

You Diligently Protect Your Clients; What About You? Part 2 (The Middle and the End)

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In the last article we discussed the importance of incorporating risk management into your practice of law, in particular with respect to client and matter selection and laying out the terms of your engagement. Risk management does not end with the signing of the engagement agreement, however. Attorneys should consistently consider and address risks arising in their practice throughout the life of each and every representation.

Client Communication

Attorneys should remain in regular communication with their clients, managing client expectations and keeping clients updated on developments that impact earlier assessments of the matter. Pursuant to the Rules of Professional Conduct, lawyers are required to promptly inform the client of any decision or circumstance requiring the client's informed consent; reasonably consult with the client about the means by which the client's objectives are to be accomplished; keep the client reasonably informed about the status of the matter; promptly comply with reasonable requests for information; and consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permit-

ted by the rules or other law. See Pa. R.P.C. 1.4(a).

This means that attorneys should promptly advise clients of all developments in the matter. Certainly if a client reaches out for information, the attorney must respond within a reasonable time frame. If an attorney cannot provide a substantive response immediately, it is acceptable to acknowledge the request and advise the client when a more thorough response may be provided. Pa. R.P.C. 1.4, comment [4]. Even if the client has not requested an update, and even if there are no major developments, it is a best practice to regularly check in with your clients. Lack of communication is one of the primary complaints raised by clients in both legal malpractice and disciplinary matters. If a matter does not turn out the way the client hoped, it is more likely for the client to blame a lawyer who was noncommunicative than one who kept the client informed. Further, if the majority of communications between lawyer and client occur in person or over the phone, it is a good idea to follow up with a written record of those discussions. If the matter goes sideways, it is in your best interest to have a well-documented file demonstrating regular communication between you and your client.

A lawyer must explain a matter to the client to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Pa. R.P.C. 1.4(b). This means the attorney should update the client on major developments, explain options to the client, and elicit the client's opinion on how to proceed. The client should be provided with sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means to pursue them. Pa. R.P.C. 1.4, comment [5]. Some clients may not be able or want to participate in strategy discussions. However, the opportunity to do so should be provided until the attorney knows the client's preferences. Strict compliance with Rule 1.4(b) has the added risk management benefit of putting the client in charge of making at least some of the decisions regarding litigation. It is more difficult for a client to blame counsel for a bad outcome if the client made the decisions that caused the outcome. Discussions such as these are a good opportunity to check in on the client's expectations and manage those expectations as to what can reasonably be accomplished through the representation. It is a best practice to follow up on verbal discussions with a written communication detailing the substance and outcome of the discussion. This becomes even more important if the client disagrees with the attorney's advice or seems to have unreasonable expectations regarding the representation.

In some circumstances, such as during trial, it may not be possible to obtain the client's opinion on how best to proceed. However, it is important to have regular discussions with the client regarding the client's objectives so that the attorney is sufficiently knowledgeable to make judgment calls consistent with the client's goals. Pa. R.P.C. 1.4, comment [3]. The comments to Rule 1.4 are a good re-

source for advice in particular situations where communication with the client may be more challenging.

Notwithstanding these obligations, it is entirely appropriate for lawyers to set boundaries when communicating with clients. One downside to this job can often be that a lawyer must always be "on." Clients are able to reach attorneys via cell phone and email twenty four hours a day, seven days a week. An attorney does not have to be available to respond to routine client questions around the clock; there is no ethical obligation to be available to your clients all the time.

However, it is incumbent upon the attorney to ensure the client is aware of any boundaries in communicating and that the attorney responds to client requests for information in a timely manner when business hours resume.

File Management

A lawyer must act with reasonable diligence and promptness in representing a client. Pa. R.P.C. 1.3. Attorneys should put in place policies and procedures that facilitate calendaring of deadlines, regular reporting on client matters and routine internal communications among staff and attorneys. As stated in the comments to Rule 1.3, "no professional shortcoming is more widely resented than procrastination." R.P.C. 1.3, comment [3]. Attorneys must ensure that they are aware of and meeting all deadlines in all matters. Failing to meet deadlines is always one of the top causes of legal malpractice cases, but is also one of the easiest things to prevent.

Many of the issues discussed as relevant at the outset of a representation remain important throughout the life of the matter. Attorneys should regularly consider the scope of the representation. Even if the scope was

limited in the engagement agreement at the outset, taking on matters outside of that scope can lead to potential liability for new matters. When an attorney decides to expand the scope of the representation, it is a good idea to put the new defined scope in writing. Conflicts of interest can arise during a representation and must be timely and appropriately addressed in accordance with the Rules 1.7, 1.8 and 1.9. If a conflict did not exist at the outset, but arises during the representation, it may require the attorney to obtain an informed waiver or even to terminate the representation. Circumstances may change for the lawyer personally or professionally which could impact the ability to provide competent representation. Such issues must be addressed promptly.

Disengagement

At the conclusion of the representation, attorneys should provide clients with a disengagement letter, communicating in writing that the representation has ended. This ensures that both the attorney and the client understand that the representation is over. This is particularly important if the matter for which you have been engaged has not concluded, but it is a best practice to use a disengagement letter in all matters. In addition to advising the client that your representation has ended, the letter is an opportunity to advise the client of your file retention procedures, final billing information, and any other relevant communications related to the conclusion of the engagement. If you fail to af-

firmatively end your engagement, you may still be engaged.

Regular attention to risk management practices is one of the best ways to avoid legal malpractice claims. By incorporating routine policies and procedures into your practice, you are more likely to have happy clients and, therefore, less likely to face claims brought by those clients. By following these best practices throughout the representation, you may be able to avoid legal malpractice claims or disciplinary matters or, at a minimum, set up a strong defense should problems later arise.



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