

LAWYERS REPRESENTING LAW FIRMS | A SPECIAL REPORT

Lawyers are hungry—too hungry, perhaps

The scramble to find new business can land the unwary fighting malpractice claims.

BY TIMOTHY J. HALLORAN
AND JASON E. FELLNER

Law firm layoffs and declining attorney profits nationwide have triggered concern about how to maintain a healthy law practice. During uncertain economic times, attorneys across the country are scrambling to find new clients and profitable new niches to keep their practices alive. Avoiding a costly malpractice claim in the process is another business imperative.

This article will address guidelines to help attorneys and law firms through this challenging time.

In terms of screening clients, it is well to remember what Shakespeare once wrote “[T]he saying is true, the empty vessel makes the greatest sound.” William Shakespeare, *Henry V*, Act IV, Scene 4, lines 58-59. When a client comes to an attorney with a good story, an interesting fact pattern or a potentially great idea, it is easy for the attorney to get caught up in the story before investigating both the idea and the client. Properly screening clients is the first step toward avoiding nonpaying clients, bad debts and malpractice suits.

Clients interview attorneys, and attorneys need to interview clients. The Internet is a powerful tool for attorneys and law firms to obtain useful information about potential clients. Free Web sites, such as www.411.org and www.-usinformationsearch.com, allow attorneys and law firms to learn

about a potential client’s public record and background.

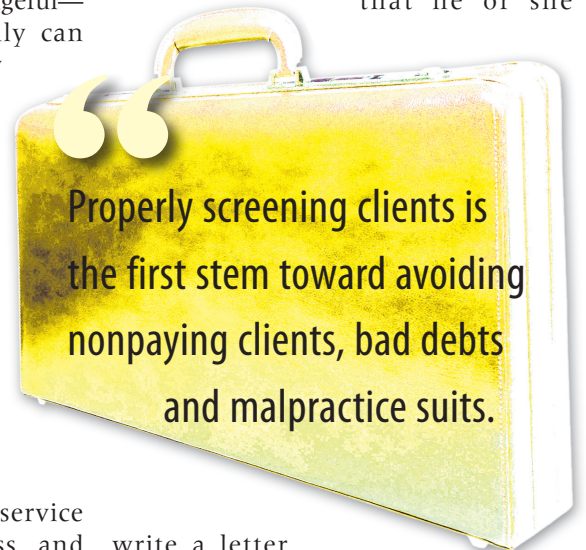
An attorney can tell a lot about someone’s character by listening to how he or she describes others. When an attorney is interviewing a potential client, the attorney should focus on the following: How does the potential client talk about other parties? If the potential client has hired an attorney in the past, how does he or she talk about that attorney? Vindictive, angry, vengeful—these are attributes that easily can turn against any new attorney and might make a potential client a not-so-perfect party in litigation.

Attorneys should trust their instincts when evaluating whether to represent a client. It will cost more to get rid of a bad client than the loss of revenue had the attorney never accepted the client in the first instance.

SERVICING CLIENTS

As the saying goes, “Make service your first priority, not success, and success will follow.” The easiest area to find new business is with existing clients. While some attorneys and law firms are scrambling to find new clients and survive the economic downturn by casting a wide net into new and

uncertain practice areas, wise attorneys and law firms keep up effective communication with clients they already represent and ensure that their every need is being met. This will also help avoid malpractice claims. Informed consent is premised on keeping clients happy and avoiding malpractice claims. Before an attorney makes strategic decisions in a case or in relation to a particular course of conduct, it is vital that he or she



Properly screening clients is the first step toward avoiding nonpaying clients, bad debts and malpractice suits.

write a letter to the client explaining the alternatives and receive a letter confirming the client’s agreement to that course. First, the letter provides the client with written confirmation of discussions. Second, the attorney has a

Timothy J. Halloran is a senior shareholder at Murphy, Pearson, Bradley & Feeney who lectures frequently about legal malpractice. Jason E. Fellner is an attorney who works in the firm’s professional liability group.

written confirmation on record of the client's informed consent.

Giving a client regular status letters about how the case is proceeding sends a message to the client that the case is important enough for the attorney to spend the time to communicate about what's happening. This confirms to the client that the case is moving toward some resolution. In fact, the American Bar Association Model Rules of Professional Conduct require that the attorney keep the client reasonably informed of important events. Again, meeting ethical obligations avoids malpractice actions. ABA Model Rule 1.4.

