

# What To Say (And Not Say) When You Need a Lawyer

Avoiding disclosure of your confidential information.

BY MAUREEN D. SMITH

**A**t some point, many businesses will need the advice of a lawyer, but before picking up the phone to hire one, consider first how much information you need to give them about your case. Is there anything that you should avoid disclosing? While there is information a lawyer needs during that first communication before he or she can decide to represent you, keep in mind that attorney isn't your lawyer yet and there is no attorney-client privilege until he or she accepts you as a client.

## What to Initially Provide

Before retaining a lawyer, there are two preliminary questions to address. First, you need to know whether the lawyer is competent to represent you and second, whether there is a conflict of interest that would prohibit him or her from taking the case. The answers to both of these questions can be gleaned quickly from two pieces of information: what the case is generally about and who is involved. Disclosing any more details can put you and your company at risk of disclosing confidential information that you would not want your adversary to have or use against you. Until you have formally established an attorney-client relationship with the lawyer to protect your communications, you should err on the side of brevity.

## Subject Matter

Describing the subject matter of the case to your potential lawyer can be as simple as "we need advice on an employment problem," or "we have been sued in federal court on grounds of age discrimination." While you will need to expand on these descriptions later, they are sufficient as an initial check on whether the lawyer can represent you. Professional conduct rules require, at a minimum, that lawyers possess or have the ability to attain specific knowledge about the fields of law in which they practice. The lawyer needs to know what the case is about so that he or she can determine whether someone in the firm has the knowledge, education and experience to represent you.

## Compare Names

Knowing who is involved in the case is critical for the lawyer to determine whether there is a conflict of interest that, under professional conduct rules, would prohibit the representation. Besides the names of the parties involved in the claim or transaction, the lawyer needs to learn the names of any key witnesses, employees or other individuals and entities that may be involved or may become important. For example, if a claim has been filed against your company and you think that the problem was caused by another company, you should also identify that other company to the lawyer during initial discussions.

This information allows the lawyer to perform a "conflict check" to determine whether his or her firm would be disqualified from representing you. A lawyer cannot represent you if the representation would conflict with the interests of an existing client, a former client, a third person involved with the case, or the lawyer's personal interests. This is because the conflict could limit the lawyer's ability to fully represent your interests. The simplest example of this is where the lawyer already represents another party whose interests are directly adverse to yours in the same dispute or transaction. The lawyer would be prohibited from representing you and would have to decline before having any further communication with you.

In some circumstances where there is no direct adversity, clients and prospective clients may be able to waive a potential conflict, but that possibility can only be determined after full disclosure and discussion of possible adverse outcomes with you and the other client involved with the conflict.

The initial conflict check that a lawyer conducts usually involves searching the firm's database of existing and former clients to determine whether there is any overlap with the names that you have provided. This process can usually be completed within 24 hours. Failure to initially disclose all persons and entities involved in large cases and transactions can be a costly mistake. If you retain a lawyer based upon incomplete information and the lawyer must later withdraw due to a conflict that might have been avoided, you may have to start over with a new lawyer and forfeit lawyer fees already paid.

If you have concerns about the lawyer's or firm's ability to handle your matter, ask questions about the lawyer's experience and whether he or she has personally handled cases like yours. If you are satisfied, you can then discuss the terms of the representation and follow with a written agreement to formally retain the lawyer. But remember, until that happens, you have not yet established an attorney-client relationship.

## Avoid Confidential Information

You might assume that everything you communicate to the potential lawyer during this initial process is treated as confidential information and protected from disclosure to others. This is not correct, especially when you are not yet a client. Any information that you communicate to a lawyer before establishing an attorney-client relationship may be at risk of being disclosed at a later time if your adversary seeks it.

For this reason, you should not include any confidential information in initial communications with a lawyer who does not yet represent you. "Confidential information" encompasses more than trade secrets—it includes all information that you would not want your adversary to have.

While we all have a tendency to try to supply as much information as possible, there is no benefit to doing so before you actually retain the lawyer. The lawyer cannot yet provide you with legal advice and, while the lawyer may be disqualified from representing you in the matter, his or her firm may not be disqualified from representing your adversary.

## Initiate Discussions by Telephone

While e-mail is ubiquitous in our daily business, seeking legal representation may be one area in which initial communications are better left to the telephone or in-person discussions. A lawyer can guide initial discussions with you to avoid premature disclosure of confidences, and thus protect your interests, as well as those of other clients that the lawyer's firm may already represent. Although cutting off conversation might appear to be rude, a lawyer's doing so might prevent future harm to your interests by averting disclosure of information that should only be discussed after an attorney-client relationship is established.

If you must communicate electronically, communicate with one lawyer at a time and avoid sending any substantive information that might be sensitive or confidential. Many law firm Web sites contain waivers of confidentiality that must be accepted before e-mails can be sent directly to their lawyers as a means to notify prospective clients that the information will not be protected. It's a reminder that any e-mail information you send to a lawyer is not protected and may become public. If you would not want to see the e-mail in the hands of your adversary, do not send it.

## Keep It Simple

The best approach to hiring a lawyer is to start with asking the two questions discussed above on conflicts and competence. If the lawyer is not disqualified from representing you, is competent to handle the matter, and agrees to represent you, you have established an attorney-client relationship. Now you can tell the lawyer the whole story because your communications will be protected by the attorney-client privilege. ■

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