



LAWYER TO LAWYER MENTORING PROGRAM

WORKSHEET W

CONFLICTS OF INTEREST

Worksheet W is intended to facilitate a discussion about how to screen for, recognize and avoid conflicts of interest.

WHAT WENT WELL?

Start by sharing with each other a brief story of something that went well in your practice this week:

Share your reflection by on one of these questions: What caused the good event? What does it mean? How did you contribute? Others? How can you have more such events in the future?

ACTIVITIES FOR TODAY

- Review the conflict of interest rules provided in Worksheet P.
- Read and discuss the attached article by Wade Davies, *Upjohn Warnings: Best Practices and Tennessee Ethical Requirements*.
- Discuss the importance of adequately screening for conflicts of interest. Share with the new lawyer the firm's procedure for screening for conflicts (if in an in-house mentoring relationship) or the mentor's office procedure for screening for conflicts (if in an outside mentoring relationship). Refer to the Tennessee Bar Association's guidelines for *Case Acceptance and Client Screening*, attached below.
- Discuss different types of conflicts of interest that can arise - particularly in the new lawyer's practice area(s) - and give examples of conflicts which can be waived with informed consent. Explain how to document your client's consent to conflicts.
- Discuss screening walls, when they apply, and how a law office manages them.
- Read the attached article by Malcolm M. Mercer, *RISK MANAGEMENT: A Systematic Approach for Law Firms*, and discuss practical risk mitigation tools (i.e. conflicts databases).
- If the new lawyer works in a small firm or has a solo practice, discuss the attached article that gives tips on effectively managing conflict checking. Todd C. Scott, *Conflict-Checking Systems: Three Great (and Cheap) Ways to Effectively Manage Conflict Checking*, GP/SOLO LAW TRENDS & NEWS Vol. 2, No. 2.



ACTION STEPS

End the session by discussing what action steps you can take to either improve or set yourself up for future success based on today's discussion. Discuss how one or more of your Signature Strengths can help you achieve success in these steps.

RESOURCES

Wade Davies, *Upjohn Warnings: Best Practices and Tennessee Ethical Requirements*, Tennessee Bar Journal (10/27/2010) at, <http://www.tba.org/journal/upjohn-warnings-best-practices-and-tennessee-ethical-requirements>

American Legal Ethics Library <http://www.law.cornell.edu/ethics/>

LegalEthics.com <http://www.legalethics.com/>

NeoEthics: Law and Insurance Resources for the ABA's Tort Trial and Insurance Practice Section <http://www.edicta.org/NeoethicsBucklin/Neoethics.htm>

practicePRO by the Lawyers' Professional Indemnity Company <http://www.practicepro.ca/>

sunEthics <http://www.sunethics.com/>

American Bar Association Standing Committee on Lawyers' Professional Liability: Understanding Your Insurance Coverage <http://www.abanet.org/legalservices/lpl/insurance-coverage.html>

Tennessee Bar Association, *Case Acceptance and Client Screening*, at <http://www.tba.org/case-acceptance-and-client-screening>

LAW PRACTICE

THE BUSINESS OF PRACTICING LAW

AVOIDING MALPRACTICE – ARE YOU AT RISK?

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FEATURES

RISK MANAGEMENT: A Systematic Approach for Law Firms

By [Malcolm M. Mercer](#)

Many of the factors involved in law firm risk management are reasonably obvious. However, some of what is reasonably obvious may, on reflection, be contrary to the perceived self-interests of individual lawyers. Taking a structured approach to risk management helps overcome the self-interests, makes for better risk mitigation and leads to a more productive, profitable firm.

Not all risks are of equal concern in law firms. Some risks are very common and relatively insignificant. Some are rare but have a huge impact when they occur. Other risks may be rare but also inconsequential. When underwriting insurance policies, insurers distinguish between risks that are “frequent” and risks that are “severe.” Firms that seek to properly approach risk management should likewise assess their different relevant types of risk so they can understand what strategies to implement in response.

Ultimately, there are a range of ways that a firm’s risks may be mitigated. For example, work in some areas of the law can be avoided, preventative procedures can be established, and education or training can help. Mitigation measures will be of varying effectiveness and cost, and some measures may have unintended consequences, whether for the better or worse. Given all these factors, there is scope for creativity and need for a pragmatic assessment.

