NEGligent Attorney Referrals: Finding Trouble in the Mistakes of Others

You are rightly upset, having referred a matter to another lawyer who allegedly committed malpractice in pursuing the case. Unfortunately, while you may not have been the one whose work has damaged the client’s case, you could still be on the hook for some, or even all of the damages suffered by the plaintiff if he or she sues 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.

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 at-

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torney … 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.”

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, attorneys should:

• 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. •
SOME THINGS TO CONSIDER WHEN PLANNING ESTATES

Alice M. Sherren – Claim Attorney

While some lawyers love the excitement of litigation and trials, most estate planning attorneys are perfectly happy to remain far away from a courtroom. However, litigation among beneficiaries as estates are probated is increasing, and malpractice claims against estate planning attorneys are on the rise. This article raises some talking points to help you minimize your exposure to the courtroom in your estate planning practice. Take a few moments to think about the issues raised in the italicized hypotheticals, and incorporate the ideas discussed throughout the article, to reduce your malpractice risk.

“It is important to communicate what you are agreeing to advise a client on and what you are not.”

Communication

You have done corporate work for Joe for several decades, and now he has asked you to help him out as he administers his father’s estate. You go over his role as personal representative, including mentioning that the estate will need to file federal and state tax returns. Since you have never done tax work for Joe before, you don’t intend to start now. You just wanted to make him aware that he needs to file taxes on behalf of his father’s estate. Some time later Joe calls to ask you why the IRS is saying the estate didn’t meet its tax filing obligations — didn’t you do what you said you would do?

It is important to communicate what you are agreeing to advise a client on and what you are not. For example, if your client is the personal representative of an estate, you might agree to provide advice concerning administration of the estate, probate of the will, preparation of court inventories and accountings, distribution of estate assets (including when, how much and to whom), and publication of notice to creditors. However, there are likely limits to your expertise and the scope of your advice. Be clear about the boundaries of your representation. For example, (if it applies) make it clear that you are not an investment advisor and cannot provide direction on how the personal representative should invest estate assets. Get this understanding in writing, preferably in a document signed by the client.

Clearly delineate who will do what. Set forth, in writing, exactly which tasks you are agreeing to complete and which you are not agreeing to complete. In the hypothetical above, the engagement letter could have resolved all ambiguity by including a statement such as this: “The law firm is not responsible for preparing or filing estate tax returns and we are not responsible for any deadlines associated with the filing of such returns or the payment of any estate taxes. You should immediately retain a qualified tax professional to handle these matters.”

Some questions to address before you begin representation include:
- Has the client determined how he wants his estate to be planned and merely retained you to draft documents reflecting his intent?
- Has the client retained you to advise him on how best to plan his estate?
- Are you competent to provide advice concerning investments or tax analysis?
- Have you been retained to file estate taxes?
- Have you been retained to fund and/or monitor a trust or merely to draft the trust documents?
- If representing a couple, have you explained how conflicts might arise and what will happen if they do?

Gathering Information

An elderly woman who was never married and has no children comes to you asking that you prepare her will. She tells you she doesn’t have much in savings, but regardless her will should be simple because she wants to leave everything to her only nephew. You drafted a simple will and considered your work done. However, after her death you find that her “minimal savings” are actually worth almost $10 million… and you didn’t do any tax planning for the estate, resulting in a significant hit to the nephew’s actual inheritance.

It is impossible to give appropriate advice when you only have some of the information, and this is even more apparent in estate planning. It is essential that you gather all of the information necessary to properly advise your clients on how best to plan their estate. It is good practice to have clients fill out a form asking for information about all possible assets and debts, and describing various familial relationships. Get copies of important documents like deeds, beneficiary designations, and documents showing ownership of accounts. Be sure you understand whether your client owns an asset outright or rather as a tenant in common or some other shared interest.

Your clients should understand the consequences of specifically designating an asset to go to an individual as opposed to designating a certain percentage of the estate for that individual. If the client no longer owns an asset upon death, or if the values of various assets have changed significantly, there could be un-
intended and disproportionate distributions that could result in a malpractice claim.

While it can be awkward, it is important to have the “hard discussions” with your clients. Address family dynamics, especially if the estate plan is unequal toward similarly related beneficiaries. Discuss how stepchildren factor into estate plans, and be sure to plan for contingencies depending on which spouse predeceases the other. Be sure to fully understand and document all discussions and decisions to disinherit a natural beneficiary, or to provide significant assets to a charity or non-family member.

Determining Competency and Avoiding Undue Influence

Your client has three children, but has been estranged from two of them after a major disagreement ten years ago. He asks you to prepare an estate plan that specifically disinherits the two estranged children and leaves his entire estate to the other. After you have begun drafting the documents but before they are fully executed, your client has a stroke and his doctors say he is no longer competent to make decisions and has less than a month to live. What do you do?

