

SHOULD LAW FIRMS ACT AS REGISTERED AGENTS FOR THEIR CLIENTS?



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What Attorneys May Not Know About Acting as Their Client’s Registered Agent

For a law firm, providing [registered agent services](#) to clients may, on the surface, appear to be an obvious choice. After all, registered agents facilitate the receipt of service of process and receive other official documents for tax and legal purposes that require a response from a business. In addition, a registered agent can play a vital role in ensuring that a business entity maintains its good standing by complying with various jurisdictional laws and requirements.

However, there are risks involved when a law firm acts as a registered agent for its clients. Generally, these risks can be divided into two broad categories.

The first category involves risks that have always existed, but some law firms may not be aware of them and may have avoided problems by chance. These are the risk of (1) default judgments against the client; (2) attorney malpractice insurers denying coverage for claims involving registered agent services; and (3) state penalties assessed against the client for non-compliance with jurisdictional filing requirements.

The second category involves risks related to emerging federal and state legislation seeking to impose recordkeeping obligations on registered agents and requiring registered agents to disclose the identity of—as well as possibly provide additional information about—the beneficial owners of business entities.

RISKS AND POTENTIAL LIABILITY ATTORNEYS ACTING AS REGISTERED AGENTS FACE

In most states, almost any person or business entity may act as a registered agent. The appointment itself is fairly straightforward. Perhaps because of this, attorneys may regard receipt of [service of process](#) as a simple activity, when it is actually a deceptively complex procedure, governed by a number of statutes and rules.

Risk of Default Judgments

Anyone undertaking the responsibilities of a registered agent assumes certain risks. One risk is that of a court entering a default judgment against a business entity client for failure to respond to the process. The risk for the attorney acting as registered agent is that, rightly or wrongly, the client might claim that it never received the process and allege that its attorney was at fault for failure to forward the process properly or in a timely manner. Under these circumstances, the client might sue the attorney who acted as registered agent to recover the amount of the default judgment and any other available damages.

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The risk of being sued necessitates confirmation of whether the law firm's professional liability insurance policy covers registered agent activities. The standard lawyers' professional liability insurance policies may not contain specific language covering errors or omissions occurring when an attorney acts as a registered agent for its clients. The firm might assume that it has coverage under general policy language covering the "practice of law" or the "conducting of professional services." However, coverage is not necessarily guaranteed under those general provisions.

Take the case of *Sadr v. NCL (Bahamas) Ltd.*, G054603, decided June 27, 2018. The California Court of Appeal ruled that acting as registered agent is a non-legal task. Therefore, where an attorney acting as registered agent for a corporation failed to tell anyone at the corporation about a complaint served on his secretary based on his incorrect belief that such service was invalid, the corporation was not entitled to mandatory relief from the default judgment based on the default being caused by an error in legal judgment.

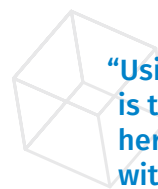
Furthermore, some insurers may even insist on a clause whereby the attorneys agree not to act as registered agents. This may be because of the serious harm that a client can suffer as a result of a default judgment.

Lawyers who want to act as registered agents should also keep in mind that registered agents are expected to be available at the registered office address when process is delivered. If they are not there—say because of an extended vacation or illness—and the plaintiff, after making diligent attempts is unable to serve the registered agent, a court may order substituted service (say, by serving the Secretary of State). This can lead to actual notice not being received in time to respond.

Lawyers acting as registered agent also need to train the personnel working at the firm's office—if it is listed as the registered office—on the proper handling of documents being served. A failure to do so is another cause of defaults. Take for example *Adams v. Sunlighten Inc.*, 328 F.R.D. 477 (W.D. Mich. 2018), where a lawyer formed a separate corporation to act as registered agent for her clients. The corporation had no employees, assets or offices. Instead, the lawyer used her law firm's office as the registered office address. Her law firm's employees accepted service when she wasn't there. In this particular case, the process server went to the registered office in the forum state and was told the person who worked there for the lawyer was on maternity leave. Process was

then delivered to a law firm employee in a different state. Neither the employee nor the lawyer remembered seeing the summons and complaint. A default judgment was issued against the client, which was upheld by the appellate court.

With or without insurance coverage, the attorney may need to settle out-of-court in order to avoid additional expenses. In instances where the attorney's professional liability insurance covers errors and omissions for registered agent activities, the lawsuit could result in increased premiums. In cases where an insurer denies coverage, the effort, legal costs and fees involved in defending against the underlying lawsuit, and perhaps for bringing a separate suit against the insurer, may be too time-consuming and cost prohibitive. This is true even if the attorney has proof of his or her lack of culpability for the default judgment.



