

CHAPTER ONE

DEALING WITH CLIENTS



This chapter discusses how to deal with clients, from the first contact from a prospective client through trial. For context, it starts with an instructive etymological exploration.

Unlike the etymology of “lawyer,” which is straightforward and uninteresting (from Middle English *lawe*, which derived from Old Norse *lag*, meaning “that which is laid down”—the law), the etymology of “attorney” is revelatory. In Old French, *atorner* meant “turn to,” as in “to assign, appoint.” The past participle of *atorner* was *atorné* (pronounced ah-torn-AY), which, used as a noun, meant “someone appointed to act as someone else’s agent.” In the seventeenth and eighteenth centuries, “attorney” was also a verb: “to attorney” meant to act as a proxy for another. The older sense survives in the “attorney-in-fact” in contrast to the “attorney-at-law,” which is what a trial lawyer is.

What about “client”? Latin *cluere* means “to listen, follow, or obey.” The present participle, *cluens*, developed the alternate form *cliens*. Someone who is *cliens* is always listening for another’s orders or advice rather than taking independent action. *Cliens* may be related to Latin *clinare*, which means “to lean or bend,” giving *cliens* the related sense of someone who leans on another—you.

Thus, etymologically speaking, an attorney is someone the client appoints to act in his or her stead on whom the client leans for sound advice. As trial lawyers, we take on tremendous responsibility for our

clients. While reading this chapter, keep in mind your role as attorney and the reliance each of your clients places on you for your expertise, professionalism, and (most of all) advice.

A. HOW TO HANDLE THE FIRST CONTACT FROM A PROSPECTIVE CLIENT

Typically, the initial contact from a prospective client is by phone. When you return that call, you must find out the general nature of the matter so you can tell whether you are competent to handle it, the urgency of the client's needs, any facts related to applicable statutes of limitations, and the names of all potential parties and others so you can check for conflicts of interest. If you have handled similar matters, this is your opportunity to tell the prospective client about your experience. On the other hand, if it becomes obvious that you cannot handle the matter—because, for example, it is a patent case and you are not a patent lawyer—now is the time to decline representation. Do not give legal advice during this initial contact.

You should explain the ethical requirement that you do a conflicts check, the procedure for it, and the date you can complete it and call back. Explain that the prospective client must not disclose any confidential information to you until you have finished that check.

Caveat: If your first contact from a prospective client is by e-mail, beware and do not open an attachment to it. It may be a scam. Typically, the e-mail is ostensibly from someone seeking help collecting money, supposedly easily recovered if you just send a demand letter. Warning signs are if the sender, often from a foreign country, is someone you do not know and makes no reference to anyone you do know; the prospective client needs immediate action; and the e-mail has poor spelling and grammar and generic references such as “in your jurisdiction.”

Here is a typical example, ostensibly from someone in Australia whose e-mail address began with the word *mutilate* (no kidding):

Dear Counsel,

We request your service for business/commercial litigation. You were referred to us from the referral service. Kindly advice [*sic*] if you can be of assistance to the pending issue.

Regards,
C.F.O.

How do these scams typically work? Various ways. Here's one: The attorney undertakes the representation, writes a demand letter, receives a check, and then deposits the check in the firm's trust account. The client presses the attorney for immediate payment. The attorney determines that the deposit was posted to the trust account and presumes that the funds have cleared. The attorney wires the money to the client's bank account. Only when it is too late does the attorney learn that the check bounced and the money was debited back out of the lawyer's trust account.

Here's what happened to one firm, Milavetz, Gallop & Milavetz, P.A., in Edina, Minnesota. Someone claimed to be a Korean woman hurt in Minnesota who needed help securing a \$400,000 legal settlement. The firm received the settlement check for \$400,000, obtained assurances that the check had cleared, and forwarded \$396,500 to a Hong Kong bank for the client. The check was fraudulent. The law firm sued Wells Fargo in Federal District Court in Minnesota (Docket No. 0:2012 CV 00875, April 6, 2012), claiming, among other things, that its employees should have known that the check was fraudulent. In 2014, the court dismissed that action with prejudice.

According to the complaint in that action, this type of scam was responsible for \$29 million losses suffered by more than seventy lawyers and law firms.

