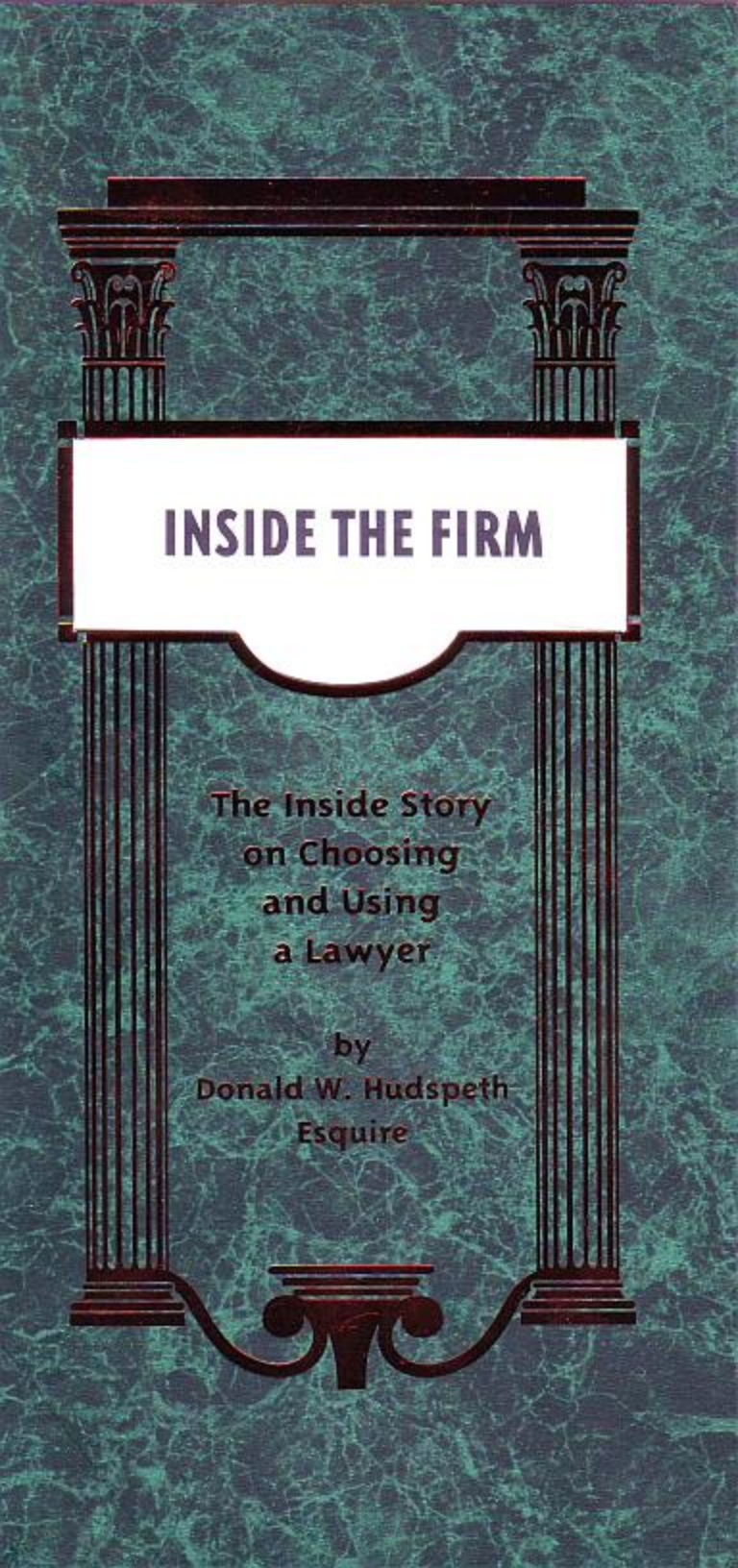
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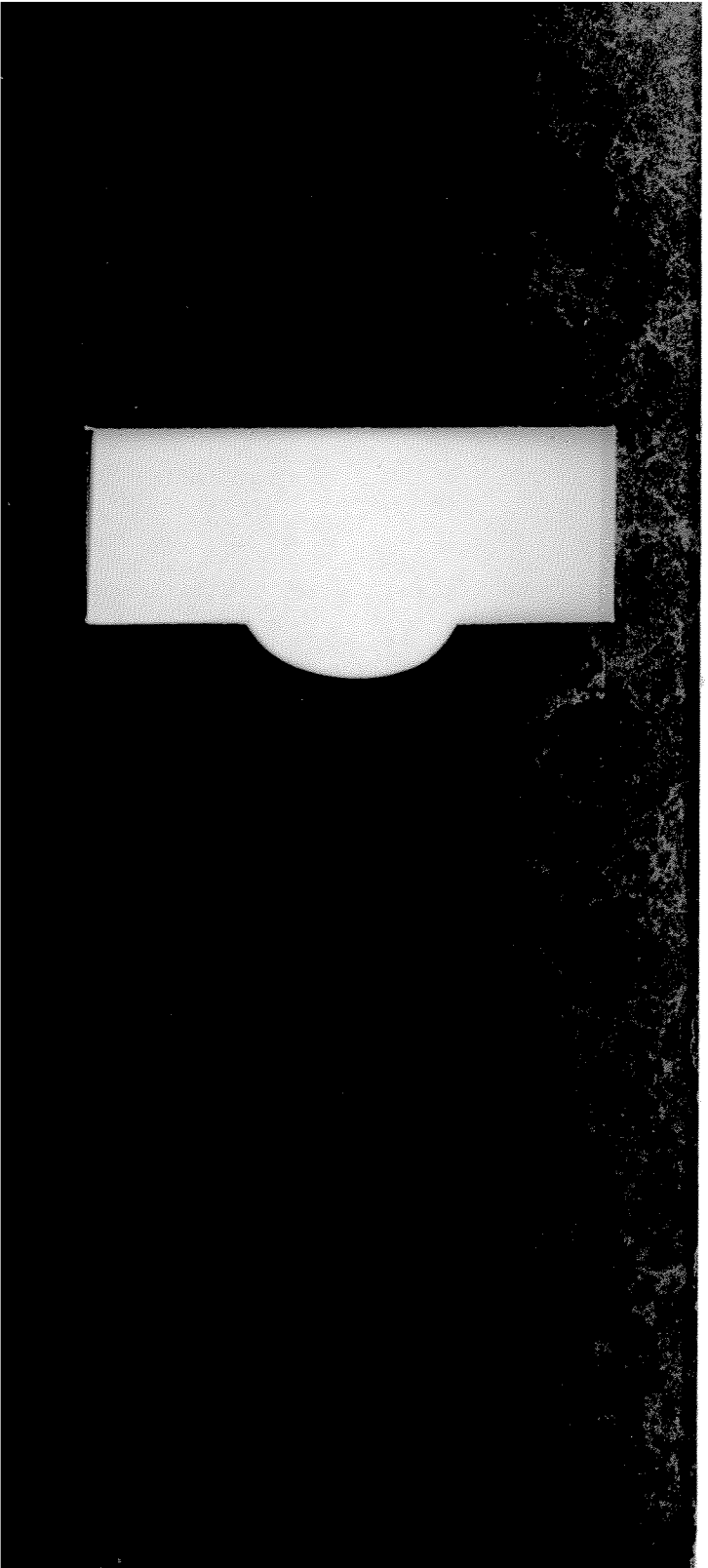

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INSIDE THE FIRM

The Inside Story On Choosing And Using A Lawyer

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Dedication

This book is dedicated to my business mentor, Russ McGuire. May he rest in peace.

About The Author

Donald W. Hudspeth has been a promoter, business organizer and adviser from the age of nineteen. He helped found, solicited investors for and organized a pinto bean processing plant before being old enough to vote. Mr. Hudspeth also founded a dynamic and successful disco-bar and real estate chain in the 1970's and a chain of mall stores in the 1980's.

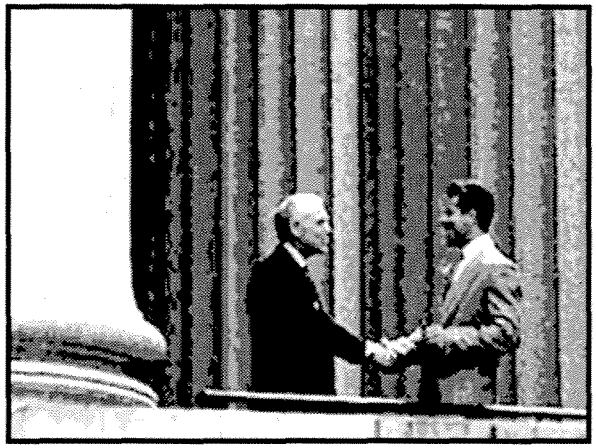
In addition to founding and developing these enterprises, the author provided management consulting and financial administration services to other companies until he began attending law school at the age of 36. While attending and after graduating from law school, the author worked for a prominent and respected Phoenix, Arizona law firm, primarily representing well-known and established corporate clients, before opening his law office in 1993.

Mr. Hudspeth's present firm is known for its representation of entrepreneurial companies, many of them owner-operated and in the forefront of their respective industries. The firm trademark is, "The business of our firm is business." The motto characterizes the firm's focus and the highest and best use of the insight, knowledge and experience of its principal.

About This Book

This book began as a series of notes for "LawTalk," a bi-weekly radio show, aired on a local financial news station. Until I did this show I did not realize how much could be said in fifteen minutes and how much preparation was required to put on a simple program. Because it was so much work to prepare for the show, it seemed natural to re-format my work product into a collection of topics. This collection of topics became the chapters of this book.

— Donald W. Hudspeth, Esq.



Chapter One

Why Use A Lawyer?

Summary

Chapter One lists and discusses important reasons for using an attorney in everyday life and business matters. These reasons include the essential relationship of a good attorney to the legal system, learning to practice preventive legal medicine, avoiding having a fool for a client, avoiding serious errors in document review and preparation, and taking advantage of the greater availability and affordability of attorneys in today's dynamic business world.

Additional reasons for using an attorney discussed in this chapter are to help you succeed, to add credibility to your business deal, to protect yourself from sharp business practitioners, to maintain objectivity, to take advantage of the lawyer's club, and to convert a bad case into a good case.

Finally, this chapter discusses when more than one attorney or different types of attorneys may be used.

Use A Lawyer To Practice Preventive Legal Medicine

A good lawyer is not only an essential element of any business problem-solving kit. He is the business client's best shot in the prevention of legal catastrophes. Quite often, an outlay of less than $1,000 in legal fees will save a business from losses that may very well reach into the hundreds of thousands of dollars.

Potential clients frequently call to say something like this: "I'm buying a business. The seller (or business broker) tells me that I don't need a lawyer. He says 99 percent of these deals close without a lawyer." The self-interest or sheer laziness behind this comment should be obvious. Perhaps, the obvious has "made a light go on" in the mind of the thinking person who calls me. Too often, however, this "inner light" never clicks on. Consequently there are many transactions, some involving substantial sums, where no lawyer or other professional looks at the deal before it is consummated.

Two "business war stories" should help illustrate how dangerous it can be to do deals without using your accountant and lawyer. Two clients come to mind. Both became my clients after they had already done the deal. One was an out-of-state buyer of an established business. The other was a local seller of a business he built from scratch.

In the first case, the buyer ("Mr. Buyer") was a family man, coming from a job where he worked "for the other guy." He now wanted to own his own business. His wife was a school teacher. He was honest and bright, a good talker. But Mr. Buyer bought a business without

having the business documents reviewed or investigating the seller.

Unfortunately, the seller's advertising and marketing materials violated the state's consumer fraud statutes. Not knowing this, Mr. Buyer continued to use these sales materials until he was prosecuted by the Attorney General's Office. This caused Mr. Buyer severe distress, destroyed the business financially, and ruined what could have been a fulfilling life as a small business owner.

Before buying the business Mr. Buyer could have had the purchase documents and sales materials reviewed by a lawyer for less than a thousand dollars. Instead, it cost Mr. Buyer more than $15,000 to deal with the problem, and in many ways (to quote the client) "the whole thing ruined my life."

In the second case, my (after the fact) client was the seller ("Mr. Seller"). Mr. Seller is and was a brilliant immigrant who came to this country, built up a business from nothing and sold it (several years ago) for $750,000. A title and escrow company prepared the pertinent documents. No attorney represented Mr. Seller during the negotiations and sale.

As part of this sale, Mr. Seller discounted and partially assigned the buyer's note to an insurance company along with all of his rights under the sales documents without reserving any rights in the property, even in case of non-payment. Mr. Seller did not have a properly completed trust (or mortgage) document under which he could foreclose and repossess the real estate and business if the buyer did not pay for it. Only the insurance company had the power to foreclose.

This was a serious mistake and had some serious consequences:

1. Mr. Seller could only sue to collect payments. This is less threatening and more expensive and time consuming than simply foreclosing. Thus, buyer would sometimes not pay Mr. Seller.

2. Even worse, sometimes the buyer would not pay either Mr. Seller or the insurance company. The insurance company had the right to foreclose, but in foreclosing out buyer's rights in the property, it would foreclose out Mr. Seller's rights. Thus, when the buyer quit making any payments, Mr. Seller had to pay the insurance company to keep it from foreclosing out his interest.

3. Worst, the buyer could file bankruptcy and discharge Seller's portion of the note as unsecured debt.

To prevent these catastrophes, and in return for modified documents to eliminate the mistakes, Mr. Seller wrote off $150,000 due on his portion of the note. Again, this was a very expensive lesson that could have been avoided for about $1,000 in attorneys fees, perhaps less.

The Documents "Look OK To Me" Fallacy

A common mistake clients make in business or real estate transactions is to tell me that they have read the agreement and "it looks OK" to them. On its face, this statement has an air of plausibility. It means that the client has read and apparently accepted the documents.

Unfortunately, there are at least two problems with this statement:

First: it assumes the client knows the meaning of the legal terms in the document, e.g. subordination, condemnation and indemnification. Many of us do not know how to read an X-ray. The same is often true for a legal document. We can see and read the words, but we may or may not understand them. Thus, clients often waive or surrender significant legal rights simply because they do not understand what they are reading.

Second: the statement assumes the client knows enough about the document to know what is not in it. Typically, the first draft of a document will be prepared in favor of the party who prepared the documents. For this reason many experienced negotiators prefer to have their attorney draft the documents, even though they have to pay the primary cost of preparing them. They believe that the party who controls the drafting controls the deal.

When the other side drafts the documents, you are somewhat at a disadvantage because you are responding to their version of the document and may spend considerable negotiation time and energy undoing what the other side has done. Letting the other side draft the documents is a little bit like giving the other side a "home court" advantage: It is not decisive, but it is a factor in the deal. On the other hand, letting the other side draft the documents and paying your attorney only to respond to and revise them can save money. It is

considerably cheaper to respond than to draft. Thus, if money is a factor, let the other side draft the documents.

Alternatively, split the cost of the documents. But, beware of the ethical dilemma and possible long-range consequences that sharing an attorney can cause to the parties. See Chapter below entitled: One Lump or Two? Deciding Whether To Use One Attorney or Multiple Attorneys In Forming Your New Business And Other Business Transactions.

Often when the other side knows from the beginning that you are represented by an attorney, it will not bother to put flagrantly one-sided terms into the agreement, even in the first draft, because it knows your attorney will not accept those terms. In that case, a disproportionately one-sided agreement will simply waste time and money.

Consider another war story. Client, another "Mr. Buyer" came to me because he was purchasing a tavern. He had the proposed contract in hand and had read it. It looked OK to him. He just wanted me "to look it over and give it my blessing." ("Look it over for my blessing" is a short hand way of saying he wants to feel good about the purchase by being able to say a lawyer looked at it. But, he does not really want me to do too much because he does not want to pay for it.)

However, for a designated fee, I agreed to look over the contract and asked Mr. Buyer to come back in two days. When Mr. Buyer returned I gave him a list of six or eight clauses that needed to be added to the document. Guess what they were? (Answer: All of the clauses that protect a buyer in the purchase of a business.)

The moral here is that not only must one know what various provisions mean, one must know enough to know what is not in the document. Few non-lawyers will have that level of expertise. This lesson applies not just to business transactions but also to the purchase or lease of a car, the purchase or sale of a house, and many other consumer transactions as well.

If You Represent Yourself You May Have A Fool For A Client

We live in a world where we, increasingly, sell and are paid for what we know, not what we do. The categories of knowledge are becoming ever more technical, sophisticated and complex. Even our cars are computerized. Because knowledge is becoming increasingly specialized, it is more and more difficult for any of us to stay abreast in our own field, let alone other fields of knowledge.

Because we live in an age of diverse and technical knowledge, we must now turn to specialists to handle the problems of everyday life. We rely on specialists to solve our problems. It is necessary and proper to do this. Otherwise, we may have a fool for a client.

If not careful, we may become like the professional who, being knowledgeable and bright in one area, falsely concludes therefore of being an expert in investment matters or psychology or ____ (fill in the bank). We may become like the small business person who has a great personality, or renders excellent service, or has outstanding mechanical skills and knowledge to build a profitable business—but in the process, carelessly expands beyond personal expertise.

If we sometimes outgrow our knowledge and present ability in our own field, is it any

wonder we need special guidance when we venture outside our chosen field of expertise?

As we expand, grow and do new things in our lives, we cannot avoid turning to experts. It does not matter how intelligent, hard-working or persevering we are. We simply cannot avoid exhausting our areas of aptitude and expertise. It is not a matter of intelligence or dedication, but of knowledge. Therefore, if we want to succeed, if we want to avoid critical, if not fatal, mistakes in our health, home and business transactions—indeed, with our lives—we need to know what we are doing. In legal matters it almost always makes sense to use a lawyer.

Lawyers Are Now More Affordable And Cost-Effective

Before becoming a lawyer, I owned several small businesses. At that time, whenever I needed a lawyer, I faced what I now call "the $3,000 decision."

Actually, $3,000 is a hypothetical number used merely to demonstrate the point that deciding to use a lawyer meant I had to commit precious capital--time and money--to pay the lawyer and other possible costs of litigation.

Today, however, you no longer face the $3,000 decision. The practice of law is now different from what it was as recent as ten years ago. Law has changed from a monopoly-collegial albatross to a business-competitive free-market reality. This change has forced attorneys to become more affordable and cost-effective. Even those firms that are not absolutely cheaper now place considerably more emphasis on client service. In short, law has changed from a "seller's market" (where the seller has ultimate power) to a buyer's market (where the client is "top dog").

Now many firms such as mine focus on practice niches. My niche is small business, including organization, routine contracts and other documentation and non-complex litigation. Complex litigation involves issues such as antitrust or securities law. In contrast, non-complex litigation is usually based on a relatively simple contract, express or implied, which some party has breached.

Focusing on practice areas, particularly less complex areas, allows firms to develop expertise and to do the same work for less money. Competitive pressures require it. As a result, you are now likely to find an affordable firm which can provide you with cost-effective service.

Recommendation: Interview a number of firms on the phone. Ask them about minimum size clients (e.g. some large firms will not handle clients with less than $2,000,000 in annual sales), their billable hourly rates and minimum retainer requirements. Look for a firm that fits your budget and requirements.

Nevertheless, law is still costly. Because of the talent and education required, and the established, expensive infrastructure, it probably always will be. However, law is now more accessible than ever before.

Possession Of A Good Lawyer Is 9/10ths Of The Law

The saying above was emblazoned on a coffee cup on a ledge in the student lounge throughout my years in law school. Shortly after I graduated, the cup disappeared when the lounge was being remodeled. You know, I sorely missed that old cup after it was gone. I was studying for the bar exam at the time and could have dearly used the inspiration.

One reason that using a good lawyer is so important is because law is arcane, diverse, and specialized. Some legal principles go back for centuries. Much of the law of real estate and trusts and estates goes back to the time of Henry VIII. When he wasn't marrying, beheading or divorcing his wives, King Henry VIII was instrumental in devising or accepting new concepts of property and property law. For example, the concept of equitable interest (i.e. an interest in property outside of or in addition to ownership title.).

