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CAN NEGLIGENT REFERRAL TO ANOTHER ATTORNEY CONSTITUTE LEGAL MALPRACTICE?

*Barry R. Temkin*¹

I. INTRODUCTION

Is there tort liability in malpractice for the negligent referral of an attorney? Every lawyer has occasion to refer a case to another attorney or firm. The reasons are myriad: the need for referral could arise due to a conflict of interest, the need for a specialist outside of the expertise of the referring attorney or his firm or the need to commence litigation in a foreign jurisdiction. The prospective client may be unable to meet the referring attorney's fee structure or the referring attorney may simply not practice in the area in which the prospective client requires counsel.

The referring attorney may seek to play a role in representing the prospective client, but may be required by professionalism considerations to retain or consult with a specialist in order to secure adequate representation for the prospective client.² Disciplinary Rule 6-101 of the Code of Professional Responsibility implies the need for referrals under certain circumstances by providing that a lawyer shall not "handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it."³ Similarly the Code's Ethical Considerations suggest that a lawyer "should accept employment only in matters which he or she is or intends to

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² See, e.g. CODE OF PROFESSIONAL RESPONSIBILITY, DR6-101, codified as 22 N.Y.C.R.R. § 1200.30 (McKinney's 1992 & Supp. 2001).

³ *Id.*

become competent to handle.”⁴ The Ethical Considerations further state that: “a lawyer generally should not accept employment in any area of the law in which he or she is not qualified.”⁵

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. While some of us can resist the temptation to venture an opinion in uncharted legal waters, it is harder still to avoid making a referral to a colleague who may be in a position to render assistance to the prospective client. Indeed, Canon 2 of the Code of Professional Responsibility provides that, “A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.”⁶ Thus, it is apparent that the Code tends to reinforce the natural human tendency to help other people, if not directly, then indirectly by the recommendation of a specialist who can.⁷

But if a lawyer undertakes to assist a lay person in retaining counsel, does that lawyer thereby become responsible for the results of the receiving attorney’s representation? If a bankruptcy specialist refers a personal injury case to his law school roommate, is he thereby liable for money damages if his erstwhile roommate proceeds to overlook the relevant statute of limitations, or otherwise commits malpractice?

Does referring counsel have any duty to investigate the background, moral character and competence of the attorney she selects to assist the prospective client? What if the client

⁴ CODE OF PROFESSIONAL RESPONSIBILITY, EC 6-1 (McKinney’s 1992 & Supp. 2001).

⁵ CODE OF PROFESSIONAL RESPONSIBILITY, EC 6-3 (McKinney’s 1992 & Supp. 2001).

⁶ CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2 (McKinney’s 1992 & Supp. 2001). EC 2-1 further provides in pertinent part: “[I]mportant functions of the legal profession are to educate people to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.”

⁷ See CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-7 (McKinney’s 1992 & Supp. 2001). See also Joseph A. McManus, *Malpractice Dangers in Tort Case Referrals*, 60 N.Y.St. B.J. 14, 16 (April, 1988).

requires the services of a foreign attorney to commence suit in another state⁸ or in a foreign country⁹ or in a specialized field such as bankruptcy?¹⁰ Does the referring attorney have a duty to investigate the credentials and professionalism of the out-of-state attorney or specialist? And how can a New York general practitioner, for example, diligently investigate the professionalism, integrity and competence of, say, a California lawyer, or a patent specialist? Is this obligation satisfied, as one court has suggested, by simply verifying that the receiving attorney is licensed in good standing in the relevant jurisdiction?¹¹ Or is some more thorough type of search required? And does the referring attorney's obligation to the client depend on whether she has an ongoing relationship with the client, or whether the allegedly negligent referral or monitoring was their first interaction?

A related issue is what obligations are assumed by an attorney who agrees to monitor the work of another attorney on an ongoing basis.¹² Moreover, does the referring attorney's civil

⁸ See e.g., *Wildermann v. Wachtell*, 149 Misc. 623, 267 N.Y.S. 840 (S. Ct. New York Co. 1933), *aff'd*, 241 A.D. 812, 271 N.Y.S. 954 (1st Dep't 1934) (New York attorney who retained a Pennsylvania attorney, approved by his client, to conduct all of the procedural matters, cannot be held liable for the negligence of the Pennsylvania attorney); *Tormo v. Yormark*, 398 F. Supp. 1159 (D.N.J. 1975) (New York attorney referring personal injury suit to New Jersey counsel who was criminally indicted and subsequently embezzled the clients' funds).

⁹ See e.g., Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 69 (1992).

¹⁰ See, e.g., *Williams v. Pretsch & Mainetti*, 116 A.D.2d 861, 498 N.Y.S.2d 1006 (3d Dep't 1986) (Attorney referring client to a bankruptcy attorney was held not responsible for malpractice committed by the bankruptcy attorney); *Glantz v. Rosenberg*, 220 A.D.2d 719, 633 N.Y.S.2d 77 (2d Dep't 1995) (Attorney hired as a consultant in a bankruptcy proceeding was held not liable for the legal malpractice committed by the initial attorney).

¹¹ See e.g., *Tormo*, 398 F. Supp. at 1171.

¹² See *Tormo*, 398 F. Supp. at 1159; *Hashemi v. Shack*, 609 F. Supp. 391, 395 (S.D.N.Y. 1984) (attorney who agrees to "monitor" out-of-state litigation does not give rise to attorney-client relationship such that he can be held liable for malpractice under New York law).

liability depend on whether he agreed to share a fee in connection with the work by receiving counsel on the case? If so, what is the implication of Disciplinary Rule 2-107 of the Code, which explicitly limits the circumstances under which a lawyer may divide a fee for legal services with another lawyer who is not a partner in or associate of the referring attorney's firm?

In an effort to furnish some guidance for practitioners who may be wary of their own professional liability, this article will address the foregoing questions. It will consider the elements of legal malpractice and the scope of the attorney-client relationship in a variety of contexts. Next considered is whether liability attaches to the mere recommendation of one attorney by another and to what extent a duty to investigate the professionalism of that attorney is implied in the act of referral. Separately considered will be the duties inherent in an agreement to monitor the work of the receiving attorney, and the implications of an agreement between the attorneys to share their fees for the work.

As will be explained, the general rule is that a referring attorney is not the guarantor of the work of receiving counsel, and therefore not liable for the latter's malpractice, provided that the referral was made in the exercise of "due care."¹³ Generally, the law has not recognized a cause of action for legal malpractice arising from an agreement to share fees with receiving counsel. Although there have been some recent suggestions that such a cause of action might be derived from the Code of Professional Responsibility, it will be argued that these authorities erroneously conflate the ethical standards imposed by the Code and the Model Rules with principles of civil liability.¹⁴ Moreover, the Preliminary Statement to the Code expressly eschews its use as a basis for civil liability.¹⁵ It will be argued

¹³ *Wildermann* at 624-25, 267 N.Y.S. 2d at 842.

¹⁴ *Compare*, *Norris v. Silver*, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997) (interpreting Florida ethics code); with NYCLA Ethics Opinion 715, 1996 WL 592658 (May 28, 1996) (interpreting CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-107, codified as 22 N.Y.C.R.R. § 1200.12 (McKinney's 1992 & Supp. 2001)); *See infra* Section IV.

¹⁵ CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (McKinney's 1992 & Supp. 2001) ("The code makes no attempt to prescribe

that erosion of the “due care” standard would, in effect, make referring counsel the guarantor of the work of receiving counsel, which would further contradict a long line of authorities holding that a violation of the Code may not be used as a basis for imposing civil liability on an attorney.¹⁶

II. THE ATTORNEY-CLIENT RELATIONSHIP

The tort of legal malpractice in New York consists of the failure of an attorney to exercise ordinary levels of competence, directly causing injury to the attorney’s client.¹⁷ As the Appellate Division has explained: “In order to establish a *prima facie* case of legal malpractice, a client must demonstrate that his attorney failed to exercise that degree of skill commonly exercised by an ordinary member of the legal community, and that he incurred damages as a direct result of his attorney’s actions.”¹⁸ Thus, a showing of legal malpractice requires proof of the existence of an attorney-client relationship, negligence by the attorney resulting in a departure from the standard of practice in the jurisdiction, and proof that actual damages were proximately caused by the departure.¹⁹ In the context of malpractice occurring in litigation, the element of causation has been construed to require a showing “not only that the attorney was negligent, but also that ‘but for’

either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.”).

¹⁶ See, e.g., *Drago v. Buonagurio*, 46 N.Y.2d 778, 779-80, 413 N.Y.S.2d 910, 911 (1978) (“Whatever may be the constraints imposed by the Code of Professional Responsibility with the associated sanctions of professional discipline when baseless legal proceedings are instituted by a lawyer on behalf of a client, the courts have not recognized any liability of the lawyer to third parties therefore where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability.”); See *infra* section IV.

¹⁷ 76 N.Y.Jur.2d § 35 at 47 (1989) (explaining New York’s general adherence to the rule that an attorney is not liable to a person other than his client for the negligent performance of legal work).

¹⁸ *Marshall v. Nacht*, 172 A.D.2d 727, 569 N.Y.S.2d 113 (2d Dep’t 1991).

