BYU Law Review

Volume 1977 | Issue 2 Article 2

5-1-1977

Lawyers, Clients, and Communication Skill

Allen E. Smith

Patrick Nester

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

 Part of the Legal Profession Commons

Recommended Citation

Allen E. Smith and Patrick Nester, *Lawyers, Clients, and Communication Skill*, 1977 BYU L. Rev. 275 (1977).
Available at: https://digitalcommons.law.byu.edu/lawreview/vol1977/iss2/2

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Lawyers, Clients, and Communication Skill

*Allen E. Smith** and *Patrick Nester***

Introduction: Sources of Dissatisfaction

Even a lawyer who loves his work occasionally experiences feelings of dissatisfaction and failure in his dealings with clients. The causes of dissatisfaction are varied and not always clear, even to the lawyer. They may range from client ingratitude to the institution and prosecution of malpractice litigation.

A client can also experience discontent, frustration—even anger—in his relations with a lawyer. The lawyer may seem aloof, unconcerned, or bored. He may be overbearing and arrogant, his language pretentious and incomprehensible. The lawyer may seem uncommunicative and inexplicably slow in dealing with client problems, and may act in such a way that the client feels that the true nature of his problem and its proper solution are never fully understood. The lawyer's fee-charging practices may seem mysterious—particularly if the fee is never discussed. When the client is finally billed, the fee may seem outrageously high.

The lawyer's dissatisfaction may give rise to a tendency to blame someone, perhaps the client, the judge, or a secretary. He may find excuses for failure in illness, distractions, time pressures, and economic demands. His behavior in further dealings with clients may become defensive, his communications with other lawyers marked by criticism of a particular client or clients.

Typical client reactions to disappointment do not vary greatly from those of lawyers. The client may blame the lawyer or others. He may develop a variety of excuses for what happened. He too may become defensive. As his interaction with the lawyer continues, he may decide, consciously or unconsciously, not to cooperate with the lawyer. The client may withhold expressions of gratitude and appreciation for the lawyer's services. He may complain about the fee, pay it late, or refuse to pay it altogether. He may criticize the lawyer before friends and other lawyers. He

* Dean and Professor of Law, University of Missouri—Columbia. B.A., 1960, LL.B., 1961, The University of Texas at Austin.

** Research Associate, The Center for Communication Research, The University of Texas at Austin. B.A., 1968, Principia College; M.S., 1972, University of Illinois; J.D., 1975, The University of Texas at Austin.

may change lawyers. In cases of extreme dissatisfaction, the client may lodge a grievance with a bar association or similar group[1] or even institute malpractice litigation against the lawyer.

In explaining the causes of lawyer-client dissatisfaction, we hypothesize that many, if not all, attorney experiences with failure result from client reactions to their own failures, which failures have been, in turn, directly produced or contributed to by the communicative ineptness of lawyers.[2] We are not under the illusion that all clients are skillful communicators and that the blame should be placed solely upon lawyers. But we believe that lawyers can communicate in such a way as to deal successfully even with clients who are not themselves good communicators and that the experience of failure can become less frequent.

Neither lawyer nor client dissatisfaction is inevitable. There are strategies for success and improvement. One major strategy is developing an awareness of the problems and major components of lawyer-client interaction. A second strategy is improving techniques for communicating with clients.[3] In the following pages we consider the nature of lawyer-client problems, their causes and effects, and strategies for producing success and increasing lawyer satisfaction. We do not ignore client satisfaction. It is part of our thesis that lawyers will be happy when clients are.

I. Communication Skills and Client Satisfaction

A. Defining Success and Dealing with Failure

Every lawyer wants "success." But not all lawyers define success in the same way. Presumably the range of criteria is not

1. *See generally* Allen, *The Unhappy Client,* 49 Ill. B.J. 894 (1961).

2. There is good reason to believe that in the practice of any profession in which one person seeks to help solve the problems of another, the nature of communication between them is an important factor influencing whether either or both will define the results of the interaction as "successful." Fuller & Quesada, *Communication in Medical Therapeutics,* 23 J. Com. 361 (1973). Some form of communication, whether verbal or nonverbal, between lawyer and client is necessary if each is to inform the other how his initial needs and expectations are being met as the interaction progresses. The presence or absence of this kind of communication can affect both perceptions of present satisfaction or success and the hope of future success.

3. One writer suggests that a lesser goal should be "to begin to develop measures for the objective appraisal of legal performance." His argument is that

> what is most wrong with the performance of the negligence bar and personal injury claimants in particular, and professions and laymen in general, is largely attributable to the way that most participants in most professional-client consulting relationships view what they are doing and how they should be doing it.

D. Rosenthal, Lawyer and Client: Who's in Charge? 4 (1974).

too broad, however. Some of the usual criteria include: (1) amount of money earned, (2) victory, (3) a "satisfied" client, (4) minimal misunderstanding between lawyer and client, (5) the absence of overt complaints by the client, (6) an "efficient" interaction with the client—one which saves time, energy, and money, (7) approval by fellow lawyers and significant others, (8) domination or control of the client or of the situation, (9) the experience of helping others, and (10) affirmation of the lawyer's value as a professional and perhaps as a person.

Not all lawyers have thought deeply about what success means for them, nor have all articulated their criteria even if they have thought about them. Some criteria may therefore be conscious, some semiconscious, and some completely unconscious. Moreover, lawyers may subscribe to criteria of success that are inconsistent or mutually exclusive, such as domination of the client and client satisfaction. As we shall see later, it can be very helpful for the lawyer to be aware of both his own needs for success and his client's needs, even if these needs are at odds.[4]

The lawyer typically determines whether he has succeeded by evaluating communications of various kinds. If money is the criterion of success, the bottom line on the bank balance is all the communication the lawyer needs. Direct communication from the client, if properly interpreted, can permit the lawyer to evaluate other criteria. A client can say directly that he is pleased. New business resulting from referrals by existing clients can carry a similar message. To the extent that the lawyer accurately assesses the situation, the apparent absence of misunderstandings between the lawyer and client can mean success. Even the prompt payment of fees can point to client satisfaction. Approval by fellow lawyers and others can be indicated by the bestowal of honors and accolades or selection for positions of leadership.

Our principal concern at the moment, however, is not with the lawyer's experience of success, but rather with the problems that arise when he experiences failure. The lawyer probably experiences the feeling of failure when the success criteria he has chosen are unsatisfied. If money means success to him, a small

4. *See* Fuller & Quesada, *supra* note 2, at 366. One common need of most lawyers is a desire for affirmation of value as a professional, both by the results achieved and by communication from clients. Like his client the lawyer needs communication as they interact that "says" that the two of them are making progress toward success. Probably, the lawyer too is disappointed if something in the situation tells him he is being exploited or taken advantage of. *See id.*

bank balance means failure. The absence of repeated employment and client referrals, late payment or nonpayment of fees, a high degree of functional inefficiency (the amount of time spent in relation to the seriousness and difficulty of the problem and the amount of money involved), direct client complaints of dissatisfaction, loss of reputation in the community or within the bar, the filing of grievance complaints or malpractice litigation against him—all these can communicate failure to the lawyer.

The experience of failure gives rise to a variety of behaviors. Only rarely will the lawyer respond by changing his communicative behavior; most often, he will "fight" or "flee." The lawyer who "flees" may restrict the nature of his practice to avoid what he perceives to be the causes of his failures. For example, he may try to stay away from people. His flight may take the form of exaggerated defensive behaviors to protect himself from malpractice suits, analogous to the defensive medicine practiced by physicians. He may also flee by changing his criteria of success. The lawyer who "fights" may react by blaming the client, some other person, something in the situation, or clients generally.[5] He may criticize the courts or other lawyers. He may become angry with his profession and seek new laws, new rules, or new ways of doing things. He may try to become more efficient, charge higher fees, or try to gain more clients. He may seek to elicit the praise of his clients and of his peers.

Rarely will lawyers look for or see the reasons for their failures in their nonuse of effective communication skills. Moreover, many do not realize that their clients are probably experiencing dissatisfaction as a result of their communicative interaction. Little has been done to improve lawyer communications for the purpose of increasing client satisfaction. Rather, it is the client who is blamed, and almost all efforts are bent to deal with his alleged shortcomings.

B. Communication and Malpractice Litigation

1. Communicative errors and client suits

Communicative failure and the resulting failure in attorney-client relationships accounts for a great deal of client dissatisfaction. Client dissatisfaction with the attorney can, in turn, occa-

5. A lawyer who frequently speaks of his clients to his fellow lawyers in derogatory and stereotypic terms is probably one who is habitually frustrated in his relationships with his clients. *See* Fuller & Quesada, *supra* note 2, at 366.

sion failure in achieving lawyer-client goals, the filing of grievances against lawyers, the institution of malpractice litigation, and loss of esteem for the legal profession.[6] Although no published research directly confirms this hypothesis in the legal context, many physician-patient studies strongly suggest that patient dissatisfaction leads to malpractice litigation. Since clients have already had experience with lawyers while many patients have not, it is probable that clients are more likely than patients to express their dissatisfaction by litigation.[7] The expansive research on doctor-patient relations can, therefore, be instructive for lawyers worried about malpractice suits.

An experienced malpractice lawyer has said: "The best way to avoid being sued for malpractice is to establish and continue a good patient-physician relationship."[8] It has also been noted of physicians:

> All too often we are on the defensive whenever a patient complains or brings a real problem to us; and we are unwilling to talk to the patient with complete honesty and frankness. It is my premise that if we are honest and open with the patient and try to answer all his questions, 99 out of 100 times litigation will be avoided.[9]

The American Medical Association told the Ribicoff Subcommittee on Executive Reorganization that "the growing complexity of life and the increased volume of medical care" tend to break down rapport between doctor and patient. Today's doctor is too busy to have close relationships, so people who would not sue the old-style family doctor do not mind suing his modern counterpart. Senator Ribicoff attributes part of the rapport breakdown to specialists and their lack of training in *showing concern* for a patient's emotional needs.[10] The prosecution of many suits is

6. *See generally* Blaine, *Professional Liability Claims: An Increasing Concern for Lawyers!*, 59 ILL. B.J. 302, 305 (1970).

7. *See* D. ROSENTHAL, *supra* note 3, at 52.

8. Averbach, *Rx for Malpractice*, CLEV. ST. L. REV. 20, 33 (1970).

9. Bay, *Communications the Key* 74 MICH. MED. 299, 299 (1975).

10. Ribicoff, *Medical Malpractice: the Patient vs. the Physician, Trial*, Feb./Mar., 1970, at 10, 11; Blaine, *supra* note 6 at 305. Some kinds of physicians are more susceptible to suit than others. Anesthesiologists, for example, are considered target defendants for malpractice law suits "partly because they control life-and-death situations and partly because nobody ever thinks of 'the friendly family anesthesiologist.'" The reason is clear. The anesthesiologist introduces himself briefly the day before surgery, does his job, sees the patient briefly in the recovery room and, "God willing, never again." A. RIBICOFF, THE AMERICAN MEDICAL MACHINE 116 (1972). The lawyer "specialist" may be another likely defendant for similar reasons and also perhaps because of the way he and the referring lawyer do—or do not—communicate with each other.

probably attributable to the plaintiff's emotional responses to his treatment by the professional.[11] Nearly every contributor to the Ribicoff Report noted that a significant factor in malpractice litigation is that medical care has become "impersonalized."[12] It is probable that lawyers are following this same pattern of "impersonalized" relations with their clients, with the same result of more lawyer malpractice suits being filed.

Many of the other forms of physician behavior which have been identified as causing a patient to be quicker to sue his physician are also relevant to the lawyer-client context. Such behaviors include (1) "overbooking" and making the patient [client] wait, (2) taking a casual attitude toward the patient's [client's] complaints, (3) failing to respond quickly to emergencies, (4) using harsh collection techniques, and (5) being unwilling to discuss problems that arise during the course of the professional relationship.[13] Each of these is a behavior that is likely to communicate a lack of empathy and understanding. As one observer has succinctly noted, "take away the things the patient feels are important and you have destroyed his defenses and his confidence. This he will not forget."[14]

The list of complaints in the medical area is by now a familiar one. Patients who are sick, anxious, and under stress are often subjected in doctors' offices and hospitals to rudeness, indignity, careless behavior, unexplained lengthy waits, long delays before appointments, and no evidence of concern. "Desk girls" and other office helpers display similar behaviors. While the stress on a lawyer's client is often more psychological than physical in origin, it is just as real and just as ubiquitous. The same sort of complaints could be made about attorneys.

---

11. Observers of the medical malpractice crisis have also pointed to the rising expectations of medical patients about their doctors' personalities and capabilities as a cause of more malpractice suits. The "Marcus Welby" fantasy that every human ill is curable and every physician is a family friend dies hard. Medical technology does make progress, and there is a factual basis for expecting a gradually increasing standard of care. But popular imagination can raise expectations to unreasonable levels. This may reflect itself both in an increased number of malpractice suits and increased size of jury awards. Rubsamen, *Medical Malpractice,* SCIENTIFIC AM., Aug. 1976, at 18. Whether the inflated expectations of medical patients have infected legal clients has not been determined. Of course, there are also "lawyer" television programs that portray attorneys as larger-than-life. Allen, *supra* note 1, at 894.