Much of this law is still in use today, sometimes used favorably, sometimes not. Consider, for example, the idea that a lease is a *conveyance*, where the tenant has the property "to have and to hold," with "rights against the whole world except the true owner." This idea made more sense in the days of leased-land estates than now, especially when applied to condominiums, shopping centers and apartments. Few of us who have ever been tenants feel like we have considerable rights and power. These days, the typical lease is so full of provisions under which the landlord controls the tenant, that the lease is more like a contract of indentured servitude than of "rights against the world."

In addition to being arcane and diverse, law is evolving into new areas, such as software technology. Is the sale of software a "good" (i.e., is it something identifiable and moveable at the time of the transaction?). Is it covered by the Uniform Commercial Code (UCC)? It's not real property (i.e. a building or land). So, what is it? Similarly, environmental law is a new and independent area of law.

Law is evolving to meet the needs of society. For example, although it had existed

previously, the law and use of modern corporations did not really take off until the Industrial Revolution. Why? Because society needed a legal concept that would allow the business owner to acquire capital from investors but still protect the investors from unlimited liability. Corporations and corporate law filled this need. As most business owners know, the corporate form of business governance allows the separation of management and ownership and limits the liability of the shareholders to the amount invested. Their other personal assets and income are not at risk. Nowadays, the Limited Liability Company (LLC) is a new form of corporate governance. It is a hybrid between a corporation and a partnership.

Again, the point is that the law is ever changing to fit society's needs. Contrary to untutored belief, it is definitely not static. Sometimes, it is difficult even for the lawyer to keep up with the changes. These days, few lawyers are "general practitioners." Most lawyers specialize or focus their practice on one small area of the law in which they have the most interest, knowledge and experience.

This latter point is important. I have represented attorneys who formerly practiced criminal law, then went into business but had a false understanding of the law of business agreements not to compete. This happened because the attorney had little or no experience in business and employment law. Likewise, some clients have surrendered and failed to protect their legal rights because they did not know that they could not lawfully be fired for reporting Occupational Safety and Health Administration (OSHA) violations.

Hopefully, the reader understands, or is now starting to understand, the need to check

out legal matters with an attorney. The law will not do you much good if you do not know what it is. Or worse, you think you know what the law is but you are wrong.

That is the purpose of this book: to explain how law is changing for your benefit and how you can take maximum advantage of those changes.

Do What The "Players" Do: Use A Lawyer To Help You Succeed

Lawyers, not you, Mr. Businessman, are trained to do what you are asking them to do. Sometimes lawyers may seem like nay-sayers or deal-breakers, but whether the lawyer's advice breaks the deal is your decision, not the lawyer's.

A major business "Player," someone who has much more knowledge and experience than we do, will invariably use a lawyer. Players use lawyers to discover sharp legal angles and reduce downside risk. Along with a cost-effective accountant and advertising agency, lawyers are a necessary and beneficial value-added service. If you want to be a "Player," make a lawyer part of your "team" as soon as possible.

Lawyers Add Credibility To Your Deal

Lawyers provide security, prestige and credibility to the deal. The client gains credibility by assembling a respected professional team. This is particularly true for newcomers who are dealing with established players. The lawyer can handle the "Player" while the client learns how the game is played.

Typically, it is the "big league player" who uses the established, prominent attorney in the practice area. Ironically, it is probably the

newcomer who most needs this level of representation. The "Player" knows the games, the rules, and the pitfalls. The newcomer does not. Thus, unless one is careful, one might find oneself the victim of the smart "Player" who is guided and protected by the knowledgeable attorney.

The best way for any of us to get hurt is to "play the other person's game," particularly, when the other person is a "player." Players usually will not play it straight or fair with neophytes. Rather, they will attempt to "snow job" the other side into a very bad deal. Lawyers can help clients make the players "cut the crap." The deal will go more smoothly and fairly. If it's a bad deal, the client stands a better chance of not "losing his shirt."

You will not usually need the attorney to send routine letters of inquiry or response. But, using an attorney to negotiate the deal or settlement adds professionalism to your side. Working through an intermediary also gives you time to discuss and think about options before committing to them.

Lawyers Can Protect You From The Bad Guys

Some con artists prey on unrepresented individuals. Worse, they often surround themselves with popular or professional lawyers, accountants and other professionals. They do this for the reasons we have recommended that you use a lawyer: knowledge, credibility and protection.

If possible, the con artist will attempt to use the law firm as a quasi-business office. Letters that would usually or often come from the business are generated by the firm. The purpose is to make the "con" and the "con artist" seem legitimate.

It may take a while for the attorney or other professional to realize his or her client is not on the "up-and-up." Until that time, the "con artist" client operates under the aura of credibility provided by the professional team.

Practice Pointer:

Beware when the other side uses its law firm like an office.

— . —

Routine letters, calls or faxes that would not usually require a lawyer's input, but that are generated from the attorney's office, are one indication of a con artist at work. This is particularly true if the deal-maker has not yet performed on the last deal and now wants you to invest in a new one (e.g. so that you can get your money back).

When in doubt, call your own attorney and/or accountant. Check things out. By working through your own attorney ,you are less susceptible to "credibility tricks" and being conned into a bad deal.

Lawyers Maintain Objectivity and Rationality

We all tend to fall in love with our own ideas. When we handle our own affairs, we develop "blind spots." We tend to focus on our interpretation of the facts and arguments, while ignoring the strengths of the other side. We tend to come from our emotions and behave irrationally. To maintain objectivity and avoid "blind spots" is one of the best reasons for using a lawyer — in legal matters and for general counseling. Even lawyers use other lawyers not just for their knowledge and expertise but also for their impartiality. When

we need advice, we need it to be impartial. Lawyers provide impartiality and rationality.

Sometimes, the opposing lawyer's rationality can benefit you. This can occur when the other side is behaving irrationally, e.g. making exorbitant demands or acting to needlessly expand the scope and expense of the matter. The best thing that can happen is for your opponent to retain a lawyer. This is because lawyers introduce rationality. Because lawyers think linearly and analytically, it is difficult for them to behave or even appear to behave irrationally. Yet, behaving irrationally can be advantageous in negotiations. Many "players" do it. Also, there are some people who behave irrationally because they are coming from emotion rather than reason.

This is where the other side's attorney can benefit you. An irate or irrational opponent probably will not listen to you; but such a person will probably listen to his or her lawyer (if anybody). In this case, having a lawyer on the other side can help resolve matters by providing calm and rational discourse between the parties and sound advice on both sides. Rationality and sound advice promote "win-win" solutions. Both parties benefit by having attorneys involved.

Take Advantage Of The "Lawyer's Club"

Sometimes, it can be extremely disconcerting to have your lawyer chatting blissfully with the attorney for the other side while you stand to lose or gain a fortune on the outcome of some litigation or transaction. However, this apparent lack of sensitivity to your cause is not because the attorney does not care: your attorney merely wants to keep the communication lines open.

In some respects the practice of law, particularly for litigation attorneys, resembles the nature and life of wild dogs. In the presence

of each other, wild dogs may cower and seem solicitous, but this apparent mutual respect is not just a matter of courtesy; it avoids triggering the other side's "wildness," or killer instinct, which can be counterproductive.

It is important for the attorneys to share frankly their positions in the case. This narrows the issues for negotiation and trial or for closing the transaction. Also, open and friendly, or at least non-hostile, communication helps keep emotion out of the case. You do not want the key decisions of a deal or case decided emotionally, at least not by your attorney.

Emotional decisions are best avoided. If the parties become emotional and dig into their positions, then the clients may find themselves in a war they can no longer afford to settle because they have too much invested in attorney fees and other costs. But if the decision is to be made emotionally, then it is your prerogative to make the decision on that basis, not your attorney's.

In law school, lawyers all receive the same education and analytical framework. They are taught to speak the same language and to approach problems with a similar mind-set. You can use this common approach and style to your advantage. Your lawyer is much more likely to get your point across to another lawyer than you are. This is not because of what he says but because of how he says it . Also understand that counsel will be treated as a member of "the club," with the same privileges and duties as other fellow attorneys.

By understanding how lawyers think and the reason for their behavior, you can use the Lawyer's Club to your advantage. One lawyer will not usually unduly play games with another lawyer. An attorney will not tolerate such

behavior, and he will quickly spot it and respond in kind, if necessary. Moreover, such conduct may violate the duties of truthfulness and reasonable candor required by the ethical rules. Because so-called "Rambo litigation" is now in great disfavor within the profession, unseemly conduct may also hurt the attorney's professional representation.

In litigation, as we shall discuss later, the Rules of Civil Procedure and other applicable rules governing the profession no longer allow attorneys to play "hide and seek" with the facts and legal issues. Full and frank disclosure is required. This benefits all parties.

A Lawyer Can Convert A Bad Case Into A Good Case

Most attorneys know that an intelligent client and an intelligent lawyer, by working together, can rationalize and defend just about anything. This has a great "narrowing effect" in litigation. Cases that might have seemed self-evident and one-sided when the client entered into the attorney's office may become close calls when one receives the other side's response. This "narrowing effect" occurs for at least two reasons:

1. Lawyers are experts at explaining away bad facts and focusing on and turning a few good facts into powerful arguments; and

2. Judges and juries can only know the "truth" as they hear and perceive it. Sometimes, the "real truth" gets lost in the system because the judge or jury does not completely understand what happened nor its consequences. Or the judge or jury is overcome by a good lawyer's marshaling of the facts and prejudices into a persuasive argument.

Lawyers know this. Transaction lawyers in a strong bargaining position and litigators with a strong case recognize that a good deal or case may go downhill because someone did not grasp the real truth of the situation.

For these reasons, with a little luck and a good attorney, even a bad deal may be salvaged or improved and a bad case won or settled on favorable terms.

In some cases, however, the evidence is so clearly against you (e.g. a collection suit on a promissory note) that your attorney's goal should be to get the best settlement terms possible. Beyond that, the attorney may just be "running up the clock" to increase the size of the bill.

Expanding Businesses May Need Different Kinds of Lawyers At Different Times

Like an amoeba that grows into a complex organism, expanding businesses change, not just in size (i.e. quantitatively), but also in the nature of their operations (i.e. qualitatively). As a business becomes larger and more complex, it not only adds more work but new types of work. Because the business naturally adds these new functions as it evolves, new skills are required from its employees and professionals. Eventually and inevitably these needed skills will require a level of management, knowledge and expertise, (i.e. specialized knowledge) that the business owner does not possess.

Businesses grow by solving problems related to service and production, among other things. Lawyers and other professionals have specialized knowledge to help solve these problems. Thus, by providing specialized knowledge, lawyers and other professionals help businesses to survive and grow.

Two levels of specialized knowledge are important to businesses. The first level is the level of the profession itself, e.g. accounting, law, and marketing. I recommend that all businesses have an accountant, a lawyer and an advertising agency from day one.

The next level of specialization is within the profession. All lawyers are not the same. Lawyers usually have specialties, just as physicians do. As they grow, businesses may need different types of lawyers to answer questions in specialized areas. This need arises due to the changing nature of expanding businesses. For example, the lawyer who prepares your incorporation documents may not be the best lawyer to handle a zoning issue.

Use A Lawyer To Assure Compliance With Applicable Law– Not Just In What The Company Does But How It Does It

Most businesses consider applicable law in deciding whether to build a building or launch a new product. However, many businesses are somewhat careless about following the rules that govern corporate decision-making. Just as Roberts Rules of Order apply to formal meetings, certain rules apply to corporate governance.

Under the laws that govern corporations, business decisions that involve a "fundamental change" (i.e. changes of capital structure or major, atypical resource commitments) require approval by the board of directors and the shareholders. This two-step process is called the "standard resolution procedure."

As a rule of thumb any matter requiring the standard resolution procedure should have attorney input. On such matters, and many others, the potential gain or downside risk makes using an attorney cost-effective. In this case,

using an attorney is like insurance; it protects against catastrophe.

One Lump or Two? Deciding Whether To Use One Attorney or Multiple Attorneys

Small business attorneys face the following scenario on a daily basis. Two or more people will join together to form a new business. The parties will use an attorney to prepare their incorporation or other documents. They want to make the business formation or transaction legally correct. But at the same time, they need to keep the transaction affordable.

Sometimes, the parties on both sides of a business or real estate purchase/sale transaction, will request one attorney to represent both sides of the transaction. In fact, sometimes, in the purchase/sale transaction, the seller will use, with the buyer's blessing, the buyer's earnest money or down payment to pay the legal expenses of preparing the documents.

These facts raise the issue of "dual representation." Under the ethical rules of their profession, lawyers are prohibited from representing parties whose interests are or may prove adverse, except with full disclosure of the conflict and its consequences and the clients' consent. Ironically, although designed for the clients' protection, the attorney's proper course of conduct under the ethical rules often aggravates the clients.

Many small clients have a hard enough time deciding whether to use a lawyer at all. (See the $3,000 decision on page 8). Now the attorney is telling them they may need two or more attorneys to properly represent them. No wonder clients think lawyers are "deal-breakers." At first blush, the clients may think the lawyers are just "feathering their own nest."

Although sometimes aggravating, there are sound reasons for the attorneys' actions under the ethical rules. Marriage is not always a honeymoon, and business transactions do not always run smooth. In fact, a frequent result of new business formations and purchase/sale transactions is that one party is, or perceives himself to be, receiving less out of the business or transaction than expected. In short, post-formation or post-transaction conflict is common, if not the norm.

Having one attorney represent both sides of a transaction aggravates the problems for the parties if conflict develops. In that case, the parties' conflict means that the attorney must withdraw. This leaves both sides looking for a new attorney. This is a losing proposition for everyone. Not only must the parties find a new adviser but they must educate their new advisers to the facts of the case. Meanwhile, the most knowledgeable adviser, the original attorney, is "conflicted out" and cannot advise either side.

This problem is avoided where each party has its own attorney going into the business or transaction. Where the attorney represents only one of the parties, then, in case of conflict between the parties, the attorney may remain involved and can bring his or her knowledge and understanding of the transaction to the problem. Sometimes, because the attorneys know the parties and/or the deal, they can resolve the dispute before it gets out of hand. Thus, frequently the decision to use one attorney or two is simply a question of when to pay the second attorney (now or later).

By definition, a buyer and seller are adverse– one gains what the other loses. In contrast, the "adversity" among new business

owners is not so definite and worrisome. New business owners are in the "courtship" phase. They are "engaged" in opening a new business.

Nevertheless, in virtually every business transaction, including forming a new business, someone is unhappy. The unhappiness may be a matter of degree; but it exists. One reason for this unhappiness is that "going into the deal" everyone tends to focus on his/her ideal result. This is similar to the "halo period" in personal relationships. The halo period is that stage where everything the other party does is right. This period often immediately precedes the "hell period," where everything the other side does is wrong.

Another reason for later conflict between new business partners is, what I call, the "enough in, enough out" fallacy. The fallacy is the assumption that if the "partners" have sufficient funds to open the business, then the business will generate sufficient funds for each of the partners to live on.

The error of this assumption can be demonstrated by the following example. Assume that a new business requires $50,000 in cash to open. Assume that two prospective new business owners each have $25,000 to contribute to the business. Often each new owner's unstated assumption is that, by investing $25,000 and working in the business, each of the owners will then be able to draw out a reasonable salary to live on, say $25,000. But, unless a miracle happens, this "enough in, enough out" assumption is almost never true.

The "enough in, enough out" assumption is a fallacy because the amount necessary to "open the doors" may have no correlation to the amount of salary which may be drawn. Consider

this change to the above example. Assume there are five partners each of whom invests $10,000 to accumulate the $50,000 necessary to open the business. Can each of the investors then draw enough to live on, say $25,000? That is unlikely. To achieve that goal the business, which cost $50,000 to open, would need to generate income to its owners of $125,000 the first year. That kind of performance is extremely rare, particularly early on.[1]

The common result of this fallacy is that, soon after the business is formed and begins operating, the business runs short of cash. This means that not everyone who invested in the business can work there and draw a salary. This means that someone has to leave, someone has to stay. This means that one of the founders will continue to use the assets of the business while the others do not. Facts like these create conflict and, frequently, litigation by the party who has been "squeezed" or "sold out."

Moral:

Understand the purpose behind the ethical rules. While they may seem like a "make work" project for attorneys, the rules are based on common experience.

Checklist

1. Use a lawyer to practice "preventive legal medicine," that is, to avoid problems before they happen. This is much, much cheaper than fixing problems later.

2. Do not assume the documents "look OK" unless you are an expert in the area. You may not know what is missing.

3. Do not represent yourself unless you have to; and even then, only with the lawyer's advice, if possible.

4. Possession of a good lawyer is 9/10ths of the law. So, find and use a good lawyer.

5. Lawyers are now more affordable and cost-effective; so, there is less reason not to use one.

6. Lawyers can add credibility to your deal, especially if you are a neophyte or weak player.

7. Lawyers can protect you from confidence men and other bad guys.

8. A lawyer can help you succeed. For that reason, legal fees can be money well-spent.

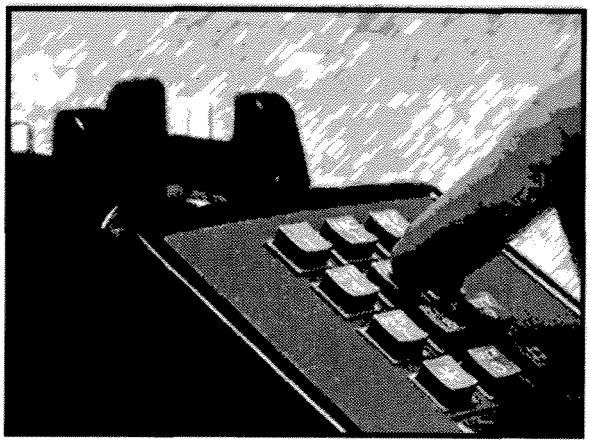
9. Lawyers help maintain objectivity by pointing out your "blind spots."

10. Lawyers belong to the "Lawyer's Club." They think and act alike. Take advantage of the club by using a lawyer.

11. Remember: Lawyers are trained to turn bad cases into better ones. So the worse your case is, the more you need a lawyer.

12. You will need different kinds of lawyers at different times; and sometimes you will need more than one lawyer at one time.

13. Use a lawyer to be sure you are operating legally, both in what you do and why you do it.



Chapter Two

When To Call A Lawyer

Summary

Chapter Two discusses when to call an attorney and typical mistakes which clients make in that regard. Those mistakes include waiting until the last minute after they have attempted to represent themselves, possibly hurting their case.

Don't Wait Until The Last Minute

Good lawyers, like good physicians, are not like the "Maytag Repairman." They are not waiting for your call, and they are not instantly available. You will need to make an appointment and work yourself into their schedule. Once you are one of the attorney's clients, it will be easier to schedule conferences according to your needs.

Clients who wait until the last minute are perceived to be "flakes." Even if there is good reason for the delay, such as a lack of understanding or funds, delay can have significant negative consequences. A client who waits until Friday to call a lawyer for a matter that should have been dealt with on Monday will have a much smaller pool of attorneys to choose from. Many good lawyers simply are not available on short notice.

Another good reason to call an attorney before matters become critical is to avoid paying higher retainers and fee billings. You will understand if you have ever hired an advertising agency or printing company to do a job on short notice. Short notice triggers "rush charges." Rush charges result in a multiple expense, e.g. 1-1/2 or 2 times the basic charge. The shorter the notice the higher the multiple. Jobs requiring overtime may trigger the 1-1/2 time rate. Weekend work may trigger doubletime.

Lawyers do not typically charge rush charges. However, a client who calls at the last minute may receive a higher bill (or a bill that seems higher) for several reasons: (1) more work needs to be done in less time, (2) a higher retainer is required to insure the money is there to cover the additional billings for the period, and, (3) the lawyers may bill at their full rate to offset the loss of other work that could have been billed during the period.

Don't Call The Lawyer After The Case Has Begun

My Dad sold and serviced appliances. He wisely advised me not to call the service person to fix an appliance after the "parts were on the floor." (Dad probably knew the limits of my mechanical ability.). The same principle applies to law. It is more expensive, particularly

cash-flow wise, to retain a lawyer after a case has begun.

Often, a lawyer inherits a file in progress when the client changes counsel. Unlike the original lawyer who may have learned about the case as it unfolded, the new lawyer must read, study and learn the significance of every document and the role each person plays in the drama. In a complicated case, this can require a lot of work; thus, it can be very expensive.

