9 *Improving the Quality of Your Negotiation*

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You presumably want to provide the best possible service to your clients, but this can be very challenging, as described in the preceding chapters. Clients normally engage lawyers when they consider matters to be important, face substantial uncertainty and conflict, grapple with situations governed by legal rules that are often complex and confusing, and worry about litigation costs. They generally would prefer to settle than to become embroiled in a long legal proceeding, but they worry about "losing" if they negotiate. Not surprisingly, you probably have clients who are very anxious, and you may take on some of their anxieties. Indeed, you and your clients may feel caught in the same "prison of fear" described in Chapter 1.

Many lawyers' adversarial mind-sets have become so deeply ingrained that adversarial tactics become the default behavior, even sometimes when it is clearly counterproductive. A mediator described a case involving a lawyer who aspired to be collaborative but struggled with it. In this case, the lawyer had worked hard to get the other side to agree to mediate. The lawyer represented an employee who sued the employer, claiming race discrimination. In her opening statement in mediation, the lawyer talked about the employer's alleged historical connections to the Ku Klux Klan more than a hundred years earlier. The mediation "went downhill from there." Although the lawyer's heart was in the right place, she "blew" the mediation without intending to do so. The mediator said, "As much as she talks the talk, she hadn't learned to walk the talk. Not surprisingly, she defaulted to what she knew, which was to enter the ring punching." Negotiation is hard work, even for experienced lawyers, and so Cleveland lawyer James Skirbunt, who has been in practice for 35 years, encourages lawyers to be gentle with themselves.

The suggestions in this book are designed to help you and your clients effectively deal with often-unconscious fears and habits so that you can achieve your clients' goals as closely as possible. As described in the preceding chapters, you are likely to provide high-quality service if you develop good relationships with your clients and counterpart lawyers, establish and use negotiation procedures designed to satisfy the parties' interests, and use additional professionals. To perform well, you need to develop good skills in a wide range of lawyering tasks through a combination of education, training, and experience. These skills include communication, interviewing, counseling, negotiating, problem solving, procedural planning, legal research and analysis, advocacy, and drafting. Of course, your actions should be

informed by a good understanding of the applicable legal rules, procedures, and norms in your cases.

In addition to improving professional techniques, some lawyers would benefit from personal development to deal with the challenges of legal practice. You may find meditation or other stress management techniques helpful to focus on any aspects of the "prison of fear" that keep you from performing up to your potential. Lawyers with serious problems may benefit from appropriate psychological counseling.

Getting Training and Education

Even if you have outstanding natural skills, you will improve your practice through continued learning. To negotiate at the highest skill levels, lawyers need substantial and repeated training, opportunities to practice their skills, and refection on their experiences. You may especially benefit from experiential trainings in which you can try different approaches in simulated cases. Mediation and Collaborative Law trainings can be especially helpful. Mediation trainings can help lawyers step out of their perspective as advocates so that they can better understand both sides of a dispute. Mediation trainings also teach practical techniques to structure negotiations and resolve difficult problems. You can benefit from taking multiple trainings because of the differences in mediation philosophies and techniques that various trainers and mediators use. Collaborative Law trainings offer similar benefits, though explicitly from the advocates' perspective. Attending continuing legal education programs and conferences can also be quite helpful.

As the former director of an LL.M. program in dispute resolution, I would be remiss if I did not suggest that you consider enrolling in an academic program. Obviously, they involve a greater investment of time and money than continuing education and training programs, but they may offer greater benefit as well. Some of the students in my program came with more than 20 years of experience as advocates and neutrals, and I used to worry whether they got any benefit from it. I was repeatedly reassured when even some of our brightest students said, in effect, that after completing our program they finally understood what they had been doing all those years. Gaining a deeper theoretical understanding of dispute resolution practice can provide you with a wider range of choices in how you practice.

One of the advantages of enrolling in an academic program is that it creates a structure and provides incentives for careful study. For many lawyers, however, it is not practical to enroll in another program after four years of college and three years of law school. If this would not fit into your life, you might create your own self-study program, perhaps starting with materials listed in the bibliography of this book.

You can also improve your work by developing a philosophy of practice, such as those described in Chapter 2. Having such a philosophy can help you grapple with difficult judgment calls and develop self-confidence, which can make you more effective working with clients, lawyers, and courts.

Getting Systematic Feedback on Your Performance

Many lawyers don't take full advantage of their experience to improve their performance. If you do not consciously focus on how you perform, you are likely to lose important learning opportunities. Some people say that the worst thing lawyers can do is to win their first trial because it makes them complacent about their skills. A spectacular failure at trial, negotiation, or other process can cause you to seriously reflect about your performance and how you might improve it in the future. Even if you are successful, there are probably things you might have done better. And when you are successful, it is important for you to understand what led to that success. You are likely to gain some valuable insights if you take a little time to write out what happened, what you did well, and what you might have done better. Appendixes U and V are self-assessment forms you can use or adapt. These forms are likely to be most helpful for lawyers doing a process that is new for them, although even experienced practitioners continue to learn throughout their careers.

After you complete cases, you can regularly seek client feedback about how you handled them. Although it may feel odd—and perhaps a bit scary—to solicit client feedback, this can be the source of important insights to help improve your service in future cases. Many clients will be flattered that you asked for their feedback because it reflects your concern about their perspectives, and this may build loyalty and goodwill. If you identify previously unexpressed frustrations, you can adjust your practices,

and this may encourage your clients to hire you again in the future rather switch to other lawyers.

