

Client Intake: A Guide to the Risks of Potential Representations

CNA, Professional Liability Risk Control

An attorney does not have to agree to represent every client that would like to retain the lawyer's services. However, once an attorney agrees to represent a client, that attorney has undertaken a duty to represent that client, subject to the applicable standard of care for that type of matter. Therefore, the decision on whether to accept or reject a potential representation is extremely important.

The criteria lawyers and law firms use to accept or reject potential representations are as varied as the cases themselves. Often, the issues that led to a subsequent legal malpractice action against an attorney were present before the lawyer or law firm decided to take the case and agree to the representation of the client.

Each potential representation of a client by a lawyer or law firm raises three important issues:

- Is accepting this case a sound ethical decision,
- Is accepting this case a wise professional decision, and
- Is accepting this case a prudent business decision?

While most lawyers go through such a three-pronged analysis for every potential representation, many lawyers conduct the analysis in an informal fashion and not pursuant to a systematic policy. From a risk control perspective, a more conscious and deliberate evaluation and creation of a formal policy on accepting client representations based on these three issues may help attorneys avoid a subsequent legal malpractice claim or ethical grievance.

Step 1: Ethical Analysis

Ethical concerns should be the first consideration before an attorney agrees to represent a client. The question the attorney should ask themselves is: Are there any ethical issues that prohibit the attorney from accepting the representation?¹

The most common ethical issue presented by a new client is a potential or actual conflict of interest in accepting the representation. The potential client's interests could be adverse to one of the law firm's current or former clients. The law firm also could already be representing another client in the same or similar transaction or case as the potential client. The representation of the new client

¹ Attorneys must review the applicable Rules of Professional Conduct concerning conflicts of interest in the relevant jurisdiction.

also could be materially limited by the lawyer or the law firm's responsibilities to another client, a third person or even the personal interests of the lawyer.

Some conflicts are fairly clear on their face; however, many conflicts are only revealed through a thorough conflict check before the lawyer accepts the representation. Also, some conflicts are potential in nature and may not materialize until later in the representation or not at all, depending on how the case progresses.

Typically, like many things in the practice of law, there will be room for interpretation about what set of facts represents an actual or potential conflict of interest. In addition, there are some conflicts that are waivable and some that are not. In some circumstances, a conflict of interest may be waived by a client if the attorney appropriately informs the client of the nature and risks of the conflict of interest.² In addition, a conflict of interest preventing acceptance of a representation may be able to be cured through instituting an "ethical screen" of all affected lawyers and personnel.³

Ultimately, the determination by a lawyer to accept a representation may depend on the lawyer's "appetite for risk." If a court or another arbiter determined that an unwaivable conflict of interest existed, the lawyer may be forced to withdraw from the entire representation. This can be important in situations where a lawyer could have represented one party in a transaction or case without any risk of a conflict, but the decision to represent more than one party puts that attorney at risk.

Conflicts of interest issues can lead to ethical grievances and are often used in legal malpractice cases to demonstrate or present to a jury either aggravating factors or that the attorney may have taken unnecessary ethical and legal risks in the representation.

There may be other ethical rules implicated by a potential representation. Most jurisdictions prohibit attorneys from representing clients to pursue frivolous actions without a reasonable legal basis or to further a purported fraud or crime on behalf a client. All attorneys should be familiar with applicable rules of professional conduct to determine whether they can ethically accept a representation of a client.

² Attorneys must review the applicable rules of professional conduct concerning conflicts of interest and whether a conflict waiver must be executed in writing. From a risk control perspective, use of a written conflict waiver is recommended.

³ Attorneys must review the applicable rules of professional conduct concerning conflicts of interest as to whether an ethical screen is allowed in a particular jurisdiction. See also Freivogel, William, "Freivogel on Conflicts – A Guide to Conflicts of Interest for Lawyers," www.freivogel.com (Outline of ethical screen rules by jurisdiction).

Step 2: Professional Liability Risk Analysis

Once an attorney has concluded that ethics rules do not prohibit the attorney from accepting the representation, the second step in the analysis is to consider the overall risk of the representation from a professional liability standpoint. The attorney needs to analyze the potential risk of a legal malpractice action if the attorney moves forward with this particular client or matter.

Without question, certain clients or cases present greater risks than others, and an attorney's reputation and earning ability is at stake with every representation.

