

Client Intake: Potential Pitfalls to Avoid at the Outset of Retention

Performing the legwork at the beginning of representation can help avoid unfortunate discoveries later on.

Ronald L. Israel, Marie L. Mathews and Brigitte M. Gladis, *New Jersey Law Journal*

January 24, 2018

In many publications devoted to the discussion of best practices to avoid professional malpractice claims, much attention has been (rightly) paid to attorney conduct during the representation—i.e., ensuring adequate communication with clients, securing the confidentiality of client information and meeting deadlines. However, client retention and intake are just as important, if not more important, to minimizing the potential for a later malpractice claim. Indeed, performing the legwork at the commencement of the representation may avoid unfortunate subsequent discoveries that could require an attorney to withdraw or perform other curative measures, and will help ensure that both the client and the firm are on the same page with respect to the scope of the representation.

Vetting the Client and the Matter

Before diving in to a new matter, the lawyer or firm should take into account a few preliminary, but extremely important, considerations.

- *Due diligence with respect to new client.* When approached by new clients, attorneys are often eager to dig in to the work and begin the representation immediately. However, any time a firm is presented an opportunity from a new client, the firm's first step should be to vet the client and determine whether the client is worthy of the attorney's representation; sometimes turning down a client is best for the firm. A firm should conduct basic internet research to verify the client's identity and general background information, such as involvement in past litigation or prior criminal convictions. A simple web search could disclose a host of potential red flags that may discourage the firm from proceeding with the representation, and a firm's failure to conduct this minimal due diligence could present serious problems for the attorney down the road.

For instance, that web search may demonstrate that the client has had a number of recent shakeups in its corporate structure, indicating instability or other issues, or that it is heavily involved in overseas transactions, which may create concerns about money laundering or other unsavory business practices with which the firm should avoid becoming involved. If numerous red flags appear from a basic internet search, it may be prudent to engage other professionals to conduct a more thorough background search before proceeding with any representation.

- *Taking over an existing matter.* If a client is seeking new representation because it has fired its previous counsel, it is important to inquire as to the reason for the termination of prior counsel. Did it stem from an act or omission of the previous attorney, or did it arise as a result of the client's failure to pay its bills or the overly aggressive stance it wanted to take in a litigation? The reason for the termination may shed light on the client's character and may give a firm some pause before commencing representation. A firm substituting for another lawyer should request permission from the client to speak with prior counsel—a refusal should give pause.

Finally, when taking over a matter from another attorney, a firm must be sure that it has properly inquired as to both the legal issues involved in the matter as well as the status of the matter. Although seemingly obvious, a failure to consider this issue when assuming a new matter could easily get an attorney in over his head, for example, by taking over a matter with a looming discovery deadline and not realizing that hundreds of gigabytes of electronic discovery in the client's possession has not yet been reviewed, or that a trial date or other serious deadline is looming. Accordingly, attorneys must be sure to assess the practical aspects of assuming a matter, not simply the identity of the client and potential legal issues involved.

Conflict Checks

Conducting a conflict check is obviously a vital first step to complete prior to beginning to represent a new client. Solo practitioners and large law firms alike should have easily accessible, detailed records of current and former clients and matters to permit efficient searching to root out conflicts at the outset of the representation. In determining whether a conflict of interest exists, certain specific issues should not be overlooked.

- *Prior work conflict.* Some conflicts of interest are straightforward; for instance, the Rules of Professional Conduct are clear that an attorney generally cannot represent a client that is directly adverse to another client unless waivers are obtained where permitted. Other conflicts, however, are perhaps less obvious, but no less common. For instance, one can easily envision a scenario in which a firm prepares a contract for a corporate client documenting a particular transaction, but a dispute later arises between the parties to the transaction concerning the interpretation of that contract. Should the client then retain that same law firm to enforce its interests in that subsequent dispute? Moreover, if the client does so, and it later becomes obvious that a mistake was made in the drafting of that contract, what is the attorney's disclosure obligation to the client concerning that mistake?