In 2015, a Florida man pled guilty to conspiracy to commit money laundering in his role scamming lawyers out of more than \$2,500,000. A Georgia law firm fell for one of his schemes: An individual identifying himself as Joe Leinenger, President of Triple J Tool, informed the unwitting lawyer that Lee's Tool and Die Company owed Triple J Tool nearly \$200,000. "Leinenger" then informed the lawyer that the debtor agreed to start paying in installments. The lawyer deposited the debtor's initial cashier's check in the amount of \$98,750 into his trust account. After subtracting the firm's \$2,500 fee, the lawyer wired \$96,250 to a bank account. When the lawyer was informed that the cashier's check was invalid, he discovered that the phone number was no more legitimate than the cashier's check.

Another con man defrauded lawyers out of \$70,000,000 in a similar fake check web scam. Do you need any more warnings? You're on notice that scammers are preying on you.

Typically, the scammers contact lawyers through websites such as lawyers.com. The lesson? Beware of scammers.

1. Complete the conflicts check.

The conflicts check must include not only the names of people who and entities that may be parties in the case but also the principals of those entities at all relevant times. For example, if the prospective client is a partnership, you must do a conflicts check on the names of all partners. The most efficient way to do a conflicts check is to use a computerized listing of prior and current clients that includes basic case information. Check that listing for the names of all potential parties in the prospective client's matter. If your check reveals a prior or present representation, you must determine whether that representation creates an ethical conflict of interest or a practical conflict, as where, for example, one of your colleagues is a good friend of the proposed adverse party. If so, you must call the prospective client immediately so that he or she can seek other representation. See Chapter 7(B), sections 3 and 4, for a discussion of ethical rules governing conflicts of interest.

2. When to decline representation even if you have no ethical conflict.

Know your firm's policies about taking on new matters, independent of your firm's procedures for handling conflicts checks. For example, some firms have policies precluding representation if an insufficient amount of money is at stake and policies regarding bringing malpractice claims against lawyers and other professionals. Even if you have the competence to undertake a representation and no ethical prohibition in doing so, you may decide to decline the representation in various circumstances, including the following, all of which raise red flags:

- The prospective client has already discussed the claims with other counsel who have declined the representation.
- The prospective client already has counsel but seeks new counsel because of attorney-client relationship issues.
- You have a good-faith basis to determine that the prospective claim is not viable.
- You can readily expect that your legal fees will be disproportionate to the likely amount recovered.
- You realize from the outset that you will not be able to work with this prospective client for any number of reasons, including the client's difficult personality.

If in doubt, discuss with one of your colleagues whether to take on a new matter.

3. If there is no ethical conflict and you can handle the matter, arrange for a first meeting with the client.

When. It is preferable to meet as soon as possible after the initial call—certainly long enough in advance of any statute of limitations or other deadline so that you can do the necessary work before it is too late. Prospective clients call because they have just been sued or because all less drastic means to resolve a dispute have proved unsuccessful and the matter is hot. Arrange to get together on a day when you have ample time for the meeting and you won't need to leave abruptly for your next appointment.

Where. It may be best to meet at the client's place of business or at the site of the dispute, especially if the case involves construction or a manufacturing process. Meeting there demonstrates your willingness to go the extra step to get the job done. It is also an efficient way to meet simultaneously with several representatives of your client while having ready access to your client's files.

In other instances, it may be better to meet at your firm, especially if you are meeting with only one person. Arrange to use a conference room rather than your office. That way you will be able to work without distraction or interruption and review documents together. This arrangement also avoids having a desk between you and your client, making it easier to establish rapport.

Another advantage of meeting at your firm is the opportunity to introduce your colleagues and impress the client with your well-organized operation.

With whom. You want to meet with the principal of the client and, where appropriate, other key employees most knowledgeable about the underlying facts of the case. However, be sensitive to a situation where an employee may be a hostile witness, as in an ongoing dispute about an employee's performance or compensation. In such a situation, it is advisable to have with you at least one other employee of your client who has knowledge of the underlying facts when you meet to serve as a witness to the interview as well as to keep the interviewee honest. Also consider having the interviewee sign a letter or an affidavit that locks him or her into an accurate version of the facts.

