CLIENT SCREENING
KEEPING THE BUGS OUT OF YOUR PRACTICE

When I was in law school, I lived in a house in Davis. Like most other houses in the area, it had a screen door to keep out unwanted bugs. But unlike most other houses, our screen door had several large holes in it. The holes often prompted people to ask why we bothered. Our reply was one of complacent humor: It kept out the really big bugs and the really stupid bugs. As lawyers, we all have screens of one type or another we use to keep out unwanted clients. Nevertheless, a large percentage of legal malpractice cases arise when we fail to screen out high risk clients. It is hard to have humor when you're being sued for malpractice. It is even harder when you know you should have screened out the client. As such, many of us need to look at the screens we use in our practices to decide if, like my law school screen door, they are in need of repair.

Over the past twenty-three years, I have spent the better part of my career representing attorneys in legal malpractice claims and third party claims (e.g., malicious prosecution actions), and counseling attorneys and law firms on loss prevention and ethical issues. I have also had the privilege of speaking to hundreds of lawyers at seminars around the State on loss prevention, often sharing the podium with other lawyers experienced in representing attorneys. My own experiences, as well as the experiences of my colleagues and of the lawyers in attendance at the seminars, have led me to conclude that establishing effective client screening techniques is one of the most important ways to reduce the risk of malpractice claims. Moreover, because the failure to screen clients appropriately is one of the most common factors in bringing about malpractice claims that have no merit (about one-half of all legal malpractice claims), it is a particularly important loss prevention tool. Ask any lawyer who has been there and they will tell you, there are few professional experiences more distressing than being sued in a matter where your only mistake was letting the wrong client through the holes in your screen door.

In this article, I will discuss some of the screening issues that have been raised in my practice, that I have heard of from colleagues in the field, and that I have learned from lawyers during discussions at seminars I have presented. I suggest that you make a checklist of the traits that mark the types of clients you want to keep out of your practice. In reviewing the checklist, keep in mind that not every client who suffers from just one of these characteristics merits being screened out of your practice. However, if even one of these traits is present, you need to make an extra effort to evaluate the client and the situation carefully before proceeding. If more than one is present, or one is present in the extreme, do not doubt your instinct: You are better served sending that client a non-engagement letter rather than a fee agreement.

THE CLIENT SCREENING CHECKLIST

Clients Who Are Changing Lawyers and Complaining about Their Previous Lawyer(s)

There is no getting away from the fact that some clients can and do have bad experiences with bad lawyers. In fact some clients can and do have bad experiences with good lawyers. I have taken clients who are changing lawyers because of bad feelings with an existing lawyer, and I have referred people unhappy with their lawyers to other lawyers whom I like and would not want to see sued. So, the mere fact that a client is changing lawyers because of a bad experience is not enough to merit putting up the industrial strength screen door. However, whenever a client is changing lawyers, be cautious. Before taking such a client, ask the hard questions:

(1) Why is the client dissatisfied?

(2) What did the lawyer do that has made the client feel that the relationship cannot be salvaged?

(3) How did the client handle the situation with the lawyer, and what was the lawyer's response?

(4) Has money been an issue with the other lawyer, and if so why?

(5) How many lawyers has the client consulted in this matter, and what have the client's experiences been with other lawyers?

(6) How many other legal matters has the client been involved in, and what have been the client's experiences with lawyers in those matters?

(7) Has the client ever been involved in litigation or a fee dispute with another lawyer?

Once you have the answers to these questions, you can evaluate whether you are likely to have problems with this client down the road. **Caution:** If the prospective client has had problems with a number of other lawyers, don't make the common mistake of believing that you will fare better than your peers. The overwhelming odds are that you too will have the same problems. I have represented numerous attorneys who knew at the outset that the client had a problem history, but who somehow felt they could make it work when other lawyers could not. The reality is: (1) there is almost always a good reason why a client with a bad track record has that bad track record; (2) such clients rarely, if ever, have what they perceive to be a positive experience with a lawyer; and (3) these clients very frequently turn their negative feelings into lawsuits against one or more of their lawyers. So, if the client is not coming off of a single bad lawyer experience, but rather has had many, in almost all instances you are best served by using the screen door and sending the client a non-engagement letter.

