

## LAW PRACTICE TIPS

### The Initial Client Interview

*By Jim Calloway, Director, OBA Management Assistance Program*

In many ways for lawyers the initial client interview is like a first date.<sup>1</sup> You do not know each other that well and hope to get better acquainted. There is often a bit of tension or wariness. There are lots of unanswered (and unasked) questions, and it may have its awkward moments. But both of you hold out the hope that this may turn into a long term, mutually beneficial relationship.

Most lawyers relish an afternoon scheduled with several interviews with potential new clients. Any businessperson appreciates new business. Even though an initial client interview might be a non-billable event,<sup>2</sup> a law firm cannot continue to thrive without new clients and new matters to handle.

So let's discuss the agenda for the initial client interview from the lawyer's point of view.

1. Determining if the legal matter is the type that would interest the lawyer or firm.
2. Determining if the particular client is one that the firm would have an interest in representing.
3. Communicating to the client the suitability, qualifications and availability of the lawyer for this matter.
4. Generally outlining the scope of proposed representation.
5. Communicating to the client the anticipated steps ahead, including discussing those matters which cannot be known at this time.
6. If it appears there is going to be an attorney-client relationship, discussing fees and obtaining the information needed to progress further.

These are all important and legitimate concerns. As one of the participants in this intended mutually beneficial relationship, the attorney is properly mindful of these matters. In this article we will cover each of these areas, and for those lawyers who read all the way to the end, we will provide some free sample intake forms for your use.

What is of primary importance in the new client interview? The primary impetus is that the potential client has a problem and may require the lawyer's expertise and knowledge. They need help with their problem. They need a solution if one can be found and a resolution even if there is no actual solution to the problem.

In almost every situation, there can be no solution or resolution to the problem at the initial interview. Critical facts are still undetermined. Court dates are yet to be scheduled. Pleadings or transactional documents must be drafted. Opposing parties must be contacted. Usually the client understands that this problem cannot be resolved immediately.

But that does not mean the client does not have needs that can and should be met in the interview.

#### The Interview - Listening to the Client

What's the most important thing to the client at this point? The client wants and needs to tell the lawyer his or her story and then receive some advice. The client might not think of that story-telling communication as a goal, but it almost always is an important need. Many clients have, in fact, been rehearsing their story for some time. They have been telling friends, family and strangers on the street. They may have been served with paper stating things that they "know" to be untrue. They may have been wronged by another. They may believe that they have acted totally appropriately and, once all the facts are out in the open, no reasonable person could disagree that they have been falsely accused. They may understand that they have acted wrongly in some way but have a litany of assertions in mitigation, explanation and justification.

Public speaking is consistently ranked as a very fearful event in surveys. Lawyers would do well to remember that. Lawyers tend to do a great deal of talking and be comfortable talking in front of others, even the transactional lawyer who never goes to the courthouse except to file real estate documents. So it is important to bear in mind that the potential client may have a great deal of anxiety about telling his or her story to a stranger.

How to address the client's initial need to tell their story is something that is handled differently by many lawyers. It is a reflection of their personal style and the subject matter of their practice. There is no right method here, although there are some wrong ones, such as the lawyer doing most of the talking, using lots of unexplained legal jargon and allowing little or no time for follow-up questions by the potential client.

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Once I heard a very well respected and experienced USA lawyer tell a group of new lawyers that it was important to control the initial client interview from the beginning and avoid letting the client wander into irrelevant matters that could waste a lot of time. I believe that was a very important point, especially for new lawyers. But a lawyer can err on the other extreme as well, by questioning and interrupting the client so much that they have difficulty telling their story.<sup>3</sup>

My practice consisted of mostly consumer clients, often retaining a lawyer for the first time. So I generally liked to make them as comfortable as possible by starting with some easy questions. I would ask them the basic questions needed for the initial interview and complete them on our office intake form by hand myself. I know that some lawyers (and it seems every health care provider) like to save time by having clients complete this information on a clipboard before the interview commences. There is nothing wrong with that approach. But going through the basic questions worked for me. I got some idea of how the client communicated, and it gave me a chance to make a little "small talk" about their children or how long they had lived in a certain neighborhood as I went through their name, address and phone number.

