

WHAT DO CLIENTS WANT FROM THEIR LAWYERS?

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Part 2

III. COMMUNICATIVE COMPETENCE AS A GOAL FOR LAW SCHOOLS AND LAW FIRMS

For most lawyers, the core of their professional work is found neither in legal research nor courtroom advocacy but in their relationship with clients. However, the client survey information and social science data reported above suggest clients of lawyers in many settings are often fundamentally dissatisfied with the legal services they receive because their attorneys do not appear to value the importance of good communication or simply lack necessary communication skills.⁵⁸ Much of the blame for this problem can be assigned to law schools, where lawyer-client communication is rarely given a central place in the curriculum.⁵⁹ Despite frequent marketing claims that law firms “put the client first,”⁶⁰ competence in client communication is often not part of firm training programs or criteria for advancement.

A. What Can Law Schools Do?

1. Easy Initiatives

In the so-called “Socratic classroom,” the teacher in effect plays the role of an appellate judge, placing students in the role of appellate counsel who state the relevant facts, apply rules and precedent, and answer hypothetical variants on the fact pattern posed by the teacher-judge. This role-playing approach is generally praised as both promoting student engagement in the substantive material and teaching students how to “think like a lawyer.”⁶¹—though this pedagogy might more appropriately be described as learning how to “speak like a lawyer,” specifically a lawyer talking to a judge.

⁵⁸ Close analysis of individual case studies provide further insight into the challenge of effective lawyer-client communication. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1346 (1992); *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2460 (1989), and sources cited therein.

⁵⁹ In 2010 the Section of Legal Education and Admissions to the Bar of the American Bar Association (ABA) conducted a comprehensive survey of law school curricula. Although 116 schools reported offering a course on interviewing and counseling, no school required that the course be taken in order to satisfy the ABA’s requirement that each student receive substantial instruction in professional skills generally regarded as necessary for effective and responsible participation in the legal profession. SEC. OF LEGAL EDUC. ADMISSIONS TO THE BAR, A.B.A., *A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010*, 41, 75 (Catherine L. Carpenter ed., 2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf. No school included interviewing and counseling as one of the courses it highly recommended that students take; notably only 25% of schools highly recommended a clinical experience, which is another course in the curriculum likely to devote substantial emphasis to lawyer-client communication. *Id.* at 68. Although 140 schools reported teaching professional skills other than legal research and writing in the first year “research and writing course,” less than one third of those schools included interviewing or counseling among the “other professional skills” that were taught. *Id.* at 60.

⁶⁰ According to the BTI report, “Most advertising . . . has little or no impact on clients’ impressions of a law firm. 43.3% of corporate counsel report that they remember nothing about the law firm whose ad they saw most recently.” HOW CLIENTS HIRE, FIRE AND SPEND, *supra* note 2, at 57.

⁶¹ See, e.g., WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 47-86 (2007); ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

This traditional method of classroom teaching can be easily enhanced by having the teacher sometimes take the role of a client rather than a judicial interrogator. The teacher could ask a student to explain to her how facts (e.g. taken from an appellate decision but treated as communicated by the client) give rise to a possible cause of action. A student could be presented with a complaint or contractual offer and asked to explain to the teacher, who takes the role of the defendant or recipient of the offer, possible defenses to the complaint or the proposed obligations stated and implicated by the offer. Simulating a discussion whether to make or accept a settlement offer also offers rich teaching opportunities. Each of these role plays requires the student to demonstrate understanding of relevant legal concepts to an extent similar to “Socratic teaching” but further emphasizes and promotes development of skills rarely emphasized in law school: listening to a client and explaining legal concepts accurately in language that the client can understand.⁶²

A slightly more complex teaching exercise that could be added to any class, and especially appropriate during the first year, is based on the research methodology discussed above and used by Hillary Sommerlad for the study commissioned by Law Society of England & Wales.⁶³ Students are given the following instructions:

Find a person you know fairly well who is not a lawyer (such as a family member or neighbor) who has used a lawyer in the past and was dissatisfied in some respect. You are required to contact up to three people for this project. (If you have not been able to find a person who has been dissatisfied with a lawyer after three attempts, you may satisfy this assignment by certifying that you have contacted three people.) When you find someone who has been dissatisfied in some respect with a lawyer in the past, ask simply: "Was there any particular reason why you were dissatisfied?"⁶⁴

