

# Yes, Sometimes a Referral Can Come Back to Haunt You

by Mark Bassingthwaight, Esq.

Lawyers make referrals. It's something that comes with the territory. For some, making a referral is almost a daily occurrence. They are often made after work is declined. Staff may make them in response to a cold call or give one to a client who needs a service that the firm doesn't provide. Referrals are sometimes made during dinner conversations, at social events, or after a presentation given to the general public. Names may be passed along to family members, friends, a colleague, and to good clients. After all, we do want to make sure our good clients are well taken care of! Too often, however, referrals seem to be made without any thought of the potential malpractice exposure. Is such casualness justifiable? Unfortunately, the answer is sometimes no.

Nationwide, malpractice coverage statistics vary geographically due to a number of reasons. Some lawyers do not feel that malpractice coverage is necessary. They prefer to protect their assets in other ways. Others simply can't afford the coverage, particularly during economic hard times. I have even had a few lawyers tell me that they believe having malpractice coverage simply invites claims. As they see it, if they have no insurance, no one will bother suing them. Regardless, this is a roundabout way of sharing that, contrary to popular belief, not all lawyers are insured for malpractice. In fact, in a few states the percentage of uncovered lawyers has been estimated to be as high as 50 percent. This reality begs the question of what could happen if a lawyer made a referral to another lawyer who was uninsured, and that lawyer eventually made a mistake? Might the referring lawyer be exposed? You bet. There are ways that liability can be found. It's a hunt for a deep pocket, and it will be framed as negligent referral. The good news is that avoiding this type of claim is relatively easy.

The most dangerous type of referral is one that results in a referral fee – and it doesn't matter if the fee was expected or simply offered as a gift. Acceptance of the fee can and will bring to the referring attorney liability for the other attorney's work. If a fee is offered, the best advice is to decline it, or suggest that the referral fee be refunded to the client because referral fees are too easily viewed by the client as payment for legal advice to have them work with the other attorney.

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If your practice does accept referral fees, proceed fully aware of the risk involved and be up front with the client about the arrangement. Remember: when you share fees, you share liability. Rule 1.5 of the Model Rules of Professional Conduct states that a division of a fee can only occur if the division is in proportion to the services performed and the client agrees in writing. In addition, the fee must be reasonable, and each lawyer will assume joint responsibility for the representation. This rule clearly requires that a referring attorney who will be accepting a referral fee inform the client of the presence of the referral fee and obtain written consent to the fee division. Given all this, it would seem to be prudent to stay in contact with the other attorney in order to monitor critical dates and see that work is completed on time, because there is no free lunch here.

Two side notes are in order. First, prior to ever making a referral where a referral fee is expected, consider making certain that the attorney you are referring to has malpractice insurance in place and that the limits are adequate for the size of the matter being referred. Do not accept verbal verification of coverage. There are attorneys who will say they are insured in order to obtain the business. Ask the other attorney for a copy of the declaration page to the malpractice policy prior to ever making this kind of referral. Second, occasionally an attorney who has recently been disbarred will seek to refer clients and request a referral fee. If the referral happened to be made while this attorney was in good standing with the bar, payment of the referral fee would be acceptable. If this attorney is seeking to make the referral and asking for a fee after being disbarred, the payment of a referral fee would be prohibited under Model Rule 5.4(a) which prohibits the sharing of fees with a non-attorney.

That said, acceptance of a referral fee is not the only method of creating a liability from a referral. Referrals to specific lawyers or a referral made with a promise such as "Attorney X is the finest personal injury plaintiff attorney in the area and always gets great results" can also create liability. To avoid exposure for a negligent referral claim, the rules are simple. When referring anyone to another lawyer, always provide a minimum of three names and make no promises. Of course, suggesting the individual contact a state or local bar referral service would be another very safe practice.

Sometimes, however, we do wish to make a specific referral if for no other reason than to see that a good client is properly taken care of. If negligent referral claims are a concern for you, consider documenting adequate malpractice coverage by asking the other

lawyer for a copy of the declarations page to her malpractice policy prior to making a specific referral. Why? Because referrals shouldn't be based on assumptions. Negligent referral claims are about coverage, not competency. Competent lawyers can and sometimes do make a mistake or miss a deadline, and again, not all lawyers are insured.

One other type of attorney referral that can potentially create a serious problem is the referral made to an officemate in an office-sharing situation. By their very nature, office sharing arrangements create added vicarious liability for every lawyer in the space. A simple referral to an officemate just increases the difficulty of avoiding this liability should a claim ever arise. In this situation, it is particularly important to give a minimum of three names. It is fine to include an officemate in this list. Just be certain to disclose that one of the names provided is an attorney in the suite, make no promises about the suitemate, and be certain that the client understands that this attorney is completely independent. It would also be advisable to document how this referral was made in some fashion. Finally, never make a referral to an officemate who is uninsured or underinsured. This risk simply isn't worth it.