Clients Rejected by Other Lawyers

The flip side of the characteristic just discussed is clients who have been rejected by other lawyers. Now, when I am talking about rejection, I am not including clients who are referred by one lawyer to another because the matter is not within the scope of the referring attorney's expertise, or clients who are rejected because the original attorney has a conflict of interest, or clients who have been turned away for other justifiable reasons. Rather, I am talking about the injured plaintiff who has been rejected by one or more personal injury lawyers, the business client whose work has been turned away by one or more business

lawyers, etc. Of course, there may be a good reason the attorney has rejected the client. For example, the attorney may truly be too busy to take on new clients. But, once again, experience tells us that clients who resort to attorney shopping usually have a fatal flaw, either as clients or with their cases. Often, the flaw is initially with the case, but then shifts to the client who refuses to accept that his or her matter does not merit pursuit. Hence, think carefully about why other attorneys rejected the client, and ask the client for consent to discuss the matter with one or more of the other attorneys. If the client declines to provide the consent, that alone should tell you most of what you need to know to ensure there are no holes in your screen door large enough for this client to slip through.

Clients Who Are Motivated Primarily by the Desire to Vindicate a Principle, to Wreak Vengeance, or to Achieve an Emotional Catharsis

On numerous occasions, I have sat across the desk from an attorney who was being sued, and listened to him or her say: "But I did a really good job. I can't believe I'm being sued." Why is this lawyer being sued? Very often, the answer to this question is that the attorney accepted a client whose motives or goals made satisfaction with the attorney's representation virtually impossible. As lawyers, we know that litigation is a time consuming, energy sucking, grueling, and expensive endeavor. Hence, clients who are looking to vindicate a principle, or who are strongly motivated by revenge or emotional considerations, are almost never satisfied with their attorney's representation, no matter how good the result. Attorneys who practice in family law need to be particularly on the lookout for these problem clients, but they are not the only ones at risk. These issues often surface in clients who desire to sue their professionals, former business associates, family members, neighbors, or others who have "done them wrong."

The next question is: How do you discover these clients during an initial interview? The first recommendation is to be an active and effective listener. Lawyers are often much better at speaking than at listening. Remember, what you hear is very often more important than what you say. The second recommendation is to formulate questions that can help you

determine the client's motivation. An approach a number of attorneys have shared with me is to ask the client what it is that he or she wants out of the proposed legal representation. Then, if you perceive any potentially problematic motivational issues, do whatever you can to flush them out and to learn whether the client can put the anger and emotion aside and take an objective look at the situation. This is easiest to do in non-contingency cases where the client will be paying for your services. Try explaining to the client that how they feel today will not be how they feel a couple of stressful years and many thousands of dollars down the road. Then, make sure that you have the client consider these issues so that you can evaluate if he or she is a person who will be able to maintain an appropriate perspective. If so, you can probably proceed, albeit cautiously given the client's initial motivations. If not, you are best served not letting this client through your screen door.

When a client is being represented on a contingent fee, it can be more difficult to get to the bottom line of what is driving the client. However, it is no less critical. In most instances, a contingent fee client who is motivated by principles, revenge or emotion, is a client who is apt to reject any reasonable settlement and then to be dissatisfied with your services, whether or not you achieve a good result at trial. With these clients, the focus of your approach needs to be determining whether the client is receptive to your perceptions of the case, and whether the client is willing to adjust his or her expectations accordingly. This brings us to our next topic.

