

ATTORNEY REFERRAL, NEGLIGENCE, AND VICARIOUS LIABILITY

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INTRODUCTION

“Attorneys are now routinely requested to handle matters which are either outside their area of legal expertise or outside the geographic area in which they practice.”¹ “Of course, every lawyer has been at social functions or other situations at which a prospective client has requested legal advice in an area outside of the attorney’s competence or field of practice.”² As a consequence of such requests from clients or prospective clients, lawyers are often placed in a position of giving referrals, especially in situations of cross-specialty referrals (such as an estate planning attorney whose longtime client has become a party in a personal injury lawsuit) or cross-jurisdictional referrals (such as an attorney in Michigan who is contacted by a prospective client who must respond to a lawsuit that was filed in Ohio).

But if the lawyer who receives the referral commits malpractice in handling the case, can the lawyer who made the referral be held liable for the client’s loss? In this paper, I argue that a *per se* rule excluding such liability is unfair, and that, in addition to the approaches already taken by the few courts that have addressed the issue, liability should be possible when the referral was given because of a conflict of interest that was not disclosed to the client. In considering when liability might be imposed or disclaimed, it can also be useful to consider doctrines from other fields of law, such as breach of fiduciary duty, undue influence, and the business judgment rule. In the following discussion, I am examining only situations in which the referring attorney’s involvement in the case, if any, ends when the referral is made. This examination thus excludes situations where the referring attorney retains any role in the case, such as that of co-counsel or associated counsel.

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1. Christine M. Guerci, *Vicarious Liability of Attorney for Acts of Associated Counsel*, 35 A.L.R.5th 717, 717 (1996).
2. Barry R. Temkin, *Can Negligent Referral to Another Attorney Constitute Legal Malpractice?*, 17 TOURO L. REV. 639, 640 (Spring 2001).

LEGAL MALPRACTICE, REFERRALS, AND THE BACKGROUND OF PROFESSIONAL RESPONSIBILITY

A typical statement of the elements for a claim of attorney malpractice was presented by the Illinois Court of Appeals in *First Nat'l Bank of LaGrange v. Lowery*:³

To prevail in an action for legal malpractice, plaintiff must prove the following elements: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause establishing that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages.⁴

Although, as reflected in the formulation of malpractice elements in the *Lowery* case, a plaintiff must usually first establish that he had an attorney-client relationship with the defendant attorney before he can sustain a claim for negligence or malpractice against that attorney, courts have recognized an exception when the attorney was retained by one party to convey information on which another party would rely. Under those circumstances, the non-client party who foreseeably relied on the attorney's representation may bring suit against the attorney for negligence or malpractice, notwithstanding the absence of privity of contract.⁵

In evaluating claims for attorney malpractice, courts can look to the professional responsibility rules regulating the ethical conduct of attorneys.⁶ Typical provisions for such ethical regulations appear in the Model Rules of Professional Conduct ("Model Rules") and the older Model Code of Professional Responsibility ("Model Code").⁷ Both the Model Rules and the Model Code contain provisions that are relevant to situations of attorney referral. In addition, under both the Model Rules and the Model Code, attorneys owe some duties more broadly than just to clients. Following is a discussion of these provisions.

3. *First Nat'l Bank of LaGrange v. Lowery*, 872 N.E.2d 447 (Ill. App. Ct. 2007).

4. *Id.* at 464.

5. *See, e.g.,* *Petrillo v. Bachenberg*, 655 A.2d 1354, 1357-60 (N.J. 1995) (attorney for seller of real estate owed duty to potential buyers, to refrain from providing misleading information as to soil tests on the property); *Greycas v. Proud*, 826 F.2d 1560, 1562-63, 1565 (7th Cir. 1987) (loan applicant's attorney was liable to lender, when he falsely stated that he conducted a search for liens on the machinery the lender offered for collateral, and that there were no liens).

6. *See, e.g.,* *Weisblatt v. Chicago Bar Ass'n.*, 292 Ill. App. 3d 48, 55 (1st Dist. 1997), *Noris v. Silver*, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997).

7. *Id.*

Prohibition against Dishonesty

The Model Rules and Model Code both prohibit attorneys from engaging in dishonesty and misrepresentation. Model Rule 8.4 provides that “[i]t is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation” The Model Code’s Disciplinary Rule 1–102(A) similarly provides that “[a] lawyer shall not: . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Notably, this duty to refrain from deceit applies to dealings with non-clients as well as to dealings with clients. Thus, in litigation, an attorney is prohibited from making misrepresentations to the court.⁸ Similarly, an attorney is not allowed to make dishonest statements to other parties in a case.⁹

Duty of Confidentiality

The Model Rules and Model Code recognize that attorneys owe a duty of confidentiality to clients and prospective clients, even if no formal attorney-client relationship is formed. Model Rule 1.18(b) states, “[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.”¹⁰ The Model Code’s Ethical Consideration 4–1 recognizes that “[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to

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8. See, e.g., *In re Disciplinary Proceedings Against Acker*, 738 N.W.2d 554, 557–58 (Wis. 2007) (suspending attorney’s license because of making misrepresentations in court, including filing falsified documents); *In re Pu*, 37 A.D.3d 56, 58–59, 63 (N.Y. App. Div. 2006) (suspending attorney’s license because of making false statements and misrepresentations in court); *State Counsel for Discipline of the Nebraska Supreme Court v. Riskowski*, 724 N.W.2d 813, 817–18 (Neb. 2006) (suspending attorney’s license because, inter alia, he forged client’s signature on a document, fraudulently had the document notarized, and filed it in court).
 9. See, e.g., *In re Hillbrant*, 182 P.3d 1253, 1256, 1262 (Kan. 2008) (among numerous grounds for suspending the attorney’s license was the fact that she had included false information in communications with opposing parties).
 10. MODEL RULES OF PROF’L RESPONSIBILITY R. 1.18 (2007) (In turn, Model Rule 1.9(c)(1) prohibits using information to the subsequent disadvantage of a former client “except as these Rules would permit or require . . . or when the information has become generally known[.]” Model Rule 1.9(c)(2) generally prohibits revealing information about representing a former client “except as these Rules would permit or require with respect to a client.”).

