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ADVICE AND INSIGHT INTO THE PRACTICE OF LAW®

## Client Intake Procedures: Avoiding Problematic Clients

Sound client intake procedures constitute one of the most effective methods for law firms to avoid legal malpractice claims. One commentator recently noted that most large legal malpractice claims faced by law firms result from accepting high-risk clients. Thus, if law firms rejected such representations, they will have reduced their exposure by “40 to 50 percent.”<sup>1</sup> Law firms that fail to implement systems to screen out high-risk clients and develop a culture that encourages compliance with such a client intake system increase their likelihood of incurring such damaging malpractice claims.<sup>2</sup>

The critical importance of the initial decision on whether to accept or reject a potential representation emanates from the fiduciary duties an attorney owes a client. Once an attorney agrees to represent a client, the attorney is obligated to represent the client in compliance with the applicable standard of care and is limited in his or her ability to withdraw from the representation.

## Establishing a Client Intake System

How does a lawyer or law firm create an effective client intake system? The answer will depend upon various factors, including but not limited to the law firm’s size, revenues, practice areas, and client base. Nevertheless, common areas of concern that all law firms should consider when creating or upgrading their client intake protocols can be identified. The purpose of this guide is to highlight those areas and suggest techniques that lawyers and law firms may implement to protect themselves from potentially dangerous representations.

### Independent Client Intake Reviews/Intake Committee

Law firms that have more than a small number of attorneys should implement an independent client intake review infrastructure. Part of that infrastructure should include a new client/new matter intake review committee. Such an intake committee must be supported by the leadership of the law firm by allowing it to operate independently and to make its decisions based upon objective factors that serve the best interests of the law firm.

While law firms also may wish to institute a review process to ensure that the intake committee is making sensible decisions, attempts by partners to override or subvert the client intake process should not be tolerated. Individual attorneys within a law firm should not be permitted to influence client intake decisions regarding their own clients. If individual attorneys are permitted to make independent client decisions regarding the clients that they bring to the law firm, those attorneys may exploit their financial interest in retaining as many clients as possible, thus placing the law firm in jeopardy of retaining a high-risk or otherwise inappropriate client.

### Lateral Hires/Background Checks and Conflicts of Interest

Law firms also should review any potential lateral hires and make acceptance of any offers contingent upon the candidate clearing all background checks and conflicts clearances. Conflicts of interest represent the most significant danger in the lateral hiring process. A law firm should not be vulnerable to the possibility that the entire firm would be foreclosed from an engagement due to its failure to check for conflicts prior to employment of a lateral hire. Law firms must obtain all relevant data from a lateral hire candidate, including but not limited to all of the candidate’s current cases and matters, and then enter all such data in the law firm’s conflicts database. CNA will address the logistics of lateral hiring in an upcoming article.

<sup>1</sup> Elizabeth J. Cohen, “Number of Claims May Be Decreasing But Their Severity is Heading Upward,” 28 Law. Man. Prof. Conduct 161 (03/14/12) (quoting John K. Villa of Williams & Connolly)

<sup>2</sup> Anthony V. Alfieri, “Big Law and Risk Management: Case Studies of Litigation, Deals, and Diversity,” 24 Geo. J. Legal Ethics 991, 998 (2011)

### **Staff Management of Client Intake Process/Client Intake Forms**

Many mid-sized and large law firms have lawyers and support staff whose primary job duties entail managing the client intake process. Although partners may delegate client intake duties to subordinate lawyers and/or support staff, partners have a supervisory responsibility over those charged with operations and management of the client intake system. They also have a duty to ensure that the law firm is complying with the rules of professional conduct.<sup>3</sup>

Consistency in the client intake process can be maintained by regular use of a client intake form, similar to the sample attached to this guide, for every new matter.

Irrespective of the type of structure established for client intake process, the system must help the law firm reject the incompatible client, avoid conflicts of interest, and document new representations.