¹⁹ *Marshall*, 172 A.D.2d at 727, 569 N.Y.S.2d at 114; See also *Jordan v. Lipsig, Sullivan, Mollen & Liapakis*, 689 F. Supp. 192, 194 (S.D.N.Y. 1988).

the attorney's negligence the plaintiff would have prevailed in the underlying action."²⁰

The existence of an attorney-client relationship is a necessary precondition to establishing liability for legal malpractice.²¹ Although there may be other bases for liability against an attorney,²² only an actual client of the attorney may maintain an action for legal malpractice against that attorney.²³ However, practitioners looking for a bright-line definition of what constitutes the attorney-client relationship are likely to be disappointed. While the execution of a formal retainer agreement has been deemed sufficient to commence the relationship, the mere payment of an attorney's fee, in and of itself, does not give rise to the existence of an attorney-client relationship.²⁴ In New York, the existence of an attorney-client relationship "does not depend on an express agreement or upon payment of a fee,"²⁵ and, indeed, the act of paying an attorney's fee, without more, is not sufficient to give rise to the attorney-client relationship.²⁶ However, the absence of any payment, while not determinative, "can be an indication that an attorney-client relationship never existed."²⁷

Some decisions, outside the area of legal malpractice, furnish guidance from which the rough outlines of an attorney-client relationship may be hewn in the malpractice arena. For example, in *Priest v. Hennessy*,²⁸ the Court of Appeals considered the enforceability of a grand jury subpoena seeking production of the bills of attorneys representing the target of a

²⁰ *Pacesetter Communications Corp. v. Solin & Breindel*, 150 A.D.2d 232, 541 N.Y.S.2d 404, 405 (1st Dep't 1989) (citation omitted).

²¹ *See Volpe v. Canfield*, 237 A.D.2d 282, 283, 654 N.Y.S.2d 160, 162 (2d Dep't 1997).

²² *See e.g., Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994).

²³ *See* 76 N.Y. Jur.2d § 36 at 47 (1989); *Jordan*, 689 F. Supp at 194.

²⁴ *See Jane Street Co. v. Rosenberg & Etis, P.C.*, 192 A.D.2d 451, 597 N.Y.S.2d 17, 18 (1st Dep't. 1993).

²⁵ *Id.*

²⁶ *Brandman v. Cross & Brown Co.*, 126 Misc. 2d 185, 187, 479 N.Y.S.2d 435, 437 (Sup. Ct. Kings Co. 1984).

²⁷ *Kubin v. Miller*, 801 F. Supp. 1101, 1115 (S.D.N.Y. 1992).

²⁸ 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980).

criminal investigation.²⁹ In considering whether the subpoenaed bills were exempt from production pursuant to the attorney-client privilege, the court concluded that since fees were paid by a third party, no privilege attached.³⁰ Accordingly, the court rejected the assertion of privilege and upheld the subpoena.³¹

If the payment of fees does not suffice to give rise to an attorney-client relationship, then what does? In the context of the attorney-client privilege it has been held that it is “the *act* of directly rendering legal advice, services or assistance . . . that forms the touchstone of the attorney-client relation.”³² In one leading formulation, the Appellate Division observed, “The relationship is not established because one pays a legal fee, or lost because the client does not pay a fee, and neither the fact that the parties have had an attorney-client relationship in the past nor that they may have such a relationship in the future is determinative. Whether the relationship exists or not is determined by the client’s purpose in contacting the attorney.”³³

The courts have also used a “meeting of the minds” definition:

A plaintiff’s unilateral belief does not confer upon him the status of client. Rather, to establish an

²⁹ *Id.* at 67, 431 N.Y.S.2d at 512.

³⁰ N.Y. C.P.L.R. 4503(a) (1992). This section states in pertinent part that “any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, or shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action” See also *Priest*, 51 N.Y.2d at 69-70, 431 N.Y.S.2d at 515 (attorney-client relationship does not arise due to payment of another attorney’s fee).

³¹ *Priest*, 51 N.Y.2d at 71, 431 N.Y.S.2d at 515-16. The court stated that fee arrangements between attorney and client do not ordinarily constitute a confidential communication and are not usually privileged because the privilege was not intended to protect such types of communication. *Id.* at 69-70; 431 N.Y.S.2d at 515.

³² *Brandman*, 479 N.Y.S.2d at 437 (citations omitted).

³³ *People v. O’Connor*, 85 A.D.2d 92, 95, 447 N.Y.S.2d 553, 556 (4th Dep’t 1982).

attorney-client relationship there must be an explicit undertaking to perform a specific task.³⁴

Such a fact-specific definition is neither a model of clarity nor a template which furnishes much guidance.

The outer boundaries of the attorney-client relationship were probed in *Jordan v. Lipsig, Sullivan, Mollen & Liapakis*,³⁵ where the court considered the question of whether a client's *husband* could bring suit for legal malpractice against an attorney who had bungled the personal injury action of the plaintiff's wife, thereby extinguishing his derivative claim for loss of consortium. Although Mrs. Jordan had consulted, signed a retainer agreement with, met with and given various medical authorization forms to the defendant attorneys, her husband did not. As a result, the court concluded that he was not their client:

The facts lead to the inescapable conclusion that no attorney-client relationship existed between Mr. Jordan and defendants. He had no contact with the firm, never met or spoke with any of the firm's attorneys, never contacted the firm in any way and had no intention for the firm to represent him in any way.³⁶

Since the plaintiff was not a client of the defendant attorneys, he would ordinarily have been barred from suing the defendant attorneys due to lack of privity.³⁷ As the *Jordan* court observed, "In New York, courts have often repeated the rule that, absent proof of fraud, collusion, malicious acts or other special circumstances, a plaintiff may not sue an attorney for simple negligence absent privity of contract."³⁸ However, on the facts of the *Jordan* case, the district court determined that an

³⁴ *Volpe*, 237 A.D.2d at 283, 654 N.Y.S.2d at 162 (citations omitted).

³⁵ 689 F. Supp. 192 (S.D.N.Y. 1988).

³⁶ *Id.* at 195.

³⁷ *Id.*

³⁸ *Id.* (citing *e.g.*, *Nakovics v. Klat*, 128 A.D.2d 505, 506, 512 N.Y.S.2d 436, 438 (2d Dep't 1987)).

exception should nonetheless be carved out permitting the plaintiff to bring a claim for legal malpractice due to the unique nature of his derivative claims against his wife's attorneys.³⁹ The court reasoned that since the husband did not have standing to bring a derivative claim by himself without his wife's underlying claim, it would be unfair to deny him the opportunity to bring suit for malpractice, even absent a true attorney-client relationship.⁴⁰

*Kubin v. Miller*⁴¹ considered whether an attorney-client relationship between a partnership and its attorney also extended to the individual partners as well. *Kubin* involved a federal diversity action decided under New York law for breach of a partnership agreement.⁴² The plaintiff sought to disqualify counsel for the defendant partnership pursuant to DR 5-105 and 5-102 of the Code of Professional Responsibility, claiming that the lawyer had previously represented him in matters substantially related to the present action.⁴³ The court denied the plaintiff's motion to disqualify defense counsel, finding that the attorneys had represented the partnership, and not him individually.⁴⁴ Further, the court reasoned that there was "no written contract" of employment or "any suggestion [the partnership's counsel] and Kubin had an informal relationship in which [the partnership's counsel] performed legal services gratuitously."⁴⁵ Thus, although denying the motion to disqualify counsel, the court suggested that an attorney-client relationship could be created by the "informal" performance of gratuitous legal services.⁴⁶

The Third Department, in *C.K. Industries Corp. v. C.M. Industries Corp.*,⁴⁷ considered the claim that an attorney who drafted an agreement between two shareholders thereby represented both of them and was liable in malpractice to each.

³⁹ *Jordan*, 689 F. Supp. at 197.

⁴⁰ *Id.* at 195.

⁴¹ 801 F. Supp. 1101 (S.D.N.Y. 1992).

⁴² *Id.*

⁴³ *Id.* at 1113-1114.

⁴⁴ *Id.* at 1115.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 213 A.D.2d 846, 623 N.Y.S.2d 410 (3d Dept. 1995).

This claim was rejected because the plaintiff shareholder never consulted with the defendant attorney, whose fees were paid by the partnership and not by the plaintiff.⁴⁸ Thus, as was the case in *Kubin*, the provision of services to the partnership did not thereby give rise to an attorney-client relationship between the defendant attorney and each individual partner.⁴⁹

In *Hashemi v. Shack*,⁵⁰ a federal district judge, applying New York law, held that a lawyer who agreed, in writing, to “monitor” the progress of several lawsuits in another jurisdiction, and to attempt to obtain counsel for the plaintiff, did not thereby become the plaintiff’s attorney.⁵¹ The defendant attorneys in *Hashemi* promised to continue monitoring the plaintiff’s suits on his behalf “until the question of representation [was] resolved.”⁵² True to their word, the defendant attorneys subsequently wrote to the plaintiff informing him that a default judgment had been entered against him in the out-of-state case. The plaintiff then sued the defendants for malpractice alleging that they permitted the default to occur.⁵³ In dismissing the claims for legal malpractice, the court reasoned that the agreement to monitor the cases was not tantamount to an agreement “to take any action with respect to them,” and that the defendant attorney “therefore reasonably assumed that he had no duty to act.”⁵⁴

A different result was reached in *Tormo v. Yormark*,⁵⁵ a federal case applying New Jersey law. *Tormo* held that a New York lawyer who referred a personal injury case to a New Jersey attorney had assumed a duty to supervise the progress of the case in New Jersey.⁵⁶ Unlike the successful defendant in *Hashemi*,

⁴⁸ *Id.* at 848, 623 N.Y.S.2d at 412.

⁴⁹ 213 A.D.2d at 848, 623 N.Y.S.2d at 412. *See also Kubin*, 801 F. Supp. at 1115.

⁵⁰ 609 F. Supp. 391 (S.D.N.Y. 1984).

⁵¹ *Id.* at 395.

⁵² *Id.*

⁵³ *Id.* at 396.

⁵⁴ *Id.* at 395-396.

