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## Are You Ready to Commit? Client Intake and Proper Client Selection

### Introduction

Client intake should never be dismissed as an unimportant but necessary task when taking on a new client. Creating a thorough client intake process is essential in order to establish a strong foundation for an attorney-client relationship – whether the relationship lasts for weeks or years.

By investing the necessary time and effort at the outset, attorneys may save time, money and even help to avoid legal malpractice claims. When used appropriately, the client intake process may reveal a stark reality that a prospective client should not become a current client.

### Critical Component of Risk Mitigation

Client intake represents a critical component in endeavoring to avoid legal malpractice claims. Often, when a law firm is facing a legal malpractice allegation, it is possible to go back to the very beginning of the attorney-client relationship to identify the overlooked red flags and abbreviated intake procedures that led to the legal malpractice claim. All parties involved in the client intake process should be educated as to why each and every step is important, as well as its impact on selecting the best clients for the law firm.

Attorneys should trust their instincts. Many attorneys that have faced allegations of legal malpractice recall having “a bad feeling” or that “something was off” from the initial contact with a prospective client. Although personal instinct is not a factor that may be added to a checklist on client intake, it should, at a minimum, trigger additional investigation into the prospective client and the proposed client matter. In addition, if legal support

staff mentions concerns related to the prospective client, their concerns should also not be ignored. Typically, legal support staff is heavily involved in the client intake process and their opinions and observations matter.

To support CNA-insured attorneys in identifying how legal support staff support risk mitigation, [\*Law Firm Support Staff: Recognizing Their Role in Avoiding Legal Malpractice Claims\*](#).

### Selective Criteria

Revenue is a critical factor on both sides of the attorney-client relationship. Law firms need clients and legal fees to stay in business. Clients seek competent representation at the right price. Before a prospective client transitions to a current client, attorneys should assess whether the prospect is an appropriate representation for both the law firm and prospective client.<sup>1</sup>

Beyond seeing a new client representation as a source of income for the law firm, does the attorney being considered for the representation have the relevant experience? If not, is there a mentor that may assist the attorney over the course of the representation so that competent representation is provided to the client?

Does the attorney considered for the representation have the necessary time to devote to the new client representation? Attorneys and legal support staff overloaded with work are more likely to make mistakes resulting in legal malpractice claims.

<sup>1</sup> American Bar Association Formal Opinion 492, *Obligations to Prospective Clients: Confidentiality, Conflicts and “Significantly Harmful” Information* (June 9, 2020)

Who is the prospective client and is the potential matter consistent with the law firm practice, ideals and existing book of business? A new client representation should not reflect negatively on the law firm or create issues in representing existing clients of the law firm.

By evaluating whether or not the prospective client is an appropriate fit for the law firm, rather than simply a source of legal fees, a law firm may avoid creating turmoil among existing clients or attorneys within the firm.

### **Presentation versus Reality in Research**

Clients will always present themselves in the best possible light when approaching a law firm for representation. Nevertheless, as a law firm would carefully assess and evaluate a new hire before extending an offer of employment, a law firm also should research a prospective client before being transitioned to a current client. If possible, all of the information provided by the prospective client should be independently verified. In addition, law firms should compile as much information about a prospective client as possible. Initial background research should include a standard search engine, federal and state court records, and secretary of state filings, as well as the prospective client's websites and social media accounts.

In some instances, it may be necessary to run a credit check on a prospective client and obtain permission to do so. A client's inability to pay may warrant a fee collection suit, which may then spur the client to file a legal malpractice countersuit as justification for the refusal to pay legal fees. By assessing a prospective client's ability to pay and credit history, a law firm may identify potential red flags before committing to a new client representation.

When conducting research on a prospective client, attorneys should be alert regarding any information that may suggest fraudulent or criminal conduct by the prospective client. American Bar Association Model Rule of Professional Conduct 1.2(d) prohibits attorney conduct that would assist or advise a client in conduct that is criminal or fraudulent.<sup>2</sup>

To support CNA-insured attorneys contemplating a fee suit, [\*Taking Stock of a Potential Fee Collection Suit\*](#).

### **New Client or Scam Artist/Fraudster**

As attorney-client relationships become more virtual due to technology, attorneys also must remain cautious and wary about scam artists posing as new clients. For example, fraudsters are taking advantage of the COVID-19 pandemic and the inability to have in-person meetings. As part of the client intake process, attorneys and support staff should remain vigilant in evaluating a new client representation as a potential scam.

Scammers have upped their game by creating fake websites, infiltrating real email accounts, and using legitimate correspondence as samples in their scams, and are now willing to invest more time to commit the fraud in order to obtain either financial benefits or client data.