12. Bernzweig, *Lawsuits: A Symptom Not a Cause,* TRIAL, Feb./Mar. 1970 at 14, 15; *see also* Blaine, *supra* note 6, at 305.

13. *See* Appleman, *Malpractice Insurance Rates—What's the Answer?,* J. LEGAL MED., Nov./Dec. 1975, at 35.

14. Page, *Why Patients Lose Their Patience,* Wall St. J., Apr. 14, 1975, at 14, col. 4.

Cases involving the communicative styles of some physicians can be instructive for lawyers. In *Rockhill v. Pollard,*[15] a mother who had been in an automobile accident along with her mother-in-law and child brought the unconscious and apparently lifeless baby to the office of a physician on an emergency call late one evening. The doctor met them with "a real mean look on his face . . . and said, 'My God, women, what are you doing out on a night like this?'" The mother asked him repeatedly to examine the child. Finally, the doctor used a stethoscope and also checked the child's patellar reflexes. Although the child's mother and grandmother were both bleeding and limping, the doctor neither examined them nor showed any concern for them. He told the child's mother to "[g]et in there and clean yourself up. You are a mess." When the child suddenly vomited, the doctor, without further examination of the child or of the vomitus, told the mother that nothing was wrong with the child and that the vomiting was caused by overfeeding. He gave no advice on how to care for the child further. When asked, he shrugged his shoulders and said he didn't know what they should do. He refused a request to let the three wait in his office for someone who would pick them up. Instead he suggested waiting outside in the subfreezing weather beneath a street light, although the baby's clothing and blanket were wet with vomit. Eventually the child was taken to a hospital emergency room where it was treated for moderately severe shock and a depressed skull fracture. She later recovered satisfactorily. The mother sued the first doctor for extreme and outrageous infliction of severe emotional distress and the court, in reversing a nonsuit, held that she could recover a damage award against him.[16]

The physician was clearly guilty of communicative misbehavior — refusal to acknowledge and empathize with maternal concern — which undoubtedly contributed to the filing of suit and the ultimate judgment rendered. It seems more than possible that the doctor might have avoided suit by different communicative behavior. How many lawyers impatiently abuse their clients much as this physician did? Obviously, finely honed skills of legal analysis are not the issue. The lawyer who is aware that clients may need and want empathy from their lawyers as much as they want legal results can surely refrain from the kind of boorish

15. 259 Or. 54, 485 P.2d 28 (1971).
16. *Id.*

behavior exemplified in *Rockhill v. Pollard.* If he can think of nothing better to do, the lawyer can at least listen to the client (if necessary, by returning a telephone call) and mumble "M-hm" now and then. Listening alone can communicate much to clients about lawyer concern.

Some common behaviors of lawyers that experience has shown likely to be counterproductive include: saying nothing, failing to accurately respond to the client, using cliches, distorting what the client says, ignoring his feelings, putting the client's problem in a bigger picture too soon, ignoring client clues about the inaccuracy of the lawyer's responses to him, feigning understanding, parroting the client's words back to him, allowing the client to ramble too much, doing nothing else but communicating empathy, seeming overeager, using inappropriate language, using legal jargon or stilted phrases, being longwinded, making wrong choices about whether to respond to the client's feelings or the content of his speech, responding to the feelings of the client too quickly, responding defensively or negatively to client questions, asking too many questions, asking only leading questions, and asking questions whose answers do not help the lawyer in counseling the client.

There are other types of communicative behavior by lawyers that may lead to client dissatisfaction and malpractice litigation. For example, negative impressions of attorneys are quite frequently either created or reinforced by lawyers other than the client's own. A person may have his will drafted by one lawyer and later visit another, perhaps for unrelated reasons. The second lawyer will look at the will and exclaim, "I can't believe this! Who did *this* for you?" Some view this kind of communication in the medical context as a substantial contributor to the filing of malpractice suits. As one lawyer put it, "First and foremost, the reason that so many malpractice suits are presently commenced is unquestionably the doctor's 'loose talk.'"[17] The reference is to careless statements made by physicians about their colleagues and their professional skills. One physician has stated his belief "that *every* malpractice suit, without any exception, is instigated either directly or indirectly by a doctor."[18] Undoubtedly, this is also true of lawyers.

Another source of communication that probably contributes

17. Averbach, *supra* note 8, at 22.

18. Wesson, *Medical Malpractice Suits: A Physician's Primer for Defendants,* 8 CLEV.-MAR. L. REV. 254, 254 (1959) (emphasis added).

to malpractice claims is the reading material found in professional offices. Medical and legal journals are full of self-criticism and elaborate discussions of malpractice problems. These journals are often left lying about in waiting rooms where they are read by patients and clients. If a client has an unsatisfactory experience with his lawyer, the material found in the legal journals will only reinforce his discontent and suggest the means for action.[19]

All of the communicative factors discussed above influence the client's perception of his lawyer and the attorney-client relationship. It is this perception that as a practical matter determines whether the client feels that he has a grievance against the attorney and whether the client will act on the grievance perceived. The client who has come to respect his lawyer so much that even serious economic loss would not induce him to take legal action has no actual grievance. Statistically, a certain percentage of grievances are likely to result from any given number of legal services undertaken, and this fact is to some degree independent of the fault of the lawyer. Even when the risks inherent in legal practice are explained and the client makes his decision to seek legal services with proper factual conditioning, client dissatisfaction may arise. But malpractice actions will most likely be filed only when a client comes to feel that ultimate satisfaction is unlikely. This state of mind may result when lines of discourse and understanding with the lawyer are perceived as closed. Even if the legal services provided have been outrageously defective, proper communication with the client may temper his subsequent behavior. But when it seems that there is no one to talk to but another lawyer, the chances of a suit increase dramatically. Once the matter is in the hands of a new attorney, the probability of reviving a healing discourse with the client is slim.[20]

2. *Implications of "defensive law"*

One behavior that has become common among physicians and that has implications for lawyers is the practice of "defensive medicine." The practice of defensive medicine is an elaborate series of procedures ostensibly designed to deal with the causal element of malpractice suits. The physician resolves to treat the

19. *See, e.g.*, Lewis, *Misprescribing Analgesics*, 228 J.A.M.A. 1155 (1974).

20. *See generally*, Bay, *supra* note 9; Morris, *The Rise of Medical Liability Suits*, 215 J.A.M.A. 843 (1971).

patient in such a way that there is no possibility of suit. The practice is noteworthy in this context both because the need for it arises out of communicative failure and because an analogous practice of "defensive law" is likely to become common among attorneys.

The so-called "informed consent" cases illustrate the problems inherent in defensive professional practice. Lawyers and doctors who know something about these cases talk knowledgeably about "consent" and "explanation of risks" and what a physician must explain to a patient in order to avoid malpractice liability. Talk of these doctrines misses a major point, however, for if we are right these suits are not caused solely by the failure of a physician to follow a disclosure formula. Instead, the malpractice suit probably results from failure to make the patient feel and understand what he must feel and understand if he is to refrain from litigious behavior. The "informed consent" approach correctly focuses on a communication disorder, but usually on the wrong communicative act.[21] The crucial act is almost never what

21. The extent of the misunderstanding is partially illustrated by attempts to practice defensive medicine by using the so-called "DocuBooks." These are published by Health Communications, Inc., and their sole mission is the improvement of communication between doctor and patient. The books discuss in lay terms various surgical procedures. The last page of one of these books consists of a consent form, with multiple carbons, that is to be signed by the patient and a relative or guardian and two other witnesses. By his signature the patient acknowledges:

> I have read and understand, or have chosen not to read, this DocuBook which provides much of the information which a reasonable, prudent person needs to know about the benefits, risks and alternatives to anesthesia.
>
> I realize that having anesthesia, while it can be beneficial, can also carry with it the possibility of risks and unforeseen events not described in this book. I accept the risks described in this DocuBook, and other like risks, because I believe that such risks are outweighed by the potential benefits to my health.
>
> I therefore give my informed consent to having anesthesia.
>
> YOUR ANESTHETIC (1973).

Those who inspired the publication of these books were no doubt frustrated by malpractice litigation, and we can sympathize with their desire to avoid it. It may well be, however, that the decision to communicate with the patient by the impersonal means of a "DocuBook" with appended "informed consent" forms tends to promote litigation rather than inhibit it. Lawyers who are tempted to use similar procedures would do well to give it a long second thought.

The assumptions made by the book about the nature of the patient population are remarkable. Apparently, it assumes that a given patient's anxieties can be known in advance. It also apparently assumes that patients as a class are intelligent, literate in English, and able to calmly assimilate scientific jargon in stress situations as long as it has been translated into laymen's language. It seems to assume that one-way "communication" is sufficient to make consent "informed" even if (1) the patient has no

the doctor did or did not say about the risks of diagnosis or treatment but what he (and perhaps other doctors with whom the patient has dealt) did or did not say about himself, the patient, and their relationship.[22] His communicative behavior affects what the patient hears, perceives, and remembers, and it affects the patient's attitude about the physician in case of an unsatisfactory result.[23]

The defensive medicine approach is not based on a careful analysis of what causes litigation. Indeed, it may make litigation more likely. Thus, a defensive practitioner X-rays the skull of every patient who has received trauma to the head. He refuses to treat anyone who has not first signed on elaborate "consent" form. He refers numerous patients to specialists. He refuses to treat high-risk patients. He records his conversations with his patients for future use as evidence. He imagines that he and other physicians might agree not to treat lawyers who represent plaintiffs in malpractice suits. In many of these instances the patient pays more than he otherwise would. The rapport that might otherwise exist between physician and patient is strained; the patient is seen as the potential enemy. The physician may unconsciously despise himself for his behavior. Everyone loses. Throughout, the physician never really considers why people sue

---

opportunity to ask questions, (2) there is much "fine print," (3) there is no attempt to determine whether the reader understands, (4) the matter is highly complex, and (5) the patient is anxious and emotional.

22. *See* Katz, *On Professional Responsibility*, 80 COM. L.J. 380, 383 (1975).

23. *Id.* A recent "informed consent" study showed that postoperative patients recalled less than 10% of the portions of preoperative discussions of possible complications of the proposed operation and less than 33% of what the surgeon had discussed with them. Many forgot extensive portions of preoperative, tape-recorded conversations with their surgeons. Some denied having had such conversations and others fabricated details. The study has been acclaimed as illustrating the unfairness to physicians of "informed consent" malpractice suits. Horwitz, *Postop Patients Forget, Fabricate, Even Deny Having Consent Talks*, Medical Tribune, Feb. 25, 1976 at 1. Perhaps it does. Those who conducted the study concluded that physicians need to protect themselves by somehow recording what was said during the physician-patient conference. The authors of the study apparently gave no thought, however, to the questions of *whether* the patients *believed* that they accurately reported their observations and recollections and of *why* their perceptions and memories were so inconsistent with the tape recording.

Another study suggests that an important variable affecting perception or memory or both is the extent to which the physician communicates friendliness and awareness of patient concern. This study suggests that problems in communication can cause so great a distortion of patient perceptions of the interaction that the patient does not report accurately what happened. For example, it shows that when the mothers of ill children were not given an opportunity to express their concerns some perceived that the doctor had not examined the child, although tape recordings of the event proved that he had. Korsch & Negrete, *Doctor-Patient Communication*, SCIENTIFIC AM., Aug. 1972, at 66, 72.

physicians. And his frustration is really never relieved for long, for people keep right on suing physicians. Indeed, this defensive attitude is so insensitive to communicative reality that it often leads to behavior of the very kind that contributes to a large number of malpractice suits.

It seems quite probable that as malpractice suits against lawyers increase, some lawyers also will try to practice defensive law with similar results. Moreover, it is our observation that, like most physicians, most lawyers are able to interpret the threat or actuality of malpractice litigation only in terms of a personal attack on their integrity, competency, or inner selves.[24] This is an understandable reflexive reaction of course, but its persistence in a group presumably capable of reason beyond reflex deserves further analysis.

In many instances neither the plaintiff nor his lawyer in a malpractice suit has even the slightest interest in attacking the defendant *personally*. The lawyer who is sued for malpractice may be merely the victim of statistical probability. Generally, the plaintiff's quest is an impersonal one for money from the attorney or his insurance carrier, and nothing more. The message received by the defendant lawyer, however, is rarely the same as that which the plaintiff or his attorney intends or which a fairly objective view of the situation would suggest. Physicians and lawyers, normally able to see patients' colds and clients' suits essentially as statistical risks of life, are for some reason unable to see malpractice suits as possibly the same thing.

The failure of attorneys to perceive alternative meanings to the communicative act that is the malpractice suit can have far reaching consequences. Lawyers who perceive the principal causal factor of all malpractice suits as a desire to make personal attacks suffer from a delusion of persecution. The lawyers' reaction may be and frequently is the defensive behavior of the classic paranoiac. Indeed, the failure of perception may itself stem from a paranoia-like delusion of grandeur that demands an explanation that is causal rather than statistical.

24. The suggested explanation for this behavior is not without irony for physicians or lawyers. It would seem that many physicians adopt a rigid perspective of the world which places them at its center in a role as captain of a health-care team. From this perspective the physician is unable to see health problems that beset the patient as more than mere manifestations of the statistical probability that a human will contract a common cold, or diabetes, or hepatitis. Most physicians would think it strange for any individual who contracts a disease to view his misfortune as a personal attack. But this perspective seems to fail the doctor when he becomes the victim of a suit. The same is true, in a sense, of lawyers.

