

Self-Help Services: Reducing Risk by Avoiding the Formation of Lawyer-Client Relationships Part I

by Arthur J. Lachman



Equal justice organizations are increasingly offering purely self-help legal services to

their patrons, including web-based kiosks, service centers, and information hotlines. But for lawyers offering these services, there are real risks, both legal and ethical. The key is to prevent legal and ethical duties from forming in the first instance, which involves something that isn't nearly as simple as it sounds: avoiding the creation of a lawyer-client relationship.

Part I of this article presents a general overview of the law regarding the formation of attorney-client relationships, as well as a description of the current legal and ethical climate for assessing risk in this area. Part II, to appear in the next edition of the NLADA Insurance Program Bulletin, will apply these general principles to the most common self-help services, including websites, in-person service-centers/clinics, and telephone hotlines, and offer practical suggestions for avoiding losses in their performance.

What this Article Is Not About

To eliminate any confusion, it is helpful to summarize what this article isn't about. First, because the context of this article is self-help services conducted by lawyers, unauthorized practice of law issues are not directly implicated. But cases and rules discussing what constitutes the "practice of law" for purposes of unauthorized practice statutes and rules in a particular jurisdiction may provide guidance to lawyers in determining when and how lawyer-client relationships are formed.

Second, this article isn't about unbundled legal services in the context of limited scope representations. While legal and ethical principles regarding unbundling may have some relevance to analyzing self-help issues, and the policies underlying the provision of unbundled services are certainly related to self-help issues, it is important to remember that the goal here is to avoid the formation of any lawyer-client relationship rather than even a limited one.

With these preliminaries out of the way, we proceed to a general discussion of how lawyer-client relationships are formed.

Formation of the Lawyer-Client Relationship

When a lawyer-client relationship is formed is generally an issue of state law. Although ethical duties are usually triggered by the formation of the relationship, ethics rules rarely provide much guidance on the issue. As a result, one must look to case law in areas such as ethics, legal liability, privilege, and unauthorized practice.

The essence of the lawyer-client relationship is the rendering of advice or counsel (i.e., exercising professional judgment) on legal matters. According to Section 14(1) of the Restatement (Third) of the Law Governing Lawyers, a lawyer-client relationship arises when

a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services.

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What Causes Trouble: A Few Lessons from the Field

By Neil McBride

General Counsel to the Legal Aid Society of Middle Tennessee and the Cumberland

The clients and lawyers described are fictional but their stories are real.



The following is an exercise whereby the reader should assume that he or she has the responsibility of

advising staff on ethical issues and malpractice complaints. (This is a position, by the way, that the ABA Model Rules for Professional Conduct assume that most law firms should have. See Rule 5.1 and commentary.) Here are three potential problems that attorneys are telling you about.

The clients and lawyers described below are fictional but their stories are real. These problems did not and would never arise in the Legal Aid Society of Middle Tennessee and the Cumberland. (If you recognized the absurdity of that statement, you have already reached an important level of understanding the concept of risk management.)

Tickler Systems

I just forgot about the hearing. I filed a motion to set aside the default, but the judge said I was out of time under local rules. After the client lost his truck he lost his job because he couldn't get to work. Now he's about to lose his house because he can't pay his mortgage. His lawyer has just called me, asking if we want to make an offer before he files a lawsuit and a malpractice complaint with the Board of Professional Responsibility.

You will almost certainly be liable for some damages because of this missed hearing. If you have a tickler system and protocol for docket control in effect – and being used – in your firm, your exposure may not be as great as it could be. More important, you should be

sure that you have a system in place that will reduce the possibility that clients will suffer this kind of harm.

No system will prevent every possible mistake. Your advocates are human. They will make mistakes. Your job, as one of the keepers of your firm's ethical and practice standards, is to make sure that the mistakes are as infrequent as possible and cause as little damage to the client and the firm as possible. You should assure that the systems that you have in place meet the standard of care for the business in which you are engaged.