⁵⁵ 398 F. Supp. 1159 (D.N.J. 1975).

⁵⁶ *Id.* at 1174.

the defendant attorney in *Tormo* did not make any written promises to monitor the progress of the out-of-state case, and apparently did not request or receive any payment for his work. The plaintiff claimed that the New York attorney had “repeatedly assured [the plaintiff] that the matter was proceeding well.”⁵⁷ Accordingly, an attorney-client relationship was deemed to exist under New Jersey law and the defendant’s motion for summary judgment was denied.⁵⁸

The New York Court of Appeals cast a wide net in defining the attorney-client relationship in *Leon v. Martinez*.⁵⁹ That decision sustained the sufficiency of a complaint for legal malpractice against an attorney who had represented several parties in an underlying personal injury action.⁶⁰ The defendant attorney initially represented Martinez in a personal injury action.⁶¹ At his request, the attorney drafted an agreement in which Martinez assigned a percentage of his recovery from the personal injury action to Leon, the plaintiff in the action for legal malpractice.⁶² When the defendant attorney disbursed the entire net proceeds of the personal injury settlement to Martinez, Leon sued for breach of contract and, significantly, malpractice. Leon argued that the defendant attorney “was requested by both Martinez and plaintiffs to prepare the [assignment] instrument,” that the attorney had advised the plaintiffs to get a written assignment from Martinez, and that he had discussed the matter with both assignor and assignee.⁶³ Thus, the Court reasoned, the defendant attorney’s payment of the entire settlement proceeds to one of his clients breached his duty to his other, assignee, client.⁶⁴

The aforementioned cases establish a framework for analyzing the existence of an attorney-client relationship. As we

⁵⁷ *Id.* at 1173.

⁵⁸ *Id.* at 1174-75.

⁵⁹ 84 N.Y.2d at 83, 614 N.Y.S.2d at 972.

⁶⁰ *Id.* at 90, 614 N.Y.S.2d at 975.

⁶¹ *Id.*

⁶² *Id.* at 86, 614 N.Y.S.2d at 973.

⁶³ *Id.* at 90, 614 N.Y.S.2d at 975.

⁶⁴ *Id.*

have seen, this has generally been a fact-specific analysis often taking into consideration the existence of a retainer agreement,⁶⁵ the payment of an attorney's fee,⁶⁶ the precise scope of any agreement between the attorney and the prospective client,⁶⁷ and any explicit representations which the attorney made to the prospective client.⁶⁸ The paying of a fee⁶⁹ and even the monitoring of litigation,⁷⁰ do not, in and of themselves, establish the existence of an attorney-client relationship in New York. The First and Second Departments of the Appellate Division disagree as to whether an "express agreement" is necessary to create such a relationship.⁷¹

We will next turn to specific examples of claims arising from referrals. These will be divided into two categories: 1) negligent referrals, *i.e.*, referrals to allegedly incompetent attorneys that were negligent *ab initio*; and 2) liability based upon the negligent failure to monitor or supervise receiving counsel.

III. IS THERE MALPRACTICE LIABILITY FOR NEGLIGENT REFERRAL?

In general, a lawyer is not responsible for the acts or omissions of a lawyer outside the firm who serves as co-counsel or in a similar arrangement.⁷² One commentator has suggested that a lawyer who refers a case to a foreign counsel "may be liable in negligence or for a breach of a professional obligation unless the lawyer takes at least minimal steps to assure the

⁶⁵ See *Id.* at 86-7, 614 N.Y.S.2d at 973.

⁶⁶ See *Kubin*, 801 F. Supp. at 1120.

⁶⁷ See *Hashemi*, 609 F. Supp. at 395.

⁶⁸ Compare *Tormo*, 398 F. Supp. at 1173, with *Hashemi*, 609 F. Supp. at 394.

⁶⁹ See *Jane Street Co.*, 192 A.D.2d at 451, 597 N.Y.S.2d at 18.

⁷⁰ See *Hashemi*, 609 F. Supp. at 394.

⁷¹ Compare *Jane Street Co.*, 192 A.D.2d at 451, 597 N.Y.S.2d at 17, with *Volpe*, 237 A.D.2d at 283, 654 N.Y.S.2d at 162.

⁷² 583 Practising Law Institute, Litigation and Administrative Practice Course Handbook Series, Lit. 299 (April 1998) at page 306. But see, *Mallen*, Legal Malpractice § 5.9 at 390 (4th Ed. 1996).

competence of the referred counsel.”⁷³ A New York court has suggested, without an extended discussion on this issue, that a referring attorney is held to “the exercise of due care in recommending a foreign attorney.”⁷⁴

This issue has not yet been resolved in New York as there are few decisions explicitly analyzing the responsibility of referring counsel to investigate the credentials and competence of receiving counsel. For example, in the case of *Cohen v. Lipsig*,⁷⁵ the plaintiff had retained the late Harry Lipsig to prosecute a personal injury case on her behalf. The plaintiff alleged that after Lipsig had represented her as attorney of record for twelve years, he transferred the file to outside trial counsel without first obtaining her informed consent.⁷⁶ Trial counsel proceeded to commit various acts of negligence as well as compounding the neglect of Lipsig, resulting in a settlement unfavorable to the plaintiff.⁷⁷ In reversing an order granting summary judgment in favor of Lipsig, the Appellate Division ruled that there were numerous disputed issues of fact that the plaintiff was entitled to present to the jury concerning the negligence of both Lipsig and outside trial counsel, including, “whether [Lipsig] used reasonable care in his choice of such trial counsel . . .”⁷⁸ Both Lipsig and trial counsel were responsible for their failure where, over the course of twelve years, they neglected to obtain medical records to establish the plaintiff’s claim.

In *Cohen*, the relationship between referring counsel and the client was obviously much stronger than the relationship

⁷³ Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 Fordham Int’l L.J. 53, 69 (1992). Lutz bases his comment upon a single footnote in *Clemminghasw Co. v. City of Norwich*, 93 F.R.D. 338 (D. Conn. 1981), recognizing a “duty to supervise co-counsel.” This is, as will be pointed out below, a different duty from the duty to investigate the background of receiving counsel. See also, *Mallen*, *supra* at §5.9.

⁷⁴ *Wildermann*, 267 N.Y.S.2d at 842.

⁷⁵ 92 A.D.2d 536, 459 N.Y.S.2d 98 (2d Dep’t 1983).

⁷⁶ *Id.* at 536, 459 N.Y.S.2d at 99.

⁷⁷ *Id.*

⁷⁸ *Id.*

between the client and trial counsel.⁷⁹ This was not a casual referral to a law school roommate or professional acquaintance over the course of a social encounter. Rather, the attorney-client relationship between Lipsig and Cohen was indisputable and of Dickensian duration, and Lipsig was designated attorney of record.⁸⁰ It seems appropriate that a lawyer to whom a client has entrusted a matter for twelve years cannot escape liability for his own professional misconduct by referring the case out to another lawyer in the same of field of specialization, here, personal injury litigation, at the eleventh hour.

Consider the situation, unlike that presented in *Cohen v. Lipsig*, in which referring counsel does not become attorney of record, but rather refers a personal injury case to an out-of-state practitioner. What duty does referring counsel have to investigate the competence, professionalism and integrity of receiving counsel?

Although no New York decision has discussed this point in detail, it was addressed by a federal district court applying New Jersey law in *Tormo v. Yormark*.⁸¹ The facts of *Tormo* are a referring attorney's nightmare: A New York attorney, Devlin, was consulted by a client whose daughter had recently been injured in a boating accident in New Jersey.⁸² Unlicensed in that jurisdiction, Devlin agreed to "see what could be done with regard to settlement." Shortly thereafter, Yormark, a New Jersey attorney, telephoned and met with Devlin at his office.⁸³ Devlin, to his abiding regret, informed the plaintiff that Yormack was a "good, well-qualified lawyer," unaware that, at the time Yormark was under indictment in Essex County, New Jersey for insurance fraud.⁸⁴ The indictment was reported in the New Jersey newspapers, but Devlin was unaware of that. Devlin's only independent inquiry into Yormark's reputation was consulting a lawyer's directory confirming that he was a licensed

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 398 F. Supp. 1159 (D.N.J. 1975).

⁸² *Id.* at 1165.

⁸³ *Id.*

⁸⁴ *Id.* at 1166.

New Jersey attorney.⁸⁵ Yormark was later convicted of insurance fraud, and, following the settlement of plaintiff's claims for \$150,000, he embezzled the settlement monies, prompting a malpractice action against him as well as Devlin.⁸⁶

When Devlin moved for summary judgment, the district court held that, under New Jersey law, referring counsel "was under a duty to exercise care in retaining Yormark to ensure that he was competent and trustworthy."⁸⁷ This duty arose both from referring counsel's express representations as to Yormark's qualifications, as well as from his affirmative conduct and the act of referral.⁸⁸ Devlin's motion for summary judgment was thus denied, and the court ruled that there were sufficient disputed fact issues to merit a jury trial.⁸⁹

On the other hand, the court ruled that Devlin could *not* be held liable for his failure to learn of, or inquire into, the criminal indictment against receiving counsel. The indictment was not a matter of public record in New York and referring counsel has no duty to check with the ethics committee and prosecutor's office in every county in which receiving counsel practices.⁹⁰ Rather, referring counsel's duty was discharged by verifying that receiving counsel was licensed to practice law in New Jersey.⁹¹ However, the court went on to reason that Devlin *could* be held liable because the manner in which receiving counsel contacted him should have placed him on notice that he may have solicited the case from the plaintiff.⁹² The evidence of potential solicitation, in violation of the Code of Professional Responsibility, should have triggered further inquiry into the

⁸⁵ *Id.* at 1167.