Clients with Unreasonable Expectations

Many clients walk into an initial interview with an attorney having unreasonable expectations about the potential outcome of the matter at issue in the consultation. It's not difficult to understand why this is so given the media's shallow coverage on cases with sensational results. Many clients have heard that a woman spilled coffee in her own lap and then became a millionaire. Consequently, many people have unreasonable expectations when they first go in to see a lawyer. Hence, the client to be wary of isn't necessarily the person who walks in the door with unrealistic expectations. Rather, the client to be

concerned about is the one you are unable to persuade to bring his or her expectations down to earth. Also, keep in mind that while unrealistic expectations are a particularly common problem with personal injury clients, the problem is found in virtually every area of the law, from business and real estate ventures to family law.

How do you attempt to reshape unreasonable expectations? Try administering a dose of reality. First, learn what information has shaped the client's unreasonable expectations. If they are media based, talk about the thousands and thousands of cases with less spectacular results that go unreported. Then, go over the potential pitfalls in the case, discuss the position that the adversary may take, explain the unpredictability of witnesses, and explore the risks and uncertainties inherent in the process (especially if a jury trial is going to be involved). If you are successful in bringing the client's expectations into line at the initial meeting, and if you stay on top of the matter throughout the representation by continually communicating with and educating your client, you should be fine. On the other hand, if the initial meeting concludes with the client continuing to have unrealistic expectations, you can reasonably assume that this will be a client: (1) whose expectations cannot be and will not be met; (2) who will be disappointed with you; (3) who is likely to assume that the reason for the failed expectations is poor lawyering; and (4) who may well decide to proceed with a malpractice claim against you. It happens every day. Hence, the time to deal with client expectations is at the outset, and if you are unable to bring the client's expectations in line with reality, you are best served by ensuring that your screen door has no holes.

Clients for Whom Litigation Is an Avocation

It is often easy to confuse a good money producing client with a good client. Over the years, I have represented many lawyers who were sued by good clients they represented frequently and even considered to be friends. Who are these “good clients” who sue their attorneys? Experience tells us that they are litigious people who are frequently involved in disputes, be they with vendors, customers, employees, investors, former business associates,

etc. Typically, many of these clients don't consult their lawyers when they should, but instead wait until there is a problem and then want the lawyer to cure it. Probably more than any other category of lawyers I represent, these lawyers are surprised when their "good client/friend" turns on them. Then, to make a bad situation worse, these lawyers almost inevitably tell me that while most of their other files are well documented, they worked on an informal basis with this "good client/friend" and do not have appropriate documentation showing the advice they gave. Assess these "good client/friends" carefully and determine if they seem to be involved in too many disputes. If so it may well be time to bite the bullet and to suggest that the client take his or her work elsewhere. If you decide to keep a borderline client, make certain that you document their files as carefully, if not more so, than all of the other files in your office. The truth of the matter is that litigious people rarely draw lines based on loyalty or friendship. Rather they generally look out for number one, and that isn't you.

Clients Who Have Difficulty Paying For, or Wanting to Pay For, Your Services

It is no news flash that a very large number of legal malpractice cases arise from disputes over the payment of fees. Whenever a lawyer sues a client for fees, the lawyer places himself or herself at tremendous risk of being sued for malpractice. However, suits for fees are not the only context in which the money problem surfaces. I have handled numerous cases where serious problems have developed when the client stopped paying the lawyer, tension and resentment began to permeate the relationship, and ultimately there was a complete breakdown of trust and confidence.

Clients who will not pay your fees in a timely manner generally can be easily flushed out at the commencement of the representation. During the initial meeting, after discussing the client's matter and establishing a good rapport you should frankly and clearly discuss the business arrangement with the client. The client has a right and a need to understand the financial ramifications of proceeding with a proposed course of action. Conversely, you have both a right and a need to know if this is a client who is willing and able to pay for your

services. If it appears that money is potentially going to be an issue, it is fine to explain to the client the truth: You want to avoid any potential financial problems because they can easily lead to resentment and tension in a relationship that requires complete trust and confidence. Some ways to minimize potential conflicts and to determine the client's attitude regarding the payment of fees are to: (1) request a reasonable retainer/deposit with clarification that it is not an estimate of the cost of the entire matter (a claim many clients make); (2) request a replenishing retainer/deposit; and/or (3) charge interest for overdue accounts.

