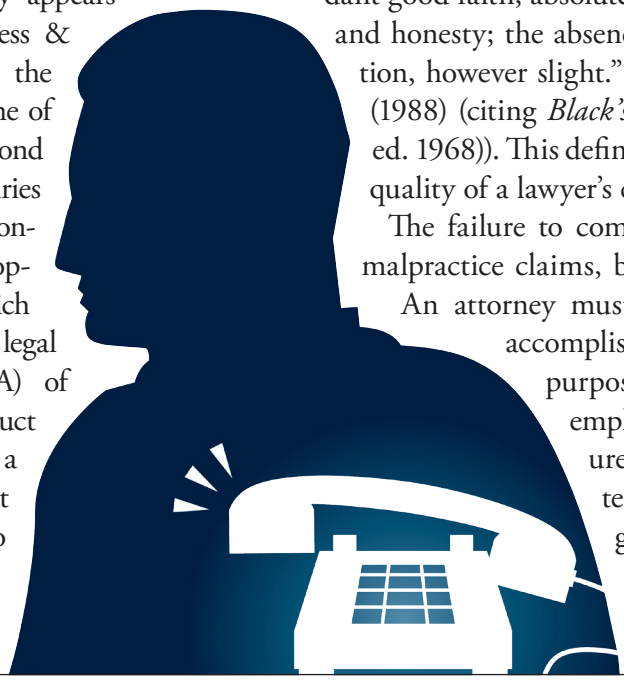
Robert K. Sall
Ethically Speaking

Communication
—An Essential Skill to Avoid Malpractice Liability and Discipline

What we've got here is failure to communicate. Readers of the era will likely remember that poignant line delivered by the "Captain" (played by Strother Martin, Jr.) to the hapless "Luke" (played by Paul Newman) in Stuart Rosenberg's 1967 film classic, "Cool Hand Luke." A prisoner on the chain gang, Luke's inability to communicate respect for the officers in command ultimately led to his demise. With sometimes devastating consequences, such a failure to communicate is an all too common problem in attorney-client relationships. Lack of communication between lawyer and client not only impairs the trust and confidence that is essential to a functioning attorney-client relationship, it can also lead to liability for legal malpractice.

Effective lawyers maintain good client relations and communicate openly with their clients, exercising complete candor. So important is the obligation to communicate with our clients that the duty actually appears twice in our ethical rules. Business & Professions Code § 6068(m) in the State Bar Act provides that it is one of the duties of an attorney "to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services." Likewise, rule 3-500(A) of the Rules of Professional Conduct provides: "A member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." (Rule 3-500 will be renumbered as Rule 1.4 in a pending revision to California's Rules of Professional Conduct, awaiting approval from the California Supreme Court.)



California cases concerning lawyer liability and conduct establish the lawyer's duty of utmost loyalty and good faith in plain Latin, readily understandable by most lawyers. All kidding aside, it is well established in oft-quoted, venerable authorities such as the Supreme Court's 1893 decision in *Cox v. Delmas*, that "[t]he relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity—*uberrima fides*." *Cox v. Delmas*, 99 Cal. 104, 123 (1893). *Uberrima fides* entails not only fidelity but the concomitant duties of communication and candor as well. As noted in *David Welch Co. v. Erskine & Tulley*, *uberrima fides* means "[t]he most abundant good faith; absolute and perfect candor, or openness and honesty; the absence of any concealment or deception, however slight." 203 Cal. App. 3d 884, 890 n.2 (1988) (citing *Black's Law Dictionary* 1690 (Rev. 4th ed. 1968)). This definition is the standard by which the quality of a lawyer's communications will be judged.

The failure to communicate may not only lead to malpractice claims, but is also a cause for discipline. An attorney must use his or her best efforts to accomplish with reasonable speed the purpose for which the attorney was employed, and it is settled that failure to communicate with, and inattention to the needs of, a client are grounds for discipline. *Butler v. State Bar*, 42 Cal. 3d 323, 328 (1986). The timing and degree of communication required

can vary with the circumstances of a case. For example, in one California Supreme Court decision, an attorney was disciplined for the failure to give a client "reasonable notice" of the client's scheduled deposition. *Wells v. State Bar*, 36 Cal. 3d 199, 208 (1984). The attorney received several deposition notices, and was eventually aware that the client's deposition had been rescheduled to occur in six days. The attorney had not effectively informed the client of the notices, and the client ultimately complained that she had only three days' notice of the deposition. The court concluded that in light of the short notice for the rescheduled deposition, "culpability appear[ed] in that . . . [the attorney] did not notify his client as soon as he should have." While the culpability in this instance was relatively minor, the fact that the attorney had been disciplined twice previously influenced the court's decision to suspend him.

Discipline can also result even where the failure to communicate with a client is "not willful, but due in large part to a breakdown in office procedures." *Id.* at 208 (finding failure to return client calls was attributable to inadequate supervision of secretary); *see also Spindell v. State Bar*, 13 Cal. 3d 253, 259-60 (1975) (finding a "willful dereliction" in the discharge of professional duties to communicate with the client about her case). The failure of a secretary to provide the attorney with telephone messages and correspondence from the client did not mitigate the failure to communicate because an attorney has a duty to supervise employees. The prudent attorney, then, must not only reach out to communicate with a client, but must ensure that the client is able to reach the attorney via adequately trained and supervised office staff.