⁸⁶ *Id.* at 1168.

⁸⁷ 398 F. Supp. at 1170.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1171.

⁹⁰ *Id.* at 1170.

⁹¹ *Id.*

⁹² *Id.* at 1166. Referring counsel Devlin initially learned of receiving counsel Yormark through telephone calls Yormark placed to him representing that he was "familiar with the accident." Yormark requested and Devlin agreed to a personal meeting.

ethics of receiving counsel.⁹³ Accordingly, Devlin's motion for summary judgment was denied.⁹⁴

Tormo is subject to criticism on a variety of grounds.⁹⁵ Although the opinion explicitly eschewed a duty to investigate the background of receiving counsel, it is difficult to believe that Yormark's indictment and conviction did not play a significant part in the court's decision.⁹⁶ The argument that "the duty arose from Devlin's express representations as to Yormark's qualifications,"⁹⁷ is unpersuasive. Doesn't every referral almost by definition contain at least an implicit recommendation of the attorney's skill and professionalism? It is questionable whether the defendant's recommendation in *Tormo* had an obvious causal connection with the actual legal malpractice. Devlin's express representation to the plaintiff was not that receiving counsel was honest or trustworthy, but that he was a "good, well-qualified lawyer."⁹⁸ But the deficiency of receiving counsel in *Tormo* was not that he lacked the technical qualifications to practice law in New Jersey, but, rather, that he was a thief.⁹⁹ Indeed, the district court determined that referring counsel had no duty to investigate the credentials of receiving counsel beyond confirming that he was in fact licensed to practice law in New Jersey.¹⁰⁰ Thus, the *Tormo* court, while leaving open the possibility of a cause of action based upon an express representation, failed to take the next logical step by requiring a causal nexus between the alleged misrepresentation and the actual malpractice.¹⁰¹

⁹³ *Id.* at 1166. See CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103, codified as 22 N.Y.C.R.R. § 1200.8 (McKinney's 1992 & Supp. 2001). See also *In re Introcaso*, 26 N.J. 353 (1958) (suspending an attorney from practicing law for employing a runner to solicit clients).

⁹⁴ *Id.* at 1171.

⁹⁵ *Id.* at 1159.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1170.

⁹⁸ *Id.* at 1166.

⁹⁹ While the concept of a "good lawyer" can be said to imply notions of integrity and professionalism, Devlin's representation at issue in *Tormo* appears to be of a general nature.

¹⁰⁰ *Tormo*, 398 F. Supp. at 1171.

¹⁰¹ *Id.* at 1770.

In sum, the duty to investigate the credentials of receiving counsel, particularly in a foreign jurisdiction, is minimal. Referring counsel is not chargeable with knowledge of non-public information about receiving counsel, but must be alert to evidence of unprofessional conduct by receiving counsel.¹⁰² The next question which arises is, assuming that referring counsel has no reason to suspect the incompetence of receiving counsel, what responsibility does she assume for monitoring the latter's work?

IV. IS THERE A DUTY TO MONITOR OUTSIDE COUNSEL?

A line of cases in New York has considered the liability of a lawyer who refers a litigation matter to an attorney in another state or in a specialized area of law. As will be seen, several authorities have declined to impose a duty on referring counsel to monitor or supervise the work of a specialist or out-of-state attorney.

The early case of *Wildermann v. Wachtell*,¹⁰³ directed a verdict in favor of a New York lawyer who had referred a collection matter to a Pennsylvania attorney who negligently failed to file a *lis pendens*, resulting in an inability to collect on the client's claim.¹⁰⁴ The plaintiff signed a formal retainer agreement with New York counsel, who recommended a Pennsylvania attorney, and the two lawyers agreed to share equally in the recovery on a contingency fee basis.¹⁰⁵ The Pennsylvania attorney negligently failed to file the *lis pendens*, resulting in a loss of recovery to the plaintiff and prompting an action for legal malpractice.¹⁰⁶

The court noted that there was no claim that the New York attorney was negligent in his selection of particular counsel in Pennsylvania and that, in any event, the standard was that of ordinary care: "A lawyer should not be held to a stricter rule in

¹⁰² See *Tormo*, 398 F. Supp. at 1171.

¹⁰³ 149 Misc. 623, 624-25, 267 N.Y.S. 840, 842 (N.Y. Sup. Ct. 1933), *aff'd*, 241 A.D. 812, 271 N.Y.S. 954 (1st Dep't 1934).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 624, 267 N.Y.S. at 841-42.

¹⁰⁶ *Id.* at 623, 267 N.Y.S. at 841.

foreign matters than the exercise of due care in recommending a foreign attorney.”¹⁰⁷ Since the selection of Pennsylvania counsel was not negligent, the question remained whether the New York attorney would be held vicariously responsible for the negligence of the former:

The novel question arises, therefore, as yet undetermined in this state, whether a lawyer here, who retains with due care an attorney in a foreign jurisdiction to take care of procedural matters in the foreign state, becomes *ipso facto* liable for any negligence of the foreign attorney, even though the client has been informed of the necessity and reason for the retainer and has approved the course and choice of attorney.¹⁰⁸

The court answered this question in the negative, reasoning that to hold referring counsel liable “would subject him to hazards which he is not qualified either to anticipate or to prevent.”¹⁰⁹ Thus, although New York counsel had been formally retained, and, indeed, expected to share in the fruits of the labors of out-of-state counsel, the court declined to apply a duty to supervise because it “would impose an impossible burden upon practicing attorneys.”¹¹⁰

Interestingly, *Wildermann* presents the converse of *Hashemi v. Shack*¹¹¹ in its analysis of the attorney-client relationship. The district court in *Hashemi* dismissed an action for legal malpractice against a Washington D.C. law firm, holding that an explicit agreement to “monitor” pending litigation in another jurisdiction was not sufficient to trigger the commencement of an attorney-client relationship.¹¹² The *Wildermann* court held that the existence of an attorney-client

¹⁰⁷ *Id.* at 624-25, 267 N.Y.S. at 842.

¹⁰⁸ *Id.* at 624, 267 N.Y.S. at 841.

¹⁰⁹ *Id.* at 625, 267 N.Y.S. at 842.

¹¹⁰ *Id.*

¹¹¹ Compare *Wildermann* at 624-25, 267 N.Y.S. at 841-42 with *Hashemi*, 609 F. Supp. at 395-97 (see discussion in Section II, *supra*).

¹¹² 609 F. Supp. at 397, discussed *supra* at notes 50-54.

relationship did not impose upon counsel an obligation to monitor the progress of out-of-state litigation.¹¹³

The principles enunciated in *Wildermann* were applied in the leading case of *Broadway Maintenance Corp. v. Tunstead & Schechter*,¹¹⁴ which held that a New York attorney who referred a lawsuit to Virginia counsel could not be held liable for the latter's negligence where there was no evidence that New York counsel assumed a supervisory responsibility over the out-of-state action.¹¹⁵ The New York attorneys in *Broadway Maintenance* had a longstanding relationship with the plaintiff as general counsel, yet never represented the client in construction contract claims.¹¹⁶ As a result, New York counsel referred the case to Virginia counsel, whose appointment was approved by a bankruptcy judge after the plaintiff began operating as a debtor in possession under a bankruptcy reorganization.¹¹⁷ In a subsequent action for legal malpractice, New York counsel was held to have no liability for the work of the Virginia attorneys because it did not undertake "supervisory responsibility" with regard to the out-of-state action.¹¹⁸ The New York firm continued to function as "general counsel" for the client, occasionally acting as a liaison between the client and Virginia counsel in obtaining documentation to support the client's claim.¹¹⁹ The firm's conduct, however, amounted to "incidental services" that were "entirely appropriate to its role as general counsel, which in no way implied or could reasonably be found to have implied, that it was undertaking to supervise the work of the two retained law firms in pursuing the plaintiff's claim for damages in Virginia."¹²⁰ Thus, recommending out-of-state counsel and acting as a conduit for a memorandum between the client and out-of-

¹¹³ *Wildermann* at 624-25, 267 N.Y.S. at 842.

¹¹⁴ 110 A.D.2d 587, 487 N.Y.S.2d 799 (1st Dep't 1985).

¹¹⁵ *Id.* at 588, 487 N.Y.S.2d at 800-01.

¹¹⁶ *Id.* at 588, 487 N.Y.S.2d at 800.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 589, 487 N.Y.S.2d at 801.

¹¹⁹ *Id.*

¹²⁰ *Id.*

state counsel was insufficient to impose liability on referring counsel for the negligence of receiving counsel.¹²¹

A similar result was obtained in *CVC Capital Corp. v. Weil, Gotshal and Manges*,¹²² which ruled that a New York law firm could not be held responsible for the negligence of a Puerto Rico law firm on a failure to supervise theory.¹²³ The plaintiff in *CVC Capital* sought to impose liability upon its New York attorneys for bankruptcy work performed in Puerto Rico by local counsel.¹²⁴ Although the Appellate Division found that there was no obligation to supervise the activities of out-of-state counsel, it further opined that:

Even if sufficient evidence existed to demonstrate defendants owed a duty to supervise the Puerto Rico-based counsel, no independent duty existed to independently verify factual reports made by those attorneys concerning the timeliness of pleadings filed, their court appearances, and representations made concerning the actions of a bankruptcy trustee in 1986.¹²⁵

Thus, there was no obligation to look behind the factual representations of foreign counsel.¹²⁶ While acknowledging in the abstract that a duty to supervise out-of-state counsel may arise upon a proper factual showing, the Appellate Division in *Broadway Maintenance Corp.* and *CVC Capital* held that a duty to supervise foreign counsel did not arise merely from the retention or receipt of memoranda and correspondence from such counsel, nor from serving as a liaison to the client.¹²⁷

¹²¹ *Id.* Although the defendant law firm in *Broadway Maintenance Corp.* had recommended the out-of-state counsel, there was no claim in that case of negligence in the selection of out-of-state counsel.

