



Best Practices for Representing Clients

By Robert A. Creo



Editor's note: This is the first of a series of columns exploring the behaviors, actions and practices that are effective for litigators and transactional lawyers.

Common sense, backed by extensive research, indicates that individuals have pluralistic identities based upon their ethnicity, nationality, gender, values, vocations, avocations and group and community affiliations. For most people, their primary identity arises from their profession, business, job or work. When engaged in the breadwinner role, an attorney's behavior and decisions result from a combination of many factors, such as legal culture, ethics, economics, client expectations and a personal definition of identity. In the novel *To Kill a Mockingbird*, Miss Maude, when talking to the children of Atticus Finch, says, "Atticus Finch is the same in his house as he is on the public streets." Finch is the prototype of the admirable lawyer: calm, collected and, most of all, able to do the right thing. He lives an integrated life as a lawyer. His professional actions are consistent with his identity and values.

My first position as an attorney was as staff counsel for a corporation. General counsel instructed me that we were "technicians" employed to implement the decisions of the executives. I accepted this with little thought at that time as being the reality of my job. The working adage was that there was no legal job too big or too small; just get

it done. After I began practicing on my own, representing primarily a working-class clientele in general-practice matters, I came to understand that many people wanted to be counseled, advised and guided. Ethical rules governing lawyers recognize and encourage a role broader than that of a technician when representing a client. Rules of Professional Conduct Rule 2.1 (Advisor) states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

This rule provides foundation for lawyers to lead a more integrated life and resist the perspective that a lawyer's primary function is to be the technician in transactional matters or the gladiator in adversary interactions. Many lawyers struggle with lapsing into "lawyer mode" in their personal interactions and consciously create a persona separate and apart from their activity as an attorney. I view this split, or duality, as difficult to live out on a daily basis.

Over the years there has been an articulation of the view that ethical conduct stems from "character," that is, a lifetime of moral faculties and dispositions and not from codes or rules. Character is based upon reflective thinking and acting in a manner that is consistent with treating others properly. The theme and platform of "The Effective Lawyer" series is to highlight best practices that promote a reputation as an ethical attorney who obtains excellent results for clients in a cost-efficient manner. The takeaways are designed to help you define and refine your desired professional identity.

For the past few years I have been presenting a communication model that has four core elements. These tenets are guiding principles for best practices for engaging in productive and rewarding problem-solving. When making decisions on how and what to relate to clients, opposing counsel or to colleagues, best practice may be to filter the content and mode of communication in the context of this model. The four pillars of this approach are characterized by me as follows:

1. Engagement;
2. Credibility-Authenticity;
3. Flexibility-Creativity;
4. Being open, not attached to outcome.

Legal problems, especially in litigation, involve participants making holistic decisions based upon a balancing of economics, emotions, values, a sense of fairness, need for closure and avoidance of future conflict and direct and indirect costs. Everyone wants others to pay attention to him or her and to hear his or her voice. The law provides forums for aggrieved individuals and commercial entities. People are innately empathetic and there is a natural tendency toward compassion. There is no reason for attorneys to suppress empathy in direct communications while working on a case or transaction. Civil and respectful behavior underlies effective engagement. A person's credibility is enhanced by thoughtful dialog that concedes the obvious and acknowledges uncertainty in facts, law and the risk factors and tolerances that may cloud the ability to predict the future outcome accurately. Effective engagement and authenticity recognize the identity and interests of all participants in the negotiation or litigation process. Insulting or humiliating opposing counsel is usually counterproductive.

Effective lawyers are flexible and adapt to the shifting dynamics of the adversary framework of American jurisprudence. Solutions arise from exploring mutual and opposing interests in a manner that encourages each participant to offer alternative solutions to a problem. Attorneys should avoid a mechanical approach to communication that relies upon tactics and clichés rather than earnest dialog. One helpful tool is to create and print a list of all possible outcomes at the start of representation. Keep the list at the front of the file or binder. Create priorities and update the list with clients and colleagues on a periodic basis. Track the costs to date in a separate

column and estimate future fees and expenses. List any indirect costs, such as stress, distraction from the mission of the business and lost opportunity.

Being open to a variety of options that meet the key interests and goals of clients advances both professional reputation and personal identity. ☞

Takeaways

- Insults and put-downs cause disengagement
- Dialog, not debate
- Define your desired identity and reputation
- Maintain a list of goals, outcomes and costs



Pittsburgh lawyer Robert A. Creo has mediated and arbitrated thousands of cases since 1979, including serious-injury and death claims, complex business transactions and cases involving multimillion-dollar settlements. Among other things, he has served as a salary arbitrator for Major League Baseball and the Major League Baseball Players Association, as a grievance arbitrator for the National Football League and the National Football League Players Association and as a neutral for the U.S. Senate Select Committee on Ethics, Office of Fair Employment Practices. He is an adjunct professor at Duquesne University School of Law.

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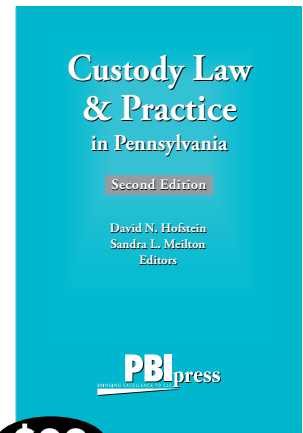
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