employ him.”¹¹ Therefore, an attorney is generally required to maintain the confidentiality of communications to and from a client or prospective client, regardless of whether the prospective client ends up hiring the attorney.¹²

Duty of Competence

The Model Rules and Model Code both require competent representation of clients. Model Rule 1.1 establishes that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹³ Several Model Code provisions are also relevant. Ethical Consideration 2–30 states that “[e]mployment should not be accepted by a lawyer when he is unable to render competent service[.]”¹⁴ Ethical Consideration 6–1 similarly provides that “Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.”¹⁵ Disciplinary Rule 6–101(A) states that “[a] lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.”¹⁶ Thus, if the attorney cannot provide competent service, then he must decline to undertake the representation.¹⁷

Duty of Independent Judgment

The ethical rules require that in representing the client, an attorney must exercise independent judgment, free from conflicts of interest. For example, Model Rule 2.1 provides that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”¹⁸ Model Rule 1.7 reinforces the duty of independent judgment by prohibiting

11. MODEL CODE OF PROF'L CONDUCT EC 4–1 (2007).

12. See, e.g., *People ex rel. Dept. of Corporations v. Speedee Oil Change Sys., Inc.*, 980 P.2d 371, 379, 382–83 (Cal. 1999); *Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319–20 (7th Cir. 1978).

13. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

14. MODEL CODE OF PROF'L RESPONSIBILITY EC 2–30 (1980).

15. *Id.* at EC 6–1.

16. MODEL CODE OF PROF'L RESPONSIBILITY DR 6–101(A)(1).

17. See, e.g., *Attorney Grievance Comm'n of Maryland v. Kendrick*, 943 A.2d 1173, 1187 (Md. Ct. App. 2008), *Segal v. State Bar*, 751 P.2d 463, 466 (Cal. 1988), *Attorney Grievance Com. v. Brown*, 517 A.2d 1111, 1118–19 (Md. Ct. App. 1986).

18. MODEL RULES OF PROF'L CONDUCT R. 2.1.

an attorney from representing concurrent clients when the interests of the clients conflict, unless each client gives informed consent that is confirmed in writing.¹⁹ Model Rule 1.8(g) also requires that an attorney who represents two or more clients must obtain informed consent, confirmed in writing, from each client before taking part in reaching an aggregate settlement of claims.²⁰ Model Rule 1.8(a) addresses direct attorney-client conflicts of interest by requiring that any business transactions between an attorney and the client—such as sale of property between attorney and client—be “fair and reasonable to the client,” that the client be advised in writing about seeking “the advice of independent legal counsel,” and that the client give informed consent, confirmed in writing, to the transaction and the attorney’s role in it.²¹

Model Code Ethical Consideration 5–1 and Disciplinary Rule 5–101 similarly require that an attorney use independent professional judgment in advising a client. EC 5–1 requires that “[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.”²² In a similar tone, DR 5–101 is titled “Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.”²³

In summary, an attorney must not place himself in a position where a conflicting interest may interfere with his representation of the client.²⁴

Fee-Splitting

Model Rule 1.5 allows an attorney who refers a client to a second attorney to be compensated for the referral, but only if disclosure is made to the client, and the client consents to the fee-splitting arrangement.²⁵ By contrast, Model Code Ethical Consideration 2–8 and Disciplinary Rule 2–103(B) flatly prohibit giving compensation to individual attorneys for

19. *Id.* at 1.7.

20. *Id.* at 1.8(g).

21. *Id.* at 1.8(a).

22. MODEL CODE OF PROF’L RESPONSIBILITY EC 5–1.

23. *Id.* at DR 5–101.

24. *See, e.g.,* The Florida Bar v. Brown, 978 So. 2d 107, 112–13 (Fla. 2008) (conflict of interest in representing criminal codefendants, where each defendant had an interest in attributing possession of a firearm to the other); In the Matter of Stein, 177 P.3d 513, 516, 520 (N.M. 2008) (conflict of interest in a proceeding for guardianship and conservatorship, where the attorney represented both the prospective ward and his wife, and subsequently sought to shift funds from the ward’s estate to the wife).

25. MODEL RULES OF PROF’L CONDUCT R. 1.5.

providing referrals, although under DR 2-103(D)(3), “a lawyer referral service operated, sponsored, or approved by a bar association” is not subject to the prohibition.²⁶

Other Referrals

Model Rule 7.2(b) allows attorneys to establish non-exclusive agreements for reciprocal cross-referrals to each other, as long as the agreement is disclosed to the client:

A lawyer shall not give anything of value to a person for recommending the lawyer’s services except that a lawyer may . . .

(4) refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

- (i) the reciprocal referral agreement is not exclusive, and
- (ii) the client is informed of the existence and nature of the agreement.²⁷

As noted above, the Model Code allows attorneys to pay fees to referral systems. Moreover, the Code’s Ethical Consideration EC 2-15 explicitly endorses the use of such referral systems and other “ethical plans” that direct clients to attorneys who are qualified to handle their legal needs:

Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.²⁸

26. MODEL CODE OF PROF’L RESPONSIBILITY DR 2-103(D)(3).

27. MODEL RULES OF PROF’L CONDUCT R. 7.2(b).

28. *Id.* at EC 2-15.