¹²² 192 A.D.2d 324, 595 N.Y.S.2d 458 (1st Dep't 1993).

¹²³ *Id.* at 325, 595 N.Y.S.2d at 458.

¹²⁴ *Id.* at 324, 595 N.Y.S.2d at 458.

¹²⁵ *Id.* (citation omitted).

¹²⁶ *Id.*

¹²⁷ See *Broadway Maintenance Corp.*, 110 A.D.2d at 587, 487 N.Y.S.2d at 800; *CVC Capital*, 192 A.D.2d at 325, 595 N.Y.S.2d at 458.

This line of reasoning was extended to encompass referral to a specialist in *Williams v. Pretsch & Mainetti*,¹²⁸ which upheld the dismissal of a malpractice complaint against a New York attorney based upon the misconduct and malpractice of bankruptcy counsel to whom he had entrusted a judgment for enforcement.¹²⁹ The defendant in *Williams* was a litigator who obtained a judgment for his client against an individual who eventually filed for bankruptcy.¹³⁰ When bankruptcy counsel recommended by the defendant attorney committed malpractice in bankruptcy court in his efforts to collect on the judgment, the client sued referring counsel for malpractice.¹³¹ However, the Appellate Division held that its prior decision in *Broadway Maintenance Corp.* precluded the liability of referring counsel for the negligence of receiving counsel.¹³²

Thus, the supervisory duties of referring counsel, as can be seen from the foregoing decisions in this section, have been largely defined in the negative. We now know to some extent what conduct by referring counsel will *not* constitute supervision over receiving counsel for the purpose of professional liability. For example, merely receiving, forwarding or monitoring correspondence from out-of-state counsel does not, without more, give rise to professional liability any more than does the mere act of referral, consistent with the exercise of due diligence.¹³³ Moreover, an explicit agreement to monitor the status of an out-of-state lawsuit does not obligate an attorney to prevent a default in that case.¹³⁴ As discussed above, *Cohen v. Lipsig* held that the attorney of record in a personal injury action cannot insulate

¹²⁸ 116 A.D.2d 861, 498 N.Y.S.2d 1006 (3d Dep't 1986).

¹²⁹ *Id.*

¹³⁰ *Id.* (Defendant referred plaintiff to Krom, another attorney to pursue the action in bankruptcy court, the forum in which the alleged malpractice actually took place. The defendant was held by Special Term not to be responsible for the subsequent malpractice of Krom).

¹³¹ *Id.*

¹³² *Id.*

¹³³ See *Broadway Maintenance Corp.*, 110 A.D.2d at 587, 487 N.Y.S.2d at 800-01. See also *CVC Capital Corp.*, 192 A.D.2d at 325, 595 N.Y.S.2d at 458.

¹³⁴ See *Hashemi*, 609 F.Supp at 395-96.

himself from liability by referring the case out to a different attorney for trial.¹³⁵ But New York courts have yet to provide guidance as to what activities by referring counsel would be sufficient to invoke a duty to supervise the work of receiving counsel.

Although there is no recorded New York case making a factual finding of negligent failure to supervise, the district court's decision in *Tormo v. Yormark*¹³⁶ wrestled with this issue based on the unique facts of the case and pursuant to New Jersey law. As mentioned earlier,¹³⁷ *Tormo* involved a New York attorney who referred a personal injury matter to a New Jersey lawyer who, unbeknownst to referring counsel, had been indicted for insurance fraud, a crime of which he was convicted shortly before he absconded with the proceeds of the client's settlement check.¹³⁸ In addition to considering the duty of referring counsel to inquire into the character and competence of receiving counsel, the *Tormo* court addressed the adequacy of the plaintiff's allegations that the New York attorney negligently failed to supervise receiving counsel.¹³⁹ The court declined to consider whether a New York attorney generally ought to be under a duty to exercise any supervision over a New Jersey lawyer's conduct in a New Jersey lawsuit.¹⁴⁰ However, the court determined that New York counsel could be held liable for his "express representations to [the client] concerning the progress of the case," along with his promise to investigate the nature of the authorization which the New Jersey attorney forwarded to the client.¹⁴¹ In addition, the New York attorney in *Tormo*, after advising the plaintiff that the case was "progressing,"¹⁴² allowed a year to pass, during which time he made no effort to contact New Jersey counsel or monitor the progress of the case. This

¹³⁵ 92 A.D.2d at 536, 459 N.Y.S.2d at 99.

¹³⁶ 398 F. Supp. 1159, 1174.

¹³⁷ See Section III, *supra*.

¹³⁸ 398 F. Supp. at 1166.

¹³⁹ *Id.* at 1173.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1167.

conduct, together with the other facts and circumstances of the case, was sufficient to be considered by a jury in assessing the negligent supervision claim.¹⁴³

Thus, New Jersey law permits the imposition of professional liability on out-of-state attorneys who agree to monitor the progress of a case they are not personally handling.¹⁴⁴ Contrast this reasoning with *Hashemi v. Shack*,¹⁴⁵ which held, *inter alia*, that an out-of-state attorney's explicit agreement to monitor the status of a New York lawsuit does not give rise to the existence of an attorney-client relationship for the purpose of imposing professional liability.¹⁴⁶ Indeed, the definition of attorney-client relationship relied upon in *Tormo* is considerably broader than that recognized in New York.¹⁴⁷ Further, the fact that the New York attorney in *Tormo* did not execute a formal retainer agreement or receive any fees was irrelevant: "The law of New Jersey imposes the duties incident to such a relationship on one who merely assumes to give legal advice and counsel."¹⁴⁸ Thus, the promise in *Tormo* to "see what could be done with regard to settlement" was held to give rise to an attorney-client relationship,¹⁴⁹ whereas the promise in *Hashemi* to "continue monitoring the suits on your behalf" was not.¹⁵⁰ As noted in Section II, *supra*, in New York, "to establish an attorney-client relationship there must be an explicit undertaking to perform a specific task."¹⁵¹ Thus, the reasoning of *Tormo*, while illustrative of the pitfalls of a blind referral to foreign counsel, has not been adopted in New York.

¹⁴³ *Id.* at 1173.

¹⁴⁴ *Tormo*, 398 F. Supp. at 1173.

¹⁴⁵ 609 F. Supp. at 391. *See also* Section II, *supra*.

¹⁴⁶ *Id.* at 395.

¹⁴⁷ *Tormo*, 398 F. Supp. at 1169.

¹⁴⁸ *Id.* at 1169 (citation omitted).

¹⁴⁹ *Id.*

¹⁵⁰ *Hashemi*, 609 F.Supp. at 395.

¹⁵¹ *See Volpe*, 237 A.D.2d at 283, 654 N.Y.S.2d at 162 (citation omitted); *but see Jane Street Co.*, 597 N.Y.S.2d at 17. (attorney-client relationship is not dependent on express agreement or payment of fee).

While we have considered the liability *vel non* of referring counsel for the negligence of specialists retained to assist the client,¹⁵² one recent decision has addressed the converse situation and considered the liability of bankruptcy specialists for the negligence of the attorney of record who hired them as consultants in a bankruptcy proceeding. The attorney of record in *Glantz v. Rosenberg*¹⁵³ hired the defendant attorneys as “consultants” in a bankruptcy matter because he “was unfamiliar with bankruptcy law and procedure.”¹⁵⁴ When the attorney of record ignored a summons and notice of trial in bankruptcy court, the proceeding was dismissed, resulting in a malpractice claim.¹⁵⁵ The Appellate Division, in rejecting claims for contribution against the bankruptcy consultants, observed that their role was limited to drafting documents and advising the attorney of record and therefore they had no duty to appear in court.¹⁵⁶ Since the failure to appear in court on the specified date was solely the responsibility of counsel of record, all claims against the bankruptcy specialists were properly dismissed.¹⁵⁷

Glantz stands for the simple, common-sense proposition that counsel of record cannot seek contribution from other attorneys for his own failure to obey a notice to appear in court. In addition, the decision bespeaks a desire to prune and restrict the liability of other attorneys who might have conceivably been in a position to prevent the malpractice, yet had no duty to do so. Thus, the fact that a consultant is one link in a chain of attorneys providing legal service to a client does not justify imposing professional liability on all of the attorneys engaged in the overall endeavor.

¹⁵² Compare *Williams*, 116 A.D.2d at 861, 498 N.Y.S.2d at 1006 (holding that trial counsel was not responsible for malpractice of a bankruptcy specialist); with *Cohen*, 92 A.D.2d at 536, 459 N.Y.S.2d at 98 (counsel of record responsible for misdeeds of outside trial counsel).

¹⁵³ 220 A.D.2d 719, 633 N.Y.S.2d 77 (2d Dep’t 1995).

¹⁵⁴ *Id.* at 720, 633 N.Y.S.2d at 78.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

V. DOES AN AGREEMENT TO DIVIDE FEES GIVE RISE TO PROFESSIONAL LIABILITY BY THE REFERRING ATTORNEY?

Does an agreement among attorneys to share legal fees give rise to professional liability to both? In New York, the payment of attorneys' fees does not, without more, give rise to an attorney-client relationship.¹⁵⁸ As demonstrated in the immediately preceding section, not every attorney who collects a fee is responsible for the malpractice of every other attorney who works on the same matter for the same client.¹⁵⁹

However, an additional level of analysis may be suggested by the Code of Professional Responsibility, which imposes conditions upon the division of fees between lawyers, and forbids the sharing of fees with non-lawyers.¹⁶⁰ DR 2-107 (A) of the Code provides in pertinent part as follows:

A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm or law office, unless:

1. The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
2. The division is in proportion to the services performed by each lawyer *or*, by a writing given to the client, *each lawyer assumes joint responsibility for the representation.*
3. The total fee of the lawyers does not exceed reasonable compensation for all legal

¹⁵⁸ See *Brandman*, 126 Misc.2d at 185, 479 N.Y.S.2d at 435. See also *Kubin*, 801 F. Supp. at 115.