Documents. Arrange for the client to send you critical documents before the first meeting so that you can review them to get a rudimentary knowledge of the underlying facts before you meet. This gives you the basis to start your factual investigation and helps the client organize his or her thoughts. In reviewing relevant contracts, determine whether your client is obligated to arbitrate rather than litigate the dispute.

Retainer agreement. After establishing the terms of your retainer agreement, send it to your client to review. For more on retainer agreements, see Chapter I(D). If you have not yet met, your cover letter should confirm the date, time, and place of the meeting. You may want to enclose your firm's brochure.

Legal research. If you anticipate encountering any unusual legal issues, complete the appropriate preliminary research before your first meeting with the client.

B. HOW TO CONDUCT THE FIRST CLIENT MEETING

1. Establish rapport.

Put your client at ease by engaging in casual conversation before getting down to business. If the meeting is at your office, be welcoming by meeting your client promptly, offering a beverage, and otherwise being hospitable. Give your client your contact information (a business card should do). Decide in advance whether to disclose your cell phone number.

2. Explain the attorney-client privilege.

Tell your client that this communication is confidential, describing the nature of the attorney-client privilege. Encourage your client to be candid, even about facts he or she is reticent to reveal. Make sure your client understands that the communication remains privileged only if it is not discussed with third parties. If your client is married, discuss the marital privilege that applies in your state.

If you are meeting with an employee or other agent of a corporate client, explain that you represent the corporate entity and not the individual. In these situations, the privilege belongs to the corporation, not its representatives. The corporation may want to waive the privilege even though the individual may not. For more on this, see Chapter 7(B), section 5.

3. Explain the purpose of the meeting.

Make sure your client realizes that you need to know both positive and negative information about the case. Explain that your purpose is to gather facts relating to claims *and* to anticipated defenses. Describe the context of the meeting vis-à-vis the bigger litigation picture and summarize the litigation process as it applies to the case. Make sure your client realizes that litigation is typically not a quick fix and may drag on for months, if not years.

4. Get necessary information.

Give your client the opportunity to tell the story. Take notes to make sure you have a good record of the facts. Doing so will impress on the client your attentiveness and respect for what the client has to say. Interrupt, but not unduly, whenever you need more detailed information. Most people find it much easier to talk this way than to deliver a lengthy monologue.

In many instances, your new client has made an error in judgment or has done something worse, resulting in the litigation. Don't be accusatory or critical. Instead, be supportive and try to get an understanding of what happened and why. But if something doesn't ring true, call your client on it.

Explain that your client will be cross-examined at a deposition or in trial. Once you have established rapport, question the client closely about something that does not ring true, preferably changing chairs to dramatize the fact that you are playing the role of opposing counsel. This interrogation will give you a sense of how well your client stands up under cross-examination on a particular point and will encourage candor.

Ask your client to imagine that the two of you are on the other side of the case. What would the adversary be telling his or her lawyer?

Get a good sense of the bigger picture of your client's business. You can't represent a business properly unless you have a genuine understanding of the context in which the relevant transaction has occurred. Get enough information so that you understand the relationship between your client and the opposing party. Find out what business considerations should be factored in when determining your strategy, aggressiveness, and flexibility in pursuing legal remedies. What are your client's business objectives in pursuing or defending the litigation?

You cannot give business advice, but knowing your client's business objectives will be useful in giving legal advice.

Learn about the course of dealing and usage of trade in your client's business. This information is important to your understanding of the underlying transaction and is crucial in cases governed by the Uniform Commercial Code. In article 2 alone, "course of dealing" or "usage of trade" is used in sections 2-202 (parol or extrinsic evidence of an agreement), 2-314 (implied warranty of merchantability), 2-316 (exclusion or modification of warranties), 2-504 (shipment by seller), and 2-723 (proof of market price).

Determine whether your client has insurance that covers the claim. Although insurance policies do not cover claims for intentional torts, some policies provide broad coverage that may apply. If insurance coverage is a possibility, get a copy of all possibly applicable policies.

Establish clear lines of communication with your client. Get the name, title, and address of anyone who should receive copies of correspondence and pleadings. Find out which representative of your client can give you authority to act.

Get names, titles, addresses, and phone numbers of anyone else who may have relevant information. This may include agents of your client or the opposing party as well as third parties. Make a list of the documents you require. Find out who the opposing counsel is expected to be.