Invariably, though, looking at the source of a risk is key to understanding and mitigating that risk. For law firms, the two principal sources of risk are the firm’s clients and the firm’s lawyers—and, not coincidentally, these sources are also a firm’s principal assets. The risks associated with these sources can be further subdivided, so let’s begin there.

Risks Associated with Clients

Essentially, the risks associated with clients fall into four categories: claims, departures, credit and conflicts. Let’s look at each, noting that these categories overlap to an extent.

- **Claims risk.** All law firms face the risk that clients will assert professional negligence or fiduciary duty claims seeking compensation. Lawyers also face the risk of client complaints to their regulators. The consequences can be direct or indirect. The law firm may be obliged to pay an award of damages and can suffer other litigation costs, and its future insurance costs may be affected as well. Indirect consequences can include damage to the firm’s reputation and morale.

Clients are also a source of claims risks from another perspective. One of the two principal sources of major claims is said to be “dangerous clients.” In fact, upon an examination of major (i.e., severe) claims against law firms, there is a significant association between major claims and situations in which “dangerous” clients face legal scrutiny relating to matters with which their lawyers assisted. These types of claims often fall in the high severity category—not so common but very ugly when they occur.

- **Departure risk.** While not usually considered a part of law firm risk management, the risk that a good client will leave can be quite important in terms of revenue, reputation and the professional cohesion of

the firm. But beyond that, this risk is tightly connected with claims risks, since dissatisfied clients are more likely to leave and more likely to make claims.

- **Credit risk.** This is closely related to the first two categories of client risks. Dissatisfied or unhappy clients are much less likely to pay their bills, and some will also depart as well as make claims against their lawyers. So-called dangerous clients add another aspect to this problem as well. Just as dangerous clients are a greater source of claims risk, they also present a greater risk of nonpayment to the firm.

- **Conflicts risk.** This is perhaps the most common risk associated with clients. Whether it comes down to a matter of legal conflicts or simply business reality, the fact is that every client carries the risk that acting for that client means another prospective retainer is not available to the firm.

Risks Associated with Lawyers

Current lawyers, arriving lawyers and departing lawyers are all potentially sources of risk for their firms. Not surprisingly, lawyer and client risks are closely connected, being essentially flip sides of the same coin.

- **Current lawyers.** Even the most experienced lawyers can present performance risks, since all lawyers sometimes fail to practice at the level required. Sometimes we are too busy or not well organized. Other times we act outside of our area of expertise or experience. Some lawyers simply prefer to do everything themselves rather than delegate or refer work to other, more appropriate lawyers. Current lawyers can also pose misconduct risks. While less common than performance failures, some lawyers act improperly. Sometimes it is an injudicious response to stress or the opportunity of “the moment.” Other times misconduct is a matter of character. It is not uncommon for the risk associated with a dangerous client to be magnified by the involvement of a lawyer who does not have the strength of character to “do the right thing.”

In addition, current lawyers are the source of conflicts risks, especially lawyers who wear “multiple hats,” such as holding a director, trustee, executor or other fiduciary role, or who have a direct or indirect personal interest in the matter at hand.

- **Arriving lawyers.** Lawyers who are newly arrived carry two principal risks. The first is that the new lawyer may not be what he or she appears to be in terms of character or expertise. Also, some lawyers leave their previous firms for reasons that are not self-evident, and the reason for that departure may have consequences for the new firm. Plus, arriving lawyers bear conflicts risks as well—specifically, the risk that the new lawyer’s presence may interfere with the firm’s ability to continue acting for an existing client or in an existing matter.

- **Departing lawyers.** Lawyer departures create two main risks. The first involves the loss of a valuable lawyer, including the potential that gaps in expertise may be created by the departure and that client relationships may suffer. The second is the potential compromise of confidential client and firm information and property.

Risk Mitigation Strategies

How can firms mitigate the various types of risk just discussed? Here are client-focused and lawyer-focused strategies to consider.

- **Client-focus ED mitigation.** Strategic client management is invaluable in reducing a variety of risks. It is critical, however, that the firm acts as a whole in this process. Unfortunately, some firms still continue to operate as a collection of solo practitioners rather than as a cohesive entity. While that mind-set raises other broad strategic issues, it definitely contributes to client risks and must be overcome for effective mitigation.

