

It's REALLY Personal: A Business 'Thank You'

by Deborah Long

(I wrote this essay in June, 2002; revised it October, 2007; and published in a private newsletter. I think it's a classic!)

What should be one of the most pleasant and trouble-free aspects of a professional life is one of its most complex: saying “thank you” for a client referral.

When I was a practicing real estate practitioner, I lost a long-time friendship over the sale of home. A colleague referred his sister to me, and after several weeks of showing her property, I successfully closed a lucrative sale, one that earned my firm about \$4,000 in total commissions. When I thanked my colleague with an appropriate note and a handshake, he made it clear he expected a more tangible reward. I explained that real estate licensees cannot pay unlicensed individuals for providing referrals. He indicated that I could surely afford to be generous. I responded by explaining that of the \$4,000 my firm earned on that sale, I earned approximately \$1,000 before taxes and expenses. While I had rebated a substantial sum to his sister (a lawful practice), I could not give him anything more than a hearty “thank you” without risking my license. His response was, “Yes, but who’s going to know?” Unfortunately, my answers did not satisfy him, and the friendship was irretrievably lost.

I wondered then, and still wonder, why lay people expect monetary rewards from real estate agents and other licensed professionals. Is it because of a mistaken belief that we are earning thousands of dollars in fees? Is it because of greed? An expectation that we will compensate them because they have seen others (illegally) compensated? Or is it a belief that in business, reciprocity should be a guiding principle—you scratch my back, and I will scratch yours.

But when I give a new neighbor the name of my pediatrician or dentist, I have no expectation that the next time I receive professional service from my physicians that I will get a discount or cash back or a free root canal. I never even expect a thank you—and rarely have I received one. The only expectation I have is that my neighbor will receive the same professional service from my doctor and dentist. If my neighbor does not receive good service, I would simply never refer that professional again. Why don’t consumers have the same expectation of real estate practitioners and other licensed professionals?

Part of the problem may lie in the conflict between licensing laws, federal laws, and business protocol. For example, real estate agents may pay other properly licensed real estate agents a referral fee. Real estate agents may give their clients—buyers or sellers—a discount on commission rates or housewarming presents for participating directly in a transaction (as I did with my friend’s sister, as described above). The prohibition in real estate deals with paying referral fees to unlicensed people who did not participate directly in a transaction.

This prohibition against giving a fee for referral runs counter to custom in other businesses. Many businesspeople—even those in regulated businesses—are permitted to accept and give referral fees and gifts. It is considered a polite gesture to give individuals who refer others a fruit basket, a modest gift certificate, or a dinner out. While many corporations have codes of ethics limiting the amounts that can be spent on wooing business clients, there is a general understanding that reciprocity can be a form of business protocol and etiquette.

To make matters more complex, federal laws govern referral fees. The *Real Estate Settlement Procedures Act* (or RESPA) enacted in 1974, specifically prohibits kickbacks and referral fees prohibited -- the paying or receiving of any fee or thing of value for the referral of business related to the settlement or closing without rendering a service. Settlement services are broadly defined to include more than just the traditional services performed by a lender, mortgage broker or title company, such as origination, processing, or funding a loan. Rendering credit reports, termite inspections, and home inspections are all considered settlement services.

Under RESPA, even those fees which are fully disclosed and agreed to by buyers or sellers are likely to be illegal. So mortgage brokers or loan officers or title company clerks getting a \$100 kickback from the surveyor firm they recommended to a buyer would be in violation of RESPA if they did not earn that \$100 by providing a real estate service for compensation. (Any person who violates RESPA's provisions may be fined up to \$10,000 or imprisoned for up to one year, or both. Additionally, the person violating RESPA is liable to the person charged for the settlement service for three times the amount paid for the settlement service. In addition to criminal penalties, RESPA violations are being combined with other private lawsuit claims such as antitrust violations, exposing violators to additional civil liability.)

Another federal law, the *Federal Corrupt Practice Act*, prohibits U.S. companies from making payments or gifts to government official for the purpose of influencing business decisions. First enacted in 1977, this law has been controversial from the start and was amended eleven years later because U.S. companies claimed to be at too great a competitive disadvantage with foreign companies. The act now allows payments to foreign officials where the purpose of the payments is to expedite routine governmental action, such as processing visas or providing police protection. Those accused of violating the Act may offer the defense that the alleged payoff was a normal and reasonable business expenditure.

Let's set aside the issue of law, for just a moment. What are some of the ethical issues in giving or receiving referral fees?

As I mentioned earlier, I don't have any qualms about providing modest thank-you gifts to individuals who send me business—with one proviso: those referrals should be unsolicited. In other words, I should not make offers to reward consumers if they send me business. If satisfied clients wish to send me referral business without prompting on my part, it seems appropriate and polite to send a small gift. (Again, this gift would be unlawful in most U.S. states even if it is the nice thing to do. All real estate practitioners can do lawfully is send a thank-you note.)

If a firm wants to woo my business with token gifts, such as donuts, ballpoint pens, or even educational seminars—as long as there is no expectation that I will buy or recommend the firm's products, the gifts are ethically acceptable. However, if the firm is trying to buy my recommendation of their product with expensive trinkets or junkets, the gift is really a bribe.

Another offensive—but lawful—practice that is currently making the rounds is paying fees to be placed on referral lists. If I must pay to have my firm placed on a "List of Recommended Vendors," I would conclude that the so-called recommended vendors are simply the ones who can afford the price of being on the list. The value of such a list is ethically questionable (and in some cases unlawful).

So here we have it: referral fees can be ethical but unlawful. They also can be lawful but unethical.

So on what basis should we conduct ourselves? The Law Enforcement Code of Ethics states, “The public demands that the integrity of police officers be above reproach. Police officers must, therefore, avoid any conduct that might compromise integrity and thus undercut the public confidence in a law enforcement agency. Officers will refuse to accept any gifts, presents, subscriptions, favors, gratuities, or promises that could be interpreted as seeking to cause the officer to refrain from performing official responsibilities honestly and within the law. Police officers must not receive private or special advantage from their official status. Respect from the public cannot be bought; it can only be earned and cultivated.”

This high standard for police officers sets a high bar for all licensed professionals.