

Chapter Two

Client Intake, Initial Screening, and Client Engagement Agreements

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Establishing a relationship with a prospective client is a critical part of the practice of law. First impressions stick, both with the prospective client and the prospective lawyer. The right process for interviewing clients and screening them for suitability can save hours of grief later.

DEVELOP A REPEATABLE PROCESS

Creating a repeatable client intake and initial consultation process that includes the use of templates and leverages technology will increase your efficiency and decrease your chances of missing important facts or steps. While specific intake processes will vary depending on the attorney, firm, and area of practice, the general flow of an intake procedure will include:

- initial/pre-screen that involves a conflicts check and controls the attorney's risk; this is where attorneys should avoid discussing confidential information;
- follow-up conversation to obtain greater detail;
- full meeting to review the case, create an engagement agreement, and discuss management of the legal issue and client expectations.

Pre-screen

The easiest and most obvious way to accomplish pre-screening is by asking basic questions. Good templates will help you catch conflicts of interest and other "red flags" about the requested representation, so develop and use a client intake template to complete this task.

Importantly, while intake provides an opportunity to build rapport with a client and screen for potential conflicts, it is the latter that is the most important aspect initially as attorneys have an ethical duty to conduct a thorough conflicts check. To adequately conduct a conflicts check, you must gather the following information:

1. Names of clients and matters, including all surnames or other names used;
2. Names of adverse parties;

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3. Names of related parties (witnesses, experts, insurance carriers, family members, co-counsel, opposing counsel, related entities, owners of business entities);
4. Names of potential/rejected clients and matters;
5. Dates matters were active/closed/rejected; and
6. Names of timekeepers who worked on particular matters.

After obtaining enough initial information, conduct a thorough conflicts check before discussing any confidential information with the potential client.

Conflicts can arise in many ways, including:

- Being adverse to a current client in any matter, however unrelated;
- Being adverse to a former client in a substantially related matter;
- Representing multiple clients in a single matter;
- Conflicts resulting from dealings with prospective clients that do not mature into engagements;
- Personal interest conflicts, including but not limited to business transactions with clients, gifts from clients, providing financial assistance to clients, sexual relationships with clients.

There are several vendors offering conflict checking software. For further reading on conflicts and establishing a conflicts checking system, see the Appendix to this chapter.

Follow-Up Initial Consultation

“Meet” with the potential client, either in person or virtually (through an online intake system), to discuss and assess his or her perceived legal issues, goals, expectations, budget, etc. and what he or she values most. Again, developing an initial consultation template for each area in which you practice will streamline the process.

The initial consultation is important to the client because the client is trying to decide if you are competent and, most important, if you are the right attorney for him or her. Here are some quick practice pointers for an effective initial consultation:

- *Engage in active listening.* Give the client an opportunity to describe his or her legal issue before you start asking questions. You don’t want to turn this meeting into a client interrogation. Make sure there are no distractions to draw your attention away from the client (turn off cell phones and email alerts).
- *Offer emotional sensitivity.* Provide a safe space for the client to speak frankly and try to empathize with their trouble. In doing this, you will gain the client’s trust which is important to a healthy attorney-client relationship.
- *Avoid problem solving and legal advice.* Remember that the purpose of this meeting is to determine if it is a good fit. It will not be uncommon for a client to ask a complicated legal question yet think the answer is simple. Avoid the urge to offer legal advice and

simply explain that there is no simple answer. Also, if you are unsure of the answer don't be afraid to be honest and explain "I don't know the answer but I can research it and get back to you."

- *Don't be afraid to reject a bad fit.* This is hard, but undoubtedly the most important. During the initial consultation, it is your opportunity to decide if it is a good fit. Don't be afraid to trust your gut and turn down representation as you will save yourself endless time and frustration.

During this meeting, it is important to discuss different fee arrangements. It is likely that as a part of this conversation you will be educating the potential client about limited scope representation and alternative fee structures associated with this practice. Be sure to review Chapter 3: Pricing, Fee Structures, Billing and Collection, as well as Chapter 5: Unbundling/Limited Scope Representation.

After the meeting, determine whether taking the case is a good fit for your practice by comparing what you learn about the client and case with your case acceptance guidelines. See the next subsection for information on developing case acceptance guidelines.

