

CHECKLIST FOR AVOIDING PHANTOM CLIENTS

Entering into a lawyer-client relationship imposes considerable obligations on you as a lawyer, and when it comes to conflicts of interest, those obligations can have repercussions for every other lawyer and client of your firm. For that reason, you should enter into a lawyer-client relationship only with full knowledge of the implications that the relationship may have.

In particular, you want to avoid the “phantom” or “ghost” client – the client you don’t even know you have. In Oregon, the general rule for determining whether a lawyer-client relationship exists was set forth in case law, particularly *In re Weidner*, 310 Or 757 (1990). It is sometimes called the “reasonable expectations of the client” test and has two parts. First, does the client subjectively believe that the lawyer is representing the client? Second, is the client’s subjective belief objectively reasonable under the circumstances? Both elements of the test must be satisfied for a lawyer-client relationship to exist. A formal agreement is not a prerequisite to the relationship, so take the following steps to avoid having an unknown “phantom” or “ghost” client:

1. Special care should be taken with email and voicemail communications, both of which tend to be informal, and with websites, which can reach a very wide audience.
2. Don’t give legal advice over the phone or during casual social contacts to people whom you don’t intend to take on as clients. If approached by a prospective client that you are interested in representing, complete a client intake form and perform a conflicts check.
3. In cases where you think doubt may exist, or it is otherwise important to disavow a lawyer-client relationship, have people whom you choose not to represent sign a non-engagement statement, or send them confirmation of non-engagement, either by letter or email. Write to clients who come to you for summary advice to confirm the limits and qualifications of that advice.
4. When a current client asks about a new matter clarify whether the client wants you to act or represent them on that new matter and, if so, complete a conflicts search and open a new file.
5. Treat work you do for friends or family with the same formality as other work (including doing a conflicts search and opening a file), even if you intend to charge them reduced fees, or no fees at all.
6. Be very clear in your file opening documentation and in correspondence with the client(s) whether you represent a legal entity, such as a corporation, partnership or unincorporated association, as opposed to other affiliated or related persons, such as officers, shareholders or members. The same issue can arise in estate law and family law and in cases involving the elderly or minors. Send them letters confirming their status as clients (an engagement letter) or an “I am not your lawyer letter” to non-clients.
7. Avoid undermining the statement that you don’t represent the person with phrases like ‘but if you have questions, get back to me.’
8. Record the names of everyone (individuals and entities) you see, whether you accept them as a client or not, and include the names of persons who you met but who did not become in your conflicts-checking system. This ensures that all names necessary for checking for conflicts of interest are entered into the firm’s list of past, current and rejected clients.

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9. On your firm's general voicemail greeting, and if appropriate, on individual lawyers' voicemail greetings, include a warning for potential clients not to leave confidential information.
10. On your firm's website, include terms of use and disclaimer statements that warn site visitors to refrain from sending unsolicited information or materials to the firm or leaving confidential information on voicemail and that access to or use of the firm's site or voicemail does not create a lawyer-client relationship.

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