In our business, in this day and time, the calendar that lawyers have on their wall, or on their desk blotter, is not good enough. Your protocol for tickler systems and docket control should be in writing. It should cover any activity that has a deadline, including hearings, replies to formal pleadings, statutes of limitations, and other time-sensitive events. It should be reviewable by and otherwise involve a second party, such as a secretary or supervisor who can see a calendar, return a tickled date, or review a computer calendar.

This kind of system is not just good for avoiding mistakes and minimizing loss. It can serve to reinforce the important notion that *your firm is representing the client* – not just your individual advocate. It should help reduce the isolation and anxiety that many advocates feel about their case-loads. And it should help them plan their work so they cannot just meet the deadline, but have time to write a high-quality brief and prepare a persuasive argument to the court.

Retainers and Closing Letters

We lost Mr. Shifflet's unemployment case about six months ago. When I called him about the decision, I told

him we were closing the case. He's just called me to ask how the appeal was going. I didn't send him a letter because he was about to move and he seemed to understand what I said. Our retainer says we are investigating the case, and I never got around to updating it. The client remembers that I told him we were closing his case, but he says that he thought that meant we were closing the administrative case since it was being appealed to court. We are past the statute of limitations.

The file in this case should include not only an explicit closing letter but a signed retainer that makes it clear that we are representing the client only at the administrative level, and that any decision to appeal to a court would be made later and would be the subject of a second retainer. Clear retainer agreements, engagement letters, and explicit closing letters in all cases would probably do as much to avoid common client disputes as any other protocol your firm might adopt.

Retainers are much more than an LSC compliance issue. They are a fundamental of good practice; a valuable opportunity to clarify client and advocate expectations about what is going to be done. Retainers should be written in understandable language and should explain exactly what the firm promises to do. A precise, well-stated retainer is as useful to the advocate as it is to the client. If you have an unusual case, or a client who needs a very clear statement of what you are doing, your protocol should include an engagement letter that explains what you are doing. Such letters will be especially important as more legal aid providers offer "unbundled" or limited representation service rather than extended representation.

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What You Don't Know Can Hurt You: Internal Reporting of Professional Liability Claims

by Arthur J. Lachman

Managing professional liability claims is a crucial part of any effective loss prevention program. But they can't be managed if they never come to management's attention in the first place. Every legal organization, therefore, should have a written policy or standard of practice in place that will enable management to solve problems at an early stage, to assess in a timely fashion the impact of claims and potential claims, and to meet the applicable liability insurance reporting requirements. This article summarizes the basic principles underlying a standard of practice for reporting claims and potential claims within an organization.

Early Detection & Reporting

Many claims situations can be averted if they're identified and resolved quickly. Failing to deal with such a problem early on and proactively can make an otherwise insignificant situation much worse. Moreover, the lawyer or staff person directly involved in a claim or potential claim is often the first person to become aware of the situation. The legal organization, therefore, should have a policy that requires any lawyer or staff person who becomes aware of a potential claim situation to report it immediately to a designated lawyer, supervisor, or management committee.

Define Reportable "Claims" Broadly

When establishing an internal reporting policy, "claims" required to be reported should be defined broadly. They should include not only actual or potential claims for legal malpractice, but also those based on breach of contract, tort and statutory duties, as well as ethics violations and disciplinary complaints, applications for court sanctions against the firm or the firm's lawyer(s), and the like. They should include not only written or oral demands for money, but also *threats* to file a lawsuit or otherwise pursue any of these matters.

And "claims" subject to an internal reporting requirement should be defined to include any request for an agreement tolling a statute of limitations.