Particularly in a small class, the results of the students' own research can be discussed. In a larger class, the use of free online survey software to record and analyze the responses is recommended.⁶⁵ If students also record the gender and approximate age of the person surveyed, along with choosing among a small set of case categories,⁶⁶ then the reasons given can be sorted by gender, age, and type of case. In the professional responsibility course where this exercise has been used over a number of years, students are put into discussion groups and given one subset of responses (e.g. men, older person, transactional cases) to review for common themes. The students have found that, consistent with the social science data reported above (which is assigned reading for the course), neither outcome nor cost are the most frequently reports

⁶² See, e.g., Clark D. Cunningham, *How to Explain Confidentiality?*, 9 CLINICAL L. REV. 579, 598 (2003) (hereinafter *How to Explain*) (simulation exercise in professional responsibility that requires students to explain to a client in an initial meeting the duty of confidentiality, and its exceptions, under the rules of professional conduct, in a way that is both accurate and comprehensible to the client).

⁶³ See generally Law Society, *supra* note 36.

⁶⁴ Clark D. Cunningham, *Causes of Client Dissatisfaction*, INT'L F. ON TEACHING LEGAL ETHICS & PROF. (July 15, 2010, 6:01 PM), <http://www.teachinglegalethics.org/causes-client-dissatisfaction> .

⁶⁵ <http://www.teachinglegalethics.org/causes-client-dissatisfaction><http://www.teachinglegalethics.org/causes-client-dissatisfaction>*Id.* (providing sample survey: <http://www.surveymonkey.com/s/ClientDissatisfaction>www.surveymonkey.comwww.surveymonkey.comwww.surveymonkey.com).

⁶⁶ See *id.* at 4 (including in survey report case categories of divorce, other family, residential sale/purchase, wills & estates, traffic, criminal (non-traffic), personal injury, business, and other).

complaints.⁶⁷ Instead, issues relating to communication always dominate regardless of gender, age, or type of representation.⁶⁸

2. Modest Initiatives

Slightly more ambitious projects than the two “easy” initiatives described above would be to incorporate into required “research and writing courses,” as well as other courses, client communication writing assignments such as an engagement letter stating the scope of representation or a letter explaining the pros and cons of a settlement offer.

Simulations of client meetings can also be enacted during a traditional class, with students playing both lawyer and client role⁶⁹ or the teacher playing the client role;⁷⁰ this teaching method is particularly appropriate for courses in professional responsibility.⁷¹

3. Ambitious Initiatives

In recent years, both Scotland⁷² and England⁷³ have pioneered the use of performance-based assessment—first developed through decades of rigorous research in medical education⁷⁴—in order to employ a valid and reliable test for a law licensing requirement that the applicant demonstrate competence in basic client interviewing skills. The key to these assessment methods is the use of a “standardized client,” a paid layperson—often an actor—who is carefully trained not only to present the “same” client in recurrent interviews by different candidates but also to perform much of the actual evaluation of competence, particularly issues where a lay person’s reaction is inherently valid—such as whether the client understood what the lawyer was saying.⁷⁵

Passing a standardized client assessment is now part of an innovative bar exam alternative approved by the Supreme Court of New Hampshire. Students at the University of New Hampshire School of Law who complete a special honors program in the second and third years are now being granted bar admission immediately upon graduation if they are certified to be “client-ready.”⁷⁶ The primary component of this certification is the on-going review during the two year program of each student by specially designated bar examiners.⁷⁷ However, the

⁶⁷ Data on file with author.

⁶⁸ Clark D. Cunningham, *Impressions of Lawyers in the Community*, INT’L F. ON TEACHING LEGAL ETHICS & PROF. (July 3, 2010, 10:29 PM), <http://www.teachinglegaletics.org/impressions-lawyers-community> (webcast of workshop presentation describing use of client survey exercise in professional responsibility course and reporting results).

⁶⁹ *How to Explain*, *supra* note 62, at 595 – 615.

⁷⁰ *See, e.g.*, Clark D. Cunningham, “How Can We Give Up Our Child?” A Practice-Based Approach to Teaching Legal Ethics, 42 L. TCHR.: INT’L J. LEGAL EDUC. 312, 320 –328 (2008) (hereinafter *Teaching Legal Ethics*), available at <http://ssrn.com/abstract=1498676>.

⁷¹ *See, e.g., Id.*; *How to Explain*, *supra* note 62, at 590.

⁷² *See Valuing What Clients Think*, *supra* note *.

⁷³ *See* Eileen Fry et al., *The Qualified Lawyers Transfer Scheme: Innovative Assessment Methodology and Practice in a High Stakes Professional Exam*, 46 LAW TCHR.: INT’L J. LEGAL EDUC. 132 (2012).

⁷⁴ *See Valuing What Clients Think*, *supra* note *, at 2–3.

⁷⁵ *Id.* at 2–4.