APPROACHES TO EVALUATING LIABILITY FOR REFERRALS

Only a few jurisdictions have considered whether an attorney who refers a case can be liable for the client's loss when the attorney who receives the referral commits malpractice—based either on a theory of negligence in giving the referral, or on a theory of vicarious liability. When courts have addressed the issue, they have selected from the three approaches described below. To simplify descriptions across cases, the lawyer or law firm giving the referral will be designated as “Attorney A” or “Firm A,” and the lawyer or law firm receiving the referral will be designated as “Attorney B” or “Firm B.”

The Michigan/Pennsylvania Approach: No Liability for Negligent Attorney Referral.

Courts in Michigan and Pennsylvania have flatly refused to recognize a cause of action against an attorney who is alleged to have negligently referred a client to another attorney, who subsequently mishandles the case. For example, in the unreported decision of *Knighton v. Goldenberg*, the Michigan Court of Appeals reviewed a case in which a mortgage company sold a promissory note, executed by the homeowner, to an investor but failed to disburse the promised loan funds to the homeowner.²⁹ After the assignee recorded his interest on the property, the homeowner sought help from Attorney A, who made a referral to Attorney B to litigate a claim against the mortgage company under the federal Truth in Lending Act (TILA), 15 U.S.C. 1601 et seq.³⁰ Attorney A had previously represented the client in other matters, and Attorney B was “of counsel” to Attorney A’s firm.³¹ Attorney B eventually filed the TILA claim in federal court, but withdrew the claim when the court mentioned that it would likely be dismissed as untimely under the statute of limitations.³²

The client subsequently filed a malpractice action in state court against both attorneys.³³ Notwithstanding the past associations between Attorney A and the client, and the “of counsel” relationship between Attorney A’s firm and Attorney B, the Michigan Court of Appeals upheld the trial court’s dismissal of the client’s claim against Attorney A, noting that “[t]his

29. *Knighton v. Goldenberg*, 1998 WL 1990426, at *1 (Mich. Ct. App. Aug. 18, 1998).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

jurisdiction has not recognized a cause of action for negligent referral in the context of a legal malpractice action.”³⁴ In the alternative, the court also found no evidence to establish that Attorney A and his firm had notice of any facts that would show Attorney B was incompetent to pursue the TILA litigation or would commit malpractice.³⁵

Similarly, the federal district court for the Eastern District of Pennsylvania declined to recognize a cause of action for negligent attorney referral in the unreported case of *Felker v. O’Connell*, in which clients alleged that Attorneys A negligently referred them to Attorney B.³⁶ The clients also alleged that a contingency agreement, in which Attorneys A would share in any recovery obtained by Attorney B, made Attorneys A jointly liable for the negligence of Attorney B. The court disagreed, stating that “[a] forwarding attorney’s inchoate right to share in the success of a receiving attorney’s efforts does not render the former liable for the acts of the latter.”³⁷

In reaching its decision, the *Felker* court noted that the clients alleged negligent attorney referral, but that they did not allege any deception by the attorneys who gave the referral: “[t]here is no allegation of misrepresentation or concealment of adverse information[.]”³⁸ The court further observed that finding attorneys liable for giving referrals could discourage the appropriate provision of legal services:

Many bar associations maintain referral services and many attorneys routinely refer cases because they cannot or do not want to handle them, or because they believe that the receiving attorney has greater expertise in the relevant subject area. Any holding that they nevertheless should be liable for the receiving attorney’s conduct of a case would be logically and legally unpersuasive, and could unduly disrupt a process integral to the profession which has helped to meet the demand for legal services in a responsible way.³⁹

34. *Id.* at *2.

35. *Id.*

36. *Felker v. O’Connell*, 1990 WL 31912, at *1 (E.D. Pa. Mar. 20, 1990).

37. *Id.* Unlike its counterpart in the Model Rules of Professional Conduct, Pennsylvania’s Rule of Professional Conduct 1.5(e) does not mandate that fee-splitting agreements require the referring lawyer to be jointly responsible for the case. (The underlying matter appears to have been a claim arising from injuries sustained in a motor vehicle accident. *See Felker v. Nationwide Ins. Co.*, 1990 WL 4395 (E.D. Pa. Jan. 16, 1990). Because plaintiffs’ counsel had failed to comply with local discovery rules governing disclosure of certain medical records, those records were not admissible. *Id.* at *1.)

38. *Felker*, 1990 WL 31912, at *1.

39. *Id.*

But the court's reasoning in the next part of its statement was rather dubious, when it asserted that liability for referral providers is not necessary to compensate clients for loss resulting from malpractice committed by attorneys who receive referrals. According to the *Felker* opinion, "[t]he law provides sufficient protection for clients in the relatively rare instances where their case may end up in the hands of an inept or unscrupulous lawyer. It imposes liability on that lawyer for any improper conduct on his part."⁴⁰ The point of including Attorney A (who gives the referral) as a defendant is that there may be instances where Attorney B (who receives the referral and ends up handling the case for the client) may not have enough assets to compensate the client for loss resulting from Attorney B's malpractice. For example, a client who wins a judgment for legal malpractice against Attorney B might not be able to collect on the judgment if Attorney B allowed his malpractice insurance policy to lapse before undertaking the client's case. In fact, this was the situation in the subsequent Pennsylvania case of *Bourke v. Kazaras*,⁴¹ discussed below. In such a situation, the *Felker* court's assertion—that the client is protected by the imposition of liability on Attorney B—is inaccurate.

