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The art of no

An essay on managing the difficult task of rejecting potential clients

"You better learn how to say no." Another piece of sage and simple advice from my mentor as we discuss my impending treasonous move from the friendly confines of his defense firm to the cold, harsh realities of solo plaintiffs' practice. I would do well to write out a list of these one-liners before I forget them all and put them on my wall to look at before I start work each day. As with most of his advice, my experience has quickly shown the wisdom in his words and often in ways I never initially expected.

For those of you who have been running successful plaintiffs' firms of any size, the importance of saying no to potential cases is elementary. For me, it has been one of the most surprising difficulties in starting my new practice. I knew from a business and practical perspective it was going to be important and I believed that my few years analyzing and deconstructing cases as a defense lawyer had prepared me to make intelligent business decisions. I got that part (mostly) right.

It is the emotional rollercoaster of rejecting another human in need that was unexpected and most problematic. I have been kept up at nights with my insides torn apart due to the heart wrenching circumstances of potential clients that I have been unable to help. I often put off phone calls to clients to tell them that I can't take their case for days, dreading that terrible moment of disappointment. The haunting experience of saying no to one client in particular provided me with the motivation to write this piece.

Saying no to a potential client and case involves moral, ethical, practical and business issues that must be considered each and every time we are contacted by a potential client or with a potential referral. I will briefly review the importance of each of these aspects of rejecting a potential case.

Business concerns

I'm sure that one of the first thoughts that goes through any successful plaintiffs' attorney's mind when learning about a new case is "can I make money on this one." Unfortunately, for those of us who have yet to make it over the hump to the green pastures of relative financial stability, it is often the only question we ask in evaluating a case. Whether finances are the only or just and important consideration, case screening is one of the most important and regular business functions that we engage in as plaintiffs' attorneys.

The business aspects of screening potential cases have been the subject of several previous Advocate articles. Through a quick search, I was able to find past articles written by the following authors, with the category of the article in parentheses: Steven Mehta (Client); Kevin Rivin (Employment); Michael Blum (Law Firm Business); William Daniels (Law Practice Management); Elise Sanguinetti (Premises Liability); and Brian Chase (Products Liability). At the risk of crowding his inbox, in the mid-1990s Arlan Cohen wrote a great chapter on how to financially evaluate medical malpractice cases. The equation he came up with is applicable, perhaps with a few tweaks, to financially evaluating a case in any practice area. I strongly recommend anyone review these sources to gain new or additional ideas for how to evaluate potential cases.

Given my relative inexperience in this field, I'll limit my advice to one tip for anyone starting a new solo or small firm: err strongly on the side of caution and only take cases that you are fully comfortable with. You don't have to read "A Civil Action" to know that one case can sink even a successful firm, let alone a start-up. Although it is an understandable concern that you will be left without anything to do if you say no, it is a huge mistake to address this concern by taking on anything that comes in the door. If you have an effective marketing strategy you will quickly have more than enough work to keep busy. Any small amount of down time you might have is going to be much better utilized by dedicating it to working your new office into shape, marketing for new opportunities, or perhaps observing any of the many talented lawyers in this organization trying a case.

Practical concerns

There are many practical aspects to rejecting cases. For example, we are often too busy to properly analyze the client's case and provide them the representation they need. This is especially true for those clients who come to us in urgent need of help, shortly before the statute of limitations or while representing themselves in active litigation. Sometimes an initial burst of effort can buy us the additional time necessary to represent the client, but often it is an immovable obstacle to accepting the case.

Obviously a practical question is whether you can either settle or win the case a reasonable percentage of the time. Sometimes a client strikes us the wrong way, a complete legal defense is obvious in the facts, or past experiences with similar fact patterns have shown us that success is unlikely. Any variety of circumstances may shift that estimated probability of success to below an acceptable threshold. Issues of venue, the availability of insurance coverage or financial assets to cover the claim and the amount of work likely required to prosecute the claim versus the likely recovery are also common considerations. Also important to address is how the estimated costs of the case are going to be covered. Each case has a highly specific set of practical factors that can lead to saying no to a potential client.

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Saying no must also be carried out in the proper manner. Best defensive practices dictate some sort of writing to the client, either in a letter or email, including a statement that there is a statute of limitations applicable to their case. This ensures that the client receives the message that you cannot represent them and documents a definitive no. However, a letter may not always be feasible and is sometimes unnecessary. Saying no to a referral from another attorney is probably safely done verbally as the other attorney bears the responsibility for client contact. Sometimes we may not even have an email or mailing address for a potential client, such as the case of a simple phone call from a potential client. The principle of all of this is that the client needs to be clearly told no and you should do your best to document that in some way in case there is ever a future issue.

