

You Diligently Protect Your Clients; What About You? Part 1 (The Beginning)

By incorporating risk management from the very beginning of the representation, an attorney can better protect against legal malpractice claims or disciplinary complaints arising from simple misunderstandings between lawyer and client.

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A critical aspect of the practice of law is managing risk. Attorneys routinely evaluate and advise clients of the risks associated with representation matters, but it is equally important for lawyers to manage their own risks arising from their practice. Risk management begins at the outset of the representation and should continue until the representation concludes. By incorporating risk management into your daily practice of law, you can avoid legal malpractice claims and disciplinary complaints, and better set yourself up for the defense of such claims should you be faced with either down the road.

Client Selection

As attorneys, there are pressures, both emotional and financial, to try and help every potential client who comes in the door. However, risk management best practices start with careful client selection.

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.” See Pa. R.P.C. 1.16, Comment [1]. The first critical step in risk management is client selection. It is important to remember that entering into an attorney-client relationship is a two-way

street. Attorneys should choose their clients as carefully as clients select their lawyers. It is far easier to decline the representation at the beginning than to seek leave to withdraw pursuant to Rule 1.16(b), which may require the attorney to demonstrate to the court a valid reason for withdrawal. It is important to look for red flags regarding the potential client which may or may not be readily obvious. The lawyer should consider the reasonableness of the client’s expectations, the client’s motivations and the client’s interest in micromanaging the representation. Are you the second or third lawyer for the potential client in this matter? If the potential client has already contacted other attorneys, who have declined the representation, it is worthwhile to look into and consider the actual or potential reasons for those declinations before accepting the representation. It can be worthwhile to ask a client for permission to speak to the prior counsel. The client declining to provide such permission, and the reason(s) for doing so, can provide good insight into what issues you may face with the client moving forward.

If the potential client has unrealistic beliefs or expectations as to what the representation is likely to accomplish, he or she is more likely to be disappointed in the outcome and blame

the attorney for the unsatisfactory result. Likewise, if the potential client is unreasonably motivated by revenge or spite, he or she may be unable or unwilling to follow your advice in proceeding with the matter. Generally speaking, attorneys must abide by their client's decisions concerning the objectives of the representation pursuant to Rule 1.2(a). However, the Rules of Professional Conduct also require attorneys to practice law ethically. At the outset, it is worthwhile to assess whether the potential client is likely to allow you to practice law in accordance with the Rules, and to decline the representation if it appears the client will inhibit your ability to competently and ethically represent him or her.

Additional considerations include the client's concern over costs and the client's ability to pay. One surefire way to be sued for legal malpractice is to sue your client for fees. This is so common that some insurance carriers disclaim coverage for legal malpractice counterclaims filed in response to a suit for legal fees. If it already seems that costs or payment will be an issue before you have even accepted the representation, it is worthwhile to think twice about proceeding. Because of the importance of avoiding disputes over fees, you should consider the use of an "evergreen" retainer for clients represented on an hourly basis (and make certain it gets refreshed) to assure that the client does not get behind in payments.

If you are not going to accept a representation, for the above reasons or any other reason, you should promptly and clearly advise the potential client, in writing, that you have declined the representation. Be mindful of your obligations to prospective clients under Rule 1.18. It is a best practice to advise the potential client to seek alternative counsel if the potential client wishes to proceed with

the matter. You can, and probably should, advise the potential client that statutes of limitations may apply to the potential client's claims. However, avoid giving the client any legal advice, including specific advice regarding the timing in which the potential client may pursue claims. Having only briefly reviewed the matter, you may not have sufficient information to competently and accurately evaluate the claims and the timeframe during which they must be brought. Even if you ultimately do not accept the representation, if you provide inaccurate legal advice, you could be on the hook for legal malpractice. Liberal use of declination letters is a best practice, if sometimes difficult to implement in the realities of everyday work. As all experienced practitioners know, what you say is not necessarily what the potential client hears, and anything the potential client (or client) does not want to hear is best put in writing.

Matter Selection

Once the lawyer has agreed to accept the client, the lawyer must assess whether the lawyer can handle the matter. The lawyer must complete a conflicts analysis. Conflicts can exist at the beginning of the representation, or they can arise in the middle of the representation. It is critical to remain vigilant regarding potential conflicts of interest among your current clients, involving former clients, and between your client and yourself. If a conflict arises during the representation, you must take steps to assess whether and how the representation can continue. Conflicts should be thoroughly explained to the client and, if waiver is permissible under the Rules of Professional Conduct, informed consent should be obtained in writing.

A lawyer may only represent a client if the lawyer can do so competently. Pursuant to Rule 1.1, competent representation requires

the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Competence may be achieved by reasonable preparation, even if a matter is outside of the lawyer's typical area of practice. However, competence cannot be achieved when the lawyer lacks experience and time or ability to get up to speed. Competence does not only consider the lawyer's knowledge of the subject matter; the lawyer must have the ability to commit sufficient time and effort to the matter.

The Engagement

Once the lawyer accepts the representation, an engagement agreement should be prepared which details the identity of the client, the scope of the engagement, the fee arrangement, and file retention and destruction procedures. It is important to ensure the client understands who the lawyer represents and, equally important, who the lawyer does not represent. Legal malpractice claims frequently arise when a person believes they were represented by an attorney, but the attorney believed the representation was for a different person or entity.

Likewise, the engagement agreement should be as specific as possible regarding the scope of the representation. Pursuant to Rule 1.2(c), a lawyer may limit the scope of the representation as long as the limitation is reasonable and the client gives informed consent. A broad scope in the engagement agreement can lead to claims related to matters the lawyer did not intend to handle. If the scope of representation expands, the revised scope should be documented with a reference back to the original engagement

agreement. By limiting the scope at the outset, the lawyer can ensure the client understands the lawyer's intentions with respect to the representation. Lastly, the lawyer must follow up to ensure the client actually signs the engagement agreement (and any modification).

As with all things, good preparation leads to success in legal malpractice avoidance. Best practices in legal malpractice avoidance begin before the actual representation, and some of the most important steps you can take occur (ideally) before you do any work at all. By incorporating risk management from the very beginning of the representation, an attorney can better protect against legal malpractice claims or disciplinary complaints arising from simple misunderstandings between lawyer and client.



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