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The Hidden Risks of Interacting with Potential Clients.

While you are already aware that your interactions with your current clients pose risks, you might not know that your interactions with potential clients may also put you at risk of a claim. This article will explain the risks of dealing with prospective clients, and provide tips to avoid misunderstandings that can lead to claims.

REJECTING RISK WHILE REJECTING PROSPECTIVE REPRESENTATIONS

Arguably, one of the surest ways to avoid being sued by a client for malpractice is to turn away all prospective clients. The logic couldn't be clearer: no clients, no risk. Unfortunately, besides being impractical, the advice is not fully accurate either, as even your interactions with prospective clients pose risks.

Case law regulations and ethics rules spell out duties that may be owed to prospective clients depending upon your interactions with them. ABA Model Rule of Professional Conduct 1.18 is the main source of the ethical obligations, addressing duties of confidentiality to prospective clients. But other risks arise as well. Misunderstandings about the rejection of a representation can lead to problems.

For instance, a prospect that does not realize or understand that you have declined the case may fail to seek assistance from another lawyer and lose valuable rights when deadlines pass. If, in turning away a potential client, you give legal advice or somehow lead the prospect to reasonably believe that you will give advice or act on their behalf, you can unwittingly turn a prospective client into an actual client. This is risky because you may not realize the change in status, and thus won't make an effort to address the prospects' needs, making it more likely that you will not serve those needs according to some legal obligation. Additionally, all lawyers should be familiar with ethics rules restricting solicitation of prospective clients in certain circumstances and regulations regarding advertising and marketing in general. While violations of the latter do not generally give rise to claims of professional liability, discipline is certainly a possibility.

In light of this, it is worthwhile to examine these risks and learn how to manage them effectively.

Risk: Allegations of Neglect or Delay or Negligent Advice

The primary risks that arise from client rejection center around misunderstandings regarding that rejection. The party seeking representation for some reason does not understand that you have chosen not to represent them. They then fail to seek assistance from another attorney, time passes, and they lose valuable rights. The party then turns to you for recovery. A typical scenario might look like this:

A prospective client approaches his neighbor, a trusts and estates attorney, about bringing a medical malpractice claim. The attorney explains that he knows almost nothing about bringing such claims, but will send it on to another attorney to assess the situation. The first attorney sends documents to the second attorney, but does not follow up for several weeks. After three months, the second attorney contacts and informs the prospective client that while the case may have had some merit, the one year limitations period expired sometime between when the first attorney met with them and when the second attorney first became aware of the potential representation. The prospective client sues both attorneys for missing the filing deadline.

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It is well-established that an attorney-client relationship can be created through implication. Likewise, even if no full-fledged attorney-client relationship arises, a lawyer may still have fiduciary duties to an individual based on the circumstances and their interactions. In determining whether an attorney-client relationship has arisen by implication, courts examine several factors. Chief among these is the putative client's view of the relationship: did the client believe that the lawyer was going to take on the representation, and, if so, was that belief reasonable?

Reasonability is determined by examining the totality of the circumstances, including whether the lawyer could or did reasonably foresee that the individual might rely on the lawyer to protect his interests, and whether the lawyer's actions or inaction with respect to the individual prompted such reliance. Additionally, the courts consider whether the attorney did anything—or nothing—to dispel any obvious misunderstanding regarding the relationship. Such actions or inactions might include whether or not the lawyer clearly and promptly responded to inquiries from prospective clients in a way that effectively communicated his rejection of the proffered employment.

"Be unequivocal when rejecting a representation"

Beyond creating a full-scope attorney-client relationship, what you say or do when rejecting a potential representation can still create unwanted and unexpected obligations regarding specific issues discussed or considered in the consultation. In most jurisdictions, attorney-client obligations arise whenever someone asks a lawyer for advice about a legal matter, believing that the matter falls within the lawyer's realm of competence, and the lawyer offers some sort of professional opinion in response. See, e.g., Franko v. Mitchell, 762 P.2d 1345 (Ariz. App. 1988)(attorney will incur duty when s/he knowingly or negligently leads a non-client to believe s/he is dealing fairly and carefully with the individual's interests).

If, when rejecting a prospective representation, you provide legal advice gratuitously—suggesting the case lacks merit, for instance, or indicating that the applicable limitations period will expire in three weeks—you could face claims that you created an implied relationship. Such advice, because it is often given without full knowledge of the facts, or because the lawyer expects that the individual will not rely upon the advice without further consultation with another lawyer, is frequently incomplete at best and outright incorrect at worst. Prospective clients who then delay or completely abandon their search for other counsel may then try to hold you responsible for misdirecting them.

