

Defense Counsel *Dos* and *Don'ts*

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Many lawyers in private practice, regardless of their years at the bar, often find themselves wondering what clients actually want and expect from them. That is not a frivolous question: a dissatisfied client is not likely to rehire the same lawyer, or to refer others to that lawyer. If substantially dissatisfied, a client may even pull pending matters from one lawyer and reassign them to another.

Knowing the law, being technically competent, working hard, and getting good results at reasonable cost are, of course, basic requirements for a good lawyer and a successful law practice. A lawyer who does not satisfy those basic criteria will usually not be able to attract or keep clients. However, many lawyers fulfill those basic requirements and still have dissatisfied clients. That is because professional competence is not the same thing as professional *service*. Rather, it is just the beginning of what clients actually want and expect from their lawyers.

To figure out what kinds of additional qualities and services clients want and expect from their lawyers – and, conversely, what kinds of things tend to annoy and alienate clients – I recently conducted a thoroughly unscientific “study” of insurance claims professionals and corporate risk managers. The “study” consisted of my sending an e-mail to an insurance and risk management internet discussion group, basically asking, “What are the things defense counsel do that really annoy you as clients? What are the things defense counsel do that really please you as clients?” I specifically asked for responses that did *not* involve law firm billing practices (which themselves might justify an entirely separate study). Responses trickled in over the course of a week or two. I collected the responses and combined them with similar anecdotal comments I have heard claims professionals make over the past twenty-odd years.

Although admittedly unscientific, the results of my “study” are glaringly true and will strike a responsive chord with any claims professional. They are also valuable for any defense counsel who wants an idea of how to provide *service* to clients.

Based on their anecdotal comments, what clients want is not all that hard to figure out. Their comments can be distilled into the following basic premises:

- Treat me with respect and remember that you are working for me, not *vice versa*.
- Do not surprise me. I hate surprises, especially unpleasant ones.
- Do not waste my time.
- Do not waste my money.
- Give me the kind of advice, judgment, and insight that lawyers are supposed to be paid for. I did not hire you to shuffle papers or be a glorified messenger.
- Do not take my business for granted.

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Listed below are the substance of the responses to my “study,” often in the exact words in which I received them.

Treat me with respect and remember you are working for me, not vice versa.

- Remember you are the servant of the client, not *vice versa*.
- Do not gratuitously complain about me to my boss, or complain about me behind my back. On the other hand, if you think I am doing a good job, it would not hurt to let me and my boss know that.
- Remember it's not *your* case, it's *my* case. If there is a judgment or settlement to be paid, it will be paid with *my* money, not yours. You are just the lawyer who represents me or my employer.
- Tell me the truth, even if it might hurt my feelings. However, if it might hurt my feelings, then please try to be diplomatic.
- Treat me with respect. Assume I am an experienced and knowledgeable professional and act accordingly, even if you don't believe it is true.
- Answer your own telephone. Do not have a secretary screen your calls.
- Make your own telephone calls. Do not have your secretary call me and ask me to wait while you come to the telephone. Who do you think you are, anyway?
- Make yourself easily accessible. Give me your office e-mail address, direct-dial number, home telephone number, personal e-mail address, or whatever else it takes to enable me to reach you in a hurry when and if it is necessary.
- Return telephone calls promptly. Do you really think I believe you are in meetings from 8:00 am to 5:00 p.m., every single day? Also, do not force your staff to be party to such lies. They don't like it and will lose respect for you. Then they'll quit and tell me what a liar you are, unless they also are liars, in which case they will end up lying to you too.
- Spare me the arrogance and ego that some people seem to have acquired with their law degrees. As deflating as it may be, your Mom is probably the only person impressed by the fact that you have a law degree and a nice office. (She might not really be impressed, either.)
- Don't assume you necessarily know better than I do. I have probably seen thousands of cases and dealt with far better lawyers than you will ever meet in your entire career.

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- Don't get arrogant when I disagree with your view on a subject. Reasonable minds disagree all the time: that is why we have courts and mediators. On the other hand if you think I am making a serious mistake, make sure you tell me why.

Do not surprise me. I hate surprises, especially unpleasant ones.

