

Advisor

An update on issues regarding liability protection for the legal profession.



Choose Your Clients Carefully

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It is remarkable how often an attorney who is the subject of a claim will tell us he or she knew from the start that the client would be a problem. Often, the attorney adamantly denies having committed any malpractice. However, the client did not obtain the expected result, or owes the attorney money, and decides to make a claim.

The attorney will often tell us that from the very first interaction with the client, he or she could tell the client was a difficult person, or that the client was going to have problems paying fees. Other times, the attorney will tell us it was obvious from the start that he or she would have difficulty obtaining the results sought by the client, and now the attorney realizes it would have been better to just decline representation.

It often seems counterintuitive to turn away work. This is especially true for a solo practitioner, or an attorney who has just started a new firm. However, careful screening of new clients and new matters can significantly decrease the chances of a professional liability claim. As counterintuitive as it may seem, this includes turning down representation, or referring matters to other attorneys, in certain circumstances. Many good attorneys have learned this lesson the hard way by ignoring early warning signs of a *problem client*, only to have that client bring a claim later.

The First Meeting

We strongly recommend that attorneys always meet with a potential client in person before agreeing to represent him or her. Taking the time to meet with clients and discuss the matters they want you to handle allows you to obtain invaluable insight that you cannot get from a simple

phone conversation. What kind of impression does the person make? Is the potential client being candid and up-front with you? How do you get along with the person? A face-to-face meeting will put you in a much better position to evaluate such issues.

Look For Warning Signs

There are certain telltale *warning signs* that commonly indicate a person may be a *problem client*. Meeting the potential client in person allows you to more effectively identify these signs. Although you should not necessarily automatically decline representation every time you recognize one of these signs, the red flags should at least cause you to carefully consider whether the matter is one for which you want to accept representation.

Common Warning Signs Include:

- The client is seeking an unrealistic outcome and gives indications that he or she is inflexible in tempering those expectations.

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Such unreasonable expectations, particularly when coupled with a refusal to consider that it may be highly unlikely such expectations will be met, are often a clear indicator that a client will be very difficult to deal with. Such unrealistic expectations also greatly increase the chances that the client will ultimately be dissatisfied.

- The client adamantly maintains sentiments such as: *the principle is more important than money*, or that he or she wants to *win at all costs*. A client espousing such sentiments is often a potential problem for the same reasons as discussed regarding the first *warning sign* above.
- The matter which the client wants you to handle is outside your area of expertise, or involves matters which you are not comfortable handling. A leading cause of legal malpractice claims is acceptance by attorneys of matters outside their area of expertise. Carefully consider whether it may be in your best interest to simply refer such matters to colleagues who do specialize in such areas.
- The client has been *fired* by other attorneys. Although this does not necessarily mandate automatic refusal of representation, it is always a good idea to make sure you know why the client ended his or her relationship with a previous attorney. The fact that a previous attorney no longer represents that client

may be an indication the client has unrealistic expectations, or is difficult to deal with, or that there are significant problems with the matter the client wishes you to handle.

- Concern about the client's ability to pay. There is no more certain way to guarantee a malpractice claim than a dispute with a client over fees owed.

Contact us for more tips on client selection.

- A *gut feeling* that the new client or matter may cause you problems. Sometimes, there is just something about a potential client that will make you uneasy, or make you doubt whether the person is being candid with you. One of the primary advantages of a face-to-face meeting is the ability to evaluate the potential client in person. Often, attorneys who are sued by a former client will say that they should have followed their own instincts and turned the client down at the outset.