The Pennsylvania Superior Court adopted the *Felker* federal court's rationale for refusing to recognize a cause of action for negligent attorney referral in *Bourke v. Kazaras*.⁴² In *Bourke*, the client fell from a cruise ship's gangplank and then contacted the lawyer referral service of the Philadelphia Bar Association.⁴³ The client received a referral to a lawyer who failed to file the client's lawsuit within the limitations period.⁴⁴ Although the client obtained a judgment against Attorney B for malpractice, she was unable to collect on the judgment,⁴⁵ as Attorney B no longer maintained malpractice insurance.⁴⁶ The client then sued employees and affiliates of the bar association that had given her the referral.⁴⁷ The Superior Court observed that "Pennsylvania courts have not adopted a cause of action for negligent referral" and concluded that "[w]e agree with the trial court that no such cause of action exists, and we decline to create one."⁴⁸

However, the federal district court for the Middle District of Pennsylvania has recognized a cause of action for negligent *medical* referral

40. *Id.*

41. *Bourke v. Kazaras*, 746 A.2d 642 (Pa. Super. Ct. 2000).

42. *Id.* at 644.

43. *Id.* at 643.

44. *Id.*

45. *Id.*

46. *Id.* at 644.

47. *Id.* at 643.

48. *Id.*

under Pennsylvania law. In *Estate of Tranor v. Bloomsburg Hospital*, a patient brought a claim alleging that her doctor—apparently a general practitioner—was negligent in referring her to a surgeon who was incompetent.⁴⁹ The *Tranor* court did not explain details regarding the underlying facts of the patient’s medical condition and treatment, but the court concluded that “negligent referral to a specialist, i.e. when the referring physician knows or has reason to know the specialist is incompetent, may be a basis for liability under general negligence principles,”⁵⁰ and therefore denied the general practitioner’s motion to dismiss.⁵¹

Thus, the state and federal courts in Pennsylvania have taken inconsistent positions—recognizing a cause of action for negligent medical referral as in *Tranor*, while refusing to recognize a cause of action for negligent legal referral as in *Bourke*. There does not seem to be any principled basis to protect attorneys who negligently refer clients to other attorneys, and at the same time, deny such protection to doctors who negligently refer patients to other doctors. The policy of encouraging appropriate referrals, noted in the legal context by the *Bourke* court, should also apply to the medical context addressed by the *Tranor* court. Therefore, the outcomes should also be similar—either doctors and attorneys should both be shielded from negligent referral claims, or neither set of professional service providers should receive such protection.

Refusing to recognize any cause of action for negligent attorney referral is unfair on two levels. First, as shown in the case of *Bourke*, this approach can leave clients in a position of being unable to recover from any source for his loss if Attorney A negligently refers a case to Attorney B, who then commits malpractice. Second, if attorneys—but not other professionals, like doctors—are shielded from liability for negligent referrals, then the courts’ privileging of attorneys appears to be suspect without having insurance or enough assets to satisfy a judgment. And as a matter of policy, this approach fails to counterbalance possible incentives—like referral fees—that could tempt attorneys to run referral mills without regard for risk to the clients.

A commentator has noted the need to balance public policy considerations of encouraging appropriate attorney referrals while not giving legal professionals a privilege of immunity that does not apply to practitioners of other professions:

49. *Estate of Tranor v. Bloomsburg Hosp.*, 60 F. Supp. 2d 412, 413 (M.D. Pa. 1999).

50. *Id.* at 416.

51. *Id.*

If the court is too liberal in imposing a duty on an attorney, then other attorneys will avoid making referrals A referral system greatly reduces a client's need to spend countless hours searching legal directories, television ads, or phone ads. Reducing the client's search for a competent attorney is especially important when a client faces pressing legal matters or lacks the physical ability to “shop around” for an attorney On the other hand, refusing to impose a duty of care will have the opposite effect. Courts have been criticized for protecting members of their own community. Courts that impose strict standards on members of other professions, yet refuse to place similar standards on their own profession, will be further criticized. These criticisms damage the legal community as a whole because they hinder the public's willingness to seek and obtain counsel. Furthermore, varying standards of care for different professionals create confusion in the law.⁵²

The Florida/Illinois Approach: Vicarious Liability in a Situation of Fee-Splitting

Florida and Illinois follow the Model Rules approach of providing that when Attorney A refers the client to Attorney B—and in return for giving the referral, Attorney A receives part of the fee paid by the client—Attorney A and Attorney B are jointly responsible for the case.

In *Norris v. Silver*, the client resided in Florida but was injured while in Illinois, when a vehicle struck his bicycle.⁵³ The client contacted Attorney A, whom he knew socially, and who had previously represented him in some legal matters.⁵⁴ Because Attorney A did not handle personal injury cases, he referred the client to Attorney B.⁵⁵ Attorney A had a history of giving such referrals to Attorney B and sharing in fees recovered by Attorney B, but had not entered a written agreement regarding division of the attorney fee for Norris' case.⁵⁶ After Attorney B failed to file suit within the period specified by the Illinois statute of limitations, the client sued Attorney B for malpractice, and also sued Attorney A for malpractice and negligent referral.⁵⁷

The Florida Court of Appeals upheld the trial court's dismissal of the negligent referral claim, noting the client conceded that Attorney A did not know of any facts indicating that Attorney B would commit malpractice.⁵⁸

52. Andrew W. Martin, Jr., Comment, *Legal Malpractice: Negligent Referral as a Cause of Action*, 29 CUMB. L. REV. 679, 695 (1998–1999) (citation omitted).

53. *Norris*, 701 So. 2d at 1239.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 1241.