Consider Online Intake

To further streamline your process, you might consider conducting an online intake. Software now allows lawyers to move the client intake and initial consultation process online. Conducting intake online can benefit both potential clients and lawyers. Online intake provides potential clients with greater flexibility and convenience because they can complete the process at a time and location that is convenient for them. Lawyers can benefit by reducing data entry errors, having the ability to easily sort and analyze potential client data, and improving organization and workflow through the seamless connection between their client intake software and case management system ("4 Reasons Why Online Client Intake is a Game Changer," Clio Team Member, GoClio.com (March 19, 2015)). If you do decide to move your client intake process online, you should seriously consider including a click-through website disclaimer to decrease the chances of a potential client prematurely thinking the attorney-client relationship has begun.

Example: I am a lawyer, but I am not your lawyer (unless you have signed a contract with my office). This communication is not intended as legal advice, and no attorney client relationship results. (From *PA Law Practice Management*, by Ellen Freedman.)

Unless you have a practice where you deliver all or some of your legal services online, conducting all of the initial consultation online might not be the best option. Meeting a potential client in person or conversing with him or her via a software application such as Skype or Zoom for at least part of the initial consultation will allow you to better assess the potential client's personality and have a more interactive and fruitful discussion. This is your opportunity to

connect with the client and help the client see why you are the right lawyer to see him or her through the legal process. An online interactive procedure does not offer this chance to bond and gain the client's trust and business.

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Engaging in Attorney-Client Relationship

If both parties have agreed that there is a good fit, draft a client engagement agreement and make sure it is signed by both the attorney and client. Not only is this an ethical requirement, it is good business practice; the client can see up front what he or she will be getting and paying for that service. The client gets a copy and a copy goes in the file. See the following subsection for information on drafting client-engagement agreements.

TIPS

1. Develop a repeatable client intake process.
2. Establish case acceptance guidelines.
3. Do you have a process by which you identify conflicts? See Colo. RPC 1.7.
4. If you have a conflict, but it is consentable, have you obtained valid consent? See Colo. RPC 1.7.
5. Decide how the attorney-client relationship should be structured, specifically considering whether the case might be appropriate for unbundling. See Chapter 5: Unbundling/Limited Scope Representation.
6. Listen carefully to the client, discuss client expectations, and establish reasonable expectations.
7. Make sure the agreement is outlined in a Client Engagement Agreement.
8. What is your policy regarding communication with clients, and have you asked the client what communication methods are preferred? Do you communicate with clients in a professional, timely, and efficient manner that is also respectful of the client and his or her needs? See Colo. RPC 1.4.
9. Trust your gut and don't talk yourself into taking a client you don't feel comfortable representing.
10. Every time you speak with a potential client and decline representation, follow up with a non-engagement letter that affirmatively states you are not representing him or her. See Colo. RPC 1.4.

If there is a good fit in any matter in which you might have a conflict or potential conflict, the conflict might still be consentable. Colo. RPC 1.7 and Colo. RPC 1.0. As stated in Rule 1.0(e), Informed Consent, and comments [18] and [19] to Rule 1.7, informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. The information required depends on the facts and circumstances of the case and the risks involved. The information has to address the implications of the common representation in that matter, including the possible effects on the attorney's duty of loyalty, confidentiality, and privileges, and the advantages and risks involved. For sample engagement and non-engagement templates due to conflicts, see Forms2Share at www.cobar.org/lpm.

If there is not a good fit, be sure to notify the potential client in writing through a non-engagement letter so there is no doubt that there is no further attorney-client relationship. Don't forget to log this client into the conflicts database! You may also consider providing the client with referral options. It is also a good idea to offer the client alternative options if he or she doesn't have the resources to hire you. For sample non-engagement templates, see Forms2Share at www.cobar.org/lpm.