How to Manage the Risks:

Do Not Delay

The decision whether to accept or reject a potential client should be made promptly. Make your determination with all deliberate speed and communicate your decision immediately, both orally and in writing. This is important whether or not it appears that deadlines will soon be approaching. The less time you are connected to the prospect, the less time there is for misunderstandings to develop, and the more time there is for the individual to seek assistance from someone else, potentially mitigating any problems for which they might seek to hold you responsible.

Be Direct and Do Not Offer Gratuitous Advice

Be unequivocal when rejecting a representation. Actually say, "we have decided not to represent you" with reference to the specific matter or matters discussed. At the same time, avoid commenting on the merits of the case, giving your opinion of its strengths or weaknesses, or commenting on its potential value. Any such comment could later be deemed to be legal advice, creating the attorney-client relationship you were trying to reject. The best practice is to state that the declination should not be taken as a comment on the merits of the case. Avoid rendering advice about specific limitations periods or other deadlines that may or may not apply to the prospect's claim or matter, but explain that such deadlines exist and that they could lose their right to pursue the matter if they fail to act quickly in pursuing assistance elsewhere.

Document Using Non-Engagement Letters

Every declination of representation should be confirmed in writing. The "non-engagement" letter is intended to help prevent non-clients from erroneously believing that you were representing them or looking out for their interests. A good letter can help avoid many problems and common claims. Never conduct an initial interview with a prospective client, whether in person or over the telephone, without getting a mailing address or email address to allow you to respond in writing after the initial contact. When sending the rejection letter, use a method that allows confirmation of delivery and keep a copy of the letter and delivery certification in your files. If the decision to decline a representation is made during the meeting with prospective clients, provide them with the letter

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before they leave your office, witnessed by another member of your staff, and follow up with another copy via e-mail or U.S. mail.

A checklist with sample language to include in a non-engagement letter can be found at the end of this article.

What If a Deadline is About to Expire?

The situation where a prospective client comes to you on the cusp of the expiration of the limitations period is admittedly a difficult one. Should you or must you help the individual preserve their rights by getting something filed with the court? As of the date of this article, our research uncovers no ethics opinions or case law defining a lawyer's obligations in such circumstances. While it is clear that a lawyer has an ethical duty to not abandon an existing client (see ABA Model Rule 1.16), there appears to be no specified obligation to assist a non-client under such conditions. Rules requiring pro bono work or regarding assistance of the legal profession as a whole seem tangential at best.

"…[A] rejected prospect must be treated like a former client with respect to the matters discussed in the initial consultation"

The decision can be guided by your own business and moral concerns and sensibilities. If you decide to try to help, but do not want to take on the matter completely, the safest approach is to proceed as if you have entered into an attorney-client relationship, at least for the limited purpose of taking that particular step. Explain to the client, orally and in writing, that you will help with the specified action you plan to undertake and that you will then withdraw from any representation. In jurisdictions where limited scope representation is available, consider assisting under the auspices of such a program. (See, e.g. Massachusetts Supreme Judicial Court Order implementing the Pilot Project on Limited Assistance Representation in Hampden and Suffolk Divisions of the Probate and Family Court Department, New Hampshire Superior Court Rule 14. See also ABA Standing Comm. on Delivery of Legal Services, http://www.abanet.org/legalservices/delivery/home.html, for various materials on limited scope representation and unbundled services.) Finally, take steps as necessary and available to establish that whatever actions you take will not violate rules against abuse of process, frivolous actions and the like, and submit a motion to withdraw as necessary if you helped the client file something in a tribunal.

If you decide not to assist, be specific in advising the prospect that you believe the limitations period may be about to expire based upon the limited information they have supplied, and that they should promptly retain another attorney and consult with them on this issue to protect their interests. Follow this up with a written non-engagement letter to the prospect which summarizes this discussion.

Risk: Breaches of Confidentiality or Conflicts of Interest

A fiduciary relationship arises when one person reposes faith, confidence, and trust in another's judgment and advice. Where the party in the position of influence has betrayed that confidence or trust, that betrayal is actionable. If, by your interactions with them, you prompt a prospective client's belief that you will protect their interests and fail to do so, you could face a claim for breach of fiduciary duty. This most often occurs when a lawyer fails to fulfill duties of confidentiality arising out of their interaction with the prospective client.

Model Rule 1.18, entitled "Duties to Prospective Client," lays out the basic principle:

(a) A person who discussed with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation.

This rule sets forth the long-standing principle that lawyers have certain duties of confidentiality running to those with whom they discuss the possibility of forming a lawyer-client relationship, even if they ultimately turn the prospective client away. The most common practical result of this rule is that attorneys can find themselves and their firms disqualified from representing another party against the prospect with whom they consulted earlier if the later representation is materially related to the matter discussed with the prospect.

