



BACK TO BASICS

BY MARCIA A. JOHNSON

“Neglect and noncommunication go hand in hand.”

Despite whatever progressive educational courses might be offered at local schools, the foundation for even the most futuristic learning depends on mastery of the old fashioned three R's — the basics. The profession of law also has its ethical basics, its commandments, its primary tenets that must be learned and “relearned” over the years of practice. This article will address two of the basics of ethical practice:

1. Do not neglect your client's case; and
2. Communicate adequately with your client.¹

Neglect and noncommunication go hand in hand. Together, they account for approximately 35 to 40 percent of all the disciplinary complaints received, year after year after year. Call it job security for the discipline system. An inquiry into what causes these problems reveals as many reasons as there are lawyers who fall into their trap. A review of some of the common problems, coupled with the client complaints that ensued, may assist practitioners to review and “relearn” the basics.

COMMON PROBLEMS

INADEQUATE OFFICE MANAGEMENT POLICIES/CLIENT EDUCATION. Failure to pay attention to systems issues can cause significant client dissatisfaction, sometimes resulting in numerous client complaints being filed against one lawyer simultaneously. This is particularly true in high-volume practices such as workers compensation, bankruptcy, or personal injury law, where lawyers frequently rely on nonlawyer staff to handle much of the work flow.

The basis for many clients' knowledge of the legal system is still television, be it O.J. or *Law and Order*. Unless the lawyer tells them what is reasonable to expect, clients expect the lawyer to set to work immediately and exclusively on their case and that the lawsuit will be over (and won) within whatever is the life equivalent of one episode. Thus, inadequate preliminary communication with a client at the time the lawyer is retained will almost inevitably result in client confusion and an increase in client calls later in the representation.

Inadequate systems to ensure prompt responses to client calls and letters create nearly immediate client frustration. If the client caller is ignored on several occasions, a complaint is likely.

To illustrate:

A lawyer against whom three complaints of neglect and noncommunication were filed in a short time recognized the systems issues that were at the root of the problem. The lawyer instituted massive changes to the office practices. The improvements to the office practices included: hiring additional staff, including an office administrator; developing detailed personnel and procedural manuals for handling client matters from intake through termination; instituting regular training and direct supervision of nonlawyer assistants; developing an intake information packet and brochure for clients explaining the workers compensation process and answers to frequently asked questions; developing a calendar system with “ticklers”; developing a firm communication system via e-mail; and scheduling regular telephone conferences with clients. Based in part on the improvements made to the office practices, the attorney was placed on private supervised probation for two years.

SAYING YES WHEN THE ANSWER SHOULD BE NO. Feeling sorry for a client is not a good basis on which to undertake representation. When the client tells you that one or two or three other lawyers have refused the case, alarms should be going off. Most lawyers can't make miracles happen.

In addition, while most lawyers will not knowingly take on a client whose case is a sure loser, inadequate preliminary screening procedures for clients can result in more

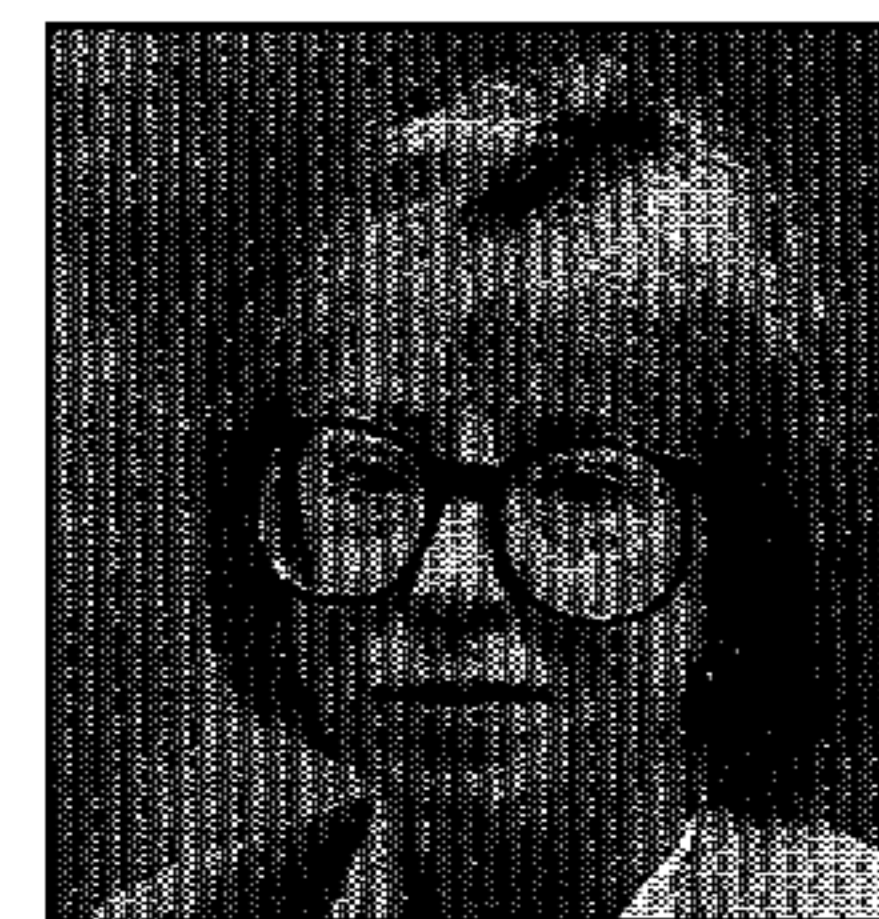
than a lawyer's fair share of losers. What is the problem the client wants fixed? What are the client's expectations from the lawyer and the legal system? Will the available legal remedies satisfy the client? These are only a few of the questions that need be answered before deciding to undertake the representation. Careful screening is even more important for the inexperienced lawyer, who may not have the knowledge to readily assess the situation. Certainly all lawyers feel pressure to bring in clients, but it is axiomatic that if the client has no case, undertaking the representation does not assist the client or the development of a successful practice.

