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**Operating In The Senior Industrial Complex**

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## **OPERATING IN THE SENIOR INDUSTRIAL COMPLEX**

### **I. INTRODUCTION**

A. The Aging Enterprise, used here as the collection of licensures, certificates, and certifications, types of service providers, and credentials related to the needs of the elderly, is a multidisciplinary model with necessary diversity of professional licenses, accreditations, and designations used at different points along our lives to problem-solve and resolve complex, multifaceted issues as a way to synergize the resources of diverse providers.<sup>1</sup>

B. Providing adequate legal representation to clients in Elder Law practices involves a holistic understanding of the client and the client's needs. Addressing more than just legal issues adds a unique aspect and value. The practitioner should remember that he or she may be the initial, and sometimes the only, contact clients have made regarding the multitude of problems and issues that confront them and their families. In addition to addressing the legal needs of clients, the attorney can assist with important but non-legal issues by making referrals to appropriate professionals. This assistance will help to establish client trust and bring a multi-disciplinary aspect to the legal practice.<sup>2</sup>

C. The referring lawyer should keep a variety of things in mind when considering referral resources for the multi-disciplinary team. For example, what is the specific role to be filled or task to be performed? The referral source may be hired to perform a service (guardian, e.g. or trust officer) or recommend and coordinate the professional services of others. What is the goal to be accomplished? To meet the client's needs, in the best, most cost effective manner, take into account current situation.

In our litigious society we also all need to be aware of the possibility of being in the "liability loop" if something goes wrong. Fortunately, with a little care the risk of

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<sup>1</sup> In 1979 Carroll Estes published her influential book *The Aging Enterprise*. In this work, and subsequent works, she described, and also criticized, the evolution of an aging human-service sector supported by government funding. This paper borrows that expression with respect for her body work in this area.

<sup>2</sup> The authors want to thank Christina Leshner, Elder Law attorney in Houston, Texas, for allowing them to draw from her presentation Elder Law Practice Considerations or Why the Little Things Really Count in preparing this paper.

that happening can be minimized. The International Association of Defense Counsel (“IADC”) reminds us that:

“A referring attorney has a duty, when referring a matter to another attorney for handling, to exercise care in retaining the other attorney in order to assure that the new lawyer handling the matter is competent and trustworthy. [citation omitted] In the ordinary referral arrangement, the referring attorney brings the client into contact with persons whom the client does not know, the client consents, often based on the assurances of the referring attorney. [citation omitted] Under such a circumstance the referring attorney, under general principals of agency law, *assumes a duty* to select other competent agents to handle those matters for the principal that were originally trusted to him. [citation omitted] The question from a malpractice standpoint is whether, at the time the referring attorney referred the matter to another attorney for handling, he had or should have known knowledge about the other attorney that would have kept a reasonable lawyer from referring the mater. ... The referral itself is the negligent act that gives rise to the client’s damage.”<sup>3</sup>

The authors have found no reported cases where a lawyer has been held liable for negligent referral to a health care professional or to any of the other professionals suggested in this paper, but that doesn’t mean it can’t happen. There are certainly ways to reduce the risk: <sup>4</sup>

- First, and probably foremost, avoid a “sub-agency” situation altogether and have the client engage the provider directly.
- Provide several names to the client when possible.
- Do not accept a referral fee.
- Use reputable referral sources (as discussed below) if you do not have personal knowledge of the individual or business.
- Seek recommendations from colleagues.
- Make sure the referral source has malpractice insurance, or is bonded. If you are the only deep pocket, you are the likely to be the best looking defendant.

## **II. WHO IS IN OUR UNIVERSE OF REFERAL RESOURCES?**

What is the range of possible providers? These days it is huge, and you need a good filtering mechanism to separate the wheat from the chaff. The following categories of professionals should be considered essential resources when representing elderly clients:

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<sup>3</sup> IADC Newsletter, October 2005, No. 1

<sup>4</sup> IADC Newsletter, July 2012

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Title search: Operating in the Senior Industrial Complex

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"The "Senior Industrial Complex": A Guide to Certified Professionals and What They Can (and Can't) Do for Your Clients"