The question of what the lawyer should do about his client relations is not answered by defensive law practice, even if this should reduce malpractice suits or help win them. Mere avoidance of litigation does not define success for most lawyers. The lawyer who is forced to use consent forms or various legal procedures[25] to protect himself from his clients is in fact sending an unpleasant message to himself—one of failure in his human relationships.

C. *The Need for Awareness of Communicative Roles*

We are certain that most lawyers do not intentionally cause their clients distress if it can be avoided. Some distress is often unavoidable, but lawyers who have well-developed communication skills, who care about their clients, and who are aware of the dynamics of lawyer-client interaction undoubtedly produce less distress than other lawyers. Usually both elements—skill and awareness—are needed. For most of us, skill development requires effort. And conscious skill development must be preceded by awareness.

There is good reason to believe that the failures of many lawyers are attributable primarily to their lack of awareness of the tremendously rich and varied communications that occur as they interact with clients.[26] A survey of 634 California lawyers' opinions concerning the relative importance of various legal skills revealed that only about one-half believed client counseling and interviewing were essential skills.[27]

Many lawyers believe that more traditional lawyer skills, such as research and analysis, are far more important. For the

25. It is a tempting idea that the lawyer and client should simply establish the details of a contract between them that will define and specify the needs and expectations of each. To a certain limited extent this can be done. The lawyer can let the client know that he expects to be paid, that in exchange he will provide certain legal services, and that he expects a certain level of cooperation from the client. But this kind of contract is probably limited to these very basic things. The needs and expectations of lawyer and client change as conditions change, and conditions change as the parties communicate with each other. Of course, their interaction can constitute a continuing attempt to reach some mutual agreement, but it can also ignore understanding and agreement. Fuller & Quesada, *supra* note 2, at 363-64.

26. Fuller & Quesada, *supra* note 2, at 361-62.

27. Schwartz, *The Relative Importance of Skills Used by Attorneys*, 3 GOLDEN GATE L. REV. 321, 324-25 (1973). Lawyers with no trial practice found these skills even less important than trial lawyers. *Id.* at 329. Only probate and estate lawyers, and lawyers who had practiced from 16 to 20 years found counseling clients the most essential skill. *Id.* at 331. As lawyers' years in practice increase, their estimation of the importance of interviewing and counseling skills generally increases. *Id.* at 334.

most part, these lawyers think that the client's primary goal is the legal result the lawyer can produce for him—a win. These lawyers make what they imagine to be the client's desired legal result their own goal and shape their interaction with the client almost entirely toward achieving that legal result.[28] Because of this they see the purpose of talking to the client as one of fact gathering and informing the client of proposed actions. Communication is seen merely as the exchange of the factual information needed to achieve a desired legal result. Such lawyers are usually unaware that as they exchange information with a client, a great number of *other* messages are also being communicated. These other messages may be positive or negative. If they are all positive, lack of awareness is no problem. If some of them are negative, however, lack of awareness that multiple communications are occurring increases the chance that the source of client discontent will not be identified or corrected. For example, without knowing it, a lawyer may be "screaming" to his client that he lacks self-confidence, that he is using his lawyer status as a substitute for confidence, that he is jealous or envious of the client's wealth or position, or that he has judged the client and despises him.[29] However true these messages may be, most lawyers presumably would choose not to communicate them.[30]

---

28. It is important for the lawyer to remember that "the client" is not "a client" to himself. That is a label assigned him by the lawyer and it has the potential for greatly affecting the treatment the client receives. *See* B. BRAGINSKY, D. BRAGINSKY, & K. RING, METHODS OF MADNESS: THE MENTAL HOSPITAL AS A LAST RESORT (1969); Langer & Ableson, *A Patient by Any Other Name . . . : Clinician Group Differences in Labeling Bias*, 42 J. CONSULTING & CLINICAL PSYCH. 4 (1974); R. GORDON, FORENSIC PSYCHOLOGY 55 (1975).

29. Prim & Porterfield, *Clients Are People*, STUDENT LAW. J., Feb. 1957, at 3, 4.

30. Perhaps many lawyers would find such messages irrelevant to the task of achieving the proper legal result. They would see pleasant client relations and good results almost as mutually exclusive alternatives. Some physicians seem to have this attitude with respect to their patients. The attitude is illustrated by a letter from a physician to the *Journal of the American Medical Association:*

> Physical Examinations By Physician's Assistants
>
> To the Editor.—The history and physical examination are not primarily designed to please people. There are, in fact, certain aspects of the procedure that are inevitably unpleasant. It is that process by which the entire medical knowledge of a physician is brought into a dynamic consideration of the total physical and mental health of a human being. The knowledge required for the procedure to be maximally productive is massive and utterly beyond the capabilities of one of the pleasant young men and women prepared by the various Medex programs about the country. The judgment of a lay person on this point is worthless; the fact that some or many or all were pleased with the performance is of no ultimate scientific value.

Letter from Preston R. Miller, M.D., to the Editor of the *Journal of the American Medical Association* (June 17, 1974), 228 J.A.M.A. 1522 (1974).

Awareness of the programming of the lawyer-client relationship with respect to the uncertainties of legal practice is also necessary. To some extent both lawyer and client have been programmed to believe and act as if the lawyer experiences no uncertainties, that he knows the client's interest, that he will act in it, and that he will not compromise that interest despite pressure to do so.[31] This kind of programming is false and pernicious, of course, but it may be irresistible for both lawyer and client unless they are aware of its existence and of the role such programming can play as the two interact. If the lawyer is aware of this programming, he can shape the interaction in such a way as to attempt to deal with these falsehoods and still satisfy the client.

An attorney aspiring for success must also be aware of his role as a sender and as a receiver of messages. He needs to be aware that client perceptions of their own role and goals can be clues to the interpretation of their words and behavior. In addition the lawyer needs to be aware of how his perceptions of his own and his clients' roles, goals, and situations may affect his perception of his clients.

As a receiver the lawyer also needs awareness that several things may be "said" simultaneously. The client may be vocalizing one thing and meaning another as well as communicating several different things at the same time. He may be saying simultaneously, *"I don't like you. I'm afraid of you. I'm upset. I respect you. I want your respect. I want good results. I don't want to pay you."* These communications may be both verbal and nonverbal.

As a sender of messages the lawyer needs similar awareness. He must be aware of the factors that affect him as he speaks and writes. He needs to be aware of how these factors affect the client as he listens to the lawyer and perceives or misperceives what is

---

It is not difficult to account for the absence of communicative awareness among some doctors. Senator Ribicoff illustrates it in *The American Medical Machine,* quoting a physician:

> [D]octors, more than any other group of people, refuse to admit to their own self-interest. They think every decision they make is made for altruistic reasons, for the benefit of society or the individual patient, when the truth is that most of their decisions, or at least a good portion of them, are made because of what is most convenient and comfortable for them. That happens everywhere, not just in America. It is a worldwide pattern.

A. RIBICOFF, *supra* note 10, at 140. Many lawyers would agree with this analysis of physicians. Probably a lesser number have considered the extent to which it may be equally true of attorneys.

31. *See* D. ROSENTHAL, *supra* note 3, at 112.

communicated. The lawyer should be aware of the communicative variables available to him as a sender of messages. Such awareness is a necessary prelude to skill development.

D. Communicative Variables

The communicative relationship between lawyer and client, however constricted it may be by the time pressures and volume demands of modern legal practice, is still a fluid and dynamic system. It is almost always possible for a lawyer sensitive to the client's role expectations to provide his services and transact his business with the client harmoniously and with minimal chance of malpractice litigation. This sensitivity involves simultaneously perceiving the communicative context, hearing some of the messages the client generates, and appreciating the relative role and goal expectations of himself and the client.

Because each client is unique, each lawyer-client interaction is also unique. Therefore, it is probably impossible to specify a list of lawyer behaviors guaranteed to produce or preclude success. Nevertheless, we believe certain behaviors can be specified and located on a spectrum of probability of success or failure. In any specific interaction one of the given behaviors may produce either success or failure, but over a number of interactions, its effect can be predicted. Some, but not all, success-producing behaviors are reciprocals of failure-producing behaviors.

The lawyer communicates with his client in a variety of ways with a variety of media. Initially, the lawyer and client look at each other. This is a communicative act, a means of obtaining information. Lawyer and client also "talk." This can include, in addition to language, audible paraverbal expressions or phonetic elements of conversation that fall short of being words, such as sighs, deep breathing, exclamations, drawn out consonants, nasal pronunciation, and stuttering.

Touch is another important communicative medium. A touch demonstrates to the client the lawyer's concern. It can also induce relaxation. It may impart a sense of comfort, pleasure—even discomfort. Like all communication techniques, touching must be done with skill and discrimination. Use of the handshake is an obvious example. In our culture a flabby handshake by a lawyer "means" he is weak and indecisive or that he lacks warmth and enthusiasm for the client.[32] A stiff and awk-

32. *See* R. GORDON, *supra* note 28, at 68.

ward handshake may "suggest" that the lawyer is aloof and reserved and that he may not respond favorably to the client. The overly firm or crushing handshake may "imply" that the lawyer will try to dominate the client. Any of these may communicate that the lawyer will not be sensitive to the client and his anxieties. At best they may impede the efforts of the lawyer to communicate empathy with and concern for the client.

The lawyer's bodily postures can have similar effects. The lawyer may slouch, relax with his feet on the desk, or sit ramrod straight. Care is called for. The lawyer may think he is communicating pleasant informality while what comes across to the client is lack of concern. Or the lawyer's posture may be so unrelaxed that it suggests dislike of the client.

Voice is another variable within the lawyer's control. Both volume and tone say things to people, irrespective of the language used. The lawyer needs to consider and use the volume and tone of voice most likely to tell the client of the lawyer's empathy and concern. It seems to us that these are most likely to be moderate volume and moderate tone. Sincerity and believability are affected by the lawyer's volume and tone of voice; any extreme is likely to impair or destroy both.[33]

Superficial social amenities can constitute an important interaction variable. The nature of the lawyer's greeting and farewell, the use of formal or informal names—such as first names, nicknames, and the like—can all be significant. The degree of social intimacy communicated can also have an impact on the achievement of the lawyer's goals. Intimacy may vary with placement of furniture, the distance which the lawyer maintains between himself and the client, and the extent to which the lawyer looks at the client, touches him, and talks with him instead of to him.

Another communicative variable is the use of humor. The prestigious *Journal of the American Medical Association* suggests that humor be used by physicians in establishing good relationships with patients—"particularly the old and the young." A *Journal* editorial asserts:

> Patients appreciate the personal relationship that a private joke with their physician creates. . . . The joke could serve to put

33. *See generally* Bogdonoff, Nichols, Klein, & Eisdorfer, *The Doctor-Patient Relationship*, 192 J.A.M.A. 131 (1965); Eldred, *Improving Nurse-Patient Communication*, 60 AM. J. NURSING 1600 (1960).

> the patient at his ease, establish rapport, and allow for the introduction of questions which might otherwise develop anxiety. A patient's hyporeaction or hyperreaction to humor ought to suggest that the implications of his condition may be found only after the surface of his psyche is scratched. And, in some cases, maybe that stratch is all that's really needed![34]

An additional factor within the lawyer's control is office design and decor. The lawyer's office itself can communicate concern or lack of it to clients. His office design, for example, can produce a physical distance between lawyer and client that articulates in an unspoken way: *"This is strictly an arm's length transaction, nothing personal."* The kind of arrangement and decor that impresses other lawyers may present a message of intimidation, distance, and aloofness to clients.[35] The color and decor of an office can similarly affect the client. The lawyer's receptionist or secretary—if he or she deals directly with clients—undoubtedly seems to the client to be the lawyer's agent. When the secretary communicates, in word and deed, the client hears the lawyer talking. Even if the client contact with the secretary is by telephone, messages concerning the worth of the client and the respect the lawyer has for him can be subtly conveyed. The lawyer is in control of all these factors. The choice is his. He can have a lawyer-centered, problem-oriented office or a client-centered one, probably at little additional expense.[36] He can control furniture arrangements, decor, and his own clothing and behavior. He can employ people who have the ability to express concern and respect, and can train them in these skills. There is no guarantee of success, of course, but the odds are that the effort will help the lawyer succeed with his clients.

As interaction between the lawyer and client continues, one of the techniques that can be most helpful to the lawyer and satisfying to the client is to repeat to the client, in a variety of ways, *"I understand you; I experience the feelings you experience; I have concern for your feelings."* While there is no assurance that particular expressions will be persuasive, several general ways of proceeding seem more likely than others to accomplish the task. The technique is easily summarized if not easily followed.

---

34. *The "Sense" of Humor - Art & Science,* 212 J.A.M.A. 1697, 1698 (1970). Humor has its risks, however, particularly if the client's basic need is a desire to be taken seriously.

35. R. GORDON, *supra* note 28, at 58, 59.

36. *Id.* at 62.