Internal General/Claims Counsel

Law firms are increasingly designating internal "general counsel" or "claims counsel" to handle claims matters. Placing actual and potential claims in the hands of an experienced lawyer permits the prompt and consistent assessment and resolution of professional liability issues, while at the same time ensuring that insurance requirements, including notice provisions of liability policies, are also complied with. While the law is far from settled and may in fact vary in particular states and forums, it's possible that communications with a designated internal lawyer regarding claims and potential claims will be protected from subsequent disclosure and discovery under privilege and/or work product theories (look for these issues to be discussed in more detail in a future Bulletin article). In any event, the designated internal lawyer will be in the best position to decide how to conduct an internal investigation to preserve applicable privileges, to determine when and if to retain outside counsel, and to sort out conflict of interest issues associated with client claims. If a "general counsel" position is created, the internal policy should require that all communications regarding claims and potential claims be channeled through that lawyer.

DON'T Put It In Writing

Internal firm memoranda about a potential claim, especially those produced prior to a full investigation, are likely to be unreliable, and may also not be protected from disclosure during discovery in subsequent litigation. The standard of practice, therefore, should require that internal reports be made orally, and that lawyers and staff refrain from creating

memoranda, notes, and other writings about the matter unless and until a managing lawyer, internal general counsel, or outside counsel instructs otherwise.

Firm Culture

Creating a culture within a legal organization that encourages all personnel, lawyers and staff alike to report actual, potential, and threatened claims in a timely fashion is certainly a challenge. Let's face it, people prefer not to admit their own mistakes, nor do they relish pointing out the errors of others (especially those that involve their own supervisors). But management must convey, through clear standards of practice and effective communication and training, that everyone in the organization shares an interest in treating the reporting and handling of claims as the highest priority. Subordinate lawyers and staff must hear from the top of the organization and their own supervisors that complying with an internal reporting policy will be rewarded, not penalized. And everyone in the organization must understand that by getting these situations into the hands of those who are best equipped to deal with them at the earliest possible time, claims and disciplinary actions may be prevented and losses can be mitigated.

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Self Help Services: Reducing Risk by Avoiding the Formation of Lawyer-Client Relationships

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Courts themselves are becoming increasingly active in providing self-help services.

The Restatement makes no attempt to define “legal services,” noting in a comment that “a lawyer may answer a general question about the law, for instance in a purely social setting, without a client-lawyer relationship arising.”¹

Most courts hold that whether a lawyer-client relationship exists involves both a subjective element (did the client subjectively believe that the relationship came into existence?) and an objective element (was the subjective belief reasonably formed based on all the circumstances, including the lawyer’s words or actions?). No formal retention or fee agreement is required to create such a relationship. Whether a lawyer-client relationship exists for purposes of imposing ethical obligations and whether one exists for purposes of imposing malpractice liability are generally the same.²

A helpful analogy in this regard is the situation of the lawyer reference librarian providing assistance to pro se law library users. Literature on this issue indicates that claims against law reference librarians are virtually nonexistent, and suggests that although lawyer librarians certainly will have ethical duties and duties of care to patrons if lawyer-client relationships are formed, they can minimize these risks by concentrating on not performing lawyerly functions (i.e., resist providing patrons with substantive legal assistance and advice, including the assessment of possible outcomes, focusing instead on assisting them in locating legal information and tools for their own use).³

The District of Columbia Bar Association recently summarized the distinction between legal advice and legal information:

Providing legal information involves discussion of legal

principles, trends, and considerations—the kind of information one might give in a speech or newspaper article, for example. Providing legal advice, on the other hand, involves offering recommendations tailored to the unique facts of a particular person’s circumstances. Thus, in discussing legal information, lawyers should be careful to emphasize that it is intended as general information only, which may or may not be applicable to an individual’s specific situation.⁴

Of course, the line between legal advice and legal information isn’t always clear. For example, in a 1994 ethics opinion (No. 17, April 25, 1994), the New Jersey Supreme Court Committee on Attorney Advertising held that lawyers who would be providing, on a pay-per-call basis, general answers to questions from callers about their individual problems created a lawyer-client relationship, notwithstanding disclaimers to the contrary. While those disclaimers referred to providing answers *or* advice to callers, it is important to remember that the more statements by the lawyer are tailored to the individual factual (and confidential) circumstances of the requesting person, the more likely the patron will reasonably believe that a lawyer-client relationship has been created.