Next, I would ask some open-ended question like "So what are you here to talk about today?" or "Why have you decided you need to see a lawyer?" Then I would try to do a very difficult thing for many lawyers (including me) - sit there without saying anything or interrupting and just listen to the client. I would let the client tell their complete story in their own words. If a point needed follow-up or clarification, I'd make a brief note of it, but I generally would not even take notes during this first telling. I did not want the client to be distracted by my writing.

We have all heard someone described as being a good listener. Listening is a skill, and like other skills can be improved with study and practice. Too many times in today's society, what passes for listening is merely waiting quietly for your turn to talk. The art of good listening is greatly taken for granted. We often talk about the importance of good communication and yet too many times the focus is entirely on speaking or writing well. The listener or reader is an equal part of the good communications equation.

According to statistics compiled by the International Listening Association ([www.listen.org](http://www.listen.org)) we spend about 45 percent of our time listening but are preoccupied for about 75 percent of that time. It is no wonder that we often do a poor job of remembering everything that we hear. Comprehending and remembering everything your client says is of critical importance. There is a great deal of literature and scholarship in this area, and if you are unaware of it, just go to Amazon.com and search for books with the word "listening" in the title.

With practice we all can improve our listening skills and, as an attorney, improving your understanding of the information that your client wishes to communicate with you is a very important goal.

Being a better listener also increases the chances that the client will want to retain you.

Two dominant figures of 19th Century British history were William Gladstone and Benjamin Disraeli. The story has often been repeated of a young woman who had dined with both Gladstone and Disraeli. She is said to have compared the two men this way. "When I dined with Mr. Gladstone, I felt as though he was the smartest man in England. But when I dined with Mr. Disraeli, I felt as though I was the smartest woman in England." There are many benefits to being a good listener.

Here are a few tips to improve your listening skills in the initial client interview:

- **Minimize distractions** - There are many types of barriers to effective communications. The wise lawyer will try to minimize the physical barriers. This means that there should be a policy of "No interruptions, except for emergencies" during client interviews. It also means making sure there are no preventable distractions like a noisy air conditioning unit or having a room temperature too hot or too cold.
- **Maintain eye contact** - Looking someone in the eye while they are talking assures them you are the focus of their attention. Appearing as if you are reading something on your desk or computer screen while the client is talking is a very poor practice.
- **Act like you are paying attention** - Have you ever seen a TV reporter interview someone? They are animated, encouraging the interview subject with nods and other positive nonverbal feedback. Practice being an active listener, rather than a passive one. Your actions and expressions should encourage your client to tell their story. This is one reason to minimize note-taking at first. When a serious matter is mentioned, it is appropriate to have a more serious expression.
- **Be alert for non-verbal cues** - Most people make assumptions based on the body language of the speaker. Everyone has had the experience of listening to someone make statements while their body language and mannerisms practically scream out, "I'm lying. I'm lying." Observing your client's posture, tone and expression may help your initial communication process. Seasoned trial lawyers know that jurors often give more weight to the way a witness says something than to precisely what was said.
- **Repeat back what was said** - One of the best ways to verify understanding in communications is to paraphrase and repeat back the message. This technique prevents the

communications is to rephrase and repeat back the message. This technique reassures the client that you did understand what was said, and may provide an opportunity to correct a misunderstanding.

Some lawyers may be concerned that the potential client may drone on for a long time about many irrelevant facts given the opportunity, but I believe in the vast major of interviews even the most loquacious individual will yield the floor after 10 minutes. If you are a bit challenged for time or patience, be sure and look at the clock as they start talking so you can feel free to interrupt them and steer them in the right direction after 10 minutes or so.

After the client has paused in his or her "opening statement," the lawyer now has the opportunity to ask for clarification and details. Good note-taking is an important aspect of the interview, as is completing the information on the in-house forms that your office uses for initial interviews. The client should appreciate thoroughness and attention to detail even if they have to repeat some things.

By the end of this first part of the interview, the lawyer has likely satisfied the first of the lawyer's concerns, which is determining if the legal matter is the type that would interest the lawyer or firm.

In some situations, you may find that you cannot help the client. If that is the case, you will want to conclude the interview and advise the client on how to proceed. You may consider sending a non-engagement letter, particularly if the client is consulting with you about something with an impending statute of limitations.

Even if you are not in a position to assist the client in the present circumstances, by treating them with respect and listening to their explanation, you have created a situation where they may return to you for advice at a later time or mention you in a positive manner to another person who could use your services.