¹⁵⁹ See, e.g., *Williams*, 116 A.D.2d at 861, 498 N.Y.S.2d at 1006.

¹⁶⁰ CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-107 ("Division of Fees Among Lawyers"), codified as 22 N.Y.C.R.R. 1200.12 (McKinney's 1992 & Supp. 2001); DR 3-102(A) (prohibiting fee-sharing with a non-lawyer).

services they rendered the client.¹⁶¹

Thus, the Code contemplates *either* a sharing of work *or* a sharing of “responsibility” by all lawyers who share in the fee.¹⁶² The Ethical Considerations, rather than explaining this phrase, merely paraphrase it: “A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation and if the total fee is reasonable.”¹⁶³ The Code does not explain in what manner the lawyers must “assume joint responsibility” for the representation, or whether the language of DR 2-107(A) (2) is intended to be used as a springboard for the imposition of civil liability on a lawyer who agrees to share a fee but does not perform work on a case. The plain language of DR 2-107 seems to suggest that a lawyer who accepts a fee yet does no work *should* agree in writing to assume responsibility for the representation. But what if the attorney does not assume responsibility? Is the remedy a grievance before the disciplinary committee or a civil suit for legal malpractice? The Preliminary Statement to the Code expressly eschews its use as a basis for imposing civil liability: “The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct.”¹⁶⁴ It is thus necessary to look beyond the language of the Code itself to understand its implications for attorney malpractice.

Fee-splitting agreements among attorneys have typically prevailed at the personal injury bar.¹⁶⁵ Even prior to the adoption

¹⁶¹ *Id.* (emphasis added).

¹⁶² *Id.*

¹⁶³ CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-22 (McKinney’s 1992 & Supp. 2001).

¹⁶⁴ CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

¹⁶⁵ See CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-20 (McKinney’s 1992 & Supp. 2001). See also *Gore v. Kressner*, 157 A.D.2d 575, 575 N.Y.S.2d 319 (1st Dept 1990) (upholding written agreement to divide recovery in personal injury action).

of the Code of Professional Responsibility in New York in 1970,¹⁶⁶ the courts upheld the division of fees among attorneys provided that there was a sharing of service or responsibility.¹⁶⁷ The prohibition of a “finders’ fee,” payable regardless of the service performed or responsibility assumed by a forwarding lawyer, was designed, in part, “to keep the profession of law from becoming an ordinary business.”¹⁶⁸ Thus, the regulation of fee-splitting among attorneys derived its origin from a desire to elevate the legal profession to “a branch of the administration of justice and not a mere money-getting trade.”¹⁶⁹

The enforceability of an agreement to divide fees between attorneys at common law was considered by the Appellate Division in *Jontow v. Jontow*.¹⁷⁰ At issue in *Jontow* was the enforceability of a written retainer agreement pursuant to which referring counsel and trial counsel were to share equally in any attorneys’ fees recovered in a negligence action.¹⁷¹ After the case was on the trial calendar, the plaintiff discharged the referring attorney.¹⁷² After a plaintiff’s verdict, trial counsel persuaded the trial judge to award attorneys’ fees on a *quantum meruit* basis pursuant to which fees were divided in proportion to the actual work performed on the case.¹⁷³ As a result, virtually all of the attorneys’ fees were awarded to trial counsel, leaving referring counsel essentially out in the cold.¹⁷⁴ The Appellate Division

¹⁶⁶ Although the Code was adopted in New York in 1970, the current version of DR 2-107 was adopted in 1990. See N.Y.C.L.A. Ethics Op. 715, 1996 WL 592658.

¹⁶⁷ See *Greenwald v. Zyvith*, 23 A.D.2d 201, 259 N.Y.S.2d 387 (2d Dep’t 1965).

¹⁶⁸ *Id.* at 203, 259 N.Y.S.2d at 390.

¹⁶⁹ *Id.* at 390 (quoting from the Canon 34 of the Canons of Professional Ethics).

¹⁷⁰ 34 A.D.2d 744, 310 N.Y.S.2d 145 (1st Dept 1970). Although *Jontow* was decided five months after enactment of the Code of Professional Responsibility on January 1, 1970, the events recited in the opinion took place prior to the enactment of the Code, which is not relied upon in the decision.

¹⁷¹ 310 N.Y.S.2d at 146.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

reversed the trial court's order allocating fees in proportion to the actual work done, and upheld the written fee agreement¹⁷⁵

The New York courts have similarly refused, in cases decided under the Code, to look behind the agreement and question the quantity of services provided as long as *some* work was performed by referring counsel.¹⁷⁶ For example, in *Benjamin v. Koepfel*,¹⁷⁷ the Court of Appeals upheld a fee sharing agreement between lawyers, observing that:

It has long been understood that in disputes among attorneys over the enforcement of fee-sharing agreements, the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either "refused to contribute more substantially."¹⁷⁸

The plaintiff attorney in *Benjamin* had sought to enforce a referral agreement pursuant to which the defendant attorneys agreed to pay him one third of any fees earned by them on a real estate tax matter.¹⁷⁹ The referring attorney's work consisted of "interviewing the client, evaluating the case, discussing the matter with firm attorneys and attending a meeting between the client and a firm partner."¹⁸⁰ Since the plaintiff performed work on the case, and served as liaison with the client, "he was entitled to his share of the fee as allocated in the parties' agreement."¹⁸¹

¹⁷⁵ *Id.* The court stated: "In view of the fact that there was a written agreement between the appellant and the respondent to divide their fee equally, and the fact that the appellant did perform services for the plaintiff, it was error for the trial court to set the fees in question on a *quantum meruit* basis."

¹⁷⁶ *Witt v. Cohen*, 192 A.D.2d 528, 596 N.Y.S.2d 117 (2d Dept 1993) (upholding agreement to share attorneys' fees "so long as the attorney who seeks his share of the fee has contributed some work, labor or service toward the earning of the fee").

¹⁷⁷ *Benjamin v. Koepfel*, 85 N.Y.2d 549, 556, 626 N.Y.S.2d 982, 986 (1995).

¹⁷⁸ *Id.*

¹⁷⁹ 85 N.Y.2d at 552, 626 N.Y.S.2d at 983.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 556, 626 N.Y.S.2d at 986.

Since the courts have been receptive to finding even minimal amounts of work sufficient to constitute “services” to the client, there has been little analysis of the alternate prong of DR 2-107(A)(2), explaining what is meant by the assumption of “joint responsibility for the representation.”¹⁸² The question arises whether a retainer agreement by which two attorneys agree to share in their fees can be construed to impose liability upon referring counsel. The retainer agreement in *Wildermann*, a pre-Code case, contemplated that both attorneys would share equally in the proceeds of the recovery of the Pennsylvania lawyer’s efforts.¹⁸³ As discussed earlier, this arrangement did not result in the imposition of liability on referring counsel.¹⁸⁴

As we have seen, the fact that an attorney may have performed services for a client in a particular matter does not necessarily render that attorney liable for negligence committed by another attorney working on the same case.¹⁸⁵ Assuming that referring counsel did not perform *any* services for the client, even under the *laissez-faire* approach enunciated in *Benjamin*, should the retainer agreement in and of itself be sufficient to impose civil “responsibility” on referring counsel under DR 2-107? For a variety of reasons, the answer is probably not. The phrase “joint responsibility,” although not defined in the Code, in all likelihood refers to ethical or moral responsibility and not civil liability. Moreover, the wording of DR 2-107 (A) (2) renders it unethical to accept a fee when the lawyer does no work unless she assumes joint responsibility “by a writing given the client...”¹⁸⁶ Given the foregoing, it seems anomalous that the *absence* of such a writing could provide a springboard for civil liability. In this regard, it is noteworthy that the New York courts have held that an attorney’s violation of the Code of Professional Responsibility does not give rise to a civil cause of

¹⁸² CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-107.

¹⁸³ 267 N.Y.S. at 840.

¹⁸⁴ *Id.* at 625, 267 N.Y.S. at 842.

¹⁸⁵ *See, e.g., Williams*, 116 A.D.2d at 861, 498 N.Y.S.2d at 1006, discussed in Section III, *supra*.

¹⁸⁶ CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107.

action against that attorney.¹⁸⁷ As one commentator has observed: "Generally, the fact of violation of the [disciplinary] rules is not a predicate for a malpractice action."¹⁸⁸

The Court of Appeals' recent decision in *Shapiro v. McNeill*¹⁸⁹ is instructive on this point. Here an attorney was sued, not by a client, but by a third party who claimed that the attorney had improperly transferred out of his trust account funds which had been deposited there by the client.¹⁹⁰ Unbeknownst to the defendant attorney, the source of the deposits into his attorney trust account were funds which his own client had bilked from the plaintiff by fraud and misrepresentations.¹⁹¹

The Court of Appeals held that the attorney, Bleecker, acted reasonably in following his client's instructions for the disposition of the funds which the client had deposited into Bleecker's trust account.¹⁹² In addition, the court rejected the plaintiff's argument that the defendant attorney had a duty, under the Code of Professional Responsibility, to advise him of the receipt of the funds and to pay those funds pursuant to the plaintiff's instructions.¹⁹³ Alternatively, the Court of Appeals observed that even a violation of the Code "will not, in and of itself, create a duty that gives rise to a cause of action that would otherwise not exist at law."¹⁹⁴

¹⁸⁷ *Drago v. Buonagurio*, 46 N.Y.2d 778, 413 N.Y.S.2d 910 (1978).

