

DIALOGUE

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Is Your LRIS Liable?

by Sheree Swetin

Are lawyer referral programs liable for the referrals they make? Can a referral client successfully sue an LRIS for negligent referral? Legal malpractice? What is the bar's liability to the client if the attorney's insurance is canceled? Lawyer referral programs must consider several types of professional liability that could result from their daily activities.

Negligent Referrals

Many professional groups refer clients to their members. Negligent referral liability can arise when the lawyer referral service promises or implies that certain standards or criteria exist when in fact, they do not. A lawyer referral program also can be negligent by inaccurately communicating panel attorney qualifications, or by not verifying that attorneys meet the criteria promised to the client. Liability also can exist when the LRIS indicates to the public that the program offers a higher standard of referral, when it in fact does little or nothing to ensure quality referrals.

Legal Malpractice

On rare occasions, lawyer referral programs have been sued for legal malpractice. In such instances, the client often names the LRIS, with the panel member, as an additional defendant, especially if the plaintiff needs a deep pocket because the panel member has insufficient insurance limits.

This is a difficult claim to pursue, because most lawyer referral programs do not establish a lawyer/client relationship or provide legal advice, which are elements of a legal malpractice claim. If your program provides legal advice through lawyer-interviewers or through call-in hotlines, you should look into adding, to your bar's errors and omissions policy, legal malpractice protection for volunteers.

Vicarious Liability

Finally, the lawyer referral program can be found to be vicariously liable for legal malpractice claims if its panel members fail to keep their insurance policies in force. Most lawyer referral programs promote the fact that all of their panel members carry legal malpractice insurance.

Is the lawyer referral service liable for malpractice damages if the panel member cancels his or her insurance or fails to make premium payments? At least one program in California has paid money to settle such a claim. Even if the program is not liable for legal malpractice damages, do we have an obligation to notify clients if the panel member drops insurance coverage? Unfortunately, the law is not clear on the answer to this question.

Claims Against LRIS Programs

Only four claims against lawyer referral programs have been reported to the ABA in the past fifteen years. All were dismissed prior to trial. In the complaint filed against the Chicago Bar Association, the plaintiff alleged that the bar was negligent and breached its duty of reasonable care because the referred lawyer was not an expert in the specific area of law and did not have adequate malpractice insurance. The plaintiff argued:

- the LRIS was liable for negligent representation under the "voluntary undertaking" doctrine
- the LRIS was liable as a referring lawyer under the rules of professional conduct.

The court, however, granted the Chicago Bar Association's motion to dismiss. It ruled that the lawyer referral service could not be held liable for the legal malpractice that the referral attorney committed. In addition, the court held that the lawyer referral service is not a "lawyer" and was not subject to the rules of professional conduct that govern the division of fees and professional responsibilities between lawyers. According to the court, "the mere taking of a referral fee as a referring agency

rather than as a referring lawyer will not suffice to make [the referral service] an insurer or otherwise vicariously accountable for the actions of the attorney to whom the matter is referred."

While this decision does not govern courts in other jurisdictions, it may well prove persuasive and may well indicate what another court would decide if faced with a similar case.

Precautions

Lawyer referral programs can take simple precautions to reduce their chances of being successfully sued for negligent referral or malpractice. First, consumers expect more from a bar-sponsored lawyer referral service than they do when looking for an attorney in the yellow pages. Indeed, LRISs pride themselves on providing a public service, and as a result, they must establish some sort of panel qualifications to meet the public's expectations.

Second, a program should not imply panel member standards or criteria that it does not verify. If you say "experienced," then verify experience. If you say "has malpractice insurance," then verify coverage.

Third, consider adding a statement to your attorney referral form that states *"All lawyer referral members must have in force a malpractice insurance policy with minimum limits of \$_____ to accept referrals. You must notify us immediately upon receipt of this referral if your malpractice insurance has lapsed so that we may refer the client to another LRS member."*

Finally, establish rules for reviewing client complaints and removing panel members who do not meet the service's standards. Do not allow today's client complaints to turn into tomorrow's liability claims. Liability claims against lawyer referral programs are always a threat, even though they are, thankfully, few and far between. Lawyer referral directors should be aware of the potential for liability, and they must clearly and honestly communicate to clients the services that the LRIS and its panel members provide. Ultimately, these common-sense precautions will protect the LRIS, the sponsoring bar, and most importantly, the client.

Sheree Swetin is the Staff Director of the ABA Standing Committee on Lawyers' Professional Liability and the Standing Committee on Lawyer Referral and Information Service. If you would like a copy of the Chicago Bar Association decision reported in this article, contact Sheree Swetin at 312/988-5755, or by e-mail at sswetin@staff.abanet.org