Sometimes a simple phone call after the end of the process may be the most direct, cost-effective way of getting meaningful feedback. You can easily call clients several weeks after you have finished a matter to ask how things are going for them and if they have any concerns about their case. If you ask about how the clients are doing, it may not feel odd to you or your clients because you would be expressing continued concern about them rather than specifically seeking feedback about your performance. If they generally express satisfaction, you can say that you're glad and leave it at that. Or you might follow up with specific questions in a natural conversational way. Of course, if clients express any concerns or dissatisfaction, you can ask follow-up questions based on their responses. In that situation, you should resist the temptation to explain your actions, at least at first, because that can inhibit clients from giving you additional candid feedback.

You can get more detailed client feedback through surveys or interviews. Both methods have advantages and disadvantages. Surveys can collect feedback from a larger number of clients, especially with convenient online survey programs. On the other hand, many clients may not want to take the time to respond, or will give only superficial responses. Some clients may feel uncomfortable disclosing their reactions, fearing that it could alienate you. If the survey is intended to be anonymous, clients may nonetheless worry that you will figure out which client provided which responses, especially if they are critical of your performance. One way to reduce this risk would be to inform clients that you are doing this every quarter for all clients who completed a case in the prior quarter.

Some clients would be more comfortable giving feedback through interviews, because they can gauge how their feedback is being received. Using interviews may encourage a more representative sample of clients to provide feedback, but it requires more time. Some clients may feel uncomfortable expressing criticisms directly to the lawyers who handled their cases, so they might be more honest in interviews conducted by others. You can use a surrogate, such as a trained legal secretary or another attorney, to get more candid information from clients. If you want to invest more resources in the process, you could hire outside professionals who can provide more independence.

Survey or interview questions can include basic open questions asking what worked well in the representation and what might be improved. In addition to such general questions, you might ask about specific aspects of the handling of the case, such as satisfaction with the information provided, communications, legal advice, negotiation, litigation proceedings, interactions with the other side, results achieved, attorney's fees, and interaction with office staff, among other things. If the questions are asked with sincere openness to whatever reactions the clients have, you can get some valuable feedback that can help you improve your performance in future matters. Appendix W is a sample client questionnaire that can be used for surveys or interviews.

You can also solicit feedback from professionals with whom you have worked on a case, possibly including judges. In some Collaborative Law communities, the professionals routinely debrief each other after each meeting and after finishing a case together. Even where this is not a normal practice, you can take the initiative to ask colleagues for observations and ideas about how you might perform better in the future. It may seem inappropriate or feel uncomfortable to ask judges, colleagues, and even counterpart lawyers to provide such feedback. Indeed, you should consider carefully whether the risks outweigh the likely benefits. Taking some risks can pay off with valuable insights and strengthened relationships, however, so this is worth considering.

A safer option might be to participate in peer or supervised consultation groups with lawyers and other dispute resolution professionals. Such groups provide the opportunity to deeply explore challenging problems in a confidential environment.[1] For example, Los Angeles mediator and Collaborative lawyer Forrest Mosten leads such a group, and the ADR Program of the U.S. District Court for the Northern District of California runs a number of such groups. Although these groups cater to mediators, similar groups can focus on lawyers' work.

One lawyer thinks that these groups can help lawyers train themselves and each other to develop a more intentional practice. As a trainer, she encourages clients to go through a continuing process of self-awareness, observation, and self-correction. Having a support system can provide feedback and hold you accountable in an ongoing learning process. The goal would be to make your decisions more self-conscious and explicit. Over time, you can change default behavior and embed new skills and habits in your practice.

Revising Your Practices

Based on input from clients and professionals, you can revise your case management and negotiation procedures. This may include things such as the information you provide on your website or directly to clients, your negotiation and advocacy techniques, and use of particular professionals.

You can also work with your courts to develop good court case management systems involving partnerships between lawyers, judges, court administrators, and other professionals. Judges usually are respected leaders who can motivate others in their community to work together. They can convene representatives of stakeholder groups to design systems for handling the issues they regularly encounter. These systems might involve some or all of the following: case assessment and referral protocols, educational materials and resource directories for parties (especially unrepresented parties), procedural rules, standard forms, training and mentoring for professionals, ADR programs, and informal mechanisms to deal with professionals' problems.

Court rules requiring cooperation can be an important part of such systems, although it is unlikely that mere promulgation of rules will change lawyers' and parties' behavior. To be effective, lawyers and parties need to believe that the courts take the goals seriously, support those who "get with the program," and sanction those who don't. In serious cases, legal sanctions may be appropriate, though in most cases, public or private admonishments are likely to be more effective. Such rules are likely to be most effective if judges are available to help lawyers work through problems informally as appropriate. Courts and local bar associations can co-sponsor continuing education programs and training to promote effective service to parties.

As an example, the family court in Morguson County, Indiana, has a court rule promoting a cooperative system. The rule requires lawyers and parents to "act with the Courts as co-problem-solvers, not mere problem-reporters." It sets an expectation that lawyers and parents consistently display personal responsibility, cooperation, and courtesy, and are "focused attention on the children's needs." Parents with children under age 20 are required to use designated websites (such as www.UpToParents.org) to write out commitments they would make about parenting. Parents and counsel are required to make reasonable efforts to resolve problems so that they avoid contested court hearings if possible. If both parents are represented,

their lawyers are required to consult with each other to resolve any issue before seeking relief from a court.[2] Obviously, this rule is tailored to family court issues, and courts handling other types of cases can fashion rules suiting their particular issues.

Endnotes

1. For a description of peer consultation groups for mediators, see Howard Herman & Jeannette P. Twomey, *Training Outside the Classroom: Peer Consultation Groups*, Disp. Resol. Mag., Fall 2005, at 15.

2. Family Court Website, Morguson County, Ind., http://www.familycourtwebsite.org/.