

# Are You Representing the Wrong Clients?

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Let's get one thing straight: good lawyers are sued for legal malpractice every day. Sure, a certain percentage of claims are generated by incompetent lawyers. But an equal number are brought against lawyers like you — competent and dedicated practitioners who take pride in what they do. One of the reasons capable lawyers get sued is that they simply represent the wrong matters.

It's sort of like dealing with strange dogs. Ninety-nine out of 100 will lick your face, sniff you in embarrassing spots, and wag their tails. But one out of those 100 would separate your hand from your arm if given the opportunity.

So what's the solution? Repress your love of man's best friend? No, just follow a simple loss-prevention procedure that I taught my dog-crazed children. Do a little investigation first by asking the dog's owner if you can pet Fifi. Occasionally your screening efforts will pay off when Mrs. Jones apologetically tells you that Fifi "isn't used to strangers." Translation: Fifi will rip your head off. If you don't ask and are bitten by Fifi, you have only yourself to blame.

This article will outline client-screening procedures that lawyers can implement to avoid getting bitten by problem clients. By following these procedures, you will not only reduce the chances of a legal malpractice claim — you'll end up with clients who are more profitable and less stressful to work with.

### Step one: identify clients and matters with a high-risk profile

The first step is to identify new clients or matters that fall within the following categories: (1) higher risk by type of legal work, (2) higher risk by



### Learn how to screen prospective cases and clients to reduce your risk of being sued.

type of client, and (3) potential conflicts of interest. Just because the legal assignment falls into one of these categories does not mean the client or matter should automatically be declined. It does mean, however, that further investigation is warranted.

**Screening higher-risk legal projects.** Each new matter should be reviewed for predetermined types of legal work that pose a greater than average risk. This category would typically include the following:

- assignments outside of the lawyer/firm's area of expertise;
- assignments where last minute services are requested;
- assignments involving questions of law in foreign jurisdictions;
- transactions or cases with low odds of success.

In addition, lawyers should identify high-risk assignments specific to each of their practice areas. For example, transactional lawyers might screen for,

among other things, assignments requiring special legal opinions on isolated issues, new business formations in speculative areas such as technology or medical research, formations of new partnerships in which the partners have unequal investments or control, and highly specialized work such as securities. (Even if you concentrate in these areas, you should recognize the added risk and investigate the matter further to minimize that risk.)

The best way to start a profile of high-risk assignments is to take a Friday afternoon off and jot down the 10 worst projects you have handled in each of your areas of concentration. You'll be surprised at the common characteristics among these assignments. Alternatively, talk with other practitioners who concentrate in the area and ask them what they think constitutes an undesirable or risky case or matter.

**Identifying high-risk clients.** The following is a list of client profiles generally considered to be high risk:

- unknown individuals or entities who have not been referred to you (e.g., off-the-street clients or cold calls);
- out-of-state clients;
- clients who have fired previous lawyers or professionals;
- foreign individuals or entities;
- financially unstable clients;
- start-up companies or partnerships as opposed to established businesses;
- clients with impossible expectations or who are proceeding on principle alone.

Again, you must establish a "problem client" profile that fits your practice areas. A firm that represents debtors in bankruptcy would obviously not screen out clients in financial trouble. On the other hand, financially unstable

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or undercapitalized clients pose a danger to transactional attorneys. If the deal fails, the lawyer is inevitably sued as a deep pocket, either by the client herself or by third-party investors.

**Checking for conflicts of interest.** Every potential client and matter should be screened for potential conflicts by means of a client list or database search (searching a list of previous clients, opposing parties, and related entities or individuals). In addition, practices with two or more attorneys should perform a second conflicts-of-interest check, the “memory” search, by sending a new client/matter memo on paper or by e-mail to each lawyer in the firm.

Besides the classic conflict between two or more clients, don’t forget to watch for conflicts arising from representing multiple parties and for “position” or “situational” conflicts (in which the lawyer is representing one client in a position that may be adverse to another client). In practices with two or more partners, all potential conflicts identified by the initial search should be referred to a disinterested partner for resolution.

### **Step two: analyzing marketing and administrative concerns**

Even if the prospective new client and matter initially pass muster, there may be other compelling reasons to decline the representation. At a minimum, ask yourself the following questions:

1. Do I have time for the new matter? There is a correlation between a lawyer’s workload and the likelihood of a malpractice claim.

2. Do I have the financial and administrative resources to competently handle the matter? For example, complex commercial litigation may require more staff and administrative resources than your practice can supply. On the

other hand, a sole practitioner who uses scanning equipment and project management software to archive and index documents may be able to handle the administrative burdens of complex, multi-party matters better than many larger firms.

3. Does the client/assignment fit within my overall marketing strategy or long-term goals? If not, decline the representation and spend the additional time serving and marketing to clients whom you do want to represent.

4. Will there be repeat business from the client or is he or she a one-time user of my services? Your tolerance for risk may be higher for the repeat than the one-time client.

### **Step three: conduct further investigation for high-risk clients**

Having identified clients and matters as high risk, you don’t necessarily have to decline them. You should however, investigate further by

- assessing the quality and reliability of the referral source;
- discussing the potential client with prior counsel or co-counsel for the potential client without disclosing confidences;
- checking references provided by potential clients of other professionals with whom they deal, such as local counsel, accountants, or lenders;
- performing Dun & Bradstreet credit checks to measure the stability and financial strength of even small business clients;
- conducting local litigation searches for prospective clients who have fired their prior counsel to determine whether they have a history of suing business partners or professionals who have provided services to them;
- reviewing financial statements and performing lien and judgment searches for potential clients with questionable finances.

The results of the investigation

should next be carefully reviewed and a decision as to the representation made. The options are to (1) accept the added risk without further action, (2) accept the risk with the safeguards suggested in step four below, or (3) decline the matter. In practices with two or more partners, the final decision must be made by an impartial partner or committee. In other words, the initiating partner or associate who would like to bring in the new work cannot be involved in the final decision. Otherwise, the risk-avoidance system collapses as the fox guards the chicken coop.

### **Step four: condition acceptance of the engagement**

You can often reduce risk through remedial measures. For example, you can reduce the likelihood of conflict of interest allegations by obtaining detailed conflict of interest waivers from the affected parties. You can minimize the risks posed by financially unstable clients by obtaining advance fees or “retainers.” Or perhaps you can lessen your malpractice exposure by retaining co-counsel with greater substantive experience in the matter in question.

### **Step five: talk is cheap – document everything**

Document the client screening from beginning to end. A relatively painless way to memorialize the process is to develop standard checklists and forms, such as client/matter screening forms that list the categories discussed above and sample conflict-of-interest search forms and waivers. Last but not least, inform the prospective client in writing of your decision to decline or accept the representation.

Implement the suggested client screening procedures and the new millennium should bring you a kinder, gentler clientele.