While you cannot prevent disgruntled disinherited heirs from being angry or even from filing suit against the estate, you can take steps to protect your own interests. When documenting the file, it is not enough to simply state what decision was made by your client. Be sure to fully document the questions asked (by you and by your client or anyone else present), summarize the discussions, information and advice given, and indicate all reasons behind decisions made and choices rejected. Having the client sign a summary of what was discussed and decided can go a long way toward proving intent after the client can no longer testify due to incapacity or death.

Technological advances make it relatively easy to conduct business without ever being in the same room. Avoid this temptation when preparing estate planning documents. It is imperative that you meet with your clients face to face, especially if there could be any allegation of undue influence or lack of capacity. Be sure to fully document the file, and consider having another lawyer or staff member present to summarize each meeting. It is good practice to fully investigate issues of mental capacity, and even obtain a doctor’s evaluation and opinion before preparing an estate plan. Pay special attention to concerns about mental capacity or undue influence if a natural beneficiary is being disinherited, or if a non-family member is to receive a large percentage of the estate.

Undue influence can refer to a beneficiary putting pressure on the testator, but it can also relate to a beneficiary pressuring the lawyer. Be careful not to succumb to pressure to administer an estate too quickly. Beneficiaries may pressure you to distribute funds early on, before all of the assets are accounted for or portions of the estate’s liabilities are fully settled. If a mistake is made and a distribution is made in error, it can be difficult or impossible to recoup those funds, and beneficiaries who were harmed by the erroneous distribution will look to you (or your insurer) for their share.

Who is the client?

A man comes into your office with his elderly mother, explaining to you that she wishes to prepare a will and other estate planning documents. While the testator seems to be competent, her son does the majority of the talking and she defers to him before saying anything herself. Her estate is to be left entirely to her son. At the end of the meeting the son writes a check from his personal account for the retainer. He provides his telephone number and email address, saying it is best to communicate through him since his mother is hard of hearing and averse to talking on the phone and using a computer. Who is your client? Have you assumed a relationship with an intended beneficiary? Do you have a duty to protect the rights of that beneficiary?

In some jurisdictions, estate planning attorneys can be sued for malpractice under theories of breach of fiduciary duty to non-clients (like the son here) who are intended beneficiaries of trusts and wills, or under tort theories because the lawyer harmed the rights of foreseeable beneficiaries.

One way to reduce the risk of malpractice claims from non-clients is to be very clear in engagement letters...

Non-client beneficiaries have successfully sued lawyers for errors such as failing to avoid or minimize tax consequences in estate planning, drafting errors or ambiguities that opened the door for costly litigation that would have not been necessary absent the malpractice, or failing to otherwise advise beneficiaries or executors and protect the assets of the estate.

One way to reduce the risk of malpractice claims from non-clients is to be very clear in engagement letters who the client is (and is not), document the file thoroughly, and be absolutely certain to deal directly with the client and not through a non-client relative or friend. If it is not possible to communicate directly with the client, be sure to take steps to determine competency to create estate planning documents.

In some cases, a lawyer might represent beneficiaries of an estate in entirely unrelated matters. Be clear in retainer agreements what you have undertaken to do for each client, and what you have not. A beneficiary who claims you are actually her lawyer (instead of just her now deceased father’s) may argue – successfully – that you should have been looking out for and protecting her interests.

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Addressing Conflicts

Your best friend and her husband of 20 years ask you to prepare their estate plans. They each have children from previous marriages, but have been married to each other for so long they consider themselves one big happy family. Most of your communication is only with your best friend, but you assume she has spoken with her husband about everything. Everyone is busy and an engagement letter never gets signed, but there is really no need to be so formal with friends, right?

Actually, there is always a need to be clear about issues that could arise if the worst scenario happens. For example, it is good practice to address potential differences of opinion between spouses when drafting estate planning documents. Should significant disagreement occur, it may be necessary for the lawyer to cease representing both spouses relating to an estate plan.

Many malpractice allegations derive from perceived or actual conflicts of interest. It is best to address any potential conflict directly from the outset, and make the relationships between and among interested parties clear in engagement letters. Some conflicts can be waived, and it is important to get such waivers in writing along with a clear explanation of the conflict and a statement that the client understands what rights are being waived. Some conflicts cannot be waived – be sure to consult your local rules or ethics board if you are unsure.

Conclusion

It is impossible to eliminate all malpractice risk, but being smart about your relationships with clients and non-clients, asking the tough questions, and being thorough when documenting your files can go a long way toward either avoiding malpractice claims or defending them should they arise.

Alice Sherren, MLM claim attorney, addresses common (and not so common) questions MLM receives from insureds through its Risk Management HelpLine and invites insureds to weigh in via the comments section.

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John Doe

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