Why Is Everyone Else So Obnoxious?

Communicating with clients, lawyers and judges

James E. Doyle Inn of Court

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COMMUNICATING WITH OTHER LAWYERS
OR
WHY IS EVERYONE ELSE SO OBNOXIOUS?

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> "Zeal and vigor in the representation of clients are commendable. So are civility, courtesy, and cooperation. They are not mutually exclusive."
>
> *In re Marriage of Davenport*, 125 Cal. Rptr. 3d 292, 316 (Cal. Ct. App. 2011).

Why, as a profession, do we spend so much time being irritated with each other? Part of the issue is the nature of the work we do. Another part of it is how we do it – the content and methods of our communications with each other.

1. Four generations of lawyers
    a. Silent generation (born 1925-44)
    b. Baby boomers (born 1945-64)
    c. Generation X (born 1965-84)
    d. Millennials (born 1985-2010)

2. Differing communication technologies
    a. U.S. Mail
    b. Telephone
    c. Overnight packages
    d. Fax machines
    e. E-mail
    f. Cell phones
    g. Smart phones
    h. Whatever's next

3. Differing communication styles
    a. Formal vs. informal
    b. Delayed vs. immediate
    c. Personal vs. impersonal

4. What are the implications for how we talk with each other?

CLIENT COMMUNICATION
Presenter: Attorney Earl Munson

I. OUR ETHICAL RULES OFTEN CONTROL THE TYPE AND CONTENT OF OUR COMMUNICATION WITH CLIENTS.

SCR 20:1.0

(b) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(c) "Confirmed in writing" when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.… If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transit it within a reasonable time thereafter.

* * *

(f) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternative to the proposed course of conduct.

* * *

(q) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, Photostating, photography, audio or video recording and e-mail. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

II. SCR 20:1.4 — COMMUNICATION

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) Keep the client reasonably informed about the status of the matter;

(4) Promptly comply with reasonable requests by the client for information; and

(5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

III. "INFORMED CONSENT" IS REQUIRED BY THE FOLLOWING RULES:

SCR 20:1.2 — Scope of representation and allocation of authority between lawyer and client

* * *

(c) A lawyer may limit the scope of the representation if … and the client gives informed consent.

SCR 1.6(a) — A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent....

SCR 1.7(2)(b) — Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:

* * *

(4) each affected client gives informed consent, confirmed in writing signed by the client.

SCR 1.8(a) — A lawyer shall not enter into a business transaction with a client … unless

* * *

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing, signed by the client….

* * *

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent [in Wisconsin that includes the consent in an insurance policy] …

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims or against the clients … unless each client gives informed consent, in a writing signed by the client….

(h) A lawyer shall not:

(2) settle a … [malpractice claim] with an unrepresented client or former client unless that person is advised in writing.…

SCR 20:1.9

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter … unless the former client gives informed consent….

IV. ORAL COMMUNICATION, E-MAILS OR FORMAL LETTER?

V. IMPORTANT EVENTS REQUIRING CAREFUL COMMUNICATION

(a) Engagement or Non-Engagement Letter

(i) Non-engagement
(ii) Engagement
(iii) Closing

(b) Fee Agreements

(i) Hourly fees
(ii) Contingent fees
(iii) Retainers
(iv) Flat fee
(v) Special agreements

(c) Court appearances
(d) Depositions
(e) Settlement
(f) Expert witnesses
(g) Discovery (requests and responses)
(h) Trial tactics

Communication With The Court

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"To me, a lawyer is basically the person that knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem the lawyer is the only person who has read the inside of the top of the box." -- Jerry Seinfeld

My Subjective Rules To Live By When Communicating With The Court (in order of priority)

1. Court staff, including judges, are human.

"*Unfortunately, what many people forget is that judges are just lawyers in robes." -- Tammy Bruce*

2. Opposing counsel are human – most of them, anyway.

"*Lawyers, I suppose, were children once." -- Charles Lamb*

3. Be yourself.

"If you are resolutely determined to make a lawyer of yourself, the thing is more than half done already." -- Abraham Lincoln

"*I think that lawyers are terrible at admitting that they're wrong. And not just admitting it; also realizing it. Most lawyers are very successful, and they think that because they're making money and people think well of them, they must be doing everything right." -- Alan Dershowitz*

4. Not all court hearings have to be dry, wasteful uses of time that suck the very life out of human existence (unless the hearing concerns a discovery dispute, in which case experience tells us there is no other conceivable possibility).

