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The Road Not Taken: Declining Representation

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You are meeting with a prospective new client. Although the matter involved is right in your wheelhouse, you are put off by the prospective client. He tells you that he has had three previous lawyers on this case and none of them listened to him. He wants someone “tough” and “aggressive” because he wants to inflict “maximum pain” on the other side. The prospective client says that he will “spare no expense” and wants “no stone left unturned.” He then adds that he stiffed his last three lawyers because he didn’t get what he wanted.

In an era of pervasive pressure to “market” both their firms and themselves, should lawyers take on every prospective new client who appears to have some reasonable ability to pay their bill? Sometimes, the answer is “no.” The smartest decision in a situation like our opening illustration can be to pass altogether. In this column, we’ll look first at common “red flags” that warn of high risk clients and then we’ll turn to equally common consequences of ignoring those risks.

Red Flags

Lawyers normally think of RPC 1.16 as the “withdrawal rule”—cataloging the circumstances when we must or may withdraw. The technical name of the rule, however, is broader and covers “declining” as well as “terminating” representation. For regulatory purposes, the “declining” concept generally means that we shouldn’t take on a matter unless, in the words of accompanying Comment 1 to ABA Model Rule 1.16, “it can be performed competently, promptly,

without improper conflict of interest and to completion.” For risk management, however, thinking about the reasons lawyers withdraw can provide a useful filter for gauging what prospective clients should be avoided in the first place.

Although there are several, we’ll look at three in particular.

First, if the prospective client suggests or implies that you should take actions that violate the RPCs or would expose you to sanctions, it should be a short meeting. RPC 4.4(a) prohibits lawyers from using “means that have no substantial purpose other than to embarrass, delay, harass or burden a third person[.]” ORCP 17C(2), in turn, imposes a similar standard for sanctions on lawyers signing pleadings, motions and “other documents.” Although some prospective clients simply are not aware of the rules that govern lawyer conduct and back off once informed, others do not. With those that don’t, lawyers also need to be wary about trying to convince themselves that they will be able to “control” a client with this mindset. Just as RPC 1.16(a)(1) tells us we must withdraw from a matter if remaining would cause us to violate the RPCs, we should also heed that warning in deciding whether we should take a matter in the first place.

Second, less dramatic but equally telling, a prospective client who doesn’t listen also poses a distinct risk. We have probably all had clients who “vent” and

then listen. But, a prospective client who won't listen in an initial meeting is unlikely to pay attention later to the more nuanced analysis that most legal problems involve and may not cooperate in providing information the lawyer needs to handle a matter. RPC 1.16(b)(6) counsels that we have the ability to withdrawal from matters which have been "rendered unreasonably difficult by the client[.]" If you sense that in short order you will be consulting this rule if you take the matter on, that is probably a good sign that you should decline up front.

Third, for every lawyer who has heard the phrase "spare no expense" and found a pot of gold, there are many more who found an empty pail. There are indeed "bet the company" cases where clients understand that expenses will, of necessity, be substantial. If you are being told to "spare no expense" on a more mundane case where there is no obvious rationale, however, your radar should be triggered. Especially when coupled with statements that prior lawyers weren't paid for one reason or another, you should not expect to be an exception. The most common reason most lawyers withdraw (under RPC 1.16(b)(5)) is that they haven't been paid.

Risks

The risks with the kind of client imagined in our opening scenario are often twofold.

First, a prospective client who gives the appearance that he or she will never be satisfied with a reasonable result under the circumstances probably won't magically change that view if they actually become a client. Although some dissatisfied clients pay their bill, many do not—often rationalizing (as in our example) that the lawyers didn't measure up. Particularly with clients of the “spare no expense” variant, it can be relatively easy to outrun an initial advance fee deposit and leave the lawyer exposed to a substantial unpaid fee.

Second, unhappy clients who don't pay the bill also may complain about their lawyers' conduct—either as a shield to a fee collection effort or in an attempt to ward one off altogether. With ORS 9.537(1) providing bar complainants absolute civil immunity, a bar complaint offers a disgruntled former client an easy avenue for what the military calls an “asymmetric attack”: cheap for the attacker and expensive for the defender. The threat of a malpractice counterclaim—however thin—can take the economic air out of a fee collection action with equal effect.

Summing Up

The age-old phrase “more trouble than it's worth” applies to some prospective engagements. In the rush to bring new business on board, lawyers should undertake a realistic assessment of prospective clients to determine

whether some present more economic risk than potential gain. In at least some instances, the best decision will be to “pass.”

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