I would prefer not to receive files "midstream." Not only will I be a different "driver," I may be on a different "road" than the previous attorney. The prior attorney may have done things differently than I would or have had a completely different strategy on the case than I do. Taking over the case means I either adopt a strategy I would not have used or I must redo the pleadings and discovery responses and give notice to alert the other side. This notice to the other side is required by the rules; and if not agreed to by opposing counsel, it requires a motion and a hearing with the court. This adds another layer of expense to your bill.

Sometimes, if the cause for the change in lawyers is due, in part, to some fault of the first lawyer, particularly where the lawyer has not diligently and competently worked on the file, then you should ask the original lawyer for an adjustment on the bill to help you pay the new attorney to get acquainted with the case. This request is unusual, however, so be reasonable. Naturally, if the reason the lawyer did not do the work to your satisfaction is because you have not timely paid him or her, then you probably will not receive a very sympathetic response to your request for a discount.

If you have decided to hire a lawyer midstream after handling the case yourself for a while, please keep in mind that lawyers do not like this. Clients who represent themselves (referred to as the plaintiff or defendant "pro per" or "pro se") usually do not know what they are doing and may have already lost or severely prejudiced the case. Do-it-yourself clients are discussed in the next section.

Pro Se Litigants May Lose Their Case Before The Attorney Is Hired

It is obvious that a layman will not have the skill of a lawyer. In litigation, how pro se clients may prejudice their case is by making "conciliatory admissions." I am using the term "conciliatory admission" to refer to the polite agreement, made not because the party really agrees with what the other side has said, but does so to appear reasonable and avoid confrontation.

Conciliatory conduct is polite. It is also good business. However, if one is not careful, it can produce bad "law." The legal problem with conciliatory conduct in litigation is that it may admit some point at issue. Under the rules of evidence, an "admission" is any word or conduct that may be construed as an assertion, e.g. "pointing the finger" at a defendant. Under the rules of evidence, even silence when a "reasonable" (read: ideal, non-existent in this universe) person would object is an admission. Thus, pro se litigants may find the other side arguing that they have admitted a point when all they did was to refrain from disagreeing.

Fortunately, not all admissions can be used against you. Conciliatory admissions made during settlement negotiations are not admissible. Because public policy favors frank and open negotiation of the facts, claims and

damages at stake in a lawsuit, the rules of evidence prevent (what I have called) conciliatory admissions from being used against you at trial for purposes of proving liability.

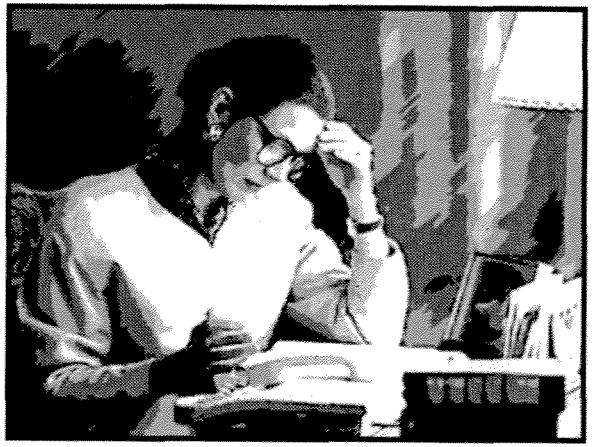
Unfortunately, however, such comments may be admissible for some other purpose, say, to prove the existence of an oral agreement. For example, an offer to pay $50,000 to settle a lawsuit is not admissible to prove liability (that is, that one owes something), but it may be used for another purpose, for example, that a contract existed. (Never mind that no juror, or anyone else, excepts perhaps a lawyer, can use a statement for one purpose and ignore it for another. Most of us would conclude that an offer implies one owes something. This type of reasoning is just part of the legal system we love and cherish.) Actually, sound public policy underlies the rule of admitting or excluding evidence based upon its intended purpose. The problem is that the policy works better as a policy than it does in practice.

Checklist

1. Don't wait until the last minute to hire an attorney. Attorneys are not like the "Maytag repairman," sitting there waiting for your call.

2. Don't call the lawyer after the case has begun. It will cost you twice as much twice as fast and hurts your chances to win.

3. Don't represent yourself unless you like losing, or unless you must because you cannot afford representation. By the time you hire an attorney, it may be too late.



Chapter Three

How To Find A Lawyer

Summary

Chapter Three describes various methods of finding an attorney and obtaining legal advice and cites the advantages and disadvantages of each method.

Chapter Three also provides a brief description of various practice areas within which attorneys specialize and a checklist for you to use in evaluating and choosing among various attorneys.

Using Media Advertisements To Find A Lawyer

Lawyer advertising used to be illegal. A United States Supreme Court decision changed this rule in the 1970s and revolutionized the practice of law. The rationale for allowing lawyer advertising was to make law more open and accessible to the general public and to create a more competitive environment. The

Supreme Court, as did many others in the bar, wanted lawyers to be able to tell the public about the services and the prices charged without violating the ethical rules.

In some ways the decision has worked. More information is available to the public about lawyers, the law, and various costs. The public is more aware of its rights and the right to compensation for injury. This is the good news.

The bad news is that the rule went from one extreme to another. Legal advertising is often tacky and the media equivalent of "ambulance chasing." Advertising for business has hurt lawyers' reputation and made the practice of law less like a profession and more like a business. Overly solicitous conduct by lawyers was and is still in disrepute. Unseemly lawyers just get away with it more often now. For these reasons, the "pendulum" may be swinging back to restrict some forms of lawyer advertising. Some state bar associations already require lawyer advertisements to be primarily informational and prohibit the use of professional actors or models to portray lawyers.

Sources For Finding A Lawyer:

- **Media commercials and advertisements**
- **Yellow Pages in your telephone directory**
- **Referrals by friends or professionals**
- **The local bar association**

The Yellow Pages in your telephone directory will contain virtually every attorney in town. In the Yellow Pages attorneys are listed and categorized in two ways: in alphabetical order and by practice area.

The most valuable information to look for is the type of law practiced by the attorney and his education and experience. This kind of information is recommended and accepted by most state bar associations. Claims such as "No fee until recovery" appear meaningful, and are, but they may actually only state the standard policy of all lawyers in that practice area such as, auto accident or other personal injury cases. Other claims like "We will fight for you" are simply tacky and meaningless.

Lawyers now use all kinds of media, from TV guides to billboards, to reach potential clients. Many advertise in specialty business newspapers and magazines. Thus, it should not be difficult to find a lawyer in about the same way that you find any other product or service.

However, many lawyers do not advertise. Some lawyers do not advertise because they do not need to. Their practice is well-established and business comes in regularly without significant marketing. Some lawyers only take new clients as their present cases end. Other lawyers do not advertise because they do not consider it proper, even though it is now allowed under the ethical rules. Still other lawyers do not advertise because they do not know how and/or cannot afford it.

Many lawyers who do not advertise are very good and well-respected. While advertising can help you find a lawyer, it should not be a pre-condition to your choice of lawyer. If you hear about a lawyer or are referred to one that you have never heard of, but who seems competent, do not be afraid to select that lawyer.

Customers of all types sometimes choose a product or service because they have heard of it, even though they cannot remember exactly what they heard or how they heard about it. The client may only have heard of the lawyer from the lawyer's own advertising. This is one reason why advertising works.

But hearing about someone or something does not make it good. Sometimes what we hear about an attorney or another professional may be bad, but we forget what we heard and remember only the fact that we recognize the name. Thus, "having heard of an attorney" is no guarantee of expertise.

Conversely, not hearing about something does not make it bad. You can obtain information about the lawyer's competence and experience in your area of need in other ways, as we will discuss in the following sections of this chapter, and in Chapter Six, where we will discuss the consultation.

Referrals Are A Great Way To Find A Lawyer

The best way to get, or at least talk to, a good lawyer is to use the name of another lawyer. Be sure to "name-drop." Where possible say "Charlie Dynamic" sent me. A referral from a respected lawyer or firm tells the new attorney that you are important. Even if the new attorney does not know or recall the referring attorney, the referral is flattering, so usually it opens the door.

If you are already using a lawyer, ask him or her for referrals in another area of law. Ask your neighbors or other businesses in your trade association or building who they use and whether they are satisfied. Newspapers and business journals often mention the names of attorneys who practice in given areas. Most bar

associations have a referral service under which you may consult with an attorney for a special initial price.

If you "cold call" attorneys from advertisements or the yellow pages, you may first need to qualify yourself to the firm as the kind of client the firm would like to have. Mention the type of case, then ask to talk to the appropriate lawyer's assistant or secretary. Explain your willingness to pay reasonable fees for reasonable service, the nature and importance of your case, your time needs and other pertinent information. Generally, if you do not call at the last minute, do not want something for nothing, and have the kind of matter the firm usually handles, the firm will probably be happy to have you as a client.

Bar Association Referrals

Lawyers in virtually every state bar belong to and are controlled by the state bar association (the "bar"). The bar establishes the rules of conduct and practice for lawyers in that state. In some cases, as in Arizona, membership in the bar is mandatory. In other states it is voluntary. In addition to the state bar, there is also, the national bar, The American Bar Association (ABA) and the county bar.

Whether voluntary or involuntary, most state and or county bar associations have referral services. These services take phone calls from persons seeking a lawyer and refer them to the kind of lawyer they need. Typically, the caller gets a drastic discount in fee (to about $25 to $50) for the first hour or half-hour of consultation with the recommended attorney. In return, the attorney gets a new client referral source.

Bar association referrals are excellent for new clients who have "no clue" as to who to call

or what kind of law their matter entails. This is one weakness of the Yellow Pages. If the caller does not know the difference between "auto accident injury law" and "corporate and business law," then the Yellow Page categories are not likely to do the client much good. In that case, calling the bar referral service can be very helpful.

The bar referral service can also be very helpful where the caller just needs the answer to a "quick question." In the next section we will discuss the fallacies of this "quick question" idea, but many questions can be answered in or shortly after an hour of in-person consultation. In those cases also, the referral service can be very cost-effective. The advice is better than free advice and the price is right.

You Get What You Pay For With Free Legal Advice

Attempting to get free legal advice, especially on the phone, is almost never a good idea. You will probably only get what you pay for, and you do both the lawyer and yourself a disservice. A good legal opinion, like a good medical opinion, requires an examination of the facts. In law, that usually requires a review of the pertinent documents and some legal research. Also, there are nuances of conversation and cases that usually will not come out except in a face-to-face meeting, at least initially.

The attempt to get a "quick answer" is usually based on a profound misconception of the nature of law and the legal process. A neophyte client may conceive of the law as a system of rules contained in a set of rule-books. Under this view all the attorney has to do to provide the answer to a legal question, is to quickly look up the rule if counsel doesn't know it already (but the attorney "should know the

answer already otherwise he probably isn't very good.").

But this "man-on-the-street" concept of law is profoundly mistaken. Only non-lawyers view the law as a system of rules. Experienced clients know the law is what the court decisions say it is. Practicing law, particularly litigation, is a lot like more like scientific research. The lawyer needs to research what the law is, even if counsel is very familiar with the practice area.

The law is constantly changing and evolving. Yesterday's knowledge may be obsolete. Even the best lawyers may need, and will probably want, to check recent decisions in the area before giving advice you can rely on.

A Brief Guide To Legal Practice Areas

Medical doctors have their areas of expertise. These areas range from general practice to brain surgery. The same is true of lawyers. Few lawyers still do all kinds of work. Most have developed their particular practice areas and do not do general practice.

To begin with, there are civil lawyers and criminal lawyers. This does not mean that one group is more pleasant and safer to be around than the other. Rather, it refers to the type of law the attorney practices. Criminal lawyers, of course, deal with persons charged with crimes. Criminal lawyers are either prosecutors or "defense attorneys." Legendary Perry Mason was a criminal defense attorney. In criminal law, the end is punishment, not money.

In contrast, legal representation in civil matters typically relates to money, which the law calls compensation for damages. In civil litigation one side is suing the other (or both sides may be suing each other) to recover money for legal wrongs.

Some overlap exists between criminal and civil law. Many crimes are also "torts," that is, civil wrongs for which one may recover money damages. For example, assault, battery and theft are not only crimes, i.e. punishable by fine or imprisonment by government authority, but also legal theories in civil actions for which one may recover money to compensate the loss.

Civil law, as opposed to criminal law, can be divided into two general types of practice: transactions and litigation. During law school employment interviews firms often ask the students which of these practice areas they prefer. (In reality, because they have not practiced in either area, most students haven't a clue. They just want a job.)

The difference between transactional law and litigation is profound, not only in the type of practice but also in the temperament of the lawyer. Transaction attorneys "do deals." They negotiate and prepare shareholder agreements, the documents for real estate deals, mergers and acquisitions, and other business documents. This is the "courtship and marriage" side of law.

Two sub-types of "transactions attorneys" are securities lawyers (who advise and work on initial public offerings and other work involving stocks and bonds) and real estate attorneys which, as the name says, handle residential and commercial real estate transactions.

Litigation attorneys, in contrast, work on the dispute and "divorce" side of business where tempers are flaring and deals are coming unglued. Litigators handle lawsuits in a variety of sub-practice areas. These areas include complex litigation, i.e. big document cases with hairy legal issues, bankruptcy, divorce, personal injury, and medical malpractice cases.

Now that you know the difference between a "transaction" attorney and a "litigation" attorney, you can seek and find the correct type of attorney for your needs.

Pre-screen The Lawyer With Questions And A Checklist

If the lawyer-client relationship fails, usually both parties are to blame, not just the lawyer. This is especially true where the client "travels" from one lawyer to another. "Traveling" usually indicates a false or overly optimistic view of the case and/or the justice system and an unduly pessimistic and probably unfair opinion of the last attorney. One way to avoid traveling is a thorough and proper evaluation of the attorney and the firm, before you engage in the services provided.

Ask the attorney, secretary or legal assistant whether the firm practices the kind of law you have in mind (e.g. a real estate transaction or a wrongful termination suit). If you don't know how to describe the case then briefly, in a sentence or two, describe the facts. This "short version" of the facts will enable the firm to analyze whether you have called the right kind of firm for your issue.

You waste your time and the firm's by going into a chronological history of your wrongful termination case if it turns out that the firm handles only personal injury cases. Thus, save the "whole story" for the initial consultation.

Also, avoid venting your frustrations with the lawyer or his staff. The attorney and his staff are not your mother, relative, friend, or psychologist. They are not responsible for and cannot solve your emotional problems. Consistently and seriously venting your

emotions with the firm will only tell the firm that you are an "amateur" and, worse, an "out of control" amateur. This will make the attorney less willing to take your case because the lawyer knows that counsel is not qualified (and is not willing) to deal with that stuff. (Divorce is an exception, and I do not know how divorce lawyers do it. They often deal with a high level of emotion and nastiness).

After it seems that the firm is interested in you, it is time to see if you are interested in the firm. If possible, pre-screen the firm on the phone by following the checklist discussed in the paragraph below. If that is not possible, then ask for a free initial interview, involving minimal or no consultation, to determine the "fit" between yourself and the firm.

Your "checklist" may include the following questions:

1. *Years in practice.* This should be more than five, unless the matter is simple or the attorney is part of a firm and closely supervised. But, when it comes to experience, more is not necessarily better. Newer lawyers tend to be more familiar with new rules or recent decisions. Older lawyers seem to get complacent, burned-out or suffer from a sense of entitlement and/or "delegationitis." Thus, for me, a balance of new knowledge and experience is best. Other things being equal, between seven and 15 years experience seems ideal.

However, this is just a general recommendation. Nowadays, many attorneys are in second careers. In their "former lives," they were engineers, physicians, nurses, and

business people. In an appropriate matter, these attorneys may be immediately and tremendously valuable to you. This leads us to the next question on your checklist.

2. *Background and experience.* Ask the attorney about his or her education and previous work experience. Ask the attorney about non-legal training, if any. An attorney who was previously a physician or registered nurse has a significant advantage in personal injury and medical malpractice cases. Former engineers may be good in contracting or zoning issues. Former business people may be good for business clients. If the attorney has no knowledge and experience outside of law, then focus on what kind of law the attorney normally does and how long the attorney has been doing it.

3. *Strongest practice areas.* Seek an attorney who normally and regularly practices that kind of law. Attorneys have different areas of expertise. For example, an attorney may be good at wills and excellent in business planning, but know nothing about trademark, copyright and patent law.

Generally, it is not a good idea to pay for the attorney's education in a new practice. This is true for at least two reasons: First, unless the attorney expressly agrees not to bill you for his education process, you will "pay through the nose" for the education. Second, the attorney is much more likely to make a mistake. If the mistake is severe enough, the attorney could commit malpractice. These days most

attorneys, unless they are really hungry, will stay with what they know, so beware of an attorney to seems too willing to "stretch."

4. *Hourly rate and retainer requirements.* A more expensive attorney is not necessarily a better one. He or she may just have a higher overhead or not have adjusted to today's more competitive business climate.

When I was in a different business, I operated on the theory that "I could impress some of the people all of the time, all of the people some of the time, but not all of the people all of the time." "People" in this context meant customers. I use this principle to remind myself to focus on customer service, not just physical plant.

The same principle applies to law firms: Impressive offices are nice, but "look (twice) before you leap." You already know that an elegant office may mean higher prices due to higher overhead. It may also indicate an air of self-importance at the expense of customer service. Good lawyers are busy, so make allowances for that, but if the firm acts like it is doing you a favor by letting you be its customer, move on.

5. Your comfort in the relationship. Evaluate the firm as it is evaluating you. Evaluate the firm in two ways:

First: its ability to handle the merits of your legal problem, and...

...Second: your personal compatibility with the firm's personality and style.

Buddhists say that how one does anything is how one does everything. This principle can help you evaluate the work styles and personalities of employees and friends. How does the firm operate? Does it fit with your values and beliefs? If so, then you have a good match. If not, move on. Don't be desperate. Look for a better relationship.

In personal injury cases, where the firm is paid on a "contingency fee" basis, i.e. as a percentage of recovery, usually from an insurance company, the initial phone calls or consultations may quickly move into the merits of your case. The attorney will be evaluating the strength and weaknesses of your case, you as a witness, and the anticipated recovery.

As we will discuss later, it is good for you to receive this evaluation of your case. However, at this stage you need to evaluate the firm while it evaluates your case. You still need to check subject matter to determine whether this is the kind of case the lawyer handles. Use phone calls and interviews to determine the lawyer's qualifications and experience in the subject area. You can take a good contingency fee case to many firms, so do not "sign on" with a firm you are not sure about. It's always better to "shop around."

Checklist

1. Advertisements and referrals as sources of lawyers.

2. Advertisements help find lawyers in the right practice area.

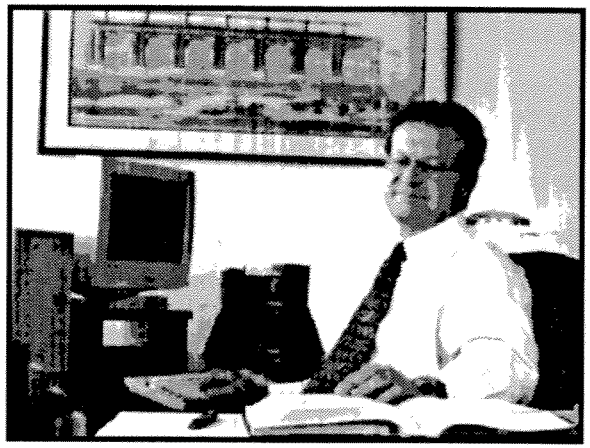
3. Referrals are a great way to find a lawyer.

4. Bar association referrals are an effective and low cost means to find a lawyer.

5. You get what you pay for with free legal advice.

6. Use a guide to legal practice areas to determine what kind of an attorney you need.

7. Pre-screen each lawyer with questions and a checklist.



Chapter Four

What To Look For In A Lawyer

Summary

Chapter Four discusses what to look for in a lawyer — how to evaluate a lawyer or a firm and why a law firm's size is not the prominent factor it used to be. Systemic factors include rules changes and the effect of technology. Personal factors include the willingness and ability to listen, preferred personality type, effective communication, trust and compatibility, teamwork, business judgment, focus and experience.

Choose A Lawyer, Not A Firm.