To begin, the firm should be involved in deciding which clients and matters to take on to make it possible to consider the various current and future implications for the firm as a business entity. In other words, acting as a firm permits deliberate choice as to the best work to take on, versus just taking whatever

walks through the door—the usual result of an individual making the choice. Acting as a firm also permits more dispassionate consideration of the legal conflicts that may arise and the type and character of the prospective client. For whatever reason, individual lawyers find it harder to say no, when sometimes saying no is the best answer.

In addition, firm-oriented intake helps ensure that proper retainer letters are required for all new clients and matters, and that client conflicts are better managed with proper disclosure and agreement at the outset. Clear identification of the scope of the matter at the outset and over the course of the representation mitigates performance risks as well. Of course, acting as a firm in this regard can be difficult. It is necessary that the people making the decisions are properly informed, motivated and trusted by others to act in the best interests of the firm. When this doesn't happen, lawyers are simply sharing space.

Client teams can also reduce performance risk by delivering more breadth of experience and expertise to a given client. Client teams also reduce the risk that individual lawyers will be beholden to or “captured” by a difficult client. Moreover, they increase the odds that client concerns will be recognized and dealt with positively before it is too late. Plus, client teams decrease the risks attendant on the departure of any one lawyer.

Communication between the client and firm, rather than just the lawyers involved, can likewise mitigate risk. Client audits by a representative of the firm, for example, can help uncover issues that clients might not want to raise with the lawyers concerned. Such audits also allow clients to advise what the law firm is doing right and, if asked, how the firm may assist the client in other areas.

Lastly, proper financial management mitigates risk. While it is clearly important that the firm get paid, vigilance with respect to accounts receivable and work-in-progress can also surface client dissatisfaction before it is too late. It can also provide evidence that a client is under financial stress, which can lead to “dangerous client” behavior.

- **Lawyer-focus ED mitigation.** Obviously, continuing professional development and training is important in mitigating performance risks. However, this needs to involve more than keeping up-to-date on legal developments. It should cover practice management and professional responsibility, too. In firms with internal professional development programs, encouragement of legal excellence and intellectual interest in the law further mitigates performance risks—and it can mitigate departure risk by increasing collegiality and professional satisfaction.

For incoming lawyers, proper diligence in interviewing, reference and background checking, and the candidate selection processes can mitigate the risk of making a bad hire. This is more important than it sometimes appears, since the risk of an unsuccessful lateral hire is significant and the direct and indirect costs can be significant, too.

For departing lawyers, proper procedures and protocols for protection of client and firm confidential information and property and the proper transfer of client files are critical. In addition, diligent and thoughtful exit interviews can mitigate the risk of subsequent departures by giving the firm a better understanding of internal problems.

Policies and Systems

Along with the client-focused and lawyer-focused strategies just discussed, having proper errors and omission insurance is, of course, a very important aspect of risk mitigation. Coverage needs to be properly assessed in terms of both the scope and quantity appropriate for the firm. The nature and attitude of the insurer may also be important when it comes to claims processing.

In addition, proper internal reporting of claims and potential claims helps preserve insurance coverage. At the same time, it facilitates proactive approaches to identified claims risks, and it allows for proper disclosure to the client when a potential problem is identified. The internal culture should be that the

greater sin is in failing to report and seek help.

There are also various firm policies and systems that are critical in risk management—and once they are implemented, they can result in lower insurance costs as well. Here are key ones:

- Standard policies with respect to audit inquiries, client confidentiality, conflicts, opinions and retainer letters
- An up-to-date conflicts database and proper conflicts searching procedures, which extends to the new entities that become involved during the course of a matter, whether as clients or adverse parties
- A system for properly screening confidential client information and clearing conflicts on a confidential basis
- The involvement of “un-conflicted” experienced lawyers to manage and clear conflicts, which also mitigates the risk of “tainting” the lawyer doing the client work

As noted at the outset, most of what has been discussed here should be entirely self-evident to law firms. And many of the topics mentioned could be the subject of much further and deeper discussion. However, the essential point is that a structured approach to identifying the sources of risk and the corresponding mitigation strategies leads to better risk management and the prevention of claims.

