

Referring Clients to Other Lawyers

In a previous article,¹ we examined the effect of new ER 1.18 (Duties to Prospective Client)² on clients who, for one reason or another, you cannot accept or who do not end up hiring you. We saw that the primary concern there was that of maintaining confidentiality of anything you learned from the prospective client before you parted ways.

But what about the situation in which you have learned from the prospective client that she wants you to bring suit against a company that is an existing client of yours? You, of course, cannot take the case but are asked to refer the prospective client to another lawyer who can.

The first thing to understand is that there is no ethical duty to refer to another lawyer any prospective client you cannot represent. You can encourage the prospective client to secure other counsel and end your relationship then and there.³ But what if the prospective client is referred by your rich client, Uncle Morry, who has asked you to help his old friend get a lawyer?

The practical difficulties of the situation are that new Rule ER 1.18 may prevent you from disclosing to your existing client that the prospective client is getting ready to sue him. Assuming that your client eventually finds out that you came to this knowledge previously, what will he then think when he finds out that you then referred the plaintiff to the lawyer who is now making so much trouble for him?


These are practical questions that are unfortunately not covered by the ethical rules. Knowing that whomever you recommend may end up being opposing counsel in a case against one of your clients, do you suggest a lawyer whom you know is easy to deal with, or one who has a reputation for being a tough fighter?

Once you get into the process of finding another lawyer, you should be aware that there is such a thing as “negligent referral,” in which lawyers have been successfully sued for negligently referring a person to an incompetent or dishonest lawyer.⁴ In view of this, you will probably want to make sure that if you refer someone to a lawyer, it is because you have a respect for that lawyer’s competence and effectiveness.

The only published analysis of this problem that I have been able to find is found in an opinion by the District of Columbia Bar.⁵ There, after discussing the dilemma that a lawyer has from keeping confidences of a prospective client from an existing client who would probably really like to know what those confidences were, the conclusion drawn was that each lawyer must decide for herself whether, under the particular circumstances, referring a prospective client in these situations is a wise thing to do. Not much help.

The cautious lawyer will determine before the first interview or communication with a prospective client whom the potential adversaries may be. Even that may not resolve the

issue, however, because the very fact that suit is being contemplated against your existing client may be confidential. If you decide to tell the prospective client that you will not give him the name of a specific lawyer to call, you might suggest a lawyer referral service or give the prospective client the names of three or four other lawyers, from which he can pick the one he chooses to represent him.

Take heart that this unfortunate scenario will only happen when a prospective client has to be turned down because you’ve learned that he wants to sue one of your existing clients. There will be plenty of other situations in which you won’t want to represent the prospective client but will be comfortable in recommending to him the best lawyers you know. And if you learned too many confidences from the prospective client before you recognized a conflict and are prevented from representing an existing client, remember that new ER 1.18 allows you to be “screened” from the litigation so one of your partners can represent the existing client without being infected by the confidences that disqualify you.⁶ 

New: “Bar Counsel Insider,” insights from the State Bar’s own Lawyer Regulation Department attorneys, on p. 47.

Ethics Opinions can be found on p. 46. Opinions and the Rules of Professional Conduct are available at www.myazbar.org/Ethics



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endnotes

1. *The Prospective Client*, ARIZ. ATT’Y, Mar. 2006, at 8.
2. Rule 42, ARIZ.R.S.C.T.
3. ER 4.3 (Dealing with Unrepresented Person) provides that a lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of an existing client.
4. I MALLEN & SMITH, LEGAL MALPRACTICE § 5.9 (2005).
5. D.C. Bar Rules of Prof. Conduct Review Committee, Op. No. 326 (Referral of Person Adverse to a Client to Another Lawyer).
6. ER 1.18(d).