Recent Developments and Current Atmosphere Affecting Risk Assessment of Lawyer Self-help Initiatives

Recent changes in ethics rules, along with increased judicial interest and activity in assisting *pro se* litigants, create an apparently positive environment in assessing risk for lawyers choosing to provide

self-help services to persons of limited means.

First, changes to the Model Rules of Professional Conduct resulting from the ABA’s Ethics 2000 effort support more lenient duties in the legal aid context. Model Rule 1.2(c), for example, now expressly permits lawyers to limit the scope of a representation, subject to a reasonableness requirement as well as the client’s informed consent. And Model Rule 6.5 clarifies that lawyers who provide limited scope legal services in connection with nonprofit or court-annexed limited legal services programs without any expectation by either the lawyer or the client of a continuing representation are subject to the conflict of interest rules only if the lawyer knows that a conflict of interest exists, and are subject to the conflict of interest imputation rules only if the lawyer knows about the imputed conflict. While these rules most directly impact limited representation and unbundling issues rather than purely self-help programs, they do indicate that serving the needs of those unable to pay for legal services is now a high priority within the legal profession, and where they are adopted, that they will be “cut some slack” in complying with otherwise applicable ethical obligations.

Second, a new ethics rule dealing with duties to prospective clients, Model Rule 1.18, supports the idea that at least some communication and consultation can take place without creating a lawyer-client relationship. Model Rule 1.18 is, in a sense, the converse of Model Rule 6.5; whereas Rule 6.5 curtails some duties when a lawyer-client relationship forms, Rule 1.18 triggers certain confidentiality and conflict of interest duties when a lawyer-client relationship does not form after an initial consultation.

Although the rule fails to define precisely when a representation crosses the line from being merely “prospective,” it is clear that the drafters were recognizing the importance of permitting lawyers to arrange their affairs to prevent lawyer-client relationships, and the bulk of the corresponding ethical duties, from attaching when the parties don’t desire to create them.

Third, and perhaps most importantly, courts themselves are becoming increasingly active in providing self-help services, recognizing the large number of *pro se* litigants participating in the judicial system.⁵ This trend places judges and court administrators in the somewhat awkward position of making sure that their own non-lawyer personnel don’t breach their own ethical duties of impartiality (or cross the line to engaging in unauthorized legal practice, assuming restrictions on unauthorized

practice actually apply to court personnel), including determining what the phrase “legal advice” really means and providing guidelines for court staff on how to deal with requests for information.⁶ There is little doubt that such efforts can’t help but make the judiciary more sensitive to the desirability of permitting lawyers to engage in self-help initiatives without the fear that the full panoply of legal and ethical duties will be imposed upon them. But because lawyers, unlike court personnel, are in the business of providing legal advice, the risk that courts will ultimately hold lawyers to a different standard remains.

Legal and Disciplinary Liability Risks and Loss Prevention

As access to justice guru Richard Zorza noted recently, it is becoming clear that attorney self-help staff can provide a very broad range of assistance, “provided that the

recipients realize that they have no attorney-client relationship or confidential relationship with the provider of the advice.”⁷ Assessing risk of legal and disciplinary liability in the context of self-help is difficult, however. The law is in a state of flux, with tension between legal duties and ethical duties, as well as the important policy considerations in having the justice system serve all citizens, all entering the mix. But there are clues in the direction the law is taking that allow us to form some concrete approaches to preventing losses and minimizing risk in providing self-help services.