### **Client Selection**

The second area of concern for the lawyer is determining if the particular client is one that the firm would have an interest in representing. At this stage, a primary concern becomes whether the client can and will pay the attorney's fees in the amount that appears likely.

Attorney fees should always be discussed at some point during the initial client interview. Everyone is concerned about the expense of purchases, whether goods or services. You should never assume that a client knows what an attorney fee should be or does not care about the amount of the fees. If the client does not bring up costs and fees, then you should do so at an early opportunity.

But just because your firm handles these types of matters, the client has the ability to pay the fees, and the client agrees to pay the fees does not mean that you should take the case. There are some people that you just should not represent. It may be that their personality conflicts with yours. It may be that they strike you as untrustworthy. It may be that your instinct is telling you not to represent them. You must learn to listen to your intuition. This is a lesson that is difficult to learn for new lawyers and even those experienced lawyers who have learned it still seem to give ourselves refresher courses every now and then. You do not have to represent everyone. If they have the ability to pay for fees, they will be able to find a lawyer, perhaps one better suited to them.

Warning signs of potentially problem clients include:

- a situation where you are the second or third lawyer on a case,
- a client who exhibits unrealistic expectations and appears not to want to hear an opposing point of view,
- a client who seems to complain about everything (Will they some day be complaining about your services?),
- situations where the client states that everyone is acting against them, and
- the most tell-tale sign of all, a client who utters that famous phrase, "It's not the money, it's the principle of the thing." (At some point, they may decide that it is the money.)

This does not mean that you should avoid all clients in the above categories. There are sometimes legitimate reasons for having three or more successive lawyers on a given case. There are clearly situations where many people do appear to be conspiring against one individual. We merely suggest that you strongly consider declining representation of potential clients when you feel uncomfortable and they exhibit these warning signs.

It is a difficult thing to do. No person in business likes to turn away new business and many of us have a fear that the client we decline to represent on a small matter may be the one who has a multi-million dollar case the next year. Those who have recently started law practice would do well to discuss this issue with more experienced lawyers in your community. We believe that they will tell

you about some of their most miserable client relationships and that they knew when they were accepting the case that they should not for one reason or another.

When the potential client appears to have unreasonable expectations, this is the time to discuss them. You should clearly state your opinions and gauge the potential client's reaction and willingness to accept your point of view. If the client is unwilling to listen and accept your advice now, then you need to consider whether you want to spend months trying to convince the client to accept your advice.

Once you have determined that both the particular matter and the client are right for your firm, the third step involves the client deciding whether your law firm is the one to represent them in this matter.

### **Client's Decision to Hire Your Firm**

For some lawyers, communicating the suitability, qualifications and availability of the lawyer for this matter to the client is easy. For others it is more difficult. After all, telling someone what a great lawyer you are does not only seem unprofessional, but it also seems like boorish bragging. We believe demonstrating proper respect and humility is much more likely to result in a client hiring you than attempting to impress the client with how important and talented you are.

One of the most important factors in the client's mind will be your interest and dedication to their case. Hopefully by using some of the active listening techniques discussed earlier, you will be well along the way to demonstrating your sincerity and dedication.

When I recently had a chance to discuss this topic with OBA General Counsel Dan Murdock, he said that demonstrating the ideals of the Boy Scouts was probably the best way during the initial interview to impress a client and make them believe that they should retain you. After reviewing the Boy Scout Law, I decided that he had a very good point. The Boy Scout Law states: "A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, thrifty, brave, clean and reverent."

The client will be also concerned about the ultimate results. Heaven help the lawyer who promises a specific outcome. Undoubtedly, some event will take place that makes that outcome impossible to achieve. It is part of the standard language in most attorney-client agreements that the lawyer does not guarantee results.

But this is a difficult line to walk. On the one hand, you simply cannot guarantee results. In most cases there are not only things as yet unknown, but there are people outside of your control, such as opposing parties, opposing counsel, judges, juries, insurance adjusters and prosecutors.

On the other hand, frankly speaking, a lawyer has to talk about possible outcomes and results. Without guaranteeing any result, we do know certain things that will almost certainly happen - those three-year-old medical bills will likely be discharged in the bankruptcy, the first offense no-accident low blood alcohol DUI offender will probably serve no or little jail time and the non-custodial parent with no history of problems with the children will be afforded significant visitation time.