In conveying this message of concern and empathy, it is best to be tactful, tentative, and cautious.[37] It probably will not do to assert the message directly, for that may imply an intolerable degree of intimacy. It must be done indirectly. The substance of the technique is for the lawyer to accurately replicate the client's feelings and concerns. This must be done after the relationship and interaction have existed for a period of time—not too early and not too late. If attempted too early, the message will be perceived as insincere. If too late, it will not be heard at all. It must be preceded by subtle preliminary demonstrations of concern, such as maintaining eye contact, appropriate body distance, and an attentive posture; otherwise, the client may simply be overwhelmed and confused rather than reassured. The expressions should be introduced gradually for the same reasons.

The words the lawyer uses in introducing his sentences as he talks with the client can provide the kind of tact and softening that this sort of communication requires. Some very useful phrases follow:

It may be that . . .
Possibly . . .
You seem to be . . .
It might well be . . .
It would follow . . .
Do you think . . .
There is a tendency . . .
Let's see if this makes sense to you . . .
If I heard you correctly you seem to be saying that . . .
Tell me if this sounds too strong for you . . .
Could it be that . . .
I have been wondering whether . . .[38]

As the relationship progresses, the lawyer may find it helpful to communicate to the client that he has an *integrated* understanding of the client and his life situation—of "the big picture." Some techniques that may be useful in accomplishing this goal include communication to the client that the lawyer understands what is said nonverbally as well as verbally, communication to the client that the lawyer is willing to share his own experience in order to be helpful to the client, and communication to the client that the lawyer is willing to discuss his relationship with the client and their immediate interactions.

37. G. EGAN, THE SKILLED HELPER 149 (1975).
38. *Id.* at 150.

Another useful technique is that of encouraging a more-or-less spontaneous flow of conversation and associations. The flow may help identify psychological, social, and other aspects of the client's problem.[39] This technique may also reveal more of the totality of the client and help the lawyer to listen rather than ask questions. An open-ended or nondirective interview by a lawyer encourages this spontaneous flow of information, since meaningful communication is most likely to occur when opportunity is provided for it to emerge. While it may be best to discourage the communication of redundant or irrelevant information in the interest of permitting the emergence of new or more relevant information within the time limitations of the interview, the lawyer probably should exercise the least possible explicit control over the client. This will help create an emotional climate conducive to a successful interaction. Accurate communication may be facilitated if the lawyer does not suggest the responses he expects by the wording of his questions, his demeanor, tone of voice, or other nonverbal communication. Simple silence can encourage the client to release his feelings and speak on his own initiative.

The lawyer can further assist the communicative process by trying to bring the interview together into a coherent whole. One useful interview technique for the lawyer is to periodically summarize for himself, and for the client, the information obtained during the interview, allowing the client to add to or to modify the information. This may facilitate solution of the client's problem and may also communicate to the client that the lawyer empathizes with and to some extent understands the client and his problem.[40]

Although the lawyer must empathize with his client's problem, we do not suggest that lawyers and their clients should necessarily become "friends." While it may be helpful for the lawyer to enter into a friendly relationship with the client—a relationship in which the client sees the lawyer as a "friend" or as "friendly"—it is not a necessary goal of the lawyer to make a friend of the client, or to in fact be a friend to him. But if friendliness seems likely to be a helpful ingredient in the situation, communication by the lawyer that can be viewed by the client as friendly may in fact be helpful without compromising the professional relationship.

---

39. *See* Kimball, *Techniques of Interviewing*, 71 ANNALS INTERNAL MED., 147, 152-53 (1969).

40. *Id.* at 151; A. ENELOW & M. WEXLER, PSYCHIATRY IN THE PRACTICE OF MEDICINE 35-61 (1966).

All of these techniques are directed toward becoming verbally and nonverbally supportive to such a degree that the client is assured of the lawyer's interest in a successful solution to his problem. This in turn reduces the client's anxiety. Reducing the client's anxiety can increase the accuracy and relevancy of the client's communication to the lawyer and can prevent hostility toward the lawyer. Thus the process is circular, with each improvement in the communicative relationship building on itself a sounder structure of interpersonal interaction.

II. COMMUNICATION SKILLS AND THE RESOLUTION OF CLIENT PROBLEMS

A. Awareness of Alternative Interpretations

The fact that a client first seeks an attorney rather than a doctor, minister, marriage counselor, psychologist, or therapist may have little to do with the nature of his underlying problem or with the best means of effectively dealing with it. The lawyer who immediately treats the client's problem as a legal one may therefore be making a serious mistake. The nature of the problem can and should be determined before anything else is done. This requires *interpretation* of the client's behavior, and effective interpretation requires sensitivity to people and their circumstances. Unfortunately, lawyers do not always have these sensitivities.[41]

One of the principal reasons for difficulties experienced by lawyers in their interactions with clients is that most lawyers are unaware of the existence of alternative interpretations of client communications. Lawyers have a limited interpretive repertoire; they may imagine that any problem is a legal one and that *their* way of interpreting and dealing with the problem is the generally accepted one. This malady can be labelled "legalism."[42] In reality, of course, an almost infinite variety of behaviors and interpre-

41. *See* Freeman & Weihofen, *Counseling the Businessman Client*, 58 A.B.A.J. 827, 828 (1972). Anthropological studies have long suggested that the success of health care depends to a large extent upon a culturally and communicatively sensitive approach. Within the Spanish-American community, for example, folk doctors or *curanderos* seem to have had more success than American physicians in dealing with patients. *See* M. CLARK, HEALTH IN THE MEXICAN-AMERICAN CULTURE, 207-17 (1959). *See generally* L. SAUNDERS, CULTURAL DIFFERENCES AND MEDICAL CARE 160-68 (1954); Karno & Edgerton, *Perception and Mental Illness in a Mexican-American Community*, 20 ARCHIVES GENERAL PSYCH. 233 (1969).

42. *See generally* W. PROBERT, LAW, LANGUAGE AND COMMUNICATION 3-22 (1972).

tations are available. Lawyers who want to improve their communication and to accomplish their goals, greatly need awareness of these alternative interpretations.[43]

Interpretive accuracy is complicated by the fact that neither lawyer nor client behavior contains a *necessary* meaning for either party. The person who is talking or engaging in other communicative behavior (consciously or otherwise) may intend or hope that his behavior will be interpreted by some other person as having a certain meaning, but his hopes and intentions do not necessarily control the reactions of others. Meaning will or may be supplied by the other person through an interpretive process that may be arbitrary, intuitive, or analytical. There is no guarantee that two people will agree on the same meaning or that they will ever know if they do not agree. Awareness of the uncertainty of shared meaning inherent in human interaction is the beginning of communicative wisdom.

B. The Attorney's Problem-Solving Style

Generally the goals of the lawyer in an initial interview with a client are to relax the client, to get some idea of his problem, to get an idea of the degree of the client's own understanding of his problem, and to encourage positive and friendly feelings toward the lawyer.[44] The attorney attempts to accomplish these goals by inducing feelings of rapport, trust, and openness in the client. The lawyer's "message" to the client is this: *"I see the portion of the world you are presently concerned about from the standpoint of your emotions, feelings, and experiences; and my perceptions are pretty accurate."* Obviously in order to communicate this message convincingly the lawyer must be skillful at discerning the nature of the client's problem.

Skill in defining a client's problem begins with an awareness of the difficulties involved in problem definition. The client may have difficulty articulating his concern in a concrete statement that refers to specific facts instead of vague abstractions. Such a statement is necessary if the attorney is to direct his efforts to the proper end. Even if a client is quite specific in stating his problem, however, the statement itself may not be accurate.[45] Deciding whether a concretely-stated problem is really this client's

43. *See* D. ROSENTHAL, *supra* note 3, at 110.
44. Prim & Porterfield, *supra* note 29, at 4.
45. G. EGAN, *supra* note 37, at 204.

problem is probably as important as ensuring that the problem is specifically stated. The client will not be satisfied with the lawyer's solution if the client comes to realize that it was not really his problem that was solved.

But a client does not—perhaps cannot—always disclose to his lawyer immediately upon initial contact with the lawyer the real problem that brought the client there. The client may present to the lawyer only "a problem" or some facts that to the lawyer seem quite trivial. Often, the stated problem is remote indeed from the client's true problem. The lawyer who is not aware of this will be tempted either to accept the client's account of the facts or the problem or to brush off the problem, the facts, and the client.

Not all "problems" actually involve all the persons to whom they cause concern. A clear example is the case where a person reads about a terrible auto accident and in his outrage wishes to sue a participant. Indeed, it may be impossible to "solve" a problem with which a client will not or cannot be closely identified.[46] The lawyer must exercise care, for it is possible to state most problems in such a way as to identify almost anyone with them.

Some of the difficulties in problem solving may be illustrated by examining the lawyer's typical role in a divorce case. Some lawyers—perhaps most—assume that the client knows what he wants when he enters the lawyer's office asking for a divorce. This may not always be the case, and the lawyer must avoid a too-literal interpretation of the client's words. The client may not be aware of alternatives to divorce such as liberalized separation, annulment, and counseling. If the lawyer informs him of these alternatives, the client may see his problem differently and set a different goal. The skillful lawyer can make use of communications techniques that probe deeper than the conventional facts of the case to reveal the background of the client, his real feelings, and his unstated problems. These may prove to be more useful than the facts and problems initially stated by the client.

The aware lawyer knows that his problem-solving style and personality may affect his relationship with the client, influencing the lawyer's point of view and the way he will present alternatives to the client. The aware lawyer knows that the lawyer-client relationship itself may alter his perceptions. For instance, the lawyer may tend to identify so strongly with his client and to

46. *Id.* at 203.

accept his evaluation of the situation so completely that the lawyer lets this evaluation limit the choices he considers. But acceptance of the client's evaluation and his expressed wishes may lead the parties to a result they may later regret. The aware attorney may desire to talk to the other spouse to seek out a complete picture or to have a meeting of the parties and their counsel with the marriage as a whole as the topic of discussion. A communications-sensitive lawyer thus may be able to probe the possibility of salvaging a marriage. Skillful handling of the situation may make the difference between a bitter divorce and a relatively happy marriage.

Criminal law cases provide another illustration. A late night telephone call can be the first introduction a lawyer has to his criminal-defendant client. The initial interview with such a client may be more critical to the relationship than the first contact the lawyer has with other types of clients. Therefore, preparation for the interview can be as important as the need for information. During this interview the basic strength of the cases of the defense and prosecution can become known. To obtain needed facts, the lawyer must create an atmosphere in which the client will trust him and give him the facts most accurately. The communications-sensitive lawyer has the best chance to create an atmosphere of trust in which significant information can be communicated. For example, if a history of alcoholism were revealed, it could result in getting a burglary defendant into a rehabilitation program rather than into a penitentiary. But such information is often difficult to elicit from the client because it may be shameful and difficult for him to talk about. The lawyer skilled in communications displays concern, creates trust, obtains needed information, and therefore can better advise his client of alternative courses of action.[47]

47. The difficulty of obtaining testimony from witnesses to alleged events may be similarly dealt with. Even if witnesses are "friendly," their fear of becoming implicated in the crime or involved in the trial may make them hesitant to present their testimony in an office interview or a courtroom. The ability to create a trusting relationship can facilitate the fact-gathering process for the lawyer and the client.

This entire approach is in marked contrast to the advice given to lawyers by the Wisconsin Bar Association:

> Get at the client's problem immediately and stick to it. Don't bother to explain the reasoning processes by which you arrive at your advice. The client expects you to be an expert. This not only prolongs the interview, but generally confuses the client. The client will feel better and more secure if told in simple straightforward language what to and how to do it, without an explanation of *how* you reached your conclusions.

Beyond its impact on the result achieved—reconciliation or acquittal instead of divorce or conviction—the lawyer's problem-solving style is important to his success because of what it communicates to the client about the lawyer's concern or unconcern for the client as a person. If the client gets the wrong message, the lawyer may in turn receive a message that he has failed, even if he has achieved an optimal legal result. The lawyer can send a message of lack of concern by rushing the client or by failing to make the effort to find out what the client's problem or the facts really are. Lack of concern by the lawyer is also conveyed when the lawyer takes it upon himself to decide how the problem is to be defined and solved, as if client participation were of no importance; the message communicated is that the client himself is of no importance. Even for the legal result-oriented lawyer this is an unfortunate approach because the client's participation is likely to produce a more satisfactory legal disposition.[48]

Lawyers who put a premium on the legal solution of clients' problems prize highly such skills as maintaining an objective viewpoint, getting all the facts, knowing the law, clearly analyzing the problem, and assessing alternative solutions. Such lawyers frequently seem to think that it is not necessary or possible for a lawyer to be professional in the exercise of these skills and at the same time to communicate effectively with a client. This concern for the perceived values of legal professionalism is in distinct contrast to the client's view of the values that should be involved in his own case—values such as empathy and concern. Even if these client values are irrelevant to a competent legal solution, they are not irrelevant to the lawyer's sense of success or failure viewed in a broader perspective. The problem-oriented lawyer is not wholly wrong, of course. We do not suggest that he become more concerned with the client and less concerned with professional skills. We suggest only that he avoid having his approach to clients' legal problems convey the message that he is not concerned about them personally and does not understand or care about their feelings.[49]

Quoted in J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW 87 (1965). It is difficult to conceive of worse advice.