## **Avoid the High-Risk or Incompatible Client**

### **Legal Malpractice Risk**

While there are no known statistics on the percentage of legal malpractice claims attributable to retaining high-risk clients, the issue raises a serious concern. In a recent survey of risk control professionals from 400 of the largest law firms in the country, 17% listed the fear of “bad” clients as a major concern.<sup>4</sup> This apprehension is attributable to a number of factors. Several law firms have faced major legal malpractice claims and other causes of action instituted by third-party victims of client malfeasance. A common theme in these lawsuits is that the law firms aided and abetted the wrongdoing clients and are, therefore, equally liable for the damages suffered by the third parties.

### **Other Risks/Background and Research of Prospective Clients**

Not all high-risk client representations necessarily result in lawsuits. They can lead, however, to disqualifications from representations, damaged reputation to the law firm, lost revenues due to clients’ lack of resources, attorney disciplinary complaints, and other serious problems.

A simple yet necessary step in a client intake system should involve conducting an internet search of potential clients. Typing the potential client’s name in a search engine and pressing the enter key may reveal criminal convictions, bankruptcies, prior litigation, and other relevant data that may signal to the law firm that a particular potential client poses a risk that the firm may not wish to assume. Several vendors offer background checks on individuals and entities, which includes reviews of public information and criminal records. Some vendors offer volume discounts that reduce the cost of individual searches. Those law firms wishing to avoid vendor costs can search court websites, as well as local, state, and federal websites, such as, but not limited to, the Department of Justice, the Federal Trade Commission, and the Department of Treasury’s Office of Foreign Asset Control’s Specially Designated Nationals List.

For companies that are potential clients, law firms also should confirm that the company is listed on the corporate records in their country of origin, request references from the company, check that the company is registered with the appropriate Secretary of State’s office, and contact the references to verify relevant information about the company.<sup>5</sup>

While a background search will not disclose every potential client that presents a high risk for law firms, it may assist the firm in prudent client selection in some instances. Therefore, firms should make background checks a routine part of their client intake systems.

<sup>3</sup> ABA Model Rules of Professional Conduct 5.1 and 5.3.

<sup>4</sup> 2012 US Law Firm Risk Survey, “Executive Summary,” IntApp, Inc., p. 8 (2012)

<sup>5</sup> Christopher Buckman, “Email Scams: When a New Client Isn’t Cause for Celebration,” 41 Colo. Law 91 (Jan. 2012)

## Assessing the Potential Client's Ability to Pay

### Credit Checks/Rationale and Procedures

Performing credit checks on potential clients serves as another method for preventing high-risk client representations. Not every potential client will require a credit check. For example, a Fortune 500 company or a new client who is paying a flat fee in its entirety before any legal work begins may not require a credit check. However, when a question arises about a potential client's financial stability, a credit check should be run.

A law firm must obtain the permission of the potential client and comply with all applicable federal and state laws when performing a credit check. Companies such as Equifax, Experian, and TransUnion may be contacted to determine a potential client's creditworthiness. Those potential clients who refuse to subject themselves to a credit check when the law firm determines it is necessary should not be accepted as clients.

If a credit check reveals a potential client with a bad credit history, the law firm may wish to consider requiring a high retainer fee and a billing system functionality that alerts the law firm if the retainer falls below a specified balance so that the law firm can request additional funds. In this scenario, the law firm and the potential client must agree at the outset of the engagement that the potential client will provide sufficient funds in order to maintain an agreed-upon minimum balance. If the potential client is a new business venture with no credit history, the law firm should perform credit checks on the principals of the new business venture.

### Financial Profile of Potential Client and Law Firm Responsibilities

Credit checks are not foolproof, so law firms must be alert to any red flags surrounding a potential client's financial profile. If the potential client is proposing an unorthodox transaction where the funding source is unclear or based upon unreasonably optimistic projections, the law firm may be better served by declining the representation. Similarly, if the potential client is requesting that the law firm assume duties that it does not customarily undertake, such as serving as an escrow agent for the potential client and third parties, the law firm should avoid involvement in such transactions.