Risk issues associated with unbundled legal services provide a useful starting point. As recently as ten years ago, the leading proponent of unbundled services, Forrest Mosten, identified the problem as follows:

In most jurisdictions, a lawyer who is involved in only part of the case may still face malpractice liability from a disgruntled client who later claims that the lawyer should have advised about rights and obligations that are ancillary to the problems presented by the client. . . . Lawyers who offer discrete task unbundling to *pro se* litigants do not presently have a safe harbor for incorrect or incomplete advice rendered due to the limited scope of employment.⁸

Ethics scholars also recognized by the late 1990s that a competence standard requiring full performance in every situation would effectively prevent lawyers, as a matter of ethics, from contracting to perform incompletely.⁹ In response to these legitimate concerns, the ABA amended Model Rule 1.2(c) at the beginning of this decade to permit limited scope representations, and some courts are now expressly defining the scope of duties for malpractice purposes by reference to the scope of the work set forth in the agreement between the

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Loss Prevention Tips in the Creation of Lawyer-Client Relationships

- Acquire a clear understanding of your jurisdiction’s law about how and when lawyer-client relationships are created, as well as the ethical duties applicable to limited representations and duties to prospective clients.
- If you’re seeking to avoid the creation of a lawyer-client relationship, say so and stick to it (i.e., don’t then proceed to offer legal advice involving the exercise of judgment based on individualized information communicated by a patron).
- When *any* lawyer-client relationship is created, *always* use a written retainer agreement/engagement letter that clearly defines the scope of work to be done.
- Clear conflicts *before* doing any substantive legal work or rendering legal advice.
- Do only the work described in the written retainer/engagement letter, and if the scope of work changes, update the retainer in writing.
- Resist the urge to dabble; if in the course of a representation you determine that your client needs assistance in an area of law or forum in which you’re not competent, get help or, if necessary, make a referral.
- When the representation is completed, send a closing letter to the client.
- *Always* communicate with your client openly and honestly, and in a timely fashion.

lawyer and client, as now permitted by the model ethics rules. For example, the New Jersey Appellate Division recently reasoned:

RPC 1.2(c) expressly permits an attorney with the consent of the client after consultation to limit the scope of representation. . . . “[W]hat constitutes a reasonable degree of care is not to be considered in a vacuum but with reference to the type of service the attorney undertakes to perform.” To us, that means if the service is limited by consent, then the degree of care is framed by the agreed service.¹⁰

Thus, according to the leading treatise on legal malpractice, “a restriction or limitation on the scope of representation, which does not seek to excuse compliance with the standard of care or to exculpate the lawyer from liability, is valid and will be sustained.”¹¹

Interestingly, writing in 2000, Mr. Mosten concluded that “there are fewer rather than more malpractice claims when lawyers unbundled services.”¹² While there are several possible explanations for the dearth of claims in the unbundling context,

as a matter of risk management, it appears that when any limitations on the scope of representation are clearly articulated by the lawyer and understood by the client/consumer, there is much less likelihood of a misunderstanding or disagreement later. Thus, rather than creating risk, clearly articulated statements regarding expectations actually reduce risk. Where the goal is to avoid the creation of a lawyer-client relationship in the first instance, the use of clear and understandable disclaimers when providing purely self-help services is crucial (although, as will be discussed in detail in Part II of this article, the use of disclaimers is not by itself sufficient to avoid the creation of lawyer-client relationships).

Lawyers must also have a clear idea of the boundaries in the process of forming lawyer-client relationships. This will be especially important in jurisdictions adopting the revised model ethics rules because courts and disciplinary authorities will no longer have to decide whether a lawyer-client relationship is formed as an “all-or-nothing” proposition. While this development points to a

better atmosphere overall for providing self-help legal services, it also allows courts to choose a “middle-ground” of limited representation, where at least some professional/ethical duties may be imposed. In a jurisdiction adopting Model Rule 1.18, there will also be a clearer definition of duties imposed in the “prospective client” situation. It is extremely important, therefore, that lawyers offering these services understand how the lines are drawn in their particular jurisdictions, and plan and control their actions accordingly.