Choosing a lawyer by the firm is a little like choosing your spouse by your prospective "in-laws." It won't work; at least, not on that basis alone.

In many ways a professional relationship is like any other relationship. Just as people have weak points and strong points, firms have areas of strength and areas of weakness. Most firms will have people you will like and respect and some you will not.

Meet with and get to know the attorney who is actually going to do the work. He or she is your relationship person. If you do not like, respect or trust this person—even if you are not sure why—move on.

Big companies, such as Honeywell, probably do better with a large law firm. Corporate America and big firms think alike. They have the same structure, mind-set and operating philosophy. Each feels secure with the other.

Everybody else is probably better off with a small firm or an experienced sole practitioner. Few firms can match the speed and cost-effectiveness of a sole practitioner. Many excellent sole practitioners and small firms have "spun off" from large firms to focus on their particular practice area. This promotes efficiency and effectiveness.

Small firm clients and sole practitioners have a "hands-on" approach and relationship that most business people will appreciate. They will get their hands dirty, and they tend to get very involved as the "champion" of your case.

Although the small firm or sole practitioner may nominally charge the same hourly rate as the big firm's junior partner or associate, the small firm or sole practitioner's overall bill may be lower. Traditionally, small firms, including sole practitioners, have been forced to be market-oriented and cost-effective to retain their clients. Small firm clients tend to be smaller

and have less money than large firm clients. Often the small firm client owns the company and is spending his or her own money. This forces the small firm to be accountable for its bill.

Large firms have sophisticated means of tracking every expenditure, and due to their overhead, they strive to recover as much of the smaller everyday expenses as possible. Small firms tend to be less inclined and less able to bill every hour and recover every expenditure than a large firm.

Small firm clients tend to react negatively to being "nickeled and dimed." Because the small firm attorney is often the person who is actually doing your work and who must account to you directly for its quality and cost, small firms have been more likely to consider "value" when determining the final bill. As discussed above, smaller firms can also afford to charge less due to lower overhead.

Traditionally, large firms had license to bill their corporate clients astounding sums. This occurred because the large client had plenty of money that did not belong to corporate management. This is changing. Legal fees have become so exorbitant that even large clients are now monitoring their bills closely. Many large clients who regularly use attorneys now require the law firm to use paralegals to save money on routine tasks and look at a "blended rate" of all attorneys and staff to evaluate the firm's cost-effectiveness. Thus, today, both large and small law firms have become more client conscious.

Size Doesn't Matter: Rule Changes And Technology Have Eliminated Most Big Firm Advantages

Surprise, hidden information, and secret witnesses or documents a la Perry Mason have

not been allowed under the rules of legal procedure since the 1940s. Since that time the rules of procedure have required each side to obtain full information from the other. This process is called "discovery." Various discovery tools include: "interrogatories" (i.e. written questions which must be answered within a certain time), requests for production of documents and subpoenas duces tecum (which are commands for documents to the other side and third parties), requests for admissions (which if not denied, are deemed admitted; and if improperly denied, result in sanctions), and depositions. Depositions are questions and answers, taken under oath, in front of a court reporter in the lawyer's office. Of these "discovery tools," depositions are the most useful and powerful, particularly under the modern rules.

During the 1970s and 80s, law firms, particularly large law firms, hired associates "by the dozen" to draft discovery documents. The larger firm could bury the smaller firm under an avalanche of discovery. This "avalanche" could include 180-page interrogatories, requests for a mountain of documents, and production of an ocean of documents that the smaller firm could not begin to wade through. Depositions went on for days, with multiple experts retained. And the experts and the attorneys were "all on the clock."

Now, under the Federal Rules of Civil Procedure used in federal courts, variations of which have been adopted by many states, including Arizona, each party to a lawsuit must, within a given time after the Answer to the Complaint is filed, prepare and produce a "Disclosure Statement" to the other side. The purpose of the Disclosure Statement is to provide full information of facts, documents and witnesses.

In those states which have adopted the Federal Rules, recent changes in the rules greatly limit the number of interrogatories, the need for document requests, and the number and length of depositions. The goal is faster, cheaper and fairer litigation. One prime result of these changes has been to "level the playing field" between large and small clients and law firms. Strict limits on discovery prevent the large client or law firm from overwhelming the smaller one. Thus, litigation has been become much more fair for the smaller firm.

Another factor which has dramatically changed the practice of law is technology. Before the advent of the personal computer and on-line legal services, the large firm had a significant advantage over the small firm due to the quality and number of its staff, library and other resources.

Now, the large firm may have dis-economies of scale. Many established law firms have made huge financial commitments to their law libraries. The major components of a law library are the statute codes and case reporter volumes from various jurisdictions. Most established law firm libraries contain past volumes of the statutes and reporters, plus their updates.

Statutes are the law enacted by the legislature, with annotations (or "write- ups") describing how the statute has been applied in particular cases. Reporters contain the actual case decisions by the appellate courts on various legal issues. Reporters are issued periodically, usually one or two per year for each set.

Because of the average law firms' prior investment in books, the rapid evolution of technology has placed the established large firm in somewhat of a "Catch-22" position. To

preserve the value of its library, the firm must continue to buy the new reporters and updates. Otherwise, the library will become obsolete and lose its value. The result is a sizeable wasted expense and/or write off.

On the other hand, if the firm does maintain its investment in books, then it may be simply duplicating what is now available on "on-line" computer services. Virtually every law firm, large and small, already has access to these on-line research networks. Thus, the firm does not really need the hard-bound books.

Many new firms no longer bother to invest in law libraries, at least in the traditional sense. The law of every state, statute or appellate decision, is now available on an "on-line" service, such as Lexis or Westlaw, within 24 hours. Because of this availability, not only are most law books unnecessary, but the tenant space needed for the books is now unnecessary.

Because of this dramatic substitution of computer technology and data for books, newer, smaller firms no longer suffer a disadvantage in resources. In fact, the reverse is true. Established, larger firms have "sunk costs" and overhead that the new law firm need not carry.

Together, mandatory disclosure, computer research, smaller and specialized firms are dramatically changing the practice of law. Simply put, while the large firm may continue to have great resources and excellent attorneys, it has lost many of its traditional practice advantages.

When we combine these dis-incentives to size with the change in the legal paradigm itself, i.e. the change from law as a monopolistic collegiate club to a competitive business with

free market advertising, the result is a revolution in the provision of legal services. Law is now a "brave new world," not in the Huxlien sense of government omnipresence and control, but of lawyers facing the trials and tribulations of market capitalism.

Look For An Attorney Who Can And Will Listen

Look for an attorney who will listen. Good listening is part of both the best offense and the best defense in any transaction or in litigation. One way to judge whether your attorney will carefully listen to and analyze the other's side's arguments is to note how well the attorney listens to you and analyzes your facts. As the Buddhists say, "How we do one thing is how we do everything."

The early part of a working initial consultation should usually consist of the attorney listening and taking notes on your case. The lawyer may or may not review the documents at that time. Sometimes, the lawyer will have a good idea what the document says or will want to get a good overview of the case, particularly as you understand it. The lawyer may want to determine whether you or the other side has misconceptions about the facts, law or situation.

A lawyer who fills this critical time with relating legal "war stories" without first listening and analyzing the facts, is not working on your case. War stories are a waste of time unless, (1) the stories respond to your expressed or implied question about past experience and expertise or, (2) are used to demonstrate a point, e.g. necessary work, time, expense. Even then, after quickly telling the story to make the point, the attorney should "move on" and get down to an analysis of your situation so you can receive the "Evaluation," discussed below.

In addition to making sure your attorney has listened to and understood the facts from your point of view, it is also important that your attorney listen to and understand the other side. The attorney who does not listen to you probably will not listen to the other side either. This can be fatal.

Carefully listening to the other side is not betrayal, it is good lawyering. Good listening leads to good questioning. Good questioning can lead to meaningful discussion. Meaningful discussion can expose the weaknesses and misconceptions on both sides. This, in turn, can lead to settlement or, at least, clarify the issues and arguments for negotiation or trial.

Some lawyers are full of "bluff and bluster." Some lawyers are much admired by their clients for their aggressiveness, toughness and tenacity. Most of the time these aggressive attorneys do an excellent job for their clients.

Sometimes, however, an attorney can become so caught up in his client's version of the facts, that in his/her bulldozing style, fails to appreciate the other side of the story. This can lead to disaster. If an attorney and client fail to listen and consider the opposing point of view, then they do not know the other sides' strengths and weaknesses. If they do not know the other side's strengths and their own weaknesses, they will not be adequately prepared to address the other side's arguments in a motion or at trial. As in a prize fight, if one side does not know the other's "best punch," then he may get knocked out early.

Decide Whether You Want "Rambo" Or "Indiana Jones"

"Rambo-litigators" were the rage of the 1980s. "Rambo" is used in this context to represent a

tough, aggressive, sometimes "bulldozing" style. "Indiana Jones" is used to represent a quieter, more professorial style, but capable when the going gets rough. Indiana Jones types tend to be quiet, polite, studious and methodical.[2]

"Rambos" are aggressive and "tough" with the other side. They use and abuse the rules, if necessary, to beat the other side into submission. At least, this is what they want their clients to think.

In reality, although they may impress some clients (usually clients who want everything—they have to be bigger and "badder" than anyone else), Rambo litigators have so irritated other attorneys and judges that leaders of the bar and bar associations have drafted and passed rules to "rein in" their actions. In Arizona, the Professionalism Committee will send representatives to meet and counsel attorneys who have been reported for breaches of courtesy and professionalism.

Not only are Rambo attorneys in disrepute within the bar, their style may actually hurt their own clients. The reason for this is the consequent lack of communication between the Rambo attorney and opposing counsel that usually results from the Rambo attorney's aggressiveness. Rambo litigators may so irritate opposing counsel and client that the parties stop talking to each other directly and only communicate through letters, pleadings and arguments to the court.

Let me give you a brief example. One of the most brilliant attorneys I know is a Rambo litigator. The good news is that he is bright, dedicated and aggressive. The bad news is that he is so aggressive that virtually every attorney (and their clients) literally hates him. Every case, then becomes a grudge match and a test of wills.

Result: His cases don't settle. Legal fees go through the roof because the parties base their decisions on emotion rather than sound judgment. This attorney, by being so aggressive, hurts his client.

I do not fear "Rambos." They often rant and rave, but this does not move me or most other attorneys. The main effect of this style is to look good to the client.

For my money, an "Indiana Jones" type is the better attorney. I have seen such attorneys politely, courteously and meticulously tear an opposing witness to shreds. The witness did not even feel the knife, but the guts of the case were all over the floor.

Indiana Jones types also do well in transactions. In negotiation, the superior attorney finds a way to give the other side what it wants — as much as can be given — in a way that does not take away from what the client wants from the deal. The good, lasting deal is struck, not to bully the other side into submission, if that's possible, but to give each side as much as possible of what it wants from the transaction. As my business mentor, Russ McGuire, said: "It's not a good deal if it's not a good deal for everybody." Russ meant that a deal will fall apart if there is not some lasting benefit in it for the other side.[3]

Whatever style you prefer your attorney to have, open communication is important. Almost always, open and relatively hostility-free communication between the parties' attorneys benefits the parties. If good communication does not result in quick dismissal or settlement of the suit, it can, at least, help clarify and focus on the real issues. Thus, open communication avoids wasted fees on unnecessary matters.

Look For A Lawyer Who Is A Responsive And Effective Communicator

Two simple tests for responsive communication are (1) the return of your telephone calls and (2) the lawyer's ability to understand the facts and to make the legal issues clear to you.

An attorney who does not return your call within a day or two is probably too busy to handle your case or does not do that type of work (assuming the staff screened your call). In that case the attorney's secretary, paralegal/legal assistant, or someone on the staff, should return your call to tell you of the firm's inability to handle your case. Having an attorney who does not return your call is not much better than having no attorney at all.

On the other hand, beware of the "Maytag Repairman" syndrome. No experienced attorney with a decent practice is always instantly available. Ideally, the attorney should return the call on the same day or, at least, within 24 hours. But, sometimes, during trial or vacation, the return call make not come for a few days. In that case, the test is whether someone from the office calls to let you know what is going on. If the lawyer or firm leaves you hanging more than a day or so, move on. That attorney is not ready for you at that time.

Look for an attorney who can tell you what is important in simple English or who uses analogies from common experience to illustrate a point. Effective communicators do not make things complex, they make them simple. If you do not understand what your attorney is telling you, it is probably not your fault; more likely, it is your attorney's fault. You may need another attorney who communicates in a style more similar to your own.

Look For A Lawyer You Like, Trust And Respect

A legal relationship is a relationship. Why hire a lawyer you would not have coffee or tea with? It is best to feel comfortable. A common mind-set and style can improve communication and understanding and make work easier.

I remember reading a book on corporate staff effectiveness. The book noted that a highly effective and praised corporate team did not appear to be composed of the corporation's best and brightest individuals. The question was "why not?" This seemed a waste of valuable corporate resources.

The answer was that the members of this group worked well together and complemented each other's strengths and weaknesses. The common understanding and good relationship among the team members fostered good results. In short, the team worked well because its members worked well together.

There are limits and exceptions to this principle. You do not want your litigator to kill the other side with kindness, or your transactions attorney to be so "touchy-feely" or relaxed that he cannot get the job done. It's a question of balance. Still, all other things being equal, I prefer to have business relationships with people that I like.

Choose An Attorney Who Will Let You Be A Part Of The Team

Generally, an attorney and client who work together as a team will be more effective than an attorney working alone, with minimal input from the client. Typically, the client is intelligent and brings his or her own knowledge and experience to the case at hand. The old saying that "two heads are better than one" is particularly true in legal matters.

A client working closely with the attorney helps the attorney master the facts and achieve the client's objectives. One of the biggest challenges a lawyer has is getting the facts from the client and learning them thoroughly. Only then can the attorney confidently decide upon and apply the appropriate law. When the attorney can finish a client's sentence by using one of the pertinent facts of the matter, then the attorney can become truly effective.

Being a team player means avoiding lawyers who want you to passively await the results. Results in that case will seldom be favorable.

Being a team player also means avoiding the temptation to dominate the attorney. The client needs to respect and trust the lawyer's judgment, or find another attorney. Otherwise, the client is limiting the expert by the limits of the client's knowledge. This is just a version of "having a fool for a client." The results are not likely to be favorable.

Look For Business Or Other Judgment Related To Your Field

All lawyers think they have superior business judgment. Few actually do. Legal solutions are just one form of a business solution. Lawyers often treat the two as the same.

Too often lawyers think like a hammer: they treat everything like a nail. For example, a litigator's natural instinct is to evaluate the case in terms of the legal theories that apply, the harm done, and the damages that may be recovered. The question whether the client actually wants to exercise all rights and claims applicable under every legal theory may never occur to the litigator. If the lawyer did consider this question, counsel would probably find it weak, odd or a

dereliction of duty. But pursuing every claim — wringing the last drop from every case — may not always be in a client's best interest.

For example, divorcing couples sometimes have already worked out the details of their separation before they see their lawyers. But after one of them sees an attorney, the next thing that happens is that one spouse steals the kids and all the money in the bank accounts, and obtains a restraining order barring the other spouse from coming home. The other spouse is left with no home, money, or family, literally overnight.

The spouse does not necessarily even want this "hammering" to occur. The lawyer may just do it —out of habit, and because it can be done. This is what I call the "hammer making every thing look like a nail." The fact that such actions are legally permissible does not make it necessary, right or appropriate. Unless the situation is one of abuse or other extreme circumstances, one spouse is not justified in "hammering" the other in this way.

Business clients do not necessarily want to win a lawsuit. More often they want to solve a business problem, e.g., hypothetically, ABC Company's refusal to perform on a contract. A long and expensive law suit with ABC Company may not be in your best interest, even if you win it. ABC Company may be important to the client, if not as a customer, then, perhaps, through influence in the community. For this and other reasons, clients sometimes would like to preserve the relationship with ABC Company. But preserving the relationship, or at least preserving neutrality, will be impossible if the case is not handled gingerly, with an eye towards the broader business ramifications of legal decisions.

More to the point, if you are looking for a legal counsel who can counsel, you may want to seek a lawyer who has judgment. A lawyer with judgment can and will focus on non-legal solutions as well as legal ones. In business, this kind of lawyer can wear a "business hat" and a "lawyer's hat" and knows the difference between the two.

Many lawyers have strong business or other law-related skills due to their prior academic experience, employment or other work history. There is no education like past experience. We may empathize with and learn from watching others, but the best way to learn something is to have done it ourselves.

For example, the best way to know what motherhood is like is to have been a "Mom." Similarly, the best way for a lawyer to understand business is to have been a business person. The best way for a lawyer to understand engineering is to have been an engineer. Often, the best personal injury lawyers are former doctors or nurses. Lawyers with past experience in business can probably provide the best business counseling, likewise for advice in other areas of law.

Often the ideal advice that you can receive from your lawyer is that you do not need a lawyer on this matter because of reason X. This kind of legal advice is rare, and is usually most available from lawyers who can "wear the hat" of a business person, engineer, physician and so forth.

If you find a lawyer willing to give you this kind of practical advice, you have found a true ally. Recognize that this willingness to put your needs first is rare. Work hard to develop a good relationship with this attorney. Reciprocate by considering the lawyer's needs.

If possible, become a "favored client," as discussed in Chapter Seven.

Check The Lawyer Or Firm's Practice Areas And Experience.

Be aware that some firms will oversell to get the business. Ask the lawyer about his knowledge and experience. Ask about previous cases, numbers and results. You may also want to inquire about publications and seminars conducted.

In particular, ask if counsel has done this kind of work before. For example, if the attorney suggests that a Temporary Restraining Order (i.e. a court order to stop doing something) may be necessary to prevent a competitor from using or copying your logo or marketing materials, ask the attorney whether counsel has previously prepared these documents and appeared in this type of proceeding.

Checking expertise can be especially important during law firm "shake-outs" or economic downturns. During the last real estate crash, many real estate attorneys attempted to represent their best clients in litigation matters, receivership proceedings or bankruptcy. Typically, such attorneys were not as effective as they could have been because this was not their area of knowledge and expertise.

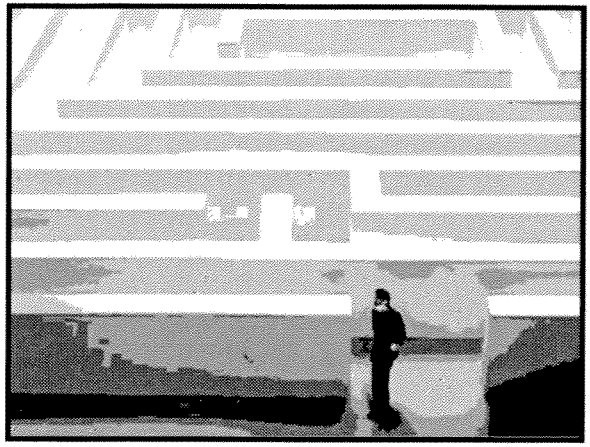
Moral:

Tell the truth, the whole truth, so help you God.

— . —

Checklist

1. Choose a lawyer, not a firm.
2. Law firm size does not matter anymore.
3. Look for an attorney who will listen.
4. Decide what personality-type you want your attorney to have.
5. Look for a communicator.
6. Look for an attorney you like, trust and respect.
7. Look for an attorney who will let you be part of a team.
8. Look for business judgment.
9. Check practice area and experience.



Chapter Five

Things To Avoid

Summary

This chapter discusses practices to avoid in your relationship with an attorney. Not telling the whole story, attempting to get free legal advice, using an attorney that you do not like or trust, having false or idealized expectations of the attorney and/or justice system, constantly changing legal relationships, attempting to dominate or control the attorney or becoming embroiled in an adverse relationship with your own attorney. Other points discussed include haggling over work and fees and basing lawsuits on "principle" rather than good business sense.

Don't "Hide The Ball" From Your Own Attorney

Not telling the whole truth to your attorney is a little like lying to your doctor about your symptoms. It is really a bone-headed play.

Nevertheless, some clients are afraid to tell their attorneys the whole truth. Sometimes, they are embarrassed or ashamed. Some think they can make their case look better by not telling the whole story. This is a serious blunder. Again, it is similar to thinking your doctor can make you well faster if you don't tell him or her everything that is wrong with you.