48. D. ROSENTHAL, *supra* note 3, at 39.

49. In some cases neither sympathy nor reassurance are appropriate for clients. It is probably a good first principle never to advise or reassure a client until the lawyer has found out what the client's real problem is. In the case of physicians and patients, reassurance and encouragement by doctors may inhibit a patient from talking further and may be seen by him as judgmental. The implications of one study are that reassurance is of

The lawyer who is aware of the communicative aspects of his problem-solving style can begin to develop a style that will bring him success in dealing with his clients. Without awareness and skill, he may achieve good legal results and still be a failure.

C. The Skill of Asking Questions

Unless he has information, a lawyer cannot produce results for his client. Necessarily, much of this information must come from the client. Although it may be difficult for the lawyer to obtain the complete "case history" that the medical profession finds so helpful, it is nevertheless useful for the lawyer to learn as much as possible about the client, his previous legal experience, his attitude toward the law and lawyers, and the degree of his legal sophistication. Unfortunately, this information probably has to be obtained indirectly rather than through narrative.

If the client does not voluntarily disclose needed information, it will naturally seem to the lawyer that asking questions is the appropriate thing to do. This assessment may be correct, but the lawyer should be careful that his questioning technique does not communicate lack of concern for the client on the one hand and distort the information he receives on the other. The lawyer's need to question should not control the attorney-client interaction. Among questioning techniques that lead to these problems are the following: asking too many specific questions, and asking them too early; asking too many leading questions; asking too many complicated questions requiring a yes or no answer; using complex legal terminology or unfamiliar language in phrasing questions; interrupting the client or cutting off his answer at a vital point; and appearing unwilling to listen to responses.[50]

A lawyer's goals may be best served by asking another question only when the client's flow of information seems to run out or when the client has gotten completely off the point. Such a question should be based on a relevant detail already brought up—"And then what happened?" or, "Tell me more about it."[51] When more particular questions are asked, it should be recog-

---

no value whatever to the client because it makes no impression on him. (At least it cannot be remembered after the interview.) Joyce, Caple, Mason, Reynolds, & Mathews, *Quantitative Study of Doctor-Patient Communication,* 38 Q.J. MED. 183, 193 (1969). In the attorney-client context, this suggests the possibility that premature expression of reassurance may cause a client to withhold valuable information that would enable the attorney to better understand the client's problem and deal with it.

50. *See* Kimball, *supra* note 39, at 148.

51. *See id.* at 150.

nized that their form can greatly influence the client's perception of the attorney-client relationship. To communicate empathy to the client we suggest the following: Questions should be brief and simple; they should be designed to aid the flow of information; only one question should be asked at a time; the question should be rephrased several times if necessary; questions should be worded carefully so as not to prejudice the client's response; the lawyer should not answer his own question, nor ask questions requiring a simple yes or no answer;[52] and he should be sure the client has understood the question and has given a complete answer before going on to the next question.

Among specific questioning behaviors that lawyers might adopt are the following straightforward verbal approaches: *"Why did you come to see me? What worries you most about the problem you're having? Why are you worried about that? Let's talk about the things that are worrying you."* These should not be fired off in machine gun fashion. Moreover, they should not be asked so soon that the client perceives the lawyer as merely prying. A lawyer may in fact decide to refrain from inquiring about some subject out of respect for the client's feelings or to avoid giving the appearance of prying. This often may be the right thing to do. Since there is a danger that the client will interpret the lawyer's behavior as reflecting nonchalance or unawareness, however, it may be best for the lawyer to let the client know why a line of inquiry is *not* pursued.[53]

D. Communication About Legal Action

The lawyer most often sees his primary goal in terms of action—doing something for the client.[54] Unfortunately, many law-

52. *See id.* at 148-49.

53. *See* Browne & Freeling, *The Doctor-Patient Relationship*, 196 PRACTITIONER 730, 733 (1966). For additional information on the role of questions in the communicative process, see G. NIERENBERG, FUNDAMENTALS OF NEGOTIATING 109-38 (1973).

54. Action is the purpose of the interaction, of course, and at some point action decisions (or decisions not to act) must be made. Some of the lawyer's goals in aiding his client are (1) to help the client reach a decision about whether he wants to take action; (2) to help him decide which action to take, if he decides that he does want to act; and (3) to help him engage in the action chosen. *See* G. EGAN, *supra* note 37, at 182-83. Most lawyers achieve some or all of these goals at some point in their interactions with clients. Some action seems essential to almost anyone's definition of success, even if the action is a decision not to alter the status quo. From the standpoint of success, however, there is probably a time at which action is premature and a later time at which it is more nearly appropriate in terms of its impact on the client. Forcing action before the client is psychologically ready can be the equivalent of communicating to him a lack of concern.

yers also talk about action from the very outset. The lawyer immediately discusses the possibility of suit or of settlement. Little effort is made to establish rapport, and empathy is ignored. The lawyer thinks that he is demonstrating competence and efficiency; in fact, he may only be showing callousness. Proper use of communication skills would enable the lawyer to communicate empathy to the client in such a way that the client perceives the lawyer's perceptions to be accurate.[55] A lawyer can communicate empathy to the client by taking the time and trouble to give the client an analysis of his problem (and perhaps a prognosis as well) before discussing the possibilities of action.[56]

Moreover, it is likely to be more helpful if the lawyer and client first come to understand the client's goals, problems, and social role as they and others perceive them. This mutual understanding facilitates making choices of action that the client perceives as effective. With such understanding, the client may make a satisfying decision as to whether or what action is needed.[57] The lawyer may help the client make a proper decision by using an exploratory process that helps the client search his memory for information needed to better understand the problem and that brings together bits and pieces of information produced from the interaction as it progresses.

In addition, the lawyer should determine whether the client has sufficient understanding to lead him to take *effective* action. Inadequate client understanding, revealed by vague and abstract language, probably will not lead to a decision to take effective problem-solving action. The client must see a need to act, must be motivated to act, and must have an idea of what actions will likely work for him. By portraying the "big picture" from the facts and the law and by outlining the available options for ac-

---

55. *See* G. EGAN, *supra* note 37, at 127.

56. The analysis can supply *the name* by which a problem can be called and dealt with by the client. Identification such as *"This is an antitrust problem,"* for example, may have a reassuring effect on the client.

Medical patients report that getting a diagnosis—being told what is wrong with them—is very important to them. When patients are asked about their satisfaction with a doctor, the lack of diagnosis correlates highly with dissatisfaction. Research has shown that a remarkably high number of physicians fail to provide a clear diagnostic statement to the patient, and many offer no statement of prognosis whatever. This evinces a clear lack of concern. Lawyers are probably worse about this than doctors. They frequently say, in effect, *"Just give me the facts, and I'll handle it."*

57. G. EGAN, *supra* note 37 at 128. Presumably, the client is not interested in action for its own sake. If he were, change is not hard to produce; any action taken by the client as a result of a visit to a lawyer is "change."

tion, the lawyer can help bring the client from an abstract and largely useless intuition to a concrete, useful understanding.[58]

Once an adequate level of client understanding has been reached, the lawyer can shift from a focus on empathy with the client's point of view to a more "objective" viewpoint—that of the lawyer himself. From this vantage point the client can be told how the lawyer—and presumably other lawyers—would perceive and deal with the client's problem. This shift can be especially useful if the lawyer's interpretation of the problem varies from the client's.[59] The change in perspectives is a necessary transition between building the lawyer-client relationship and acting on the final decision reached.[60] The shifting process must be done with care, however, for if the client is ultimately to experience satisfaction, he must act on his own and not his lawyer's understanding of the problem.[61] If the client comes to see things from a different perspective, he may become more ready to take action in solving his problem. The lawyer's communicative skill can help change his perspective.[62]

As part of his general technique for helping the client reach a decision on legal action, the lawyer is likely to find it helpful to help bring bits of information together, to summarize periodically, and to provide models that can help the client as he thinks the matter through. On a more specific level the successful lawyer should probably have a number of objectives for his own communicative behavior. These could include (1) getting a discussion started, taking care not to restrict the client too much or to sidetrack him; (2) warming the client up—establishing and maintaining empathy and rapport; (3) exploration of the problem by the client; (4) providing direction and focus for the interaction; (5) providing coherence for the discussion; (6) helping the client to summarize; (7) summarizing periodically himself; (8) avoiding blind alleys and digressions; (9) properly closing the discussion;

58. *Id.* at 130-31.

59. *Id.* at 131-33. As he shares his own understanding with the client, the lawyer may find it useful to reveal not only his interpretation of what the client seems to be saying *directly* but also what the totality of the situation *implies* to the lawyer. To be used effectively, this skill probably requires both accuracy of interpretation and statement. The best clue to accuracy is client response itself. The skillful lawyer does not limit himself to superficial interpretations; he tries to deal also with the client's deeper feelings. For example, a client who is dispassionately describing his problem at one level may also be feeling quite sorry for himself at another level. *Id.* at 135.

60. *Id.* at 132.

61. *Id.* at 135.

62. *Id.* at 132.

and (10) moving the client closer to a decision about action.

In order to achieve these goals, the lawyer must be able to (1) perceive themes in the client's expressions that are likely to be useful in identifying and solving the problem, and (2) present these themes to the client in a useful and tactful way. The lawyer must avoid using too high a level of abstraction. Concreteness is needed because effective action on an abstract idea is almost impossible. For example, imagine a lawyer who perceives in his client's communication a recurring theme of concern about his ability to pay for whatever legal action ultimately may be needed. If this is a major fear, discussion of action solutions to the client's problem may be blocked indefinitely. A lawyer who perceives this theme can bring it out in the open. The two can then discuss the realities of the client's financial resources with sensitivity and specificity and can relate them in a concrete way to financial options open to the client in the event a decision to take action is made. Done properly, this kind of discussion can also be taken by the client as a dramatic expression of concern by the lawyer for the welfare of the client. Mere identification of the client's concern or recognition of its existence, however, is not enough.

As the process of making an action decision progresses and the lawyer-client interaction continues, the information communicated back and forth will not necessarily come in a logical, orderly, or complete sequence. Therefore, one way in which the lawyer can be helpful and simultaneously communicate his concern for the client is by connecting islands—bringing together things that to the lawyer seem to belong together. Possibly proceeding from the simple to the more complex, the lawyer can help the client by periodically suggesting interpretations of the factual and conceptual data and conclusions that might be drawn therefrom.[63] Even if these interpretations and conclusions are too complex for him to understand and use, the client will probably be grateful for the concern communicated by the attempt.

In order to make these connections, the lawyer must have a mental model of appropriate ways to aggregate the information communicated. His education, experience, and imagination provide these models for him. If successful, the use of models can provide an appropriate decision-making framework for the client.

63. *Id.* at 144-48.

III. Attorney-Client Interaction: Some Problems and Some Skills

A. Problems of Misperception

Most lawyers believe that their clients correctly hear and understand what is spoken to them. Many lawyers think they are communicating adequately with their clients because they know that they take a great deal of time explaining the legal implications of their problems to their clients and explaining what they propose to do about them and why. In a great many instances, however, such lawyers make no attempt to determine whether clients understand their explanations.[64] If later a client does not remember what was said, or remembers something differently than the lawyer, the lawyer may believe that the client is lying. Research with physicians and patients, however, suggests that this kind of client behavior often does not result from a decision to lie but stems from misperceptions that could be prevented by effective communication.

A 1972 study[65] revealed that patients may fail to perceive and remember fundamental aspects of a physical examination and statements of prescription for treatment. Tape recordings of the interactions proved some patients' memories to be completely unreliable. Since lawyer-client interaction involves the transmission and reception of verbal messages to a much greater degree than does doctor-patient interaction, the implications of this study for attorneys are significant.[66]

The impact on the client of his lawyer's messages is probably far less vivid than the aseptic vinyl of the doctor's examining couch and the cold steel of the stethoscope. Consequently, the lapses of memory that characterize the medical patient may be even more expectable from a lawyer's client. The lawyer may have told his client that he had to decide "by next Tuesday at the latest." But the attorney should not be too surprised to see his client take the stand and swear that those words were never spoken. No inference of lying need be drawn; the testimony could be thoroughly conscientious. The anxiety level of the client—either very low or very high—diminishes the ability of a

64. A study of physician-patient communication revealed that 40% of the medical patients examined completely misunderstood the main point of what their physicians had said. The physicians, of course, were completely unaware of this. Golden & Johnson, *Problems of Distortion in Doctor-Patient Communications*, 1 Psych. Med. 127 (1970).

65. Korsch & Negrete, *supra* note 23, at 72.

66. *See* Allen, *supra* note 1, at 897.

client to remember the lawyer's instructions to him.[67]

Just as there is no assurance that the client will remember accurately, there can be no assurance that the lawyer will remember accurately. A study by Raimbault and his colleagues showed that physicians who believed that they had spoken directly and fully to their patients and had answered their questions relating to a particular malady were badly mistaken.[68] Tape recordings of the actual interviews revealed that they had not communicated clearly.

An "overload" phenomenon can also greatly distort a client's processing of information. In the physician-patient context it has been shown that the ability of a patient to remember the facts of a communicative exchange diminished both proportionately and absolutely as the amount of information emitted by the doctor increased.[69] Another study[70] showed that no patient remembers all the doctor tells him. Only about one-half the information conveyed by the doctor and less than one-half of his instructions could subsequently be reported by the patient. As the amount of information spoken by the doctor increased, the distortion by the patient of what the doctor said increased. Nevertheless, physicians consistently overestimate the extent of patient knowledge about medical things.