However, the appellate court found a factual issue of whether there was a fee-splitting agreement between Attorney A and Attorney B, and consequently reversed the trial court's grant of Attorney A's motion for summary judgment on the client's malpractice claim.⁵⁹ The court observed that under Rule Regulating The Florida Bar 4-1.5(g), when the client's fee is divided between attorneys in different firms, the attorneys must assume joint responsibility for the representation of the client.⁶⁰ Explaining the policy for requiring joint responsibility in such circumstances, the court quoted an Opinion from the Florida Bar Committee on Professional Ethics, stating that such responsibility "is the quid pro quo for the attorney's receipt of a portion of the fee that does not represent payment for work performed."⁶¹ The court also noted an Informal Opinion from the American Bar Association Committee on Ethics and Professional Responsibility, which explained the sharing of responsibility as comparable to that of partners within a law firm.⁶² The court concluded that if Attorneys A and B agreed to division of the fees, then Attorney A shared responsibility for malpractice committed by Attorney B.⁶³

Courts in Illinois recognize that Illinois Rule of Professional Conduct 1.5(g) requires that when Attorney A receives part of the client's fee in return for making a referral to Attorney B, then Attorney B must disclose the fee-splitting agreement to the client, and Attorney A assumes the same responsibility for the case as does a partner of Attorney B.⁶⁴ However, the Illinois cases involved suits against organizational referral services (such as the Chicago Bar Association), rather than individual attorneys making referrals.⁶⁵ The courts found that the organizational referral services were not attorneys, and so were not subject to Rule 1.5 and did not assume responsibility for the conduct of the cases even though they received payment for providing referrals.⁶⁶

59. *Id.* at 1240-41.

60. *Id.* at 1240.

61. *Id.* at 1241 n.3.

62. *Id.*

63. *Id.* at 1241.

64. *See, e.g., Weisblatt*, 684 N.E.2d at 989.

65. *See, e.g., Weisblatt*, 684 N.E.2d at 985; *see also* *Gonzales v. American Express Credit Corp*, 733 N.E.2d 345, 352 (Ill. App. Ct. 2000); *Richards v. SSM Health Care, Inc.*, 724 N.E.2d 975, 979 (Ill. App. Ct. 2000).

66. *Weisblatt*, 684 N.E.2d at 990; *Gonzales*, 733 N.E.2d at 352. (The Model Rules similarly allow for payment of fees to a lawyer referral service. Model Rule 7.2 governs attorney advertising. Model Rule 7.2(b)(4) permits attorneys to "pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service." The same subsection also explains that "[a] qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority[.]").

Recognizing the possibility of liability when Attorney A financially benefits from referring the client to Attorney B is attractive because it uses a concrete guideline and is grounded in ethical rules like Model Rule 1.5. In addition, it seems fair to require a heightened level of responsibility from Attorney A if he financially profits from giving the referral, compared with his level of responsibility if he does not receive monetary profit from the referral. The prospect of liability also counterbalances the referring attorney's financial incentive to give the referral, thus discouraging the idea of operating a "referral mill" to profit by giving large numbers of referrals without regard for the risk to the clients.

But such a rule is under-inclusive because it does not deal with situations where Attorney A might give a risky referral based on non-monetary incentives—such as supporting a law school classmate whose business has suffered due to having been reprimanded by the state bar association. It also does not deal with situations where *indirect* financial incentives may occur, such as reciprocal cross-referrals between attorneys with different specialties, so that both attorneys increase their revenues although there is no direct payment to either of the attorneys in exchange for making a referral. (In fact, such reciprocal cross-referral agreements are explicitly allowed under Model Rule 7.2, which governs advertising. Subsection 7.2(b)(4) permits such an agreement as long as it is not exclusive and the client is informed about the agreement.) Thus, the approach taken by the Florida Court of Appeals in *Noris v. Silver*—analyzing the issue of liability under *both* ordinary negligence principles and vicarious liability for fee-splitting—seems sensible.

The New York/New Jersey Approach: Totality of Circumstances

In contrast to the other two approaches described above, courts in New York and New Jersey have employed a broader examination of circumstances in determining whether a referring attorney is liable for malpractice committed by the attorney who receives the referral.

In the case of *Broadway Maintenance Corp. v. Tunstead & Schechter*, Firm A was the New York-based general counsel for the corporate client, who wished to sue for delay damages on a construction contract with the state of Virginia.⁶⁷ At the client's request, Firm A recommended a Virginia law firm, Firm B, to handle the litigation.⁶⁸ Firm B then recommended another Virginia

67. *Broadway Maint. Corp. v. Tunstead & Schechter*, 487 N.Y.S.2d 799, 800 (N.Y. App. Div. 1985).

68. *Id.*

Firm, Firm C, to function as local trial counsel.⁶⁹ The Virginia law firms failed to timely file the lawsuit, and the client then sued for malpractice, including Firm A as a defendant.⁷⁰

In reversing the trial court's denial of summary judgment for Firm A, the New York Appellate Division relied on the fact that Firm A never represented the client in the Virginia contract litigation, and on the absence of any evidence showing that Firm A undertook supervision of the work of the Virginia law firms.⁷¹ But the Appellate Division apparently failed to consider whether Firm A might have been negligent in recommending that the client hire Firm B. The court did not indicate whether there were any facts that would have given Firm A notice that Firm B was likely to mishandle the litigation. Although Firm A did not represent the client in the case against Virginia, Firm A was the client's ongoing general counsel. If Firm A had any reason to believe that Firm B would not conscientiously pursue the litigation, then the recommendation to hire Firm B could have been both negligent and a breach of fiduciary duty, although the short opinion in the *Broadway Maintenance* case does not indicate that a claim for breach of fiduciary duty was pleaded. The legal grounds for breach of fiduciary duty are explored later in this article.