- Whether I am the defendant or the insurance company, begin communicating with me at an early point in the litigation. Have a face-to-face meeting, if practical. Discuss and secure agreement on how the case is to be handled, what my objectives are, how communications will flow, how I want information reported, *etc.* Do your best to solicit and understand my expectations, then do your best to meet those expectations.
- Keep me consistently in the loop and up to speed.
- Send me copies of important documents, whether I am the insurer or the insured. Keeping my file complete and up to date is just as important as keeping your own file complete and up to date.
- Give me enough information to enable me to set a reasonable reserve. Claims people live and die by their reserves. It is difficult and risky enough to set reserves, even if one has complete knowledge of a matter. It is much harder and riskier if you are not telling me things I need to know.
- Avoid surprises. If the case has a down-side, be sure I am aware of it.
- Do not be unrealistic because you want to tell me what you think I want to hear. Do not exaggerate the chances of success.
- Don't tell me it's "too early to tell" what a case is worth without also telling me what information you need to plug the gaps and a target date by which you expect to be able to answer this key question.
- Don't tell me the case is worth "between \$5,000 to \$500,000." Thanks a lot! I knew that before I hired you!
- Don't surprise me. If the case is turning sour or your evaluation of liability or damages is rising, tell me ASAP and explain why. NO SURPRISES!!!
- If your evaluation of my exposure or defense costs has changed, don't wait for me to ask you that. Volunteer it up front.

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Don't waste my time.

- Tell me everything that is going on in the case and do it on a regular basis. If there is nothing going on, tell me that. Don't make me waste my time by sending you a letter to ask what is going on.
- Don't ignore my letters, calls, voice mails, or e-mails because you think "there's nothing new to report." **Tell** me there is nothing new to report. Also tell me whether we should make things happen.
- If you need an answer or decision from me, don't bury it on page eight of a ten-page single-spaced report. Put "REPLY REQUESTED" or the equivalent on the top sheet. Flag needed responses or, better yet, give me a bulleted or numbered list of issues about which you need to hear from me.
- Provide an executive summary at the beginning of lengthy reports.
- Please do not begin each and every report with, "As you will recall," followed by a two-page rehash of the entire file before you reveal any new information. This wastes both my time *and* my money.¹
- Keep reports clear, organized, to-the-point, and simple, consistent with the amount and complexity of the information you have to impart. Use section headings, executive summaries, numbered or bulleted lists, and similar devices to provide a logical structure and highlight important areas. Clearly label your requests for information, decisions, or authority. Do not use gratuitous legalisms, law French, or law Latin. Try to use simple declarative sentences in the active voice. Avoid paragraphs that cover an entire page (or more than one page!). Well chosen words are the tools of a lawyer's profession. Use them!
- Don't leave me a voice-mail message and omit your return phone number, because then I'll have to waste time looking it up. Say it slowly. Twice, please. Spell unusual names.
- Don't call me with a 15-minute oral report on matters that are not time-sensitive. Even worse, do not interrupt me with such a report and then close by saying, "I'm going to send this to you in a written report."
- Don't expect a fast decision from me on something you've known about for weeks but did not tell me until just now. Don't treat me as if I were the drive-through lane at McDonald's.
- Don't write to me, asking me to phone you. If I am paying you, you chase me.

¹ I have dealt with a few clients who *like* such "as you will recall" preambles to every piece of correspondence, because they handle an enormous number of claims and cannot reasonably be expected to recall what any individual claim is about. However, even those clients want such preambles to be very succinct.

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- Don't assume I can drop everything to chew the fat with you. Get to the point, then move on. Assume I am at least as busy as you are. Try asking, "Is this a good time to talk?"
- Don't fax or overnight stuff that is clearly not time-sensitive. It impresses me, but not favorably; it impresses me...negatively.
- If, in the course of the matter you are working on, a non-routine letter or document has to be sent out on my letterhead, then please give me a recommended draft. Don't make me waste my time drafting a letter and then having you revise it, if it would be easier and faster for you to draft it in the first place.
- Don't send me correspondence without my file number or claim number on it. Everything I get from lawyers has *their* file numbers on it, but my file number is often missing. Guess what: I do not organize my office according to *your* firm's file numbers. Mail without *my* file number on it might float around my company for several days before somebody can figure out what file it actually belongs to.

