



# Beginning the Process

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## 1.1 Initial Client Contact

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The initial contact with the client usually begins with a telephone call. It may be received by the lawyer or the secretary. In either event, the client typically asks if anything should be brought to the first conference.

Many lawyers prefer to keep the process as simple as possible for their clients and encourage the clients simply to come to the initial meeting and not be concerned with collecting any data in advance of the meeting. Indeed, many clients have procrastinated for years in even making the telephone call to set an appointment. Requiring them to collect a large amount of personal and financial data may delay them further. If the client has not known the lawyer previously and does not understand the confidential nature of the relationship, the client may be concerned about the lawyer's detailed interest in personal and financial affairs. Nonetheless, some initial data are essential.

Ideally, the lawyer should receive the initial telephone call from the client. The lawyer can then explain the estate-planning process in general terms, explain the need for thoroughness, and advise the client that a brief questionnaire will be mailed to the client, which the client needs to complete and bring to the first conference. If the secretary has made the appointment, the lawyer may want to forgo efficiency, telephone the client, and provide this explanation. Then a letter should be mailed to the client, confirming the appointment and enclosing the questionnaire. The client should be asked to bring all deeds and other documents of title, life insurance policies, and retirement plan information, if possible.

Experience teaches that most clients really do not understand the differences in ownership of property. Even if they do, many times they will be incorrect in their recollection of how the title is held. Ideally, life insurance and retirement plan beneficiary designations will also be brought to the conference for review. It is the responsibility of the lawyer, not the client, to inquire as to title ownership and current status of beneficiary designations.

Lawyers seldom think in terms of marketing their services; however, they are in a customer service business. The service they provide will be as important to the client as the product. Certainly, the client rightly expects the documents to be properly drafted, but it is the manner in which the lawyer handles the entire estate-planning process that results in a satisfied client and future referrals of business. Therefore, the initial personal telephone call, followed by a personal letter confirming the appointment, enclosing the questionnaire, and explaining the estate-planning process is very important. To avoid overwhelming the client, the questionnaire should be brief. The details can be obtained later, during and following the first conference. A sample client questionnaire is included in Appendix A to this chapter.

## 1.2 Initial Conference

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### 1.21 Client's Side of the Desk

The initial conference is another day at work for the lawyer, but it is a very important day for the client. Clients approach the estate-planning process quite differently. Some are very distrustful of the lawyer and do not want to divulge information. Clients simply want the lawyer to write the will as they instruct but using the basic legalese of the profession. Most clients are apprehensive about the costs of legal services yet are uncomfortable about bringing up the subject. This concern should be addressed by the lawyer early in the initial conference. The thought and discussion of one's own death seriously disturbs many clients, making the entire conference uncomfortable for them. Be sensitive.

There may be secrets that one spouse does not want divulged to the other spouse; thus, the lawyer's questions may be evaded. Also, there may be

unexpressed concerns over the future stability of the couple's marriage. The lawyer who senses marital problems may wish to decline the representation or undertake to represent only one of the spouses. This fact should be made clear to the unrepresented spouse. If a lawyer is representing only one spouse, this fact should be noted in the lawyer's own file and be confirmed by a letter to the unrepresented spouse.

If the representation is a joint one of both spouses (which is the usual situation), then explain that this means anything disclosed by one spouse must be shared with the other spouse. No secrets! Letters of engagement are wise, as this will avoid a future ethics complaint if problems develop between the spouses that affect their estate plan. Sample engagement letters are shown in Appendix B.

Many clients have none of these concerns and are eager for the lawyer to lead them through the estate-planning process. Irrespective of how clients approach the first conference, they have a level of confidence in their choice of a lawyer. They have definite needs and are looking to the lawyer to guide them through the estate-planning process. It is the lawyer's function to accept clients' apprehensions as understandable and to proceed with both sensitivity and professionalism.

## **1.22** Lawyer's Side of the Desk

The lawyer should use the initial conference for several purposes. First, basic data gathering is needed to supplement the information brought by the client to the conference. Obviously, the dispositive intent of the client must be determined. This often involves a great deal more discussion than just asking, "Whom do you want to receive your estate?" How will the client's and the surviving spouse's financial needs be met in the event of disability? How is the client going to protect the estate for the children if the surviving spouse remarries? Are there special needs of the client's children to be considered? Does a child have a handicap? Are the children old enough to receive an inheritance outright? Will a child's spouse influence squandering of the inheritance? Should the children inherit in trust for life to protect their inheritance from a possible future creditor claim or a possible divorce? Can the child act as his or her own trustee? Although determining the dispositive intent of clients is not difficult, lawyers will find that when more time is devoted to this process, a more complete estate plan will result. On adopting a more thorough approach, the lawyer will begin to recognize the inadequacy of the quick-interview, simple-will approach.