About the Author

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Case Acceptance and Client Screening

It is tempting (sometimes necessary) as a new lawyer or at the start-up of your own firm to take whatever clients or cases walk in the door. Even the most successful lawyers sometimes suffer from the fear that the most recent client that engaged the attorney will be his or her last. But there are dangers in accepting every case. Lawyers who fail to initiate some discipline in the types of cases they accept early in their practice are the lawyers who eventually find that they are not managing their law practice - their law practice is managing them.

In the small firm, this often leads to overwork, mistakes, errors in judgment, missed deadlines, lapses in communication with clients, strained firm financial and labor resources; and, finally, an unprofitable and stressful practice. The dangers do not stop there. The lawyer's personal life can then become affected in very negative ways. Malpractice claims and ethical complaints can jeopardize the lawyer's career and can contribute to depression, failing personal relationships or substance abuse. Case acceptance criteria or guidelines, therefore, are an essential management tool for the practice of law, particularly in the small firm.

Large firms must also be vigilant in analyzing their practice mix. The types of problems arising in larger law firms when they fail to control their practice or case mix are usually internal ones. Equity in partner compensation is difficult when the practice areas within a firm do not generate compatible billing rates. The marketing dynamics of certain practice areas can be offensive to other members of the firm and firm clients. Client mix can also become an issue. Corporate clients may not be comfortable sitting in the reception area with the typical personal injury or criminal client. Proper and profitable legal and non-legal staff utilization can also be an issue. A practice area that is more labor intensive than others may strain the resources available to other practice areas. The viability of a larger firm can be threatened if proper consideration and attention is not given to practice and case mix. Case acceptance guidelines in the larger firm, therefore, focus the firm on the most compatible and profitable types of practice areas and mix and help to reduce the internal conflict in a large firm.

Establishing Case Acceptance Guidelines

Establishing case acceptance guidelines can be as simple as making a list of clients, case types or practice areas that you prefer not to handle. You may develop criteria within certain practice areas that must be present in a case in order for you to accept it (i.e., clear liability, insurance coverage, etc. in personal injury cases, for example). You may decide that you don't want to handle certain types of matters (i.e., domestic matters, real estate, bankruptcy, contingency fee work). With experience, you may determine that certain client characteristics are difficult for you to work with. Your guidelines can remind you to look for those characteristics and steer away from clients who possess them.

Factors that may be considered in establishing case acceptance guidelines are:

- practice areas the lawyer desires to develop or in which he or she has expertise
- types of cases within practice areas for which the lawyer has expertise or desires to develop
- the types of clients with whom the lawyer desires to work
- the revenue generated by selected practice areas or case types
- the labor and cash requirements of the firm by certain types of cases or practice areas
- facts that must exist in certain types of cases (i.e., clear liability, insurance coverage, etc., in personal injury cases)
- the type of fee arrangement of the case (i.e., hourly, flat fee or contingency)

It should be a firm policy that each case be analyzed by a partner (or a committee of partners in larger firms) prior to acceptance based on your firm's case acceptance guidelines. Consistent compliance with pre-established case acceptance guidelines will help protect the lawyer and the firm from the types of problems mentioned above.

Case and Client Screening

Links

- [Acknowledgments](#)
- [Case Acceptance and Client Screening](#)
- [Case Management](#)
- [Checklist for Opening a Law Office](#)
- [Client File Management and File Retention](#)
- [Client Relations and Communication](#)
- [Conflict of Interest Systems](#)
- [Disaster Planning](#)
- [Insurance](#)
- [Tickler and Calendar Systems](#)
- [Trust Accounting Procedures](#)

Once case acceptance guidelines are established, case and client screening procedures should be developed. Proper case and client screening assists the attorney in identifying whether the case falls within the pre-established case acceptance guidelines.

Case and Client Screening Procedures

As previously stated, case and client screening is the process by which information is obtained which will enable you to make an informed decision regarding whether or not the matter meets your case acceptance guidelines. Pre-screening may expose other information which will assist you in evaluating the prospective client. Finally pre-screening provides the opportunity for you to communicate important information to the client about his or her case and to establish realistic expectations.