*Don't waste my money.*²

- Do not bring complicated motions, create enormous databases, engage in massive discovery, or perform massive research without first discussing the need for it and securing my approval. Such things cost a fortune. Even when they are clearly necessary, I need to be told about them in advance so (a) I am not surprised by a large bill for work I know nothing about and did not expect to be done and (b) I have an opportunity to limit or disapprove the work, or suggest a workable alternative, in advance.

Give me the kind of advice, judgment, and insight that lawyers are paid for.

- Don't tell me during a trial how stressed out you are. I hired you because this is your line of work. If the case blows, it's my money that goes. You'll move on to the next case. "If you can't stand the heat..."
- Don't ask me to "Please advise" about something without itemizing the options and telling me which one you recommend and why. I don't pay lawyers' rates for glorified messengers.
- Don't be defensive if there is a screw-up. Take accountability and tell me how you will set things right.

² Many of the comments about long-winded and disorganized reports in the preceding section ("*Don't waste my time*") also apply to this section. Not only are such reports terrible time-wasters, but it costs a lot of attorney time (*i.e.*, defense dollars) to prepare them.

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- Make specific assessments and recommendations, if possible. If it's not possible, explain why not and what additional information you need. Do not use weasel-words and lawyer-speak to avoid making specific assessments or recommendations.
- Once you've gone through your analysis and explained your reasoning, don't forget to give me a clear bottom-line opinion.
- Some lawyers seem never to admit they don't know what they're talking about, even if they don't have a clue. If you don't know the answer to something, say you don't know. Then go find it out.
- Do not be unrealistically optimistic in the hope it is what I want to hear. The truth is always worth knowing, painful as it may be.
- Give realistic opinions on damages and liability, even if those opinions have to be qualified due to lack of information or quirky local conditions. If it necessary to qualify an opinion, then give a considered qualification, but don't shilly-shally. Don't say there is no chance of liability when there is always a chance some fool judge or jury might find me 100% liable. Don't low-ball estimates of damages because you think it will make me happy. Experienced clients, happily, are pretty good at assessing these risks themselves, but the less experienced ones might take you at your word and be very unhappy [*i.e.*, very unhappy with you] when your over-confident predictions turn out to be wrong.
- Do not reflexively pass the buck. Don't reflexively blame everything on the other side, your secretary, a junior associate in your office, or the traffic jam you got caught in on your way to the courthouse.
- When we are negotiating a settlement with the other side, do not become fixated on how much money I have to come up with to make a deal. If you are going to be fixated on anything, it should be on how to get the best deal possible for *me*. If my lawyer advises me to ante up a large amount of money in order to make a deal, regardless of the actual value of the case and regardless of whether it is a good deal for me, then I begin to wonder whether my lawyer is really on my side.

Don't take my business for granted.

- Don't hit me up for a 10% hourly rate increase without being prepared to tell me how you're going to notch up your service by 10%. My fixed costs are going up too, but I often can't pass those increases along. What makes you assume you should be able to?
- If my only contact with your firm is a good lawyer who just left, don't call me all of a sudden to tell me how much my business means to your firm. By then, it's too late.

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- Don't be afraid to ask, "How could I go about getting your business?" or "How could we do a better job for you?" Many clients and potential clients are amazed by the poor salesmanship skills of lawyers who will never come right out and ASK FOR THE ORDER!
- Show me you keep up with my business and my industry and that you're a "Big Picture" guy.
- Have a sense of humor and fun. Other things being equal, I gravitate to lawyers who are a pleasure to work with.
- Don't agree to my service guidelines unless you really mean it. Talk is cheap – actions are dear.
- Don't force me to act as your quality control unit, to catch billing and reporting snafus.
- Don't ask me to pay full price if I'm not getting full service. If I don't get (or want) full service, offer to discount your price.
- Do not get stuck in an ivory tower. Come and meet with me in my office once in a while, if a face to face meeting might be fruitful. Let's have lunch, dinner, or a few beers once in a while. I'm not talking about commercial bribery here, just sociability. And for God's sake don't invite me out for dinner or drinks and then add the cost to a file. Incidentally, if I want to pay, then accept with thanks. It is as rude to refuse my hospitality as it is never to offer me yours.