What We've Got Here Is a Failure of Communications

By Kathryn S. Whitlock

Every client is your most important client and every case is your most important case. This phrase should be every lawyer's mantra to help remind them to keep in touch with their clients.

ABA Professional Rules of Conduct 1.4 provides that

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent…is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Most states have adopted this rule, or something very similar to it. *E.g.,* Calif. R. Prof. Conduct 3-500; Ga. R. Prof Resp. 1.4; N.Y. R. Prof. Conduct 1.4. It requires lawyers to communicate promptly, clearly, and completely to clients. Failing to do so can lead to disciplinary proceedings and civil suits for liability. *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625, 629, 658 S.E.2d 178, 183 (2008); *DePape v. Trinity Health Sys.*, 242 F. Supp. 2d 585 (N. D. Ia. 2003) (Missouri law).

While the professional discipline level is relatively low (for example in Georgia the maximum penalty for failing to communicate is a public reprimand), public reprimand is, as the name suggests, public and permanent. In addition, the consequences in civil suits can be catastrophic. They can lead to damages for breach of fiduciary duty, under which the client can recover for pain and suffering and emotional distress (*DePape, supra*) or attorneys' fees and punitive damages (*Brito, supra*). Furthermore, "he never called me back" is something that resonates with jurors. No one wants to feel abandoned or unimportant, especially when (s)he is navigating the unfamiliar waters of legal matters.

So lawyers should call their clients. Call them often. Return their phone calls promptly. If the lawyer genuinely is tied up, (s)he should have an assistant call the client and communicate that the attorney is unavoidably unavailable until whatever time, but that the lawyer will reach out then. Then do reach out. Call the client back.

And write to the client. There is a saying in the legal malpractice world: Jurors try the person. Then they try the file. Then they try the facts. In other words, jurors are first going to decide if they like the lawyer. One of the things that makes jurors like lawyers is regular, ongoing communication with the client. One of the things that makes them not like lawyers is irregular, spotty, or no communication with the client. The second thing the jurors are going to look at is the file. They want to see that, in addition to phone calls and in-person meetings, the attorney wrote the client. They want to see formal letters, they want email, and they want entries on billing records. If there is none, especially in our electronic world, the jurors will assume that the lawyer really did not communicate regularly or often with the client, notwithstanding testimony to the contrary. *See, DePape, supra.* A word of caution: despite its ubiquitousness, it is recommended that lawyers not text message, WhatsApp, etc., with clients. These communication forms are too informal for the attorney–client relationship. It permits the lawyer to forget his/her role and become careless about language, which can be a problem in a later dispute. Keep the communication frequent, but at least somewhat formal.

In addition to ensuring that compliance with the Bar rules, and in addition to creating the defense that can be presented in a legal malpractice case, communicating frequently and clearly with clients helps avoid legal malpractice cases in the first place. A good rule of thumb is to touch every file and touch every client at least once every 30 days. As with any profession, "bed side manner" is important. If the client feels like the attorney has done his/her best and stood by his/her side, the client is less apt to be angry and less apt to lash out at the lawyer. Moreover, if the lawyer has communicated frequently and clearly, then there are fewer surprises and the client has been an active

participant in the process and the decision-making. All of those reduce the odds of the client suing the lawyer later when there is an unhappy result.

Besides communicating with clients, lawyers need to communicate clearly and often with their staff, which includes the other lawyers. The ABA Model Rules provide that the supervisory lawyer shall be responsible for his/her subordinate's violation of the Rules. Rule 5.1. Obviously, the lawyer cannot help avoid another's violation of the Rules if the lawyer doesn't know what the other person is doing. And, negligent supervision is a viable count in a legal malpractice case. *United Wis. Life Ins. Co. v. Kreiner & Peters Co., L.P.A.*, 306 F. Supp. 2d 743 (D.C. Ohio 2004); *OneWest Bank, FSB v. Joam LLC*, 2011 U.S. Dist. LEXIS 150999, 2011 WL 6967635 (E.D. N.Y. 2011); *Fang v. Bock*, 2000 ML 1730 (2000). Lawyers should make sure they communicate clearly and frequently with the team so that the supervisor's instructions are clear, the vision for the matter is plain, and the lawyers' potential liability is diminished.

Another reason to keep in close touch with staff is to ensure that the docket is properly calendared and monitored. All the best intentions of the secretary noting the statute of limitations is for naught if the lawyer doesn't realize the statute expires today. Make sure the system selected has redundancies and backups. One person should be responsible for entering deadlines and another for double-checking them. There needs to be in place a clear system for regular exchanges of information, such as the hand-off of a hard-paper copy of deadlines every Friday; or a response-required entry on an electronic calendar. Deadlines are too easy to miss if they are not properly calendared and a missed one is so very hard to defend against. Regardless of overall skill and acumen, failing to file within the statute of limitations, or failing to answer within the time provided by law, or not responding to an offer while it was viable, is generally *per se* negligence. *Labair v. Carey*, 2012 MT 312 (2012); *Bagan v. Hays*, 2010 Tex. App. LEXIS 6530, 2010 WL 3190525 (2010).

Calendaring systems need to have docketing and tickler functions. The lawyer needs to be reminded several days ahead of when a task needs to be completed to ensure that adequate time is allocated for completing the task. And the docketing or calendaring system needs to work with the particular lawyer's style and the law firm's practice. There are many products out there that can help. For example, LawBase is a web based database that stores cases. It integrates with Calendar Rules for deadlines. Calendar Rules is subscription based, based upon number and types of courts in the subscription. Another system is SmokeBall . It is an all-in-one application which tracks time and deadlines and stores emails. MyCase is a web based management software that also does calendaring and notes deadlines, tracks billing and stores documents in one place. PracticePanther also has everything in one place for lawyers. It consolidates legal calendars and emails into one software.

Whatever system that is selected, it is important to share the deadlines and due dates with the client as part of the regular communications with the client. This helps clients prepare—psychologically and actually—for whatever comes next in the legal matter. It makes the client a part of the process, which reduces the chances of the lawyer taking action that is at odds with the client's wishes and reduces the chances of an outcome that displeases the client. And, if the client is happier, the lawyer's life is easier.

Kate Whitlock is a partner in the Atlanta office of Hawkins Parnell & Young, LLP and a member of the ABA and its Standing Committee on Lawyers' Professional Liability. She is Vice Chair, Publications, for DRI, Professional Liability Section, and an Advisory Board Member for CLM, Professional Liability Committee. She has litigated for over 25 years, focusing on professional liability (including grievances), products liability, and premises liability. Kate represents her clients, Fortune 500 companies to individuals, in pre-suit negotiation through appeal in all state and federal courts in Georgia, as well as a few others around the country. She speaks and writes on numerous subjects, is active in the Georgia high school mock trial program, and provides pro bono services to the senior community. She is AV Preeminent rated by Martindale-Hubbell and a Top Lawyer in American Law Society, 2018.