To meet the problem of information overload on client memory, careful selecting of a few pertinent facts and conveying them in a memorable way are key ingredients to a successful communicative style. Obviously some styles are more successful than others in overcoming the inevitable vagaries of memory. And a style that fosters inaccurate memory or misperception of events is likely to subject its user to a much higher level of client dissatisfaction.[71] This dissatisfaction can translate into lack of cooperation or malpractice litigation.

---

67. *See* Ley & Spelman, *Communications in an Out-patient Setting*, 4 BRIT. J. SOC. & CLINICAL PSYCH. 114 (1965).

68. Raimbault, Cachin, Limal, Eliacheff, & Rappaport, *Aspects of Communication Between Patients and Doctors: An Analysis of the Discourse in Medical Interviews*, 55 PEDIATRICS 401 (1975).

69. Ley & Spelman, *supra* note 67, at 115.

70. Joyce, Caple, Mason, Reynolds, & Mathews, *supra* note 49, at 189.

71. An example of a problem-causing communicative style is the tendency to use technical language in speaking to laymen. There are circumstances in which the use of legal jargon such as "proximate cause" and "estoppel" may flatter a client and give him a sense of the attorney's competence. But when the lawyer's goal is the conveyance of information to be remembered, such jargon can be treacherous. A lawyer who fails to speak in language that his client can understand can expect dissatisfaction as a direct result. *See* Korsch & Negrete, *supra* note 23, at 71.

Because a client is dissatisfied or sues his lawyer does not necessarily mean that there was something lacking either in the lawyer's performance as a legal expert or in his relationship with the client. Rather, a client's sense of satisfaction may result from his preconceived expectations of legal service, a factor over which the lawyer has no control. If a client expects that he will become rich from any claim, he is very likely to be disappointed. Many people who are injured in accidents believe that the more severe the accident and the larger their monetary loss, the larger the recovery will be. Actually, the opposite may be true.[72] But a client's false expectations can be a direct result of communications from the lawyer. The lawyer may by his words, behavior, or even his clothing and office decor, lead the client to believe that a win is assured, perhaps a *big* win. The lawyer may simply fail to adequately convey to the client that he may well lose.[73]

The lawyer need not accept this kind of misperception, whether by his client or by himself, as inevitable. While improved communication skills cannot guarantee better results, there is room for hope. If the lawyer can become aware of the stresses that may cause client misperception, he is in a position to take remedial measures. He may, for example, replace or supplement his oral communications with the client with written renditions of the same information. He can send the client written confirmations of their interviews, and can reinforce these in subsequent communications. He can use written checklists to ensure that nothing is overlooked. He can repeat what he says. And above all, based on his awareness that the client may misperceive, forget, and distort, the lawyer can ask questions and look for clues that can inform him whether these problems are occurring in their interaction. If they are, he can take remedial action. If he does not, he and the client may be like two ships passing in the night, and success for either will be merely a matter of chance.

Even highly educated laymen may be thrown off the track by words in common usage among professionals. One study showed that graduate students in educational psychology could not understand many of the terms a physician chose to use in talking to a lay audience. Matthews, *Doctor What Did You Say?*, 35 N.C. MED. J. 297 (1974). In law perhaps more than in medicine, the use of a technical term may be especially vexing since a specialized legal term is very likely to have a cognate form used in everyday speech. The technical words "intent" and "cause" are ready examples.

72. *See* A. CONRAD, J. MORGAN, R. PRATT, C. VOLTZ, & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 196 (1964).

73. Allen, *supra* note 1, at 897-900. Lawyers and physicians are alike in this respect. A critic of physician behavior points out that "[d]octors spend far too little time talking to patients and/or their families in an attempt to establish a relationship of trust and confidence between both parties *and to prepare them for the possibility of an imperfect result.*" Bay, *supra* note 9, at 299 (emphasis added).

B. Listening Behavior and Its Effect on Success

The listening behavior of a lawyer affects his success in interacting with his client in two principal ways. First, listening itself conveys a message to the client. Second, listening behavior affects the ability of the lawyer to acquire information about the client, his probem, and the lawyer-client interaction.

The importance of listening style in communicating the lawyer's concern for the client is difficult to overstate.[74] People who go to a lawyer want and expect him to convey in some way the message that he is friendly, sympathetic, and interested in their primary concerns, whatever those concerns may be. A lawyer's failure to meet this expectation can create disappointment no matter how effective his problem-solving skills are from a technical standpoint. The prime manifestation of this kind of communicative pathology is a perception by the client that the lawyer is not listening. No matter how well the lawyer may in fact be listening, the client may conclude that the lawyer is bored or indifferent if he does not appear to be listening. Actions such as staring out the window, sorting through the mail, paring the fingernails, or merely being silent while listening[75] may give rise to such a conclusion. Instead, the lawyer should use his posture, his eyes, and his voice to send the message, *"I am with you; I hear you; I care."* He can move close to the client and incline his body slightly toward him. He can maintain eye contact with the client. He can express an occasional "m-hm" or "I see" in a way that indicates he is following the client's thoughtstream. Open-ended or even leading questions may also say, *"I'm with you."* The total effect is reassuring and comforting.

The kind of listening behavior we suggest contrasts sharply with the listening behavior of many lawyers. Their usual behavior consists of asking questions and recording or remembering the answers, preferably as soon as possible after greeting the client. To many lawyers this is "getting the facts." As we mention elsewhere, this can be done prematurely.[76] And it can be done wrongly.[77] The lawyer who merely asks questions may get an-

74. Probably most lawyers, as do most doctors, think they are good listeners. Lawyers may think they do more listening than speaking in client interviews. One study, however, showed that on the average the doctor does more talking than the patient during a visit. Korsch & Negrete, *supra* note 23, at 73.

75. *See* Browne & Freeling, *supra* note 53, at 730.

76. Note 50 and accompanying text *supra.*

77. Standardized form questionnaires of the kind used by some lawyers may also be

swers, but he may not get success. The client may interpret the questioning as impersonal, dehumanizing, and hostile unless it is done properly. "Properly" means letting the client talk and listening to him, using questions only after rapport and empathy have been to some extent established. Brusque and precipitate questioning does not establish empathy. Indeed, accurate analysis of problems probably begins when the lawyer stops asking questions and starts listening to the client.[78]

The impact on the client of the lawyer's listening behavior can greatly affect the ability of the lawyer to obtain facts he needs to properly deal with the client's problem. Lawyers commonly complain that clients do not always tell the "whole story." Legally significant facts may not be revealed because the client does not think them important. But he may also lie or refuse to mention some things because (whether he is aware of it or not) he does not yet trust his lawyer. The client may fear being judged, ridiculed, or even "sold out" to the other side by someone who does not seem to be concerned with him as a person.

Sensitive listening to the client is required to avoid errors of the kind described. The lawyer who is searching for messages can find them by listening to and watching the client. The lawyer who is sensitive to the possibility of client mistrust and to the possibility that the client may withhold or distort information can watch the client's nonverbal behavior for clues. This can tell him more about the client and his situation than do his words.[79]

If the lawyer desires to induce the client to relax and talk openly and accurately in an atmosphere of trust, he will want to communicate to the client that he understands the world, at least in part, from the perspective of his client. For the lawyer to "say" this in an acceptable way requires the ability to discern the client's perspective and the skill to choose words and behaviors that send the message. Discernment requires listening to the client's words and being sensitive to the messages carried by the client's vocal tone, volume, pitch, speed of delivery, silence and

---

problematic. Lawyers who use the forms should consider the potential communicative costs. "Taking a medical history" or "getting the facts" can be different from listening.

78. Asking a question of course implies a process in which the question is followed by a period in which the questioner *listens* to the response of the person questioned. But it does not follow that listening must occur or that it frequently does occur in the lawyer-client relationship. *See* Browne & Freeling, *supra* note 53, at 730. Yet if the lawyer is to accurately communicate to the client that he understands the client and his concern, the odds are that the lawyer will have to listen carefully to the client.

79. *See* Eldred, *supra* note 33.

pauses, gestures, facial expressions, and posture. As the lawyer "listens" to such messages from clients, he will also become sensitive to the messages he himself transmits.[80] This is the kind of listening that enables the lawyer to communicate that he has an accurate understanding of the client's perspective, his problems, and his concerns. This kind of listening is a skill that can be taught.

It does not follow that a lawyer who listens to and comes to understand his client knows how to help the client with his legal problem. Indeed, listening and understanding could actually create discomfort for the lawyer if he perceives that he is incapable of providing more than understanding alone. We do not suggest that effective listening is the beginning *and end* of a satisfactory professional relationship. It is only a beginning, but it is nevertheless essential.

C. Communication Through Use of Time

Most lawyers are aware of some ways in which their use of time is important professionally. They know, for example, that "time is money" and that "time and advice are a lawyer's stock in trade." They know also that they seem always to be short of the time necessary to meet the many demands made on them. Many keep time records for fee-billing purposes. All of these concerns are only for the lawyer's own needs, whether for revenue production or for the accomplishment of tasks or both. Few lawyers, however, fully understand how communicative and important the way the lawyer uses his time and the client's time can be *to clients.*[81]

---

80. The value of such sensitivity for professionals is suggested in a comment about physicians:

> *The ability to listen is a new skill, necessitating a considerable though limited change in the doctor's personality.* While discovering in himself an ability to listen to things in his patient that are barely spoken because the patient himself is only dimly aware of them, the doctor will start listening to the same kind of language in himself. During this process he will soon find out that there are no straightforward direct questions which could bring to light the kind of information for which he is looking.

M. BALINT, THE DOCTOR, HIS PATIENT AND THE ILLNESS 121 (1957).

81. Time-related behavior, such as failure to file lawsuits on time and statutes of limitations errors, account for nearly one-half of all malpractice actions. Blaine, *supra* note 6, at 305.

In Texas, the second most common client grievance is that the lawyer "hasn't done anything." (The most common complaint is that the fee was too high.) D. GRANT, LEGAL ETHICS—AVOIDING UNINTENTIONAL GRIEVANCES 1, 4 (1976). Most clients report that they are

In our society the way that people utilize time carries important social messages. For example, only a person of relatively higher status may keep another waiting beyond a certain length of time (which length members of our society "know" but probably cannot specify).[82] If a person is kept waiting beyond that time the social message may be perceived as *"You are a person of low social status."*

Most lawyers do not wish to communicate this message to their clients, but many lawyers do just that. Clients are kept waiting in a variety of ways. They wait in lawyers' waiting rooms beyond the time scheduled for appointments. They wait in vain for replies to their telephone messages. When they are in the lawyer's office, they wait while he accepts telephone calls from others. They wait for action that the lawyer promised to take at a specified time, but which comes, if ever, after the socially permissible delay has been exceeded. They wait, and wait, and fume. They may not be consciously aware of the content of the lawyer's message, but it is real to them, and their reaction to the lawyer who sends it is *not* favorable. Similarly, there is good reason for oft-preached punctuality. If he is or must be late the lawyer should provide ways of preventing or overcoming his negative messages. He can say, *"You are a person of importance and worth"* in other ways instead.

Clients frequently complain that their lawyers give them too little time. The message communicated by this behavior is much the same as that conveyed by keeping a client waiting. The lawyer, possibly quite harried for usable time himself, may send this message by impatient behavior, by brusqueness, by clockwatching, and by hurried action and attempts to solve the client's problems without taking the time to deal with the client as a person rather than simply as a legal problem. The lawyer should see that spending enough time with a client is not a mere luxury but a necessity for both of them. At least the lawyer should know that if he must be brusque, hurried, harried, and watchful of his wristwatch, he will likely pay a price for it.

Some lawyers do not make contact with clients from the time they are employed until they have produced some result. The

---

more concerned with the friendliness and the effort of the lawyer to try to produce for them than with the result produced. *See* MISSOURI BAR PRENTICE-HALL SURVEY: A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT (1963).

82. *See generally* E. HALL, THE HIDDEN DIMENSION (1966); E. HALL, THE SILENT LANGUAGE (1959).

lawyer may think he is doing the client a favor by not bothering him, but this kind of failure to communicate with the client *at all* during an extended period often is taken by the client to convey the message: *"You are not important enough for me to take the time to communicate with,"* or *"I am not interested enough in your problem to take the time to solve it properly."* This is just the kind of behavior that leads many clients to complain of "impersonality" in their dealings with lawyers. It is not true—from the standpoint of the client—that "no news is good news." No news is often taken to mean *"I don't care about you."*[83]

The messages lawyers send by the use of time are intensified because they occur in the context of an interaction which often is threatening to the social status and personal image of the client. When he visits the lawyer, a client may feel himself temporarily divorced from a familiar social role, in which his status and identity are secure and in which he is relatively in control. The client as "client" may find himself in an ambiguous role in which the lawyer seems to be a person of higher status, in which the lawyer seems to be in control, and in which the client feels that his familiar status and identity are threatened. In addition, the client may be anxious because he has a problem large enough to require professional help and because he has an unaccustomed need to ask someone else for help. In this context, the client is likely to be highly sensitive to negative meanings in the messages coming from his lawyer.

When considering communication through the use of time, it is also important to realize that lawyers and laymen may have different time perspectives. Lawyers are accustomed to the inherent delays, postponements, and procrastinations of the legal system. Most clients are not aware of these difficulties. They generally want speedy results. Unless the lawyer educates the client about potential uncontrollable delays, the client is likely to assume that something is wrong. The assumption is likely to be that the lawyer does not care.

