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HOW TO AVOID BECOMING A DEFENDANT IN YOUR NEXT LAWSUIT

by Todd A. Picker

Going from lawyer to litigant is a juxtaposition that most in our profession seek to avoid. Although it is impossible to control what a disgruntled former client might do, there are some basic things that can be done to avoid a legal malpractice claim or quickly defeat one if it is filed.

1. Don't Leave The Creation of the Attorney Client Relationship Up to Chance The Case That You Do *Not* Want To Take:

If you are not going to take a prospective client's case, without exception, confirm your decision in writing. The fiduciary relationship between lawyer and client can extend to preliminary consultations with a prospective client, even if actual employment does not result. On the other hand, a lawyer's investigation of a particular case's facts for purposes of determining whether to accept employment does not necessarily create an attorney-client relationship.

Thus, when declining employment clearly state that you will not be representing the prospective client, and make him or her aware of any deadlines, e.g., applicable statutes of limitations, which may apply to the matter. In addition, document anything done relative to investigating the facts of the case so that you can later establish what you did and why.

The Case You *Do* Want To Take:

When you do decide to take a case, be diligent about following the rules that govern attorney fee agreements. A written retainer agreement is required when representing a client on a contingency fee basis. Cal. Bus. & Prof. Code § 6147(a)(3). The agreement must include, among other things, the contingency fee rate and describe how the payment of costs and other disbursements will affect the client's recovery.

In situations not involving a contingency fee, the contract between lawyer and client needs to be in writing, if it is reasonably foreseeable that the client's total cost will exceed \$1,000. Cal. Bus. & Prof. Code § 6148. The agreement must define the basis of the attorney's compensation, the nature of the services that will be provided, and set forth the respective obligations of both the attorney and client.

Collection suits often lead to malpractice claims being asserted in response. So when the attorney-client relationship is based on a written contract that clearly describes what the attorney is going to do and how the client is going to pay, misunderstandings that can lead to litigation can be avoided.

2. Minding the Store - Delegating Work to Paralegals and Clerks

Modern litigation practices often require the use of paralegals and clerical staff. However, delegation without adequate supervision is a recipe for disaster. "While delegation may be a necessity in modern law practice, it can't be a lever for ratcheting down the standard for professional competence. If it's inexcusable for a competent lawyer to [fail to act competently, i.e. misread a rule], it can't become excusable because the lawyer turned the task over to a non-lawyer." *Pincay v. Andrews*, 389 F.3d 853, 862-863 (9th Cir. 2004) (Kozinski, J. dissenting); See also Model Rules for Professional Conduct, Rule 5.3.

While it's not possible nor practical for an attorney to carry out all aspects of a case, it is ultimately the attorney who is responsible for everything that happens in the office. Thus, make sure that the work being done by non-lawyers on a client's behalf is appropriate for the person involved and is being properly supervised. Providing legal services is a lawyer's responsibility and should not be delegated to staff.



Todd A. Picker

3. Taking Care of the Client's Money

A quick scan of the Discipline Section of the California Bar Journal reveals no shortage of cases arising from the mishandling of a client's funds, whether intentional or not. Money placed in trust for a client should not be disbursed without the client's informed consent and careful documentation consistent with the terms of the attorney's employment. Carefully scrutinize all transactions involving trust funds, make sure that proper accounting controls are in place and that the client has authorized the disbursements.

Todd A. Picker is a partner and co-founder of the law firm of *Picker, Chow & Freisleben*. His core expertise includes defending professional errors & omissions cases and partnership disputes.

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