Case and client screening procedures should include the following components:

Client Pre-screening. Before accepting a new client, you should:

- Conduct a telephone interview with the client to obtain initial client and case information which will be reviewed to determine if a face-to-face interview is warranted. A staff person may conduct the telephone interview.
- Conduct a face-to-face client interview with the client to obtain client and case facts and to observe the demeanor of the client. The attorney should conduct the face-to-face interview. In addition to questions relating to fact, the face-to-face interview should also provide the following information or impressions:
 - Has the client engaged or attempted to engage other lawyers for this case? If so, why was the case rejected by one or more lawyers?
 - What is the client's attitude toward other professionals such as doctors, accountants, bankers, lenders?
 - Does the client have a reasonable approach to the case?
 - Does the client agree with the fee arrangement and is the client able to pay the fees for your services?
 - Is the client willing to pay a retainer in advance of services rendered?
 - Does the client have all of the documentation associated with the case and is he or she prepared to submit those to you?
 - Complete a New Client Information Sheet. This form is for firm use in opening the client's file, tickling the file for important dates, deadlines and file review dates, and performing a conflicts check.
 - Complete a client/case questionnaire. This type of questionnaire varies with practice area or case type. This form is designed to provide all client and case facts and to document the sending of engagement/non-engagement letters and other appropriate forms.
 - Complete a conflict-of-interest check. The New Client Information Sheet should provide space for the listing of related and adverse parties to the case. This list should be checked against the firm's conflicts information to be sure no conflicts exist that would prohibit the firm from accepting the case.

Case Analysis. Once client and case information has been obtained the solo practitioner, partner or committee of partners should review the information against the firm's case acceptance guidelines. In doing so, the following factors should be considered:

- Do the facts of the case support proceeding with the case?
- Your expertise and experience with similar cases.
- Your availability to handle the case.
- Your "gut" reaction to the client and the case.
- The prospective client's attitude toward the case (e.g., unreasonable expectations for the case, attempts to tell you how to handle the case, unreasonably focused on winning at all cost).
- The ability of the client to pay for services provided and advance expenses. This is particularly important in risky cases.
- Case value vs. cost to represent (use of firm resources, expense advance requirements, loss of opportunity);

Establishing Realistic Expectations

After the screening process has been completed and a decision to represent the client has been made, the attorney should discuss the merits and problems of the client's case with the client. It is important that the attorney convey verbally and in writing (via an engagement letter) the following to the client:

- The issues involved with the case.
- The problems regarding the case.

- The process involved in pursuing the case.
- The client's obligations throughout the case and any specific requirements of the client.
- The estimated time frame for case resolution.
- The economics of taking the case to trial or settling the case.
- The attorneys and/or staff who will be involved with the case.
- How the firm will manage the case. • How the firm will communicate case status with the client.
- Warning: Avoid any guarantees to the client regarding the outcome of the case.

Case acceptance guidelines and good client and case screening procedures are the first steps in building a profitable, quality practice. Doing good work will ensure that good clients and cases continue to walk in the door.

Resources used for this piece and which may be beneficial to you in establishing case acceptance and client intake procedures are:

The Lawyer's Desk Guide to Preventing Legal Malpractice, American Bar Association Standing Committee on Lawyer's Professional Liability. (Available through the TNBAR Management Services Library.)

Risk Management, Survival Tools for Law Firms, by Anthony E. Davis, ABA published jointly by the Section of Law Practice Management and Center for Professional Responsibility. (Available through the TNBAR Management Services Library.)

Attachment	Size
newclientinfo.doc	61.5 KB

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NEW CLIENT INFORMATION SHEET

TODAY'S DATE _____

Client's Full Name _____ SS# _____

Spouse's Full Name _____ SS# _____

Street Address _____

City/State _____ Zip _____

Telephone (Home) _____ Client Work _____ Spouse Work _____

Client's Employer _____ Spouse's Employer _____

Emergency Contacts:

Name _____ Relationship _____ Telephone _____

Name _____ Relationship _____ Telephone _____

Referred By _____

Conference With Attorney Regarding:

FOR OFFICE USE ONLY

Fee arrangement: _____

Billing arrangement: _____

DOCKET CONTROL	
Statute of Limitations Deadline	
Tort Claims Act Notice Due	
First Appearance Due	
Other Deadlines	
File Review Frequency	
INSTRUCTIONS:	

CONFLICT CONTROL	
NAME	RELATIONSHIP

File opened by _____ Conflicts checked by _____ Deadlines docketed by _____
 Engagement letter sent by _____ Date: _____