## Protecting the Law Firm's Reputation

When deciding whether to accept a potential client, law firms should consider whether the potential client and the potential client's matter are strategically appropriate and consistent with the firm's values, reputation, and brand. Law firms also must consider whether a conflict of interest arises from a representation.

### Conflicts of Interest

A law firm representing various companies in specific industries in commercial transaction and business organization matters probably does not want its litigation practice group representing plaintiffs in shareholder derivative lawsuits against companies in those same industries. Law firms may wish to formulate a "Do Not Represent" list of representative entities that the firm will not represent in order to avoid ethical or business conflicts of interest. Lawyers and support staff responsible for managing the law firm's client intake process should be knowledgeable about the firm's client base and practice areas in order to prevent the law firm from accepting clients that may potentially damage existing client relationships or that prevent opportunities for future client engagements.

### Client Intake Infrastructure/Areas of Expertise

The client intake infrastructure also must review any new matters that fall outside the attorney's area of concentration. Lawyers have a duty to reject potential representations that they are not competent to perform or otherwise handle.<sup>6</sup> This precept does not preclude a lawyer from accepting a matter in which the attorney has never practiced. But law firms should decline such representations unless they are convinced that the lawyer bringing in the matter can obtain the requisite competence by associating with another lawyer who has relevant experience, undertaking specialized training, and/or performing the necessary legal research and study.

### Alignment with Firm Mission and Values

In addition to triggering legal malpractice claims, breakdowns in the client intake system can also cause friction among lawyers who work together. For example, a law firm had agreed to represent the U.S. House of Representatives Republican leadership as a client in defending the Defense of Marriage Act.<sup>7</sup> The decision sparked a backlash within the law firm, which had a history of supporting gay rights, and the law firm quickly withdrew from the representation. As a result of the withdrawal, the partner who had brought the client to the firm resigned in protest.<sup>8</sup> This case highlights the importance of the client intake committee to examine more than legal conflict of interest issues when accepting new clients. While lawyers have a fiduciary duty to protect the best interests of their clients, they want to protect their own interests as well by selecting clients that align with their law firm's values. Good client intake systems strive to differentiate between those potential clients that align with the law firm's values and those that do not and help to establish within the law firm what is in its own best interest in terms of client selection.

<sup>6</sup> ABA Model Rule of Professional Conduct 1.16.

<sup>7</sup> Drew Combs, "Vetting Controversial Clients: How AmLaw 200 Firms Do It," The Am Law Daily, May 3, 2011, <http://amlawdaily.typepad.com/amlawdaily/2011/05/lawfirmvettingprocess.html>; "Former King & Spalding Partners Claim Usual Vetting Process Is Very Thorough," The BLT: The Blog of Legal Times, April 27, 2011, <http://legaltimes.typepad.com/blt/2011/04/former-king-spalding-partners-claim-usual-vetting-process-is-very-thorough.html>.

<sup>8</sup> *Id.*

## Conflicts of Interest/Procedures

In addition to avoiding the high-risk or incompatible client, law firms must take steps in the client intake process to ensure that they do not engage in a conflict of interest when accepting a new client. While this section is not intended to serve as a primer on the substantive law on conflicts of interest, it is intended to provide guidance on how to detect and avoid conflicts of interest. One of the Comments to ABA Model Rule 1.7, with respect to the conflict of interest rules, states, in relevant part: “A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. ...Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule.”<sup>9</sup>

### Database/Current and Former Clients

A first step that law firms should undertake is to maintain an accessible database of current and former clients, adverse parties, and other pertinent information that can be retrieved quickly. As with any database, the more comprehensive and current the information that it receives, the more effective a tool it can be. Therefore, at an initial meeting with a potential client, the lawyer should ask, among other questions, about the specific identity of the potential client, the purpose of the representation, any known adverse parties, and any known potential witnesses.