Whether the case was a loser from the beginning, or it just did not develop as expected, once the lawyer has exhausted reasonable efforts at factual development and legal research and concludes that the evidence or legal theory or fault simply isn't there, the client has to be informed. Sooner, not later. This type of bad news does not age well. All too frequently, a lawyer will not inform the client that the case is going nowhere until after it has aged significantly and with little or no contact with the lawyer. The result is a frustrated and angry client who will now blame the lawyer for the problems with the case and file a complaint, alleging, among other things, neglect and noncommunication. Let there be no misunderstanding, however: It is not a defense to a complaint of neglect and noncommunication that the case was worth little or nothing. Discipline likely still will ensue.

To illustrate:

A lawyer agreed to move to reopen a divorce decree on the issue of spousal maintenance. The lawyer obtained a

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PROFESSIONAL RESPONSIBILITY

hearing date, but did not prepare or serve the motion papers. The client called her former spouse with the hearing date and both of them appeared for the hearing. The lawyer did not, having not informed the client that the hearing date had been canceled at the lawyer's request. For a period of three months the client called and left messages for the lawyer, but the lawyer never responded. When the client filed a complaint, the lawyer acknowledged that the calls and requests were being made, but had come to the conclusion that the maintenance issue could not be reopened. The lawyer intentionally did not respond, because the lawyer "didn't want to face up to telling her [the client] there was nothing to be done."

OVERWORK. Overwork is frequently the explanation offered by attorneys against whom a complaint of neglect and non-communication has been filed. Overwork, however, is not a defense.² The comment to Rule 1.3 states that "A lawyer's workload should be controlled so that each matter can be handled adequately." The Supreme Court has also addressed overwork as it relates to neglect and noncommunication complaints:

While it may well be that this young lawyer was assigned more work than he could handle effectively — an unfortunate but not unique circumstance — overwork *does not excuse or even explain*, the repeated disregard of the duties owed his clients and also of the duties owed this court and the officials charged with enforcing the rules of professional responsibility.³

THE DISHONEST PROCRASTINATOR. Unfortunately, the lawyer who neglects a case and then lies to the client, the court, and/or the disciplinary authorities in an attempt to cover up is still with us.⁴ Telling a client that a case has been filed, a hearing scheduled, an appeal taken, or a brief filed, when it has not, is nearly certain means by which to encounter public discipline. This year the Court has suspended several attorneys who can be characterized as dishonest procrastinators.⁵

CHEMICAL/ALCOHOL DEPENDENCY AND MENTAL HEALTH PROBLEMS. A pattern of neglect and noncommunication complaints is a frequent marker of attorneys

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suffering from psychological or chemical dependency problems. There has been a significant increase in the last several years in disciplinary cases involving psychological or emotional disorders, while the number involving alcohol has remained stable.⁶ Problems such as these do not necessarily mitigate attorney misconduct.

A petition for public discipline is presently pending against a Minnesota attorney for some six different complaints alleging neglect, noncommunication, and misrepresentations, as well as other misconduct. The attorney has raised psychological problems in mitigation. In a disciplinary proceeding, the attorney bears the burden of proof as to mitigation. If the attorney can show, by clear and convincing evidence, that the disorder from which he or she suffers is severe, that there is a causal connection between the disorder and the misconduct, that the attorney is receiving treatment and making progress to recover from the problem, that the recovery has arrested the misconduct and that the misconduct is not apt to recur, the Court has imposed a lesser sanction than disbarment.⁷

Systems issues, overwork, and mental and emotional problems are but a few of the explanations offered for neglect and noncommunication. However compelling the lawyer's excuse, the client and the reputation of the legal profession alike suffer from a lawyer's neglect of client matters. Human nature being what it is, however firm or frequent the warning from the disciplinary authorities, procrastination problems likely will always be a curse to the profession. But the fact that it is a common problem does not make it acceptable, or not susceptible to discipline. A few minutes spent reviewing and "relearning" the rules might help avoid a complaint and discipline. □

NOTES

1. Rules 1.3 and 1.4, Minnesota Rules of Professional Conduct, provide as follows:

Rule 1.3 Diligence — A lawyer shall act with reasonable diligence and promptness in representing a client. **Rule 1.4**

Communication — (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reason-

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

2. A variety of factors, including caseload, may be relevant to a determination of whether or what level of discipline is appropriate in a particular situation.

3. In re McCoy, 423 N.W.2d 731, 733 (Minn. 1988).

4. William J. Wernz, "The Dishonest Procrastinator," 47 Bench & Bar 1 (Jan. 1990), p. 15.

5. In re Fredin, C7-96-1080 (Minn., July 10, 1996) (60 days suspension); In re Ostroot, CX-96-666 (Minn., July 10, 1996) (24 months suspension); In re McNabb, C6-95-2632 (Minn., July 3, 1996) (9 months suspension).

6. The number of disciplinary probations for mental and emotional disorders increased from 9 to 15 in 1995. The number of probations involving chemical dependency problems remained at 6.

7. In re Weyhrich, 339 N.W.2d 274, 279 (Minn. 1983).

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