The practice of law is a service industry in which clients are the customers. Consider how a customer reacts when someone performs a service at an extraordinary level with extra consideration, professionalism and courtesy. Isn't that the kind of service that would yield referrals and requests for additional services? Despite the increase in professional advertising and the Internet, a lawyer's best source of business is still word of mouth. That word of mouth begins and ends with happy clients who are willing to provide referrals.

KEEPING SHARP

Abraham Lincoln once said, "If I had eight hours to chop down a tree, I'd spend six sharpening my ax." See http://thinkexist.com/quotation/if_i_had_eight_hours_to_chop_down_a_tree-id/194268.-html. The legal profession has become one of increasing specialization. In difficult economic times, attorneys often believe that by expanding into other practice areas, they will expand their potential to recover new and greater sources of income with new types of clients.

Attorneys beware! Expanding into an unfamiliar area of practice has some negative ramifications. The first of which is ABA Model Rule 7.4, which forbids attorneys from claiming a specialization they lack and allows them to communicate whether they do or do not practice in a particular field of

law. As a corollary, an attorney is wise to disclose to clients or potential clients his or her lack of expertise in a certain area. That attorney should refer that person to another lawyer or associate in a law firm who can help the client. Again, this allows the client to make an informed decision whether the attorney is sufficiently skilled to perform the requested service.

Additionally, the more skilled that attorneys are in their specific fields, the better they can compete for business. Continuing Legal Education courses are not only important to comply with whatever state educational requirements exist, but they also help to give attorneys their competitive edge in the specific practice areas that they are moving toward. The ABA Web site at www.abanet.org/cle has a list of courses for almost every field of specialty.

An attorney has only so many hours in a day to expand and become familiar with a new practice area while maintaining expertise in his or her current field. The easiest way for an attorney to avoid malpractice claims is to avoid unfamiliar areas of the law. Alternatively, the best way to grow a law practice in a world of specialization is to become sharper and more proficient in a specified practice and rise above competitors. This way, attorneys will also find complementary specialties that fit within their practice area.

WHEN CLIENTS DON'T PAY

The noted English writer Samuel Butler once quipped, "In law, nothing is certain but the expense." See www.websters-dictionary-online.net/bu/butler.-html. Despite attorneys' best efforts and hard work, there are occasions when clients simply do not pay. Every client must have understood that walking into the attorney-client relationship would generate an expense. Most clients honor their obligations and pay. However, when clients don't pay, attorneys need to end the relationship appropriately.

As required by ABA Model Rule 1.16(b), an attorney and law firm

must avoid prejudicing their clients by withdrawing if the client refuses to let the attorney out of the relationship. It is important to note that a decision needs to be made fairly early on whether a client is simply dilatory and will come up with the amount due or is actually waiting for the attorney and law firm to realize that they will not be paid. If and when the attorney severs the relationship with the client who is not paying, a formal letter confirming the end of the relationship will set the demarcation for a statute of limitations for any future malpractice claim.

When the relationship is over and the client still has not paid, the attorney should not file a lawsuit until the statute of limitations for a legal malpractice claim has expired. In most states, a claim for unpaid fees has a longer statute of limitations than does a claim for legal malpractice. Remember, a client who is not paying is not happy. Either the client can't afford it or didn't like the work that the attorney provided. In either case, attorneys and law firms are wise to refrain from filing a lawsuit until the attorney and law firm know that they can defend a malpractice action on statute of limitation ground.

Finally and most importantly, attorneys should be willing to be flexible with their current and former clients regarding fees owed. Once the attorney-client relationship is over, attorneys may be better served by discounting fees for an unhappy client who is unwilling to pay for what happened in the case in exchange for an agreement that the attorneys and clients will waive any and all claims arising from the relationship, including malpractice. The only caveat in this instance is that the attorney must make sure that the former client obtains independent legal advice regarding the release, to avoid any potential claim that the attorney unduly influenced the client.

Keeping in mind these precepts will help increase attorneys' and law firms' capacity for new business and professional growth, while reducing the potential for malpractice claims.