On an intellectual level, most clients know that a lawyer has many other clients and cases to deal with. Emotionally, however, the individual client may feel that he is the only client the lawyer has. Many clients want and need to have this feeling reinforced by the lawyer. Unfortunately, many lawyers meet this need by

83. *See generally* Ethics Pointer, *Communicate! Don't Fiddle Around While Your Client Does a Slow Burn,* WIS. B. BULL., Aug. 1975, at 39.

"informing" their clients that they are indeed very busy. Although he obviously cannot comply in a literal sense with all his clients' needs, there are ways in which the lawyer can use time to tell the client how important he really thinks the client and the case are. The lawyer can do this by sending the client periodic progress reports and copies of all relevant letters, documents, pleadings, and instruments. The lawyer can refrain from making all client contacts through his secretary or receptionist. Rather than accepting calls from others while the client is in the lawyer's office, the lawyer can tell his secretary—in the presence of the client—to hold all calls while the client is with him.[84]

Many lawyers seem to assume that because they know the effort they are expending on behalf of their clients, their clients know it too. This is not true. Even if he knows this intellectually, the client will not "know" it emotionally unless he receives assurances of lawyer concern. This need can be met through periodic reports and other lawyer-initiated communications to the client. In addition, it can be at least partially met when the client is billed by means of *elaborate* explanation of the effort expended on the client's behalf. Unfortunately, many lawyers, unaware of this need, tersely describe their efforts only with such phrases as *"For legal services rendered, $10,000.00."* Lawyers need to learn that *the only way* a client can know of a lawyer's concern is for the lawyer to tell him so, either directly or indirectly by demonstration of socially "proper" use of time in the client's behalf. Reports and billing statements should tell the client *in detail* what specific activities the lawyer and others engaged in for the client. The report should use *active* verbs, not passive ones. This is much more important than specifying the time spent in these activities. In fact, specifying the time may have a negative effect. The great skill, knowledge, and imagination that go into the drafting of a brief motion in an important case, for example, are substantially ignored, it seems to us, by the notation "55 minutes."[85]

84. Karcher, *What Does a Client Expect of a Lawyer: "Effort" or "Results"?*, N.J.B.J., Summer 1970, at 26.

85. A better statement might read:

> Attorney John Brown planned, researched, and drafted a motion to dismiss the plaintiff's action, on the ground that . . . . The motion was prepared and typed in Mr. Brown's office. Mr. Brown took the motion to the Jackson County Courthouse, filed it in the clerk's office, and set the motion for hearing. On September 12, 1976, at 9:00 a.m. Mr. Brown appeared in the circuit court of Jackson County, Missouri, where he presented and argued the motion successfully before

Some lawyers make a point of contracting with their clients on the basis of time, at an hourly fee rate. These lawyers keep meticulous records of time expended on a client's behalf, and punctiliously submit bills on the basis of the agreed hourly rate. The lawyers assume that they have "done right" by the client in agreeing in advance on the fee, and have met their ethical obligations and client expectations by clearly and completely communicating to the client the basis for the fee charged. But the "time message" sent by this procedure probably also carries an unintended negative significance to many clients. Possible messages are: *"I am a merchant. I am not interested in serving you; I am interested in selling time to you. Your problem or case is like that of anyone else. I handle them all at an hourly rate. It is a high rate, for I am a person of high status. You are a client, and you must pay for every minute I spend with you. I am not concerned with the particular aspects of your case. I am not concerned with you as a person."* There are ways of contracting and billing that need not carry these messages. The lawyer can certainly use an hourly rate as one factor among several in computing his fee. And this can be referred to in talking with the client as an "overhead factor" or a similar phrase. But his billing statement probably should not relate a definite dollar amount to a specific unit of time.[86]

A related aspect of communicating through use of time involves the client's perception of appropriate ways for the lawyer to use the time he devotes to the client. Here, the client may have two goals that are somewhat inconsistent. On the one hand, he wants the lawyer's use of time to tell him that he is a worthwhile person about whom the lawyer is concerned. On the other hand, the client does not want the lawyer to waste costly time in socializing. Thus, the lawyer must walk a communicative tightrope of sorts. He must use "enough" time but not "too much." One way

---

Judge H. A. Jones. Attorney Alexander Doniphan argued vigorously against the motion. The hearing lasted for one hour. After the hearing Mr. Brown drafted a judgment and a letter and mailed the proposed judgment to Attorney Doniphan for objection. When Attorney Doniphan called on September 14 to say he had no objection, Mr. Brown took the motion to the courthouse and presented it to Judge Jones, who signed it. Mr. Brown then filed the judgment with the clerk of the circuit court. Mr. Brown has ordered an abstract of the judgment for filing in Daviess County.

See generally Morgan, *How to Draft a Bill Clients Rush to Pay*, 2 TEX. PRAC. GUIDE 642 (1971); Karcher, *supra* note 84 at 27.

86. *See* Morgan, *supra* note 85.

to help accomplish this task is for the lawyer to engage in other behaviors that assure the client that the lawyer uses his time wisely. Business-like dress, office furnishings, and manner will communicate this assurance. The lawyer should simultaneously communicate that he is concerned and friendly. Often this will require considerable skill.

People who look for the causes of increased malpractice litigation and client grievances frequently point to the increasing impersonality of lawyer-client relations and suggest that this impersonality results from the decreasing amounts of time lawyers spend with clients.[87] An unstated corollary to this suggestion is the idea that the more time spent with a client the more satisfied he will be. There may be a minimal time requirement to produce client satisfaction, but there need not be any direct correlation between client satisfaction and the length of time spent. In the physician-patient context, a study demonstrated that there was no relationship between patient satisfaction and time spent with the physician.[88] In some instances, the study revealed, the longest visits produced the least satisfaction. These visits appear to have been devoted largely to futile efforts to establish communication. The study suggests that the effective use of communication skill during an interview is much more important than the length of the interview.

The length of a communicative interaction between a lawyer and client can, nevertheless, be an important factor in producing success. It can greatly affect a client's reaction for good or ill. For example, it does not follow from the fact that good progress is being made in an interview that the lawyer should push to accomplish everything that he might accomplish communicatively in one session. A client may become uneasy if the length of the interaction makes him feel that he has revealed too much about himself. On the other hand, if an interaction has not been long enough, the client may feel that he has been cheated. The time needed varies with the client, and the lawyer cannot always know in advance what the right length is.

Timing within the interaction can also be an important variable. The terminal stage of the interview, for example, is a time in which many clients become particularly willing to communicate valuable information that perhaps through oversight, denial,

87. *See* Blaine, *supra* note 6, at 305.

88. Korsch & Negrete, *supra* note 23, at 71.

or embarrassment they have failed to mention before. It is a good idea for the lawyer to say, near the end of the session, *"Is there anything else?"* or *"Do you have anything else on your mind?"* before terminating the interview.[89]

Lawyers who are sensitive to the messages of time use can take steps within their offices to avoid sending unpleasant messages of indifference to their clients. The establishment of office procedures that will ensure that mail and telephone calls will be promptly processed, answered, or returned can be helpful. Measures for avoiding unintended loss of control of time include reminder systems of various kinds, calendar controls, checklists, in-house memoranda, manuals, and well-organized file systems. A lawyer can improve his time management by learning to delegate to others some aspects of professional service. He can enlist his secretary to assist him. If events make it impossible for him to meet his deadlines, the lawyer can delegate to someone else the duty of communicating with the client until the lawyer can himself make contact—as soon as possible. The office should be the lawyer's tool in his campaign to communicate effectively through his use of time.

D. Improving the Interaction: Techniques for Building the Relationship

When he has clues to client discomfort or mistrust and therefore to distortion of information, the lawyer is in a position to use communicative techniques to achieve rapport and empathy and ultimately success. Once rapport and empathy are established to some extent, among the more useful techniques for building the relationship are self-disclosure by the lawyer and discussion with the client about the realities of the interactive situation itself.

1. Lawyer self-disclosure

Self-disclosure—the lawyer revealing something about his own life to his client—can be a useful tool.[90] It can also be a dangerous one. The key to understanding its potentials for utility or disutility is to remember the reason the lawyer and the client are together—to produce an action decision *by the client.* Anything the lawyer does that leads to fulfillment of this purpose is helpful; anything that impedes it is harmful.

89. *See* Browne & Freeling, *supra* note 53, at 735.
90. *See* Prim & Porterfield, *supra* note 29, at 5.

When properly used, self-disclosure can communicate to the client that the lawyer empathizes with him. This makes the lawyer more attractive to the client. The willingness of the lawyer to take the social risks of revealing something of himself to the client can also lead to increasing the client's trust in the lawyer. The client will be likely to think: *"If you trust me enough to reveal yourself to me, then I in turn can probably trust you."* In addition, self-disclosure can make the lawyer seem more human, and thus can decrease any "role-distance" that may exist between him and his client. Combined, all of these results can help the lawyer and client work together toward their ultimate goals. Self-disclosure will likely put the client more at ease, lead him to make a more frank disclosure to his lawyer, and make him more receptive to consideration of alternative perspectives and actions.

A form of self-disclosure that can be very useful to the lawyer is the use of anecdotes, introduced in this way: *"In a similar case for another of my clients . . . ."*[91] An anecdotal technique can indicate to a client that the lawyer has had experience with similar problems and is familiar with their ramifications. It can put the client in an emotional position equivalent to that of the former client in the anecdote—in what the lawyer has told the client was a successful relationship. Such anecdotes or examples can lead the client to identify with a relationship paralleling that of the former client, and the real or fancied former relationship can be used by the lawyer to influence the present client's behavior.

Unfortunately, however, the potential for harm from self-disclosure may be greater than that for good. Moreover, the temptation to use self-disclosure in unhelpful ways is probably greater than the temptation to use it in helpful ways. One of the principal disadvantages for the lawyer is that self-disclosure can make him appear to lack discretion, judgment, and a sense of restraint—qualities many clients expect in their lawyers. Self-disclosure can also be an end in itself, rather than a means to an end. The lawyer may obtain a sense of gratification from revealing his weaknesses. Or, he may think that revealing similarities between himself and the client will make the client like him better. While this may be partially true, no progress may be made if self-disclosure becomes an end in itself. Moreover, the technique has the danger of being overused, making the lawyer appear to be insincere. This expression of sincerity may be a greater

91. *Id.*

problem for young lawyers who have not had extensive experiences on which they can call for self-disclosure, and who therefore feel uncomfortable in doing so.

Lack of accuracy is another danger of self-disclosure. One purpose of the technique is to establish and maintain rapport, but that purpose is not accomplished when the client perceives that the lawyer's self-disclosure is not analogous to what the client has communicated to the lawyer about the problem situation. Lack of accuracy can make the lawyer appear to lack intelligence, empathy or sincerity.

Another problem with self-disclosure is that it can falsely suggest a desire for a personal relationship with the client. If the client acts upon what he thinks the lawyer is communicating, a crippling misunderstanding may result. Moreover, self-disclosure can frighten the client who is not prepared to be involved in a relationship in which personal revelations are made. Instead of decreasing role distance, adding to trust, and making the lawyer more attractive, the opposite may result. Similarly, the lawyer's self-disclosure can burden the client by making him feel that he must take on the lawyer's problems as well as the problems he brought the lawyer.

Perhaps the greatest problem with self-disclosure, particularly when unwisely used, is that it can distract the client or the lawyer from their principal tasks of deciding on and taking action. Self-disclosure can become an anecdotal digression from decision and action on the client's problem.

All of these difficulties impede progress. Because of the potential dangers of self-disclosure and because development of the skill is so difficult, self-disclosure can be pathological in the lawyer-client relationship. Unless he is aware of the potential problems, the lawyer may find that he is failing to achieve the results he desires for his client. Beyond that, the lawyer may find that he and the client are having interpersonal difficulties for which he cannot satisfactorily account. These difficulties can result from inappropriate or unskillful self-disclosure.[92]

2. *Lawyer-client discussion about their relationship*

Many lawyers and clients are reluctant to engage in mutual discussion about the dynamics of their relationship. This kind of discussion—requiring a skill that many lawyers lack—has been

92. G. EGAN, *supra* note 37, at 151-55.

referred to as "immediacy."[93] Immediacy as a communicative technique can be useful to both lawyer and client.

A lawyer may find an immediacy discussion useful when he senses that unmentioned thoughts and feelings of the client are affecting the client's behavior and getting in the way of success. Such thoughts and feelings may simply reflect differences of style between the lawyer and the client, or they can result from mistrust. Both lawyer and client may experience interpersonal difficulties and immediacy may be useful in reducing these problems.

The need for communication about the relationship can also be generated by either the perception that the discussion has become directionless or the awareness of strong mutual personal attraction that seems to interfere with goal achievement. Unilateral or mutual dependency in the relationship may produce difficulties that immediacy discussion will help reduce.

