



ATTORNEY AT LAW

Let's Put the Counselor Back in "Attorney and Counselor at Law"

By Christina L. Corl

I will never forget the first time I turned down a winnable case. A young woman and her parents were sitting in my office telling me about a dispute with the woman's employer. She believed she was being treated unfairly and wanted to file a lawsuit to force the employer to give her certain benefits to which she believed she was entitled. The problem was that the current issue was only the most recent of many. It simply was not a good fit with the employee and employer. In fact, the continued employment was making the woman ill from the stress and she was forced to seek medical treatment (in addition to consulting with a lawyer). I told her not to sue, to seek a modest severance and find another job. Could I have filed the lawsuit? Yes. Could we have won after years of stressful litigation? Yes. Would that have been in the best interests of the client? Absolutely not.

All attorneys have encountered the client with more money than sense, the client who simply cannot let go and move on, or the client who wants to pay you to "prove a point" or make the opposing party's life miserable for a few years. There are many lawyers who will do just that. I recently had some very unpleasant litigation terminate with the filing of voluntary dismissals by either side. It was the best thing that could have happened. The proceedings were intractable and the parties hated each other. A year later, the opponent refiled the lawsuit. When I asked the lawyer why it was refiled, the lawyer responded, "Because my client wanted me to."

Unfortunately, there seems to be a lot of that going around. My partner Larry James told me a long time ago, "Don't let a client make you do anything stupid." It seems that more and more lawyers simply do not want to have that difficult discussion with the client, either to avoid litigation in the first place or bring it to an end when the situation becomes untenable. I spent a full day with an official for a state entity

at a mediation conference. This official had been dealing with lawsuits and attorneys for three decades. He regaled me with story after story of lawyers on prior cases "doing battle" and "enjoying the battle" and then told me that he thought he should be a lawyer because he "likes to argue." I guess that is what the public thinks of the skills necessary to be a good lawyer. Nothing could be further from the truth.

The reality is that it is not difficult to find a lawyer who can competently litigate a case. Sure, some are better than others, but plain, old competent litigators are a dime a dozen. It is the more esoteric pursuit of whether to engage in litigation in the first place that is more of a challenge. As a profession, I think we are failing miserably at competently advising clients how to manage conflict and resolve issues. Clients should be paying us for our judgment on how to solve problems as opposed to simply filing lawsuits. At some point there was a reason that attorneys were referred to as "attorneys and counselors at law" and not just "lawyers." Here are some thoughts on getting back to basics:

What is the client trying to accomplish? Many times a client sees you for the first time with a pre-conceived notion about what needs to be done in any particular case, or simply comes in and asks whether it is legal to do a particular thing. Between advice from internet chat rooms and stories from friends and neighbors, many clients think they know better than you what should be done to resolve a conflict. I once had a client bring in a complaint that he had prepared and just wanted me to sign my name to it for him to file. Turns out he had a claim against a totally different party, which we settled without filing suit and accomplished exactly what he wanted. You, as the counselor, need to start at the end

resolution of the problem and work backwards to get there the fastest and cheapest way possible for the client.

You have to be able to see around corners. Most clients don't even know what they don't know. While clients may tell you what they *think* is important, it may or may not *actually* be important to the analysis at hand. This requires the lawyer to spend some time with the client, start at the beginning, learn about the overall business or circumstances and get a grasp on history. If the case involves an industry or profession that is highly regulated, the lawyer better learn all the relevant regulations before providing advice. I once had a client who wanted to enter into a contract with a product manufacturer for sponsorship of an event. The client simply brought me the contract and asked me to review it. I did. It was fine. However, then I asked if there were any other contracts already in place for sponsorship of the event. I found out that the product manufacturer's biggest competitor had already signed up to sponsor the event and the current contract was a violation of the prior. While clients may appear to be sophisticated and experienced, a good counselor simply cannot take that for granted.

Clients are people too. A good counselor has to assess the client's physical and mental ability to engage in litigation or any other form of conflict resolution. Many lawyers end the analysis at whether the client has the ability to pay. Ask about a client's health, his or her family, and his or her support system. Litigation can be taxing and unpleasant. Clients do not always have an appreciation of what it takes (in addition

to money) to be involved in litigation that may span many years. On more than one occasion, I have simply told a client that I will not put him or her through litigation and worked out the best settlement possible short of filing suit.

I, of course, understand that clients do not always listen and understand that not every lawyer is in a position to tell clients they should not litigate. After all, if everyone was reasonable, there would be no need for lawyers. However, many posturing or overly-threatening tactics I see are simply not productive and embolden clients to overestimate the value of their case or its potential for success. Mindlessly doing exactly what the client asks is not helpful either. We, as counselors, should never be part of the problem and should always strive for conflict resolution, not conflict maintenance. That may require us to have tough conversations with our clients, conversations we may not even be comfortable having. But, hey, that is why we get paid the big bucks.



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