Applying The Rules To Reality – Appropriate and Inappropriate Court Communication

The next question, after putting the above rules to memory, is what limits are placed on one's ability to be his or herself in court. The following are some applicable Supreme Court Rules regarding appropriate and inappropriate communications, along with case law discussing situations in which inappropriate language can cause a mistrial or lead to sanctions.

The cynical among you will believe I included these legal authorities for the sole purpose of complying with CLE outline requirements. Cynical or not, these represent the few rules that address court communications and pave the way for you to be yourself.

A. **SCR 20:3.5 Impartiality and decorum of the tribunal.** A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication;
(c) communicate with a juror or prospective juror after discharge of the jury if:
  (1) the communication is prohibited by law or court order;
  (2) the juror has made known to the lawyer a desire not to communicate; or
  (3) the communication involves misrepresentation, coercion, duress or harassment; or
(d) engage in conduct intended to disrupt a tribunal.

"Mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process." -- Thurgood Marshall

"Good lawyers know the law; great lawyers know the judge." -- Author Unknown

SCR 20:3.5 prohibits ex parte communications, meaning no private jokes with the judge or jurors regarding the case (and no communications with the jurors during trial, period). Subsection (d) also prohibits conduct intended to disrupt a tribunal. However, the rules do not prevent levity or lightening the mood of trial, nor does it prohibit an attorney from being his or herself.

B. **SCR 20:3.4 Fairness to opposing party and counsel.** A lawyer shall not:

> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

Ok, you can't state personal opinions or misrepresent facts, but how much does that really limit you being yourself? Let's look at comments of counsel made during closing argument that were held to be within the range of permissible argument at trial:

> I will say it again, if these people are compensated, we might as well tear down this courthouse and plow up the ground and plant potatoes, because inscrolled in the front door of this courthouse building are three words – Truth, Justice and Honor, and I sincerely ask you members of the Jury to sift the evidence in this case, and find the Truth, and do Justice with Honor. *Combs v. Peters*, 23 Wis. (2d) 629, 638, 127 N.W.2d 750 (1964).

Kevin's Comment: If there is this much latitude in front of a jury, there is even greater latitude in other court proceedings.

"There are three sorts of lawyers - able, unable and lamentable." -- Robert Smith Surtees

C. **SCR 20:4.4 Respect for rights of 3rd persons.** (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

"A jury consists of twelve persons chosen to decide who has the better lawyer." -- Robert Frost

"Law: the only game where the best players get to sit on the bench." -- Author Unknown

D. You can be yourself, but you cannot be abusive. See *Masterson v. Chicago & N.W. Ry. Co.*, 102 WI 571, 78 N.W.2d 757 (1899) (It was a reversible error to not grant a mistrial when plaintiff's counsel stated "You [the jury] have witnessed a proceeding which, in my judgment, is a prostitution of the usual and ordinary proceedings in a court of justice," and that "representation is cheap, weighed against the money of this company, -- counsel does not consider it as that [snapping finger].")

"Jurors want courtroom lawyers to have some compassion and be nice." -- Johnnie Cochran

E. Lawyers actually have more leeway to be themselves than judges, but that does not mean that *judges* cannot be human as well. The fact that a judge shows that he or she is human and may express general frustration or emotion does not constitute grounds for a mistrial:

> "…litigants are entitled to a fair trial but the judge does not have to enjoy giving it." *Breunig v. American Family Ins. Co.*, 45 Wis. 2d 536, 546, 173 N.W.2d 619 (1970).
>
> The responsibility for an atmosphere of impartiality during the course of a trial rests upon the trial judge. His conduct in hearing the case must be fair to both sides and he should refrain from remarks which might injure either of the parties to the litigation. Since a trial is and should be an adversary proceeding, the trial judge should take care not to be thrown off balance by his own emotions or by provocations of counsel.
> …
> Most judges do their utmost to maintain a poker face, an unperturbable mind and a noncommittal attitude during a contested trial, but judges are human and their emotions are influenced by the same human feelings as other people. Perhaps no judge during a hard-fought trial can remain completely indifferent, especially if the case is one which he thinks ought not to be tried. *Id.* at 547-548.

"Law is not justice and a trial is not a scientific inquiry into truth. A trial is the resolution of a dispute." -- Edison Haines

F. Communication *about* the trial court and trial judge should also be respectful, including when you are arguing for a reversal on appeal regarding some action the trial judge did or did not take. You gain nothing in your argument, and may lose respect and credibility, by taking an aggressively nasty or disrespectful approach concerning the conduct of the trial judge.

"An appeal... is when you ask one court to show its contempt for another court." -- Finley Peter Dunne

So, be yourself and treat the people with whom you interact in court as human beings – unless, of course, they offer indisputable proof that they wrote the rules of discovery or are otherwise inhuman.