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Scientific Client Selection

By Marc S. Stern

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As the practice of law entered the 21st Century, there have been major changes in the manner in which lawyers perform their duties. What was once considered a “learned profession” first became a profession and has now become a business. Law Practice Management Consultants abound. They converse in terms of leveraging associates, earnings ratios, marketing, and maximizing productivity. Numerous articles and even books have been written about how to charge more, how to increase billable hours, and even how to go beyond the billable hour. Tomes have been written about how to attract and retain clients, how to effectively market practice areas, cross sell services, and how to develop good client relationships.

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However, little, if anything has been written about how to determine whether you want the client you attracted and, even more importantly, how to make that decision when they first come through the door. Until now, no one has applied scientific principles to the initial determination of whether to accept the client in the first instance.

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In our office we have developed a scientific system for making this decision. In short we take the factors outlined below and, after applying statistical methods and means averaging analysis, we rate each potential client on our Client Flake Index (CFI). We then apply that rating to our Monthly Flake Quota (MFQ) and Office Flake Allowance (OFA) to determine whether to accept representation of the potential client.

A number of factors go into a CFI¹ determination. The first and most important of these is the LPR or Likelihood of Payment Ratio. Experience has shown that a client with a low LPR has a substantially higher CFI even when all of the factors are considered. Consequently, a quick determination of the LPR² cases requiring an instant determination will provide a good indication of whether to take on this client's problems.

The LPR is derived from a number of factors. What is the retainer amount? Is the client employed? What kind of payments can they make? What is the referring attorney's experience with the client? Are there wealthy relatives? Are there assets (house, real estate, etc.) that can be liquidated to pay you? Will the client secure your fee? If so, on what property and in which position? If the retainer check bounces, the LPR is negative and you should consider whether or not the client falls into the TFC status discussed infra.

The LPR is determined as follows:

$$LPR = RA + (CPMP - PWD) + VS \times 10 \\ PTF$$

where RA= Retainer Amount, CPMP = Current value of Projected Monthly Payments, PWD = Potential Work Date (When will you have to do the work), VS = Value of Security, and PTF = Projected Total Fee.

Since the vast majority of our business is the result of referrals from other lawyers, the RACF or Referring Attorney Credibility Factor is important in our office. For instance, some attorneys send us all of their non-average bankruptcies. If the referring attorney is a regular referral source, it may indicate that the client is a good risk since most attorneys do not wish to be known as sending flaky clients. If you have never heard of the referring attorney it means nothing. However, if you think (s)he is a clod, a higher CFI is indicated. If you really don't like them, they may be getting even with you for something in the past. Tread carefully.

Our office handles a number of complex cases which have been mishandled prior to our involvement. The PCCF or Previous Counsel Competency Factor is therefore important. If previous counsel was competent, a higher CFI results. If previous counsel was incompetent, a lower CFI is indicated. If the attorney is an idiot and the client recognizes it, it does not indicate much of anything unless the client has been with the attorney for a long time. In this case, a higher CFI is indicated. A good general rule is that if you are the second counsel and previous counsel has a low PCCF score, do not elevate the CFI on this basis. Be cautious, however. If previous counsel was competent or if you are the third attorney don't take the case regardless of other factors. The possible exception to this is if you are a specialist and the referring attorney is also prior counsel.

The Client Honesty Factor, or CHF, is the next item to consider. If the client is lying to you, it is not worth representing the client. Period. With the expansion of Rule 11, and the new obligations under '707(b) of the Bankruptcy Code, it is important that you investigate all that your client tells you. If you must do this regularly, it takes time from other cases. If you must pay sanctions because your pleadings are not grounded in fact, your reputation with the court will suffer, you will probably lose the case, the client will be angry with you, you will not be paid, and you will have to pay the sanctions from your own pocket.

A related factor to consider in deciding to represent a potential client is the MPF or Malpractice Premium Factor. This is a function of client honesty, rationality and expectations.³ The factor is most appropriately summarized in the following question, "Will this @#%\$\$# sue me if he/she/it does not get the relief desired and what will it do to my malpractice insurance premiums?"

If the potential client wants to do it as a "matter of principle" be extremely careful.⁴ This is the client who will look for a malpractice action and probably will complain about your bill. They most probably will not pay your bill.

In our office the SIF or Secretarial Intuition Factor is an important element of a clients CFI quotient. My current secretary has more life experience than I, and an uncanny ability to spot flakes. Consequently, her opinion⁵ is a major factor in the determination of the CFI.

The last factor to be discussed in depth in this article is the PRF or Potential Referrals Factor. I have, throughout my career, represented a number of clients with CFI statistics off the scale. However, these clients have sent me numerous substantial business clients who pay their bills regularly, listen to my advice, and do what they say they will do. Consequently, they rate a low CFI. These clients would not have come to me but for my representation of their friend, relative, etc.

