



AttPro Ally

MANAGING YOUR RISK

Best practices to help you avoid future legal malpractice claims or disciplinary matters



IN THIS ISSUE:

- ❖ Risk Management in the Practice of Law
- ❖ What's Your COLLATERAL?



Risk Management in the Practice of Law

By: Alesia S. Sulock, Esq. and Josh J.T. Byrne, Esq., Marshall Dennehey, P.C.

A critical aspect of the practice of law is managing risk, not just for your clients but for yourself. Risk management begins at the outset of the representation and should continue until the representation concludes. By incorporating risk management into your daily practice of law, you can avoid legal malpractice claims and disciplinary complaints, and better set yourself up for the defense of such claims should you be faced with either down the road. Below are some practical risk management tips to incorporate into your practice.

Consider Red Flags When Selecting New Clients

Choosing to represent a client is a two-way street. While the prospective client may vet you, your experience, your background, your knowledge and your skill set, so too should you vet the prospective client before agreeing to the representation. In fact, attorneys should choose their clients as carefully as clients select their lawyers. There are a number of red flags attorneys should look for when considering a prospective client: (1) unreasonable expectations; (2) motivations of revenge or spite; (3) an interest in micromanaging the representation; (4) multiple prior attorneys; (5) dishonesty or exaggeration of the facts; (6) unwillingness to take your advice; and (7) extreme cost concerns or an inability to pay. It is important to gain the full picture of your prospective client before deciding to accept the representation. You should fact check, to the best of your ability, the story your potential client tells you. It is far easier to decline the representation at the beginning than to seek leave to withdraw, which may require the attorney to

demonstrate to the Court a valid reason for withdrawal. Of course, if you do need to terminate the representation, you should do so promptly, in accordance with the Rules of Professional Conduct and applicable Court rules, and without prejudicing your client.

If you are not going to accept a representation, you should promptly and clearly advise the potential client, in writing, that you have declined the representation. You should advise the potential client that statutes of limitations may apply to the potential client's claims, and advise the potential client to seek other counsel. However, avoid giving any legal advice, including specific advice regarding the timing in which the potential client may pursue claims. Any legal advice, even to someone you perceive to be a non-client, can later give rise to legal malpractice claims.

Evaluate Your Ability to Provide Competent Representation

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Competence may be achieved by reasonable preparation, even if a matter is outside of the lawyer's typical area of practice. However, competence cannot be achieved when the lawyer lacks experience and time or ability to get up to speed. Competence does not only consider the lawyer's knowledge of the subject matter; the lawyer must have the ability to commit sufficient time and effort to the matter. A consideration of competence includes



Alesia Sulock specializes in representing attorneys in defense of legal malpractice actions, Dragonetti suits, disciplinary matters, and other claims. In her spare time, Alesia enjoys reading and taking long walks on the beach. Just kidding, she has three small children (who she adores!) and no spare time.

As Chair of Marshall Dennehey's Disciplinary Board Practice, Chair of the Pennsylvania Bar Association's Professional Liability Committee (and Co-Chair of the Amicus Brief Committee), and Co-Chair of the Philadelphia Bar Association's Professional Responsibility, Josh Byrne is a polished problem solver protecting members of the Bar. Otherwise, he's just trying to make it through the day juggling all of the flaming torches thrown at him.



considering the amount of time you have available to devote to the matter, the resources you can rely upon to handle the matter and any health or other personal problems which may impact your ability to handle the matter. A highly experienced attorney can be nonetheless incompetent to handle the matter due to any number of these items.

Identify and Address Conflicts of Interest

Conflicts of interest must be assessed at the outset of the matter and throughout the representation. While most attorneys complete conflict checks at the outset of the representation, conflicts of interest can arise at any time and must be addressed. It is critical to remain vigilant regarding potential conflicts of interest among your current clients, involving former clients, and between your client and yourself. If a conflict arises during the representation, you must take steps to assess whether and how the representation can continue. Conflicts should be thoroughly explained to the client and, if waiver is permissible under the Rules of Professional Conduct, informed consent should be obtained in writing.