Potential clients and matters that should be considered carefully:

- ***Clients with Unrealistic Expectations.*** Lawyers know that in most cases, the results rarely exceed a client's best expectations. Each case typically involves some compromise on the part of all of the parties, whether in a transactional or a litigated matter. Some clients are only satisfied if their attorney exacts some type of revenge on or "punishes" the other party. Clients with unrealistic expectations of what an attorney can achieve on their behalf are rarely satisfied with the representation. Dissatisfied clients are more likely to pursue a claim or file an ethical grievance against their attorney.
- ***Dishonest Clients.*** If an attorney suspects that the potential client is not telling the attorney the complete truth about the underlying facts in a representation, the attorney should proceed cautiously. Reliance on incorrect or fraudulent facts or documents can put the attorney in a difficult situation, both professionally and ethically.
- ***Uncooperative or argumentative clients.*** A client that refuses to abide by some of the terms of the representation or constantly disagrees with an attorney's advice can jeopardize a strong attorney-client relationship. Similarly, a client that has difficulty in appearing for meetings or legal proceedings or producing required documents can put the attorney at risk of ethical and judicial sanctions. Attorneys should recognize this type of client at the earliest juncture and question any continued representation.
- ***The unwinnable case.*** As a practical matter, a good case outcome typically results in a happy client. An attorney representing a client in a matter that is unlikely to be winnable needs to manage client expectations and prepare them for a negative result. This situation can be exacerbated if the potential client does not comprehend the weaknesses in their matter.
- ***Multiple attorneys.*** If a client has discharged several attorneys on the same case or previous lawyers have withdrawn from the case, an attorney should carefully consider agreeing to represent that client. There may be

a serious underlying reason why the client has been unable to work cooperatively with his or her attorneys. The client may have unrealistic expectations over the cost or progress of a case. From a risk control perspective, an attorney should consider being a client's second lawyer on a matter, but rarely – if ever – be willing to be their third attorney.

- **Relatives or friends.** An attorney should be cautious about representing relatives or friends. The friendship or familial relationship could jeopardize the attorney's willingness or ability to provide sound, objective advice to that client. Second, depending on the fee arrangement, an attorney may not treat that relative or friend as they would a fee paying client, possibly putting the attorney at risk for neglect, competence and malpractice issues.
- **Matters with No Clear Mechanism for Recovery.** Some potential clients have been wronged in some manner, but there is no legal mechanism to provide for any recovery. There may be no realistic cause of action that would allow this client to recover damages or be made whole. Often, this type of potential client has already been turned down by several attorneys and is pleading with the attorney to represent them. These types of cases may be neglected due to no clear ability to pursue an action on behalf of the client. These files may be pushed to the corner of the attorney's desk or into a box on the floor, resulting in missed deadlines or statutes of limitations. The most important thing to remember in such situations is to reject the representation in the first place.

Step 3: Business Analysis

The final and possibly most critical part of the analysis is the representation's potential impact on an attorney's business. Although this step is addressed third, it is this prong of the analysis that often steers the outcome of the previous steps. Except in the case of an ethical prohibition that precludes an attorney from accepting a representation, business reasons will ultimately determine whether or not an attorney takes a representation.

With all cases, an attorney must consider whether there is a compelling business reason to agree to represent a client. The biggest issue in this analysis is whether the client has the ability to pay the attorney for the representation. Fee disputes create malpractice risks for attorneys, as a client often will file a counterclaim for legal malpractice against an attorney seeking payment of fees.

In addition, the potential client may be facing a bankruptcy action, which can put the attorney at risk for a legal malpractice action pursued by a bankruptcy trustee. Such a potential client with a possible waivable conflict of interest may not provide enough income for the attorney to risk accepting the representation.

A potential client may request representation close to or extremely near a deadline, putting the attorney at risk of pursuing an action without adequate time to investigate the facts or prepare the action. The impending deadline can result in representation that does not meet the requisite standard of care, or cause the attorney to neglect another client matter.

Whether an attorney decides to accept a case will ultimately be determined by the attorney's appetite for business risk. Similar to ethical analyses and interpretations, the more risk adverse an attorney is, the less likely the attorney will be willing to take a chance on the representation. If ethical rules are complied with, there is nothing inappropriate about an attorney considering their business needs and goals when thinking about whether or not to accept a new matter or client. It is important to objectively discuss and analyze business concerns and make the best decision possible with the facts presented.

Ethical, professional and business implications are all legitimate concerns that have a place in risk control assessment. Attorneys should consider all three steps each time they consider a potential representation. Attorneys should consult with ethics experts when necessary, and discuss potential representations with other attorneys in the law firm if there are questions.

By implementing a formal risk control assessment in considering whether or not to accept a representation, attorneys can help identify and manage the risks that can lead to subsequent legal malpractice claims and ethical grievances.

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