Client communication should start at the beginning

By Timothy J. Storm

"What we've got here is failure to communicate."

—Captain, *Cool Hand Luke* (1967)

Communication lies at the heart of much of what attorneys do with, and for, clients. Among other things, Rule 1.4 of the Illinois Supreme Court Rules of Professional Conduct (aptly titled "Communication") requires that a lawyer keep the client "reasonably informed" about the subject of the retention and explain the matter as "reasonably necessary" to permit the client to make informed decisions. Those are the minimum acceptable communication requirements and are not intended to describe the optimal scope of attorney-client communication.

On the other hand, a failure to communicate can be a serious problem. Reports from the Attorney Registration and Disciplinary Commission ("ARDC") show that attorneys' (real or perceived) failure to communicate with their clients is the second most common type of client complaint, accounting for about 24 percent of all ARDC complaints year after year. In addition, it is likely that many other sorts of problems between attorneys and clients have their genesis in a failure of communication and could have been avoided or mitigated with improved dialogue.

Whether viewed from a positive or negative perspective, it is difficult to overstate the importance of communicating effectively with the client. It may be less obvious, although no less important, that attorneys should begin the communication process even before an attorney-client relationship is formed. Again, the Rules of Professional Conduct require that the attorney communicate certain things to the prospective client, such as the basis of the fee (RPC Rule 1.5(b)) and potential conflicts of interest. RPC Rule 1.7. Just as with the rules relating to communicating with clients, those rules represent the floor, not the ceiling.

The attorney who wishes to avoid substantial future difficulties ought to think of the initial meeting with the potential client as the beginning of a process intended to educate the potential client about what he or she should expect from the attorney and from the process in general. Although it sounds obvious, that basic step is often overlooked in practice.

Many (and probably most) attorneys seem to believe that the layperson shares with the attorney a common understanding of the attorney's role in the legal process and of the nature of the attorney-client relationship. Oddly, attorneys who otherwise insist upon empirical proof of just about everything seem to retain that belief even though there is very little support for it and there are many reasons to believe that clients are uninformed or misinformed about the attorney's role.

Where do clients get their information about what an attorney is and what an attorney does? For those who have never hired a lawyer or have done so only once or twice for different types of matters, the most likely sources of information about lawyers are dramatizations and the general news media. Rather than providing accurate information, those sources tend to perpetuate some of the most corrosive myths about lawyers and lawyering which should be dispelled as quickly and decisively as possible:

Litigation is (or should be) quick, cheap, and easy. Modern dramatizations of lawyering suggest that there is virtually no problem that cannot be resolved in a half-hour, or an hour at the most (minus commercial breaks). It may be perfectly obvious to you that is not true, but why would the prospective client know that? Potential clients who have no first-hand knowledge of substantial litigation have no idea of the toll that such an undertaking can extract. Be upfront with the client about the costs of litigation—not just the money, but also the emotional stress and time taken from productive activities.

An honest, hard look at the potential costs may not (and usually won't) change someone's mind about proceeding. But some time in the not-too-distant future, the client may realize that your warnings were fully justified.

Winning isn't the most important thing; it's the only thing. The potential client who enjoys television lawyering dramas will expect that the most likely way for a conflict to be resolved is for his or her attorney to provoke an angry confrontation with the opposing counsel and opposing party and launch into a tirade that will intimidate them into dropping the case.

Due to that particular view of conflict resolution, many potential clients may believe that any attempt to settle early in the litigation process is a sign of weakness. The client may lose confidence in an attorney who explains, explores, or suggests settlement options. More unfortunate still, that misconception may even make the client resistant to a favorable settlement by planting the belief that he could get a "better deal" with a more ruthless lawyer.

Explain to the potential client at the outset that over 95 percent of civil cases are concluded short of trial. Explain that your goal (indeed, your duty) as a lawyer is to obtain the most likely best result, balancing the potential outcomes with—and here's the important part—the projected costs of achieving those outcomes.