Clearly Define the Terms of the Engagement

An attorney-client relationship is contractual in nature, and it is a best practice to capture the terms of that contract in writing. A good engagement agreement details the identity of the client, the scope of the engagement, the fee arrangement, and file retention and destruction procedures, and it is signed by the client. It is important to ensure the client understands who the lawyer represents and, equally important, who the lawyer does not represent. Likewise, the engagement agreement should be as specific as possible regarding the scope of the representation. A broad scope in the engagement agreement can lead to claims related to matters the lawyer did not intend to handle. If the scope of representation expands, the revised scope should be documented with reference back to the original engagement agreement. By clearly identifying the client and limiting the scope at the outset, the lawyer can ensure the client understands the lawyer's intentions with respect to the representation.

Practice Good Client Management

It is critical throughout the representation to manage client expectations, to meet reasonable client requests, and most importantly, to keep the client informed. One of the most valuable risk management tools to incorporate throughout the representation of any client is regular client communication.

Pursuant to the Rules of Professional Conduct, lawyers are required to (1) promptly inform the client of any decision or circumstance requiring the client's informed consent; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules or other law.

This means that attorneys should promptly advise clients of all developments in the matter. Certainly if a client reaches out for information, the attorney must respond within a reasonable time frame. However, even if the client has not requested an update, and even if there are no major developments, it is a best practice to regularly check in with your clients. Lack of communication is one of the primary complaints raised by clients in both legal malpractice and disciplinary matters. An informed client is less likely to think the lawyer missed something when the matter goes awry. At a minimum, a clear record of regular communication with your client often lays the foundation for a strong defense against a malpractice claim..

Practice Good File Management

Attorneys should put in place policies and procedures that facilitate calendaring of deadlines, regular reporting on client matters and routine internal communications among staff and attorneys. Attorneys must ensure that they are aware of and meeting all deadlines in all matters. Failing to meet deadlines is one of the top causes of legal malpractice cases, but it is also one of the easiest things to prevent. Throughout the representation, it is important for attorneys to regularly consider the scope of the representation, to assess potential conflicts of interest, and to evaluate the ability to provide competent representation. Attorneys must be aware of their responsibilities when supervising other lawyers and staff. In sum, attorneys must have the practices in place to ensure matters are handled timely and competently by themselves and their staff.

Understand the Importance of Disengagement

At the conclusion of the representation, attorneys should provide clients with a disengagement letter, communicating in writing that the representation has ended. This ensures that both the attorney and the client understand that the representation is over. This is particularly important if the matter for which you have been engaged has not concluded, but it is a best practice to use a disengagement letter in all matters. In addition to advising the client that your representation has ended, the letter is an opportunity to advise the client of your file retention procedures, final billing information, and any other relevant communications related to the conclusion of the engagement. If you fail to affirmatively end your engagement, you may still be engaged.

Regular attention to risk management practices is one of the best ways to avoid legal malpractice claims and disciplinary matters. These practices lead to clients who feel informed and understood by their attorneys. By following these best practices throughout the representation, you may be able to avoid legal malpractice claims or disciplinary matters or, at a minimum, set up a stronger defense to any such claims.



Click or scan here to register for our **FREE** upcoming risk management webinars.

What's Your COLLATERAL?

By: Kate Gould, Esq.

When your firm is looking to add a lateral attorney, you need the security of knowing who you are hiring and what they are bringing to the table. Like any good lender, conducting thorough due diligence is key to understanding a potential hire's background and assessing the book of business they propose moving to your firm. While a prospective candidate might look great on paper and interview well, it is crucial to properly vet them to ensure their arrival does not prompt a legal malpractice claim or result in unintended financial losses for the firm.

The Lateral Market

Hiring lateral attorneys, rather than bringing on new associates who require extensive training, can prove to be profitable and a great way to add the legal talent you need to serve your client base or develop a practice area. And attorneys, like many professionals these days, are on the move. The days of an attorney starting as an associate and retiring from the same firm are long gone.

