INTERVIEWING YOUR CLIENTS

Introduction

An effective interview is often the most critical interaction between a lawyer and his or her client. An effective interview will allow the lawyer to fully understand the nature of the services required, identify who the client actually is, as well as clearly establish terms of the relationship and how lawyer and client interaction and communication should occur. It also provides perhaps the best opportunity for the lawyer to manage client expectations. Particularly in the immigration setting, where significant time delays are not uncommon, it is particularly important that the client understand the time frames involved in accomplishing their goal and the various difficulties that may arise during the process.

Interview Preparation

Before entering any interview, the lawyer should have a clear frame of reference as to what he or she hopes to accomplish. First and foremost, the lawyer should confirm, even before the interview occurs, whether or not a legal or business conflict exists. Particularly for lawyers who practice in multi-lawyer firms, waiting until after the interview has occurred before determining if a conflict exists can be a painful and expensive mistake. If the interview elicits confidential information, the lawyer, and his or her firm, may be precluded from acting for not only the new client, but also an existing client with whom a legal or business conflict may exist. As such, a thorough conflict search should be done before any interview occurs. Indeed, the lawyer should be cautious in even discussing personal matters with the client over the telephone prior to having conducted a proper conflict search to ensure that no conflict or other difficulty will arise with the representation of the potential client.

The interview should identify what the client wishes, as well as determine the information you will need from the client. A clear and concise understanding of the exact service required must be obtained. Further, counsel should also obtain the information necessary to determine whether there are any particular background issues that may make the desired result difficult to obtain. For example, immigration lawyers should quickly identify if there are any criminal convictions, security concerns, or health issues that may pose challenges to obtaining the desired outcome. For example, if a client is aware that a significant health issue or prior conviction that may make the desired outcome unlikely, he or she may not wish to pursue the application. It is obviously more helpful to have these matters discussed at the outset of the relationship rather than after considerable expenses have been incurred. It is also extremely important that fee and retainer relationships are fully discussed and agreed upon.

It is also critical that proper client identification occurs at the outset of the retainer relationship to ensure that Law Society requirements are met and clearly identified and documented. Under client identification rules, which are similar throughout most Canadian jurisdictions, generally require the following:

Identification Requirements

- apply whenever a lawyer provides legal services to a client
- must obtain basic ID info about individual or organizational clients in every retainer (subject to certain exceptions):
  - For clients who are individuals:
    - full name, home address and telephone number; occupation; business address and business telephone number
  - For clients which are organizations:
    - full name, business address and telephone number
    - organization's incorporation or business identification number and a description of the general nature of its business or activity, unless the organization is a financial institution, public body or reporting issuer
    - details on the contact person who is providing instructions for the organization
- "client" includes any "third party" for whom the client is acting or representing
- examples of exceptions:
  - where the lawyer is acting as agent for, or on referral from, another Canadian lawyer who has already ID'd the client
  - when a lawyer notarizes documents without providing any legal advice

The Client Interview - Specific issues that may arise during the Interview

Language / Cultural Issues

A number of issues commonly arise in the interview. Some of the most significant and challenging are often language issues. If there appears to be difficulty in communicating, the interview should be delayed until proper translation can be obtained. The lawyer should be aware of the risks involved in having a family member translate, particularly when the family member's interest may conflict with the interests of the client. This situation often arises in cases of spousal sponsorship where the sponsor may be receiving translation assistance from the sponsoree. It is essential that the lawyer ensures that the sponsor fully understands the nature and commitment of the sponsorship obligations.

Dual Representation

Another issue that often arises is dual representation. Dual representation occurs when solicitor/client obligations arise with more than one person or entity. The primary risk in situations of dual representation is that the interests of the various parties subsequently conflict. The *Rules of Professional Conduct* clearly state that a lawyer must generally not represent parties opposite in interest. In many cases, no obvious "opposite in interest" issues are apparent at the outset. However, situations can, and often do, change and previously harmonious relationships become antagonistic. In many of these cases, the lawyer has no option but to cease acting for the parties and refer them to other counsel. A further complication in the dual representation situations is the general inability for legal counsel to keep information confidential as between the parties, unless specifically agreed and permitted. As such, the risks of dual representation should be made clear at the outset of the retainer relationship.

