

## **News Story**

### **Referring cases and mastering the fine art of referral fees**

***By Sheryl M. Vassallo***

Practitioners tell Michigan Lawyers Weekly that the judiciary's ability to administer justice is greatly enhanced by the legal community's time-honored and time-tested system for referring cases.

Through a careful mixture of ethical rules, referral fees and dedication to doing what's best for the client, a successful redistribution of talent, skill and experience plays out on a daily basis where clients' needs are matched with attorneys' abilities.

For many firms, the practice of making and accepting referrals — along with the payment of referral fees — is their bread and butter. For others, it may be just one of several revenue sources.

Either way, there are certain guidelines and rules that all practices should follow in order to ensure the client, the referring attorney and the attorney accepting the referral maximize the rewards the referral system has to offer.

In this article, Michigan Lawyers Weekly will explore these issues in detail and, thus, give practitioners a reliable frame of reference for taking stock of their current referral practice and mapping out a course for its future.

#### **More than competent**

Professor Lawrence Dubin of the University of Detroit Mercy School of Law told Michigan Lawyers Weekly there are two principal reasons why lawyers refer cases.

"Most attorneys who refer cases do so either because they do not feel competent to handle the representation themselves or they simply want to gain the economic benefit that can arise as a result of referring a case to another lawyer," he explained, noting that competency is measured against the standards set out in the Michigan Rules of Professional Conduct (MRPC).

According to the commentary to MRPC 1.1 — which instructs attorneys to bring in additional, experienced counsel on cases where their own competence is in doubt — the factors that a lawyer should consider in evaluating competency include "the relevant complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the filed in question."

Employment lawyer Deborah L. Gordon of Bloomfield Hills said in those cases where the answer to the competency question is easy, action should be swift.

"An attorney should refer a case whenever it's not in a field that you feel you're intimately familiar with," she stated. "If you don't have the expertise in that field, you better refer it out pretty quickly."

Meanwhile, Detroit attorney Brian J. McKeen, who specializes in medical-malpractice law, observed that, even in those cases where the answer to the competency question is not cut and dried, referral may still be the best thing to do.

"There's a difference between being competent to handle something and being the best person for the job," he explained. "While someone may be competent within the meaning of the rules of ethics to handle something, it doesn't mean they're the best person for the job. That's an important distinction."

### **For the money**

Grandparents' rights expert and family law practitioner Richard S. Victor of Bloomfield Hills explained the economic benefit that comes from referring cases — i.e., the referral fee — helps ease the pain of "turning away business," which can seem quite unnatural to most attorneys.

"Having referral fees allows the system to help both attorneys who are able to secure clients, and attorneys who are better able to handle and represent clients work together to improve the practice of law," he stated.

Moreover, auto no-fault expert Steven M. Gursten of Southfield said he believes clients are the ones benefiting the most from referral fees.

"Clients are best served because the referring attorney has a direct financial interest in making sure his client gets to the best attorney possible," he declared. "This allows the client to obtain a better result and the referring attorney has an interest that is directly aligned with the client."

Meanwhile, Dubin pointed out the devil's advocate position.

"The ethics rules state that if a lawyer is not competent to handle a representation, the lawyer may not accept that representation," he stated. "If a lawyer followed that ethics rule, then the argument is there is no need for a referral fee that provides an economic incentive to refer the case to another lawyer rather than handling the matter in an incompetent way."

Aside from the fact that MRPC 1.1(a) only requires an incompetent lawyer to "associate" with a competent one, McKeen suggested it would be unfair to impose a financial disadvantage on attorneys who were merely trying to get their clients the best representation possible.

He urged that under the current referral fee system, "the client benefits, the legal system benefits, everybody benefits."

### **Choosing a 'referee'**

Criminal defense specialist Steven Fishman of Detroit advised that long-standing relationships are often the way to go when referring, but cautioned against allowing the strength of the relationship to be a substitute for staying informed about how that attorney has been performing.

"If you're going to refer cases, make sure you keep up with the notion of how he or she is performing," he asserted.

Fishman emphasized that practitioners cannot forget that, while they have referred the case out, it's still their reputation with the client that's on the line.

McKeen agreed, noting that referring attorneys "should look at what the attorney's track record has been in terms of their success at trial, in terms of their success in resolving cases."