According to a recent Thomson Reuters report, nearly 25% of large law firm associates left their firms in 2021.¹ While recent studies showed a slight dip in lateral hiring in 2023, certain practice areas maintained consistent hiring or modestly increased in the second half of 2023. According to Lateral Link, recruiting for Labor & Employment attorneys remains active.² There is also a demand for data privacy and cybersecurity attorneys, along with a surge in hiring IP litigation associates. Litigation associates looking to make a move are also highly sought after as litigation is typically less affected by any corporate activity slowdown.

Another interesting trend in 2023 was group lateral moves. Recruiters found that large group moves were driven by the star rainmakers leading the groups who highly encouraged the group move with them. For firms wanting to grow a practice area or establish their presence



in a certain geographic region, large group lateral moves can be profitable for the firm and incoming attorneys.

Whether your firm is looking to absorb an entire practice group or just add another attorney to a solo office, the risks of hiring lateral attorneys remain the same and require the necessary research and time to vet potential hires.

Risky Business

With an applicant pool full of strong potential candidates, what are the risks of bringing on a new lawyer? According to the Ames & Gough 2022 legal malpractice survey, conflicts of interest continue to be the most significant cause of malpractice claims largely due to the inappropriate handling of lateral hires.³ Eileen Garczynski, senior vice president and partner at Ames & Gough, states "...[T]here are no shortcuts for addressing conflicts; firms should be proactive in their efforts to anticipate, avoid and manage potential conflicts, including implementing sound procedures for recruiting, interviewing, engaging, and training lateral hires; flagging any issues, and communicating effectively – both internally and with clients."

Any lateral move must start with a conflict check by the new firm. The ABA Model Rules governing concurrent conflicts and former clients are both at play when examining any potential conflicts as you consider a new hire. Rule 1.7 governs concurrent conflicts. A concurrent conflict can arise if the prospective new attorney represents a client who is adverse to a client of the firm. These circumstances also implicate Rule 1.10, the general rule that protects client confidentiality by limiting a law firm's ability to represent a client in matters when a lawyer within the firm (or potentially part of the firm) is individually disqualified from representing a client. A firm

continued on next page

Kate Gould is a Risk Management Consultant with AttPro, offering resources so you can reduce the likelihood of a claim occurring and lessening the potential impact if it does. While she keeps tabs on emerging trends in the LPL market, she is patiently waiting for the return of spring to Indiana.



continued from previous page

may have no choice but to pass on the potential hire if the a conflict would disqualify the firm from representing a long-term client with a significant financial impact on the firm's bottom line.

Rule 1.9 concerns the lawyer's duty to former clients. The Rule prohibits the lawyer from representing a client "in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client whose interests are materially adverse to that person." This is because that lawyer would have acquired confidential information protected by Rules 1.6 and 1.9(c) that is material to the matter (unless the former client gives informed consent). As with any conflict check concerning past clients, whether the matter is the "same or substantially related" must be analyzed.

Aside from the conflict issues, hiring a lateral attorney can also result in increased costs to the firm if they do not stay as promised or fail to deliver the business they anticipated bringing. Nearly half of recently surveyed firms reported that their laterals underperform when it comes to bringing their stated book of business which can result in yet another move and negative financial impact to the firm. While lateral attorneys can be one way to grow your firm, hiring laterals is not without risk and, quite frankly, doesn't always have the financial benefit you may have anticipated.

Best Practices

Notwithstanding the risks, it is possible to strengthen your firm with lateral hires while avoiding the potential pitfalls. Several Am Law 200 firms have hired new talent leaders or created new roles within the firm for the purpose of hiring and overseeing talent. The looming retirement of many baby boomers and what has been described as new lawyers' "get-in, get-out" approach to Big Law when starting their careers has arguably created a need for these roles as law firms adjust how they will handle recruiting and talent retention.

However, if your firm size doesn't require this level of internal oversight, there are some best practices you can implement to successfully hire lateral attorneys while avoiding a potential malpractice claim:

- **Do your due diligence** – The value of fully vetting each applicant before offering them a position cannot be overstated. As firms vie for the seemingly best candidates, many are failing to actually validate the candidate's practice areas and professional relationships, especially as they relate to their purported book of business. Interestingly, law firms are reportedly less interested in a candidate's personal background which may reveal certain professional conduct issues, questionable social

media content, or even tax liens. Make sure you review their social media accounts and look for any personal or professional red flags. Take the necessary time and steps to thoroughly research a potential candidate to fill the need at your firm.