Unlike the appellate outcome of the *Broadway Maintenance* case, in *Tormo v. Yormark*, the federal District Court for the District of New Jersey denied Attorney A's motion for summary judgment, finding a question of fact on the issue of "a New York attorney's liability for negligence in transferring his client's personal injury case to a criminally indicted New Jersey lawyer who subsequently embezzled the client's funds."⁷² In *Tormo*, the client, who was at that time a minor living in New York, was involved in a boating accident in New Jersey.⁷³ The client's father contacted New York Attorney A—with whom he had often consulted on business matters—for help in pursuing settlement of the client's claim.⁷⁴ New Jersey Attorney B contacted Attorney A, saying he had spoken with the client and her father about the accident, learned about Attorney A's involvement, and would like to handle the case.⁷⁵ Later, after the client married, moved to Spain, and became a Spanish citizen—rendering New York improper as a venue to litigate the boating accident—Attorney A contacted Attorney B, so that Attorney B could

69. *Id.*

70. *Id.*

71. *Id.*

72. *Tormo v. Yormark*, 398 F. Supp. 1159, 1164, 1171–72 (D.N.J. 1975).

73. *Id.* at 1165.

74. *Id.*

75. *Id.* at 1166.

file suit in New Jersey.⁷⁶ However, Attorney B had in the meantime been indicted in New Jersey for conspiring to defraud an insurance company, and was later convicted of the charge.⁷⁷ While appealing his conviction, Attorney B received and embezzled the settlement payment for the client's boating accident claim.⁷⁸

The client brought suit against Attorney B and against banks involved in transfer and deposit of the funds, and the banks named Attorney A as a third-party defendant. The banks alleged that Attorney A was negligent in referring the case to Attorney B, or that Attorney A had breached a duty to supervise Attorney B's handling of the case.⁷⁹

Regarding the issue of negligence, the court noted factual questions of whether Attorney A told the client that Attorney B was a "good well-qualified lawyer" (which would support finding that Attorney A had a duty to check Attorney B's background) and whether Attorney A made sufficient inquiry into whether Attorney B was trustworthy.⁸⁰ Attorney A verified that Attorney B was a licensed lawyer in New Jersey, but did not make a more extensive investigation, and did not know that Attorney B was under indictment at the time the referral was made.⁸¹ The court found that, given the state's extensive regulation of the legal profession, Attorney A would ordinarily not be required to make further inquiries beyond Attorney B's licensure.⁸² The court suggested that New York and New Jersey attorneys might be held to different levels of culpability in referring clients to Attorney B, if the level of media coverage regarding allegations of his criminal conduct was less in New York than it was in New Jersey: "[Attorney B's] indictment was reported by the New Jersey press, but there is no evidence that it was given wider coverage. [Attorney A] ought not be deemed negligent for failing to discover that fact absent proof of the latter sort."⁸³ So in theory, New Jersey media coverage of a New Jersey attorney's indictment might be higher than New York media coverage, which in turn would probably be higher than coverage in a more distant jurisdiction, such as Wyoming, and courts would therefore apply different expectations to lawyers in those jurisdictions.

Evaluating the overall impact of the *Tormo* case, one commentator declared that "the duty to investigate the credentials of [Attorney B],

76. *Id.*

77. *Id.* at 1166–67.

78. *Id.* at 1168.

79. *Id.* at 1169.

80. *Id.* at 1170–71.

81. *Id.*

82. *Id.* at 1171.

83. *Id.* at 1170.

particularly in a foreign jurisdiction, is minimal.”⁸⁴ But a countervailing consideration is the greater accessibility of information since the time of the *Tormo* decision, through sources such as the internet. Could there now be a duty to Google search an attorney’s background, before giving the client a referral to that attorney? In addition, if Attorney A does not have the same specialty as Attorney B, should Attorney A be held to a less stringent standard of care in making the referral than would an attorney who does practice in the same specialty as Attorney B? As a general matter, attorneys who claim specialized skills are held to a higher standard of care.⁸⁵ In the area of referrals, this could mean that, for example, tax Attorney A who refers a client to tax Attorney B could be held to a higher standard than personal injury Attorney C, who also makes a referral to tax Attorney B but does not have the background to make as thorough an evaluation of Attorney B’s level of competence.

The *Tormo* court also observed that there was a question of fact as to whether Attorney B had initiated contact with the client and her father about the case, which would have been a violation of the Code of Professional Responsibility, DR 2–103(A),(B), that New Jersey had in effect at that time.⁸⁶ Such solicitation of legal employment from the general public would have been grounds for disbarment.⁸⁷ The court reasoned that “the ethical violation evidences a general lack of trustworthiness” for Attorney B, so that Attorney A should have noted the need for further investigation into Attorney B’s trustworthiness, and Attorney A might therefore have been negligent in referring the client to Attorney B without having done such investigation.⁸⁸

Regarding the issue of supervision, the court found a question of fact as to whether Attorney A’s involvement in the case ended at the time he transferred the case to Attorney B.⁸⁹ The court also explained that neither a formal retainer agreement nor payment of a fee was necessary to establish an attorney-client relationship, and the court found that Attorney A’s “promise to see what could be done with regard to settlement” was sufficient to establish that he had placed himself in the role of the client’s attorney.⁹⁰ The lessons from this part of the *Tormo* opinion are clear—an attorney should

84. 17 *TOURO L. REV.*, at 641.