But this is an area fraught with peril. If you forecast a potential personal injury settlement range of \$25,000 to \$100,000, the client will remember the \$100,000 figure much more clearly than the other. There is always the risk that the apparently well-heeled defendant is mortgaged to the hilt, contemplating bankruptcy and only carrying a "dime" liability policy. If you ever tell a criminal defendant that they will serve no jail time, the district attorney may announce a new policy the next week.

It is far better to make representations about things totally within the lawyer's control. You can talk about keeping the client informed by always sending copies of all pleadings and correspondence. You can discuss that the client will make major decisions.<sup>4</sup> You can discuss your telephone call return policy. It is appropriate to mention that you have handled a number of cases like this one, if that is the case.

There will be some potential clients who decide to hire another attorney. It is just a part of life. But hopefully the client will decide to retain you.

### **Where Do We Go from Here?**

The scope of the representation and future steps vary depending on the individual circumstances of each legal matter. You need to communicate these orally to the client at the interview. But you also need to re-enforce this communication with a written follow-up. We have discussed this before,<sup>5</sup> but this is one area where computers can help you better serve your client. A standard letter to the client re-enforcing the next few steps, particularly things that the client must do before you can proceed, can be generated quickly. You can include in this letter a lot of general advice, such as cautioning against discussing the legal matter with third parties.

The good lawyer will have a series of general advice and status letters that are sent to the client

The good lawyer will have a series of general advice and status letters that are sent to the client throughout the representation, often at no charge.

It is very important to document in writing any limitations or matters that the attorney is not handling, especially where they are related in some way to the matter that the attorney is handling.

### **Attorney Fee Issues**

With the exception of contingency fee cases or court-awarded fee cases, an attorney undertaking a new matter for a new client should always get a retainer. There will always be worthy clients who cannot pay and need help.

Paul McLaughlin, a lawyer and law practice management advisor from Edmonton, Alberta, Canada, spoke at our 2000 OBA Solo and Small Firm Conference. He indicated it was sometimes difficult for him to turn down worthy clients who could not pay. He believed that lawyers had an obligation to accept pro bono cases, but he also believed that a lawyer had an obligation to feed his or her family. His method of dealing with this was simple. He made a rational judgment about how many pro bono cases he should carry at any time.

He kept a list of his pro bono cases in his desk drawer. For example, he might have decided that he would have five such cases. When the potential client who could not pay asked for help, he would pull out the list, refer to it and explain to the client that he could only carry so many free cases and all of his slots were filled. On occasion, he might notice that one of the listed cases had been resolved. He would then mark it out, and if he decided that this was a worthy case, add the new case to the list.

I have told many groups of lawyers that I do not mind doing pro bono work, but I want to be the one who decides which cases were going to be pro bono and decide that in advance.

If you do not get a retainer fee, you are increasing your odds that this case will become an involuntary pro bono case. You are also sending a message to your client. You told the client he or she had to do something to retain you, but you apparently were not serious about your requirements. This client, for whom you are doing a great favor, may begin to mistrust your firmness from the beginning. When you fail to get a retainer fee, you are then more committed to the case than the client is. You have taken on certain obligations and could be sued for malpractice or subjected to bar discipline if you fail to carry them out. Most lawyers have experienced frustration with clients disappearing or not communicating in the middle of some proceeding. You need to have commitment to this matter and the client needs to demonstrate commitment as well.

Get a retainer fee. Deposit it in your trust account. It is the business-like thing to do.

The second business-like thing to do is to always have a written understanding with your client. Whether your style and practice uses the engagement letter or the attorney client agreement, it is important to reduce things to writing. You certainly would not advise your clients to enter into significant business arrangements based only on a oral contract, so why would your law firm do so?

The Oklahoma Rules of Professional Conduct only require that a contingency fee agreement be written,<sup>6</sup> but good business practice requires that every fee agreement be written.

At some point with an hourly fee situation, the client will ask you for an estimate of the total costs and attorney fees. The lawyer will, of course, first explain the many unknown and unknowable possibilities that could lessen or increase the attorney's fees. But attempting to be fair, many attorneys will eventually estimate a broad range of fees. Many clients will seize with hope on the lowest amount quoted and may soon forget the largest amount. So bear that in mind when making such estimates. If you tell a client that a fee may be anywhere from \$1,000 to \$5,000, do not be surprised if at some point in the future the client says, "I thought you said it would be only \$1,000." This is just human nature. Never make any estimation of fees without making a notation in your file (or in your case management software). Be sure and visit with the client immediately if it appears your estimation will be too low.