¹⁸⁸ Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 Fordham L. Rev. 443, 495 (1998) f.n.75.

¹⁸⁹ 92 N.Y.2d 91, 677 N.Y.S.2d 48 (1998).

¹⁹⁰ *Id.* at 94, 677 N.Y.S.2d at 49.

¹⁹¹ *Id.*

¹⁹² *Id.* at 99, 677 N.Y.S.2d at 51.

¹⁹³ *Id.* See also CODE OF PROFESSIONAL RESPONSIBILITY, DR 9-102 (c), codified as 22 N.Y.C.R.R. § 1200.46 (McKinney's 1992 & Supp. 2001). The provision involved in the *Shapiro* case requires an attorney to "promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest." It further obligates the attorney to follow the instructions of the client or third person in disposing of the funds, securities or other properties.

¹⁹⁴ *Shapiro*, 92 N.Y.2d at 97, 677 N.Y.S.2d at 50 (citation omitted). Accord *Drago*, 46 N.Y.2d at 779-780.

Although a third party, under *Shapiro*, cannot derive a cause of action against an attorney from a violation of the Code of Professional Responsibility,¹⁹⁵ what about the lawyer's own client? Is a violation of the Code *prima facie* evidence of negligence by the attorney? This question was answered in the negative in *Brainard v. Brown*,¹⁹⁶ where the plaintiff sued his former attorney for negligence in drafting a security agreement in connection with the transfer of real estate and construction equipment from the plaintiff to an excavating concern.¹⁹⁷ The plaintiff contended, *inter alia*, that the defendant committed malpractice both in the drafting of the agreement and in a conflict of interest by simultaneously representing both the seller and buyer.¹⁹⁸ In rejecting the plaintiff's argument that the alleged violation of the Code gave rise to a cause of action for breach of contract, the Appellate Division observed that: "A purported violation of a disciplinary rule does not, in itself, generate a cause of action."¹⁹⁹ This principle has similarly been applied to bar a malpractice claim based upon an alleged violation of the Code in the First²⁰⁰ and Second²⁰¹ Departments.

¹⁹⁵ *Shapiro*, 92 N.Y.2d at 97, 677 N.Y.S.2d at 50.

¹⁹⁶ 91 A.D.2d 287, 458 N.Y.S.2d 735 (3d Dept 1983), *overruled on other grounds*, *Santulli v. Englert, Reilly & McHugh*, 164 A.D.2d 149, 563 N.Y.S.2d 548 (3d Dept 1990).

¹⁹⁷ *Brainard*, 91 A.D.2d at 287, 458 N.Y.S.2d at 736.

¹⁹⁸ *Id.*

¹⁹⁹ 91 A.D.2d at 289, 458 N.Y.S.2d at 736. *Accord*, *Lavanant v. General Accident Ins. Co.*, 212 A.D.2d 450, 622 N.Y.S.2d 726 (1st Dept 1995) ("Their claims of conflict of interest, even if a violation of the Code of Professional Responsibility, would not support a separate cause of action for punitive damages."); *Baxt v. Liloia*, 714 A.D.2d 271 (N.J. 1998); *Perillo*, *supra*, 67 Fordham L. Rev. at 495 f.n.75.

²⁰⁰ *Steinberg v. Harmon*, 259 A.D.2d 318, 686 N.Y.S.2d 423 (1st Dept 1999) ("Plaintiff cannot state a cause of action for legal malpractice based solely on defendant's disqualification for an alleged conflict of interest in a separate litigation.").

²⁰¹ *Brown v. Samalin & Bock*, 155 A.D.2d 407, 547 N.Y.S.2d 80 (2d Dept 1989) ("However, even if the procurement of the release constituted a violation of the Code of Professional Responsibility, as plaintiff claims, it did not, in itself, generate a separate cause of action which might support an award for punitive damages").

Without referring to the foregoing authorities, the New York County Lawyers' Association Committee on Professional Ethics has interpreted DR 2-107 to support malpractice liability against referring counsel based upon a hypothetical fact situation in which the attorneys agreed in writing to assume joint responsibility for the representation, and, further, in which receiving counsel agreed to indemnify referring counsel for any malpractice committed by the former.²⁰² The Committee concluded, in Ethics Opinion 715, that the indemnity agreement did not violate the Code, and went on to opine that the agreement to assume "joint responsibility" is financial as well as moral.²⁰³ While referring counsel has no obligation to supervise the work of a specialist, counsel should be prepared to indemnify the client for the former's malpractice because, in the view of the Committee, "joint responsibility is synonymous with joint and several liability."²⁰⁴

Interestingly, the Committee's conclusion states that a lawyer who agrees to share fees for a referral "is *ethically obligated* to accept vicarious liability for any act of malpractice that occurs during the course of the representation."²⁰⁵ The Committee seems to be enunciating an exhortatory principle for the guidance of the ethical attorney: An ethical attorney who refers a client to a specialist who commits malpractice should do the noble thing and agree to make the client whole financially.²⁰⁶ But whether a court can take these noble sentiments and convert them into a cause of action for money damages is another question altogether, particularly in light of the prohibitions in *Drago* and the Preliminary Statement to the Code itself on deriving such a cause of action.²⁰⁷

²⁰² NYCLA Ethics Op. 715, 1996 WL 592658 (May 28, 1996).

²⁰³ *Id.* at *3 (While a referring lawyer may have a financial obligation of 'joint responsibility,' that liability does not lead to an ethical obligation of the attorney to supervise the lawyer who accepted the case).

²⁰⁴ *Id.*

²⁰⁵ *Id.* (Apparently, the attorney is *ethically* obligated to accept financial responsibility.).

²⁰⁶ *Id.*

²⁰⁷ *Drago*, 46 N.Y.2d at 779, 413 N.Y.S.2d at 911. See also *supra* note 15.

Moreover, the scope of Ethics Opinion 715 is limited to interpreting the language of a hypothetical written agreement among attorneys to share responsibility for receiving counsel's representation of the client.²⁰⁸ The opinion does not address the situation in which the attorneys, either through neglect or ignorance, simply fail to have such an agreement. While such a failure may be unethical, it does not thereby become civilly actionable.

Under Ethics Opinion 715, an attorney who wishes to make a referral has several options. He can: (a) keep the matter himself, consistent with his professional obligation to provide competent legal representation; (b) refer the case out without accepting any fee; (c) accept compensation in proportion to the work actually performed, or (d) accept a referral fee along with a written fee agreement acknowledged by the client.²⁰⁹ Under the last alternative, referring counsel may, at least in New York County, ethically extract an indemnification agreement from receiving counsel and may inquire about the status of receiving counsel's malpractice insurance.²¹⁰ However, the insurance coverage existing on the date of the referral may not be in effect on the date of the malpractice, *e.g.*, two years later.²¹¹

Along these lines, it is noteworthy that a Florida appellate court has recently held that a referring attorney may be held civilly liable for the malpractice of receiving counsel, even without an agreement to assume joint responsibility, where there is "an express or implied agreement to divide the fee."²¹² The defendant in *Norris v. Silver*²¹³ was a Florida lawyer who referred a personal injury case arising out of an Illinois accident to an Illinois attorney, who neglected to commence suit within the two year Illinois statute of limitations.²¹⁴ There was no written

²⁰⁸ 1996 WL 592658.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Norris v. Silver*, 701 So. 2d 1238, 1241 (Fla. Dist. Ct. App. 1997).

²¹³ *Id.*

²¹⁴ *Id.* at 1239.

agreement between the two attorneys concerning their fees or assuming joint responsibility for the representation.²¹⁵

Although the trial court had granted summary judgment in favor of referring counsel, the District Court of Appeal reversed, finding the existence of “a genuine issue of material fact as to whether [referring counsel] retained a financial interest in plaintiff’s personal injury case by entering into an express or implied agreement to divide the legal fee.”²¹⁶ The court reasoned that liability can be derived from a written agreement assuming joint liability for the representation, as required by the Rules Regulating the Florida Bar, which are roughly analogous, but not identical, to the language of DR 2-107 of the Code.²¹⁷ In Florida, fees may be shared among attorneys in proportion to actual services performed or, by written agreement in which “each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client....”²¹⁸ Although, under Florida law, the failure to put the referral agreement in writing rendered it unenforceable, the court reasoned that equity and fairness required that counsel not be rewarded for his failure to comply with the state ethics rules.²¹⁹ The court held that vicarious liability can be derived from an express or implied agreement to divide the legal fee, yet cautioned:

It would not, however, be enough for the plaintiff simply to show that the working attorney had a unilateral, subjective intent to pay a referral fee The fact that the working attorney

²¹⁵ *Id.*

²¹⁶ *Id.* at 1240.

²¹⁷ Fla. Bar Reg. R. 4-1.5(g) (2001). The statute provides in part that a division of fees can be allocated either in proportion to the services performed by each lawyer, or, “by written agreement with the client; (A) each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client; and (B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.”