Informed Consent

It is possible, and ethically permissible, to act in a matter where a conflict of interest may arise if the parties provide their informed consent to waive the conflict of interest. In order to obtain such informed consent, a lawyer must clearly explain the circumstances of the conflict. This can be accomplished in the retainer letter prepared at the beginning of the matter or, in circumstances where one party is not going to be considered the lawyer's "client", in a letter to that party which clearly details the limits of the lawyer's obligations to that party.

A definition of "conflict of interest" can be found in Chapter 6 of the *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia,* 2nd ed. (Halifax: Nova Scotia Barristers' Society, 1998) (the *Handbook*), at Guiding Principle 1:

> 1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgment or advice on behalf of, or loyalty to a client or prospective client. Conflicting interests include, but are not limited to, the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information

In obtaining informed consent, the lawyer must ensure that the client(s) understand what the lawyer has been retained to do, the nature of the conflict or potential conflict, who is being represented by the lawyer, any other parties involved and what steps will be taken should the conflict crystallize.

Guiding Principle 2 of the *Handbook* provides a definition of "informed consent":

> 2. For the purposes of Rule (b), a lawyer has the client's informed consent to act in such a matter where the client or prospective client, preferably in writing, has consented to the lawyer so acting after the lawyer, preferably in writing, has advised the client or prospective client
>
> > (a) that the lawyer intends to act in the matter not only for that client or prospective client but also for one or more other clients or prospective clients;
> >
> > (b) that no information received from one client respecting the matter may be treated as confidential with respect to any of the others;
> >
> > (c) that if a dispute develops in the matter that cannot be resolved, the lawyer cannot continue to act for any of the clients and has a duty to withdraw from the matter;
> >
> > (d) whether or not the lawyer has a continuing relationship with one of the clients and acts regularly for that client; and
> >
> > (e) that the client or prospective client obtain independent legal advice where the

> lawyer has a continuing relationship with one or more of those for whom the lawyer intends to act

Informed consent should be reduced to a clearly worded letter that includes, at the very lease, the information suggested above. A lawyer should go through the letter with their client and/or other party in person, ensuring that all points are understood. If there is a language barrier, it is the lawyer's responsibility to ensure that the client or other party understands which may require the assistance of an interpreter. It is prudent to maintain a copy of this letter in the file that includes the client/party's signature indicating understanding and consent.

If a matter is particularly complex or the interests of the parties so obviously divergent, the lawyer should refer the parties for Independent Legal Advice (ILA), and may consider whether acting in the matter is appropriate in the absence of independent counsel. If ILA is sought, the lawyer should obtain a certificate to document that the advice was in fact received.

With regard to the circumstances where a lawyer should not act, guidance is provided in Guiding Principle 3 of the *Handbook*:

> 3. A lawyer, however, has a duty not to act for more than one client where, despite the fact that all parties concerned have given informed consent, it is reasonably obvious that an issue contentious between them may arise or that their interests, rights or obligations will diverge as the matter progresses.

All Canadian jurisdictions have similar provisions regarding conflicts of interest. See for example the Law Society of Upper Canada's *Rules of Professional Conduct*, Rule 2. The rules regarding joint retainers begin at rule 2.04 which states:

> **2.04 (6)** Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that
>
> (a) the lawyer has been asked to act for both or all of them,
>
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

This rule is further explained by the Commentary:

> Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

The *Annotated Professional Conduct Handbook* in British Columbia addresses conflicts of interest in Chapter 6, and General Principle 4 provides that:

> **4.** A lawyer may jointly represent two or more clients if, at the commencement of the retainer, the lawyer:
>
> (a) explains to each client the principle of undivided loyalty,
>
> (b) advises each client that no information received from one of them as a part of the joint representation can be treated as confidential as between them,
>
> (c) receives from all clients the fully informed consent to one of the following courses of action to be followed in the event the lawyer receives from one client, in the lawyer's separate representation of that client, information relevant to the joint representation:
>
> (i) the information must not be disclosed to the other jointly represented clients, and the lawyer must withdraw from the joint representation;
> (ii) the information must be disclosed to all other jointly represented clients, and the lawyer may continue to act for the clients jointly, and
>
> (d) secures the informed consent of each client (with independent legal advice, if necessary) as to the course of action that will be followed if a conflict arises between them.

