

CHAPTER 1

The Client Interview

In the middle of every difficulty lies opportunity.

—Albert Einstein

Real estate litigation generally involves clients at their worst. Americans tend to be deeply attached to their land. Disputes over real estate, especially between neighbors, can involve tremendous tension. By some accounts, more real estate litigators are attacked than divorce lawyers. Americans, it seems, are far more attached to their land than their spouses.

The real estate trial lawyer must vigorously represent the interest of his client, while simultaneously exuding professionalism and defusing unnecessary tension. The first substantive meeting with the client is key.

Set up a person-to-person meeting with the client as soon as possible. Before the meeting is held, review all documents, plans, tax maps, and pleadings that are readily available. You want to attend the first meeting with a preliminary understanding of the issues. After reviewing the available materials, make a list of educated questions that you need to ask the client.

The first meeting with the client—if at all possible—should be at the site. Promptly viewing the actual “lay of the land” is absolutely critical for the effective trial lawyer. Plans, deeds, and other documents can never convey the full story on the proximity of the parties, the location of an easement, or the terrain involved in a boundary dispute. Meeting the client at the site is the only way to fully understand the issues at hand in a real estate dispute.

Do not place any artificial time limits on the first meeting. The best way to begin evaluating a contentious real estate case is to give your client a complete opportunity to express the entire story. Try not to ever interrupt—unless you simply cannot understand what is being explained. Afford your client the time to get everything off his chest, and to fully describe all of the facts and contentions. As most mediators will tell you, tensions decrease when a client truly feels that he has explained the entire story to an avid listener. Listening also creates the bond of trust that is essential in the effective representation of a client. Hearing the complete story gives you a better opportunity to create effective litigation strategies.

Walk the property, especially all disputed boundaries or easements. Personally examine all characteristics of the property involved in the dispute. Look for all signs of evidence that benefit or harm your case. As you walk the property, try to wear the shoes of the opposing party. What will he claim? What would you do if you were representing the other side? Note, as soon as possible, all strengths, weaknesses, and problems with your case.

At the initial conference, press the client to provide you with all relevant documents. Depending on the facts and issues, relevant documents may include the following:

1. Deeds, easements, and other recorded documents
2. Plans and surveys
3. Contracts and Purchase and Sale Agreements
4. Closing binders
5. Correspondence and e-mails
6. Appraisals
7. Title insurance policies and comprehensive general liability insurance policies
8. Photographs
9. Files from prior litigation regarding the same property
10. Prior deposition or trial transcripts concerning the parties

Ask your client to identify all people who have information that will be helpful. Try to determine the potential witnesses—and ask about professionals whom one side or the other may be looking to for expert testimony: surveyors, title searchers, appraisers, accountants, contractors, architects, or historians.

Note: Clients tend to bring surveyors or other nonattorney professionals with them to lawyer meetings. It is very helpful to meet these professionals and to have them walk the boundaries and detail the critical aspects of the dispute. However, communications with nonattorney professionals generally are not privileged—especially if the professional is going to be your expert at trial. Make sure that you politely excuse the consultant or expert when you communicate with your client concerning facts, opinions, goals, and strategies.

While in the initial privileged conversation with the client, thoroughly explore whether insurance might cover some of the cost of litigating the dispute. Title insurance provides defense costs and coverage for certain unanticipated easements and other encumbrances on the property or the title. General comprehensive homeowners or business liability insurance often provides a defense and/or coverage for claims of trespass. **Note:** These coverages may be *voided* by the failure to give proper notice to the insurance company. Be careful not to waste the client's resources by proceeding down a path only to find out later that an insurance company would have reimbursed your client for your work if it had been given timely notice of the claim.

And, possibly most importantly of all, discuss the parties' past settlement efforts and all of your client's thoughts on settlement. Are the parties far off? Are there easements that can be traded for land? What does each party have that will benefit the other side?

Exploring settlement at the beginning of a case is a sign of experience, not weakness. Given the very high costs of real estate litigation, the experienced real estate trial lawyer will spend the beginning of every case looking for a "win-win" between the parties. This is cost effective to do at the beginning of the case, but not after both sides have spent substantial money and are ready for trial.

A thorough understanding of settlement options is also key because real estate disputes—unlike contract actions or most other litigated disputes—afford the potential for unique solutions. While a court is limited to a declaratory judgment, injunction, or financial award, a win-win settlement can carefully redraw boundaries, create or modify easements, and establish a myriad of other property rights benefiting the other parties. For more on this topic, see Chapter 14, "Settlements and Consent Final Judgments."

Note: Always have an accountant review the tax consequences of a potential settlement before signing off on it. If there are known tax

issues involved from the start, consult the accountant before entering into settlement negotiations.

A helpful **checklist** for the initial client interview is as follows:

The Dispute

- Describe the problem
- What is the history of the dispute?
- Tour the property

The Client

- Education
- Occupation
- Experience with real estate
- Length of time property has been owned
- What does the client want?

The Opponent

- Education
- Occupation
- Background
- How long have you known the opponent?
- Intelligence level
- Temperament
- What “buttons” have an effect?
- What does the opponent want?

The Documents

- Purchase and Sale Agreement
- Closing binder
- Deeds
- Plans and surveys
- Communications (letters and e-mails)
- Photographs

Witnesses and Professionals

- Witnesses
- Prior owners
- Abutters
- People who grew up on the property

- Renters
- Employees
- Surveyor
- Closing attorney
- Title searcher
- Accountant
- Architect
- Appraiser

Insurance

- Title insurance
- General comprehensive insurance

Settlement

- History of settlement discussions
- Possible middle grounds
- What can we give the other side?
- What are we OK with giving to the other side?
- Tax implications

Credibility

- Prior litigations
- Prior testimony at depositions and trials
- Criminal convictions
- Other skeletons