This is a minor factor. After all, flakes seem to travel in packs⁶ and it is unlikely that your flaky client will have non-flaky friends. At the outset, it is extremely difficult to determine what the possible referrals are. While the PRF may not be readily available when determining to take the client, it should certainly be considered when deciding whether to fire the client.

There are a number of additional factors which go into our determination of a client's CFI. Is the client pleasant; do you need to fumigate the office after he/she/it leaves; will they follow your instructions; will they do what they tell you they will do; can they; do you like the client; do they reek of cheap (or expensive) perfume, aftershave, or spirits, do they smoke?⁷

After establishing the CFI, we then apply that number to see if the potential client meets our MFQ or Monthly Flake Quota. We have arbitrarily set our MFQ at 500. In order to determine whether a client is over or under our MFQ we simply add the CFI for each new client taken during the month. This is expressed mathematically as:

$$\text{SUM (CFI1+CFI2+CFI3 ...)} < \text{MFQ}$$

where each superscript number is a client and MFQ is our Monthly Flake Quota.

We also maintain an Office Flake Allowance (OFA)⁸. This is the sum total of the CFIs of all active cases. In our office this is set at 10,000. In the event that our OFA exceeds this level we do not take new clients and do not start new matters until the OFA is reduced. The reason for this is that when our OFA reaches this level, the office cannot physically or mentally handle any new case.

When a client's CFI will result in a total score in excess above our allocated MFQ we refer the client to another attorney or tell him/her/it to come back next month. The same is true if our OFA is at or near capacity.

This process is designed to weed out Marginally Flaky Clients (MFC's). When applying the formula to real life it is important to remember that if clients didn't do stupid things, we would not be in business. MFCs appear reasonably intelligent and normal. They may even act normally. However, they are not. The Degree of Flakiness (DOF)⁹ is an indication of how much trouble¹⁰ you will have representing them and how much staff time they will take in the event that they retain you.

This process may be helpful in allowing you to avoid the Totally Flaky Client (TFC). The TFC is to be avoided at all costs.¹¹ The TFC will argue about your bill, obtain an adjustment and still not pay you. (S)he will not listen to your advice and will not tell you all of the truth. He will spend time researching his case on the internet and then argue strategy and procedure with you. She will consume vast amounts of time and cause untold amounts of aggravation. No amount of analysis will allow you to be certain you have a TFC. However, to paraphrase Justice Stewart, you'll know him/her/it¹² when you see him/her/it. And when you see one, RUN!

This entire process is intended to answer the one question that every attorney must ask when taking on a new client. I have always referred to it as the S.O.B. question. Six months from now would I rather be unpaid and defending a motion for sanctions for an SOB who is angry with me or would I rather be unemployed and

Sitting On the Beach?¹³

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¹The relative values assigned to each factor will vary with the office and with the personality of the lawyer involved.

²In 90% of cases the LPR = CFI

³If you are taking the case pro bono, charge something. Even \$5.00 per hour gets the client invested in the process and makes them realize that they are receiving value. It won't cover your overhead but it will cut down on useless phone calls and will inject some reality into their decision making.

⁴I usually tell such clients that principles are important and to litigate his case he should place \$15,000 in my trust account so that the matter can be properly pursued at least \$5,000 is not refundable. This usually injects some reality. On the other hand, if they pay it . . .

⁵Since most clients deal with my secretary/ paralegal directly, and, she is the primary contact point and client interface, her reaction to the client is extremely important. If they can work together, a good attorney client relationship is more likely.

⁶This is sometimes referred to in the literature as the Flake Grouping Effect or the Lemming Principle.

⁷In addition to establishing the values to be assigned to each factor, each office or attorney must decide what individual factors must be considered. It is anticipated that the factors in a personal injury client may be different from those in a securities client.

⁸This is sometimes referred to in the literature as the A/STL or the Attorney/ Staff Tolerance Level. In other words, will continued dealing with the client give you the screaming meemies.

⁹The DOF is measured in our office on CFI. It is not to be confused with the DOJ which is in a different world altogether.

¹⁰In nearly all cases DOJ=TROUBLE where D is a department of or part of a governmental agency and J is equal to or greater than Justice. See, inter alia, Office of the U.S. Trustee. As in "I'm from the government and I'm here to help."(The scariest words in the English Language) See, inter alia, Federal Emergency Management Agency (FEMA) In Re Hurricane Katrina (2005)

¹¹Unless he/she is married to your brother, sister, mother, father, etc. in which case you are already out of luck.

¹²Note: Politically correct designation

¹³"The Beach" is allegorical. In the middle of winter in Chicago it might be better to be in a warm courtroom with adrenalin flowing than on one of Chicago's "famous" beaches. However, that courtroom is probably not as good as the slopes at Aspen.