Lawyers mostly just wing it. A potential client who is either old enough to remember the original Perry Mason television series or young enough to have "discovered" its re-release on DVD may believe it is only a matter of time (probably something like 40 minutes after your retention) until you will elicit a tearful confession on the witness stand. And that's a client who wants to hire you for a real estate closing . . . imagine what a criminal defendant would expect!

It is important that the client understand that legal professionalism requires that the attorney marshal the law and facts related to the case. When the potential client knows that the attorney is serious about thorough case preparation, it helps to establish a common

understanding that the case will be presented in the best way possible in light of the merits and not in some flim-flam fashion. That sets the proper tone for the attorney-client relationship and provides a favorable (and accurate) message about the profession.

The best lawyer is the meanest dog on the block. Those who gain their knowledge of the lawyer's role from the news media may view lawyers as attack dogs who are willing to do anything to "win," where "win" means achieving the client's stated objective. However, a lawyer is not an attack dog and a potential client who believes that myth must be disabused of the notion as soon as possible.

One of the most difficult things a lawyer can do is say "no" to the client. In fact, it is so difficult that many lawyers bend over backwards to avoid saying it. But sometimes it has to be done. The potential client should be made to understand that the lawyer is required to exercise his or her professional judgment to pursue legitimate means to legitimate goals. A desire to inflict financial or emotional pain on someone else for its own sake is not a legitimate goal.

The best time to align expectations with reality is before the lawyer is retained. Could having that kind of discussion cost you a client? Yes, the potential client who is looking for an attack dog rather than a professional may choose to look elsewhere. It will be the best thing that could happen to you.

Lawyers overcharge anyway, so clients don't really need pay the full fee. Every attorney who has been in private practice for any significant length of time knows something about collection problems. We also know that there are seemingly endless justifications for failure to pay. Indeed, there may very well be a good explanation for a failure to pay fees. However, a part of the educational process should be to explain to the potential client that the failure to pay has only one effect so far as the attorney is concerned—prompt attorney withdrawal. Tell the potential client, in writing. Mean it. Stick to it.

Don't allow the mass media to define you or your profession. Rather than merely assume that the potential client understands what a lawyer is and what a lawyer does, explain it. Then, perform the engagement so as to show your client that everything you said is true. Client communication that starts at the beginning will increase satisfaction in the long run for both you and your client. It is also one more step to earning the respect that the legal profession deserves.

Author's Note: This article was inspired by a presentation at the 2007 Solo and Small Firm Conference by Bernard Wysocki titled "The Ten Commandments of Professionalism."

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The Illinois Open Meetings Act: Client communications to counsel while the door is closed

By Patrick Kinnally

The purpose of the Illinois Open Meetings Act is to ensure the work of public bodies be patent and candid. Public bodies are created to conduct the people's business and citizens have the right to know the nature and extent of such business. Most agree with this precept. This is the public policy of the State of Illinois and why the Open Meetings Act was enacted. (5 ILCS 120/1). Hence, Illinois citizens not only have the right to know what goes on at such public meetings, but more importantly to rely upon the fact that the Open Meetings Act was created to protect such interest. (See, *Copley Press Inc. v. Board of Education for Peoria School District No. 150*, (3d Dist. 2005) 359 Ill.App.3d 321).

But what our General Assembly giveth with one hand it often taketh away with the other. And, even if public bodies are required to hold open meetings the Legislature has said that "exceptions" exist to this general rule of openness.

These limitations cover a vast array of topics and include: complaints, employment performance, compensation or discipline of employees or the public body's attorney; collective negotiating matters or deliberations concerning salary schedules, the selection of a person to fill, discipline, or remove a person from a public office; evidence or testimony presented in a closed hearing to a quasi-adjudicative body; the purchase or lease of real property including the consideration of price; the sale or acquisition of securities or investments; security procedures applicable to employees, students or the public; student disciplinary cases; matters concerning the placement of students in special education programs; litigation, when filed, or is pending before a court or administrative tribunal, or if the public body finds that an action is probable or imminent; the establishment of reserves under the Local Government Tort Immunity Act; conciliation of complaints of discrimination charges relating to the sale or rental of housing where an ordinance