

Risk Management in the Practice of Law

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A critical aspect of the practice of law is managing risk, not just for your clients but for yourself. Risk management begins at the outset of the representation and should continue until the representation concludes. By incorporating risk management into your daily practice of law, you can avoid legal malpractice claims and disciplinary complaints, and better set yourself up for the defense of such claims should you be faced with either down the road. Below are some practical risk management tips to incorporate into your practice.

Consider Red Flags When Selecting New Clients

Choosing to represent a client is a two-way street. While the prospective client may vet you, your experience, your background, your knowledge and your skill set, so too should you vet the prospective client before agreeing to the representation. In fact, attorneys should choose their clients as carefully as clients select their lawyers. There are a number of red flags attorneys should look for when considering a prospective client: (1) unreasonable expectations; (2) motivations of revenge or spite; (3) an interest in micromanaging the representation; (4) multiple prior attorneys; (5) dishonesty or exaggeration of the facts; (6) unwillingness to take your advice; and (7) extreme cost concerns or an inability to pay. It is important to gain the full picture of your prospective client before deciding to accept the representation. You should fact check, to the best of your ability, the story your potential client tells you. It is far easier to decline the representation at the beginning than to seek leave to withdraw, which may require the attorney to demonstrate to the Court

a valid reason for withdrawal. Of course, if you do need to terminate the representation, you should do so promptly, in accordance with the Rules of Professional Conduct and applicable Court rules, and without prejudicing your client.

If you are not going to accept a representation, you should promptly and clearly advise the potential client, in writing, that you have declined the representation. You should advise the potential client that statutes of limitations may apply to the potential client's claims, and advise the potential client to seek other counsel. However, avoid giving any legal advice, including specific advice regarding the timing in which the potential client may pursue claims. Any legal advice, even to someone you perceive to be a non-client, can later give rise to legal malpractice claims.

Evaluate Your Ability to Provide Competent Representation

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Competence may be achieved by reasonable preparation, even if a matter is outside of the lawyer's typical area of practice. However, competence cannot be achieved when the lawyer lacks experience and time or ability to get up to speed. Competence does not only consider the lawyer's knowledge of the subject matter; the lawyer must have the ability to commit sufficient time and effort to the matter. A consideration of competence includes considering the amount of time you have available to devote to the matter, the resources you can rely upon to handle the matter and any health or other personal problems which may impact

your ability to handle the matter. A highly experienced attorney can be nonetheless incompetent to handle the matter due to any number of these items.

Identify and Address Conflicts of Interest

Conflicts of interest must be assessed at the outset of the matter and throughout the representation. While most attorneys complete conflict checks at the outset of the representation, conflicts of interest can arise at any time and must be addressed. It is critical to remain vigilant regarding potential conflicts of interest among your current clients, involving former clients, and between your client and yourself. If a conflict arises during the representation, you must take steps to assess whether and how the representation can continue. Conflicts should be thoroughly explained to the client and, if waiver is permissible under the Rules of Professional Conduct, informed consent should be obtained in writing.

Clearly Define the Terms of the Engagement

An attorney-client relationship is contractual in nature, and it is a best practice to capture the terms of that contract in writing. A good engagement agreement details the identity of the client, the scope of the engagement, the fee arrangement, and file retention and destruction procedures, and it is signed by the client. It is important to ensure the client understands who the lawyer represents and, equally important, who the lawyer does not represent. Likewise, the engagement agreement should be as specific as possible regarding the scope of the representation. A broad scope in the engagement agreement can lead to claims related to matters the lawyer did not intend to handle. If the scope of representation expands, the revised scope should be documented with reference back to the original engagement agreement. By clearly identifying the client and limiting the scope at the outset, the lawyer can ensure the client un-

derstands the lawyer's intentions with respect to the representation.

Practice Good Client Management

It is critical throughout the representation to manage client expectations, to meet reasonable client requests, and most importantly, to keep the client informed. One of the most valuable risk management tools to incorporate throughout the representation of any client is regular client communication.

Pursuant to the Rules of Professional Conduct, lawyers are required to (1) promptly inform the client of any decision or circumstance requiring the client's informed consent; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules or other law.

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. However, 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. An informed client is less likely to think the lawyer missed something when the matter goes awry. At a minimum, a clear record of regular communication with your client often lays the foundation for a strong defense against a malpractice claim.

Practice Good File Management

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. Attorneys must ensure that they are aware of and meeting all deadlines in all matters. Failing to meet deadlines is one of the top causes of legal malpractice cases, but it is also one of the easiest things to prevent. Throughout the representation, it is important for attorneys to regularly consider the scope of the representation, to assess potential conflicts of interest, and to evaluate the ability to provide competent representation. Attorneys must be aware of their responsibilities when supervising other lawyers and staff. In sum, attorneys must have the practices in place to ensure matters are handled timely and competently by themselves and their staff.

Understand the Importance of 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 affirmatively 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 and disciplinary matters. These practices lead to clients who feel informed and understood by their attorneys. 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 stronger defense to any such claims.



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