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And there are even more costs to consider. Contentious legal actions between attorneys and clients have the potential to sever their business relationship. Even if a matter settles out-of-court, the client may lose confidence in the attorney and the law firm. Not only could this result in the loss of the particular client, but in referrals as well.

RISK OF NON-COMPLIANCE

State agencies routinely send official notices to business entities through their registered agents. These notices can include reminders of deadlines for [filing annual reports](#) and paying franchise taxes, as well as delinquency and administrative dissolution notices. If a business entity fails to make the required filing or payment it will be subject to penalties. Moreover, the entity will not be in [good standing](#) with the state, which could impede business transactions. In these situations, the business entity may claim it did not receive its official notice and seek to hold the attorney acting as registered agent accountable for this harm.

Business entities are also required to keep the state's information about their registered agent and registered office up to date. So if a law firm acting as registered agent relocates, a change of registered office document has to be

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filed with the state. The clients may expect the law firm to do it and to pay any filing fees. Penalties for not updating this information can include administrative dissolution or revocation. Furthermore, any documents delivered to the old address will not be getting to the lawyer acting as registered agent, or the clients, in a timely manner.

HOW A PROFESSIONAL REGISTERED AGENT CAN SOLVE THE ISSUES

Many law firms avoid the efforts, risks and potential costs involved in acting as a client's registered agent by providing such services through a national, professional registered agent. Since its core business is registered agent services, a professional registered agent is an expert in the varying state requirements governing service of process and compliance filings. This is particularly beneficial when a business entity operates in multiple states, since a national commercial registered agent is capable of representing the business in any state or jurisdiction.

A national, professional registered agent has specific policies and procedures in place for handling process for each customer. This reduces the likelihood of errors or omissions and the serious consequences they may bring.

Partnering with a national, professional registered agent is advantageous for attorneys and their business entity clients. Arrangements can be made to ensure that the attorneys receive notice or are copied on any service of process. This enables the attorneys to immediately be able to counsel their clients. In addition, among other services a professional registered agent can offer are providing compliance information, assisting with public filings and partnering with government agencies to streamline their relationship with business entities—services that a law firm may simply be unable to undertake.

The Ever-Changing Maelstrom of Law Enforcement Regulations

The events surrounding 9/11 brought about a change in how law enforcement combats terrorism and security threats. The Financial Assets Task Force (FATF) is concerned that terrorist organizations and other criminal enterprises conceal their identities behind business entities such as corporations and, in particular, LLCs. That concern spurred initiatives to make business entities more transparent and to give law enforcement easier access to beneficial ownership records.

In response to these initiatives, the federal government and some states have either proposed or enacted legislation that impacts registered agents throughout the country. Several states have enacted laws requiring registered agents to obtain certain business entity information. This includes two of the most important incorporation states—[Delaware](#) and [Nevada](#).

Delaware, for example, requires that the registered agent maintain the name of a contact person to receive communications from the registered agent. Delaware also enacted regulations, which went into effect in January 2019. Among other things, registered agents are required to take reasonable steps to verify the identity of potential customers, compare new customer information with the OFAC (Office of Foreign Assets Control) lists and register, and review their customer registry with the OFAC register or lists at a minimum on a quarterly basis.

Nevada requires the registered agent to maintain both the name of a contact person similar to Delaware, and the name of the custodian of records for entities that do not maintain records within the state.

Other states have enacted or proposed similar legislation. In addition, legislation has been introduced in Congress to require greater availability of and access to business entity beneficial ownership information.

These examples establish data, customer identification, or record-keeping requirements for business entities and/or their registered agents. There are potential penalties for failure to comply. These and other laws are still emerging, and registered agents need to keep apprised of any new requirements. This is yet another issue claiming a registered agent's time and effort that—where the registered agent is a law firm or attorney—could be more profitably spent on the practice of law.

The Potential for Ethical Breaches

In addition to the added burden of record-keeping in these instances, attorneys acting as registered agents for their clients could risk ethical dilemmas regarding attorney-client confidentiality. This could occur if state and/or federal legislation requires those holding the entity information to provide it to law enforcement upon request, without a subpoena. Absent a court order, clients may object to their attorneys providing that information to law enforcement.

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The emerging trend toward law enforcement's right to demand that a registered agent disclose business entity information can also potentially conflict with the attorney-client privilege when an attorney acts as registered agent. Thus, the expansion of law enforcement's power to demand information may result in a minefield for attorneys acting as registered agents..

CONCLUSION

The risks and potential costs that an attorney or law firm assumes in acting as a registered agent on behalf of clients are numerous and not always readily apparent. Using a national commercial registered agent is the best way an

attorney can satisfy his or her clients' needs when it comes to complying with statutory registered agent requirements. A national commercial registered agent has expertise in navigating the complex and changing laws and nuances of federal, state and local jurisdictions. It maintains standards for knowledge and performance and has a track record for managing service of process and compliance.

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