

CASE INTAKES: IDENTIFYING GOOD CASES AND ETHICALLY DISPENSING WITH THE REST

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The lifeblood of any law practice is the intake process. Without the phone ringing or people otherwise contacting your office, you will have to close your doors. While it may take some time and resources, one should probably never complain about having to deal with intakes. Having an effective system for dealing with intakes is one key to having a successful practice and greatly minimizing prospective professional liability problems. You will note that most references in this article are to personal injury intakes but the same general principles and forms should apply to other legal case types. The goal is to develop a system to get the information needed to contact the prospective client, identify the nature of their legal problem, determine the parties involved therein. Lawyers Mutual Liability Insurance of North Carolina has information, resources and forms to help lawyers effectively and efficiently meet their ethical obligations. For an excellent discussion of engagement, nonengagement and disengagement letters and sample letters, go to the following Lawyers Mutual web page: <http://www.lmlnc.com/pdf/Engagement.pdf>.

I. IDENTIFYING THE GOOD CASES...

A. STUDY YOUR PROSPECTIVE CLIENT'S FACTS

The first step to effectively handling intakes is to create an intake form that has relevant questions to ask the prospective client. The intake form need not be terribly detailed but, at a minimum, it should list the date of your initial interview with the client and seek the following from the prospective client:

- Full name;
- Mailing address and physical address including county;
- Phone numbers (work, home, cell, etc.);
- Description of legal subject area (real property, estates, etc.);
- Date of incident(s) or relevant date that the claim(s) accrued---this is highly important in determining the expiration of any applicable SOL.

For more detailed information such as medical history, criminal history, or educational background, you can provide the prospective client with a detailed questionnaire to complete and return but preferably *after* you have decided to take the case. This saves you a tremendous amount of time. What need is there to spend 30 minutes obtaining the prospective client's employment history and prior accident history if you quickly learn that the statute of limitations is too close for [your] comfort or that the client faces a significant defense of contributory negligence? For a sample "basic" intake form, see Appendix A to this manuscript. For more detailed intake forms, visit www.lmlnc.com/pdf/ClientIntake.pdf.

While it is a good idea to have your office staff participate in the case intake process, at some point in the process you need to speak with the prospective client. When Joe Doe calls the law firm, he wants to have his case reviewed and discussed by a lawyer. Some lawyers take pride in creating a wall between themselves and prospective clients but this is a problem on many levels. Often the intake may not adequately verbalize or otherwise convey key facts that could greatly affect your decision whether to take the case. While paralegals are often highly trained, there is no replacement for an attorney reviewing the case facts and asking the appropriate follow-up questions. When you talk to a prospective client about a case, you are essentially engaging in issue-spotting---the same skill-set you applied during the dreaded essay portion of the Bar exam. In addition to the legally relevant facts, you have to also assess other more practical factors including but not limited to the economic viability of your undertaking representation.

Another reason that an attorney should speak to every prospective client is the marketing aspect. Even if you have to decline employment, the way you relate to the prospective client could lead to them calling you back with that whopper of a case that could really help your practice's bottom line. The prospective client may refer family or friends to you if she feels that you were honest and showed some sense of compassion and professionalism despite your rejection of her case. Even if neither of these occur, you have provided someone with the dignity of a response and review of their legal matter and hopefully helped with the image of our much-beleaguered profession.

As you obtain the case facts from the prospective client, consider the following:

Locus of litigation: Where will the case need to be filed if litigation is required? If the incident involves out-of-state acts or omissions, you may be able to resolve it out-of-court but if litigation is required do you have contact with an attorney licensed in that other state? In the case of an employment matter, if you file the case in state court and the defendant removes it to federal court, are you admitted to practice in the particular federal district to which the case would be removed?

Statute of Limitations: Think long and hard and hard and long about undertaking representation in a case in which the SOL is near at hand. You may think that you can get the case resolved before the SOL expires but what if you are wrong? Are you prepared to handle the case beyond that point? This is especially important in medical

malpractice cases as Rule 9(j) of the North Carolina Rules of Civil Procedure allows you to file for an extension of up to 120 days of the SOL in order to allow time for investigation of the case. If you obtain an extension and then determine this is not a case you wish to pursue, you may need to file a motion to withdraw as counsel. Query as to whether your motion would be allowed given the ethical concern of your withdrawal in the face of the rapidly approaching SOL constituting prejudice to the client. N.C. Rules of Professional Conduct 1.16(b)(1) and (d). Don't become the lawyer who gets caught in this pickle and makes the front cover of North Carolina Lawyers Weekly.