These principles are instructive in forming strategies and systems for avoiding loss in the provision of purely self-help services. If lawyers are careful in preventing a lawyer-client relationship from ever coming into existence, the risk of malpractice claims and ethical violations should be even less than in the unbundling/limited representation context. Part II of this article, which will appear in the next Insurance Program Bulletin, will present loss prevention strategies for three major types of self-help services: self-help websites, in-person self-help service centers/clinics/seminars, and telephone hotlines.

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Additional Online Self-Help Resources

Unbundling/Limited Representations

- ABA Standing Committee on Delivery of Legal Services., *Pro Se/Unbundling Resource Center* (www.abanet.org/legalservices/delivery/delunbund.htm)
- Handbook on Limited Scope Legal Assistance: A Report of the Modest Means Task Force (ABA Litigation Section 2003) (www.abanet.org/litigation/taskforces/modest/report.pdf)
- Limited Representation Committee, California Commission on Access to Justice, *Family Law Limited Representation Risk Management Materials* (Jan. 12, 2004) (http://calbar.ca.gov/calbar/pdfs/accessjustice/Risk-Management-Packet_2004-01-12.pdf)
- Maryland Legal Assistance Network, “Unbundled” Legal Services (www.unbundledlaw.org)

Legal Information vs. Legal Advice

- ABA Center for Responsibility, *Ethical Aspects of Providing Legal Advice & Legal Information* (on-line 2004 CLE presented by Paula Frederick and Will Hornsby; at <http://www.abanet.org/cle/clenew/probonoethicsreg.html>)
- ABA Center for Responsibility, *State Definitions of the Practice of Law* (http://www.abanet.org/cpr/model-def/model_def_statutes.pdf) (NOTE: this document is undated and may not be updated)

- Judicial Council of California, Administrative Office of the Courts, Access & Fairness Advisory Committee, *May I Help You? Legal Advice vs. Legal Information: A Resource Guide for Court Clerks* (2003) (<http://www.courtinfo.ca.gov/programs/access/documents/mayihelpeyou.pdf>)
- Michigan Judicial Institute, *Employee Guide to Legal Advice* (<http://www.courts.michigan.gov/mji/resources/legaladvice/LegalAdviceBook.pdf>)

Judicial Policy Recommendations

- American Judicature Society, *Revised Pro Se Policy Recommendations* (March 2002) (www.ajs.org/prose/pdfs/Policy%20Recom.pdf)
- Conference of State Court Administrators (COSCA), *Position Paper on Self-Represented Litigation* (Aug. 2000) (<http://cosca.ncsc.dni.us/PositionPapers/selfreplitigation.pdf>)
- COSCA/Conference of Chief Justices (CCJ) Task Force Report (July 29, 2002) (<http://cosca.ncsc.dni.us/PositionPapers/TaskForceReportJuly2002.pdf>)

Self-Help Support

- www.selfhelpsupport.org/index.cfm (a self-help support website; a collaborative effort of the National Center for State Courts, the State Justice Institute, Legal Services Corp., American Judicature Society, Zorza Associates, Pro Bono Net, and Chicago-Kent College of Law)

