

Risk Management Tip

A risk management publication for legal professionals

March 2018

Steps to Take at the Inception of Each Client Engagement to Avoid a Malpractice Claim

Any client who is unhappy with a law firm's representation is a potential plaintiff in a subsequent legal malpractice action. Thus, as a preliminary matter, a lawyer should analyze a prospective client and the potential matter prior to engagement, in an effort to minimize the risk of a future disciplinary action, legal malpractice action, or fee dispute. The lawyer should undertake to determine the prospective client's expectations, and whether those expectations are reasonable in light of the facts and circumstances presented.

Expertise. A critical component of the potential new client analysis is whether the firm is capable of handling that client's matter. The Rules of Professional Conduct of most jurisdictions mandate that a lawyer shall not handle a legal matter that the lawyer knows, or should know, he or she is not qualified or competent to handle. Part of this analysis should be whether the prospective matter will overburden the firm's finances, time, and staff resources, such that retention may harm the firm's other clients, or cause the firm's resources to be overtaxed.

Will your fees be paid? Another critical component of the analysis is whether the prospective client can pay the firm's fees. In the context of contingency agreements, the attorney may want to analyze the potential viability of actual recovery in the event a judgment enters in favor of the prospective client.

A state and federal docket search to analyze the prospective client's litigation history, including

whether he or she has ever been involved in any legal malpractice actions or fee disputes might also prove helpful.

Any conflicts? A conflict search regarding the parties, and any known potential parties, such as through third-party claims, counterclaims, or cross-claims, should be undertaken, preferably with a conflict-checking program.

Set expectations - for both you and the prospective client. Prior to entering into the representation, the attorney should also discuss the scope and limits of the firm's representation. A simple litigation matter can become quite complicated if, for example, a party files for bankruptcy, takes an appeal, enters receivership, becomes subject to a guardianship situation, or dies. The attorney should make sure that the prospective client understands the exact scope of the firm's potential representation.

Put it in writing. Always. Once these issues have been resolved, and the determination has been made to move forward with the representation, the retainer agreement should explicitly memorialize the bounds of the firm's actual representation. If, for example, the law firm has no intention of pursuing appeals on behalf of its client, then it must explicitly state that appeals are not part of the firm's representation, unless a separate retainer is executed.

The Engagement Letter. Once a firm has performed the above analysis and decided to accept the new client, a letter of engagement must be drafted and executed. Generally, an engagement letter should:

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- 1) Explain the scope of the legal services to be provided;
- 2) Explain the attorney's fees, expense costs, and billing practices; and
- 3) Where applicable, provide that the client may have a right to arbitrate fee disputes under applicable rules.

Or, a Non-Engagement Letter. Another important and often overlooked way to minimize risk is to send non-engagement letters when a firm decides not to accept a client. A non-engagement letter should be direct, concise, and in plain English, and should explicitly inform the prospective client that the law firm will not accept retention. It is highly advisable to send such letters via certified mail, return receipt requested, so that evidence exists in the event a statute of limitations issue later arises.

While it is not possible to eliminate every risk, a thoughtful and deliberate client acceptance process can go a long way towards doing just that.

Watch for our next Lawyers Professional Liability Webinar: **The Importance of Engagement and Disengagement Letters**, on April 18, 2018.
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