

## Recent Cases of Interest: Lawyers on the Firing Line

BY SARAH D. MCSHEA

Lawyers practicing in the ethics and professional liability fields know that courts are increasingly likely to hold lawyers and law firms accountable to their clients, third parties and fellow members of the bar. However, lawyers who practice in other fields may not be as familiar with the growing tendency to expand lawyer liability and fee forfeiture in certain circumstances. Three recent decisions illustrate what is almost certainly part of a larger national trend in that direction.

### Malpractice Liability for Referring Counsel

In *Reed v. Finkelstein, Levine, Gittlesohn & Tetenbaum, et al.*, 756 N.Y.S.2d 1250 (1st Dep't 2003), the Appellate Division, First Department, affirmed the trial court's denial of summary judgment to a referring law firm that sought dismissal of a legal malpractice action filed against it. The referring firm, a prominent personal injury firm, argued that it could not be held liable for the referred firm's alleged negligence in handling a late notice of claim in an infant malpractice action. The referred firm allegedly filed an inadequate late notice of claim and the client ultimately sued for legal malpractice. In seeking dismissal of the legal malpractice action against it, the referring law firm argued, among other things, that it could not be held responsible for the negligence of the referred law firm, which specialized in medical malpractice.

The Court disagreed, noting that the retainer agreement signed by the client listed both law firms. The Court also pointed out that the record contained no *written* evidence concerning the sharing of responsibilities and fees between the two firms, which had an ongoing professional relationship. More importantly, the Court observed that both the referring law firm and the referred law firm were "located in New York, specialize in similar areas, and practice in the same courts under the same rules and before the same judges." Thus, the referring firm could not disclaim responsibility for the handling (or alleged mishandling) of the case it had referred to another firm.

The principle underlying this decision is clear: lawyers who refer cases to other counsel and expect a referral fee must also be prepared to share the responsibilities to the client. Indeed, Disciplinary Rule 2-107(A) provides that a lawyer may not share legal fees with an unaffiliated lawyer unless three requirements are met. First, the client must consent to employment of the referred lawyer "after a full disclosure that a division of fees will be made." Second, the division of fees must be "in proportion to the services performed by each lawyer" or by a "writing given to the client," each lawyer must assume "joint responsibility for the representation." Finally, the total fee must not "exceed reasonable compensation for all legal services" rendered by both lawyers to the client.

Compliance with DR 2-107(A) is not difficult for attorneys who wish to refer cases to other counsel and participate in the legal fees. The rule does not prohibit the standard referral fee arrangement under which a fixed percentage of the recovery is paid to referring counsel by referred counsel. The rule simply

requires referring counsel to agree in writing to be responsible to the client. This means that referring counsel must respond to telephone calls and inquiries by the client and, if called upon to do so, protect the client's interests. It also means that referring counsel may be held legally liable to the client for breach of fiduciary duty or malpractice, even if the misconduct complained of is committed by the referred law firm.

In the *Reed* case, the Appellate Division concluded that the referring law firm could not avoid legal liability simply because it had referred the client to another law firm, however well qualified that law firm might be. Clearly the referring firm expected to participate in the recovery in the event the client was successful and, in any event, the retainer agreement signed by the client retained both law firms. Under these circumstances, the Court declined to relieve the referring firm of liability, leaving open the question of the extent of its responsibilities to the client. An important issue left open by the court is whether these responsibilities include supervision by the referring firm of the work of the referred firm.

Professor Roy Simon discussed the issue of joint responsibility at length in a recent NYPRR article (December 2002). He distinguished between the broad view of responsibility espoused by the ABA in Model Rule 1.5(e), Comment 4, which states that joint responsibility "entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership," and the narrower view generally followed in New York. *See*, New York County Lawyers' Association Opinion 715 (1996) (joint responsibility means only joint "financial responsibility"); *Aiello v. Adar*, 750 N.Y.S.2d 457 (Bronx Cty. 2002), and *Simon's New York Code of Professional Responsibility Annotated* (West 2003), at 272-278. Interestingly, the New York State Bar Association commented in Opinion 745 (2001) that joint responsibility "means more than financial responsibility and malpractice liability."

The *Reed* case makes clear that referring counsel may be held responsible for the alleged malpractice of referred counsel. Prudent referring lawyers therefore would be well-advised to 1) have a good malpractice policy in place and 2) make sure that some minimal supervision or oversight is being exercised over referred counsel.

### **Malpractice Liability for Trial Counsel**

In *Shafi v. Gorayeb & Associates, P.C.*, (NYLJ, 4/21/03), New York County Supreme Court Justice Kornreich declined to dismiss a legal malpractice action filed against retained trial counsel. He found sufficient basis to conclude that the client's negligence action against the New York City Transit Authority "was not merely referred to Gorayeb as trial counsel but transferred to Gorayeb completely."

