

PROPERLY SCREENING CLIENTS HELPS TO AVOID MALPRACTICE CLAIMS

Experienced attorneys know that agreeing to represent every prospective client who walks through the door can only lead to trouble. Careful screening of clients and cases yields a more profitable practice and also reduces the likelihood of malpractice.

Client and case screening should follow a three-pronged analysis. Attorneys need to weigh the ethical implications, professional liability considerations, and business development risks or opportunities of each potential case. This article focuses only on the second part of the analysis – the issues that can trigger malpractice claims.

Before you agree to represent a new client, do yourself and the client an enormous favor – take the time to evaluate the client and the matter by asking yourself the following questions:

1. Is the case outside the scope of my practice?

Many malpractice claims are caused by accepting cases outside the attorney's expertise. If you normally handle estate planning, agreeing to represent your neighbor in his or her divorce may be the biggest mistake of your career. If you want to expand your practice to a new area of law, consider associating qualified co-counsel. Always ask yourself whether a few thousand dollars in fees is worth a potential malpractice claim and damage to your reputation.

2. Will I have the time and resources to devote to the case?

Having too large a caseload can lead to malpractice claims. Before agreeing to represent a new client, examine your current caseload and decide whether you have the time and energy to commit to the potential client and case.

3. Can the client afford to hire me?

Many malpractice claims are generated by a fee dispute – an attorney sues a client for fees and the client countersues for malpractice. Representing a client who cannot afford your fees is a no-win situation. Even if you provide the highest quality legal services, the client will still be unhappy with your bill. You may also be forced to cut corners in hiring experts or performing necessary research because the client is unwilling or unable to pay for these services.

PROFESSIONAL LIABILITY FUND BOARD OF DIRECTORS AND OFFICERS

Robert W. Nunn – *Portland*
(*Chairperson*)

Stephen M. Bloom – *Pendleton*
(*Vice Chairperson*)

Ron J. Palmer – *Cottage Grove*
(*Public Member*)
(*Secretary-Treasurer*)

Bob Thuemmel – *Portland*

Louis A. Santiago – *Portland*

Amanda Walkup – *Eugene*

Lisa Almasy Miller – *Portland*

Tim Martínez – *Salem*

(*Public Member*)

Robert C. Cannon – *Salem*

Also consider that some cases are not worth your while, even if the client can afford to pay.

4. Has the client consulted other attorneys regarding this matter?

In many malpractice claims, the attorney being sued is the third or fourth attorney who represented the client. If the client has fired the prior attorney, what are the chances the client will be dissatisfied with *your* handling of the matter? Try to ascertain why the other attorney did not take the case or why the client was dissatisfied. Ask the client's permission to discuss the case with the previous attorney. Some important clues may surface as to why you shouldn't take the case either.

A client who changes lawyers may be trying to avoid paying legal fees. If you decide to take the case, get a retainer.

5. Does the client have unrealistic expectations?

Beware of clients with unreasonably high expectations. If the client believes the case is a "million-dollar gold mine," you likely will never achieve a satisfactory result for the client.

6. Is the client pursuing the case on principle alone?

No amount of money will satisfy a client who is proceeding on principle alone. Approach with caution the angry client bent on avenging

the alleged wrongs of the opposing party.

7. **Does the client seem irrational, unreasonable, or overly emotional?** Your client's cooperation is essential for adequate representation. If the client is unable to assist you, withholds information, or changes the facts of the case, you cannot adequately represent his or her best interests. In addition, emotionally distraught clients sometimes make decisions they later regret. For example, a corporate client may tell an attorney to settle a case at all costs to avoid bad publicity and later become upset over the amount being paid in settlement.
8. **Has the client come to me at the last minute?** Many malpractice claims are filed because time was of the essence and the attorney failed to name the proper defendant. Do not let a prospective client pressure you into accepting a case simply because a deadline is approaching. If you cannot properly investigate the case, you cannot adequately represent the client. The client's failure to act in a timely manner isn't your problem – unless you accept the case.
9. **Is the client's integrity questionable?** Investigating the background of new clients before agreeing to represent them can be a good practice. Corporate attorneys should exercise extreme caution with startup ventures. Is your client honest and financially secure? If not, unhappy investors might seek relief from you if the deal falls through.
10. **Am I positive no conflict of interest exists?** Thoroughly checking for conflicts before accepting a new case is critical! Maintaining a comprehensive conflict database will provide the information needed at the engagement stage. Remember, not all conflicts can be waived by the client.
11. **Am I being influenced by a referral?** Feelings of flattery or obligation are not sufficient reasons to take a case. Do not risk your career and reputation simply because you do not want to offend the person who made the referral.
12. **Would I be comfortable working with this client?** Many claims are initiated because the attorney avoided communication with the client. You don't have to become the client's friend, but you will be more inclined to take the client's calls

if you genuinely enjoy working with him or her.

13. **Do I really want this case?** Most attorneys overlook this obvious question, but it bears asking. Just because you practice in a particular area of law doesn't mean you must take every case that falls in your specialty. Trust your instincts.

In addition to asking these questions and paying attention to the "red flags," review past problem clients. You may find that a particular type of client or a specific type of legal matter tends to cause you trouble. Try to avoid repeating these situations.

If you decline representation, send a nonengagement letter that clearly states your decision not to represent the party. Avoid giving any opinion about liability or indicating that the case lacks merit. If applicable, point out that a critical deadline is approaching and other counsel should be consulted immediately, but do not mention specific dates because circumstances unknown to you could alter the deadline.

When clients are concerned, an ounce of prevention truly is worth a pound of cure. Declining a case you don't want frees your time for other cases you do want. It also frees the client to find a more enthusiastic advocate and gives you control over your work life. It's a win-win situation!

Dee Crocker
PLF Practice Management Advisor

ert