



The Fundamentals of Loss Prevention for Lawyers

EXCERPT

► **CHAPTER 3: Client Screening**

Serving Illinois Lawyers

Chapter 3: Client Screening

Client Evaluation

Lawyers who report malpractice claims to ISBA Mutual often begin their conversation with the phrase, “I should have never agreed to represent this client because...” These lawyers have learned the hard way the importance of client screening in preventing malpractice claims.

Effective client screening begins with knowing the types of clients you want to serve and who your ideal clients are. Reviewing information about the client at the intake stage provides you with the data you need to assess whether the potential client is the right fit for your firm at that particular time.

Many legal malpractice claims start with lawyers who accept matters that they do not have the expertise to handle. They accept every case that comes through the door without making any meaningful assessments as to whether that particular matter is a fit for the firm. While it is always difficult to turn down legal work, your reputation and your bottom line will suffer more by taking on clients that you did not properly screen.

It’s also important to remember that once you’ve established a relationship with a troublesome client, it may be difficult to disengage. Once a lawyer files an appearance, they must obtain leave of court to withdraw that appearance. In state courts, this process is governed by [Illinois Supreme Court Rule 13](#). The court is not required to grant the motion. There are circumstances under which courts will often refuse to grant motions for leave to withdraw, such as an imminent trial date, in which case the client or opponent would be prejudiced by the necessary delay for the client to obtain a new lawyer (in Illinois state courts, the court must give a party at least 21 days within which to have new counsel file an appearance). If the client objects to the lawyer’s motion for leave to withdraw, the court may deny the motion, though this is unlikely if prejudice to the client isn’t likely to result. The key inquiry will be whether the client is likely to be prejudiced to withdraw. Some judges will grant a motion for leave to withdraw only if the client has already retained a new lawyer who is ready to appear. In deciding whether to permit withdrawal, the judge may take into consideration whether the lawyer is getting paid, but it will not be a significant factor. If the client is likely to be prejudiced by the withdrawal, it won’t likely matter whether the lawyer is getting paid. The same is true relative to the lawyer’s ability to advance expert costs.

We recommend that you ask yourself a series of questions before agreeing to represent a new client or undertake a new matter for an existing client:

Are you competent to handle the new matter?

[Illinois Rules of Professional Conduct Rule 1.1 \(eff. January 1, 2010\)](#) requires that you provide competent representation to your clients. Competent representation requires “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”. Don’t assume, for example, that because you have handled one type of litigation or transaction, you have sufficient expertise to handle other types. Each cause of action has its own set of rules and requirements. Similarly, there can be a world of difference between a residential real estate matter and a commercial real estate transaction.

If the new matter is beyond your expertise, you have three choices. You can:

- **decline** the representation;
- **engage** a qualified co-counsel with the written consent of your client; or
- **refer** the matter to another lawyer.
 - Remember, however, that if you refer the matter to another lawyer for a fee, you remain legally responsible for the case.

Does your office have the time and financial resources necessary to handle the matter?

Even if you have the expertise to handle a particular case, you may not have the time or resources necessary to take on the matter competently. We recommend you consider the following factors:

- **Time: Analyze your current workload and staffing limitations.** Do you really have the time for another matter? Firms that are overwhelmed with their workload are the first ones to make a critical mistake.
- **If you work on a contingency fee basis, evaluate whether you have the financial resources to handle the matter.** Can you cover your office expenses and the initial costs of the case while the matter is being litigated? Don't put yourself in a position in which your case management is being dictated by economics rather than sound legal principles.

Is this the case or matter right for your firm?