⁷⁶ Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 506–512 (2011).

⁷⁷ *Id.* at 510–511.

certification now also requires passage of a standardized client assessment designed on the model of the testing methodology used in Scotland.⁷⁸

B. What Can Law Firms Do?

1. Easy Initiatives

Law firms can communicate to rising associates the importance of the client relationship and the challenge of effective communication by adding the observation of client meetings as part of formal associate training. Just as beginning lawyers observe experienced attorneys conduct depositions, cross-examine witnesses, and negotiate, they should also engage in structured observation of lawyers who have exemplary client-relationship skills. Mentors should explain their plan for conducting the client meeting in advance and then debrief with the observers after the meeting, encouraging the observers to offer their own analysis of the meeting before the mentor discusses how the actual meeting might have differed from the plan. The mentor might also share his or her impression of how the client experienced the meeting.

Firms could also routinely set aside a few minutes at the outset of an initial meeting with a new client to ask a variant of Sommerlad's research question:⁷⁹ "Have you been in any way dissatisfied with a lawyer who has represented you in the past? If yes, please don't identify the lawyer or law firm, but just tell me what caused you to be dissatisfied." Asking this question communicates to the client that the law firm wants to understand how legal representation is experienced from the client's point-of-view and signals the firm's commitment to client-centered lawyering.⁸⁰ This practice will allow a firm to learn "what clients want from their lawyers" through the firm's own first-hand inquiry, tailored to their specific client base. The client's responses should serve as a useful guide for representing that client. Recording those responses in a firm database would assist other lawyers involved with that client in any current and future matters and, if many clients are queried, the database can be analyzed to identify patterns of client dissatisfaction specific to the firm's practice areas.

2. Modest Initiatives

According to a recent Martindale-Hubbell survey of senior corporate counsel employing firms in Western Europe, over half said their outside law firms never did a client satisfaction survey with them.⁸¹ Only 15% of the corporate counsel said surveys were regularly conducted.⁸²

⁷⁸ *Id.* at 509–510. For additional information on the development of the standardized client methodology in Scotland and its implementation in England and New Hampshire, see Clark D. Cunningham, *Performance-Based Evaluation of Lawyer-Client Communication: The Development of the Standardized Client Assessment*, INT'L F. ON TEACHING LEGAL ETHICS & PROF. (September 10, 2013, 3:55 PM), <http://www.teachinglegalethics.org/development-standardized-client><http://www.teachinglegalethics.org/development-standardized-client>

⁷⁹ Law Society, *supra* note 36, at 21.

⁸⁰ At the request of one major firm, I conducted confidential interviews with a number of their commercial clients and began by asking this question. During the interview I also asked how the client would feel if a lawyer began a first meeting with this question. With the caveat that some would want assurance they were not being billed for this discussion, all said they would feel comfortable responding to such a question and that they would have a favorable opinion of the lawyer for asking it.

⁸¹ Heaney, *supra* note 21, at 13.

⁸² *Id.*

However over 90% said they would participate in client satisfaction surveys if asked to do so.⁸³ The need for systematic client feedback is strongly suggested by BTI's report that most large law firms did not recognize their clients were dissatisfied until it was too late and that law firm self-perceptions are rarely shared by the marketplace.⁸⁴

Perhaps the most common method used by large law firms to measure client satisfaction is to conduct an annual informal discussion between the client-relationship partner at the firm and the top client representative—typically the General Counsel. Unless the General Counsel herself has in place a systematic procedure for reporting to her all unsatisfactory interactions with outside counsel, such conversations are not likely to capture all of the events in the past year in which a firm's lawyer could have been a better communicator. This is particularly so for communications between a lawyer and lay employees of the client, especially employees below the top executive level. Furthermore, if the decision has already been made by the client to shift business to another firm, the client has little incentive to provide feedback to the current, unsatisfactory firm.⁸⁵

Limitations also exist with another common method: sending a written client satisfaction survey at the conclusion of the matter. Response rates to such surveys can be low and either very satisfied or very dissatisfied clients can be overrepresented. Measuring client satisfaction only at the end of a matter can encourage firms to dismiss indicators of dissatisfaction as merely resulting from an outcome that was below the expectations of the client but not the fault of the lawyers—reinforcing the misperception that client dissatisfaction is driven by outcome.