When discussing business arrangements with prospective clients, keep in mind that clients who do not pay are often the most demanding clients. Why not? It's not costing them money to get their demands satisfied! Also keep in mind that a client who isn't willing and able to pay you, also is not apt to be willing or able to pay an investigator or an expert, and may then turn around and blame you for failing to fully advise them just how critical the investigation or expert was to their case. These are not just warnings of what may happen; these are all malpractice claims I have defended. So, if you determine during your initial client interview that this client is one for whom payment of your fees is going to be a problem, either because of a lack of willingness to pay or a lack of ability to pay, make one of two choices: (1) handle the matter on a pro bono basis; or (2) decline the representation and skip all of the potential problems that accompany a breakdown in the attorney-client relationship. If you miss the problem at the outset, and it surfaces after you undertake the representation, remember to act promptly, and that extricating yourself from representation of a client (for non-payment or other reasons) requires compliance with Rule 3-700 of the State Bar Rules of Professional Conduct. The primary emphasis of that Rule is that the attorney cannot act in a manner that prejudices the interests of the client. Also, keep in mind that until the representation ends, you remain in an attorney-client relationship with the client. In this regard, one tip for protecting yourself when you substitute out of litigation is

to be the last one to sign the substitution and the one who files it with the court, thereby clearly marking the end of any obligation to the client.

Clients Who Play Attorney

A classic client to avoid is the one who walks into your office having researched his or her case, and who tells you how to proceed. These are frequently the most difficult clients to represent because they are most apt to follow their own agenda rather than your advice, but then to hold you responsible when their approach does not produce the desired result. I can't tell you the number of times I have heard clients who do their own research and investigation and who are over-involved in directing their legal matter, turn around and testify in the subsequent malpractice case: "Sure I read some of the law, but I didn't really understand it, and I was relying totally on my attorney to advise me and to counsel me!" These are also the clients who regularly deny that the attorney ever advised them of risks, and who say they most certainly would have proceeded differently if they had been properly counseled. These clients also inevitably point to how much money they paid the attorney for his or her advice to show that they were relying totally on their lawyer: "If I was running the show, how does my attorney explain his $12,000 bill?" These clients should be viewed as the largest and most aggressive bugs you want to screen out of your practice.

The Bottom Line: Listen to Your Gut!

The single most important criterion to follow in screening clients is: Listen to your gut! A cardinal rule of client screening (except perhaps for those engaged in criminal law) is: If your gut says there is something about this person you do not like or respect, do not take him or her on as a client. In most instances, if your gut is telling you no, it is because you sense one or more of the client characteristics we have been discussing. In other instances, it may just be someone you don't like or respect. If that is the case, the odds are that at some point during the representation your feelings will start to show, and the trust and confidence at the foundation of the attorney-client relationship will be shaken.

When I talk about "your" gut, I urge you to think of the term "your" collectively. If someone else in your office, such as a receptionist, secretary, legal assistant, or other attorney, tells you that they have a gut problem with the prospective client, listen. Sometimes, those around us may be better able, or more willing, to see the problem clients. This may be because of the Eddie Haskell syndrome. Clients who otherwise leave much to be desired, often turn on the charm when they meet with the lawyer, but forget themselves either when they are waiting in the front office where they are observed by your staff, or when they interact with others they may feel are not as important to impress as you. In other instances, the staff member who is observing the client or taking notes may be in a better position to assess the potential client while you are focused on legal issues.

Of course, listening to your gut instincts is often easier said than done, especially when your gut is saying "no" and your wallet is saying "feed me." Before listening to your wallet, think about the warning signs you have just read, and remember: In the long run, the cost of taking clients who never should have made it through the screen door almost always exceeds the gain.