- **Time constraints:** If you will not have time to perform in a competent manner, do not accept the representation. Many malpractice claims are caused by unreasonable time constraints. For example, a lawyer may fail to name the proper defendant because an impending deadline prevented the lawyer from conducting an adequate investigation.
- **Prior handling: You may unwittingly walk into a file that has been neglected or mishandled. As a subsequent lawyer, you have a duty to mitigate.** Thus, if the prior lawyer did not perform competently, you have an obligation to rectify the situation if possible. Unfortunately, prior mistakes are often detected too late. The wiser course is to decline representation of clients who have used multiple lawyers in the past.
- **Is the person a close friend or relative?**
There are a few important reasons to be wary of clients who are friends or relatives. First, lawyers are sometimes badgered into accepting matters for friends or relatives that are outside their expertise or for which they do not have time. As a result, mistakes are made, details are overlooked, and before you know it, Aunt Edna is suing you for legal malpractice. Therefore, before agreeing to represent a friend or relative, ask yourself whether you would take on the client if they were a stranger; if the answer is no, decline the representation.

A second danger in performing legal services for friends and family is that lawyers routinely let down their guard in these situations and don't follow regular procedures. As an example, you may obtain the client's informed consent verbally rather than in writing and open yourself up to a misunderstanding with the client. If you decide to accept a close friend or relative as a client, follow all regular office procedures, including procedures on engagement letters, conflict checks

and written informed consents. There have been many claims brought against lawyers asked to do favors by disgruntled friends and family members.

For more discussion, see the sections on [Engagement Letters, Fee Agreements, and Nonengagement Letters](#) and on [Documentation and File Management](#).

Warning signs that might mean you are looking at a difficult or troublesome client

- **Clients who are seeking your advice at the eleventh hour.** As the newly hired lawyer, you may not have time to properly investigate the matter or draft the required documents. As a seasoned lawyer, you have so many other cases that require your immediate attention such that you cannot neglect those cases to take on the new matter with an impending deadline.
- **Clients who switch lawyers are often avoiding legal bills.** If you decide to represent a person who has had multiple lawyers in the past, obtain a retainer fee.
- **Clients who are very concerned about fees.** Their concern may be based on an inability to pay.
- **Clients who were dissatisfied with a previous lawyer's work may well be dissatisfied with yours.** Don't let ego overwhelm your common sense. At a minimum, call the previous lawyer and get their side of the story. The lawyers should be able to tell you what you need to know without violating the lawyer-client privilege.
- **Does the person appear difficult to deal with or exhibit irrational behavior?** Most of us have represented the annoying or irrational client at one time or another. In the best case, these clients are just a temporary nightmare that will eventually fade from your memory. In the worst case, they become your foe in a legal malpractice claim. The bottom line is that clients who complain and second-guess everything you do are the first ones to rush to another lawyer and sue you when the results are less than perfect. Why risk the aggravation and potential claim?
- **Is the client proceeding on principle alone?** Avoid clients who want blood at all costs, particularly if you are fronting the costs. They often do not appreciate the limitations of our legal system and will not accept anything short of total victory, however they may define it.
- **Does the client have unrealistic expectations concerning the outcome of the matter or the time needed to complete it?** While all clients have unrealistic expectations to a certain extent, this question is designed to weed out clients whose expectations are simply unobtainable. In these cases, lawyers often spend months performing solid legal work only to be sued for malpractice when the impossible expectation cannot be met. The classic example is the client who believes they are entitled to one million dollars because of a simple slip and fall. Try to find out at the intake stage, what the client expects so that you can help them manage their expectations.
- **Is the client of questionable moral character or financially unstable?** If so, you may not want to represent the client, depending upon the nature of the matter. For example, a lawyer may agree to defend a particular individual in a criminal or civil matter, but decline to represent that same individual in a securities offering.
- **Transactional lawyers must be particularly careful with start-up ventures.** These lawyers often discover too late that their clients are dishonest or financially incapable of consummating the deal. Frustrated investors and other third parties may then seek relief from the innocent lawyer's deep pocket. Today, a growing number of transactional lawyers investigate the background of new clients before agreeing to represent them.

For more discussion, see the sections on [Engagement Letters, Fee Agreements, and Nonengagement Letters](#) and on [Documentation and File Management](#).

