Bedside Manners for Lawyers

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Author

Building strong relationships with clients is the key to being their zealous advocate. Baird shows how to breathe new life into the practice by exercising a better bedside manner.

AMERICAN BAR ASSOCIATION

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by Peter D. Baird

Whenever anyone asks me, "Have you heard the one about the lawyer who . . . ?" I know that a tiresome joke is coming and it will probably involve sharks, leeches, or the blistering fires of hell. However, since these jokes come from bad lawyers and are based on stereotypes that I can't do anything about, I tolerate the dig, wrench a smile, and force a chuckle.

Whenever I come across an opinion poll that ranks professions by their public esteem, I know that lawyers will be near the bottom, along with car salesmen and undertakers. Since lawyers inhabit a justice system that invariably generates losers—and frequently produces winners who are losers too—I shrug off our unpopularity as just something else I can't do anything about.

Yet, after decades of practicing law and after years of defending lawyers, I have changed my mind. I now believe that anti-lawyer jokes and polls stem more from matters within our control than from those beyond our control. Although as individuals we can't do much about crooks, incompetents, or others who discolor our reputation, one thing we can do is better serve clients. Remember, they are the ones who for centuries have bashed lawyers and perpetuated the negative stereotype that dogs us no matter how exemplary our individual conduct may be.

Think about it: Clients trust us with their secrets, safety, freedom, injuries, contracts, families, jobs, property, and an enormous range of other individual, governmental, and corporate interests. Things can and often do go wrong during our pursuit of those objectives. Consequently, more than anybody else, clients sue us. More than anybody else, clients file bar complaints. More than anybody else, clients scorn us.

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While continuing legal education, lawyer-assistance programs, and stricter ethical standards may improve our services, there is something more basic, perhaps more important, that we can do for our clients, our profession, and ourselves. Recently, I have tried to do it myself. I'm talking about lawyers having better bedside manners.

To explain what I mean by bedside manners, I must tell you about my father, who was an old-fashioned, bag-toting general practitioner M.D. in rural Idaho about whom I have written in this and other magazines. *E.g., N.Y. Times Magazine* (July 7, 1991); *Newsweek* (Dec. 16, 1996); *Chicago Tribune Magazine* (Dec. 24, 1995). He had no special training, and he was not board certified in anything. His "residency," such as it was, had been as a World War II Army field surgeon during some of the bloodiest battles in the South Pacific.

The hospital where he practiced was small and basic; it had no Departments of This or Departments of That, no interns or residents, one operating room, one delivery room, a rudimentary laboratory, a limited number of beds, and a non-state-of-the-art X-ray machine. In short, my father was the antithesis of many doctors today who—with their board certifications and sub-specialties, their ICUs and MRIs and HMOs, and their emotional as well as physical detachment—care little about their patients and behave more like aloof technicians than as hands-on healers.

Given my father's professional limitations, he surely had patients who would have lived or who would have experienced better outcomes if his training and support had been stronger. Yet there were no doctor jokes in our little town. Medical malpractice actions were unthinkable. My father commanded more respect than did the clergy. To say he was thought of as God is overstating it, but not by much.

The reason for all that esteem was not that he was the most accomplished doctor in the world, because he wasn't, and not that he cured all his patients, because he didn't. The reason

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was simple: He cared constantly and authentically for his patients and they knew it, felt it, and appreciated it. He cared by paying house calls, sometimes in the dead of winter, sometimes in the middle of the night, and sometimes to lumber camps high up in the mountains. He cared by making time for his patients and by knowing them and their families inside and out. And he cared in ways that, had I appreciated them earlier in my career, would have made me a better lawyer and, in some small measure, might have ennobled our profession.

Words. In my struggle to be that better lawyer, I realized that my vocabulary frequently kept me from thinking enough about those I represent. Compare the words my father used that focused him on internals with the words I use that focus me on externals. My father inwardly "treated" patients, and I outwardly "represent" clients. He "took histories," and I "gather facts." He spoke of "healing," and I talk of "winning." He worried about a patient's "candidacy," and I worry about a client's "claim." He referred to his cases by patient name and affliction (e.g., "Inez Nelson's heart condition"), and I refer to my cases by legal problem as if they belong to me (e.g., "my securities case"). Without knowing it, he practiced an early version of what New-Agers might call "holistic medicine," and I don't practice anything that anybody would call "holistic law."

What this means is that, if I am to provide better bedside manners, I must breathe new life and instill deeper meaning into my vocabulary. Specifically, I have to "listen" more intently, "ask questions" more directly, and "counsel" with greater sensitivity and straighter talk. That also means I must borrow a medical exhortation my father slavishly lived by: "First, do no harm."

Listening. I regret to say this but, over the years, I have done less and less honest-to-goodness listening. For example, I can't listen when I am typing on my computer, shuffling papers, answering the telephone, and putting someone else on hold. And yet I've done just that. I can't listen when someone else is talking and all I'm doing is thinking about what I'm going to say as soon as I get the slightest chance to interrupt. But I've done that, too. Moreover, I can't listen when I'm talking at the same time that one, two, or even three other people are also talking. That happens all the time.

What makes these ear-plugging incidents so unforgivable is that I am well practiced at being quiet and listening. In trials and depositions, I am tight-lipped and all ears. Why can't I do in my own office what I do in the courtroom or deposition room? Moreover, I'm always telling my clients and witnesses to concentrate on the questions being asked before uttering a peep. Why can't I do what I tell them to do? With better bedside manners, maybe I can.

Asking questions. My father probably didn't realize it, but he instinctively knew when to ask direct questions and when to ask leading questions. In conversations that I overheard when patients called our house, my father would ask direct questions at the outset, such as "How long is it between contractions?" or "What have you done for it?" Later on, when he had heard the patient out, he would switch to leading questions to get the details, such as "Is it a sharp pain?" or "Do you feel faint when you stand up?"

By training and practice, I know all about direct questions. I'm careful during trial to ask my witnesses only direct questions when eliciting important information. I do that not only because the rules require it but also because it is far more effective for the witnesses to testify for themselves than for me to do it for them through leading questions.

Unfortunately, outside court I seem to forget all about using direct questions that will encourage clients or witnesses to tell me their truths in their own words. Instead, I pepper them with leading questions that tend to drag them away from their realities and toward my preconceived assumptions. That's not asking questions; that's manipulating. And to make matters worse, I am rarely conscious of it.

A related problem arises when I ask questions as if the colloquy were a one-time, static event. Yet how many times have I finished an interview, had the client or witness verify the story in writing, and later learned that the client or witness was honestly mistaken? How many times have I then watched the person, on cross-examination, made out to be a liar because I had prematurely pinned her down to a story before all the facts and documents had surfaced that could have refreshed her recollections and put things in proper sequence and perspective?

As I have discovered the hard way, past events are almost always reported incorrectly when recalled by raw memory alone. Consequently, to have better bedside manners, I must keep asking the same questions of the same clients and same witnesses as time passes and as information continues to develop. When I do that, I also must remember to listen, really listen, to what they tell me.

Counseling. I don't know how my father counseled patients because, except for overheard telephone conversations at home, I was not privy to those doctor-patient sessions. However, knowing him, I suspect that he was an intense listener, that he was compassionately blunt, and that he often told patients to do nothing. I regret to admit it, but that kind of counseling frequently has eluded me.

For years, I have "counseled" on the erroneous premise that "counseling" consisted more of my talking than my listening. When I did talk, it often came out as defensive hedging rather than comprehensible advice, and, I'm embarrassed to say, that kind of mumbo jumbo also has shown up hundreds of times in my "CYA" letters. Like many other lawyers, I worry so much about being wrong, getting sued, or scaring off clients that what I say or write is occasionally devoid of any meaning. A classic example is the jargonistic nonsense that all of us put into corporate audit responses.

In the absence of lay-it-on-the-line straight talk from lawyers, how can clients possibly give their "informed consent," especially to litigation? Often, when my cases finally end, the dust eventually settles, and, using hindsight, the benefits are compared against the bruises, I wonder if I could have better warned clients at the outset. Did I adequately alert them how grueling, expensive, time-consuming, unpleasant, and risky the whole undertaking was going to be?

Given the fact there is no way to forecast the future of any case or to warn clients of every risk, the best approach to prelitigation counseling is probably to think as my father did and ascertain whether the client is a good "candidate" for litigation. If I think in terms of client candidacy, I am more likely to cover vital issues and possible contingencies that are outside the narrow scope of the lawsuit.

Candidacy for individuals would include such subjects as age, health, finances, family circumstances, psychological strength, available time, and risk aversion. For example,

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how would a sick and infirm individual weather cross-examination, delay, frustration, and trial? How would the client cope if his good claim triggered a powerful counterclaim? What if the costs were to end up being greater than the benefits? Since the possibility of losing is omni present in every case, how would the client cope with defeat? Would psychological counseling, settlement, mediation, or bankruptcy be a better alternative?

For corporations and government agencies, candidacy also is important. Allegations and statements made in one case may conflict with allegations and statements made in other cases, SEC filings, regulatory reports, and internal memos. A commonly forgotten question is whether the key witnesses will still be employed when their testimony will be needed and, if so, will they be happy people when that time comes? Also, what will former, sometimes disaffected employees in the "alumni association" have to say about the dispute? Will the litigation affect credit lines, bonding capacities, license restrictions, leases, marketing programs, mergers, acquisitions, or legislative relations?

One of the hardest things for lawyers to do when counseling is to tell clients to do nothing. Our livelihoods depend on our doing something, and our instincts drive us to do something. No wonder that asking a lawyer if you need a lawsuit is sometimes like asking a barber if you need a haircut.

Just as my father had to tell patients with colds to stay in bed and do nothing, we must sometimes tell our clients the same thing, because there are situations in which doing nothing is the right thing. The liability may exist but the damages may not. Tempers may cool. Threats may not be carried out. Markets may improve. Management may change. Statutes may be amended. Patience may be the right prescription.

Do no harm. For centuries, physicians have been taught a negative exhortation that lawyers should learn as well. In Latin, it is "*Primum non nocere*." In English, that means "First, do no harm." It was my father's credo.

Unfortunately, lawyers are prone to forget how much harm we can do even when our conduct is ethically sound, technically proficient, and without a trace of malpractice. A common example is how competently and ethically handled divorce proceedings can produce enormous psychological, financial, and familial harm. Thus, evaluating harm must always be an integral part of good bedside manners.

I don't know why it has taken me so many years to remember and adopt my father's bedside manners. If there is an answer to this question, it is probably found in this observation attributed to Mark Twain: "The older I got, the smarter my father became." ◻

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