The lawyer's skillful use of immediacy involves a combination of self-disclosure and confrontation. Its usefulness probably is directly proportional to the amount of rapport already existing between lawyer and client. A lawyer who senses that something is wrong might approach the problem by asking himself this question: *"What, if anything, is the client trying to tell me indirectly that he can't tell me directly?"* It may be that the lawyer simply cannot answer this question. In order to answer it and to use immediacy effectively, the lawyer must be aware of his own and his client's behavior and must be able to act on this awareness. Accuracy in identifying the problems in the relationship is important. Raising the immediacy issue and then missing the mark when it comes to focusing on the problem may be worse than not raising the issue at all. As with self-disclosure, immediacy can cause problems if used excessively. The client may well perceive the lawyer's overuse of the technique and respond by engaging in behaviors that do not contribute to the success of the lawyer-client relationship.

The client can be easily frightened by the lawyer's use of immediacy. This is especially so if by using it the lawyer seems to be threatening or punishing the client for his behaviors during their interaction. It is wise, therefore, for the lawyer to be tentative and cautious in his use of the technique. Perhaps one of the most satisfactory techniques for using it is for the lawyer to invite the client to engage with him in a kind of postmortem review of

93. *Id.* at 173-80.

a concluded discussion. This removes some of the situational pressure from the discussion and possibly minimizes some of the threat the client may feel. He may experience the review as an objective one, from which he is more or less removed.[94]

Immediacy may be the remedy for a communicative phenomenon called "spiraling down."[95] This phenomenon may occur when the lawyer and his client have been communicating with reasonable success but one or both comes to believe that he is being exploited or otherwise frustrated in the relationship. Spiraling down is a sequential deterioration in willingness or ability to hear the other and to say what the other wants to hear. One or both parties may be affected. If both are affected, each experiences increasingly greater distrust of the other, becomes less attentive to the other, selectively (but not necessarily intentionally) filters out the mounting unacceptable demands of the other, and simultaneously tries harder to make the other hear about his own unmet needs.

The proper use of immediacy can "spiral up" a lawyer-client interaction that has deteriorated.[96] The use of this technique assumes that most messages have "positive" components (such as *"I am willing to cooperate")* as well as "negative" components (such as *"I am angry").* Spiraling down involves paying primary attention to the negative components and largely filtering out potentially constructive messages about how a more satisfying relationship might be created. Spiraling up requires a conscious effort to discover the positive ones. If he can discover it, the lawyer can tell the client that the positive message was received. After receiving this positive feedback, the client may react somewhat less defensively.

There is no guarantee of success, of course. Despite the efforts of lawyer or client, or both, spiraling down may continue and the relationship may "hit bottom," without hope of reversal. One of the parties must act if such an impasse is to be avoided. Since the lawyer is probably in a better position to stop or reverse a downward spiral, it is important that he be aware of it and what might be done about it.[97]

---

94. *Id.*
95. *See* Fuller & Quesada, *supra* note 2, at 364.
96. *See id.* at 366.
97. *Id.* at 366-67.

IV. CONCLUSION

In discussing the communicative interactions of lawyers and clients, we have at times painted with a broad brush. In fact, many lawyers are skillful communicators and are satisfied in their practices as a result. Moreover, not all the lawyers who are not doing well communicatively are as unaware of it as we have suggested from time to time.

A need for a better understanding of communications skill is keenly felt by many legal practitioners, but most are reluctant to undertake training or to accept responsibility for this kind of understanding and skill in their relations with their clients.[98] The reason most frequently advanced is that they have too much to do as it is and, even if they had the skills, it would be impossible for them to sit down and spend long periods of time with a single client at a time. These arguments, impressive as they sound, are often fallacious. Of course learning takes time; establishing and maintaining a proper communicative relationship obviously takes more time than drafting a pleading. In the long run, however, such an effort can lead in many cases to a considerable gain for the lawyer and for his client. The economic and emotional consequences resulting from the behaviors of disgruntled clients may be forestalled as well.

Our focus on improved communications as a partial remedy for the coming lawyer malpractice crisis probably should be viewed in the perspective of the remedies that have been most frequently proposed in the medical field. Most of these, in our view, bear little relation to the basic causes of litigation. Some, such as harsher medical association discipline, peer review,[99] and antagonistic consumer-vendor relations between physician and patient,[100] are unfortunate because they are likely to result in more suits, more anxiety, lower quality service, and increased dissatisfaction. Analagous remedies in the attorney-client context would likely have equally unfortunate results.

---

98. Few lawyers have any formal training in the fields of client counseling and interviewing. H. FREEMAN, COUNSELING IN THE UNITED STATES 157 (1967). A survey of lawyers conducted by Harrop A. Freeman indicated in 1964 that less than 5% of the lawyers had this sort of training. There is little evidence that makes it seem likely that this percentage has increased appreciably since that time. *See* Katz, *supra* note 22.

99. *See, e.g.*, Simmons & Ball, *PSRO and the Dissolution of the Malpractice Suit*, 6 U. TOLEDO L. REV. 739 (1975).

100. *See, e.g.*, Annas & Healey, *The Patient Rights Advocate: Redefining the Doctor-Patient Relationship in the Hospital Context*, 27 VAND. L. REV. 243 (1974). We doubt that institutionalizing an adversary relationship will solve many interpersonal problems.

We view with skepticism the establishment in the legal context of the sorts of professional standards review groups advocated by many inside and outside professional medicine as at least one answer to "the crisis in malpractice." While they are no doubt well-meaning, these suggestions almost always overlook the fact that peer review and peer judgment are likely to be almost as threatening to professionals as malpractice litigation is. Both have high potential for being entirely judgmental and negative. The relative advantage of the improved communications approach is that it is essentially positive and nonjudgmental.[101] We prefer an approach that seems to deal with the causes of lawyer and client dissatisfaction rather than with symptoms that leave causes untouched.[102]

We do not suggest that our idea that lawyers can profit from learning how to communicate better with their clients is either novel or original. The importance of communication skills for professionals has been recognized by many in the medical profession, and several medical schools have instituted courses dealing with the interpersonal dynamics of physician-patient relationships and with development of the communications skills needed in the interaction.[103]

Nor do we suggest that all malpractice litigation is a result of pathological communication. Even very effective lawyer-communicators sometimes make mistakes and are sued by their clients. Undoubtedly a number of factors enter into a decision to institute malpractice litigation. It does not follow from the fact that a lawyer is a good communicator and well-liked by his clients that he is a good lawyer. On the contrary, he may be both well-liked and completely incompetent. Nor are all bad communicators bad lawyers. While we think that good lawyer-client communication is very important, perhaps even necessary to good legal representation, we are not under the mistaken apprehension that it is sufficient for good service.

We do suggest that there is a problem of communication between lawyers and clients and that this fact is related to client satisfaction and probably to the rate of malpractice litigation.

---

101. Coulter, *Peer Review: Tutor or Judge?*, 230 J.A.M.A. 1161 (1974).

102. Peer review proposals, for instance, pay no attention to the nature or quality of physician-patient interaction. *See, e.g.*, Simmons & Ball, *supra* note 99; Gosfield, *Consumer Accountability in PSROs*, 6 U. TOLEDO L. REV. 764 (1975).

103. Medical students are asking for help in preparing themselves for interaction with patients. Benson, *Are Today's Medical Students Going to Be Able to Speak to Their Patients Several Years From Now?* 74 WIS. MED. J. 13 (1975).

However, we do recognize that the problem cannot be easily solved.[104] In our view the main hope for improvement lies in two communicative dimensions. First, and we believe most important, lawyers must be aware that *communication is occurring* between clients and themselves. This is by far the hardest thing to learn. Second, lawyers must learn communicative skills. Ideally, of course, clients should also learn how to communicate properly, and society as a whole should be more sympathetic to the problems with which lawyers must contend in dealing with clients. Unfortunately, lawyers cannot control clients or society generally, but only their own behaviors.

In the preceding pages, we have supplied some information upon which a lawyer may base changes in his communicative style in an effort to increase client and lawyer satisfaction. Just how the already-practicing lawyer is to go about learning the necessary skills we do not know. Proper communicative behavior cannot simply be left to chance; it must be taught. This leads to two separate problems: (1) What is to be taught?, and (2) Who is to be taught?

The Need for Further Research. As the references we have cited indicated, some good research work has been done in the field of physician-patient interaction. Very little research, however, has been done on lawyer-client interaction. Specifically, future research should probe the achievement of goals in the professional relationship. With the exception of research to determine how well medical patients follow instructions, most research has not focused on the behavioral results of the physician-patient interaction. It is not enough to know that a patient or client was or was not satisfied: We need to know how his reaction to the interaction affected his subsequent behavior. As we have pointed out, while there is reason to suspect that poor communicative behavior results in malpractice litigation, there is little empirical evidence. As one writer put it, the malpractice crisis is "an epidemic without statistics."[105]

---

104. As C.P. Snow has written:

> You can't teach wisdom. You certainly can't teach empathy. Yet, if the potentiality of empathy exists in anyone, then it can be encouraged by those who have possessed it and have tried to express it in words.
>
> That is why I am inclined to think that there ought to be a literary component throughout the course of medical education.

Snow, *Human Care,* 225 J.A.M.A. 617, 618 (1973).

105. Bernzweig, *Lawsuits: A Symptom Not a Cause,* TRIAL, Feb./Mar. 1970, at 15.

Further research is needed to test the causal hypothesis we and others have advanced. We suggest as one research technique that studies be made of the communications techniques of physicians and lawyers who have been sued more than once and of patients and clients who have instituted malpractice litigation—especially those who have done so more than once. Then both of these study groups should be compared with control groups in order to determine whether or not communicative behavior is an important variable and, if so, the ways in which it is important. Folklore has it, for example, that "country" doctors and lawyers are sued *much* less frequently than their city counterparts. Is this true? If so, why? And how may the differential rate of suit between various medical specialities be explained?

Much more research will remain to be done when and if destructive communications patterns are isolated. Presumably, those who engage in litigation-prone communicative behavior do not do so from choice. What are the possible solutions? Should potential lawyers be screened for poor communicative personality? Should clients? Is increased training the answer? What kind of training? These are both practical and political problems, and they are not easy ones.

This is not the place to specify the details of this kind of research. It is clear to us that such research would be fruitful, not only for law but for medicine and all other service professions. Because of the folk-popularity of our hypothesis, even research that proved it erroneous would be valuable by directing attention to other causal factors.

Law School Training in Communication Skills. In our opinion the best prospect for successful communication skill development is the law student—in the institutional setting of the law school. There he can receive formal instruction and simulated clinical experience with the assistance of technological developments such as instant replay videotape.[106] That is not to say that the law schools are now prepared to undertake this task or would be enthusiastic about doing so. The present student selection process used by law schools does not bear on the communicative qualifications of aspiring students or test their potential abilities as client counselors. The LSAT examination currently used measures logic, reading comprehension, and reasoning. Other indices

106. *See* Whitman & Williams, *The Design of Videotape Systems for Legal Education,* 1975 B.Y.U.L. REV. 529.

of probable success in human relations, such as motivation, psychological adjustment, empathy, and communication skill are usually not tested by written test, personality profile, or personal interview.

Like law students, until very recently no medical student was told how important his interaction with a patient could be or how to communicate more effectively with the patient. Most still are not told. Senator Ribicoff recounts asking a professor of internal medicine what in his view was the single greatest flaw in American medical education. He replied, "We never teach our students the most important part of medicine. We never teach them what it's like to be a patient. So they go out into practice not knowing what patients really need and why they are so upset with us."[107] Medical students, he said, rarely learn what medicine looks like from the bottom up because their professors make little effort to leave the ivory tower. The same thing is substantially true of most law students and professors.

Law students have too few opportunities to develop human relations skills. Few law schools even provide counseling service to assist the student in his own personal and emotional adjustment or to help him understand and achieve satisfying interpersonal relations.[108] The usual law school emphasis is on theoretical concepts of law. Rarely are a client and his problems treated as important legal concerns. No real effort is made to teach interpersonal skills.[109]

The expression of need for law school training does not discount the great skill thousands of lawyers have acquired in practice. This cumulative experience is a resource upon which the law schools should draw. The sharing of the client counseling experiences of practicing lawyers should also be encouraged in continuing legal education programs so that lawyers will be able to deal more effectively with their clients. There is a great and present need for systematic, penetrating, and sustained study of the way in which this kind of training can best be provided.[110]

---

107. A. RIBICOFF, *supra* note 10, at 188-89. *See also* Jason, *The Relevance of Medical Education to Medical Practice*, 212 J.A.M.A. 2092 (1970).

108. *See* H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING 98 (1972).

109. *See id.* at 99; Galinson, *Interviewing, Negotiating, and Counseling*, 27 J. LEGAL EDUC. 352 (1975).

110. Katz, *supra* note 22, at 385. *See generally* A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS (1976); Galinson, *supra* note 109; Goodpaster, *The Human Art of Lawyering: Interviewing and Counseling*, 27 J. LEGAL EDUC. 5 (1975).

For the proposition that communication skills should be part of professional educa-

tion, see Cline & Garrard, *A Medical Interviewing Course: Objectives, Techniques, and Assessment,* 130 AM. J. PSYCH. 574 (1973); Jason, Kagan, & Werner, *New Approaches to Teaching Basic Interview Skills to Medical Students,* 127 AM. J. PSYCH. 1404 (1971); Raimbault, Cachin, Limal, Eliacheff, & Rappaport, *supra* note 68 at 404; Sacks, *Human-Relations Training for Law Students and Lawyers,* 11 J. LEGAL EDUC. 316 (1959).