When the case was marked off the calendar, trial counsel Gorayeb was apparently the only counsel of record. The firm originally retained by the plaintiff had closed its practice and referred many of its cases, including the plaintiff's case, to trial counsel to assume the representation. While there was some question whether a consent-to-change attorney form had been executed, it is clear that the firm initially retained by plaintiff had transferred the matter to trial counsel to handle and that trial counsel had subsequently communicated directly with the client about the case.

The trial court dismissed trial counsel's argument that it could not be held liable for malpractice because there was no attorney-client relationship between the client and trial counsel, and thus no contractual privity. The court pointed out that in determining whether an attorney-client relationship exists, courts

will look to "the words and actions of the parties" and not simply at the formalities of retention. One important test is whether a law firm has agreed to "perform a specific task" for the client.

The court held that trial counsel had certainly agreed to handle the trial for the plaintiff. Thus there was an attorney- client relationship, and the requisite contractual privity, between the plaintiff and trial counsel to support a claim of malpractice.

This raises an interesting question. By agreeing to be trial counsel, does a lawyer assume responsibility for all aspects of a client's matter? The *Shafi* case is a good illustration of the risks faced by lawyers retained for limited purposes. It clearly would be prudent for any lawyer retained to handle a trial (or any other limited task), to define the limited scope of the representation in a writing given to the client and, also, to primary counsel. While this may not protect the limited- assignment lawyer from all claims, it would eliminate many uncertainties about the scope of the work the lawyer agreed to do.

### **Legal Fees and Written Retainers: A Cautionary Tale**

The importance of a good retainer agreement cannot be overestimated. While written retainer agreements are now required in New York for many representations, it is clear that mere compliance with the rule is not enough. A good retainer agreement may protect a lawyer from possible civil liability by accurately defining the scope of the representation. A good retainer agreement can also improve a lawyer's chances of being compensated for services rendered, as is illustrated in the recent *Spinale* case.

In *Spinale v. Schuman Abramson Morak & Wolk*, (NYLJ 5/9/03), New York Civil Court Judge Kleinman directed a hard- working law firm to return the entire \$25,000 trial fee paid by the client, even though the firm had spent substantial time preparing for the federal criminal trial and claimed that the client had agreed that it could retain the fee.

The law firm's written retainer agreement provided for \$50,000 for pre-trial services "including pre-trial hearings." An additional fee was to be negotiated and agreed upon in the event the case went to trial. When it appeared clear that the case would go to trial, the law firm and client agreed on a trial fee of \$25,000. The firm's confirming letter stated that the \$25,000 trial fee was due two weeks before trial and would be held in the firm's trust account: "until and unless the trial actually commences. In the event that the case never proceeds to trial, the fee will of course be returned to you."

The client pled guilty on the eve of trial, just before jury selection was scheduled to begin. The law firm wanted to keep the trial fee to compensate it for its substantial work in preparing for the trial. The firm claimed that the client's civil attorney agreed that the client would not seek a refund and that this was an oral modification of the written retainer agreement. The firm also asserted a *quantum meruit* claim for services rendered in the amount of the \$25,000 trial fee.

The Court was understandably unsympathetic and held the firm to the plain language of its own written retainer agreements, rejecting its claims that there had been an oral modification of the retainer. The Court also gave short shrift to the firm's claim that the client had "lied" either about his innocence or his intention to plead guilty: "Even a relatively inexperienced criminal defense attorney has encountered the client who steadfastly refuses to plead guilty and who only reevaluates his or her predicament when the trial judge instructs the clerk to call for a panel of venire persons from the juror assembly room."

The Court also rejected the firm's efforts to "re-interpret" its own retainer letters, pointing out that the plain language of the second agreement stated that the trial fee would remain in the firm's escrow account "until the trial actually commenced." Under federal law, trial commences with voir dire of the jury, which never occurred, because the client's guilty plea was entered before jury selection began. The Court also dismissed the firm's *quantum meruit* claim, noting that the firm had already received \$50,000 for pre-trial services for all work to be performed "prior to trial of the case." Thus, the firm was defeated by the plain language of its own retainer letters. If the Schuman firm wanted its trial fee to include its many hours of trial preparation before jury selection - witness preparation, document review, writing opening statements, outlining cross-examinations, reviewing the government's evidence - then its retainer letter should have said so.

The March Hare's advice to Alice in *Alice In Wonderland* to "say what you mean" applies to lawyers drafting retainer agreements. It is not enough to mean what you say, you must "say what you mean."

Lawyers who wish to reduce their potential civil liability and avoid disputes over their fees should draft retainer letters that accurately reflect the reasonable expectations of the parties, carefully define the scope of the representation and accurately and clearly set forth the services to be performed and the fees to be paid.

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