- **Review any claims** – Depending on who you may be hiring, inquire about the attorney's claim history and their firm's insurance coverage. For example, if you are considering adding a solo practitioner to your firm, ensure that any claims related to their former firm have been properly reported to their insurer.
- **Examine your track record** – As you interview potential candidates, consider your firm's track record for successful lateral hires. Have your firm's prior new hires successfully assimilated into the firm and met certain benchmark requirements, such a hourly or financial goals? Who you hired – or perhaps "how" you hired them – may inform your process this time around.
- **Prioritize your needs** – While it is easy to focus on simply filling a position to satisfy your firm's immediate needs, consider your firm's growth strategy, long-term plans, and the client-centered services you committed to providing. By keeping your firm's goals in mind, it may be easier to pass on a candidate who isn't the best fit in favor of a candidate that better suits the firm in the long run.
- **Consider the cultural fit** – There is simply no substitute for the gut feeling you and your partners may have about a candidate. Although you should always check yourself against each other's feedback, if the candidate has the "it factor" in terms of fitting in with your firm culture and potentially adding to your bottom line, you have likely found the lateral hire that may be a longtime member of the firm.

Adding a new attorney (or attorneys) to your firm can be stressful. From sorting through resumes to the interview process to seemingly endless conflicts checks, it takes time away from your practice. However, a proper hiring protocol is critical to ensure you "get what you paid for." With the right procedures in place (and a little patience), you will be well-equipped to hire the best lateral candidate for your firm. With these tips in mind, you can bank on it.

¹ https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2022/01/State-of-Legal-Market-Report_Final.pdf

² www.abovethelaw.com/2023/08/lateral-attorney-hiring-trends-in-2023-adapting-to-a-shifting-economy

³ www.amesgough.com/law-firms-see-u-s-legal-malpractice-claims-costs-soar-as-they-rush-to-cope-with-rapid-change



Attorney Protective

a MedPro Group/Berkshire Hathaway company

5814 Reed Road
Fort Wayne, IN 46835-3568



Visit us at **attorneyprotective.com** or call (877) 728-8776.

ERIN MCCARTNEY, ESQ., EDITOR

Policies are written by either National Liability & Fire Insurance Company, AttPro RRG Reciprocal Risk Retention Group, or National Fire & Marine and administered by Attorney Protective. All coverage is subject to specific policy terms and conditions. 2023 Attorney ProtectiveSM. © All Rights Reserved. Information provided by AttPro Ally is not intended as legal advice. This publication provides best practices for use in connection with general circumstances, and ordinarily does not address specific situations. Specific situations should be discussed with legal counsel licensed in the appropriate jurisdiction. By publishing practice and risk prevention tips, Attorney Protective neither implies nor provides any guarantee that claims can be prevented by use of the suggested practices. Though the contents of AttPro Ally have been carefully researched, Attorney Protective makes no warranty as to its accuracy, applicability or timeliness. Anyone wishing to reproduce any part of the AttPro Ally content must request permission from Attorney Protective by calling 877-728-8776 or sending an email to erin.mccartney@attorneyprotective.com.

ATTORNEY PROTECTIVE OFFERS COVERAGE THAT'S RIGHT FOR TODAY'S TOUGH CHALLENGES WITH \$25,000 OF CLAIMS EXPENSES PAID IN EVERY COVERED CLAIM BEFORE THE DEDUCTIBLE APPLIES.

It's coverage designed for lawyers, by lawyers.



SCAN TO COMPLETE
AN APP IN NO TIME

To apply, call Monica Roth at **214-220-7527**
or email **cs@attorneyprotective.com** or
go to **myappinasnap.com**.

Monica has over 20 years of expertise in the insurance industry. She is an avid animal lover and shelter volunteer who is passionate about cooking, fishing, spending time with her daughters and of course insurance!