A failure to properly communicate with a client can also provide independent evidence to support a finding of willful wrongdoing. For example, in *Chefsky v. State Bar*, an attorney was disciplined for misconduct that included the misappropriation of client funds that went missing from his trust account. 36 Cal. 3d 116, 123-24 (1984). In addition to finding that the attorney had failed to properly communicate with his client, the court relied on the attorney's repeated failure to respond to the client's requests for information about the status of the trust funds to determine that the misappropriation of those funds was willful. Thus, the act of failing to respond and communicate to the client enhanced the disciplinary consequences.

Clients who go months without hearing from their lawyers and then suddenly get a large bill are among the most likely to complain.

One of the most common results of civil litigation is settlement. Most lawyers and clients would consider an offer of settlement in a civil matter to be a very significant development. Rule 3-510(A)(2) explicitly requires a member of the bar in civil matters to "promptly communicate . . . [a]ll amounts, terms, and conditions of any *written* offer of settlement made to the client" (emphasis added). *See also* Bus. & Prof. Code § 6103.5 (requiring the same). While rule 3-510 explicitly refers only to *written* offers in the civil context, would anyone credibly argue that a lawyer has no duty to communicate to the client an *oral* offer of settlement? It would seem to be a thin defense to a malpractice action that a lawyer lost a case at trial after failing to communicate an offer of settlement simply because it had not been presented in writing.

Communication with clients is critical to any matter that might be significant. Lawyers should communicate with the client about the status of their litigation matters, the pros, the cons, the legal risks, available legal options, the possibilities for settlement, mediation and alternative dispute resolution, the possible or probable costs of taking a certain course of action, risks of loss, risks of appeal, and risks of post-trial proceedings. The list is almost endless, yet some lawyers fail to give enough consideration to communicating necessary information. Clients sometimes go to trial without having been informed that an award of costs will be made against them if they lose. On occasion a client is surprised to find out that an attorney's fee award is going to be made against the client, when he or she did not even know it was a risk. Other clients are surprised to find that their very expensive expert witness fees are not recoverable, even though they won the case. Many clients do not understand how attorney's fees awards work or how Code of Civil Procedure section 998 may be applied as a cost-shifting mechanism that can either be a benefit or a substantial risk. Unsophisticated clients, in particular, are likely to

never know those risks unless their lawyers properly advise them.

Lawyers should not assume that clients are aware of legal risks. For example, clients may be unaware that email communications the client sends from an employer's computer could be subject to a waiver of attorney-client privilege where the employer has a policy that personal communications made on business computers are not confidential. Prudence dictates that attorneys communicate the possibility that such a policy could lead to a waiver of privilege, thus making the attorney-client communications discoverable. *Holmes v. Petrovich Dev. Co., LLC*, 191 Cal. App. 4th 1047 (2011).

Lawyers don't represent clients exclusively through advocacy. Lawyers also must render advice, and that obligation is met only through communication skills. Where relevant to the circumstances, lawyers must research and then explain to the client the risks of taking one position or another, the available options, and the possible or probable consequences of electing one course of action over another, or the pros and cons of each. Frank discussion with a client about the reasonably available alternatives under a particular set of facts is essential to any lawyer's fulfillment of duty.

Giving advice to the client with complete candor means that such advice should deliver both the good news and the bad. This includes the duty to volunteer opinions—even those that may be outside the scope of representation—where such advice is necessary to further the client's objectives or to avoid the possibility of adverse consequences. *Nichols v. Keller*, 15 Cal. App. 4th 1672, 1683-84 (1993).

So broad is the duty to communicate that a lawyer must even inform a client of the relevant facts when an attorney has erred. "Attorneys have a fiduciary duty to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice." *Beal Bank SSB v. Arter & Hadden LLP*, 42 Cal. 4th 503, 514 (2007).

Lawyers should adopt office and staffing procedures for regular communication with their clients. Keeping clients apprised of the status of their matters will foster better communication and trusted client relationships. One example of such regular communication could be a monthly letter that accompanies the billing statement. A well-written status report is useful to soften the blow of a large invoice or explain the reasons for the charges. Clients who go months without hearing from their lawyers and then suddenly get a large bill are among the most likely to complain.

Another method of communication is to provide sufficient detail in the billing statements so that the client can readily discern the services being performed. A vague entry such as "telephone calls and emails" is a lot less likely to convey the importance or the value of the services being performed than a detailed entry that identifies the persons on the call, the subject of the discussion, the reasons for the services, and the amount of time spent.

Before a significant, costly motion is brought, communication with the client about the necessity for the motion, the legal alternatives, the chances of success, and the projected cost will go a long way toward avoiding sticker shock or angst by a client over the lack of information about a particular case.

Even the most basic level of communication, a periodic telephone call, is essential to client relations. One of the most common client complaints about lawyers, frequently number one on the list, is that he or she fails to return telephone calls or respond to emails.

Communication is a skill that is developed over time, and improves with experience. It is never too late to improve your communication skills. An informed client is more likely to be a satisfied one. Finally, if the advice is worth giving, it is generally worth putting it in writing. The Rules of Professional Conduct may not always require a writing, but prudence and good business practices suggest that important advice delivered orally should also be confirmed in writing. Not only is a writing a permanent record that the advice was given, it adds a measure of significance to the client and allows for emphasis in a way that the client is less likely to ignore or forget.

Robert K. Sall *is a shareholder with The Sall Law Firm, APC in Laguna Beach. He is a member of the OCBA's Professionalism and Ethics Committee, and lectures frequently on lawyer conduct, legal ethics, and malpractice. He can be reached at rsall@sall-lawoffice.com.*

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