- ¹ Restatement (Third) of the Law Governing Lawyers §14, comment c (ALI 2000).
- ² Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §8.3 (5th ed. 2000).
- ³ Randy Diamond & Martha Dragich, Professionalism in Librarianship: Shifting the Focus from Malpractice to Good Practice, *Library Trends* 395-414 (Winter 2001); Paul D. Healey, In Search of the Delicate Balance: Legal & Ethical Questions in Assisting the Pro Se Patron, 90 *Law Libr. J.* 129-47 (1998); Madison Mosley, Jr., The Authorized Practice of Legal Reference Service, 87 *Law Libr. J.* 203-09 (1995).
- ⁴ D.C. Bar Ethics Op. No. 316 (July 2002).
- ⁵ Paula L. Hannaford-Agor, Helping the Pro Se Litigant: A Changing Landscape, 39 *Court Rev.* 8 (Winter 1993).
- ⁶ John M. Greacen, No Legal Advice from Court Personnel: What Does That Mean?, *Judges J.* 10-15 (Winter 1995); John M. Greacen, Legal Information vs. Legal Advice: Developments During the Last Five Years, 84 *Judicature* 198 (Jan.-Feb. 2001).
- ⁷ Richard Zorza, The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers 116 (NCSC 2002).
- ⁸ Forrest S. Mosten, Unbundling of Legal Services, 18 *Fam. L.Q.* 421, 430-33 (1994).
- ⁹ Fred C. Zacharias, Limited Performance Agreements: Should Clients Get What They Pay For?, 11 *Geo. J. Legal Ethics* 915 (1998).
- ¹⁰ *Lerner v. Laufer*, 819 A.2d 471, 483 (N.J. App.), certif. denied, 827 A.2d 290 (2003).
- ¹¹ Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §21.11, at 28 (5th ed. 2003 Pocket Part).
- ¹² Forrest S. Mosten, Unbundling Legal Services: A Guide to Delivering Legal Services a la Carte 96 (ABA Law Pract. Mgmt. Sec. 2000).

What Causes Trouble: A Few Lessons from the Field

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An “investigate only” retainer that is the only signed agreement in place after full-scale representation has begun confuses rather than clarifies expectations. If new issues arise, they should be handled as different cases with new retainers.

Legal aid firms should have standards of practice that require explicit closing letters in every case, including advice, brief service, and extended service cases. A good closing letter, written in plain English, is the only truly effective way to establish that a course of representation has ended. It also wouldn't hurt to have a peer or supervisor review every file before a case is closed in the firm's database. This review should, at the very least, check for a retainer and a closing letter, as well as any appropriate documentation that might be required in the course of representation.

Representation Creep

As I was helping Ms. Marlow on her divorce a few years ago, she got fired for missing too much work while she was taking care of her sick kid. I don't know much about employment law, but I wrote the employer a letter, asking him to give her a break. My letter didn't stop her from getting fired but she did get her divorce. I just got a call from an employment lawyer who tells

me that Ms. Marlow had an obvious Family and Medical Leave Act claim. She's missed the Act's two-year statute of limitation. The guy says we owe her \$25,000 in lost wages plus damages.

In legal aid firms throughout the country, files are full of helpful letters like the one this lawyer sent, addressing issues unrelated to the initial case and involving legal questions that the advocate may know little or nothing about. These issues may often be far more important to the client than the presenting case. Of course the retainer agreement will not cover the scope of representation on the new question.

Each legal aid firm should have explicit protocols and standards of practice requiring that new issues should be treated as new cases, with separate files and separate retainer agreements. The benefits of this policy should not need to be explained: With new files the program gets a more accurate picture of what it is accomplishing for clients. The client gets a more accurate understanding of what the firm is doing and not doing about different problems. The advocate is forced to think more precisely about the new issue, and decide whether he or she is the one to handle it or whether it should be referred to another lawyer in or out of the legal aid firm.

To make sure that advocates follow this standard of practice in their individual cases, firms should back up their standards by having complete, periodic, hands-on review of open cases. (See Standards for Providers of Civil Legal Services to the Poor, *Commentary* at 3.4.)

These three standards of practice – involving tickler systems, retainers and closing letters, and the scope of representation – are simple concepts. If adopted and consistently followed, these standards would go a long way toward helping legal aid firms avoid many of the common problems that arise in the course of representation. When problems do arise, they help the firm show that it has made a good faith effort not only to avoid loss but to provide quality representation.

The author is General Counsel to the Legal Aid Society of Middle Tennessee and the Cumberlands, where among other things he acts as an advisor on ethical issues to a staff of 35 attorneys. Until a recent consolidation, he was the director of a legal aid firm for 22 years. He had conducted on-site assessments of over 70 legal aid firms throughout the country.

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