MANAGEMENT of Client EXPECTATIONS

By Mark E. Goodman
Looking back on 41 years of practicing law, I have a clear vision of both ecstatic and disgruntled clients. This is, after all, a service profession, dependent on problem solving and resolution of real and perceived grievances.

Success has many measurements (what everyone now calls metrics), but none greater than fulfilling the expectations of each person or entity that pays the bill. Setting unreal and ill-conceived expectations can poison an attorney-client relationship and lead to discomfort and inability to function effectively.

Litigation, in particular, is a fluid and amorphous process, subject to shifts in strategy based on constant flows of information and events – not the least of which are the actions and reactions of opponents and the men and women who don the black robes.

Clients must be involved and informed to keep the process functional and manageable. This article will provide some guidance in navigating the land mines of client expectations with the goal of providing an atmosphere conducive to resolution of conflict in a satisfactory manner. It will also highlight some important ethical considerations relating to Rules 4-1.4 (Communication) and 4-1.5 (Fees).

THE FIRST STEP: UNDERSTANDING THE PROBLEM AND PROVIDING COMFORT

Without overstating the obvious, the legal profession exists to assist people in resolving problems with one another and government entities, and providing structures for business and personal affairs. Like talented musicians, good lawyers have a “trained ear” for assessing factual situations and articulating problems and solutions. Ideally, clients should have no expectations as to courses of actions, but in most cases there are preconceived notions that a particular problem should be resolved without regard to legal and factual obstacles.

I have learned that fear of the unknown is a reality that can and should be applied to setting the tone for a good working attorney/client relationship. Human nature is such that if there is a calm, patient and thought-out explanation of the process – including potential problems – an atmosphere of trust and confidence will prevail. So, at the first juncture, there needs to be a frank discussion of the various categories of hazards: legal, factual and economic. It is impossible to plan an offensive or defensive game plan without regard to consideration of “the other side of the ball.” Clients need to be a part of that discussion.

In addition, expectations regarding fees are most important at the outset. I often have a frank discussion about the cost of litigation with inexperienced clients, indicating that it is difficult to estimate cost, as much of what happens in a lawsuit has to do with how the opposition behaves and reacts. Detailed discussions about discovery, motion practice and experts are crucial and a huge part of expectation management. Clients need to also understand how litigation is handled internally in a firm.

Rule 1.5 and its comments underscore the necessity of communicating the scope and basis or rate of the fee and expenses for which the client will be responsible. While this rule does not mandate a written agreement, it is by far the best practice to memorialize the relationship and fee basis.

Our engagement letters detail the “teamwork” approach and who will be responsible as “captain.” It is important to explain how various tasks will be performed, by whom, and the reasons for division of labor. This will provide some comfort and minimize the need to explain billing statements generated during the course of representation.

COMMUNICATION: REGULAR AND HONEST

Given the fluidity of litigation, it is important to continually evaluate information and formulate strategies accordingly. The best practice, in most instances, is to involve clients as much as possible – again, with an eye toward sensitivity to expectations. In addition, Rule 1.4 and its comments underscore the necessity and reasoning behind “reasonable” and timely communication.

With regard to factual issues, clients should be educated on how discovery works and briefed on what knowledge is acquired, or not, and its significance. Similarly, if discovery yields information that impacts legal theories pled or creates an opportunity to add additional theories, the client needs to be informed. Not to overuse the medical metaphor, but when a patient is informed about medical conditions, available therapies and likelihood of success, anxiety levels become more manageable. The same is true of litigation.

COST-BENEFIT ANALYSES: TACTICAL AND ECONOMIC

At the outset of establishing a good working litigation relationship, there needs to be a framework established to
continually evaluate strategic moves from both tactical and economic perspectives. For example, it should be apparent in most cases if and when the engagement of an expert is necessary to establish a crucial element of a cause of action. If this is the case, the client must understand the need and necessity and how this will impact cost. In some instances, for strategic reasons, an expert may be required to assist the lawyer not only in providing needed testimony but also to serve as a consultant to design discovery and help with the presentation of evidence at trial.

Economic considerations should be discussed with the client at all stages. Again, our engagement letters contain language indicating the client will be consulted if expenditures exceed a certain dollar amount. Regular correspondence by letter or e-mail should be standard operating procedure. In addition, effective litigation management should include face-to-face or telephonic meetings on a regular basis to make sure information is communicated and understood.

Decisions will most likely have to be made on strategic moves and overall conduct, as well as continuation of litigation based on financial considerations. While some clients are sophisticated and experienced, and can budget when given appropriate information, many clients will depend on you to guide them through the thicket of a cost-benefit analysis.

SETTLEMENT AND LITIGATION

In most instances, parties to litigation are afforded opportunities to resolve their differences informally or through mediation. Settlement is a topic that also needs to be discussed from the outset and continuously revisited during the course of litigation. Importantly, clients’ expectations need to be considered and managed by discussing resolution potentials and the ramifications at all stages. If informal settlement discussions occur, the client should stay well-informed and participate as much as possible. In the event mediation is chosen, there needs to be extensive preparation – both in involving the client in the preparation of a memo for the mediator and in explaining the process and what to expect. Don’t leave it for the mediator to explain to your client the morning of the mediation event.

If a matter progresses to trial, the expectation management protocol is elevated to an even higher level. Clients need to understand all aspects and nuances of the trial procedure, from appropriate dress and demeanor to submission of jury instructions. Knowledge is the best antidote to anxiety and fear of the unknown. A dress rehearsal for testimony is an advisable investment to spend adequate time educating the client about what to expect during a trial, both substantively and procedurally.

MANAGEMENT OF EXPECTATIONS: KEY TO RELATIONSHIPS WITH CLIENTS

My experience is that if a client feels informed and part of the process, he or she will feel satisfied with services received even if the result is not a good one. Conversely, if expectations are grandiose and unrealistic, it is often because they have not been properly attended to along the way. Certainly, the mark of a good counselor is to evaluate and advise but not be afraid to deliver bad news if warranted. Do not underestimate your client’s ability to handle the truth. Knowledge is a powerful tool. Impart it and ensure that your client is your best ally.

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