Clients are often afraid of negative facts. Usually they do not realize that every case, negotiation or lawsuit, has negative facts. Attorneys deal with awful and outrageous facts on a daily basis. Attorneys specialize in negative facts. Attorneys do not often see blue skies. They often see clouds and storms, real or potential, which can return to haunt the less than forthright client.

Nothing a client can say or do will shock or surprise lawyers. Starting as students in law school, lawyers are exposed to the most egregious facts, ranging from cannibalism and incest to "living vegetables" as plaintiffs. Sometimes, to lawyers, it seems like they hear more confessions than a priest.

Virtually any fact can be dealt with—stated positively, put in context—if the attorney knows about it. Generally, it takes more than one or two negative facts to make or break a deal or lose a case. The attorney who has the full set of facts from the beginning will have more time to figure out how to handle the bad fact(s).

The only sure way to maximize the harm from negative facts is to not tell your attorney and let him or her be surprised by them later during the case or negotiations.

This oath, is, of course, the same one witnesses take before depositions and trial. Follow it, not just because you are required to

by law, but because it is the best way to come out ahead in your legal matter.

Avoid Seeking Free Legal Advice; You May Get What You Pay For

It is tempting for clients to seek free legal advice at social gatherings or on the phone; but, it is not a good idea. The lawyer is probably not interested, and may not be paying attention, if he thinks you want a "freebie." Why should he be? All any lawyer has to sell is time and expertise, and you are not offering to pay for either one. Think about it. Lawyers do not suffer through the personal and familial trials of law school to work for you for free.

Even worse is the situation where people seek legal advice from close friends who are attorneys. A lawyer has ethical responsibilities and will probably hold back even though wanting to help out. The person gets just enough information to think he's been helped when he is only getting started. The message here is that only full legal advice comes to the client who actually retains a lawyer.

No "beginners' standard" protects lawyers who are new to the profession or practice area, or who are going out on their own. Like doctors, lawyers are held to the highest level of competence from the first day on the job. Moreover, unlike doctors who tend to be collegial, lawyers are paid and required to deal with and fight against other members of the bar who are probably as educated, smart and dedicated as they are.

A lawyer's life is difficult in many ways. The hours are long, and many lawyers have terrible work loads and time pressures. Everything related to law is over-priced. Books that would otherwise cost $19.95 cost $105, plus yearly

supplements, because the word "law" is in the title. Due to the outrageous overhead, cash flow is always a problem.

In short, lawyers often do live the life of "gunslingers," and are not willing or able to do their job for free.

Rather than seek free legal advice to a "quick question," a better idea is to retain the attorney for "advice only" at the normal hourly rate. A small retainer goes a long way when used for consultation only. You will get the attorney's full attention, and the attorney is fully responsible for the advice given.

Choose An Attorney With Style – Your Style

An attorney's style should match your own, or at least what you want the attorney to be in that case. If the attorney is too formal or informal, too aggressive or not aggressive enough, too slick or not slick enough for your tastes, then move on.

Ideally, your professional relationships can be reasonable versions of your personal relationships. Not that you need to become close friends with your professional advisors, but it is pleasant and productive to have as an advisor the kind of person you would enjoy drinking coffee with, i.e, someone you like and respect. This improves communication and understanding. In so doing, you will maximize the final results.

Beware Of Interpreting Your Own Projections As Reality

Although many clients think their case is perfectly clear and obviously just, few clients actually wear "white hats." Most clients, like the issues in question, wear shades of gray. On the issues, this "gray" constitutes the middle ground.

It is one reason why cases that seem so one-sided when viewed only from our perspective seem less certain and become much closer on the issues when viewed from the other side's perspective. Often the truth of the matter lies somewhere between the positions of opposing parties.

One reason for this disparity between our perception of the facts and reality is our fundamental makeup or "stuff," i.e. the belief system and conceptual framework through which we filter our observations and experience (also known as our belief system or "BS"). The effect of interpreting events through our "BS" is that we may notice, select and focus on a completely different sub-set of phenomena than someone else. Thus, before expecting full affirmation of our position from the court, it is important to listen to and consider the other side's point of view—not necessarily to accept it, but to understand it.

Another reason that cases become closer on the issues as they progress through negotiation to trial is that the parties and their attorneys become creative and skillful in their presentation of the facts. These creative presentations are not necessarily untruthful; they just have a self-serving "spin" on them and may be selective in the facts considered.

Avoid False Expectations Of Our Justice System And The Perfect Justness Of Your Cause

Many clients, usually those with no prior experience with the legal system, are hell-bent on their idea of "Truth, Justice and the American Way." Regardless of the color of their hat and the justice of their cause, such clients are blinded by their own perceived righteousness and are the most frequently and seriously disappointed.

The legal system is a bureaucracy. Judges are bureaucrats and, worse, lawyers turned bureaucrats. They are overloaded with work and have scarce and often outdated resources. Ideally, they would care a lot about your case. In truth, they may not. They may not like a certain area of law or be as familiar with it as those areas they practiced before becoming a judge.

Juries can be better or worse than judges, depending on the case. Juries may ignore the law and rule on the basis of grand themes, prejudice or sympathy. This tendency is aggravated by the fact that the jury members are not even told what law applies until all testimony has been heard and the trial is almost over. By the time they have all the facts, the jury members may have already formed a tentative conclusion about the right and wrong of things. This tentative conclusion may or may not square with the actual truth and justice of the matter.

False expectations about your relationship with your attorney and/or the legal system often lead to another mistake clients make: switching from one attorney to another.

Avoid Constantly Changing Legal Relationships

Individuals who go from one attorney to another, especially on the same matter, have probably "planted their own seeds of discontent" and carried them from one relationship to another. Often such clients have false expectations. They may have an unrealistic conception about what the lawyer can do for them. They may not realize the amount of time involved or how arduous and slow the system is under the rules of procedure. They almost certainly will have false expectations regarding money—little or no idea how expensive legal services are, especially litigation. And finally, a clients' false

expectations may revolve around themselves—undue confidence in the justness of their cause or uncontrolled fear. Sometimes the client cannot settle on and trust one attorney for fear another attorney would do things differently or better.

Any one or more of these factors can cause the client to "bolt" at the slightest sign of trouble in a continuing quest to find an ideal lawyer. But lawyers, like everyone else, are a "mixed bag" of positives and negatives. The attorney who is excellent in customer service and client relations may be less experienced. An attorney may be brilliant but have the "desk-side" manner and personality of a Gila monster. The chances of finding the perfect attorney are on par with finding a perfect spouse or having a perfect child. It is highly unlikely. The client must decide what factors are most important in these circumstances and choose an attorney accordingly. How one chooses is the subject of this book. A sample checklist and weighting system is furnished at the end of the book.

The realistic client does one's homework, asks questions, evaluates the attorney as best as possible, then turns over the matter to the chosen attorney's knowledge and experience. From that point on, unless the attorney is missing deadlines or failing to do any work on your case, you probably can rely on the attorney to do a good job.

Avoid Attempting To Dominate Your Attorney

Some books read by the author suggest that the client should attempt to control and dominate the attorney to achieve the most cost-effective and satisfactory results. This idea, if carried to an extreme, is not usually possible or advantageous.

It is usually not possible to control and dominate an attorney because good attorneys are not that tractable. In many ways attorneys are paid to control and dominate others. In this regard, an attorney, particularly the modern litigator, plays much the same role as the hired "gunslinger" of the Old West. Counsel is paid to deal with others under adverse circumstances. For the same reasons that it was difficult to control the gunslinger, it is difficult to control the attorney. In the realm of law, the power belongs to the attorney. Moreover, only a fool hires a "gunslinger" then expects to have total control. If counsel is truly a "gunslinger," counsel will not be that tractable. Even if it is possible, the idea of control and domination may not be advantageous to the client. The attorney who yields to the client's daily instructions will seldom do a good job, since this amounts to surrendering professional judgment to the client.

Most clients will have limited legal knowledge and experience. Due to these limitations, most clients probably are not qualified to make all decisions in legal matters. Even attorneys hire other attorneys, when not working in their field of expertise. Thus, if the client makes legal decisions, then almost always the quality of representation will suffer.

We live in an age of technology, technicalities, and specialization. Except when working in our own field, few of us can hope to know as much about anything as the expert in that field. We are forced to rely, and should rely, on the expert to achieve best results. The principle is as true for law as it is for auto mechanics and quantum mechanics. Thus, the wise client relies on the attorney.

This does not mean the client should be "shut out" from participating in the case or

should give the attorney completely free rein. The ideal situation lies somewhere between these two extremes. The client should want to have information and input along the way and to make the final decisions on the terms of the deal or settlement.

The client should also "be involved." A caring, informed and involved client will usually obtain better results than an "absentee client." Some clients can help the attorney brainstorm the case. Always, the client is most knowledgeable about the facts of the case. The client's job is to make sure the attorney knows the facts — so well, in fact, that the attorney can tell the story as well as the client.

However, not all facts are equally important. Some facts have great legal significance. These are called the "material" facts. Other facts have little significance. These facts may be part of the story and add flavor and context, but do not prove anything relative to the legal theory in question. These facts are called "irrelevant" facts.

Because clients are not lawyers, it is usually very difficult for them to know the difference between material and irrelevant facts. For that reason clients tend to repeat and emphasize facts which trigger their emotions but are not as material as other facts. One way the client can avoid this problem is to ask the attorney what kinds of facts are most important to the case and what legal theories these facts are material to.

In summary, select an attorney who will keep you informed and make you feel like part of a team. Then, be an active member of the team. Be responsible for the facts and final decisions regarding the terms of the deal or settlement; but leave legal decisions and strategy to the lawyer. If you are not confident in the attorney

you have selected, then find another lawyer (keeping in mind the problems of idealization discussed in the previous chapter).

Avoid Being In An Adversary Relationship With Your Own Counsel

Some clients haggle about money. Others constantly nag for status and other information when there is nothing more that needs to be done at that time. These tactics create unnecessary stress and "turn off" the attorney.

Before complaining, ask questions about the status or money and do so only at reasonable intervals. Most legal problems take at least three times longer than you would expect. That is the nature of the legal system. Get used to it. The only thing you accomplish by hounding your attorney is to make him wish you were not his client. By asking questions, or periodically sharing your thoughts on various matters, you can keep your attorney involved without making him feel like a henpecked spouse.

Avoid Haggling With Your Attorney Over Work And Fees

Look for a lawyer whose price is fair and whose work is reasonably good and completed within a reasonable time. When you need a doctor you want the best you can afford. Likewise, in most cases you want a good lawyer, not a cheap one. So, haggling about fees is the wrong approach.

Asking about and discussing fees is perfectly acceptable and a good idea. Talk to a variety of firms. For example, talk to several listed under the same heading in the yellow pages (business, accident, bankruptcy, divorce), then get a range of hourly rates and retainer

requirements. (A retainer is an amount paid in advance, placed into a trust account, against which the attorney bills as the work is done.)

Some attorneys have high retainers, but lower hourly rates. Some attorneys have the opposite. Choose what is more comfortable for you. The important thing is to know what you are buying and why.

Avoid Basing Lawsuits On A Matter Of Principle

Clients or prospective clients often tell me: "I have been mistreated." "What he did is just not right." "I just want to teach him a lesson." "It's not a matter of money; its a matter of principle." These statements are reasonable, and probably true. Nevertheless, in most cases, I would not advise that you pursue civil litigation (i.e. suits for money damages) for these reasons alone.

In general, the legal system is designed to achieve four ends for its participants:

1. to compensate for injury or damages done;

2. to punish wrongdoers, so that they receive their "just desserts;"

3. to rehabilitate—this applies most in criminal law, but applies somewhat in civil litigation, in that the defendant may learn that what was done was unlawful; and

4. to deter—to prevent such conduct in the future by "sending a message" to the wrongdoer and others like him.

As shown, suing as a "matter of principle" and "to punish the wrong-doer" are well-recognized goals of our legal system. But, the "principle only" rationale ignores the high transaction costs of litigation. Litigation can compare in cost to "emergency room treatment" or major surgery. However, unlike medical treatment, often no insurance carrier is "footing the bill."

Where an insurance carrier is paying the bill or the litigant is a sizeable corporation or wealthy individual, then the costs of attorneys fees, expenses and other costs are more easily handled. In that case, the rough order of factors to consider are:

1. The merits of the claim (whether plaintiff or defendant);

2. The end-reward (what may be gained or lost); and

3. The transaction costs.

But where an insurance company is not defending the claim, then for most businesses and "middle America," the most logical priority of these criteria is as follows:

1. The transaction costs;

2. The end-reward (what may be gained or lost); and

3. The merits of the claim (whether plaintiff or defendant).

Putting transaction costs ahead of what may be gained or lost may be an exaggeration. But, unfortunately, many claims are forfeited or lost because the party, plaintiff or defendant, does not have the money to pursue the claims or properly defend against them. One can have a great case and not have the money to pursue the claim. Conversely, one may have a great defense and still settle to avoid the financial (and emotional) strains of going to trial.

This is the "bad news." The "good news" is that, due to the new competitive nature of law, many attorneys are more affordable than ever before; and most law firms are much more client-oriented than they were ten years ago.

More good news is that in collection cases, where one is suing to collect an unpaid invoice or promissory note, or in personal injury cases, such as auto accident cases, the attorney often works on a contingency fee basis. Under a contingency fee arrangement the law firm will collect its fee from the recovery. Sometimes, the firm will even advance the costs that must be paid to third parties to prosecute the litigation. Such costs include filing fees, process service and court reporters.

Collection cases are often done on a contingency fee basis because they tend to be relatively simple, both factually and legally. In most collection cases, the indisputable argument is: There was a contract. Defendant signed the contract. So, defendant owes the money. The problem with collection cases is having a defendant with assets or income to pay the judgment.

Personal injury cases are contingency fee cases. In personal injury cases, almost always, an insurance company is paying the claim for the defendant. Thus, unlike collection cases,

personal injury suit judgments are usually collectable. Personal injury cases often settle because both the insurance company and the plaintiff have a rough idea of what the claim is worth from the moment it is filed. Collectability and relative certainty make personal injury suits fertile grounds for lawyers to practice on a contingency fee.

Other examples of contingency fee cases are discrimination or wrongful termination suits where an employer has discriminated against an employee on the basis of race, gender or handicap. Wage and hour cases are also handled on a contingency fee basis. Wage and hour cases are those where an employer owes an employee a specific amount of money under state or federal law.

Most cases, however, particularly commercial litigation cases, are not contingency fee cases. In most cases, the client will be paying his or her own way. Where the client is paying the bills, cases based on "principle" usually "run out of steam" fairly quickly. Soon after the client begins receiving the legal bills, a client undergoes a change of mind. At that time the issue is the money (not just the principle). For these reasons, I do not recommend a case based solely "on principle" unless one is wealthy or unusually determined.

Checklist

1. Don't "hide the ball" from your own attorney.
2. Avoid seeking free legal advice; you may get what you pay for.
3. Avoid attorneys you don't like, trust or feel good about.
4. Beware of interpreting your own projections as reality.
5. Avoid false expectations of our justice system and the perfect justice of your cause.
6. Avoid constantly changing legal relationships.
7. Avoid attempting to dominate your attorney.
8. Avoid being in an adversary relationship with your own counsel.
9. Avoid haggling with your attorney over work and fees.
10. Avoid basing lawsuits solely on a matter of principle.

Chapter Six

The Consultation

Summary

Chapter Six talks about your initial and subsequent consultations with the attorney, the importance of teamwork and homework, and your objective in those critical early consultations.

A Good Lawyer-Client Relationship Requires Teamwork

The fantasy is that the client can dump the legal problem and psychological load on the attorney. The reality is that the client must furnish the facts in an organized manner and review the attorney's work to make sure counsel understands those facts. Most attorneys have an awesome ability to process, organize and analyze data. It is part of their law school training ("brain-scrambling" we called it). However, almost always, clients will think of or need to remind the attorney of some

significant fact as they review the work. For this reason, it is important to have a client who keeps the attorney involved. As long as the client gives the attorney freedom to do what counsel is trained to do and the client is not over-controlling, then even the best attorney will do a better job with the client's help than without it.

Lawyers tend to be analytical. They go step by step to a solution. But legal problems are receptive to creative solutions. Some of the best solutions are non-linear. Creative minds often see the big picture. Ironically, having the "big picture" in mind helps one get to the "heart of the matter." One does not need to climb every tree if the object is to get to the center of the forest. Thus, even non-analytical clients can make significant contributions of fact and insight.

Do Your Homework

You will not be able to just "dump" your case on your attorney, anymore than you can just dump your need to do taxes on an accountant. The accountant will need your receipts, books and records. The lawyer will need the complete facts of the case and pertinent documents.

The process of assembling and organizing the facts starts before, or soon after, the initial consultation. Impress your attorney. Put copies (not the originals) of material documents in chronological order in a three ring binder. Summarize the facts of your transaction or suit on paper. Because lawyers can quickly read and absorb mass quantities of information, this will save you time and money. Most importantly, it will expedite the transfer of information from your mind to the attorney's.

Some clients want to fax documents to the attorney for his review before the consultation. This idea tends to be better in theory than practice. The lawyer may feel uncomfortable doing work for a client that counsel has not met and before being retained. Also, the practice sometimes raises "something for nothing" issues. Expect and offer to pay, then use the time to go over your case notebook.

As discussed earlier, use the consultation to question the lawyer about counsel's background and experience. Ask the attorney whether counsel has handled this type of case. If so, find out when, how often, with what results.

Do not expect the attorney to have always "won." All lawyers lose cases unless they are established enough to accept only the best cases. Moreover, lawyers learn as much from losses as victories. Rather than expect perfection, ask the attorney what counsel has learned from experience, both positive and negative.

See If The Lawyer Has An Immediate Practical Or Business Solution, Not Just A Legal Solution

A lawyer who can see and recommend a non-legal solution makes a great counselor. Use such a lawyer not just for legal advice (e.g. in buying a house or hiring or firing an employee) but also to "bounce ideas off of" on routine matters. Sometimes, a lawyer can think of a solution that takes away the need for a lawyer right now.

This is wonderful news and usually only a lawyer can tell you that. Unfortunately, many lawyers won't. So, if you find a lawyer that will, grab on to him or her. Such an attorney is

priceless and makes a great companion at your table.

Your Consultation Objective Is To Obtain An Evaluation

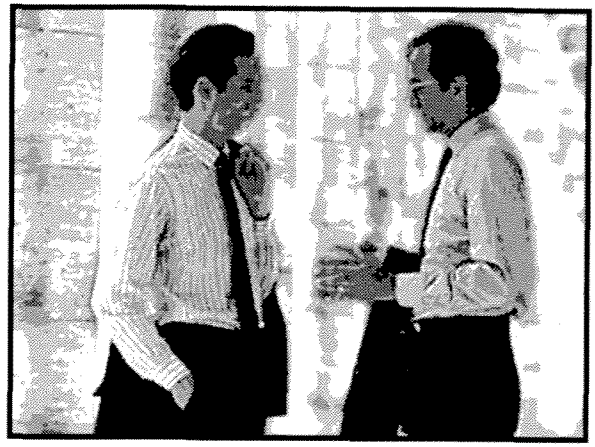
A transaction or lawsuit is like a journey. Any road will take you somewhere even if you don't know where you are going. Before leaving your initial consultation, or as soon as possible thereafter, obtain an evaluation of your:

1. Situation.
2. Strategy/Options (cost/benefit).
3. Lawyer's past experience in these situations.
4. Cost ("ballpark" estimate based on strategy, including what to include and what not).

These items constitute the criteria by which you should judge your transaction or case, its cost, and the attorney. As discussed above, it is important to have a framework to evaluate your options and success.

Checklist

1. A good lawyer-client relationship requires teamwork.
2. Do your homework.
3. See if the lawyer has an immediate practical or business solution, not just a legal solution.
4. Your consultation objective is to obtain an evaluation.



Chapter Seven

Things To Do

Summary

Chapter Seven lists three ways some clients misuse their lawyers and or the legal system. The chapter also discusses certain beneficial things you can do in your attorney-client relationship. These beneficial ideas include how to be a favored client and why, the need to talk early and often about money, and what the legal services will cost. The latter point stresses staying focused on practical solutions and working with your attorney to develop alternative courses of action.