Prior to receiving any confidential information from the potential client, the law firm should input the relevant information into the conflicts database and run a conflicts check to verify that no conflicts of interest exist. Even if the representation does not result, the potential client’s information should be entered into the database and marked as “potential client data.” Including such information in the database may yield more positive hits than actual conflicts, but this information can be illuminating. The conflicts partner and/or client intake committee can then review all positive hits to analyze the facts and circumstances of any potential representation to determine if an actual legal or business conflict of interest exists. Lawyers also must remember that any confidential information gleaned by the lawyer during the intake process must remain confidential, even if no attorney-client relationship is formed.<sup>10</sup>

### Conflict Memorandum/Daily Circulation and Timely Review

A conflict memorandum should be circulated on at least a daily basis throughout the law firm. A brief description of the proposed representation should be sent to all lawyers and support staff throughout the law firm, including the identity of the potential client, the adverse party, and other relevant information. If a person or entity is listed as a potentially adverse party, a tickler reminder should be sent periodically until a final determination is made as to whether the party is actually adverse or not. Law firm management should stress the importance of timely review of the conflict memorandum to all attorneys and support staff in the law firm.

<sup>9</sup> ABA Model Rule of Professional Conduct 1.7, Comment 3

<sup>10</sup> ABA Model Rule of Professional Conduct, 1.18

## Conflicts Check

A conflicts check should be run at three junctures:

- 1) at the initial client consultation before any confidential information is revealed,
- 2) immediately prior to opening the new client/matter to ensure that no conflicts developed since the initial client consultation; and
- 3) whenever a new party enters the case or matter.<sup>11</sup>

Failing to properly utilize a conflicts check system can result in adverse consequences for a law firm.

In one illustrative case, a law firm represented a company ("Company A") suing another company ("Company B") in an underlying product disparagement action. During the pendency of the underlying litigation, a third company ("Company C") acquired a controlling interest in Company B. The law firm representing Company A then agreed to represent Company C in various trademark enforcement issues and other matters unrelated to the underlying product disparagement action between Company A and Company B. After the underlying litigation concluded, the law firm sued Company A for unpaid legal fees. Company A then countersued the law firm in a legal malpractice claim, contending that the law firm's loyalties were divided in representing Company A in order to gain favor with Company C. As part of its evidence of the alleged conflict, Company A alleged that the law firm failed to abide by its conflicts clearance procedures, asserting that lawyers at the law firm were not reading the daily new matter sheets and failing to have its representation of Company C approved by the law firm's new business committee.<sup>12</sup>

## Utilize Conflict of Interest Waivers When Appropriate

When a conflict of interest presents itself, the law firm must determine whether it is the type of conflict that can be waived. ABA Model Rules 1.7 and 1.9 provide the framework for the type of analyses that attorneys and law firms should undertake when assessing whether a conflict is subject to waiver.

### Guidelines: Review, Content, Execution and Record Retention

The following guidelines are recommended in creating a conflict waiver protocol:

- The client intake infrastructure must set forth guidelines for drafting, reviewing, and executing conflict of interest waivers.
- A lawyer dedicated to conflict of interest issues or members of the intake committee should review all conflict of interest waivers prior to execution to ensure that they contain all the necessary language to be effective.
- The law firm must implement a process that precludes lawyers from commencing work on a case unless and until the waivers are executed with all the necessary signatures and countersignatures.
- The law firm should maintain a repository of these conflict of interest waiver letters in case they are needed later to defend the law firm.
- In order for a waiver to be effective, it must inform each client of the option to seek the advice of another lawyer with respect to the conflict waiver and that neither client is obligated to consent to the conflict.

<sup>11</sup> Jim Calloway, "Conflict Checking Systems from A to Z," 77 OBJ 3107 (Nov. 4, 2006)

<sup>12</sup> *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 (1st Dept. 2004) (reinstating legal malpractice counterclaim) and Decision and Order, Index No. 100630/2003 (March 23, 2006 N.Y. Sup. Ct.) (unpublished).