Learning curve: Does the case involve subject matter with which you are not familiar? Rule 1.1 of the Revised Rules of Professional Conduct states that “[a] lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter”. This does not mean, however, that you cannot take a case just because it is in a subject area with which you have neither experience nor familiarity. In the Comment to Rule 1.1 it is noted that “a lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation”. Thus you can take the case and review the relevant statutes, case law and other legal resources to get up to speed on a certain area of the law. Under these circumstances, it may be advisable to also consult a colleague who has more experience in the relevant legal subject area than you.

Red flags: Play devil's advocate and question any holes or weaknesses in the case. Wear the hat of your prospective opposing counsel. Apply the summary judgment standard which is essentially: even if what this prospective client says is true, is there a legal reason that he will not be able to sustain his case? Are there any defenses or counterclaims that negatively affect your case?---contributory negligence, unreasonable reliance, failure to exhaust administrative remedies, failure to timely report an injury, failure to reasonably mitigate damages, etc. If you have a hard time overcoming these meritorious defenses in your mind, it may be a sign that you should not undertake the representation. If, however, you decide to accept the case, be clear and resolute in your responses and positions to these possible defenses. Last but not least, be sure to discuss these issues with your client at the outset of your representation.

Repeat offended?: If it is a personal injury case, does the client have similar prior or subsequent physical injuries? If it is a contract case, has your client had previous problematic dealings with the opposing party which could affect the case? In an employment case, had the client previously been disciplined for the same conduct that resulted in their termination? The mere existence of prior or subsequent similar incident and occurrences is likely insufficient to justify declining the case but it should force you to seriously consider how these similarities would affect the prospective case.

Cost factor: Will the case require you to incur significant costs for investigation, litigation or both? Are you willing to advance these costs or will you look to the prospective client to provide the money or some portion thereof? Rule 1.8(e) allows you to advance the court costs and case expenses so long as the client remains ultimately responsible for said costs.

Conflict?: Will your representation of this person create a conflict under the applicable ethics rules? You need to perform a conflict check before agreeing to undertake representation. This is especially true in a firm with multiple attorneys. You may be talking with a prospective plaintiff but the prospective defendant in the case may have already spoken with and possibly retained another attorney in your firm.

A far more frequent example of prospective conflict is what the ethics rules term a “concurrent conflict”. The concurrent conflict often arises in the personal injury context where multiple injured parties seek your legal services but one of the parties is subject to a defense of contributory negligence. For example, a driver and two passengers of a motor vehicle are involved in a one-vehicle collision after several hours of alcohol consumption. The driver is cited for driving while impaired due to his blood alcohol readings. Even if there is no viable contributory negligence defense against the passengers [for entering a vehicle driven by a person that they knew or had reason to know was impaired], there may be an issue of the value of all claims exceeding the available insurance proceeds---i.e. too many spoons and not enough soup.

The conflict situation requires careful consideration and, if the representation is undertaken, written conflict waivers from each prospective client. Read Rule 1.7 and Rule 1.9 very closely. Prior to undertaking the representation the attorney must explain the conflict or potential conflict with the prospective client(s) and discuss the pros and cons of waiving the conflict. Alternative courses of conduct, including advising the client to seek independent counsel, should also be discussed. The depth and documentation of these discussions will be of great importance if the client files a malpractice claim. When it comes to client representation it is best to avoid all real or potential conflicts of interest.

B. STUDY YOUR PROSPECTIVE CLIENT

Always try to meet with a prospective client before deciding to take their case. Often people make different impressions in-person than they do on the telephone or via e-mail. Phone, e-mail and fax communication are no substitute for your face-to-face assessment of a person with whom you and your staff may have to work quite closely for some period of time. To the extent you have support staff available, you should seek their input on a decision to take the prospective client’s case. The support staff may have the most direct contact with the client and there should be a mutual comfort level from the very beginning. If you and your paralegal or legal assistant are meeting with the prospective client in person to screen the case, the two of you should excuse yourselves from the conference room for a few moments to discuss your initial impressions of the prospective client and her case. In gauging personality, demeanor and other important intangibles, two heads are often better than one. In assessing the prospective client consider the following:

- Is she discussing a large settlement figure or a blockbuster lawsuit instead of just the facts of their situation? This could be a sign of a client with the unrealistic case expectations.
- Is she *instructing* you what to do instead of *asking* you what to do?
- Does he keep good records or have a good sense of organization? If he lacks basic records needed to support his case contentions, you may need to think twice about the specific claims he seeks to advance or the representation as a whole.
- Does she attribute all of her current health or other problems to the defendant's conduct and is this causal nexus supported by the medical providers or other evidence? Some prospective clients may possess a victim mentality or suffer from exaggeration complex. An already-skeptical jury will hone in on this feature of your client's personality.
- Are you taking the case primarily because the prospective client is a family member or close friend? Your analysis of the case should remain the same regardless of the identity of the prospective client. It is best to be tactful and turn down a friend than to take the case and regret it in the end.
- How many lawyers has the prospective client met with before coming to you? It is usually a fair question to ask the prospective client and it can be an indicator of whether their case has some problems. A closely related question is whether or not the prospective client has just parted ways with another lawyer and is wanting you to pick up where the other lawyer left off. Beware of this situation as you may find it difficult to ever live up to the prospective client's expectations.
- Is the prospective client difficult or unpleasant to deal with? If so, do not foist her off on your support staff and build a wall between you and the prospective client. You will breed resentment from your staff and eventually the prospective client will come back to haunt you.

If you have completed the above inquiries and decided to undertake the representation, it is strongly suggested that you commit this decision to writing as soon as possible via a contract for legal services. An engagement letter (which is discussed later on in this manuscript) may be appropriate in some cases.

C. SIGN UP THE PROSPECTIVE CLIENT (“Seal the deal and spell out the scope of the representation”)

Once you have decided to undertake representation of the client, you need to commit it to writing as soon as practical. There are two primary methods of confirming

legal representation: execution of a contract for legal services or an engagement letter. Your standard contract for legal services should also include the following: name and signature of client(s), date of signature(s), the specific legal matter(s) you will be handling, an explanation of the nature and amount of your fee including what happens in the event that the attorney-client relationship is terminated prior to the conclusion of the case, discussion of the nature of prospective out-of-pocket costs, statement of your right to associate or otherwise engage other attorneys to assist you, statement of your right to terminate service should your client fail to abide by the terms of the fee agreement. The only limit on the nature of the legal fee is that it must not be illegal or excessive. Rule 1.5.

As part of the client-intake process, engagement letters should reflect or summarize discussions with clients that set out the scope, terms and limitations of the lawyer's representation. They help to define expectations of both the lawyer and client and to avoid the misunderstandings that cause client dissatisfaction. Engagement letters should include the same essential information as would be found in your contract for legal services in addition to the following:

- Responsibilities of the client in assisting with the preparation of the case;
- Explanation of the difference between attorneys' fees and costs;
- Projected case budget, if any;
- Name of any lawyers or staff that may be assigned to assist you with the case;
- A general chronology of how the case will proceed including time estimates.

ADMONITION OF CONTINUING DUE DILIGENCE: Just because you decide to take the case does not mean you should cease questioning your case. Be on the lookout for inconsistent prior statements and other possibly harmful information in medical, financial or other documents you obtain during the course of the representation. Though you may have done quite a bit of work and spent a good deal of money on the case when you discover a big hole in your case, it is far better to make the tough decision and close the client's file earlier than later. Too many lawyers find themselves in the uncomfortable position of spending time, money and energy on a case from which they probably should have disengaged months earlier. Few things are worse than preparing for trial in a case that you feel is a real loser. Also, if the client has repeatedly been delinquent or failed to pay your invoices for legal services and expenses, perhaps you need to consider whether termination of the attorney-client relationship is appropriate.

II. ..AND DISPENSING WITH THE REST

Now that you have communicated with the prospective client and decided not to undertake the representation, for your own protection, you must confirm this decision in

no uncertain terms. Here we will review how to handle nonengagement as well as disengagement.

A. NONENGAGEMENT LETTER (“No substance; just simple, subtle sayonara”)

The nonengagement letter helps to avoid malpractice and disciplinary problems raised in situations such as the following example: A person consults with you and you orally decline the case at the consultation, but the person later claims and believes (after the statute of limitations has run) that you are his or her attorney. You have no written record of your declination of the case. You should consider the following elements when drafting your own nonengagement letters:

- Thank the prospective client for making the personal contact, calling, or visiting the office and encourage her to contact you again. This letter serves as a marketing opportunity and you should leave a good impression with the prospective client despite the fact that you are declining representation in his case).
- Include the date and subject matter of your consultation with the prospective client.
- State clearly and unequivocally that representation will not be undertaken. No room for legal jargon or other gobbledygook here.
- While you can provide brief reasons for the declination, steer clear of stating why the potential client’s claim lacks merit or why other parties are not liable.
- Repeat any legal advice or information given -- making sure that it complies with the applicable standard of care.
- Advise that there is always a prospective for a statute of limitations associated with a legal claim. Providing specific statute of limitations should be avoided because of the limited information typically received in a preliminary consultation. If, however, it appears that a limitations period will expire in a short period of time, you should inform the prospective client of this concern and urge her to seek another lawyer immediately.
- Advise that other legal advice be sought.