CREATE CASE ACCEPTANCE GUIDELINES

The right process for interviewing clients and screening them for suitability can save hours of grief later, so it is important to create case acceptance guidelines and stick to them. When considering whether to take a case, ask yourself the following questions:

- Are you comfortable with this kind of legal work? If not, do you have the time and desire to become competent in the relevant practice area?
- Do you feel comfortable with this client? If there are personality clashes already, beware — differences at early stages will be magnified if the representation does not go exactly as the client expects.
- Are the client's goals and expectations reasonable?
- Can the client afford the amount of work necessary to accomplish the task?
- Do you have the necessary time to commit to the matter?
- Will other professionals (lawyers, expert witnesses, etc.) be needed?

Consider incorporating these guidelines into your client intake and initial consultation templates.

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IDENTIFYING GOOD CANDIDATES FOR LIMITED SCOPE REPRESENTATION

While limited scope representation is a good and helpful option for many clients, it is not appropriate for everyone and can actually do more harm than good if offered to an inappropriate candidate. When evaluating a case and potential client during the initial consultation to determine whether both are a good fit for limited scope representation, ask yourself these questions:

- Does this case fall within your area(s) of expertise?
- Do you have enough time during which to provide competent assistance (or has the client come to you with a last minute “emergency”)?
- Are you the first lawyer the client has consulted regarding the potential representation?
- Does the potential client have realistic expectations about his or her ability to handle all or parts of the case on his or her own or what you can achieve?
- Does the potential client have the mental, physical, and emotional capacity to handle parts of the case himself or herself?
- Is the potential client capable of representing himself or herself in court?
- Can the case be broken down into discrete steps that can be easily divided between you and the potential client?
- Have all parties been identified?
- Will the other party be difficult to find or serve?
- Are you able to verify the client’s material facts and, if not, does the client understand the consequences of proceeding without your verification?
- Is the case simple enough substantively, strategically, and tactically to allow for a workable allocation of responsibilities between you and the potential client?
- Is the client coming to you before the case has started (*i.e.*, are you working with a clean slate)?
- Is your client able to focus on legal outcomes after you have explained them to him or her (or does he or she seem more focused on revenge)?
- Would the limited scope of your representation be reasonable? See Colo. RPC 1.2.
- Does the potential client seem open to discussing and agreeing to fees?
- Is this a field of practice allowing limited scope representation?

If the answer to any of the above questions is no, you should consider declining to limit the scope of the representation. Additional items to consider include:

- **Whether There Is an Imbalance of Power Between the Parties.** If there is, can you work with the potential client on this case? Is he or she emotionally equipped to handle parts of the case himself or herself? Domestic violence cases typically involve a great disparity in power between the abuser and the survivor. While many survivors would not be equipped to handle any part of the case on their own, some survivors are able to do so and can greatly benefit from coaching from a lawyer prior to going to court.

- **Whether There Is a Language Barrier.** If English is not the potential client's first language and you do not also speak his or her first language, it is important that you hire an interpreter for all parts of the case so that the potential client fully understands the limitations of the representation and what that means for him or her.

During the initial consultation, it is important that you discuss the following items with a potential client who might be a candidate for limited scope representation:

- **The Differences Between Limited Scope Representation and Full Representation.** Explain the differences between the two models to the potential client and make sure the client fully understands his or her role and responsibilities associated with limited scope representation if he or she chooses that option.
- **Proper Filing and Service of Pleadings and Deadlines.** During the initial consultation, you should provide specific instructions to the client regarding proper filing and service of pleadings and advise the client of the importance of deadlines and how he or she will be responsible for keeping track of them.
- **Problems the Potential Client Is Likely to Face.** Try to foresee the problems the potential client is likely to face during the case. Remind the client verbally and in writing of those problems and of his or her independent responsibility for managing them.
- **Issues Outside of the Scope of the Limited Scope Representation.** You *must* advise clients on all related issues outside the scope of the representation and of their right to seek advice on issues outside the scope of the representation, even if they do not ask. Be sure to include this item in your initial consultation checklist(s).

"Unbundling 101: Expanding Your Practice Using Limited Scope Representation," M. Sue Talia, Practicing Law Institute CLE Materials (Jan. 30, 2015), and "Unbundling Legal Services: Options for Clients, Courts & Counsel," Janice B. Davidson, Institute for the Advancement of the American Legal System (Oct. 2015).