Conflicts of interest constitute a leading cause of legal malpractice cases.<sup>13</sup> Therefore, if a conflict can be waived, law firms should consider whether the risks of proceeding with the representation outweigh any potential benefits. Sample conflict waivers can be found in CNA's *Lawyers' Toolkit*.<sup>14</sup>

### **Conflicts Between Lawyers and Clients/Business Transactions**

Conflicts can develop not only among different clients being represented by the same law firm but between lawyers and their clients as well, especially with respect to business transactions. For example, implementation of the following protocols can address such conflicts:

- Law firm policy should require its attorneys to obtain prior approval from the law firm before entering into any business transaction with a client at any point during the pendency of the client's matter, including during the client intake process.
- The client intake infrastructure must require that its attorneys disclose any pending or anticipated business transactions with clients. Any such business transaction must be reviewed by designated leaders within the law firm and approved before that transaction is completed.
- If a lawyer is planning on acquiring a financial interest in a client, the law firm should assess whether the size of the financial interest might compromise the lawyer's ability to represent the client in an unbiased manner.

### **Conflicts Between Lawyers and Clients/Directors, Officers and Board Members**

Another related area that law firms must examine concerns the role of their lawyers serving as directors or board members of their corporate clients. Law firm leadership must assess whether a lawyer's service on a corporate board would impinge upon the client's ability to operate efficiently and effectively. For example, problems may arise if a particular action or decision by the lawyer-director confuses other directors and management as to whether the lawyer-director acted as a lawyer or director. The law firm should only approve board membership of one of its lawyers where it is reasonably certain that the lawyer's board membership on behalf of the corporate client will not adversely affect the client.<sup>15</sup>

Many lawyers' professional liability policies exclude coverage for claims arising out of a lawyer's work as director or officer of a company. Therefore, if a law firm permits its lawyers to serve as directors or board members of a client, it should require the attorney to obtain and show proof of his or her own directors and officers' liability insurance.

### **Other Miscellaneous Conflicts**

A law firm also should adopt a policy that its lawyers obtain prior approval before serving as an expert witness, mediator, arbitrator, or third-party neutral. Any time a lawyer serves in such a role, all relevant data must be entered into the law firms' conflicts database to guard against conflicts of interest.

<sup>13</sup> Ames & Gough, "Lawyers' Professional Liability Claims Trends: 2012," p. 6 (2012).

<sup>14</sup> "Lawyer's Toolkit: A Guide to Managing the Attorney-Client Relationship." CNA Professional Counsel, 2012.

<sup>15</sup> "Walking the Legal/Corporate Tightrope: The Risks of Lawyers Serving as a Director of a Corporate Client," CNA Professional Counsel, 2012.



## Use Engagement Letters for All New Matters

A comprehensive client intake system requires that engagement letters be used for all new matters, not solely for new clients. Documentation of the scope of the representation and the mutual responsibilities of the attorneys and their clients can often be a deciding factor in determining the responsibilities of both parties.

### Purpose of Engagement Letters

Engagement letters are designed to identify the client (and, if appropriate, who is not a client), limit the scope of representation, establish client expectations, reduce client misunderstandings, improve client communications, and provide opportunities for additional services. Use of an engagement letter may not prevent a legal malpractice claim, but it can support a stronger defense in the event a claim arises. Sample engagement agreements can be found in CNA's *Lawyers' Toolkit*.<sup>16</sup>

Engagement letters not only help establish expectations about the attorney-client relationship with the client, they may also protect attorneys in disputes with clients. In one matter, a law firm represented a client in his administrative proceeding before the IRS. The client contended that the law firm committed legal malpractice by failing to pursue third parties for liability concerning the outstanding taxes. After reviewing the engagement letter, which stated that the law firm was only representing the client in the administrative proceeding with the IRS, the court ruled in favor of the law firm.<sup>17</sup>

### Engagement Letters and Client Intake Infrastructure

Similar to conflict of interest waiver letters, the client intake infrastructure must set forth guidelines for drafting, reviewing, and executing engagement agreements. Such guidelines should consider inclusion of the following procedures:

- A law firm may wish to authorize a certain partner or partners to review engagement letters before they are countersigned by the client to ensure that they include all essential language.
- Best practices dictate that no work on a new file commences until the client has countersigned the engagement letter.
- Prior to the client's countersignature, the lawyer should have an in-depth discussion with the client as to how the representation will proceed and ensure that the client understands all the provisions and terms of the engagement letter. Documentation of the attorney-client relationship represents a critical risk control technique. Failing to document the key terms of a representation in an engagement letter could defeat the protections that an otherwise sound client intake system offers.
- If a potential representation does not come to fruition, the law firm should follow up in writing by sending a declination letter. The letter should convey that the law firm is not accepting the representation and that the potential client should act swiftly to secure other counsel so that no statutes of limitation or jurisdictional deadlines are missed. A sample declination letter is included in CNA's *Lawyers' Toolkit*.<sup>18</sup>

<sup>16</sup> "Lawyer's Toolkit: A Guide to Managing the Attorney-Client Relationship." CNA Professional Counsel, 2012.

<sup>17</sup> *Ambrose Corp. v. Davis Polk & Wardell et al.*, 866 N.E.2d 1033 (2007).

<sup>18</sup> "Lawyer's Toolkit: A Guide to Managing the Attorney-Client Relationship." CNA Professional Counsel, 2012.

## Conclusion

Lawyers should institute sound client intake procedures in order to protect themselves from representations that may lead to malpractice claims. Avoiding the high-risk or incompatible client, checking for conflicts of interest, and using engagement letters for all new matters constitute key elements of a client intake system. Law firms that not only adhere to these practices but actively support the law firm personnel through implementation of the client intake procedures are engaging in risk control measure that will assist in averting legal malpractice claims arising from clients who may represent a risk to the firm's reputation.

## Client/Matter Intake Form

CHOOSE ONE:  NEW CLIENT  EXISTING CLIENT

### CLIENT INFORMATION

Client Name:

Address:

City:

Country:

State:

Zip:

Client Contact:

Title:

Address:

City:

Country:

State:

Zip:

Phone:

Email:

Website:

Industry Group:

Type of Ownership:

### NATURE OF REPRESENTATION

Describe Nature of the Matter:

### PRACTICE AREAS

Requesting Attorney:

Supervising Attorney:

Practice Group/s:

Does Matter Fall w/in Expertise of Practice Group/Supervising Attorney:

### FEES

Fee Arrangement:

Retainer Fee:

If an Existing Client, Are Any Fee Payments Overdue:

## REFERRAL

How Did Client Learn of Law Firm:

## CONFLICT OF INTEREST CHECK

Adverse Parties:

Potentially Adverse Parties:

Non-Adverse Third Parties/Witnesses:

Conflicts Search Date:

Known Conflicts:

Possible Conflicts:

Business Conflicts:

Any Law Firm Attorneys (or Family Member) Have Ownership Interest in Client:

Any Law Firm Attorneys (or Family Member) Serve on Client's Board:

## WAIVERS

Are Waivers Required:

Date Waivers Obtained:

Signature Confirmed:

## INTERNET/BACKGROUND SEARCH

Internet Background/Search Date:

Criminal Record:

States for Criminal Record Check:

Credit Report Date:

Results of Credit Report:

Has the Client Ever Sued an Attorney for Legal Malpractice:

Has the Client Ever Been Represented by Another Attorney in this Matter:

If Yes, Name of Former Counsel and Reason for Termination:

Any Other Client Worthiness Issues or Concerns:

**ENGAGEMENT LETTER**

Date of Engagement Letter Approval:

Date Engagement Letter Signed by Client:

Confirmation of Signature:

**ADDITIONAL ISSUES**

Any Other Issues Concerning This Representation That the Client Intake Committee Should Know Before Making Its Decision:

\_\_\_\_\_  
Approval of Conflicts Partner

\_\_\_\_\_  
Date

\_\_\_\_\_  
Approval of Intake Committee

\_\_\_\_\_  
Date

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