Firms can supplement end-of-matter surveys with an additional method that can produce both a 100% response rate and results that are not skewed by outcome. The simple method is to ask clients to fill out a short survey immediately after the initial client meeting, ideally before leaving the meeting room. The Effective Lawyer Client Communication Project⁸⁶ has developed such a form applicable to a wide variety of practice settings after extensive pilot project development. A copy of this form is appended⁸⁷ and may be freely used for noncommercial purposes as long as proper attribution is provided. The usefulness of this method is enhanced if the lawyer conducting the initial meeting also fills out a parallel form in which the lawyer predicts the client's responses to the same questions.⁸⁸ For example, Question 2 on this form asks whether the lawyer said things the client did not understand. Obviously if the client says "yes" to this question, the client is right, which by itself makes the response of considerable importance since the lawyer never wants to say things to the client that the client cannot understand. The method produces even more important information if the lawyer states on her form that that the lawyer expects the client to say she did understand everything. This mismatch between client and lawyer evaluation of the initial meeting indicates a need to the lawyer and her supervisors for

⁸³ *Id.*

⁸⁴ *Supra* note 2 and accompanying text.

⁸⁵ In my confidential interviews with one firm's commercial clients, discussed above, *supra* note 80, I asked the clients whether they had told the prior firms about their dissatisfaction. With one exception, they had not; their general response was that they had a number of comparable firms to draw from and saw no reason to help the firm that they were going to leave, nor any reason to risk the firm's irritation. The one client who had communicated her dissatisfaction with the prior firm's supervising partner received an unsatisfactory response, reinforcing her decision to stop using that firm.

⁸⁶ See *Evaluating Effective Lawyer-Client Communication*, *supra* note *, at 1964-67; *Valuing What Clients Think*, *supra* note *, at 6-12. The forms appended to this article provided the basis for development of the Standardized Client assessment instrument; see text accompanying note 70, *supra*.

⁸⁷ Appendix, Client Interviewing: The Client's View.

⁸⁸ Appendix, Client Interview: The Lawyer's View.

follow-up to determine what the client did not understand in order to maximize effective representation; the mismatch also provides important feedback as to the lawyer's need to be more self-reflective and self-critical as to the lawyer's communicative skills.

3. *Ambitious Initiatives*

Law firms with a strong commitment to providing "what clients want from their lawyers," would formally assess their lawyers' communicative competence as part of the training, retention, and promotion process. Client feedback could be one valuable source of information for such assessment.⁸⁹ Firms could also arrange for partners to observe and evaluate associates as they met with clients and/or review audio recordings of such meetings with client consent (easily accomplished in a non-intrusive way with an MP3 recorder the size of a thumb drive or a smartphone, e.g. the Voice Memo function on the iPhone).

An ambitious law firm program to maximize client satisfaction would use performance-based assessment both for training and evaluation, such as the Standardized Client methodology discussed above.⁹⁰ A number of large law firms in Scotland have supported the development of an assessment program that includes client-relationship skills operated by an independent professional body: The Society of Writers to Her Majesty's Signet—one of the world's oldest organizations of lawyers.⁹¹ This program accredits Scottish lawyers in specialist areas of practice early in their career and is thus intended to be similar to board certification in medicine. One component of the rigorous assessment is a videotaped simulation of an extended client meeting; the person playing the client is typically someone with actual experience in the business world relevant to the specialization being accredited. Recognized experts in the practice area carefully review the videotape using a variety of criteria including effective lawyer client communication.⁹²

IV. CONCLUSION

After decades of empirical research, the medical profession has concluded good doctor-patient communication is not only what patients want from their physicians but also leads to better health outcomes.⁹³ As a result—unlike the legal profession—effective communication is not only a standard component of the medical school curriculum but also must be demonstrated, through successful performance of a series of Simulated Patient assessments, in order to receive a medical license in the United States.⁹⁴ The legal profession has a long way to go to match this

⁸⁹ For example, one large healthcare provider collected patient satisfaction data on 160 physicians representing 25 specialty areas. Individual physicians received the survey results with information comparing their individual results with those of other physicians in the same department. The medical director and each department chair also reviewed the report as part of a comprehensive annual assessment process. *Evaluating Effective Lawyer-Client Communication*, *supra* note * at 1960. *See also*, Anemona Hartocollis, *New York City Ties Doctors' Pay to Care Issues*, N.Y. TIMES, Jan. 11, 2013, at A1 ("In a bold experiment in performance pay, complaints from patients at New York City's public hospitals and other measures of their care ... will be reflected in doctors' paychecks under a plan being negotiated by the physicians and their hospitals. ... The public hospital system has come up with 13 performance indicators. Among them are how well patients say their doctors communicate with them").

⁹⁰ *See* text accompanying notes 68–73, *supra*.

⁹¹ *See* Signet Accreditation Program, www.thesignetaccreditation.co.uk (last visited Aug. 17, 2013).