CLIENT ENGAGEMENT AGREEMENT

Once you and your potential client have agreed to enter into an attorney-client relationship, it is important that you outline the agreement in a Client Engagement Agreement. Make sure you note any limitations of the scope of the representation (if any) and specifics of the corresponding fee arrangement. Although Colo. RPC 1.5(b) limits any requirement for lawyers to provide clients they have "not regularly represented" with a written engagement agreement, it is highly recommended that lawyers memorialize Client Engagement Agreements in writing in all cases.

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All Client Engagement Agreements should:

- **Define the Scope of the Engagement and the Fee Arrangement.** Your Client Engagement Agreement should first and foremost include the scope of the agreement you reached with your client: what services you have agreed to provide and how you are going to charge the client for those services. Be sure to disclose whether any work will be outsourced to independent contractors. See also Chapter 9: Staffing.

If you are offering limited scope representation, it is best if you can list all of the tasks that need to be completed during the scope of the representation and indicate who is responsible for handling each task. Both you and the client should be able to pick up the Client Engagement Agreement and determine what falls inside and what falls outside of the scope of the agreement. If at any time after you and the client sign the Client Engagement Agreement you expand or contract the scope of the representation, you should draft and sign a new Client Engagement Agreement outlining the new scope of the representation. See the Appendix to this chapter. See Practising Law Institute's "Expanding Your Practice Using Limited Scope Representation" webinar at www.pli.edu for sample forms: an Initial Consultation Checklist; an Attachment to Limited Scope Representation Agreement – Tasks to be Apportioned; an Attachment to Limited Scope Representation Agreement – Issues to be Apportioned; a Follow-up Checklist; and a Tickler Checklist. This webinar is free for all lawyers.

Your Client Engagement Agreement should also clearly outline the fee arrangement, including the following details:

- How much you are going to charge the client;
- When the client is responsible for making payments;
- What forms of payment you accept; and
- What happens if the client does not make the payments on time, including your right to terminate the relationship and withdraw (consult Colo. RPC 1.16 prior to withdrawing from a case).

If certain costs or expenses, such as filing fees, are not included in the fee, it is important to make that clear as well.

If you are offering the client a fee arrangement whereby the client pays all or a portion of the fee up front, be sure to consult Colo. RPC 1.5(f) and include a fee earnings schedule in your Client Engagement Agreement.

- **Include Assumptions Upon Which the Agreement Is Based.** It is equally important to outline in the Client Engagement Agreement what is not included in the scope of the representation and any assumptions upon which the agreement is based. For example, in a domestic relations case, you may offer the client a fixed fee for an uncontested divorce based upon the assumption that the two parties have already

reached an agreement on all issues pertaining to their children. Another example could be that you offer to serve as an on-call general counsel for a small company on a recurring fixed fee basis based on the assumption that the company will remain a certain size and therefore only have certain needs. Spelling out this type of assumption in your Client Engagement Agreement will protect you from getting stuck in a lopsided agreement where you are working many more hours than you bargained for because an assumption turned out to be incorrect.

- **A Right to Renegotiate Clause.** While the goal is to factor as many potential outcomes into your pricing structure as possible, it is often nearly impossible to do so. It is therefore advisable to include a right to renegotiate clause in all of your Client Engagement Agreements. These clauses should be enforced when an unforeseeable outcome has arisen and enforcing the clause is reasonable under the circumstances. If you do choose to renegotiate a fee arrangement with a client, be sure to first consult Colo. RPC 1.8(a). Because the renegotiation could possibly constitute a business transaction, it is best to be on the safe side and afford the client the safeguards outlined in this rule, such as drafting and signing a new written Client Engagement Agreement outlining the new scope of the engagement and fee structure. See also Colo. RPC 1.5(b).
- **Set Boundaries.** When offering alternative fee arrangements, it is essential to strike a balance that:
 - Allows clients to feel that they can contact you without being nickled and dimed when they have new information or a new problem that is relevant to their case; but also
 - Allows you to stay efficient and profitable by not causing you to spend more time on the case than necessary.

One way to proactively handle these situations is to include communication guidelines or requirements in your Client Engagement Agreement. For example, you could require your client to send all communication to you via email, or you could require clients to limit calls to one time per day. You should then have a candid conversation with your client about your communication boundaries, why you have instituted them, and how they will positively affect the client.