In other words, for purposes of conflicts of interest analysis, the rejected prospect must be treated like a former client with respect to the matters discussed in the initial consultation, prohibiting the lawyer from taking on a representation adverse to that prospect in which the prospect's information would be materially relevant. Attorneys who fail to heed this prohibition

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can face claims by the rejected client alleging breach of fiduciary duty based on conflicts of interest.

How to Manage the Risks:

How best to manage such risks short of avoiding all consultations with prospective clients? The keys are circumspection, vigilance, and documentation.

Limit Information Received

Start with a frank admonition to a prospective client that you want only the barest minimum of information to begin the conversation—just enough to allow you to run a preliminary conflict check. Gather names of all relevant parties or potential parties, and minimal details of the nature of the issue (e.g., a negotiated transaction, a personal injury suit, or a trust and estate matter) and immediately run a preliminary conflicts check before proceeding further. While such action will not ensure that all conflicts are cleared at that point, it can eliminate the most obvious ones and help you avoid being conflicted out of a later representation of a current or future client against the rejected prospect.

> *"Be careful to return all documents or other materials [to] the prospect"*

Protect the Confidentiality of The Information Received

Next, carefully control information you receive during the consultation. Do not share it with others in your firm unless necessary to make a determination about accepting the representation. This is especially effective in those jurisdictions which have adopted new Model Rule 1.10(d)(2), which allows other members of the disqualified lawyer's firm to take on a representation adverse to the prospect provided that the interviewing lawyer who learned the protected information is properly and promptly screened from the representation. See Model Rule 1.10(k) for details of effective screening. By keeping the spread of information small, you may have a better chance to effectively institute an ethical wall to isolate those persons with actual knowledge of the confidential information should a potentially conflicting representation arise later on. Be careful to return all documents or other materials the prospect may have shared with you, documenting their return in writing.

Record in the Conflicts Database

Finally, include in the firm's conflict database the names of rejected clients from whom you have received information that must be protected. Create a separate database of "rejected clients" or "one-time only contacts" to house the information. This increases the likelihood that you will be alerted to the need to address any such problem—through the use of an ethical wall or written waivers—in a timely manner.

Conclusion

We have discussed, before in this space, the risk management benefits of good client screening and refusing representations that outpace your capacity, skills, interest, or integrity. Disciplined client and matter selection is indeed good risk management. But so is discipline in the act of rejecting prospective clients.

NON-ENGAGEMENT LETTER CHECKLIST AND SAMPLE LANGUAGE

- State clearly and precisely that the firm will not undertake the proposed representation.

  Possible language includes:
  The purpose of this letter is to confirm, based on our conversation of [date] that this firm will not represent you in [the proposed matter, your possible malpractice claim, your proposed transaction].

  Or:
  Thank you for [visiting, telephoning, writing] regarding the possibility of having us handle your [proposed matter]. [As we discussed,] I do not feel that it would be appropriate for this firm to represent you and so we will not be able to act as your attorneys at this time.

  Or:
  This will confirm that you contacted me [by telephone, by letter, in person] on [date] to inquire whether this firm would represent you in connection with [the proposed matter]. We appreciate your interest in our firm, but for various reasons we have decided not to represent you in this matter.

- Disclaim any investigation of the merits of the matter and note that your rejection of the representation should not be interpreted as any comment on the merit or lack of merit of the matter.

  Possible language includes:
  In declining this representation, this firm is not expressing an opinion on the merits of your case.

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Or:
Our decision to decline this case should not be construed as a statement of the merits of this case. [Any advice or opinions given during our initial consultation were preliminary only and not based on a thorough analysis. Accordingly, you should not rely on those comments, but seek the advice of other counsel if you wish an actual analysis of your matter.]

Or:
You should not take this declination of representation as a comment on the merits, or lack of merit, of your case. We have made no investigation into the merits of your claim [or defense] and express no opinion as to whether you have a viable or valuable position to pursue.

- Do not state legal reasons for rejecting the case except to note if you are rejecting the representation for reasons of conflict of interest.

- Warn the individual about the possibility that legal deadlines exist that, if not adhered to, could completely bar pursuit of an action or defense. Do not identify specific statutes of limitations or deadlines, however. Encourage the individual to not delay in seeking counsel elsewhere.

  Possible language includes:
  It is possible that one or more [deadlines, statutes of limitation] [may be about to expire, may work to bar your ability to bring your action/defense, may work to prevent you from proceeding in the near future]. If such deadline expires before you act, you may lose valuable rights. [You should therefore take steps immediately to contact another attorney to preserve whatever rights you may have.] [I strongly recommend that you consult with another attorney without delay concerning any rights you may have in connection with your proposed matter.]

- Send the letter certified mail, return receipt requested.

- Follow procedures to have the individual's name added to the firm's conflicts database.

- File a copy of the letter and the return receipt in the firm's central files.

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