The lawyer also needs to assess the client's general mental capacity to execute a will, as well as discerning any possible influence being placed on the client by others. If the will is challenged at a later date, the lawyer will be a prime witness. That can be an uncomfortable experience if you have not assessed these two concerns. Lawyers know from their law school days that the requirements for executing a valid will are minimal. About all that is required in most states is for the testators to have a general understanding of what they own, who their

beneficiaries are, and to have formed a general plan for passing their estate on to those beneficiaries. When in doubt, cautious practice dictates having the client examined by a physician and retaining a written letter from the physician in your files. Some lawyers prefer to videotape or otherwise record the signing of a will in order to better document the testator signing the will; this approach provides the lawyer the opportunity to ask questions as well as to cover the formalities for execution of a valid will.

When these options are not available, the lawyer should consider asking a few pertinent questions to determine competency. A helpful resource is to utilize some or all of the questions found in the Mini-Mental State Examination (MMSE), which is a short test used by mental health professionals to assess cognitive impairment. That test is easy to use and can be found by searching online for “MMSE form.”

Determining undue influence is more difficult. Obvious red flags include the prime beneficiary of the estate being the person who brought the client to your office, significant changes being made late in life that favor a person who has the closest daily contact with the client, or a significant change in the estate distribution from prior wills. When undue influence is suspected, but the client is insistent on making the change, the lawyer is faced with a difficult dilemma. Wise practice will be to obtain an ethics opinion from your state bar association before proceeding. Absent that option, many cautious lawyers would refuse the representation. A better option if the lawyer is not certain about undue influence is to question the client while having the interview videotaped or otherwise recorded as part of video recording of the execution of the will. In that way the lawyer creates a record that can be viewed by a court at the appropriate time.

The initial conference also offers an educational opportunity. In discussing the client’s dispositive intent, the lawyer should explain the fundamentals of a will and contrast this with intestacy. Many clients are not sure they need a will. The explanation of this area of the law is helpful to the client. Explaining the fundamentals of wills is not only a mark of good professionalism but also provides a good marketing opportunity for the lawyer’s services. Clients who are well satisfied with the service provided will be quick to refer other business to their own lawyer.

The lawyer should take time to discuss the probate process with the client. Clients need to understand how a will and trust fit in with the settlement of their estates. There is considerable misunderstanding over the probate process. Many people simply start with an impression in their minds that probate is “bad,” terribly complicated, and expensive. The lawyer needs to demystify the probate process. The client should leave the office with a better understanding of the probate process and its costs. Clients should also be told that their executor will normally need to hire a lawyer to perform the legal work incident to the probate process. The lawyer’s availability to perform that service is, perhaps, understood; however, the client should be assured of the lawyer’s availability if the executor chooses to hire him or her.

## 1.3 Formulating the Estate Plan

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Following the initial conference, collection of the necessary data, and any other required client conferences, the lawyer is ready to formulate the estate plan. Fortunately, creating an estate plan for most clients is no longer complicated by estate tax considerations. Yet, for larger estates, the lawyer must still take into account the amount of federal and state estate taxes that will be owed by the estate. The available tax savings options must be considered. The question of estate liquidity must be considered, as must the apportionment of the death tax liability among the estate beneficiaries. Consequently, the formulation of the estate plan requires the lawyer to be familiar with the various tax and nontax tools needed to implement an estate plan. These are discussed throughout this text. A worksheet for computing the federal estate tax liability appears in Appendix C. The state death tax should also be computed; no worksheet is provided, however, because state death tax structures vary from state to state.

After the lawyer has determined the death tax liability and formulated a general overall estate plan, another client conference is necessary to consider various dispositive provisions. The checklist that appears in Appendix D should be helpful. Following the client conference, the lawyer should be ready to draft the necessary wills and trusts. After the initial drafts of the documents are reviewed by the client and any revisions are made, the final drafts of the wills and trusts can be executed.

With the estate plan concluded and all documents executed, the lawyer will bill for any services that have not been prepaid. The lawyer should specify in the billing the amount of service that is for will and trust drafting and the amount that is for tax advice. Will and trust drafting is a nondeductible personal expense, but the portion of the billing that represents tax advice can be taken as an itemized deduction. For the client to be entitled to the income tax deduction, the lawyer's billing should separate the services.<sup>1</sup> A simpler approach is to submit two billings, one for the nontax services and the other for the tax services. No effort should be made to improperly apportion the billing between the tax and nontax services. After all, the client may assume that the lawyer who lacks integrity in apportioning the billing for tax purposes may also lack integrity in other areas of professional conduct. That is not the type of public relations a lawyer needs or wants. As a final consideration, the lawyer may wish to include with the billing a letter explaining various concluding matters, such as when the will should be reviewed. See Appendix E for an example of such a letter.

### Note

1. *Bagley v. Commissioner*, 8 T.C. 130 (1947); *Merians v. Commissioner*, 60 T.C. 187 (1973); I.R.C. § 212.