### **Managing the Information from the New Client Interview**

Your office should have a standard form or set of forms that is completed during each potential new client interview and retained whether or not the client retains the firm as counsel.

The only exception to this rule is for those firms that have such cutting edge technology that their potential new client interview information "forms" are on their computer system and the information is actually entered into the computer system while the interview is taking place.

Some lawyers still like to interview their new clients and write the information on a yellow legal pad. Then when they forget to get a certain important piece of information, someone from their office has to call the client to get the information. This wastes time for the law firm and the client.

The new client interview form provides a great checklist so that the lawyer will not forget to ask for some information.

I related a horror story that reportedly occurred in Florida<sup>7</sup> to the attendees at the 2002 OBA Solo and Small Firm Conference. The Florida lawyer appeared at a temporary order hearing in a domestic case representing the husband. As the hearing started, the wife became upset, telling the court that this lawyer could not represent her husband as he had represented her in a prior divorce proceeding and knew confidential facts she had confided to him. The lawyer indicated that he was unaware of this and asked that the hearing be reset to allow his client to obtain new counsel.

The hearing judge did not like what transpired and reported the lawyer to the Florida Bar for discipline. Even though the lawyer maintained that he was unaware of the prior representation at the time, disciplinary charges were filed against the lawyer. Reportedly, at least one basis for the charges was that the lawyer did not ask about prior names of the opposing party. Do you ask about the possible prior names of every client and opposing party? You may not think you have a responsibility to do so, but how can you do an appropriate conflicts check if you do not do so?<sup>8</sup> This story from Florida demonstrates this well.

The lawyer in this story would have been happy to produce an interview form showing that he has asked the client for all of the spouse's prior names and had only been given some of the names.

A good client intake form can streamline your office file opening procedures as well. Some lawyers design their client intake forms so that the information is in the same order that their case management software requires when opening a new file.

Some lawyers will want to have separate forms for each type of action that they handle, e.g. one form for wills, one form for bankruptcy. Others will have a single form that is the same for all clients, with an additional form used for questions related to the particular client matter.

1. Of course, I was not about to entitle this article "First Date with the New Client." That would bring up more moral and ethical issues than I wanted to cover.
2. Or it might be billable. That's up to your individual law firm policy.
3. The following is from my 1999 article "Everything I Need To Know About Practicing Law I Learned From My Mom." (*Oklahoma Bar Journal*, November 20, 1999, [online](#).)  
"But if we are not careful, the initial interview can turn out something like this."  
CLIENT: 'Well, I was driving down the road in Pryor.....'  
LAWYER: (Interrupting) 'What county is that?'  
CLIENT: 'Ah..... Mayes County.....(pausing)'  
LAWYER: 'Go on.'  
CLIENT: 'Well, I was driving down the road in Pryor and this semi-tractor pulled out in front of me.'  
LAWYER: (Interrupting) 'Did the semi have company markings?'  
CLIENT: (Puzzled) 'Yes, it was a McDonalds semi.'  
LAWYER: 'McDonalds....like the hamburger chain??'  
CLIENT: 'Yes.'  
LAWYER: 'Go on.'  
CLIENT: 'So I swung over to the other lane and missed the semi.' (LAWYER sighs heavily.)  
CLIENT: 'And, anyway, that's when the Missus and I decided we needed to update our wills.' "
4. "Major" is an important word here. Be careful about assuring the client that they will make all decisions. If the opposing attorney's spouse dies, you are going to have to continue a hearing set that week. You can explain to the client then that neither you nor the client have any real option.
5. "Form Letters You and Your Clients Will Love," *Oklahoma Bar Journal* March 7, 1998 - Vol. 69; No. 10, [online](#).
6. Oklahoma Rules of Professional Conduct Rule 1.5 (c), Title 5 Oklahoma Statutes Appendix 3-A
7. I have been unable to verify this story, although I do have a reliable source. Whether the story is true or not, the lesson is the same.
8. The comments to Oklahoma Rules of Professional Conduct Rule 1.7- Conflict Of Interest: General Rule begin with this statement:  
Loyalty to a Client. Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. The lawyer should adopt reasonable procedures appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the parties and issues involved and to determine whether there are actual or potential conflicts of interest. (Emphasis added.)  
Title 5 Oklahoma Statutes Appendix 3-A