

**ETHICS: REFERRALS AND RESPONSIBILITIES**  
**Oregon State Bar CLE Seminar: The Elder Law Experience**  
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I. Common referral-based relationships in elder law

A. Elder Law Attorney (ELA) refers client to financial advisor or accountant, or financial advisor/accountant refers client to ELA.

B. ELA refers client to another attorney, to handle an issue outside of the scope of traditional elder law, such as litigation.

II. Risks to the referring attorney

A. Elder Abuse Prevention Act, ORS 124.100(4):

(i) An action may be brought under this section against a person for Permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse.

(ii) See Richard Braun's materials entitled "Litigating the Oregon Elder Financial Abuse Case," prepared for the OLI CLE Representing Elder Abuse Victims, which occurred March 4, 2005.

(iii) Fact scenario: ELA refers client to financial advisor, or financial advisor refers client to attorney. During attorney representation, financial advisor commits elder financial abuse through theft and/or fraud. Is attorney liable for elder abuse under ORS 124.100(4)? See *In re Britt*, Appendix 1.

B. Tort of Negligent referral

(i) In certain circumstances, attorney has duty to investigate receiving attorney prior to making referral. *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975).

(ii) In certain circumstances, attorney has duty to refer case to specialist. *Horne v. Peckham*, 158 Cal Rptr. 714 (Ct. App 1979)

C. Attorney negligence

(i) Elements: duty to client; breach of duty; resulting harm; causation, i.e. causal link between breach of duty and harm. *Varner v. Eves*, 164 Or. App. 66 (1999)

(ii) Attorney duty to client

a. "In an attorney client relationship, the law imposes a duty of care on the attorney to 'act as a reasonably competent attorney in protecting and defending the interests of the client.'" *Varner v. Eves*, 164 Or. App. 66, 77 (1999), citing *Onita Pacific Corp v. Trustees of Bronson*, 315 Or. 149, 160 (1992).

b. "The tort duty to exercise reasonable care in protecting the client's economic interests is implied by law when the attorney contracts with the client to provide legal services." *Onita Pacific Corp v. Trustees of Bronson*, 315 Or. 149 (1992), citing *Georgetown Realty v. The Home Ins. Co.*, 313 OR. 97, 106 (1992).

c. "The scope of the duty created by the attorney-client relationship is developed on a case-by-case basis. In defining the scope of the duty, it is appropriate to look to '[c]ommon law principles of reasonable care and foreseeability of harm.'" *Varner v. Eves*, 164 Or. App. 66 (1999), citing *Allstate Ins. Co. v. Tenant Screening Services, Inc.*, 140 Or.App 41, 50 (1996).

d. Defining the scope of the duty using the facts of the case:

- 1) Retainer agreement
- 2) Standard practice for the industry
- 3) Rules of professional conduct

(iii) Fact scenario: Attorney enters joint venture with insurance company. Attorney sends letters to clients, advising estate planning review. Insurance company follows with agents who conduct review, sell insurance products. Insurance company sells products to elderly clients who do not need them, at great financial cost. If insurance company tactics amount to fraud, is attorney vulnerable to negligence allegations? See *In re Complaint of Phillips*, 338 Or. 125 (2005),

D. Joint liability:

(i) *Scott v. Francis*, 314 Or. 329 (1992). Attorney Lopez associates Attorney Jackson in malpractice action. Attorneys agree to split fees. Jackson's job is to file complaint, and he relies on Lopez to inform him of deadline for filing. Lopez fails to do this, statute of limitations runs. Attorneys found jointly liable. Indemnity potentially available for attorney who is less at fault, however.

(ii) *Duggins v. Guardianship of Washington*, 632 So. 2d 420 (Miss. 1993).

Attorney Duggins associates Attorney Barfield in malpractice action. Attorneys agree on fee split. Barfield settles action without informing Duggins, clients, misappropriated funds. Attorneys found jointly liable because the "intent to share both the responsibility and the profits from this representation clearly demonstrate the presence of a joint venture." *Duggins v. Guardianship of Washington*, 632 So. 2d 420, 428.

#### E. Rules of Professional Conduct

##### (i) Referral relationships with non-lawyers

a. RPC 5.4(a): Except in very limited circumstances, attorney cannot share legal fees with non-lawyer.

b. RPC 5.4(e): Attorney cannot refer client to non-lawyer for fee or anything else of value. See Ethics Opinion 2005-2: Cross-referral agreement with Trust company is unethical.

c. RPC 5.4(c): Referral source cannot influence legal counsel. See *In re Britt*, Appendix 1.

d. RPC 7.2(a): Attorney cannot compensate anyone for promoting, or recommending the attorney. See Ethics Opinion 2005-2: Cross-referral agreement with Trust company is unethical; Ethics Opinion 2005-73: Accepting uncompensated referrals from friends is ethical;

e. RPC 1.6(a): Attorney cannot reveal information relating to the representation of a client without client consent. See *In re Complaint of Phillips*, 338 Or. 125 (2005)

##### (ii) Referral relationships with lawyers - RPC 1.5: Fees

a. Model Rule approach: Fee split is appropriate if a) either the fee split is in proportion to hours worked, or each lawyer is jointly responsible for work, b) client agrees in writing to fee splitting arrangement, and c) overall fee is reasonable. In commentary, ABA suggests that joint responsibility of the two attorneys is comparable to joint responsibility of partners in law firm. See *Noris v. Silver*, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997).

b. Oregon rule approach: RPC 1.5(e) - Fee split is appropriate if a) client gives informed consent, and b) total fee is not clearly excessive.

### III. Mitigating the Risks

#### A. Direct communication with client

(i) Explicit retainer agreement, follow-up letters, detailing attorney role, distinguishing it from role of other players (Financial advisor, accountant, other attorney)

(ii) Take direction directly from client. Give counsel, documents directly to client. Do not speak to client through financial advisor, other counsel.

B. Avoid referral fee agreements or, in the alternative, structure them in a manner that is consistent with disciplinary rules (no referral fees for non-lawyers; referral fees for lawyers with client consent).

C. Do not share client names with financial advisors, accountants, attorneys, without client consent.

D. In attorney referral cases, consider a retainer agreement for each attorney. Consider indemnification agreement between attorneys.

E. Before referring case to another attorney or financial advisor, and before accepting referral, ask these questions:

(i) Do I have personal history, experience with this person that satisfies me of his competence?

(ii) If this person brought the case to me, is he attempting to limit my involvement? Is his involvement, advice (what I know of it), suspect? If the answer is yes, additional investigation warranted.

(iii) Is my client particularly vulnerable to financial exploitation, due to age or illness? If the answer is yes, referral should be based upon personal knowledge or additional investigation.

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