To support CNA-insured attorneys against fraudulent cyber activity relative to client intake, you may access multiple publications on awareness, avoidance and protecting client data. You may refer to [\*Scammers Targeting Attorneys; Alert: New Scam Targeting Lawyers Wiring Funds\*](#); [\*The Remote-Ready Law Firm: Managing the Long-Distance Relationships\*](#); and, [\*For Your Eyes Only: Securing Lawyer-Client Communications\*](#).

### **Clear Communication and Documentation**

Engagement agreements are an essential part of the client intake process. Some law firms have made the executed engagement agreement a requirement before a new client file may be billed. This process sends a clear message to all involved in the client representation that the engagement agreement will never be overlooked.

The attorney who establishes the client representation should take the lead in creating the engagement letter. This attorney will have the necessary conversations with prospective clients to understand who the client is, what is being asked of the law firm in the client representation, what the law firm is capable of doing for the client, the client's responsibilities, legal fees and billing, document retention and destruction. Drafting an engagement agreement appears deceptively simple but requires the application of important due diligence principles.

<sup>2</sup> ABA Formal Opinion 491, *Obligations Under Rule 1.2(d) to Avoid Counseling or Assisting in a Crime or Fraud in Non-Litigation Settings* (April 29, 2020)

Attorneys should devote as much time as necessary to clearly defining the scope of representation. Whether newly licensed or with decades of experience, attorneys must ensure that they and the client are on the same page as to the expectations being created. In the event of an allegation of legal malpractice over the course of the attorney-client relationship, one of the first questions defense counsel will ask is the history of how the representation was established and to review the engagement agreement.

Outside counsel guidelines also serve as documentation creating expectations as to how the client representation will proceed. Over the years, outside counsel guidelines have become complex and must be reviewed thoroughly before being executed by the law firm. Notably, the engagement agreement and outside counsel guidelines should not create contrasting expectations or requirements. Law firms do not want to expand their exposure to legal malpractice exposures or contractual liability, heightened IT requirements or issues pertaining to insurance coverage that may be included in outside counsel guidelines.

To support CNA-insured attorneys in creating a well-drafted engagement agreement the [\*Lawyers' Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship\*](#) was created to assist in the daily practice of law. In addition, [\*Creating a File Retention and Destruction Policy\*](#); and, [\*Caution in the Cumulus: Lawyers' Professional and Ethical Risks & Obligations Using the "Cloud" in Their Practice\*](#). Outside counsel guidelines are discussed in [\*Fighting the Trojan Horse: Managing Outside Counsel Guidelines\*](#).

### **Calendaring a Potential Withdrawal**

It may seem counterintuitive to calendar a potential withdrawal from an attorney-client relationship at the beginning of a representation. However, calendaring a time to review the status of the attorney-client relationship and whether the relationship should continue is a key element in helping to avoid potential allegations of legal malpractice. Attorneys should discuss how the representation has been going with all staff working on the file. Is the client responsive to requests for information? Does the client have realistic expectations related to the representation? Does the client respond timely to communications? Are all invoices current? Has the client expressed disappointment or frustration with the legal services being provided by the law firm? Does the client have realistic expectations of the outcome? Again, this examination represents an opportunity to check with staff members who have the most direct communication with the client.

To support CNA-insured attorneys in evaluating whether to and how best to withdraw from an attorney-client relationship, please refer to [\*Plan Your Route Before Getting Out: Attorney Withdrawal\*](#).

### **Consistent Conflicts Conundrum**

While conflicts of interest checks are an obvious part of any client intake process, attorneys may overlook the need to check for additional conflicts that may arise over the course of the client representation. When a new party enters litigation or a transaction, it is necessary to run additional conflicts of interest checks to address any new conflicts that must be addressed.

Attorneys are often apprised of how unaddressed conflicts of interest may result in allegations of legal malpractice. The legal support staff providing assistance also should understand why it is important to continuously address potential conflicts of interest that may arise after the attorney-client relationship is initially established.

Similar to confirming that a well-drafted engagement agreement is executed before any billing is permitted on a new client file, legal support staff also may assist in avoiding legal malpractice claims by reminding attorneys of the need for a new conflicts check when the parties change in a client representation.

To support CNA-insured attorneys in evaluating conflicts of interest in their daily practice of law the [\*Conflicts of Interest Guide\*](#) is available to ensure that all necessary steps are covered in the conflict checking process as part of client intake and over the course of the client representation.

### **Conclusion**

The client intake process represents an important step in evaluating a prospective client representation, avoiding problematic clients and exposing your firm to allegations of legal malpractice. Attorneys must lead the charge in making client intake a priority by maintaining open lines of communication with all those involved in the process. Robust client intake procedures occasionally require the declination of new business, but no client, no matter how valuable, is worth facing a legal malpractice claim.

