Risk Management and Potential Malpractice Liability to Third Parties

By Gilda T. Russell

I. Introduction.

A growing concern for law firm risk management is potential malpractice liability to third parties. Historically, a firm could be potentially liable only to “clients” for claimed malpractice. Clients are those persons or entities with whom a firm has an express attorney-client relationship or one that can be implied from the circumstances. However, over the years, a number of jurisdictions have allowed claims against firms by non-client third parties in certain limited circumstances. While it may be difficult to prevent claims in this area, some measures firms can employ in an attempt to reduce risk are briefly discussed below.


A firm must be clear at the outset of a representation, as well as throughout its duration, who is and who is not the client. The best way to demonstrate an express attorney-client relationship is through an Engagement Letter. The Engagement Letter should be written to a client or the client’s legal representative at the beginning of the representation. The letter should state, among other things, the identity of the firm’s client, and, where appropriate, who is not the client, the scope of the firm’s representation, and other terms that control the representation. The client should sign and return the signed Engagement Letter to the firm, and the firm should file the letter in a manner so that it is readily available if later needed. To the extent that there may be any changes over the course of the representation to its terms, including with regard to the identity of the client or clients, the firm should send to the client a Modification of Original Engagement Letter, have the letter signed and returned by the client, and file it so that it also is readily available.

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2 For suggested contents of an Engagement Letter, see Paragon Forms Library, Sample Engagement Letter.
3 For suggested contents of a Modification of Original Engagement Letter, see Paragon Forms Library, Sample Modification of Original Engagement Letter.
Of course, a major risk management concern regarding liability to third parties is that a non-client may claim that he/she/it is a client of a firm and, as such, is owed a duty of care. Consequently, one way in which a firm can insure against third party malpractice claims based on allegations of an express or implied attorney client-relationship is through the use of a Declined Client Letter or a "You Are Not Our Client Letter." The Declined Client Letter should be written to a person or entity who or which may have sought the firm’s representation in a matter, but who or which the firm has declined to represent. The Declined Client Letter should also be written to a person or entity whom or which, while having some relation to a matter in which the firm does represent a client or clients, is not the client of the firm in the matter.

A Declined Letter should specifically and unequivocally state that:

the firm does not represent the person or entity in the matter or in any other matter,

the person or entity should seek his/her/its own attorney;

the person or entity should immediately seek other representation to protect legal rights to the extent that certain deadlines or statutes of limitation may apply to the matter in question; and

the firm has not obtained any confidential information from the person or entity.4

As with an Engagement Letter, a Declined Client Letter should be filed in such a way so that it is accessible if needed.

Firms often receive unsolicited or “cold” third party emails, telephone messages, website or other social media communications. Consequently, a firm should regularly utilize a Written Response to Unsolicited Inquiry to guard against third party claims against the firm of either an express or implied attorney-client relationship having been formed through such communications. The Written Response, whether by return email, letter, website response, or other social media response, should clearly state that the firm is not able to provide legal assistance to the inquiring person or entity, that an attorney/client relationship has not been established between the firm and the person or entity, and that the person or entity should not consider him/her/itself a client of the firm.5

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4 For suggested contents of a Declined Client Letter, see Paragon Forms Library, Sample Declined Client Letter.

5 For suggested contents of a Response to Unsolicited Email, see Paragon Forms Library, Sample Response to Unsolicited Email.
At the end of a representation, a firm should send the client a Disengagement Letter. The Disengagement Letter should state that the matter has been concluded and the firm’s representation of the client completed. The Disengagement Letter should also provide that the firm will not advise the client further in connection with the matter or of any possible future developments regarding the matter. The Disengagement Letter should also be positive and thank the client for the opportunity to have represented the client. The letter may also note that, if there are other matters in the future in which the firm could be of assistance to the client, the client should not hesitate to contact the firm.⁶

III. Be Aware of the Circumstances that Can Lead to Malpractice Liability to a Third Party Non-Client and How to Minimize Risk.

Even if a third party is neither an express or implied client of a firm, certain circumstances can give rise to a firm owing a duty to the third party and potential malpractice liability depending on the jurisdiction. It is important for firm lawyers to have an awareness of these circumstances and how to minimize the risk of liability when dealing with them.

--Intended Beneficiary. Liability to a non-client third party can arise if the third party is the intended beneficiary of a firm’s representation of a client.⁷ Potential liability in this area is most likely to arise in the context of a firm’s wills and trusts practice.⁸ An intended beneficiary who loses rights because of a firm’s negligence in the drafting of a testamentary instrument has a cause of action in many jurisdictions. Thus, firm lawyers practicing in this area should be very certain of a client’s intentions as to his or her beneficiaries and proceed with extreme caution in drafting instruments in order to carry out such intentions.

--Foreseeability. Liability to a non-client third party can arise if it was reasonably foreseeable that a firm’s negligence or negligent misrepresentation could cause harm to others.⁹ In this area, firm corporate lawyers who write opinion letters should be cognizant of potential liability to third parties who may rely on

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⁶ For suggested contents of a Disengagement Letter, see Paragon Forms Library, Sample Disengagement Letter.
such letters. In addition, in all firm practice areas, firm lawyers should be careful not to make misrepresentations to anyone who may rely on them.\textsuperscript{10} It has been stated that, to avoid liability in this area, lawyers should use written limitations and disclaimers and also convey that their comments are opinions rather than statements of fact.\textsuperscript{11}

\textbf{--Multiple Factors.} Some jurisdictions have employed a balancing test of multiple factors in determining whether a firm may be liable to a third-party non-client for the firm’s malpractice. These factors include the two factors discussed above: was the third party an intended beneficiary of the firm’s services and was the harm to the third party caused by the malpractice reasonably foreseeable, and also the additional factors of how close is the connection between the malpractice and the harm to the third party, how certain is it that the third party suffered harm, would finding liability promote a policy of preventing future harm, and would finding liability unduly burden the profession.\textsuperscript{12}

\textbf{IV. Conclusion.}

Risk management concerns for the potential of third party malpractice claims are growing and significant. Such third party claims may be brought by persons or entities who or which claim to be firm clients, or, notwithstanding their third party non-client status, nonetheless allege a duty was owed them. It is hoped that the measures discussed above will be helpful in reducing some of the risk in this area.

\begin{footnotes}
\item[10] See provisions of \textit{Restatement (Second) of Torts} §552 (1997).
\item[11] Strick and Tafflin, “Can Lawyers Be Sued by Non-Clients?”
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