- **Include a Clause on Termination by the Client.** The Client Engagement Agreement should specify that the client may terminate the agreement and representation at any time and outline what happens when the client makes that choice. For example, procedures for the return of the client's file and any unearned fees should be spelled out. Lawyers are prohibited from including any improper fees, charges, or waiting periods in the Client Engagement Agreement that would in any way limit the client's absolute right to terminate the relationship.

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- **Include a Clause on Termination by the Lawyer.** The Client Engagement Agreement should also outline the situations in which a lawyer may withdraw from a case and the associated process, including the client's rights and the court's role in the process.
- **Outline a Fee Dispute Process.** The Client Engagement Agreement should outline what happens when a fee dispute arises, including the remedies available to the client and the lawyer. One dispute resolution option is the CBA Legal Fee Arbitration Committee. See www.cobar.org/For-the-Public.

If the Client Engagement Agreement is for limited scope representation, it should also make clear that the client is responsible for disclosing material facts to you and complying with rules, statutes, and deadlines, and should outline who is responsible for communicating with other lawyers, mediators (if applicable), and court staff (if applicable) on the client's behalf.

Please note that the above list is by no means exhaustive, and you should carefully consider each provision in your Client Engagement Agreement with each client. To work at maximum efficiency, consider automating your client engagement process and thinking creatively about rules you could establish that could help you do this. One example might be to require your client to have a functional email address and utilize it as the primary form of communication and service. This would not only increase your efficiency, it would also decrease your expenses. Another example might be to include an outsourcing clause allowing you to outsource some of the legal work in an effort to save you time and the client money, when applicable.

APPENDIX

Colorado Bar Association Resources

Law Practice Management

- As a service to its members, the CBA Department of Law Practice Management provides information and resources on a variety of law practice management issues, including templates on Forms2Share, a collection of materials in the Lending Library, Tech Tuesday Webinars, and monthly newsletters.

The Colorado Lawyer

- "Screen Clients First – Avoid Problems Later," Randy Evans, Shari Klevens & Lino Lipinsky (Dec. 2014)

Solo in Colorado

- “Should a Solo Attorney Charge for an Initial Consultation?,” Melanie Fischer, Blog Post on SoloInColo.com (Dec. 3, 2015)

Colorado Supreme Court, Office of Attorney Regulation

- Proactive Management-Based Program: OARC Subcommittee-developed self-evaluation tool so law firms can evaluate the firm’s ethical infrastructure and proactively address common risks.

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Additional Resources

ALPS Risk Management Resources at Your Fingertips

- www.alpsnet.com/risk-management

Creating Case Acceptance Guidelines

- *Case Acceptance and Client Screening*, Tennessee Bar Association Guide to Setting up a New Practice

Client Intake and Screening

- “Five Questions to Ask a New Client,” Merrilyn Astin Tarlton, Blog Post on AttorneyAtWork.com (Oct. 17, 2014)
- “How to Screen Clients,” Spojmie Nasiri, Blog Post on Nasirilaw.com (June 2, 2012)
- “Client Screening Form Can Help Avoid Tactical Conflicts,” Dan Pinnington, *Slaw* (March 28, 2011)
- “4 Reasons Why Online Client Intake is a Game Changer,” Clio Team Member, Blog Post on GoClio.com (March 19, 2015)
- “Should You Use a Client Intake Form?,” Mark Bassingthwaight, Blog Post on SoloPracticeUniversity.com (Aug. 27, 2015)
- “Best Practices for Effective Law Firm Client Intake,” Christopher Anderson, LexisNexis Business of Law Blog, originally published in *Legal Management Magazine* in June 2013.

