

Trial Strategy: From Contract to Verdict

Trial Prep: From the womb to the tomb

Prepared for Trial Skills Training Camp CLE

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I Potential client contacts you

- A Learn general nature of dispute and identify all potential parties. This communication is privileged and confidential even if the lawyer and potential client do not agree the lawyer will represent the potential client and there is no further communication. Tex. R. Evid. 503(a)(1); DR 1.05 cmt.1.
- B Assuming the lawyer is competent to help with the issue and has no apparent conflict, schedule a meeting as soon as possible.
 - 1 Explain to the potential client how delay can hurt
 - a If defendant, default judgment and potential tactical weakness
 - b If plaintiff, limitations and tactical weakness
 - c There are many tactical advantages for the party setting the pace of trial preparation and forcing the other side to react. An aggressive approach is almost always more effective than any other.
 - 2 Instruct the potential client to bring all possibly relevant documents, without trying to decide which are important. It is the *lawyer's* job to decide which documents and facts are important.

II Meet with the Potential Client

- A Interview the potential client in detail, getting as much relevant data as possible and being sure to identify the potential client's goals and expectations for the representation.
- B **If the potential client's expectations are unreasonable and the potential client cannot be persuaded to modify them, then do not take on this potential client.**

III Obtain a Signed Retainer Agreement

- A Require a written fee agreement for the first representation and for all contingent fee agreements. DR 1.04(c) and (d). *Especially* true for family and close friends.
- 1 Unless it is a contingent-fee case, charge by the hour. Avoid flat fees. A lawyer cannot predict what opposing counsel will do, what the court will do, or what complications might turn up in the investigation and research that have not yet been conducted.
 - 2 For commercial contingent-fee cases, client may agree to bear out-of-pocket expenses.
 - 3 Never take on a contingent-fee case without evaluating the cash-flow and other financial resources needed for document production, depositions, mediation, and trial.
- B Remember that representing a client invokes three distinct duties: contractual duty, duty of care (avoiding negligence) and fiduciary duty. See *Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 189-90 (Tex. App. – Houston [14th Dist.] 2002, no pet.); *Murphy v. Gruber*, 241 S.W.3d 689, 693 (Tex. App. – Dallas 2007, pet. denied).

IV If There Will Be No Representation, Confirm in Writing

If the attorney and potential client do not agree on terms of representation, write a letter clearly confirming there is no representation, and emphasizing the importance of not delaying to obtain counsel. “[A]n attorney-client relationship can arise by implication. An attorney-client relationship is a contractual agreement that can be created by an express contract or implied from the actions of the parties. We must determine whether a contract can be implied using an

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