Find out if you can expect any issues to arise regarding employees of your client who may be key witnesses. Are they likely to be demoted, transferred, or fired? Even if not, are they subject to effective cross-examination as to their credibility or otherwise?

5. Discuss the document litigation hold requirement.

A litigation hold, sometimes referred to as a "preservation order" or "hold order," temporarily suspends a company's document destruction/retention procedures for documents that are reasonably anticipated to be potentially discoverable in litigation. The litigation hold is designed to ensure that discoverable documents are preserved, thereby avoiding a claim of spoliation. Courts increasingly impose draconian sanctions on clients and their counsel when a litigation hold is not put in place timely and enforced rigorously.

The litigation hold must be put into effect as soon as litigation is reasonably anticipated, even before an action is brought against your client, whether an individual or entity. You or the entity you represent can

issue it, but you should draft it. Notice of the litigation hold must be sent to any employee who may have documents or electronically stored information that may be discoverable in any action that may be brought. If in doubt about the recipients of this notice, err on the side of inclusivity.

The litigation hold notice should contain the following:

- A brief description of the claim or anticipated claim
- The purpose of the notice
- The scope of what must be preserved, including data in hard copy and on computer systems, laptops, personal computers, PDAs, handheld wireless devices, mobile telephones, smartphones, and audio devices such as voicemail
- The actions required by the recipient to preserve data
- The ongoing duty of the recipient to preserve data through the final resolution of the case
- Sanctions a court can impose if the recipient does not comply

Keep a list of the names and e-mail addresses of all recipients of your litigation hold letter. Send reminder notices periodically to comply with your continuing obligation to avoid spoliation. See Chapter 4(H), Section 2.

6. *Get a commitment.*

Get the client to commit to providing resources to help you prepare for the prosecution (or defense) of the case. Explain that this commitment will save you time and will therefore save the client money, especially if the case involves voluminous documents.

7. *Discuss options.*

Once you have obtained all of the preliminary information, generally discuss legal theories that may apply and available remedies. If you represent a defendant, explore possible jurisdiction and venue issues, affirmative defenses, counterclaims, crossclaims, and third-party claims (e.g., for indemnity). Discuss other options, such as removal to federal court (if available) and alternative dispute resolution procedures. To the extent necessary, make it clear that you will need to do further legal and factual investigation before you can give advice on possible responses to the suit.

If your client wants you to bring a court action (and even if you determine there is a valid cause of action—assuming that you can

determine this at the first meeting), discuss whether it makes sense to institute suit. Factor in the cost, publicity, disclosure of confidential information, disruption of business, and potential affirmative defenses and counterclaims. In evaluating cost, make sure your client appreciates that costs involve more than just attorney fees, experts' fees, disbursement, and the like. There will also be indirect costs to the client, including diversion of time, energy, and personnel, as well as emotional cost.

8. Don't predict.

Avoid predicting the outcome of the case except to comment in general terms about the strengths and weaknesses of the claims and defenses. Don't raise unrealistic expectations for your client. If pressed, be conservative in your estimate. See Chapter 1(F) for more about managing client expectations.

9. Discuss your fee.

Explain the basis of your fee and billing procedures. Also explain whether your client is to pay disbursements such as stenographers' and experts' fees directly and when invoices are to be paid. Go over the terms of the retainer agreement. If you seek a retainer check, make specific arrangements to get it. Clarify whether you are charging for the first meeting. Remember that once you file a court appearance, it is not easy to withdraw as counsel; so get a reasonable retainer up front.

10. Warn your client about communicating about the case and preserving the attorney-client privilege.

Caution your client that from the initial conference, anything your client or a representative of your client says or does that is related to the underlying transaction or dispute may affect the case. Make explicit that all future communications about the underlying transaction and dispute should be between you and your client or his or her representatives only, rather than between the parties, and that your client's representatives should not discuss the underlying transaction, dispute, or case among themselves in the absence of counsel. You don't want to find out at trial that the president of the company sent the head of purchasing a "smoking gun" memo making detrimental admissions or characterizing your client's position in a negative light.

Also caution your client about not forwarding your e-mails to anyone who is not within the attorney-client privilege and about using