

Communication Challenges

By Tim Brick, J.D.

Numerous studies confirm that the number one source of client dissatisfaction is a lack of communication on the part of the lawyer. Clients that feel neglected and uninformed are more likely to file a grievance or malpractice claim. As a practical matter, lawyers who do not advise clients of important developments, fail to return messages or otherwise ignore clients have a greater risk of facing a claim asserted by an unhappy client. Sometimes there are challenges

that make it more difficult for the lawyer to properly communicate with a client such as the client may be non-responsive, incarcerated or has a diminished capacity. A lawyer's ability to adapt to a client's needs and specific situation can be crucial to providing effective representation, and can also minimize the risk of potential claims.

The non-responsive client:

Communication is a two-way street. Occasionally, a client "disappears" and refuses to respond to e-mails, phone calls, texts and letters. Rule 1.4 of the Model Rules of Professional Conduct mandates that a lawyer shall: (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; and (3) keep the client reasonably informed about the status of the matter. What does a lawyer do when there are impending deadlines or important decisions need to be made and the client has gone off the radar?

Document, Document, Document!:

- Document every attempt to communicate with the client and save all letters, email and phone records in the client file. Any attempts to locate the client should be memorialized contemporaneously.



- Explicitly explain exactly why the client's input is required in each communication.

- Consider sending a certified letter to confirm receipt.

The goal is to be able to establish, if necessary, that the lawyer took reasonable steps (even went above and beyond) to properly communicate and advise the client.

It's also a good idea to set expectations at

the beginning of the attorney-client relationship. Explain that communication is a two-way street and that you cannot effectively protect your client's interests without proper communication. Confirm the client's preferred methods of communication and agree on expectations in the very first meeting. After exhausting attempts to elicit a response from the client, it may be necessary to withdraw from the matter. Rule 1.16(b) of the Model Rules of Professional Conduct states that a lawyer may withdraw from representing a client if: (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or (7) other good cause for withdrawal exists. A client's refusal to communicate may satisfy these requirements for withdrawal. Of course, withdrawing from representation should be a last resort and if this occurs, the lawyer must take the necessary steps to protect the client's future interests.

The incarcerated client:

The primary challenge when representing an incarcerated client is protecting the client's confidentiality. "Eavesdropping" is a significant concern which takes on many forms -- from prison officials reading an inmate's mail or listening in on phone conversations, to standing guard over an inmate when meeting with an attorney. Despite these obstacles, every attorney must take appropriate steps in order to limit the risk of abrogating privileged communications. Many of the same tools available under normal circumstances are also available when a client is incarcerated, however attorneys should be aware of some unique challenges.

As of 2011, all 116 federal prisons in the United States provide e-mail access to qualifying inmates. However, concerns about prison security and "inmate cyberstalking" have led most to adhere to strict policies regarding reviewing incoming and outgoing inmate e-mails. Even so, if a client's facility has e-mail capability it may still be a useful tool to update a client on scheduled court dates or case status without relinquishing the attorney-client privilege. Similarly, telephone calls to and from prison are most often monitored and recorded. Although it appears that no phone conversation may be absolutely protected, the best way for a lawyer to communicate with an incarcerated client over the phone is to set up a secure attorney-client call through prison officials. However, this method can involve scheduling aggravations and may be limited to the resources of the facility.

The attorney-client privilege is not waived when communicating with an incarcerated client by regular U.S. mail. Courts agree that attorney-client mail may not be read by prison officials. Still, the lawyer's best method of communication with an incarcerated client has been, and always will be, the private face-to-face consultation, and well-established case law mandates that these consultations be allowed.

The client with a diminished capacity:

Communicating with a client who is suspected of having a diminished mental capacity presents several challenges. For example, if you have been requested to prepare a trust for an elderly client with a failing memory, family members who are probable beneficiaries of the trust and involved in the matter can present potential conflicts. If the

elderly client seems capable of making informed decisions then it is probable that the client has the capacity to enter into the attorney-client relationship. If not, a non-family guardian may be required.

Comment 6 to Rule 1.14 of the Model Rules of Professional Conduct provides some guidance: "[i]n determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client." If still unsure of the client's capacity, the lawyer should consider obtaining further guidance from the client's mental health provider or medical professional. If you decide that a client has the required capacity to enter into an attorney-client relationship, document the reasons why you reached that conclusion. Communicating thoroughly and in writing is also helpful in this scenario.

Even if the client has a diminished capacity, the American Bar Association Commission on Ethics and Professional Responsibility, recommends following the advocacy model. The Commission has stated that a lawyer is still required to maintain a normal lawyer-client relationship with the client and has explained, "[t]his obligation implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matters, and continue as far as reasonably possible to take action consistent with the client's directions and decisions." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-404.

Proper and effective communication is the foundation for a successful attorney-client relationship. When communication with the client becomes difficult, for any reason, the lawyer should develop a plan of action to deal with the situation as soon as possible. Ignoring a communication challenge with a client will only make things worse and could lead to a possible grievance or malpractice claim.

Tim Brick is the Business and Employment Practice Group Manager and a Partner at Gallagher Sharp. He has defended professional liability claims against lawyers, accountants, and real estate professionals for over 20 years.