A "prior work" conflict can arise under that exact scenario. RPC 1.7(a)(2) provides that an attorney cannot represent a client "if the representation involves a concurrent conflict of interest," which exists when, among other things, "there is a significant risk that the representation" will be "materially limited by ... a personal interest of the lawyer," unless the client gives "informed consent, confirmed in writing, after full disclosure and consultation[.]" That personal interest is implicated when the attorney becomes aware of

the potential for a malpractice claim against him or her by the client. See *Olds v. Donnelly*, 150 N.J. 424, 442-43 (1997). Accordingly, an attorney is required under the Rules of Professional Conduct to disclose that potential claim to the client when he or she becomes aware of it. See *id.*; N.J. Advisory Comm. on Professional Ethics Op. 684. Continued representation is only permitted in that instance so long as the client gives informed, written consent.

Accordingly, firms that handle both transactional and litigation work should be particularly vigilant when taking on the representation of a corporate client in a litigation involving a document the firm prepared. Indeed, the firm should carefully review the details concerning the corporate work as well as the claims in the litigation to ensure there is no possibility of a prior work conflict before proceeding with the representation.

- *Positional conflicts.* Finally, another issue to be considered is the potential conflict that may arise when a firm takes conflicting positions in different pending matters for different clients, otherwise known as “positional conflicts.” See N.J. Div. of Child Prot. & Permanency v. G.S., 447 N.J. Super. 539, 572 n.13 (App. Div. 2016) (stating that a “positional conflict” occurs “when a lawyer takes inconsistent legal positions in different tribunals at different times on behalf of different clients”). While the American Bar Association has indicated that positional conflicts are not inherently conflicts of interest under RPC 1.7, a conflict of interest does exist “if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case,” such as “when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.” See ABA Model Rules of Professional Conduct, R. 1.7, cmt. 24. As with prior work conflicts, clients may need to be informed of the potential conflict and provide consent to the continued representation.

Accordingly, when taking on a new matter, a firm must be cognizant of the central issues in the case and make an informed assessment as to whether there is a likelihood that it may be required to take a position adverse to another taken by the firm in another matter, and if so, whether that position would substantially undercut arguments raised on behalf of other clients.

Engagement Letters

The importance of entering into a retainer agreement with clear, unequivocal terms cannot be overstated. Engagement letters will serve to identify for both attorneys and clients the expectations of both parties, and can provide useful evidence for an attorney should the client later assert a malpractice claim arguing that the attorney failed to perform a task for which he was retained.

- *Scope of retention and particular provisions.* RPC 1.2(c) expressly permits an attorney to limit his or her representation of a client at the outset of the representation, so long as that limitation is “reasonable under the circumstances and the client gives informed consent.” The engagement letter should thus

clearly and succinctly express the nature of the proposed representation. To determine the scope of representation, attorneys should meet with their potential clients and discuss in detail the client's expectations concerning the representation, as well as identify the tasks the attorney has agreed to perform, so that the attorney and client are both on the same page. Moreover, attorneys should also be mindful of the identity of the client —i.e., whether the client is a corporation or individual, or the attorney is undertaking a joint representation—and narrowly tailor the engagement letter to that client, rather than rely upon a purely boilerplate form letter.

Conclusion

Taking the time at the beginning of the representation to ensure that the above issues have been addressed can help to create a smoother representation for both attorney and client, as well as head off potential issues that could arise during a subsequent malpractice claim. All attorneys—whether solo practitioners or those at larger firms—should focus on maintaining a thorough and consistent intake process to address these issues up front.

Israel and Mathews are members and Gladis is an associate in the professional malpractice group at Chiesa Shahinian & Giantomasi, where they advise professional services clients on legal malpractice claims, the RPCs and ethical issues. Israel is also the firm's general counsel and Mathews is a member of the firm's Ethics-Conflicts Committee.

Reprinted with permission from the January 24, 2018 online issue of *New Jersey Law Journal*.
© 2018 ALM Media Properties, LLC. Further duplication without permission is prohibited. All rights reserved.