Lastly, if you are a member of a referral panel, make sure that your rejection of a client referred to you by that panel complies with the rules that panel has in place. Typically sending that client back to the referral panel is required. For example, I am on the Long Beach Bar Association's referral panel and often receive calls from potential clients out of the blue. I take notes, including the name and number, and spend the amount of time necessary to determine if the case is worth further investigation or not. If the answer is no, I tell the potential client to call the panel back and put the notes in a file so that I have some record of the conversation and the fact that the client was told no.

Ethical matters

There are several important ethical rules that must be considered before agreeing to represent a new client. California Rules of Professional Conduct rule 3-110 states that attorneys must apply the necessary level of diligence, learning and skill, and mental, emotional and physical ability reasonably necessary for the performance of the services to the client. Attorneys without the initial requisite learning and skill can agree to representation if they either associate or consult with another competent attorney or acquire sufficient learning and skill before performance of the services is necessary. Taking on representation that you are ill equipped for in any respect is not only unethical, but it is bad business. Defense attorneys in most practice areas can sniff out weakness and inexperience and you will likely end up losing money in the long run if you accept cases you are not fully competent to handle.

Another important ethical consideration is conflicts of interest with current and former clients. The topic of conflicts of interest is well beyond the scope of this piece, but a good starting place is California Rules of Professional Conduct rule 3-300, et seq. and The Rutter Guide on Professional Responsibility. For purposes of this article, it is enough to state that establishing a system for performing a conflicts check when considering potential clients is a required step of the process of evaluating cases and clients.

In sum, careful thought about the entire scope of the potential case should allow you to identify potential ethical issues, research them if necessary, and make an intelligent decision about whether you can accept the case. It is incumbent upon us to say no to any potential client where an ethical violation is unavoidable. Taking the necessary time at the outset of every case to at least think about the ethical issues can help you avoid ending up in hot water later.

Moral

I strongly believe that it is our moral duty as lawyers, and especially as lawyers representing individuals, to say no as infrequently as possible despite the reality that we cannot possibly help everyone who comes through our doors. We are the guardians of society and are not doing our jobs if we say no to every case with a potential difficulty or pitfall. As a whole, this organization has an unbelievable wealth of knowledge, experience and talent. If we each strive to take on an additional case or two that may not have the financial upside often desired, but with the potential to help someone in real need, we can do a whole lot of good for our community. In the long term this will bolster our reputation as an organization dedicated to fighting for those in need and help to destroy the negative stereotypes often applied to us.

There is also a morality to the way in which we say no. Often we can do as much good in the manner that we say no to a case as if we took it on ourselves. One of the most obvious examples is by referring the matter to a trusted colleague who can provide competent services and is likely to have the time and desire to take on the case. The value in referring cases is obvious in the fees and return referrals generated, but it is important to remember that the ultimate victory is for the client who obtains the best possible result due to the referral.

I also recommend that where possible and appropriate you provide the potential client with an honest and reasonably detailed explanation of why you cannot take their case. I have been surprised by the gratitude of several clients after receiving my explanation for why I could not take their case. A detailed and reasonable legal opinion about their case can allow a person the closure and peace of mind to move on from the events that led them to seek counsel in the first place. The negative experience of being rejected by you turns into a positive and over the long run will help to establish your reputation in the community as a professional and honest attorney.

Providing the rejected client with some reasonable amount of legal explanation also does our community of lawyers a favor. If you are not willing to take the time to refer the matter to a colleague, the likelihood that any other attorney will be interested in representing the client goes down significantly. We have all spent time evaluating fatally flawed cases that have been rejected by several attorneys. Many clients are reasonable people and will make intelligent decisions if we simply give them the information and tools to do so. By providing something more than a form rejection letter at least a percentage of those seeking counsel for an issue for which there is no legal redress will be satisfied and the time of the attorney down the road will be spared.

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Finally, our powers are not limited to providing legal advice and representation. A moment of critical thought may reveal an alternative method for the client to get the assistance they need or a piece of practical advice for the person. Many of us have made powerful connections in the community that can be used, in appropriate times and doses, to help out those in need. A referral to a charity, potential employer, physician specializing in treating their condition, or other appropriate resource empowers the potential client and again can be as productive as if you had taken the case.

Conclusion

Rambunctious (that's putting it nicely) children like me got used to hearing their exasperated mothers exclaim, "What is it that you don't understand about NO? N…O…?" It is rather ironic that during the first few months of solo practice I have learned that the answer is still quite a lot.

Saying no to potential clients is an integral and everyday part of life as a plaintiffs' lawyer. No matter how large or small the firm, how green or experienced the lawyer, it is something we all have to deal with. To say no can be done with little thought or effort and if so is probably doomed to failure. But, if we pay critical attention to the manner in which we reject each and every case we say no to, we can become masters at this art. By doing so we can make a most difficult and potentially negative part of our practices a positive. Ultimately, saying no to potential clients the right way and for the right reasons is as important to our long-term success as saying yes.

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