Send the nonengagement letter via regular mail or possibly certified mail, return receipt requested ---especially if a time limit is close to expiring. Electronic mail (e-mail) transmission of a nonengagement letter should be an absolute last resort only to be used if you have absolutely no other means of contacting the prospective client. If you do send your nonengagement letter via e-mail, print and retain your e-mail message so as to have a record of the date and time it was sent and the e-mail address to which it was sent. Put a copy of the letter in the prospective client’s file, and keep it until your risk of a malpractice or disciplinary claim is past. If the nonengagement letter comes back to you as undeliverable, take notes of your efforts to locate the client, and attempt to send the letter again. Keep these notes in the file. Finally, all documents and any other property left with the lawyer by prospective clients should be returned with the nonengagement letter. I prefer to meet with the prospective client and have her date and sign a short form acknowledging that (1) she has received her file materials and (2) I shall be providing no legal services. A sample form is attached as Appendix B.

You also face potential liability when a casual contact involves a legal question. This can occur on social occasions, on the street, by e-mail, and cold phone calls. It is probably best to document every casual contact made that involves any discussion of legal questions. It can be short, but should include the date, name of casual contact, brief summary of what was discussed, and any disclaimers communicated at the time. Many lawyers use a numbered consultation form for this purpose. In many cases it may be necessary to send a letter of nonengagement to make it clear that no attorney-client relationship was formed. This may appear to border on paranoia but it may be your saving grace in the event of a legal malpractice claim. The best way to avoid these situations is to refrain from providing legal advice in casual conversations.

B. DISENGAGEMENT LETTER (“Cut your ties, get your money and run!”)

A lawyer may withdraw for any reason or for no reason, "if withdrawal can be accomplished without material adverse effect on the interests of the client." Rule 1.16(b). When disengaging from a case, be sure to send a disengagement letter to the client, return all file materials and collect any money due to you under the contract. No, you cannot withhold documents from your client to secure payment of your fee. Rule 1.16(d). Further if the client retains other counsel, you should turn over all documents that may be helpful to the client. These materials may include original documents and correspondence, however, you need not release your personal notes and incomplete work product. Remember that if the case is pending in a court or administrative tribunal you will need to file a motion to withdraw and continue the representation until receiving a final order allowing withdrawal. Rule 1.16(c).

In contemplating withdrawal, also consider the time and manner of withdrawal. The sudden, “courthouse-steps” withdrawal violates Rule 1.16(d), which requires giving reasonable notice to the client and taking steps to mitigate prejudice. Failure to give timely notice can put you and your client in the unhappy situation of choosing between a last-minute withdrawal, which may prejudice the client and result in attorney discipline, and your unwillingly having to provide free services.

The disengagement letter ends the attorney-client relationship for a given matter. This letter is important to establish the statute of limitation for malpractice claims and ethics complaints (if such statutes exist). Use a disengagement letter that:

- Confirms that the relationship is ending, the effective date the relationship ended and a brief description of the reasons for withdrawal.
- Provides reasonable notice before withdrawal is final.
- Avoids imprudent comment on the merits of the case.
- Indicates whether payment is due for fees or expenses and encloses any outstanding invoices.
- Recommends seeking other counsel.
- Explains under what conditions the lawyer will consult with subsequent counsel.

- Identifies all important upcoming deadlines.
- Includes arrangements to transfer client files.
- If appropriate, includes a closing status report.

Failure to effectively terminate the attorney-client relationship could lead to an implied-in-fact attorney-client relationship. Factors that bear on when an implied-in-fact attorney-client relationship is formed include:

- Whether the attorney volunteered services to a prospective client.
- Whether the attorney agreed to investigate a case and provide legal advice to a prospective client about the possible merits of the case.
- Whether the attorney previously represented the individual, particularly where the representation occurred over a lengthy period of time in several matters, or occurred without an express agreement or otherwise in circumstances similar to the matter in question.
- Whether the individual sought legal advice from the attorney in the matter in question and the attorney provided advice.
- Whether the individual paid fees or other consideration to the attorney in connection with the matter in question.
- Whether the individual consulted the attorney in confidence.
- Whether the individual reasonably believed that he or she is consulting a lawyer in a professional capacity.

It is also a good idea to copy the disengagement letter to all opposing counsel, adverse insurance adjusters, adverse parties, lienholders or other persons with whom you have had contact during the case. If your disengagement letter contains sensitive or confidential information, create a short letter notifying the above persons of the fact that you no longer represent the client and the date that representation ceased. A sample disengagement letter is attached as Appendix C.