85. See, e.g., Norman B. Arnoff and Sue C. Jacobs, *The Specialized Attorney and a Higher Standard of Care*, 214 *N.Y.L.J.* n.69 (Oct. 10, 1995), at 3.

86. *Tormo*, 398 F. Supp. at 1171.

87. *Id.*

88. *Id.* at 1172.

89. *Id.* at 1167, 1173.

90. *Id.* at 1169.

clearly communicate whether he is representing a client, and should clearly communicate to the client when he withdraws from representation.

The totality-of-circumstances approach has the advantages and drawbacks of flexibility, in contrast to a more restrictive approach like a bright-line rule such as Model Rule 1.5, which imposes shared liability in situations of fee-splitting, or the Model Code's DR 2-103(B), which simply prohibits fee-splitting. In order to make good use of the totality-of-circumstances approach, the courts have to recognize different theories of liability that can be supported by the same facts. The decision in *Broadway Maintenance Corp. v. Tunstead & Schechter*⁹¹ failed to do that, when it considered only whether Firm A had a duty to supervise Firms B and C, but did not consider whether the act of recommending the hiring of Firm B might be negligent. In contrast, the decision in *Tormo v. Yormark*⁹² considered multiple approaches as to whether the facts could support a claim for negligent referral. Such a broad-based look at liability for referrals could be strengthened by incorporating doctrines that have been applied in other areas of law.

UTILIZING CERTAIN DOCTRINAL CLAIMS AND DEFENSES

In evaluating claims for malpractice arising from attorney referrals, it may be useful to consider doctrines that have been applied more broadly. Plaintiffs may claim breach of fiduciary duty and analogize to undue influence. Defendants may analogize to the business judgment rule.

Breach of Fiduciary Duty

Fiduciaries are prohibited from acting against the interests of their principals. "Although an agent's interests are often concurrent with those of the principal, the general fiduciary principle requires that the agent subordinate the agent's interests to those of the principal and place the principal's interests first as to matters connected with the agency relationship."⁹³ For example, when entrusted to make purchases or sales for the principal,

[A]n agent who has received precise instructions from a principal breaches the agent's fiduciary duty to the principal by using the information conveyed

91. *Broadway*, 487 N.Y.S.2d 799.

92. *Tormo*, 398 F. Supp. 1159.

93. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. B (2006).

by those instructions in a manner to which the principal does not consent, for example by “front-running” or trading on the agent's own account in advance of executing an order to trade received from the principal. If the market is thin, the agent's trade may affect the price received by the principal. If the magnitude of the principal's order will affect the market price, the agent's front-running makes use of the fact, known to the agent, of the principal's order without the principal's consent.⁹⁴

As noted by the New York Appellate division, “[a] lawyer is a fiduciary of and for his client.”⁹⁵ Indeed, “the relationship of client and counsel is one of unique fiduciary reliance and . . . the relationship imposes on the attorney the duty to deal fairly, honestly and with undivided loyalty . . . including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients’ interests over the lawyer’s[.]”⁹⁶ Thus, when there has been an established attorney-client relationship, a claim for breach of fiduciary duty could supplement a claim for attorney malpractice. But when a claim for breach of fiduciary duty is merely coextensive with a claim for legal malpractice—premised on the same facts and seeking the same relief—the fiduciary duty claim can be dismissed as redundant.⁹⁷ Nevertheless, a claim for breach of fiduciary duty could be an alternate claim for plaintiffs in jurisdictions that have not considered whether a cause of action for negligent attorney referral should be recognized.

A typical explanation for breach of fiduciary duty comes from the New York case of *Kurtzman v. Bergstol*: “In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct.”⁹⁸ In *Kurtzman*, the defendant was the attorney for the limited liability company of which the plaintiff was a member.⁹⁹ The defendant breached his fiduciary duty to the plaintiff by preventing her from receiving her share of the limited liability company’s profits.¹⁰⁰

It is also worth noting that establishing an attorney-client relationship—which entails a fiduciary relationship—can result from rather

94. *Id.* at cmt. 3.

95. *McMahon v. Pfister*, 332 N.Y.S. 2d 591, 591 (N.Y. App. Div. 1972).

96. *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 21 (N.Y. App. Div. 2008) (citations and internal quotation marks omitted).

97. *Weil, Gotshal & Manges, LLP, v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 (N.Y. App. Div. 2004).

98. 40 A.D.3d 588, 590 (N.Y. App. Div. 2007).

99. *Id.*

100. *Id.*

minimal statements, such as that of Attorney A in the previously discussed case of *Tormo v. Yormark*¹⁰¹ from the federal District of New Jersey, when that attorney told the client's father that he would see what could be done regarding settlement of the underlying case.

Undue Influence

Undue influence is a doctrine that protects against improper, self-dealing transactions through exploiting a confidential relationship. For example, in contract law, California Civil Code § 1575 provides that,

Undue influence consists:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.¹⁰²

Similarly, in probate law, the Pennsylvania case *In re Estate of Fritts*, explains that “[a] *prima facie* case of undue influence is established and the burden of proof is shifted to the will's proponent when three elements are established: 1) there was a confidential relationship between the proponent and testator; 2) the proponent receives a substantial benefit under the will; 3) the testator had a weakened intellect.”¹⁰³

The policy against undue influence is thus protection against a conflict of interest that can arise in a confidential relationship. As observed by the New Jersey Supreme Court in a case dealing with undue influence in estate planning, “[a]n attorney-client relationship is inherently a confidential relationship[.]”¹⁰⁴

Moreover, in some jurisdictions, the doctrine of undue influence also applies to a situation in which the dominant party exploits a confidential relationship to effect a transaction not to benefit himself, but rather to unfairly

101. 398 F. Supp. 1159.