Meanwhile, in those cases where familiar faces and word-of-mouth aren't enough to go on for making a referral, Gordon said she will often consult her copy of "Best Lawyers in America," a reference book which contains a comprehensive peer-review survey of thousands of the top lawyers in the U.S.

Finally, Dubin stated that, in addition to competence and trustworthiness, another quality a referring attorney looks for in a lawyer is whether he "will honor any referral agreement entered into between the parties."

### **How much?**

While the rules are silent as to how much a referral fee should be, the legal community has grown accustomed to certain standards.

"There is no set amount that a referring lawyer is entitled to," Dubin said. "It seems to me the most common referral I've seen is one-third of the legal fee earned as a result of performing the legal services for the client."

McKeen confirmed this is what his firm charges.

Nevertheless, Dubin pointed out there's nothing to say the referral fee can't be more or less, depending on the terms of the agreement between the referring lawyer and the lawyer who handles the representation.

Moreover, Gordon suggested that it's not unheard of for attorneys to refer cases without any expectation of a referral fee.

"A lot of times people just want their clients or friends or family to get to somebody really good," she said.

Sometimes, it's just to help out another lawyer, Fishman added.

### **In writing?**

Although the rule on fees — MRPC 1.5(e) — doesn't require the attorneys to put their agreement or their client's consent to the division of the fee in writing, Dubin said they would be wise to do so.

He suggested the lawyers spell out in writing exactly what the referral fee will be, how it will be computed and the fact that it will be paid.

Moreover, he said it couldn't hurt to memorialize the client's consent to the arrangement, either, because if "the client protests the referral fee being paid, that can arguably be a basis for a lawyer to not pay a referral fee."

Although the client normally doesn't object, Dubin cautioned that it can happen.

For example, in *Dietrich and Assocs., et al. v. Fieger, et al.* (Lawyers Weekly No. 44067), where the plaintiff claimed the defendant owed him a portion of the \$6 million verdict he'd won on behalf of the client whom the plaintiff had referred, the Court of Appeals disagreed, concluding the plaintiff had failed to prove the client had been advised of and had not objected to the division of the fee between the plaintiff and defendant.

According to MRPC 1.5(e), before a fee can be validly divided between lawyers who are not from the same firm, it must be shown that the client has been "advised of and does not object to the participation of all lawyers involved."

Additionally, the *Dietrich* panel rejected the plaintiff's quantum meruit claim, explaining the "plaintiffs performed no work" on the client's case.

While it's true that MRPC 1.5(e) in its current form does not *require* that a client's lack of objection be put in writing, that could change soon.

Under the Michigan Supreme Court's "Proposed Adoption of New Michigan Rules of Professional Conduct," ADM File No. 2003-62, which was issued on July 2, 2004, the high court proposes to amend 1.5(e) to require "the attorney who will be representing the client advises the client of the participation of all the lawyers involved and the client consents in writing."

In other words, the "client must agree to the fee sharing arrangement, and the agreement must be confirmed in writing," reads the comment which follows the proposed amendment.

A public hearing on this and other changes to the Michigan Rules of Professional Conduct was held on Sept. 29, 2005.

### **Any more obligations?**

Finally, assuming a referring lawyer has answered all the necessary competence questions, found the right attorney to represent the client and put the important issues in writing, is there anything else the referring attorney must do in order to collect her referral fee?

Dubin said, according to the MRPC, the answer is no.

He pointed out that nowhere in the MRPC 1.5(e) is there a requirement that a referring attorney must assume any portion of responsibility for the case in order to collect a referral fee from the lawyer who ends up handling it.

However, Dubin noted that Michigan's liberal rule stands in stark contrast to the American Bar Association's Model Rule 1.5(e) which requires that the division of a fee among lawyers from different firms be "in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation."

He reiterated that as "a Michigan lawyer, you can refer the case, not perform any legal services and not expressly assume joint responsibility for the representation."

Among the proposed changes to MRPC 1.5 that are currently awaiting a decision by the Supreme Court, none seek to bring the Michigan rule in line with the ABA Model Rule regarding the responsibilities and obligations of an attorney who wishes to collect a referral fee.

#### **Dubin's Referral Fee Tips**

- Make a referral to a lawyer whom you know is competent to handle the representation
- Put into writing the exact terms of the referral agreement and amount
- Ensure the client is made aware that there will be a referral fee paid and that there are no objections. Then put it in writing.

October 3, 2005