Watch Out For Parties Who Are Cheating The Legal System

There are several ways for unscrupulous clients to abuse or cheat the legal system.

1 Opposing Counsel Elimination:

Under this tactic the prospective client calls and discusses the facts of the case and/or has consultations with all the best known or most affordable attorneys in the legal practice area. This tactic is based on the ethical rule that, even if not retained, an attorney must retain as confidential all information disclosed by an actual or potential client, and cannot act on that information and certainly cannot use such information to the detriment of the consulting client. Because the consulted attorneys may not act on the confidential information, they cannot be retained by the other side. The result is the other side may not be able to retain one of the more knowledgeable or affordable attorneys in that practice area.

2 Multiple Consultations:

This trick is most often used by criminal defendants, actual or potential. Under this tactic the client will discuss the facts and merits of the case with more than one attorney. The client will use the first attorney to get ideas and advice on the merits of the defense. If the defense the client envisions is not a proper legal defense, or does not seem like it would work, then the "facts" as to what happened may change on the way to the second attorney. The second attorney may never know the client's case has been "tailored" to fit the law before the client ever walked in the (second) door.

3 Altered or Forged Documents:

This tactic is a variation of number (2). In this case the client changes the facts by changing the documents. "Tell me what you need, I'll get it for you" is not what the attorney likes or wants to hear in response to his request

for copies of the pertinent documents. Because pertinent documents are almost always seen by more than one party, document alterations can and will be exposed and the case lost because of it. Nevertheless, desperate clients do desperate things, and this is one of them.

These tactics are unethical. If you catch an opposing party engaging in such tactics, you have persuasive evidence of fraud on the system if not perjury to the court. If you can substantiate the fact of this conduct, it should be reported to opposing counsel and/or the state bar. Unfortunately, to the detriment of the honest client and the legal system ,such tactics often go unchallenged or undetected.

Be A Favored Client

Create a good relationship by being prepared, doing the work you need to do and paying the attorney legal bills promptly. Attorneys love the client who comes to the first meeting, or a later one, with the pertinent documents organized with cover notes. It doesn't happen very often, but it is very helpful when it does. It will help the lawyer do a better job on your case. The lawyer's main task is to get the facts from your head into his, so that he may apply the law to those facts.

Let the attorney know you are willing to pay for the consultation, forward a retainer and promptly pay a reasonable fee. This tells the lawyer you are a winner; the kind of client counsel wants to have. But, it does not mean you accept all bills without question.

The ideal attorney/client relationship is one of mutual respect and honor. Be prepared, constructive and pay promptly. Lawyers will often do favors for a respectful client. For example, recently a client asked me about

Moral:

Lawyers are like most people;
they will care about those that care about them.

— • —

doing business in Mexico. That area of law is not within my expertise, but I bought a book at a Continuing Legal Education Seminar and will share that information for free with my client.

A good relationship requires commitment in order for it to work. We develop relationships with our loved ones, out job, our boss, our possessions, even ourselves by working at it. Therefore, what you get out of a professional relationship will be proportionate to what you put into it.

Talk Early And Often About The Job And What It Will Cost

Early on in the relationship, if the lawyer does not bring up the question of money, raise the topic yourself.

Many attorneys do not like to discuss fees in detail or even to provide a "ballpark" estimate of the work and fees required. But omitting to talk about fees is not to the client's advantage. One of the biggest problems clients have with their lawyer relationship involves surprises with the bill.

When I worked for a larger firm, clients would often tell me that if they had known the cost would be that large, they would have considered other options. But at the time the

firm was hired, the client did not ask; and neither I nor the other attorneys told the client what to expect.

Sometimes, the attorneys do not even know the current amount due on the account because the accounting office generates the bills from individual time sheets. This causes additional difficulty in holding the firm accountable.

So, ask your attorney what he expects the first bill to be. Inquire how this bill relates to the size and scope of the overall task at hand. Legal expenses, like any business expenditure, should be as cost-effective as possible. Work with your attorney to achieve that goal.

Keep Your Attorney Focused On Practical Solutions

Some lawyers will climb every tree even when the goal is to get to the clearing as soon as possible. Sometimes, this is "due diligence" or an "abundance of caution" (favorite lawyer phrases); but, sometimes, it is because the lawyer does not have a "handle" on the case. Without a definite strategy, a transaction or lawsuit may flounder at your expense.

Evaluate whether the attorney seems to have a definite "handle" or understanding of the situation. Attorneys who know the game can look for the "breakthrough play." Others just play along, focusing on the common rules.

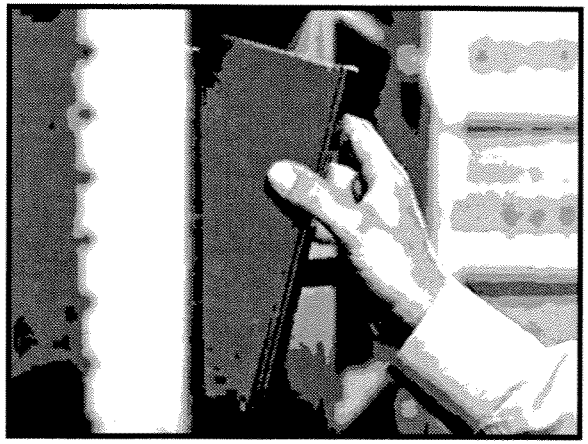
Work With Your Attorney To Devise "Plan A" and "Plan B"

Most attorneys are good at Plan A; many are not so good with Plan B, the backup plan. Know your options and help your attorney devise them. This will help your use of the lawyer remain cost-effective.

The significance of having a back-up plan is that it demonstrates your attorney's understanding of the facts, your goals, and what events must happen along the way to achieve your goals. With a plan, you know when events did not happen that you wanted to happen. This is important not only because a change of course can positively or negatively affect the outcome of your case or transaction but also because it almost always dramatically changes the costs (usually upwards). Knowing your goals and plans helps keep costs under control.

Checklist

1. Watch out for parties who are cheating the system.
2. Be a favored client by working with, not against, your attorney.
3. Talk early and often about money so that you do not get into a financial "hole" you cannot get out of.
4. Keep yourself and your attorney focused on the practical.
5. Develop a strategy which includes Plan "A" and Plan "B."



Chapter Eight

Understanding Law

Summary

Chapter Eight discusses the nature of law and the court system. Contrary to popular opinion, the law is less like a set of rules than it is a system of facts. Various courts serve different needs according to the size and type of the case.

The Law As A System Of Facts.

Law is a system of facts, not of rules. This is counter-intuitive. To the proverbial "man on the street," the law is a system of rules contained in ponderous legal tomes, such as statute books. It is neatly organized and indexed for quick reference and understanding.

Under this conception, to know the answer to any legal question, the lawyer simply needs to look it up "in the book." Once the lawyer has

"looked up the answer," then counsel knows it and can easily pass the answer on to the next person with little or no work and for little money.

This common understanding is a tremendous misconception. The law, as applied to you and me, is closer to a set of policies and facts.

I remember my first class on the first day of law school. The class was on contracts. The professor was talking about the law, not as a system of rules, but of facts. I remember my mental response (which was something like "Yeah, right!"). But (guess what?) the professor was fundamentally correct.

No rule of law has meaning unless we know the factual situations in which it has been applied and/or the underlying policy rationale for the rule. Without being able to extrapolate or infer from the policy and past facts, it is usually not clear how the rule would apply to this situation.

Every general rule has an exception. Nothing can be said without qualification. Because of this, in law, the only certainty is predominant uncertainty.

Law, then, is a system of decisions by legislators, judges, and bureaucrats. The law is dynamic, ever-changing. Every year Congress and individual state legislatures make new law. Every day, judges and bureaucrats make decisions about law, old and new. The major decisions about the law are printed in statute books and case law "reporters," and then typed 24-hours a day every day onto computer data "on-line services." Attorneys then use the statutes, reporters and on-line services to find and tell you "the law." Finding the law in this way is

called legal research. Good legal research is time-consuming, expensive and absolutely necessary.

This explains why it is usually impossible for the lawyer to answer a "quick question" over the phone. The question only reveals a profound ignorance of the legal system. It tells the lawyer that the prospective client (or freeloader) has no idea what the lawyer has to do to be a good lawyer. This makes the lawyer uncomfortable and less likely to take the client.

A good lawyer will want to know every single fact (including a review of all the documents), then research and think about the decisions and policies that apply to the factual situation. Off the cuff advice is probably not good advice.

Types Of Courts

In litigation, where you are suing some person or company (or some person or company is suing you) one needs to decide what kind of attorney to hire. To do that you need to know a little bit about our court system.

In a nutshell, very small cases (e.g. under $1,500 in Arizona) are heard by Justices of the Peace in what is known as the Small Claims Court. Lawyers are not allowed in these proceedings, but you may have a lawyer if you counter-sue and the matter exceeds $1,500.

The next level of cases (using Arizona as an example) is the "Civil Division" of the Justice Court. Same Justice of the Peace as judge, same courtroom, but now the rules of procedure and evidence apply and attorneys may appear. Incidentally, in Arizona most Justices of the Peace are not lawyers, never were, so they may

or may not know the rules of procedure and evidence.

The next level of case is filed in the local county court (called the "Superior" or "District" Court in most places). If the case is under $50,000 and does not seek an injunction (i.e. an order to do or stop doing something, like tearing down a historic landmark), then, often, the case will be heard by an Arbitrator. An Arbitrator is a lawyer sitting as a judge.

The purpose of arbitration is to expedite relatively small cases and to make them less expensive. However, as the Arbitrator's decisions in such cases usually may be appealed de novo (i.e. as if they never happened) to the Superior Court, the policy behind the practice is often not served.

The next level of case is the one you probably most think of when you think of a trial lawyer and a lawsuit. This is the case before the judge only (called a "bench trial") or a judge and a jury (usually you get a jury if you ask for one).

At this same level are numerous specialty courts. These courts function in specialized areas of law, like the probate of wills, taxes, police courts (usually "municipal" courts) and bankruptcy court. Most of these courts are state court. Bankruptcy courts are federal courts.

In a jury trial, the jury is the fact-finder and decision-maker. It determines what the facts are, and who is telling the truth. Taking the facts, the jury applies the law given to it by judge and reaches its decision (the "verdict").

Juries also have the authority to ignore the law and decide the case according to reason and justice. This power is called "jury nullification," so-called because of the jury's power to nullify the written law. This power is controversial, but

has existed for centuries. The rationale for this power is to allow the jury to function as the "conscience of the community" based on an overall view of the circumstances.

Jury nullification would typically occur where the defendant in a criminal trial would be guilty under a normal application of the law to the facts, but for other reasons the "community" would not find the conduct to be criminal. A hypothetical example might be a case of abuse, where a child or wife commits a crime against an abuser.

In a jury trial, the judge serves as the "gatekeeper" of evidence and states the law for the jury to follow. (Whether the jurors actually can understand and follow the law and, or do, is an open question).

This verdict may then be appealed to the next highest court, which is The Court of Appeals. The Court of Appeals usually sits as a three judge panel. It does not hear the witnesses or other evidence but reads the lengthy "briefs" filed by the attorneys. The briefs refer to the facts in the record and argue points of law and procedure.

The appealing party (the "appellant") will argue that the trial judge messed up because he let in the wrong evidence or misstated the law. The other side, who won at the trial court level, is called the "appellee." The appellee will typically argue that the judge had it exactly right, or should have let even more evidence and given more instruction on the law, so that the only question is whether the original winner is just right or even more right.

The next level is the Supreme Court of the State (except in New York ,where the Supreme Court is the trial court and its highest state

court is called the Court of Appeals). The process in the Supreme Court of the State is like that of the Court of Appeals. This is the highest state court and the end of the line.

Although most cases do not even make it this far, theoretically, one may attempt to appeal to the U.S. Supreme Court. However, the U.S. Supreme Court has authority to refuse to hear the case and usually does.

Checklist

1. Understand the law is less a system of rules than of facts. This means there is hardly ever a clear obvious answer to any legal question; rather, legal questions are decided on a case by case basis.

2. Different courts satisfy different needs and come into play at different stages of your legal matter.

Chapter Nine

The Work

Summary

Chapter Nine talks about goals, being a team player, and not being a prima donna.

It also talks about the inflexible nature of legal fees and the impact of transaction costs on small cases.

It explains how to tailor representation to make it more cost-effective and the importance of discretion is choosing and using legal services.

Finally, Chapter Nine explains how a trial is like theater and why one should not use the attorney as an analyst.

Work With Your Attorney To Develop Your Goals, Strategy And Tactics For Achieving Them, And Options

As a general rule, trust your attorney to know what to do, and to get it done. Still, it is important to monitor progress periodically, especially if time goes by and it seems that nothing is happening. Keep in mind when checking progress, that the amount of time that passes while the case is going through the system before may be a function of the state practice rules. For example, in Arizona, which operates under a so-called "fast track" system, a complete case should be over in less than a year. In California, in contrast, cases typically do not "heat up" for several years because it takes four of five years to get a court date.

Ask at the outset to timely receive copies of all significant letters, documents and pleadings when they are sent or filed. This will allow you to keep informed and to monitor progress without having to call your attorney for the current status of the case.

Ask to proofread and review for accuracy letters, documents and pleadings before they go out. Often the drafts will contain an erroneous name or statement which should be corrected. More importantly, the draft will frequently trigger new facts and thoughts which you need to tell your attorney. Clients also recall new facts after reading documents or pleadings prepared by the other side.

It is common for clients to still be thinking of additional facts or witnesses long after the matter or lawsuit has started. Simply put, people think of things when the subject comes up. Because of this propensity to remember facts well into the case, you may want to

schedule periodic meetings with your attorney to go over the facts and evidence.

In new litigation matters, I ask my clients to write out their version of the facts. If several people are involved I ask each of them to do this individually, so I (and they) can see the "picture" from different angles. In many ways every case is a "story." I want to learn the different versions of the story.

Create your own "trial or transaction notebook." Fill it with your notes and copies of every important document. Then as you approach a deposition or trial, review each page to refresh your memory of the factual and legal issues and the arguments being made.

Be A Team Player

Work with your attorney. It is not a good idea to dominate or force your ideas on the lawyer. Most clients, at least early on in litigation, do not know which facts have legal significance and which do not. Thus, they may push and repeat points that are less significant than others that they skim over.

When in doubt, ask what facts are important. The attorney should be able to give a rough sketch of the important issues and the kinds of facts that are important. This will help you to determine which facts are material and which are not.

Often you will have good ideas which will come to you at all hours of the day or night. Keep a pad handy in a secure place so you can record these ideas and discuss them with your attorney. Better yet, type the notes and give a copy to your attorney at your next appointment.

Resist the urge to call your attorney every time you feel stress or have a good idea. It will

drive your attorney crazy, cost a fortune and will be counterproductive. Because not all of your thoughts will be brilliant or crucial, it is better to present them all at once, so that the wheat can be quickly sorted from the chaff. Often, minor ideas become supporting players for major themes, which may not be clear if ideas are only taken piecemeal.

Expect Attention, But Not Constant Or Instant Attention

Naturally, your case is most important to you. It is also very important to your attorney. His livelihood and reputation depend on it. Nevertheless, your attorney will have other clients and other important matters. So, expect attention, but not immediate gratification.

It is not a good idea for the client to act like a "prima donna." Well-run firms have diverse clientele, not all of their "eggs are in one basket." No client is or should be so important to the law firm that the lawyer "jumps" when the client calls.

On the other hand, some lawyers could use instruction on customer service. Although this is changing, lawyers are notorious for not returning calls and only talking to their clients when they have to. This is not acceptable.

A reasonable goal for service is somewhere between the two extremes of constant service and being ignored. As a lawsuit approaches trial or a transaction nears closing, contact between the attorney and client should become more frequent. If this does not occur, then "bells should ring" and you may want to contact your attorney to see if more contact is necessary.

Remember To Consider "Transaction Costs" In Evaluating Your Course Of Legal Action.

Clients often get so caught up with the justness of their cause or defense that they ignore transaction costs in evaluating the best course of legal action. By "transaction costs" I am referring to the costs of the attorney, his staff, faxes, photocopies, process servers, messengers, filing fees—the total bundle of legal costs.

Usually, a $100,000 case will cost more than $10,000 to prosecute. If one is the plaintiff and has less than $10,000, then the case, even if perfect on the merits, does not have a value to $100,000 to that client. In fact, if the client has no money, and the case is not a contingency fee case (where the lawyer's fee is a percentage) then the present value of the case may be almost zero.

The situation here is a little like building a building. A building may be worth $100,000 when finished. But to the contractor who cannot finish the job, it may have little or no value. Because of commitments, the project may have negative value. In that case, the builder would be better off without the project.

Clients who forget this analysis do so at their peril. A plaintiff who cannot afford to prosecute a $100,000 case to the end should not expect to get $100,000, but should evaluate lower settlement offers. I have had judges look me in the eye and tell me this.

As my father used to say: "A bargain is not a bargain if we cannot afford it." Lawyers do their clients a disservice if they pursue a case past the point of settlement, even a low settlement, if it is unlikely the client can afford to continue the case to the end. This can lead to tragedy.

Usually, however, the tragedy is not the attorney's fault, at least not solely. Attorneys will usually warn their clients not to overreach. Attorneys do this out of self-interest. If there is anything worse than not having a client, it is having a client who cannot pay for the time and out of pocket costs the attorney is expending on the case.

Justice, unfortunately, is a commodity. You only get the justice you can afford — which may be completely different than what you deserve.

Moral:

A case, like a building, only has full value if you can afford to complete it.

Big Suit/Little Suit: The Cost Of Litigation

Legal costs are relatively inelastic. "Inelastic" in this context is a term from economic theory. It means not responsive to changes in demand or price. For example, toothpicks are relatively inelastic. We will buy about the same number of toothpicks whether they cost 15 cents a box or 20 cents a box, even though one price is a third higher than the other.

In law, prices tend to be inelastic in the sense that a smaller case does not cost proportionately less than a big one. Rather, it costs about as much to litigate a $60,000 case well as it does to do a $600,000 case. The amount of time necessary to investigate the case will be about the same and the filing and third party fees, like depositions, may be about the same.

Due to this price inelasticity, a small case has a lower "return on investment" than a larger one. A lower return on investment does not matter so much where one prevails on a case that carries through to arbitration or trial and attorneys fees are awarded to the prevailing party. But where the matter settles, then each side will be typically "bear its own costs and attorneys fees." As most cases settle, the client may want to include the cost of the attorney, filing fees and other expenses in determining acceptable offers of settlement.

Early on in small cases the parties may soon have "too much invested to settle." Too much invested to settle means that after attorneys fees are considered, then viewed strictly from a business point of view, settlement is no longer a good deal for either side.

For example, assume a female plaintiff is suing another woman for $30,000 and will accept $15,000 to $20,000. Defendant will offer to pay $10,000 to $15,000. Assume that the costs and attorneys fees have already reached $6,000 for each side. (Remember legal costs and fees do not vary much according to the size of case.)

Were the case to settle on these facts, plaintiff would only recover $9,000 after her fees and costs are paid or defendant would have to offer and pay $6,000 more so that plaintiff could receive and keep the $15,000 she is willing to accept in settlement. But defendant is unlikely to offer $6,000 more, particularly after paying her attorney $6,000. If defendant had been willing to do that, she would have just paid the $30,000 claim in the first place.

On these facts — which are not atypical— plaintiff and defendant are not likely to settle because neither party can rationally afford to. On the other hand, like tired, punch-drunk

fighters staggering to the end of their struggle, litigants often settle simply because they get sick of the case and want to go on with their lives.

The moral here is to watch costs carefully in small cases. $100,000 in fees for a $37,000 case can happen. It is your job to prevent it.

Tailoring Representation To Make It Cost-Effective

As explained in the previous section, legal costs tend to be relatively inelastic, i.e. inflexible as to size of case or demand. Due to this inelasticity, legal representation can be relatively expensive, especially on small matters. Using a lawyer is like paying your doctor. Getting involved in litigation is like paying for surgery. This expense makes representation difficult, especially on smaller matters. Thus, it may not be cost-effective to have a lawyer completely handle very small transactions or lawsuits.