102. CAL. CIV. CODE § 1575 (West 2008).

103. 906 A.2d 601, 606–07 (Pa. Super. Ct. 2006).

104. *In re Estate of Stockdale*, 953 A.2d 454, 470 (N.J. 2008).

benefit a third party such as a friend or relative.¹⁰⁵ This reasoning could apply to a situation where an attorney makes a referral based not on the client's best interest, but rather on a wish to support friends who are attorneys.

When such a conflict of interest arises, there should at least be a requirement of disclosure of the conflict—such as is required in the situation of fee-splitting under Model Rule 1.5, where the attorney must disclose his own financial interest in making the referral. There may also be situations where an attorney *indirectly* gains financial profit from making referrals to another attorney—for example, Attorney A and Attorney B may specialize in different fields of law, and may follow an arrangement of making reciprocal cross-referrals to each other, so that both attorneys increase their revenues although there is no direct payment to either of the attorneys in exchange for making a referral. Requiring disclosure of the reciprocal referral arrangement—as required by Model Rule 7.2(b)(4)—could give the client relevant information for deciding whether to use the referral, and it would not impose an unmanageable burden on the attorneys.

The Business Judgment Rule

The business judgment rule protects corporate directors who take reasonable, business-justifiable risks. The policy underlying the business judgment rule was explained in the case of *In re PSE & G Shareholder Litigation*:

The decisions directors are asked to make may not be susceptible to right or wrong analysis at the time they are made. With hindsight, decisions may prove to have been wrong, but that does not necessarily mean a director's decision was wrong when made. Directors act for the owners of the corporation; they make the decisions that the owners would otherwise have to make. Unless they engage in conduct in which no reasonable owner would be likely to engage, the directors should not expect to be monetarily liable.¹⁰⁶

The court then stated that “[i]n order to be protected by the business judgment rule, the directors making a business decision must have become fully informed and acted in good faith and in the honest belief that their actions are in the corporation's best interest.”¹⁰⁷

105. See, e.g., *Montoya v. Torres*, 823 P.2d 905, 909–10 (N.M. 1991), *Swenson v. Wintercorn*, 234 N.E.2d 91, 98 (Ill. Ct. App. 1968).

106. 718 A.2d 254, 256–57 (N.J. Super. Ct. 1998).

107. *Id.* at 257 (citation and internal quotation marks omitted) (emphasis in original).

Another rationale for the business judgment rule is that courts are ill-equipped to evaluate complex corporate decisions.¹⁰⁸ Courts might be better situated to evaluate the reasonableness of attorney referrals than to evaluate corporate decision-making, so the applicability of the business judgment rule to legal malpractice cases might be questionable. However, commentators have begun to compare what is required of corporate directors and officers under the business judgment rule with the standard of care imposed on physicians in medical malpractice cases.¹⁰⁹ Given that courts have routinely evaluated liability in both medical malpractice cases and legal malpractice cases, it seems reasonable at least to consider whether an analogy to the business judgment rule can be made in legal malpractice cases, in light of the commentators' consideration of whether the doctrine should apply to medical malpractice disputes.

When Attorney A is a defendant in a legal malpractice suit, he could analogize to the business judgment rule if he can show that he referred the client to Attorney B based on the client's best interest, even though Attorney B unfortunately ended up committing malpractice. A policy promoting such an analogy may be to encourage providing information to clients who need referrals, as noted by the court in *Felker v. Nationwide Insurance, Inc.*¹¹⁰ Otherwise, in order to avoid liability, some attorneys might give only as much information as can readily be found elsewhere, such as the yellow pages section of a local telephone book.

Analogy to the business judgment rule could thus protect Attorney A against the unknown risk that, e.g., Attorney B has very recently developed a problem with alcohol abuse or other substance abuse that affects his legal judgment or work ethic. At the same time, it would serve the public by encouraging attorneys to give referrals based on the information that they currently have.

CONCLUSION

Viewing the issue of attorney referrals with the background of the professional responsibility rules for attorneys shows that, at a minimum, conflicts of interest should have to be disclosed when referrals are given. The

108. See, e.g., DENNIS J. BLOCK, NANCY E. BARTON, & STEPHEN A. RADIN, *THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS* 15 (5th ed., Aspen Law and Business) (1998).

109. See, e.g., Jeffrey O'Connell and Andrew S. Boutros, *Treating Medical Malpractice Claims Under a Variant of the Business Judgment Rule*, 77 NOTRE DAME L. REV. 373 (2002); Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587 (Fall 1994).

110. 1990 WL 4395.

ethical rules and case law are clearest about this when referral fees are involved. But indirect financial incentives such as reciprocal cross-referrals between attorneys with different specialties, or non-financial incentives such as loyalty to attorney friends, can also conflict with the best interests of the client, and so should also be disclosed to the client.

Categorically shielding attorneys from all claims of negligent referral can unfairly leave clients unable to recover for loss, and does not seem justified when negligent referral claims are allowed against other professionals such as physicians. On the other hand, exposure to excessive risk would discourage attorneys from giving appropriate referrals. Analogizing to the business judgment rule could help to establish a presumption that protects attorneys who give appropriate referrals, while still allowing claims based on negligent referrals.

For plaintiffs who have been negligently referred by their attorneys, presenting a claim for breach of fiduciary duty can give the court a familiar framework to evaluate liability, especially in jurisdictions that have not yet considered whether to recognize a cause of action for negligent attorney referral. In some circumstances, analogizing negligent referrals to situations of undue influence might similarly give the court a familiar framework involving unfair exploitation of confidential relationships.