



# ALPS

## Practice Management Pointers

## Communication – It's all in the Details

Mark Bassingthwaighte, Esq.

[mbass@alpsnet.com](mailto:mbass@alpsnet.com)

MRPC Rule 1.4 Communication is one of those rules that seems clear on its face. We all know that as lawyers we are to keep our clients reasonably informed about the status of their matters as well as to promptly comply with reasonable requests for information. There's nothing unexpected there. Most also know that the rule further states that a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Maybe I'm just not seeing it, but all this seems rather straight forward to me. If it were that simple, however, why do attorneys continue to face disciplinary complaints and malpractice claims in the numbers that they do for simply failing to communicate? Perhaps there's more to the rule than what is generally remembered.

As I consider the implications of this rule, I have found it helpful to analyze the rule from a slightly different perspective than what's commonly done. So often, what we remember the rule as saying is taken at face value and discussed from the perspective of what needs to be communicated and when. One often hears of the importance of returning phone calls in a timely fashion, forwarding to the client copies of all relevant documents, providing regular and detailed billing, and personally visiting with the client to explain the status of a matter sufficient to allow the client to make informed decisions when deemed necessary. While all of this is quite important, I would like to come at the rule from the perspective of who gets to decide what. This helps me keep roles straight and remember who has employed who, which is key given other language in the rule which isn't as often recalled.

Beyond what is set forth above, Rule 1.4 also states that a lawyer shall inform the client of any decision or circumstance that requires the client's informed consent under the Rules. Now, Rule 1.2 Scope of Representation comes into play as do several conflict rules at a minimum. In addition, the Rule tells us that a lawyer is to reasonably consult with the client about the means by which *the client's objectives* are to be accomplished. For me, this language shifts the emphasis of the rule. The rule is no longer about sharing what you think the client needs to know; but rather it is really about what does your client reasonably expect to be told throughout the course of representation. I believe there is real value in shifting the focus away from what you, as the attorney, thinks should be shared and moving it toward what any client would reasonably expect their attorney to share.

With all this in mind, what are the ramifications of this rule day to day for the practicing attorney? Certainly promptly returning phones calls, timely responding to client requests for information, forwarding copies of documents, and the regular sending of detailed bills are a given. But there is more.

An attorney should keep clients informed of all court dates, all filings, and all offers to settle or mediate. Also, don't overlook telling clients about any changes to your contact information such as a change in your address, phone number, or email. Yes, perhaps a shift in perspective wasn't necessary to develop this list thus far; but I will share that many attorneys regularly struggle with following through on just these basics. Typical rationalizations or excuses include the client doesn't really need to be bothered with this, I know what my client will say or decide anyway, I don't have the time to tell them, the client doesn't want to be billed for the time it will take, etc. In short, attorneys start to run with assumptions and rationalizations when it comes to the basics of effective communication and this can be a dangerous play.

However, with the shift in focus in mind, how might this list of suggested practices expand? Consider scope of representation. As an attorney being hired to handle litigation for a financial institution, it is easy to understand how one might focus solely on the litigation. On the other hand, the client who has hired the attorney may be expecting their attorney to see the "big picture" and keep them informed about everything in play to include issue spotting. What if there is a regulatory reporting and/or compliance issue peripheral to the litigation? If the attorney is not up to handling the related issue she must say so because the client will often reasonably expect their attorney to not only issue spot but to take care of the related matter or at least inform them of anything that the attorney is not competent to or perhaps prepared to handle so that appropriate attention can be given to that peripheral issue. This is one reason why documenting scope of representation is critically important with all clients. Again, it is all about considering what clients would reasonably expect to be told.

So now we can expand our list of ramifications to include the following. Clients should be told what the scope of representation is and also what it isn't; they should be informed of their rights, especially in criminal matters; the ramifications of any actual or potential conflict issues should be fully explained to clients prior to their agreeing to representation; and client permission should be obtained for granting extensions of time to adverse parties, stipulating to evidence or testimony, agreeing to continuances, and for making and/or rejecting settlement offers. Clients expect to be told when their matter has concluded and what, if anything, they must yet do. Whether through inability or oversight, clients must also be informed of a failure to take action on the client's matter or that their case has been dismissed. Clients do reasonably expect to be informed about any and all of the above whether it's good news or bad.

When thinking about communication, this shift in perspective helps to keep the emphasis on the client and the fact that we, as the attorney, are in the client's employ. Many decisions are for the client to make. This reality does not in any way, shape or form minimize your role as the attorney. In fact, I believe this perspective helps to elevate an attorney's role. Consider the word "counselor" in light of Rule 1.4 and ask yourself what might that word mean in daily practice? For me it means that a lawyer is to advise the client about the legal and practical aspects of any given matter. She is to identify and evaluate alternative solutions pointing out the positive and negatives of each. The goal is to enable the client "...to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." (*See Comment 5 to Rule 1.4 of the ABA Model Rules.*) This intended outcome does require that we approach communication from the client's perspective. With all clients, ask yourself just what does the client need to know to be able to make intelligent decisions? As the attorney, if this question is never asked and answered with every client, you are taking an

unnecessary risk that can and will at times lead to disastrous outcomes in the malpractice and disciplinary arenas.

Let's take this point one step further. Assume that you have taken on a regular run-of-the-mill divorce client. Should you discuss the option of conducting electronic data discovery? A number of attorneys simply never raise the issue. Some don't see the need. Some see it as cost prohibitive, and some simply have no idea how to do it and/or no intention of ever going there in their own practice. Now focus on the client, haven't these attorneys actually made a decision that properly belongs to the client? I would argue that indeed they have. In fact we have reached a time where a follow-up attorney, who was hired to review a file of one of these attorneys after their client did experience an eventual unintended consequence from their attorney's failure to discuss let alone conduct electronic data discovery, may actually tell the client that not only does he view the situation as a failure to communicate but there may also be a viable malpractice claim here.

I can't create a list of everything that an attorney should tell a client. I can only give examples of things to think about and a perspective from which to begin to address the issue. What clients expect to be told will vary with every client and on every matter. Talk with your clients and try to determine their expectations from the outset. The bottom line is this. Clients do expect to be fully informed and attorneys have an ethical obligation to meet that expectation. Here's the kicker, however. Your communication efforts must be handled in a way that seeks to assure that the client understands and comprehends all that is being communicated about all that must be decided. Forwarding copies isn't enough. This is how a jury is going to see it so once again, it's all in the details.



## Risk Management Questions?

Mark Bassingthwaite, Esq. is the Risk Manager for ALPS Property & Casualty Insurance Company. He is available to answer risk management questions and can be reached at 1-800-367-2577 or [mbass@alpsnet.com](mailto:mbass@alpsnet.com).

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