Fortunately, many lawyers will tailor their representation to fit your needs. Assume, for example, that you are suing your neighbor for wrecking your fence. The amount in question is $5,000. In Arizona this would be a justice court case; that is, heard by a Justice of the Peace. Because legal costs are relatively "inelastic" in relation to the size of the case, your attorney's fees in this dispute could be almost as much as the amount in question, perhaps more. This is particular true in this case because cases between neighbors can be really nasty. This is one of those types of cases where the parties want to "take it to the Supreme Court" no matter how much it costs. Thus, unless one prevails and is awarded and can collect fees from the other side, it is not cost-effective to hire an attorney in this case.

But that does not mean that legal representation is not available or helpful. An alternative to having the lawyer represent you in this kind of case is to have the lawyer advise you. Even if the attorney does not represent you in court, counsel can tell you what to expect, explain court procedures, point out your best facts and arguments as well as the bad aspects of your case, and tell you what to stress to the judge.

Under this alternative you would prepare your own pleadings and represent yourself in Justice Court before the Justice of the Peace. The disadvantage of this procedure is that you will not do as well as an experienced attorney would. The advantage is that you will do much better with this on-going advice than you would on your own without the attorney's advice and at less than one/third of the cost.

Although this system works better in small cases, theoretically, it will work in all types of cases, before all types of courts. However, the larger the case, the more problems you will have because in larger cases an attorney will almost certainly be representing the other side and it is difficult for a lay person to take or adequately defend depositions or to conduct other discovery.

The same principle would hold true in small business deals. If you cannot cost-effectively use an attorney to prepare the documents, then, at minimum, see if you can find an attorney to read the documents and advise you on changes that need to be made. Involving an attorney in your transaction or suit can make a big difference in your performance and the outcome. The secret is to find an attorney who is willing to tailor services to your budget and needs.

In the "old days," before law changed from the collegial paradigm to business competition, it may have been difficult to find an attorney willing to adjust the provided services. The unquestioned rule was that you can have whatever level of service you want as long as it is full-price, full service. It was kind of like being able to have whatever car you want as long as it was a Buick Regal. This led to problems where people could not afford or did not want the law practice equivalent of the Buick Regal. Many people were, in effect, "squeezed out" of the system.

Nowadays, however, because law practice has become competitive and law firms are more client-service-and-market-oriented, you can probably find a firm who will tailor its services to your need. This is good for you and the new tailored-service firm.

Discretion Is The Better Part Of Valor When It Comes To Litigation

Clients often tell lawyers something like this: "I'll take this matter to the Supreme Court." and/or "It's not a matter of money; its a matter of principle." This approach, though noble, can be foolish. It often ends when the client begins to experience the emotional and financial travails of litigation.

Lawsuits are tough. They wear us out. They can take over our lives. In Charles Dickens' book, *Bleak House*, the lawsuit over the estate continued for generations. "The suit" captured and consumed the time and attention of all members of the family. It became the center of their lives, to the detriment of everything else. Because of their interest in and expected benefits from the estate, the children did not work or learn vocations. They expected to live

on the money from the lawsuit when it ended. In essence the suit became their lives.

In *Bleak House*, the attorneys were being paid from the estate (which was settled when there was no more money left in the estate after the attorneys were paid). In most matters, you the client, will have to pay as you go. That is expensive.

The story of *Bleak House* is exaggerated and inaccurate, but the basic point is sound. Because the emotional and financial costs of litigation (which is institutionalized war) are enormous, we need to approach "the war" rationally and cautiously.

A rational and cautious approach to litigation should be emotionally and financially cost-effective. I know of cases where the legal fees exceeded $400,000 on each side, when, at one point, the parties were less than $30,000 apart in settlement. This is irrational and destructive.

Normally, an attorney has no clear ethical duty to advise his/her client of the circumstances unless a formal offer has been made. But because of the tremendous costs to the client of this situation, attorneys should advise their clients of the situation, even where no formal offer has been made. A good attorney will pursue what is rational, at least to the point of advising a client when things have become or are becoming irrational.

Because things can get out of hand, using one's head is a usually a better idea than trying to prove a point or maintain stubborn nobility. An early, complete and thorough evaluation of the case is advisable. This evaluation should include, not just the merits, but a consideration of one's financial and emotional "budget."

Following this evaluation one may then want to make an early one-time offer. This offer would probably be substantially less than one might win in the suit because it will be discounted for the time, trouble and uncertainty of litigation. But it should be enough to give you some sense of satisfaction.

Some cases are difficult to win. Any suit is "losable." Every attorney has won cases that could have been lost and lost cases that could have been won. Things go wrong. The judge or jury doesn't like you, or your business, or your attorney, or vice versa. In short, two bright clients represented by bright counsel can make even the most one-sided case into a close call. Keep this in mind when determining your "one-time" offer."

Remember, you are asking the other side to concede the game. That is tough to make happen unless your offer seems to be a fair deal to opposing counsel, particularly where the opposing party is still hung up on the emotional aspects of the case. In that case, the law firm is unlikely to commit "suicide" of its representation, even where the offer is reasonable.

Even where the "one-time offer" is demonstrably reasonable, and the opposing party is rational, the offer often faces the additional obstacle of opposing counsel. Most law firms prefer to make money on cases rather than promptly settle them. They prefer to thoroughly investigate the facts and do some work on the file before closing it. Whether this is "due diligence" or "working the file" depends on the circumstances. Often it is a combination of both.

One big advantage of the one-time offer is that it avoids what may be the biggest tragedy of litigation: the case where the client turns down

an offer only to realize later that the offer was a good offer because the client can no longer afford the cost of litigation, or now realizes that one may lose what formerly appeared to be a perfect case. As there are no "perfect cases," it is a good idea to do a cost-benefit analysis at different stages of the litigation.

The Trial As Theater

A lawsuit requires tremendous financial and emotional commitment. Even for the plaintiff, who by definition wants and has filed the suit, litigation is a little like living with a serious illness. As discussed earlier, it can preoccupy one's attention to the point of dominating one's life.

In spite of these great costs, however, litigation is important not only as a means to compensate a wrong but also as a catharsis (i.e. emotional release). The ancient Greeks believed that theater was necessary to allow the citizens to release and cleanse themselves of pent-up, negative emotion. Lawsuits play much the same role in western society. In this respect, a trial is like theater, it recreates the passion and drama of living. It helps the parties and others affected by events to "process" the events, intellectually and emotionally.

A trial is like theater in another important respect as well. Because of the full disclosure now required under the modern rules of civil procedure in law courts, each side is fully informed of the other side's facts and arguments before the trial begins. In fact, to the extent any party is surprised and prejudiced by unexpected evidence at trial, that party is entitled to have a mistrial declared and the parties will have to start over.

Thus, as in theater, by the time the trial opens the parties (the "stars") and their

witnesses (the "supporting cast") know their lines. They need only recite them to recount the play to the judge and/or jury and the rest of the audience. The hard work of preparing and staging the "play" has been done before the trial begins.

This fact becomes important when the case "settles on the courthouse steps." Clients tend to think: "We didn't go to trial, so the bill should be substantially less." This reasoning is often flawed because the hard work has been done before trial. The trial is just like the opening-night performance, after months of preparation and rehearsal. The real work and costs have already been incurred. This is not to say that money is not saved by not going to trial; just that the savings probably will not be as large as the client expects.

Underlying this is a difference in perspective between the client and the lawyer. To the client "the trial's the thing." To the lawyer, the heart of the matter lies in the work before trial. One reason for this difference in perspective may be the absence of the "catharsis" referred to earlier. Even with a favorable settlement, clients often miss the vindication or at least the process of attempting vindication that trial represents. Without release of their pent-up energy, they may never be completely satisfied, even if "on the numbers" the negotiated result has been outstanding.

Remember An Attorney Is Not An Analyst Or Guru

Avoid using your lawyer as a psychologist. Many new clients, particularly those inexperienced in legal problems or the legal system, use their attorney to vent their anger or frustration. Overdone, this is expensive and unwise. Emotions do not win lawsuits or foster

good business deals. Usually emotions are counterproductive. The last thing you want is an attorney who is emotionally involved in your affairs. He or she will lose perspective and develop "blind spots." That is a good way to lose. It is certainly not in your interest. So do not encourage your attorney to join you in ranting and raving about your case.

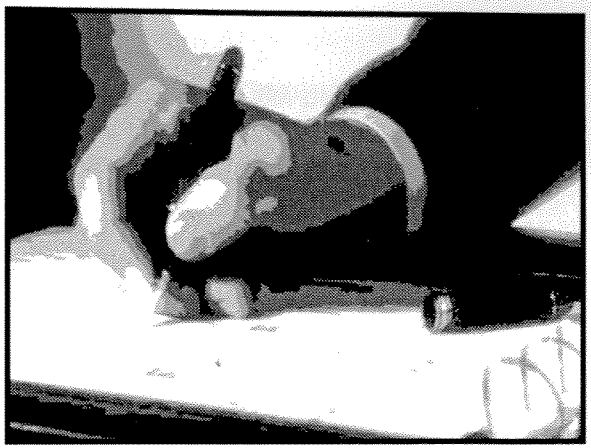
Attorneys are not psychologists or otherwise able to solve your emotional issues, but they will bill you for the time spent listening to you emote as if they were. If you over emote, they will also brand you as a "problem client" because you can not deal with your problems in a rational manner.

It is natural to feel anger and frustration, but it is important to stay focused on the legal issues of your situation. Those issues are the only thing the attorney can handle professionally. Counsel may handle emotional issues quite badly, and it will be your fault for presenting legal problems in the wrong format.

Use attorneys only for legal matters, and some business matters. Beware of using attorneys for non-legal matters. They are probably no better qualified to solve your personal problems than you are.

Checklist

1. Work with your attorney on joint goals.
2. Be a team player.
3. Expect reasonable attention, but avoid a "prima donna" attitude.
4. Remember the lack of economies of scale and high transaction costs of legal representation in evaluating your options.
5. See if your can tailor your representation to make it cost-effective and affordable.
6. Remember: Discretion is the better part of valor when it comes to lawsuits.
7. Trial is theater in that everyone knows the facts and issues before trial.
8. An attorney is not a psychologist, so do not run up your bill by engaging in histrionics.



Chapter Ten

The Bills

Summary

Chapter Ten talks about money and bills. Topics included in this chapter are fee agreements, policy statements, what to expect in the bill, and factors that influence the size of the bill.

Also discussed in this chapter are the differences in bills and billing strategy between plaintiffs and defendants in litigation and various reasons clients give for not needing to defend their case or pay their attorneys.

Ask About Money Early And Often

When it comes to legal bills, denial will burn you. If you do not mention money, the attorney may assume he has authority to do "whatever it takes." You may wind up owing a bill you cannot afford or did not expect.

Ask About Fee Agreements And Policy Statements

In contingency fee matters, that is, where the attorney's fee is taken as a percentage of recovery, a written fee agreement is a must, both as a matter of good business and under the legal profession's ethical rules. The agreement should state the manner in which the fee is determined, including the percentage to the lawyer. You need to know exactly what percentage the firm will take. Sometimes this percentage varies according to whether the matter settles, goes to trial or appeal. The agreement should also state whether the expenses will come off the top, i.e. before the firm's percentage is calculated, or after (before is more expensive).

Sometimes, the firm will consider a modified contingency fee relationship. Under this arrangement, the client will pay a retainer and be billed hourly, but at a discounted hourly rate. In return for the discounted hourly rate, the firm will receive a contingency percentage. This percentage will be significantly lower than the typical 1/3 or higher fee charged by most firms in contingency fee cases. It may be as low as five to ten per cent, depending upon the discount the firm gives on its standard rates.

If you are paying the expenses (called "costs"), you need to know how much the firm anticipates they will be. Even if you are not paying the lawyer on an hourly basis, the "costs" can be very expensive. "Costs" include filing fees and the court reporter for depositions. Filing fees are typically around $100 and deposition transcripts can cost more than $1,000 each. So, beware. Even in a contingency fee case, you need to know what you are getting yourself into.

A lawyer's time may be his "stock in trade," (Abraham Lincoln), but after that comes paper. The author conceives a law firm as a

knowledge-based "print shop." We sell paper with our thoughts, knowledge and analysis on it.

Ask the charge for photocopies, faxes in and out. The charge for these expenses can vary significantly from one firm to another. In a large case, where travel is necessary, talk to the firm about limits on airfares, hotel bills and meal expenses. In the past, $300 meals charged to well-heeled clients were not unusual, so don't just talk about your case, talk about money.

Although not required in cases billed by the hour, fee or retainer agreements are still a good idea. Typically, such agreements should state the hourly rate of the attorney and his staff, the cost for incidental expenses, and the circumstances under which the attorney may withdraw.

Fee agreements are not required for the attorney to collect his fee, but they make the case stronger. Like some large firms in the area, I include a "Policy Statement" along with my fee agreement. This Policy Statement sets forth in more detail the manner in which the bill is determined and the applicable charges.

Expect To Be Shocked, But Not Too Surprised, At The Size Of The Bill

Legal work, like medical work, is expensive. Litigation, like surgery, is outrageously expensive. No matter how well you have discussed your situation and options with your attorney, you may still find the bill to be expensive.

However, while the cost of legal services may astound you, the size of the bill should not be too surprising. Too much of a surprise indicates that communication has broken down. Something has not been made clear.

This often happens in the course of litigation, where Plan A turns into Plan C and work previously considered only as an option becomes critical from new facts or developments in the case.

Because new developments are common and not within the sole discretion and control of the attorney, the client should not blame the attorney for an escalation in fees based on new developments.

On the other hand, to reduce the possibility or magnitude of such surprises in the future, a surprising bill should trigger a conversation between the attorney and client about "avoiding surprises."

Be Aware Of The Law Firm's Need To Bill Hours

Does the firm look "rich?" Keep in mind who made it look that way. Law firms are under more pressure than ever before to cover costs, salaries and to satisfy lawyer egos. Law firm associates are under pressure to make partner and to pay for their considerable salaries. These pressures create a great need for the firm to generate billable hours. Some firms will bill you if they even think about your case, regardless of where or when.

If the resulting work is cost-effective, then you have no problem. However, a smart client will review the time and item entries to see if they make sense. Some attorneys bill for status calls even though the only reason you called them is that they were not keeping you informed. Other attorneys put a "cover letter" on every document so they can bill you $40 to mail you a letter.

Ask the attorney not to draft cover letters to documents unless the letter says something

important about the document or tells you something that you need to do.

Other "red flags" are office conferences among the firm's own attorneys where each attorney bills you for the time spent in the conference. The result is to bill twice as much to the file than would occur without the conference. Inter-office conferences are not bad per se (although I have had institutional clients who just refuse to pay for them). Firm attorneys should discuss their cases among themselves. But because this "dual billing" is so subject to abuse, it is more suspect.

Another questionable practice is the use of multiple attorneys on the same file even though the case is relatively small. A prime example of the violation of this rule is the use of multiple attorneys at hearings. (Larger trial may be a different matter). The attendance of more than one attorney at a hearing is almost always unnecessary. As the judge will only allow one attorney to speak, the presence of more than one attorney is wasted.

Time billed for one attorney reviewing the work of another is appropriate as long as the time looks like a review, for example by a senior attorney, and not a duplication of effort.

Games That Law Firms Play With Billable Hours

Sometimes when a law firm, particularly a large firm, is involved in a new litigation case, the first thing that happens is that the firm sends out a letter or announces that the firm will "vigorously defend" (or prosecute) the matter. Next, the firm engages in "due diligence" with an "abundance of caution." (A cynic would call this "working the file."). This "due diligence" means an extensive review of the documents, discovery requests and depositions, all of which cost time and money for both sides.

To some extent such conduct is posturing, i.e. sending a message (whether true or not) to the opposing party that it is in for a fight. One book on litigation likens this pre- or early litigation conduct to the mating rituals of bull walruses: lots of show and huffing and puffing.

If posturing were all that was involved, the conduct would just be part of the game (yes, litigation is a game. Important, and potentially life-destroying, but still a game with rules, winners and losers). Unfortunately, the immediate effect of "due diligence" is to generate a flurry of work and activity and to run up the bills.

It does not take long for a large law firm to run up a bill of $10,000 or more. If the client is large, it can probably pay the bills promptly. Unfortunately, average people may have difficulty paying legal bills, even if their firm bills at a lower rate and its bills are substantially smaller.

In this respect the large firm still retains the large firm advantage (i.e. superior resources). It is not uncommon for small clients to run out of money in litigation with large firms because the work created by the other side runs up the bills faster than the small firm's cash flow can handle it.

On the other hand, for those clients who can afford to "hang in there," the large firm advantage somewhat disappears over time. One reason for this is that the large firm client may "go into shock" when it sees the bill(s). Large firms send large bills.

A $20,000 bill from a large firm on a $50,000 matter is not unlikely. Because this billing ratio is not very cost-effective, the large firm client may object to it. After a few such monthly billings the large firm client may ask its law firm to be more "cost-effective."

Cases also tend to "wax and wane." They heat up, then after a few months of furious activity, they typically slow down somewhat. This natural lull in the action allows the client to catch up on unpaid fees.

Getting In The Litigation Ring As A Plaintiff

If you are going to get "into the ring" in litigation against a major firm (most suits against landlords, real estate agents and business brokers trigger insurance claims, which in turn are defended by large law firms), and it is not a contingency fees case (i.e. you are paying the attorney by the hour, not as a percentage of settlement), then it is important for you to have the emotional and financial commitment to "last more than five rounds." Otherwise, starting the fight may do more harm than good.

Usually, if the parties settle before trial, then each side will bear its own costs and attorneys fees. However, unilateral surrender or early defeat because you weren't up to it, may allow or cause the other side to demand payment of its attorneys fees as a condition of settlement. So, if you are going to quit or get knocked out early, then you are better off not pursuing the matter at that time. If you are not sure whether you are up to starting a lawsuit now, ask your attorney for the statute of limitations (i.e. filing) deadline for that kind of case, and come back when you are more ready, willing and able to pursue the matter.

This assumes, of course, that you are the plaintiff with a choice in the matter of when to start the fight. If you are a defendant, then the important thing to do is to diligently work on your case step by step.

Getting In The Litigation Ring As A Defendant

The plaintiff's job is to keep the case moving to settlement or trial. The defendant's job is to defend, or if the plaintiff will allow it, to "hide." Defendants do not have to push the action. If the plaintiff doesn't push the matter, then the defendant can sit back and relax.

Defendants like this rule, but they over-apply it. As long as the case is pending, some defense must be made or prepared. Some clients just want the case to go away without doing anything. That stratagem won't work. In fact, if the matter is serious and reasonably defensible (some cases like collection cases are difficult to defend because the money is clearly owed), the defendant's best course of action is to vigorously defend. This applies not only to cases where plaintiff's claim is meritless, but also to cases that are much stronger.

The risk is that by failing to diligently pursue the evidence and law necessary to defend, the truth may get lost "in the system." Remember, the judge only knows the facts as they are presented and as well as they are prepared.

The Do-Nothing Defendant's Syllogism

Unfortunately, out of a sense of outrage or denial, some clients want to do absolutely nothing. It is surprising how many clients start with the conclusion (they want) and reason backwards to deny the reality of the need to defend. The syllogism in their mind must look something like this:

> **First** Premise: This case is "BS." I didn't do anything wrong and I don't owe these people (plaintiff) anything.

> **Second** Premise: One who hasn't done anything wrong, does not have to "do anything" (to prove it).

Conclusion: Therefore, I don't have to do anything to prove my non-liability. (Never mind that client has been served with a Summons and Complaint and has 20 days to file an Answer or a Default Judgment may be entered against him.)

When this kind of reasoning occurs, it is time for a "Reality Check." The lawyer must point out to such clients some obvious facts: Plaintiff disagrees with the First Premise or there would not be a lawsuit. Second, whether or not plaintiff or the client is correct about the First Premise, the Second Premise is always false in litigation. One has to prove "innocence" in civil suits by showing why plaintiff's facts are wrong or legal theories do not apply.

Because the First Premise may be false in the eyes of the Court and the Second Premise is always false, then the Conclusion ("I don't have to do anything") is always false. It may be frustrating to spend hard-earned dollars on legal fees, but this is reality. So, if you are a defendant, cinch your belt and get involved in your case.

