Counseling Your Client Through Litigation

by Jonathan B. Frank

In previous articles, I discussed seeing and solving problems, and how to foster a sense of shared responsibility. Now, I'd like to focus on how to translate the legal system and effectively counsel a client, as opposed to dealing with a "case."

What We Learned in Law School

From the first day of law school, we are taught about cases, principles, statutes and precedent. We are trained, through the Socratic method, to "think like lawyers." When we pass the bar, we demonstrate our proficiency of and mastery over a set of rules, some of which have been in place for hundreds of years. We are, we believe, ready to solve the world's legal problems. But unless we've worked in a clinical law setting, we haven't worked with or helped any people. And since our formal education is finished, we are unlikely to take any more classes in psychology or social work.

What We Didn't Learn in Law School

How, then, do we hold ourselves out as "attorney and counselors"? Well, we just do. After a while, it becomes obvious that the counseling part of our job is complicated. Yes, we can apply a set of legal principles to a set of facts. But can we talk to our clients? Can we help them understand the foreign language (literally and figuratively) of the legal system? Can we help them assess risk? Understand the ambiguities inherent in our world? Because if we can't, then all the elegant legal solutions in the world can't possibly justify our fees.

So how do we become counselors? Certainly, time and experience are critical. Just as we become more capable of crafting better legal arguments or contracts, so should we become more capable of guiding our clients through a land as foreign to them as Qatar or Thailand. We see certain situations repeat themselves. We see how our clients react. We see how they rely on our advice.

There's something more we can do. Study the creation of conflict. Understand why the "case" became a case. Appreciate the human dynamics at play. I think you'll find that there are some common denominators. And once you find those, you'll have a reliable framework for providing valuable counsel.

Some Examples

Let's look at some examples. First, consider a situation where two people used to get along, but now they don't. It could be business partners, family members, or maybe a combination of both (a situation crying out for legal counseling). Maybe it's even parties to a contract. Over time, something has happened. To borrow from matrimonial conflict, they've "grown apart." While it's possible that this estrangement won't involve legal conflict, in many situations it does. Your client comes to see you, probably under stress, probably angry, probably looking for an extreme solution. This is a once-in-a-lifetime problem. Your client may say things like, "I can't believe I was his/her partner for 25 years," "He/she has been taking advantage of me forever," and "I just can't take it anymore." Does your client want a legal solution? Yes. But as much as that, your client wants to regain control. Your client wants order to replace chaos. The sooner you understand the human dynamics, the better your counseling will be.

Another example: your client has been damaged by some unexpected act. Maybe it was a fire, maybe negligent construction, maybe wrongful termination of a contract. Maybe the responsible party is a large organization, maybe it's a governmental agency. Although there may be an equal sense of desiring control, your client also wants compensation and justice. Your client may say, "This ruined me" and "Someone needs to pay for this." It could be personal. It could be business. Is there really any difference? To a business owner who was expecting to profit during the three remaining years of an exclusive distribution contract, the termination of that contract is a devastating blow, financially and emotionally. To provide counseling means to understand this deep sense of loss and then explain how the legal system can – and even more importantly, can't – restore the loss.

Defendants suffer too. They are being attacked in an unfamiliar setting, possibly unfairly. Your job, in addition to the core legal function of explaining and then reducing risk, aggravation and expense, is to address the element of dealing with responsibility. Again, it may be personal or business responsibility. A seller of defective goods, a joint venturer who abandons one venture for another, and an employer who terminates an employee under difficult circumstances all need help navigating the litigation process and preparing, in every respect, for a possibly terrible outcome. Professional defendants aside, these clients face tremendous uncertainty. Their stress comes not from the destroyed relationship or unexpected injury, but from a damaged reputation and being held accountable by forces outside their control, not to mention prolonged involvement with you and the legal system.

Think Beyond the Law

How can you help these clients navigate the treacherous legal system (and make no mistake, that's how they look at it)? By filing a complaint/answer/counterclaim/third-party complaint, taking depositions, sending subpoenas, filing motions, participating in case evaluation and appearing for trial 18 months from now? Of course, those are the basic tools of your trade. And if all that was at stake was a legal issue, and if your client was capable of appreciating the nuance of motion and trial practice, maybe that would be enough.

But you're dealing with people and their problems, only a part of which involve the law. As discussed above, to be an effective counselor you must establish a trust relationship with your client that allows your client to express him/herself and allows you to offer candid, unfiltered advice, and then you must be able to effectively deliver that advice.

Establishing credibility is therefore critical. How do you establish credibility? Be credible. Sound simple? Maybe. Is it simple? No. Certain activities help, mostly "performance" activities – participating in a meeting with opposing counsel, taking or defending a deposition, appearing in court. Accurately predicting future events helps too (but not – I repeat, NOT – with percentages). I'm not talking about major swings in the NASDAQ. I'm talking about the little things: some basic procedure, for example. To re-use the doctor analogy, think of how your doctor inspires confidence (or doesn't). Be competent. Be thorough. Be respectful. Be responsible. Be empathetic. Have integrity. Your clients will have faith in you.

Be careful of your language. You say "summary disposition," and your client nods and agrees, much like you would if your doctor said "review the pathology." You talk about "interrogatories and document production" and your client looks at you blankly. What does your client hear? You need to figure that out. Speak in a language your client will understand. Use analogies, charts, graphs, stories – anything you can think of to effectively translate terms that are so familiar to you and so unfamiliar to your client.

Depositions

A special word about depositions – you talk about "deposition prep" and your client is petrified (as you probably would be if your doctor quickly described an intrusive test to find a possibly serious ailment). And when you sit down to conduct "deposition prep," your client's stress and fear are certain to prevent him/her from remembering a fraction of the questions and answers you worked so hard to prepare. That's how the brain works. Even worse, this is a compounding problem – your client will leave the session even more stressed, probably won't eat or sleep well, and will not only perform badly during the deposition, but will also associate the entire process with tremendous emotional upheaval. Resentment follows, directed not only at the system, but at you. Unless your client is used to answering probing questions from a well-trained attorney sitting in a conference room under oath with significant money at stake, you have a lot of counseling to do.

The solution is easy, in theory anyway: reduce your client's stress level. Explain the deposition process in a comfortable environment, maybe even in the room where the deposition will take place. Review the role of the court reporter. Describe the likely questions in general terms. Talk about some nuts and bolts, like your limited ability to make objections, when your client can take breaks, what a transcript looks like and how it will be used. At the end, make sure you answer all your client's questions (most of which will surprise you). And then, try to maintain this approach before, during and after the deposition.

Losing

Finally, and perhaps most importantly, a word about losing. Nobody likes to lose. Nobody likes to talk about losing. And nobody wants to be perceived (especially by a client) as a loser. Yet there is always (yes, always) a chance (at least some chance) of losing. A client isn't properly counseled unless the client understands losing.

So how do you talk about losing? Here's one option: don't. Don't talk about it when you first analyze the case. Don't talk about it during discovery. Don't talk about it before or after case evaluation. Don't talk about it before or during summary disposition motions or trial. Wait until there's really a loss. Once losing is a fact, it's gotta be OK to talk about losing then, right?

I think you see my point. It's too late to talk about losing once you've lost. And if that's true, then there must be a point in time before losing to talk about losing. Losing has consequences. Possibly serious consequences. Clients have a right to know the consequences of losing before they lose. In fact, they have a right to know the consequences of losing as soon as possible.

What's the best way to talk about losing? There isn't one. But I submit there are a few lousy ways to talk about it. Here's one: "Don't worry about it ... I never lose." Even if that's true (and may the Force continue to be with you) it's not a wise approach. You will instill a certain sense of confidence in your client – let's call it a false sense of confidence. If you lose, you will have a client who is not only unhappy, but also at an unfair disadvantage, not having been given the opportunity to avoid the consequences of losing.

Here's another one: attribute some percentage to winning and losing. How can you do that? Are there statistics supporting your statement? What would you think if a doctor made up statistics about your chances of recovery from a serious disease? And yet it is a FAQ, maybe the most FAQ (although I can't say for sure in the absence of statistics). Clients want to feel comfort. They like predictions. You think you show your expertise through quantification. Not so.

Assuming that there is some chance of losing, and that it's wise to discuss this chance before losing happens, why is it so hard to talk about? Simple – none of us wants to appear un-gladiator-like. But remember, the gladiator has nobody else to answer to, nobody else who faces the consequences of defeat. In litigation, you are not really the gladiator, you are the gladiator's briefcase-carrying, bar-card-carrying representative. You are the translator of the legal system.

Still, it's hard to have a conversation about losing when your client wants you to be a winner. Every time you say, "If the judge rules against us on this motion," your client may hear, "If I were a better lawyer I could win this motion." Every time you say, "It's always hard to predict what a jury might do," your client may hear, "I'm not sure that I'm ready to try this case." It's up to you to find a way to effectively deliver the right message. Once you establish credibility, your client will know that you are a good enough lawyer to win the motion and that you are ready to try the case. And when you talk about losing, they will listen.

Be a Counselor

In the end, if you are mindful of the inherent stress your client is under and the distance between your client and the legal system, you'll be a good counselor. Be a translator, not a lecturer in a foreign language. Hone your listening and empathy skills – skills that you did not learn in torts, contracts or civil procedure. For plaintiffs, understand and respond to your client's expectations of the legal system. For defendants, understand and respond to the natural instinct to deflect blame and the fear of being judged. For both, remember that the stakes are high, and that they are relying on you to guide them through the process.