Through implementation of client intake protocols appropriate to the nature of your practice, the firm can help to ensure that the representation is consistent with your mission, guidelines and risk appetite.

## Client Intake Checklist

The following checklist provides a number of questions that a firm may consider, among others suitable to your practice, during the client intake process.

<b>Prior to Transitioning Prospective Client to Current Client</b>	<b>Yes</b>	<b>No</b>	<b>Comments</b>
Are there any concerns related to the prospective client's capacity to retain counsel and understand the purpose of the representation? Are there any concerns related to undue influence of the prospective client?			
Does the attorney taking on the representation have the necessary experience, resources and time to provide competent legal services? If not, is there a mentor available to the attorney to provide guidance?			
Is the type of client representation appropriate for the law firm?			
In researching the prospective client, was all of the information easily verified and consistent?			
Has the prospective client representation been evaluated by an attorney or committee that will not be working on the matter?			
Has initial information been compiled to complete an initial conflicts of interest check?			
Where applicable, has the prospective client's ability to pay been confirmed?			
Has the prospective client's credit history been reviewed (with their permission)?			
Have other attorneys or law firms been involved in representing the prospective client related to this matter? If so, why is the prospective client seeking new representation?			
What is the prospective client's experience in legal matters?			
Has anyone at the law firm who has interacted with the prospective client mentioned any red flags or concerns regarding the client representation?			

<b>Prospective to Current Client</b>	<b>Yes</b>	<b>No</b>	<b>Comments</b>
Has the attorney responsible for bringing in the new client conducted all of the requisite discussions to prepare a well-drafted engagement agreement establishing the minimum requirements of identifying the client, limiting the scope of the engagement, responsibilities of the client, legal fees and record retention and destruction policy?			
Has the well-drafted engagement letter been signed by the client before anyone is permitted to bill on the new client matter?			
Has the new client provided all of the necessary information to complete a thorough conflicts of interest check?			
Has the client provided all necessary documentation and information to the law firm?			
Has the client provided a retainer in a timely manner, if applicable?			
Has a future date been calendared to evaluate and determine whether it would be appropriate to withdraw from the client representation and provide sufficient time for the current client to locate new counsel?			
Do all parties working on the new matter understand that any concerns related to the client representation should be communicated directly to the lead attorney? For example, are there any issues related to client expectations as to scope, timing, recovery of damages or concerning behavior?			
Is the current client aware of the billing structure, when invoices are due and any and all vendors associated with the client representation?			

Continuing Concerns with Client Intake	Yes	No	Comments
Do all those working on the client matter understand that conflicts of interest remain an ongoing concern over the course of the representation and new conflicts of interest checks must be run when new parties enter litigation or the matter?			
Do all those working on the client matter know that any red flags or concerns regarding the client representation should be communicated immediately to the lead attorney?			

This self-assessment tool serves as a reference for law firms seeking to evaluate risk exposures associated with client intake. The content is not intended to represent a comprehensive listing of all actions needed to address the subject matter, but rather is a means of initiating internal discussion and self-examination. Your practice and risks may be different from those addressed herein, and you may wish to modify the questions to suit your individual practice needs. The information contained herein is not intended to establish any standard of care, or address the circumstances of any specific law firm. These statements do not constitute a risk management directive from CNA. No organization or individual should act upon this information without appropriate professional advice, including advice of legal counsel, given after a thorough examination of the individual situation, encompassing a review of relevant facts, laws and regulations. CNA assumes no responsibility for the consequences of the use or nonuse of this information.

**This article was authored for the benefit of CNA by:  
Theresa Garthwaite**

Theresa Garthwaite serves as Risk Control Consultant for CNA’s Lawyers Professional Services program. She is responsible for the overall assessment, evaluation and delivery of risk control services for complex risk exposures within CNA’s Lawyers Professional Liability business. She is responsible for developing risk control content for presentations and publications. She oversees the “In Practice ... with CNA” and “CNA’s Professional Counsel” publications. Prior to joining CNA, Theresa worked as an associate in a boutique law firm, specializing primarily in plaintiffs’ medical malpractice, catastrophic personal injury and wrongful death matters. She is admitted to practice in Illinois and United States District Court, Northern District of Illinois. Theresa also holds the Commercial Lines Coverage Specialist (CLCS) designation, and is a recipient of the Risk Control Superior Service Award.

For more information, please call us at 866-262-0540 or email us at [lawyersrisk@cna.com](mailto:lawyersrisk@cna.com)

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