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Checking Conflicts

- “Maintaining a Conflict-Checking System,” Marian C. Rice, *Law Practice Magazine* (Nov./Dec. 2013)
- *Creating Conflicts of Interest Procedures to Protect You and Your Firm from Malpractice*, Sandra J. Roberts (2013) (CBA members can check this book out for no cost through the Lending Library)

Client Engagement Agreements

- “Engagement Agreement Essentials,” Allison C. Shields, *Law Practice Magazine* (Nov./Dec. 2015)
- “Today’s Tech: How a Business Lawyer Uses Document Automation in His Practice,” Nicole Black, Blog Post on Above the Law (May 7, 2015)
- “Expanding Your Practice Using Limited Scope Representation,” Practicing Law Institute webinar — free for all lawyers!
- “Simplify Your Retainer Agreement,” Sam Glover, Lawyerist.com (Sept. 2010)
- “Get It Right: Retainer Agreement Do’s and Don’ts,” Dolores Dorsainvil, *The Young Lawyer* (Oct. 2009)
- “Sample Engagement Letters and Fee Agreements,” P.A. Henrichsen, *American Bar Association GPSolo Magazine* (February 2007)

Limited Scope Representation – See Chapter 5: Unbundling/ Limited Scope Representation for more information

- “Expanding Your Practice Using Limited Scope Representation,” M. Sue Talia, Practicing Law Institute CLE Program, Jan. 30, 2015 — free for all lawyers!
- “Unbundling Legal Services: Options for Clients, Courts & Counsel,” Institute for the Advancement of the American Legal System
- ABA Unbundling Resource Center (browse by state), www.americanbar.org/groups/delivery_legal_services/resources.html
- ABA Pro Se/Unbundling Resource Center, <http://apps.americanbar.org/legalservices/delivery/delunbundrules.html>
- American Bar Association Modest Means Task Force *Handbook on Limited Scope Legal Assistance*, <https://apps.americanbar.org/litigation/taskforces/modest/report.pdf>, and Appendix

Authorities

Colorado Appellate Rules

- Colorado Appellate Rule 5(e) — Notice of Limited Representation Entry of Appearance and Withdrawal

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Colorado Rules of Civil Procedure

- C.R.C.P. 11(a), Obligations of Parties and Attorneys
- C.R.C.P. 11(b), Limited Representation
- C.R.C.P. 23.3, Rules Governing Contingent Fees

Colorado Rules of Professional Conduct

- Colo. RPC 1.0(e), Informed Consent
- Colo. RPC 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer
- Colo. RPC 1.4, Communication
- Colo. RPC 1.5, Fees
- Colo. RPC 1.6, Confidentiality of Information
- Colo. RPC 1.7, Conflict of Interest: Current Clients
- Colo. RPC 1.8, Conflict of Interest: Current Clients: Specific Rules
- Colo. RPC 1.10, Imputation of Conflicts of Interest: General Rule
- Colo. RPC 1.16, Declining or Terminating Representation
- Colo. RPC 1.18, Duties to Prospective Client
- Colo. RPC 7.1, Communications Regarding a Lawyers Services
- Colo. RPC 7.2, Advertising
- Colo. RPC 7.3, Direct Contact with Prospective Clients
- Colo. RPC 7.4, Communication of Fields of Practice

Colorado Ethics Opinions

- CBA Ethics Committee Formal Opinion 40, Accepting Case Handled By Another Lawyer
- CBA Ethics Committee Formal Opinion 57, Conflicts of Interest
- CBA Ethics Committee Formal Opinion 68, Conflicts of Interest: Propriety of Multiple Representation
- CBA Ethics Committee Formal Opinion 76, Lawyer Advertising Guidelines
- CBA Ethics Committee Formal Opinion 90, Preservation of Client Confidences in View of Modern Communications Technology
- CBA Ethics Committee Formal Opinion 101, Unbundled Legal Services

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- CBA Ethics Committee Formal Opinion 111, Communication with Represented Person for the Purpose of Providing a “Second Opinion”
- CBA Ethics Committee Formal Opinion 126, Representing the Adult Client with Diminished Capacity

- Formal Opinion 05-436, Future Conflicts
- Formal Opinion 08-453, Consultation Not a Per Se Conflict of Interest with Firm Client
- Formal Opinion 08-450, Multiple Representation
- Formal Opinion 93-377, Positional Conflicts
- Formal Opinion 90-358, Prospective Clients
- Formal Opinion 92-366, Client Fraud
- Formal Opinion 92-367, Client as Adverse Witness in Unrelated Matter
- Formal Opinion 94-384, Disciplinary Complaint Filed by Lawyer Against Opposing Counsel
- Formal Opinion 96-404, Disabled Client