Obviously, there is no foolproof method to determine when a potential client or a particular matter may lead to problems later on. However, a policy of meeting all potential clients in person prior to accepting representation, as well as careful screening of new clients, can dramatically decrease your chances of having a claim brought against you. ☘

Supreme Court on Trust Account Liability

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In May, the Supreme Court of Florida issued a very significant decision impacting law firm trust account fund liability. You, or the attorney responsible for administration of your firm trust account, are urged to review the decision which is on the Court's website at:

<http://www.floridasupremecourt.org/decisions/2008/sc07-1136.pdf>

The bottom line is that if a law firm's trust account check has not cleared the law firm's account, and

the law firm is served with a writ of garnishment seeking debts owed to the payee of the check, the law firm is liable to the garnishor for the check amount. It is my conclusion that the payor law firm has a duty to stop payment on the check upon receipt of the writ.

Consider The Ramifications

1. If you receive as the payee (i.e., you are

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the closing agent or seller's counsel) of a law firm's trust account check (i.e., buyer's counsel's check) and;

2. If the payor law firm (i.e., buyer's counsel) is served with a writ of garnishment seeking debts due to the payor law firm's client (i.e. the buyer of real estate);
3. Then the payor's (buyer's counsel) law firm appears to be obligated to immediately stop payment of the trust account check before you are contacted!

A duty to stop payment is defined.

My summary of the non-final Supreme Court decision follows:

Arnold, Metheny and Eagan, P.A. v. First American Holdings, Inc., ___ So. 2d ____, 33 Fla. L. Weekly S268 (Fla., May 1, 2007)

First American obtained a \$26,000 judgment against Preclude. Preclude's law firm settled an unrelated lawsuit against Greenleaf. First American served a writ of garnishment upon Preclude's law firm, and the firm truthfully answered the writ stating that the firm did not hold any funds belonging to Preclude.

Two days later, Preclude's settlement proceeds were deposited into the trust account of Preclude's law firm. That day two checks were written: just over half was paid to Preclude law firm's operating account which First American did not contest; and, the remainder was payable to Preclude.

Four days later, before Preclude tendered the trust account check for payment, First American served another writ on the law firm. The law firm denied possessing any Preclude funds.

First American filed an action seeking to hold Preclude's law firm responsible for the payment of funds. The trial court entered judgment for the law firm dissolving the second writ of garnishment.

The District Court of Appeal in *First American Holdings, Inc. v. Preclude, Inc.*, 955 So. 2d 1231, 32 Fla. L. Weekly D1256 (Fla. 2nd DCA, May 11, 2007), reversed the trial court order dissolving the writ of garnishment. When an attorney is holding a client's funds in the attorney's trust account, the attorney has a duty to stop payment on a check drawn on those funds and delivered to the payee upon receipt of a writ of garnishment.

The Second District Court of Appeal certified as a matter of great public importance the following issue:

DOES AN ATTORNEY GARNISHEE HAVE A DUTY TO ISSUE A STOP PAYMENT ORDER FOR A CHECK DRAWN ON HIS OR HER TRUST ACCOUNT AND DELIVERED TO THE PAYEE PRIOR TO THE RECEIPT OF A WRIT OF GARNISHMENT IF THE SERVICE OF THAT WRIT OCCURS PRIOR TO THE PRESENTMENT OF THAT CHECK FOR PAYMENT TO THE ATTORNEY'S BANK?

The Second District concluded: "Florida does impose on both bank and non-bank garnishees the duty to retain funds held by the garnishee even after a check on those funds has been drawn by the garnishee and delivered to the payee."

The Supreme Court of Florida unanimously approved the District Court of Appeals decision.

Though a check is a negotiable instrument, a check is not an assignment of funds because the funds remain in the drawer's, the law firm's, account,

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until presentment by the payee's bank to the payor's bank.

The payor's ability to stop payment indicates the law firm's continued possession of the funds. Individual bank's stop payment requirements may require a case by case analysis of the payor's rights. And keep in mind the differences in wire transfers and in the payor's ability to stop wire transfers.

While the Legislature has exempted some trust accounts from garnishment, attorney trust accounts

were not exempted. In view of this decision by the Florida Supreme Court, a review of your firm's escrow policies would be in order. 🌴

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