Learn How to Say No

One of the most difficult tasks for any lawyer is learning how to say no. Sometimes the courts will now allow lawyers to withdraw representation. The only way to be sure to avoid being stuck with a troublesome client is not to take them on in the first place.

Here are some suggestions for how to say no:

“I’d like to help you, but I have other commitments at this time that would prevent me from giving your matter the full attention it deserves.”

“I’m sorry but I’m not available. I suggest you contact the Illinois State Bar Association Lawyer Referral Service at illinoislawyerfinder.com.”

“Your matter is outside of my area of expertise and you would be better served by seeking a lawyer who handles cases like yours.”

Nonengagement Letters

If you decide to decline representation, send a nonengagement letter. Otherwise, you may be surprised when you are served with a legal malpractice complaint brought by an individual that you never agreed to represent. You may consider capturing the contact information of all potential clients that you speak to so that you are able to send them the nonengagement letter. Whether or not a lawyer-client relationship was created is viewed from the subjective view of the client. For more on nonengagement letters go to that named section of the manual. For more discussion, see the section on [Engagement Letters, Fee Agreements and Nonengagement Letters](#).

Past Problem Clients

There is one final guard against the troublesome client. Make a list of clients who have been problematic in the past and search for common themes. You will often find similarities or patterns in these past representations that you can avoid in the future.

Client Screening Do's and Don'ts

Do...

- ✓ Analyze your current workload and staffing limitations.
- ✓ Evaluate whether you have the financial resources to handle the matter.
- ✓ Learn how to say no.
- ✓ Make a list of clients who have been problematic in the past and search for common themes, so you can avoid similar clients in the future.

Don't...

- ☹ Don't take just any matter that comes through the door.
- ☹ Don't take a matter outside your area of expertise.
- ☹ Don't take a matter where the client has switched lawyers multiple times.
- ☹ Don't take on a client who contacts you at the eleventh hour; who has unreasonable expectations or who cannot afford your services.

Addenda: Sample Letters and Forms

Conflict of Interest Search Form

- Search Only (do not add to system)
- Declined Client (add to system only if confidential information was obtained from non-client)
- New Client/Matter (add to system)
- Additional Information (add to system)

Client/Potential Client Name: _____

Other Name, Maiden, AKA, DBA.: _____

Matter (describe nature of representation): _____

File Name (if any): _____ File No. (if any): _____

Adverse Parties _____ Relationship Code _____

_____	_____
_____	_____
_____	_____
_____	_____

Other Parties Involved in Matter _____ Relationship Code _____

_____	_____
_____	_____
_____	_____

Requested By: _____ Date: _____ No Conflict Found

- Names Found as Follows: _____
- Searched and Entered By: _____ Date: _____

New Client/Matter Intake Form

Date File Opened: _____

File Number: _____ Matter Type: _____

File Name: _____

Client Name: _____

Contact Name and Title (if different): _____

Client Address: _____

Client Telephone Numbers: Work _____ Home _____ Cell _____

Client Fax Number: _____ Email Address: _____

Responsible Lawyer: _____

Billing/Fee Information

- | | |
|--|--|
| <input type="checkbox"/> Retainer: \$ _____ | Billing Cycle: |
| <input type="checkbox"/> Hourly \$ _____ | <input type="checkbox"/> Monthly |
| <input type="checkbox"/> Contingent \$ _____ | <input type="checkbox"/> Other (explain why) _____ |
| <input type="checkbox"/> Fixed Fee \$ _____ | <input type="checkbox"/> N/A |

Calendaring Information

File Review Dates:

- Every 30 days
- Every 60 days

Statute of Limitations Date:(Reminders 180, 90, 60, 30 and 15 days prior)

Verified by: _____ (Lawyer Initials)

Other Critical Dates to Calendar: _____

Calendaring Information

- Added to Calendaring System
- Conflict Search Completed
- Engagement Letter sent or Contingent Fee Agreement signed

File Opened By: _____ Date: _____



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