The Canadian Bar Association has available on its website (www.cba.org) a Conflicts of Interest Toolkit that provides sample engagement letters, guidelines for multiple representations and model "I am not your lawyer" letters. This is a tremendously valuable tool for lawyers who find themselves in the muddied water that is conflicts.

Disengagement

Good client relations should be maintained from the start of the retainer to its finish and effective communication is the key. Ideally, an effective retainer letter will lead to an effective conclusion and termination of the relationship. A retainer letter should include the following:

- an agreement on the specifics of the retainer and the desired outcome;
- a discussion of anticipated fees and payment;
- a discussion of the anticipated timeframe for completion of the matter; and
- an agreement on the nature and extent of communication throughout the retainer.

It is wise to communicate regularly with the client throughout the course of the file, consistently documenting your file and copying the client on all correspondence. A retainer is more likely to end on a positive note and with low risk to the client and the lawyer if the client's expectations are effectively managed throughout the file. This will help to keep clients coming back and reduce your risk of complaints and negligence claims. Chapter 2 – Competency and Chapter 3 –

Quality of Service in the *Handbook* specifically address a member's duty to manage client expectations (Chapter 2, Guiding Principle (iv)), communicate with the client in an effective and timely manner at all stages of a matter (Chapter 2, Guiding Principle (v)) and to keep a client reasonably informed (Chapter 3, Commentary 3.3).

There are many reasons why a lawyer may choose to end the retainer prematurely, such as a conflict of interest, or a breakdown in the solicitor-client relationship. Effective communications with the client at all times can prevent these circumstances from escalating into complaints to the Society of poor quality of service or improper withdrawal.

The Professional Responsibility Department sees too many complaints from clients based on poor communications by the lawyer, and problems with the manner by which the lawyer's retainer was terminated. If the retainer is being terminated by the lawyer for good and appropriate cause, a simple apology to the client for the inconvenience caused will sometimes go a long way toward addressing client concerns.

When a lawyer wants to terminate a client for reasons other than completion of the file, that lawyer should first refer to Chapter 11 of the *Handbook*, which addresses the circumstances when a lawyer can or must withdraw. The rules with regard to managing withdrawal and transfer of the file to successor counsel must be adhered to as a minimum requirement.

A lawyer should then consider all file closure considerations, which include:

- Return of client file and property;
- Retention of a complete copy of the file by the lawyer in the event of future claims or complaints;
- Billing issues (lawyers are encouraged to resist exercising their right to a solicitor's lien for unpaid fees if some other reasonable arrangement can be made with the client or successor counsel).

We recommend that lawyers use disengagement letters at the conclusion of their retainer, whether the retainer comes to an end when the matter is completed, or whether the termination is unexpected and prior to the matter's conclusion. The letter should:

- Be positive and include a thank you to the client for their business;
- Summarize the retainer and the work completed;
- Set out the reason for the end of the retainer, but be careful not to cause any prejudice to the client in so doing (keep it simple, dispassionate and factual);
- Confirm any terms regarding the disengagement, e.g. payment of any outstanding fees, return of file, etc;
- Confirm any further court dates, limitation periods or other uncompleted matters to ensure the client clearly understands his or her position at the end of the retainer; and
- Confirm that your client has received the disengagement letter (registered mail or personal service).

A disengagement letter that addresses the above issues will be an effective risk management tool for the lawyer and will help to maintain a positive working relationship and a good reputation.

It is important to note that disengagement letters are now recognized as an essential means for transferring a current client's status to that of former client to avoid unnecessary conflicts of interest as highlighted in the Supreme Court of Canada's decision in *R* v. *Neil*, [2002] 3 S.C.R. 631. It is imperative that a lawyer document a client's status since conflicts rules are less onerous for

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