THE SPECIAL CASE OF INTERNET COMMUNICATION: The Internet provides many opportunities for casual discourse with would-be clients and ample opportunities for misconstruing the intentions of lawyers and other legal professionals. Law firm websites often allow prospective clients to send e-mail messages and inquiries about legal representation. To guard against the inadvertent formation of a lawyer-client relationship while communicating electronically, lawyers should refrain from eliciting confidential information from participants and avoid providing legal recommendations tailored to a particular person's circumstances, which might be construed as legal advice.

One way to handle e-mail or Internet inquiries is to create a standard e-mail message that tells the prospective client to contact your office to arrange a consultation to discuss their legal matter. Your e-mail message, which possibly can be automated, should contain the following information:

- Name of your office
- Date e-mail was generated

- Legal matter(s) about which the prospective client contacted you
- Clear statement that no attorney-client relationship has been created by any e-mail correspondence
- Clear statement that statutes of limitations may be associated with the prospective client's legal matter(s)

Another category of Internet communication related to potential legal representation is the posting of e-mails to message boards or online communities. Participation in a message board is permissible under Rule 7.3(a) because the attorney is not engaging in direct solicitation of the prospective client. If the message board is accessible by individuals outside of the jurisdiction(s) in which the lawyer is licensed to practice law, it is probably advisable for the attorney to state the jurisdictions where he is licensed to practice law. Such a statement would reduce the risk of misleading a user of the message board. Rule 7.1(a) and RPC 241. An attorney posting messages to the message board should also have a disclaimer, perhaps in their signature line, stating that he is not entering into an attorney-client relationship merely by virtue of the communication on the message board.

APPENDIX A --- CLIENT INTAKE FORM

Date of 1st contact/interview with client:

Client full name:

How client came to contact office:

Mailing address:

Case type:

Home phone:

Date of incident/injury:

Work phone:

PROJECTED SOL DATE:

Cell phone:

County of incident/injury:

E-mail address:

S.S. #

DOB:

D.L. # and state:

Place of birth (city, county, state, country):

Family members (spouse, children):

INFORMATION ABOUT INCIDENT: Date and location (including city, county and state) of incident, weather, time of day, obstructions to view, etc.

Defendant(s) names, addresses, etc.

Please describe incident and relevant facts:

Statements or admissions made by defendant(s) or any witnesses:

Name/phone/address of any witnesses:

APPENDIX B --- RETURN OF FILE DOCUMENTS FORM

Re: Jane Doe (personal injury claim arising out of 3-15-05 wrongful death of Joe Doe in Thomasville, Davidson County, North Carolina)

By my signature below, I hereby acknowledge that, as of today's date, _____, ____ 200__, the O'Neal Law Office has returned to me and I have received all of my file materials in the above-referenced matter. I further understand that the O'Neal Law Office has decided that they shall be unable to handle this matter and thus shall be under no further obligation to render legal services in this matter. I have been advised that there are statutes of limitations associated with this matter and the failure to pursue a claim within the prescribed time frame could lead to the matter being forever barred.

X _____
Jane Doe

APPENDIX C --- DISENGAGEMENT LETTER

April 1, 2006

John Doe
Make 'Em Fast Inc.
123 Anytown Street
Anyplace, NC 20001

Re: Make 'Em Fast Inc. v. Supplies Unlimited; breach of contract;
our file #1000

Dear Mr. John Doe:

When I undertook to represent you concerning the above-referenced breach of contract claim related to your widget business, Make 'Em Fast Inc., you signed a Contract for Legal Services agreeing to pay for the legal services provided to you and the costs and disbursements made on your behalf. At the present time, our records reflect that you have not paid our invoices in a timely manner as you agreed you would.

Our records reflect that you have paid \$200.00, leaving a balance of \$570.00, which is now due and owing. Due to the apparent breakdown in our professional relationship and pursuant to the Contract for Legal Services signed by you, I have decided to end my representation in this matter. I will be happy to continue to represent you if we can make acceptable financial arrangements in the very near future. Otherwise, my further representation of you has terminated.

If you wish to be represented in this matter, you should contact another attorney immediately. Keep in mind that, if your case is not filed in a timely manner, you may be barred forever from pursuing your claim. You may wish to call the North Carolina Bar Association Lawyer Referral Service at 1-800-662-7660.

Please contact our office to make arrangements for return of your file. I will be happy to give it directly to you or to forward it to your new attorney, if you wish. It is our policy to maintain a file such as yours for seven years, after which time it will be destroyed. I look forward to hearing from you soon regarding these arrangements.

Very truly yours,

John O'Neal