client was not the erring lawyer’s guarantor,” he said.

**Risk avoidance**

Despite the potential for liability, it’s unlikely that lawyers are going to stop making referrals or accepting referral fees. In fact, many lawyers view the referral of client matters as part of the practice of law. But lawyers do need to appreciate the risks inherent in making those referrals. To minimize the risk of liability, malpractice defense attorneys should advise their lawyer clients to:

- Ensure that the referred lawyer is competent in the subject area of the matter being referred and has the time and staff necessary to handle the case;
- Confirm that the referred lawyer is admitted to practice in the state and is in good standing with the bar;
- Verify that the referred lawyer carries adequate professional liability insurance for the size of the matter being referred; and
- Monitor critical dates and ensure that work is completed on time, particularly if a referral fee is expected.

Taking these steps every time a referral is contemplated or made may seem onerous, but it will significantly reduce the referring lawyer’s exposure to a malpractice claim based on another lawyer’s error. It is time well spent.
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