⁹² *Id.* *See also* *The Development of the Standardized Client Assessment*, *supra* note 78,.

⁹³ ROBERT C. SMITH ET AL., *PATIENT-CENTERED INTERVIEWING: AN EVIDENCE-BASED METHOD* 5 (3rd ed. 2012).

⁹⁴ *Valuing What Clients Think* *supra* note *, at 2–3.

level of commitment to assuring professional competence in communication, but the first step is the recognition that effective lawyer-client communication is not only an essential component of client representation but also the most important thing many clients want from their lawyers.

CLIENT INTERVIEWING: THE CLIENT'S VIEW

Scenario Reference _____

Name of Student Lawyer _____

Student Lawyer Registration No _____

This survey is being conducted in order to assess GGSL processes, not student performance. It will not be used in the assessment of any student. Your answers will not be shown to the student who interviewed you in the role of the lawyer, or any tutor involved in marking students.

For questions 1-10, please indicate how much you agree or disagree with each statement about the student who played the lawyer who interviewed you.

For each item, you may circle any number corresponding to the scale below.

-4	-3	-2	-1	0	+1	+2	+3	+4
strongly disagree		disagree		not sure		agree		strongly agree

The lawyer. . .

1. Made me feel comfortable.	-4	-3	-2	-1	0	+1	+2	+3	+4
2. Said things I did not understand.	-4	-3	-2	-1	0	+1	+2	+3	+4
3. Treated me with respect.	-4	-3	-2	-1	0	+1	+2	+3	+4
4. Did not understand what was most important to me.	-4	-3	-2	-1	0	+1	+2	+3	+4
5. Listened to me.	-4	-3	-2	-1	0	+1	+2	+3	+4
6. Did not explain what he or she would do next for me.	-4	-3	-2	-1	0	+1	+2	+3	+4
7. Was interested in me as a person.	-4	-3	-2	-1	0	+1	+2	+3	+4
8. Asked confusing questions.	-4	-3	-2	-1	0	+1	+2	+3	+4
9. Was someone I could trust.	-4	-3	-2	-1	0	+1	+2	+3	+4
10. Understood why I needed legal help.	-4	-3	-2	-1	0	+1	+2	+3	+4

For questions 11-13, please indicate how much you disagree or agree with each statement.

11. I did not say everything I wanted to say.	-4	-3	-2	-1	0	+1	+2	+3	+4
12. I know what I need to do next.	-4	-3	-2	-1	0	+1	+2	+3	+4
13. If I came back with a different need for legal help, I would want the same person to help me	-4	-3	-2	-1	0	+1	+2	+3	+4

CLIENT INTERVIEWING: THE LAWYER'S VIEW

Scenario Reference _____

Name of Student Lawyer _____

Student Lawyer Registration No _____

This survey is being conducted in order to assess GGSL processes, not student performance. It will not be used in the assessment of any student. Your answers will not be shown to the student you interviewed in the role of the client, or any tutor involved in marking.

For questions 1-13, please respond by imagining how the *client* would respond if asked the question. We realise this is a difficult task and may involve some guessing on your part.

For each item, you may circle any number corresponding to the scale below.

-4	-3	-2	-1	0	+1	+2	+3	+4
strongly disagree		disagree		not sure		agree		strongly agree

The client. . .

1. Felt comfortable.	-4	-3	-2	-1	0	+1	+2	+3	+4
2. Did not understand some things I said.	-4	-3	-2	-1	0	+1	+2	+3	+4
3. Felt treated with respect.	-4	-3	-2	-1	0	+1	+2	+3	+4
4. Felt as if I did not understand what was most important to him or her.	-4	-3	-2	-1	0	+1	+2	+3	+4
5. Felt like I listened well.	-4	-3	-2	-1	0	+1	+2	+3	+4
6. Felt like I did not explain what I would do next for him or her.	-4	-3	-2	-1	0	+1	+2	+3	+4
7. Felt like I was interested in him or her as a person	-4	-3	-2	-1	0	+1	+2	+3	+4
8. Thought I asked confusing questions.	-4	-3	-2	-1	0	+1	+2	+3	+4
9. Trusted me.	-4	-3	-2	-1	0	+1	+2	+3	+4
10. Thought I understood why he or she needed legal help.	-4	-3	-2	-1	0	+1	+2	+3	+4
11. Did not say everything that he or she wanted to say.	-4	-3	-2	-1	0	+1	+2	+3	+4
12. Knows what he or she needs to do next.	-4	-3	-2	-1	0	+1	+2	+3	+4
13. Would want me to help him/her, if they came back with a different need for legal help.	-4	-3	-2	-1	0	+1	+2	+3	+4