²¹⁸ *Id.*

²¹⁹ *Norris*, 701 So.2d at 1240.

routinely pays referral fees is not, in and of itself, enough to establish an agreement between the referring and the working attorney. Plaintiff must prove an express or implied agreement to divide the fee.²²⁰

Norris is unlikely to be persuasive in New York for a variety of reasons. First, it is based upon an ethical framework somewhat different than DR 2-107. Florida's ethical rules require a referring attorney either: (a) to accept a fee in proportion to the work actually performed, or (b) to assume joint responsibility *and* "to be available for consultation with the client."²²¹ The *Norris* court never even considered the argument that the work performed by receiving counsel, while modest, might have entitled him to a fee.²²² Yet that is the rule in New York; as long as referring counsel performs *some* work, he will be entitled to enforcement of the referral agreement provided "there is no claim that either refused to contribute more substantially."²²³ The New York courts, mindful of the realities of the everyday practice of law, have been loathe to look behind referral agreements and have accordingly interpreted the "proportion to the services performed" prong of DR 2-107 so broadly as to obviate the type of analysis employed in *Norris*.²²⁴

The result of *Norris* seems harsh: How can a Florida practitioner be held liable for the negligence of an Illinois lawyer in missing an Illinois statute of limitations in a case arising out of an Illinois accident? Moreover, a line of New York cases, going back to *Wildermann*,²²⁵ have held that referring counsel is not responsible for the negligence of foreign counsel. Indeed, in *Wildermann*, referring counsel expected to share in any recovery obtained by Pennsylvania counsel on a contingency fee basis.²²⁶

²²⁰ *Id.* at 1241.

²²¹ Fla. Bar Reg. R. 4-1.5(g).

²²² *Norris*, 701 So.2d at 1241.

²²³ *Benjamin*, 85 N.Y. 2d at 556, 626 N.Y.S.2d at 986.

²²⁴ *Id.*

²²⁵ 149 Misc. at 263, 267 N.Y.S. at 840.

²²⁶ *Id.* at 841.

Even if a referring attorney somehow fails to furnish any legal services within the broad net cast by the New York Court of Appeals, the Code of Professional Responsibility should not, as a matter of policy, be used as a vehicle for imposing professional liability upon referring counsel. As mentioned, the purpose of the Code is to regulate and set standards for ethical behavior, not to govern civil liability.²²⁷ As a matter of policy, referrals to more competent or specialized attorneys serve the public interest and advance the goals of the Code by making experienced counsel available to the lay public. Clients are generally served by a system which encourages referrals to specialists. Given the increasing complexity of the law, a client, particularly a business entity, may require the services of a variety of legal specialists. While the law does not permit a naked finder's fee, it conversely should not penalize a lawyer economically for seeking the advice or services of a specialist.

Given the foregoing, it seems anomalous to render a referring lawyer, who is generally only responsible for her own lack of ordinary care in her own legal practice, absolutely liable as a guarantor of any specialist she recommends to a client. Look at the result in *Norris*: a Florida lawyer who referred an Illinois case to an Illinois lawyer without an explicit agreement to share fees may be held absolutely liable for the latter's negligent oversight of an Illinois statute.²²⁸ After *Norris*,²²⁹ a Florida lawyer is likely to think long and hard before referring a case to an out-of-state practitioner, with or without a fee. A New York lawyer presented with the opportunity to refer a case to a Florida colleague, may well decide that the risks outweigh the benefits, and simply walk away.²³⁰

Such a scenario would provide an economic disincentive to making referrals to specialists or out-of-state attorneys. Some attorneys would devote the time and effort to investigating the

²²⁷ CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement.

²²⁸ *Norris*, 701 So.2d at 1241.

²²⁹ *Id.*

²³⁰ In addition, an interstate referral may result in choice of law problems, which amplify the uncertainties of attorney liability.

backgrounds and insurance coverage of receiving counsel, and would be more likely to enter into written fee-sharing agreements, perhaps even requiring an indemnity agreement along the lines of Ethics Opinion 715.²³¹ This development would be time-consuming and expensive, yet potentially beneficial in reducing uncompensated claims. Other attorneys, due to economic constraints, might feel pressured into holding onto matters that they otherwise would and should have referred to specialists. This could have the potential effect of giving rise to more malpractice. Further, the delays and confusion caused by attorneys investigating and negotiating agreements with each other would be accompanied by a price tag, as they would be forced to allocate limited time and resources away from other clients and matters.

On the other hand, it is logical to shift the risk of loss from the innocent lay victims of legal malpractice to the lawyer who steered them to the incompetent specialist in the first place. This is particularly the case where referring counsel expects to receive an attorney's fee for doing little or no work, the situation addressed in *Norris*.²³² If referring counsel expects to share in the fee, why should he not share in compensating the client in the event of legal malpractice?

Yet imposing strict liability on referring counsel for the misconduct of receiving counsel can be inherently unfair, particularly where counsel's liability is disproportionate to his own fault in making the referral or misjudging the professionalism of receiving counsel. While not insuring against ordinary malpractice or negligence, the Lawyer's Fund for Client Protection provides some level of reimbursement to clients who have lost money or property as a result of fraud, theft or conversion by their attorneys.²³³

The most reasonable approach, it seems, is to judge a referral by the standard of ordinary care, and not to render

²³¹ 1996 WL 592658.

²³² 701 So.2d at 1241.

²³³ See, Caher, *Lawyers Stealing Less, Clients Say*, N.Y.L.J. Nov. 19, 1999, page 1. f.n. 167 p. 34.

referring counsel the guarantor of receiving counsel's professionalism. This middle-ground approach eschews the absolute liability proposed by *Norris* and Ethics Opinion 715.²³⁴ Yet it is consistent with *Wildermann* and the New Jersey rule explicated in *Tormo*.²³⁵ For example, referring counsel may be aware of receiving counsel's litigation prowess, but unaware of his or her counseling skills or responsiveness in returning telephone calls. Receiving counsel may be a tiger in the courtroom but a dud in the library, or vice-versa. Under this approach, those attorneys who actively assume a supervisory role over receiving counsel, or who make affirmative factual representations about the latter's work, should be held to the standard of ordinary care. Rather than becoming the guarantor of the legal work of receiving counsel, referring counsel should be held responsible in proportion to his actual negligence.

VI. CONCLUSION

A referring attorney is required to use due care in the selection of outside counsel to whom he entrusts a client's legal business.²³⁶ This being said, the standard of due care is actually quite minimal, and there has been no reported decision in New York finding a violation of this standard. Indeed, even under the liberal, expansive standard enunciated in New Jersey under *Tormo*, the duty of investigation into the background of receiving counsel is discharged by simply ensuring that the receiving attorney is in fact licensed to practice law in that jurisdiction.²³⁷ The fact that the receiving attorney in *Tormo* had actually been indicted for insurance fraud was not chargeable to referring counsel.²³⁸ However, referring counsel must use reasonable diligence to investigate any known irregularities or obvious

²³⁴ *Norris*, 701 So.2d at 1241. See also NYCLA Ethics Op. 715.

²³⁵ 398 F. Supp. at 1170-1171; *Wildermann* at 624-25, 267 N.Y.S. at 842. See discussion, *supra*, Sections II and IV.

²³⁶ *Wildermann* at 624-25, 267 N.Y.S. at 842.

²³⁷ *Tormo*, 398 F. Supp at 1171.

²³⁸ *Id.*

questionable conduct on the part of the receiving counsel that could cast doubt on her competence or professionalism.²³⁹

No duty to supervise receiving counsel arises, at least in New York, simply by virtue of the referral.²⁴⁰ Nor should an obligation be imposed by the acceptance of an attorney's fee or an agreement to share fees with receiving counsel, provided counsel does some work on the case.²⁴¹ However, the possibility has been left open by the courts that a referring attorney could, by conduct or express representations, assume a duty to supervise the legal work of out-of-state or specialty counsel. While we know that reviewing correspondence and memoranda from receiving counsel will not, in and of itself, give rise to liability for their negligence in New York, the courts have not delineated when referring counsel's services will cross the line between functioning as "general counsel" and undertaking to supervise the work of outside counsel. Thus, counsel must be vigilant in clearly communicating with the client the precise scope of representation and supervisory authority over receiving counsel.

While a lawyer cannot ethically limit her liability to her client,²⁴² she may ethically require receiving counsel to enter into an agreement indemnifying her for the latter's malpractice.²⁴³ In addition, it cannot hurt to ensure that receiving counsel, in addition to possessing the highest standards of professionalism and expertise in his field, is also up-to-date on his errors and omissions insurance.

While no reported decision in New York has derived a legal malpractice case from a violation of DR 2-107, and, indeed, there are many reasons why such a decision would be anathema

²³⁹ *Id.*

²⁴⁰ *CVC Capital Corp. v. Weil, Gotshal & Manges*, 192 A.D.2d 324, 595 N.Y.S.2d 458 (1993).

²⁴¹ But see, NYCLA Ethics Opinion 715, discussed in Section IV, *supra*.

²⁴² See CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-102, codified as 22 N.Y.C.R.R. 1200.31 (McKinney's 1992 & Supp. 2001) ("A lawyer shall not seek, by contract or other means to limit prospectively the lawyer's individual liability to a client for malpractice . . .").

²⁴³ See, Comment, "*Legal Malpractice*" *Negligent Referral As A Cause of Action*, 29 Cumb. L. Rev. 697, 702 (1998); Ethics Op. 715.

to New York jurisprudence, there is no reason to tempt the fates in this regard. Indeed, the principles enunciated in *Norris* and Ethics Opinion 715, while not native to New York soil, have not been explicitly rejected here either. Counsel should take guidance not only from the authorities discussed in this article, but from the letter and spirit of the Code of Professional Responsibility as well. Successfully defending a legal malpractice claim may be of fleeting consolation to an attorney whose livelihood is challenged by a disciplinary proceeding arising out of a violation of DR 2-107. Perhaps the best way for a lawyer to comply with standards of ordinary competence is to aspire to something higher.