Now here is the interesting twist to the issue of negligent referral. Many referrals are made to non-clients. A lawyer's duties to non-clients are minimal and thus negligent referral claims arising out of such referrals are few and far between. The real concern is when an attorney refers a client to another attorney or, perhaps more frequently, to another professional. Making matters worse, words of assurance are also often shared with the client in this situation perhaps as a way to make sure the client follows through. To underscore this concern, consider an estate planner who regularly refers clients to the same CPA and is surprised to learn, after the CPA has made an error, the CPA has no errors and omissions coverage. The client, now harmed, may very well

look to the estate planning lawyer for a recovery based upon her legal advice to work with that particular CPA. Here, following the above advice becomes even more important. The same rules should apply whenever making a referral to an existing client. Always provide a minimum of three names, make no promises, and verify that an errors and omissions policy is in place if a specific referral is preferred.

Remember that these rules not only apply to referrals made after work is declined. They also apply to referrals made at a dinner party, in an email to a friend, in response to an email from someone contacting you as a result of a visit to your firm's website, in a casual conversa-

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tion following a public presentation, on a chat site, or in response to an inquiry over the phone.

The next issue concerns staff. Occasionally a firm will have a sound referral policy in place that all attorneys understand and follow, yet a staff member may be completely unaware of the reason the policy is in place and thus not follow the rules in every instance. There is no ill will here, just an honest desire to try and see that clients get the best help possible. Their motivation is to provide good service. This staff person will make a specific referral to an attorney or other professional whom they know and think highly of, blissfully unaware of the associated risks. For clients who are upset, staff may even try to reassure them by making certain "harmless" promises about the receiving attorney.

"Attorney X is a very good attorney and well-respected by our firm." If attorney X misses a statute date and is uninsured or underinsured, the client may not agree with the statement that attorney X is a good lawyer, and they may want to hold the firm liable for their loss.

Make certain that all staff understand your firm's policy and procedure for referrals and also the reasons why such a policy is in place. Develop a referral list with three names for the various types of matters the firm will refer out, and make it available to everyone in the office. If this list doesn't cover a referral request, have the staff pass the matter on to one of the attorneys, politely decline by stating the firm does not make referrals, or have staff refer to the state or local bar referral line.

Last but not least, an often-overlooked source of potential liability for negligent referral claims may come from links on your firm's website. If there are links to other sites, an appropriate external links disclaimer should be prominently displayed near these links. The disclaimer should simply state that the firm has provided these links for the convenience of users of the site and that these links do not constitute an endorsement of the linked websites, or of the information, products, or services contained therein.

In reality, negligent referral claims are not a significant problem for mal-

*Referrals continued on page 60*



**Mark Bassingthwaite, Esq.**, has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at [alps.inreachce.com](http://alps.inreachce.com). Mark can be contacted at: [mbass@alpsnet.com](mailto:mbass@alpsnet.com).

Referrals *continued from page 59*

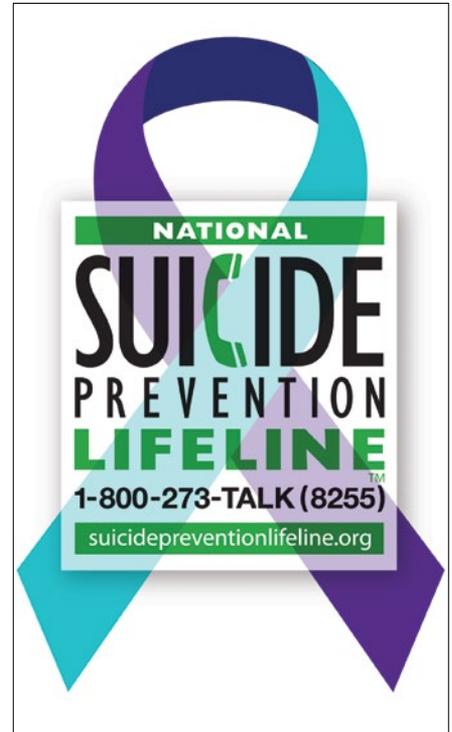
practice carriers. Yet when they arise, and they do, these claims can be costly. Given that the actions that can be taken to avoid this type of claim are highly effective and quite minimal, there really is no reason not to take the prudent course of action and follow the advice shared here.

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