

RISK MANAGEMENT CORNER

To Refer or Not to Refer

by John J. Brandt

It is a challenge for both attorney and client whether to refer a client to another lawyer or to represent the client, even if the attorney may not be experienced in the field of law in question.

The Virginia Rules of Professional Conduct (2005-06) set forth in the first rule, Rule 1.1 Competence, the basis for our discussion:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

The comments under Rule 1 offer some assistance as we ask ourselves these questions:

- How complex or specialized is the case?
- What is your general legal experience?
- What is your training and experience in the field of law represented by this case?
- Can you give the case adequate preparation and study?

It is important that “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.”

A newly admitted attorney may be as competent as an experienced practitioner. Of course, an attorney may always associate with another more experienced lawyer—or he or she may decide that the best practice is to refer the client to another lawyer. Indeed, as discussed in the article “Lawyer-to-Lawyer Fee Splitting Arrangements,”

(*Virginia Lawyer*, Vol. 54, No. 3, p. 51 (Oct. 2005)), it may be remunerative for the referring lawyer to send his client to a more competent attorney; and it may be comforting to know that the referring lawyer is probably relieved of any legal responsibility for the case.

Attorneys just beginning law practice do not have to refer all cases, or else they would never practice law. Those lawyers, and even older lawyers encountering a new area of the law, are usually armed with analytical skills honed in law school, in studying for and passing the bar and being licensed in Virginia.

Good judgment, common sense and pure old-fashioned elbow grease are predicates for a successful representation. Attorneys should not shy away from seeking assistance from more experienced members of the bar. Virginia has a well-earned reputation for producing lawyers always ready to give a helping hand to less experienced attorneys.

Location in the commonwealth may also influence an attorney’s judgment. An attorney should be more willing to refer a client to more experienced representation when the resources are readily available. For example, if a large-city client of substantial means requests a detailed estate plan from an attorney with limited experience in trusts and estates, the attorney should be more willing to refer than if the client comes from a more rural part of our state and is reluctant to travel to a large city for assistance. To some extent, the attorneys in our more rural areas may be the single source of legal representation for myriad legal issues. They are the true “general practitioners” and we are all indebted to them for



the wonderful work they do for their fellow Virginians.

However, a lawyer should not foolishly go forward alone into an area of the law beyond his or her competence. Thus, where a wealthy client in a rural area needs a good estate planner and refuses a referral to an attorney in a large city, the rural attorney may be able to associate experienced counsel, and by e-mail forward important documents to better assist his client.

There may not be an easy answer to all questions involving the propriety of referring clients. Here are a few practical-guideline questions:

- Do you have the time to devote to a case which concerns an area of the law in which you do not presently feel comfortably competent?
- Does the client have the money to be able to afford the extra time that may be necessary to increase your competence?
- Is the client a longtime client who looks to you frequently for legal advice and assistance?

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- Conversely, is the client a new client who is not likely to return after a one-time engagement?
- Do you have a good friend-attorney who practices in an area of law in which you may feel inadequate?
- Does the case involve a considerable amount of money?
- Have you reached a personal decision, either immediately upon meeting the client or shortly thereafter, that you feel inadequate in representing the client?

Honest answers to these questions may hold the key to your reasonable decisions. The standard of care for a Virginia attorney is whether he addresses a case entrusted to him “with a reasonable degree of care, skill, and dispatch...” *Glenn v. Haynes*, 192 Va. 574, 581, 66 S.E.2d 509, 512 (1951). For example, if you cannot develop the necessary skills to represent a client, refer him to a good lawyer. If the prospective client cannot pay you to

develop the expertise needed to successfully represent the client, refer him.

If the client is a longtime client who will not be referred easily, explain the challenges to the representation and give the client options: stay with you and associate a more experienced lawyer; pay a bit more to you as you develop the expertise to reasonably represent the client; or pursue a complete referral.

If the client is a new client and is not likely to bring further legal business to you in the future, refer the case.

Where you have a good friend who practices in the area of law in question, you will probably feel more comfortable with a straight referral because your friend is not likely to enter into a long-term relationship with your client.

If the case involves a considerable amount of money and concomitantly a potentially large fee, you understandably may wish to keep the case. However, if you are honestly con-

cerned about your level of expertise, you must inform the potential client that you may need to formally associate another, more experienced lawyer, and the client must approve of the association. Alternatively, you may refer the case entirely and investigate a referral fee.

When all is said and done, you will probably know instinctively whether or not you should try to keep the case or refer it. Read the Rules of Professional Conduct; consult an attorney friend with experience; make a free, confidential call to the risk manager (1-800-215-7854) or to the Ethics Hotline (1-804-775-0564); and use good judgment.

The challenge for an attorney who lacks the specific expertise required for a given legal representation is significant, but it can be solved with a careful and reasoned evaluation of the problem.