

It's Not Just About the Referral
by Briggs Cheney

For those involved in the legal referral business, this article is not about legal referral per se. Rather, it is about what I will call the “selfish side” of legal referral. It is about why practicing lawyers ought to carefully review their practices in referring clients and potential clients to other lawyers, and consider that there is more to referring a client than just the referral.

My hopes are several: First, that I can provide for those in the lawyer referral “business” a tool to encourage lawyers in their communities to think of their local bar-sponsored lawyer referral service when making referrals. Second, that those in the business will take to heart the importance of making their referral service the very best. That is, providing a service that screens panel members to ensure they are competent and professionally responsible lawyers, and also prescribes specific panel standards. Third, for practicing attorneys, providing some good reasons why lawyers should formalize their practice for making referrals, and why that practice should include public service-oriented lawyer referral services.

The process of referring a client or potential client to another lawyer is often completed too casually, without enough thought. The circumstances and occasions when a lawyer refers a client vary widely. It may be an existing client where the relationship has deteriorated, or a conflict has arisen. Maybe the individual is a potential client, but the referring lawyer cannot take on the representation (for example, due to time constraints or because the nature of the legal problem is not within the area of practice of the referring lawyer). Whatever the reason, one of the very important things we can do as lawyers for the public we serve is to help members of that public find the best possible lawyer. It is often a mystery how clients get to lawyers.

In my home state, the courts have made clear that “[n]o formal contract, arrangement or attorney fee is necessary to create the relationship of attorney and client... [and]... “the contract may be implied from the conduct of the parties.” *George v. Caton*, 600 P.2d 822, 827 (N.M. Ct. App. 1979). New Mexico is not alone in holding that whether an attorney-client relationship has been created is a question of fact. This creates a situation where a lawyer may believe no attorney-client relationship ever existed or that the relationship was terminated (and thus, the lawyer believes he has no duty or obligation), but a client/potential client or a court may think differently. Some courts have recognized actions against lawyers for **negligent referral**. *Rainey v. Davenport*, 353 B.R. 150, 180 (Bankr. S.D. Tex. 2006) and *Tormo v. Yormak*, 398 F. Supp. 1159 (D. N.J. 1975) (each case recognizing that a lawyer must exercise ordinary care and skill in referring a client to another lawyer). The question then becomes: What are a lawyer’s duties and obligations and what is the standard of care for client referral? In *Tormo*, the court concluded that the referring lawyer could reasonably rely upon the fact that the New York lawyer to whom the referral was made was licensed by that state and was competent and fit to practice law. But what about the situation where the reason for referring is that a specific area of law is outside the referring lawyer’s expertise? Does the

standard of care require the referring lawyer to make reasonable inquiry into the experience or skills of the referred lawyer?

The standard of care applied will depend on the circumstances presented in each case. What about the referral to a lawyer who shares the same office suite as the referring lawyer? What if the referred lawyer is the tenant of the referring lawyer, the referred lawyer is behind on the rent, and the referral of a client will make possible payment of past due rent? Or, what if the referring lawyer and the referred lawyer are business partners in some other venture? And how many names of other lawyers should a lawyer provide in making a referral? What does the referring attorney really know about the lawyers recommended? Does she have personal knowledge of the referred lawyers' competence or is it just a matter of thinking, "I have heard this lawyer is good in this area." Lawyers take a risk when making a referral. How can we minimize that risk? One answer: make a referral to a recognized and reputable lawyer referral service.

Interestingly, even bar association referral services have not been immune from lawsuits for negligent referrals, which only underscores the risk for the practicing lawyer. In *Weisblatt v. Chicago Bar Association*, 684 N.E.2d 984 (Ill. App. Ct. 1997), the bar had referred the plaintiff to a lawyer for legal malpractice. The plaintiff later sued the bar for negligent referral alleging that the referred lawyer had entered into an inadequate settlement. In rejecting the action against the bar association, the Illinois court concluded that although a fee was paid to the bar, no attorney-client relationship existed, the bar association was not a lawyer, and thus, not subject to the professional duties applicable to attorneys.

That same court in *Gonzalzes v. American Express Credit Corp.*, 733 N.E. 2d 345 (Ill. App. Ct. 2000), relied on its earlier decision in *Weisblatt* in affirming dismissal of a variety of claims against a "for profit" referral service for a negligent referral. The dismissal followed the failure of the plaintiff to submit a legally sufficient complaint, suggesting that the door might not be closed on negligent referral if properly pled. However, citing *Weisblatt* and *Richards v. SSM Health Care, Inc.*, 724 N.E.2d 975 (Ill. App. Ct. 2000), the court held that there are no legal requirements that a legal referral service "stand legally responsible" for the services provided by a referred attorney. In a Pennsylvania decision, *Bourke v. Kazaras*, 746 A.2d 642 (Pa. 2000), a referred client sued the bar referral service after the referred lawyer allowed the statute of limitations in the plaintiff's case to run. The referred lawyer, who was also sued, did not have malpractice insurance, which explains—in part—the suit against the referral service. The Pennsylvania court was less gentle in its rejection of the plaintiff's action against the bar association concluding that to allow such an action would inhibit lawyers and bar associations in providing referrals.

The *Weisblatt*, *Gonzalzes* and *Bourke* cases provide several lessons and a convenient conclusion to this article. *Weisblatt* and *Gonzalzes* both confirm that a cause of action against a lawyer for negligent referral does exist, based on the court's comments that referral services are not lawyers and may be viewed differently. The *Bourke* holding reaffirms the importance of lawyers and referral services feeling comfortable in making

referrals. Both decisions suggest that referral by a practicing lawyer to a recognized referral service may provide some insulation (the “selfish side”) from liability. But the most important lesson is probably the responsibility we all have, lawyers and referral services, to make responsible referrals. It is not just about the referral, but about the right referral.

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