The Syllogism Of Non-Payment Of Lawyer

A variation of the above "Syllogism of Non-Action" is the "Syllogism of Non-Payment." This syllogism reads as follows:

> **First** Premise: By a defendant; this case is "BS." I didn't do anything wrong and I don't owe these people (plaintiff) anything.

By a plaintiff; this case is obvious. I've been wronged. I'm entitled to satisfaction.

Second Premise: By a defendant; one who hasn't done anything wrong, should not have to pay anything to an attorney to defend.

By a plaintiff; one who has been wronged is entitled to justice without having to pay for it.

Conclusion: By plaintiff and defendant: Therefore, I don't have to pay an attorney, even if I hire one. (Never mind that a plaintiff's case is worth zero without an attorney to prosecute it and that judgment would be entered by default if defendant did not defend.)

Notice that, under this syllogism, the only thing the plaintiff and defendant have in common is their belief that they are entitled to justice without paying their attorneys. This indicates that "blaming the attorneys and the legal system" may be the best stratagem for achieving settlement. That is, the parties may hate each other, but if they hate attorneys more, then that hate can be used to establish a common basis for settlement.

If it does not appear early in the case, the Syllogism of Non-Payment" may appear after the attorney has worked his tail off to come to a just settlement or victory. About that time client may reason as follows: "Well of course I won. I was right all along. Attorney did not have to do anything but demonstrate the obvious (never mind 10 depositions and numerous other discovery requests and/or motions). Therefore, why should I pay this attorney?

The reason, of course, if one is objective about it, is that the client only arrived in "Baltimore" because of the attorney's help. But for the attorney as "bus driver," client would be still sitting at the station in Grand Rapids, or worse, in the homeless shelter. The fallacy, again, is that client's thought process is starting with the "destination" and is forgetting how he got there.

Where Possible Pay By The Job

For transactional documents, (e.g. a will, or contract or lease) ask the attorney to do the work by the job, i.e. at a fixed price. If possible, get bids from other attorneys, then ask the attorney you like the best to match the best price. Be aware, however, that busy and experienced attorneys are going to have their "bottom line," so do not count on getting both the best price and the best attorney. Again, it's a question of balancing your interests.

If you have multiple tasks, (e.g. purchase /sale documents, a new corporation, non-disclosure and non-compete agreements for employees, and sales contracts) see if the attorney will give you a volume price. Attorneys have more "mark up" in "relatively standard" contracts.[4] Although no good contract is pure boilerplate, experienced attorneys can prepare most contracts fairly quickly once the negotiations are complete and the terms are known. Thus, they can afford to give you a break on their pricing.

You can attempt to negotiate volume rates in litigation also. However, it is more difficult. Virtually all litigation work is purely custom work. The facts, applicable law and legal research involved are almost always new. Thus, usually, there is no "standard" content the attorney can use. Still, the attorney may quote

job or volume prices on more simple pleadings (Complaint, Answer, and perhaps, the Disclosure Statement), especially in less complex cases.

If doing the work "by the job" does not make sense, e.g. in a complex litigation case, and the case is not being done on a "contingency fee" basis, you may want to negotiate a lower hourly billable rate with a "contingency kicker." By contingency kicker I mean a percentage off the top, but much less than the standard 25-percent to 33-percent contingency fee. The object here is to give the firm a stake in the action in return for lower hourly rates billed by its attorneys and legal assistants.

In this case the contingency fee will be used as a bonus. A sample bonus would be five to seven percent. This option can be used by plaintiffs and defendants. Where used by the plaintiff, plaintiff's firm would receive a small percentage of the gross settlement or judgment earned against defendants in addition to the hourly fees, which would be billed at a discount rate. Where used by a defendant, then defendant's firm would receive a percentage of the difference between the "average" anticipated verdict and the actual verdict (i.e. of money saved) in addition to a hourly fees billed. For example, in defense work, insurance companies and insurance defense firms may have a good idea what certain claims are worth and base the incentive on an average pay-out for that kind of injury or claim.

Consolidation Of Legal Work To A Few Firms

Some large clients, which previously used a variety of firms, now consolidate their work into one or two firms. This idea stemmed in part from bill monitoring services. We will discuss monitoring services in the next section. The

theory is that the large user of legal services can better manage its use of legal services and get a better rate by negotiating a volume discount with one or two firms, than by using a variety of firms.

Consolidation is most often employed by major users of legal services, e.g. major corporations. It means that the corporation will use just one, two or three law firms, instead of a variety of firms and will negotiate a volume or bulk rate for the work. Often, these bills will be reviewed by the monitoring service, supposedly to insure accuracy and fairness.

Consolidation is somewhat of a fad. It may be an idea that works better on paper than in practice. Usually the firm pitching consolidation is the large law firm or an accounting firm that provides bill monitoring services. Thus, the idea is coming from a self-interested party.

In my experience the consolidated-volume discount bill is still higher than the small firm bill. Sometimes the difference is due to increased expertise, and this can be an important factor. Where special expertise is necessary, then a volume rate for specialized services can be a good idea. But, for many routine services, and even in specialized areas, many sole practitioners and small firms can provide the same level of service and expertise as the large firm, but at the same or lower rate. Indeed, in these days of high firm overhead, many small firms are "spin-offs" of large firms.

It is true that using a number of law firms can make managing legal services more difficult, but it allows the client to tailor its use of legal services to the matter at hand. Routine matters, that do not involve specialized areas of law, can be delegated to firms that are strong and cost-effective in such

matters. Due to its overhead, typically, this will not be the larger firm.

Some firms are good at getting rid of problems. They are strong in business judgment and focus on closing the file rather than expanding it.

Collection firms tend to be specialized. Many have a staff of paralegals to prepare voluminous documents cost-effectively. Often these firms work on a contingency fee basis.

For volume users of legal services, the choice is between consolidating legal services into a few firms in return for a volume rate or using a variety of firms for different purposes. There is no clear right or wrong answer on this choice. Which works best for you is a function of what is lost and gained.

Giving up a firm than has done good, cost-effective work for you can be a big mistake. The author worked for a firm doing bankruptcy work for a major bank in the area. During its acquisition by a large interstate bank chain, the client consolidated its business away from our medium-size firm to an excellent larger firm. Based on the quality of legal work by the prominent firm, our former client made an excellent choice, but as a matter of cost, the consolidation theory proved disastrous. The new law firm's billing, even after the alleged volume discount, were more than three times the size as our firm's rate on similar matters and for similar results. (I heard this from our former client's employees who were against the consolidation because they were satisfied with our work and lost some of their autonomy on the files.)

The good news about the new firm was

that it hired nothing but the best and brightest. The bad news was that the attorneys working for the firm were treated like prima donnas. Since our firm had been very successful in its cases for the client, the client simply wound up paying substantially higher fees in the name of a false or overstated theory of efficiency.

Pros And Cons Of Bill Monitoring Services

Often large corporations will get the idea of consolidating law firms and monitoring bills from one of the national accounting or other large consulting firms. One of the firm's "consultants" will recommend the idea as a way to improve manageability, lower costs and improve supervision. The idea has great theoretical appeal.

In truth, however, the monitoring service and the law firm(s) are often in a symbiotic relationship with one another. The consulting firm is "feathering its own nest" by selling the idea of lower and supervised costs. Often, it does this by recommending prestigious high-priced law firms whose bills may merit, and can probably stand, some reduction. The consulting firm gains by being paid to monitor the bills and costs of the law firms. The law firm whose services are ostensibly being monitored gains by being recommended by the consulting firm.

Both the new law firm and the new consulting firm benefit from the arrangement. The consulting firm looks good to the client by eliminating waste; the law firm has a major new client under an arrangement that, by design, restricts competition and raises barriers to entry to outside firms.

Consolidation and bill-monitoring can work, but will work more effectively where the self-interest of the law and consulting firms are reduced or eliminated. The consulting firm should

not nominate the law firm. The arrangement should begin as a trial run before a long-term contract is signed. The new bills, after consolidation, should be compared with the old on same and similar services. The client should consider whether it can choose the law firm and monitor the legal bills.

Ask For An Itemized And Detailed Bill.

Recently, I received three bills from an expert witness. Actually, I first received two bills for two different matters and requested a "breakdown" of how my clients $1,200 retainer was applied. The bills I received read something like the following:

Example A

A

Bill

Medical research, 5 hours: (This is the "breakdown.")	$1,200.00
Deposition:	$1,000.00
Medical research and consultations, review medical files:	$2,600.00

Receiving a bill like this is not very satisfying, so do not accept it.

Fortunately, nowadays, most bills are more detailed. Typically, an invoice from a law firm should read something like the example on example B.

Ask for detailed billing. The bill should tell you who did the work, when, what the work was and what it cost. It should tell you enough to ask intelligent questions, if necessary.

If your account and/or the firm is sizeable, and you use more than one law firm, then you may want to request a "blended rate" of the cost of attorneys and paralegals. Theoretically, this helps you measure the cost-effectiveness of the firm.

Whether or not you receive a "blended rate," monitor the use of lower cost attorneys and paralegals for routine matters. There is no sense in paying a road-grader to pull a plow, if all you need is a Ford tractor.

Example B

B

Bill

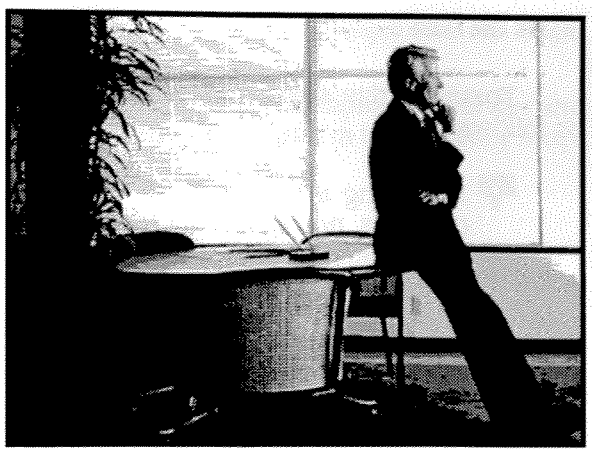
7/10/95 DWH:
Legal research lien statutes and cases, on _____. Draft letter to attorney X re lack of lien and theft

2.5 hours $100.00 =$250.00

7/12/95 DWH:
Review settlement proposal from X; discuss with client Y
.5 hours $100.00 =$500.00

Checklist

1. Talk about money with your attorney.
2. Ask about fee agreements.
3. Expect legal bills to be high but not surprising.
4. Be aware that law firms need to bill hours.
5. Legal bills as a plaintiff or as a defendant.
6. Non-payment syllogism.
7. Paying by the job.
8. Consolidating legal work pros and cons.
9. Bill monitoring services pros and cons.
10. What a legal bill should look like.



Chapter Eleven

Final Thoughts

Summary

This final chapter simply gives a checklist of mistakes to avoid in choosing and using an attorney and a modified "Ben Franklin" technique for using and weighting these factors. This list is based on the previous chapters of the book.

A Summary of How Not To Choose And Use An Attorney

One of the best articles on investing this author has read was entitled something like: "Ten Ways to Lose Money In The Stock Market." The article was excellent because, while it is not always clear how to make money, certain investor mistakes are almost guaranteed to lose money. Similarly, certain mistakes by clients in choosing and using a lawyer are almost guaranteed to result in a less than an ideal relationship.

To summarize, some of these mistakes are as follows:

1. Not using a lawyer at all when the client is not qualified to evaluate the documents or prosecute or defend the case.

2. Suing as a matter of principle without considering the transactions' costs of litigating the merits.

3. Waiting until the last minute to hire an attorney, not interviewing counsel on qualifications and experience in the area, failing to evaluate lawyer's ability to listen and communicate.

4. Not bringing up the expected cost of legal representation, and the assumptions upon which it is based, until the bill(s) come in.

5. Leaving the initial consultation without an idea and evaluation of what will or, at least, could happen in your transaction or lawsuit.

6. Pestering and haggling your own attorney over money after hiring counsel to represent you.

7. Entertaining false expectations about your side of the deal or lawsuit and about the justice system as a "perfect source of truth and justice."

8. Venting and dumping your anger and emotional grief in the attorney's lap.

9. Dumping the case in your attorney's lap, without doing your own "home work" on the case.

10. Choosing an attorney who will not let you be part of the team or deciding on your own not to join the team yourself.

11. Not requesting or receiving itemized billing statements that tell who has done what on the case.

The Don Hudspeth-Ben Franklin Weighted Average Technique

The "Ben Franklin" technique of evaluating a course of action is well known to salespeople and many executives. Under the Ben Franklin technique, one may list the "pros" in favor of one action in the first column and the "cons" against an action in the second column. Alternatively, option "A" may be considered in the first column and option "B" in the second column. The column with the most entries wins the argument and the decision is made.

If we used the Ben Franklin technique to choose an attorney, factors like experience and qualifications might be in the "Pro" column, while costs and relatively low-listening skills might be in the "Con" column, or each attorney's name could be assigned to the head of a column and the attorneys evaluated according to the

factors. Here, however, we have already identified many of the factors one may use to evaluate an attorney. Thus, a modified version of the Ben Franklin technique is appropriate.

Before we discuss this modified version, however, we need to understand the weaknesses of the Ben Franklin technique. The traditional Ben Franklin technique has two weaknesses: First, one may omit an important factor from consideration in listing the pros and cons. Second, under the technique, all factors are considered equal (at least on the surface), but in the real world not all factors have equal weight. For example, a swimming pool light and a hall light might both be factors to consider in purchasing a home, but the pool would be more important to most people than the hall light in making the final decision.

Many people will allow for the differences in "weight" of the factors instinctively, but this intuitive approach does not force one to consider the proportionate and total weight of the factors. If factor number 1 is three times more important than factor 3, then the valuative system should state that expressly.

We will modify the technique in two ways: First, by listing the factors to be considered along the left hand side of the chart (points 1 through 9), and, second, by weighting the factors according to an assumed value system (you would substitute your values here). Listing the factors helps us to remember and include them, so that none is overlooked and forgotten. Weighting the factors helps us to consider their relative importance. This weighting system is the key to the Don Hudspeth version of the Ben Franklin

technique.

Under the weighting system, each factor is assigned a range of relative importance. This range or scale may vary from 1 to 5 or 1 to 10, depending on the importance of the factor. For example, an attorney's qualifications may be ranked on a scale from 1 to 10, while the attorney's ability to listen may range on a scale from 1 to 5.

After each factor is assigned a range, and each range is evaluated in relative importance to every other range, then the next step is to evaluate and assign a specific numeric value to each factor. This assignment is made according to which factors are most important to you.

In the following example, a hypothetical evaluation is being made by a woman seeking a divorce attorney. Most important to the woman are the attorney's qualifications and experience. The client would prefer a woman attorney, but it is not essential (see factor 10). At this stage, listening and communication skills are of medium weight, but the client may reevaluate all of these factors as she goes along.

Using this sample evaluation sheet we will now plug in numbers based on the client's initial phone and personal interviews with the attorney.

Hypothetical Attorney A is a male, educated at the University of Chicago Law School, with 15 years experience. Attorney A is bright, polished, talks a little more than he listens and seems to know what he is talking about, but is not always clear. He sometimes "talks above" the client. Attorney A is with an established, well-known firm, but his billing rate is about $25.00 an hour higher than Attorney B's billing rate. Attorney A seems

somewhat indifferent about the case, but this could just be due to a natural reticence to be excited. Attorney A wants the facts from client, but is not anxious to have the client attend depositions or to be actively involved except as necessary. Due to the firm's apparent resources, it appears that Attorney A will be able to get the work out fairly promptly and the bills will be sufficiently detailed and accurate.

Hypothetical Attorney B is a woman. She attended the College of Law at Arizona State University, and has six years experience. Attorney B is less sophisticated than Attorney A, but listens well and restates legal concepts in everyday language. Attorney B is excited about the case, but is not quite as familiar with the area as Attorney A. Attorney B wants the client to be actively involved in the case, partly because she has less staff and feels she can get things done faster and better with the client's involvement. Attorney B says she will get the work out promptly and her bills are basically in the same format as all other firms, which is fairly detailed. Attorney B agrees to add more information to the bills if the client requests it.

Based on these facts the initial evaluation turns out as follows:

Example C

C

Sample Completed Evaluation Chart

	Attorney A	Attorney B
1. Qualifications (1-10)	8	7
2. Experience (1-10)	8	6
3. Listening skills (1-5)	3	4
4. Communication skills (1-5)	3	4
5. Cost (1-10)	6	8
6. Eagerness to please (1-5)	3	5
7. Team approach (1-5)	3	4
8. Turnaround time (1-7)	4	4
9. Detailed billing. (1-7)	4	4
10. Other: female: (1-3)	0	3
Total	**42**	**49**

Glossary

Code of professional responsibility - Rules that govern a lawyer's right to practice law in a state. A lawyer's license can be removed or suspended, or the lawyer can be reprimanded for violating the code. Each state's code is based on the American Bar Association's model code.

Conflict of interest - Attorney's association or tie that would jeopardize or bias representation of the client. Failing to disclose a potential conflict of interest to a client is a violation of every state's code of professional responsibility.

Contingency fee - With a contingency fee, the law firm takes a percentage of the award as payment of its fee. Typically, personal injury cases are prosecuted on a contingency fee basis while most contract-related litigation is not. One/third is a fairly standard contingency fee, although some firms discount the rate to 25 percent.

Defendant - Person against whom a legal action is filed.

Deposition - Out-of-court process of taking the sworn testimony of a witness. This is usually done by a lawyer with a lawyer from the other side being permitted to attend or participate. The purpose is to

disclose relevant information so that each side can evaluate its case before going to trial and decide whether to pursue the claim or settle out of court.

Discovery - Before-trial formal and informal exchange of information between sides in a lawsuit. Two types of discovery are interrogatories and depositions.

Expenses - Charges for a lawyer's work other than fees, typically including long distance telephone charges, photocopying, court filing fees and expert witness fees.

Lawyer referral service - Telephone service that provides the names and addresses of lawyers in a specific geographic area and by area of practice. Many are run by bar associations and charge a fee to the participating lawyers and law firms.

Ordinary course of business - Ordinary course of business is a function of your business. For a real estate firm, buying property may be normal, and thus, in the ordinary course of business. For most businesses, e.g. a trucking company, buying a business would not be in the ordinary course of business, thus; this might be a "fundamental change."

Plaintiff - Person who files a lawsuit against another.

Pleading - Making a formal written statement of claims or defenses of each side in a lawsuit.

Pro se - Representing yourself in court without the help of an attorney. Also called in pro per.

Retainer - Money asked by the lawyer before beginning work on a case, often considered a deposit for a portion of the work to be done. The money may be used to cover expenses or the lawyer's fee or simply to reserve the lawyer's services for a specified time period on a lawsuit. The unused portion may or may not be refundable.

Endnotes

[1]This example ignores industry and leverage. In the right industry, e.g. one requiring high-tech knowledge, and with the right financing, the assumption may prove less of a fallacy. But this is a simple example to make a simple point.

[2]These references refer to styles of conduct, not gender. They apply equally well to men and women lawyers.

[3]Russ McGuire left Kansas City, Kansas with his wife, children, furniture and everything he owned in his car. He later became the owner of a vending machine company that did business in most of Kansas, Colorado and Oklahoma.

[4]I say "relatively standard" because inexperienced clients think that every contract is standard, but all contracts are most definitely not standard. Even sophisticated clients, who should know better, have taken contracts prepared by their attorneys for one transaction, in which the client was the seller, copied it, and used it in the next transaction in which the client is the buyer. This is a prime example of "shooting yourself in the foot" and being "penny wise and pound foolish." (Please forgive the mixed metaphors).

Bibliography

Dancing With Lawyers: How To Take Charge And Get Results, by Nicholas Carroll, Royce Baker Publishing, 953 Mountain View Drive, Lafayette, California 94549 (First Ed. 1992).

Legal Street Smarts: How To Survive in a World Of Lawyers, Dennis M. Powers, J.D. Insight Books, 233 Spring Street, New York, N.Y. 10013-1578 (First Ed. 1994).

Using a Lawyer, Kay Ostberg, in Association with Halt, Random House, New York, New York (First Ed. 1985).

NOTES: