

A stitch in time

Presenter's Workbook

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March 2015

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Introduction

A stitch in time looks at managing risks with effective communication and how bad communication can be disastrous. These materials are designed to be used with the video.

The communication issues explored are:

- the ways practitioners communicate with their clients
- the factors effecting communication
- how practitioners can improve their communications with the aim of reducing the risk of a claim
- dealing with commercially savvy or sophisticated business people
- accepting information or assumptions made by clients.

This material also explores the underlying causes for claims, why communicating is so hard, what practitioners do wrong and how to improve communication skills.

Effective communication

A basic model of effective communication is sending or receiving the right messages by and to the right people by the right means at the right time.

If any of these things go wrong there can be a communication failure.

Communication breakdowns

These are the types of communication breakdowns LPLC regularly see in claims.

- Failure to speak in a way the client will hear – advice is given but not received/understood. Test the understanding of the client; don't just accept a nod or a yes and ask them to tell you what they understood you to say.
- Failure to communicate enough or at all – the reasons for this range from assuming the client is too busy, they won't/don't understand, they are sophisticated clients who the practitioner thinks understand the issues, the matter is routine so doesn't need to be communicated or failure to ask enough questions to gathering enough and required information.
- Failure to set up how the framework of the relationship/matter will proceed – engagement management including setting up, varying and closing retainers.
- Failure to communicate key changes such as change in personnel handling the matter, changes in fees and new evidence.
- Failure to deal with clients acting to their detriment or against your advice – confront the client with the risks of their own attitude and question why they are taking a particular course of action.

The video scenario *A stitch in time* has a variety of these communication breakdowns.

A stitch in time

The video scenario

Andrew, a busy practitioner, is asked by Donna, a clothing manufacturer, to review a potentially lucrative supply contract with Glamsport. Under pressure, Donna proceeds to order fabric while waiting for the advice. However, Glamsport subsequently changes its order, a dispute quickly ensues and Andrew launches into litigation. Donna is told she has good prospects of success but months later she is surprised by advice from a barrister that she may lose and have to pay the other side's costs. It is clear the practitioners' communications failings have, in large part, contributed to the problems they face.

This scenario highlights the importance of effective communication in the context of a matter that shifts from fast-moving transactional to contentious in nature.

Scenes 1, 2 and 3 - Initial interactions – 0:00 to 4:11

Andrew meets with Donna where she asks him to look over the contract as soon as it arrives. Donna then meets with Carla from Glamsport a week later and hears the contract has been sent. A follow up meeting between Andrew and Donna confirms the contract details.

What is the problem playing out and what do you think could go wrong?

- Donna's appointment with Andrew has been squeezed in and she is made to feel unwelcome.
- Andrew is inattentive, distracted and ignores Donna's excitement and concerns including those related to the urgency of Andrew contacting her as soon as he receives the contract.
- Andrew is more interested in the problem than the person or her business.
- Donna leaves feeling bad and possibly dissatisfied.
- Carla tells Donna the contracts have been sent to Andrew a week ago.
- They discuss the fabric, the required order date to meet the delivery date and Donna's commitment to placing the order without the official contracts in place.
- Andrew apologises for not contacting Donna as soon as he received the contracts but doesn't seem to appreciate the impact this has had.
- Andrew asks if Donna wants to go over the contract, raises his concerns about the timelines and offers to negotiate with Glamsport, which she rejects.

- Donna says she has already ordered designs, fabric and extra machinists to ensure there won't be any time problems. Andrew doesn't listen or understand the importance of this information.

Scenes 4, 5, 6 and 7 - Situation spirals out of control – 4:12 to 9:32

Watch the situation spiral out of control in the next four scenes. Donna and Andrew meet with the litigation practitioner Liz, Andrew's phone conversation with the Glamsport's counsel which closes with Andrew's remark of seeing them in court and Donna's meeting with Liz the litigator three months later. This is followed by Andrew leaving a 'bad news' voice mail message for Donna from his mobile as he is walking down the street with Liz after seeing the barrister.

How do you think this situation could have been avoided?

Who does the fault lie with?

- Glamsport is not answering letters of demand nor providing progress payments. Liz questions Donna about the history of the matter and the details of the contract.
- Donna wants the situation fixed and doesn't want Glamsport to 'get away with this'.
- There is miscommunication of the tasks Andrew wants Liz to undertake.
- There are discourteous and personal remarks exchanged between Andrew and the Glamsport counsel during their phone conversation.
- Glamsport counsel claim their client has no case to answer and makes an offer that each party walks away and pays their own costs. This offer is not communicated to Donna.
- Liz gives Donna false reassurance on prospects of the matter.
- It is not until this point that Liz gives Donna a costs estimates and billing arrangements disclosure. Donna is surprised at the amount of the estimate and makes it clear she has not been reading the other letters.
- Andrew leaves bad news in a voice mail message for Donna after meeting with the barrister. The barrister's view is that Donna is on shaky ground contractually and she should settle with Glamsport as soon as possible.
- Andrew and Liz argue about what has gone wrong and blame each other rather than taking responsibility for the problems and recognising the communication failure.

Final scene - What happens in the end? – 9:32 to the end

The final scene is a meeting between Donna, Andrew and Liz.

How does the matter conclude?

- Donna is unprepared for the bad news.
- Andrew acknowledges Donna's feelings and takes responsibility.
- Andrew's explanations now focus Donna on the central issues of the matter.
- They are all saved by good luck more than good management.

Client experiences

Which of these practitioner communication stereotypes did Andrew exhibit?

- Clients not being told, not asked and not listened to.
- Practitioners not being accessible.
- Infrequent, slow and last minute actions.
- Practitioners using jargon and poor explanations.
- Clients feeling awkward and uncomfortable.
- Practitioners being discourteous and dishonest.
- Practitioners being self-serving and not client-focussed.

Communication challenges for practitioners

In addition to the everyday barriers to effective communication, practitioners face particular challenges in their efforts to communicate which may explain some of the stereotypes. Some of these challenges are:

- building trust and rapport quickly with clients and others who may not be motivated to communicate openly
- overcoming barriers arising from client characteristics such as a client's emotional distress, physical or mental impairment, language, cultural, gender, personality or age differences
- finding out enough about a client's situation, motivations and expectations to be able to give useful advice and recommendations
- managing the volume and variety of communications that need to be processed in order to understand what facts are relevant and irrelevant to the client's position and to implement legal strategies
- how to explain abstract, complex legal concepts, arguments and uncertainties to non-lawyer clients to ensure understanding and informed decision-making
- dealing with clients who make it difficult to communicate with them such as clients who don't want to hear bad news, who won't take advice, who disappear or are otherwise inaccessible
- complying with increasing regulation of communications such as professional conduct rules about costs and other disclosures
- adopting and mastering new communications technologies
- communicating effectively in the face of time pressures and the economic realities of legal practice.

[Above sections came from workbook with DVD *A stitch in time* – written by Ronwyn North]

How people process information

There are three ways people digests and retain information – aurally, visually and kinaesthetically – and your clients will use all of these approaches at different times. They will rely on any one of these approaches more than the other two. When delivering information to a client be conscious they will most likely process information differently to you.

The aural people will need to hear you tell them the information while visual people will take in the information from a diagram much faster.

To maximise the opportunity for your audience to remember your information keep the following points in mind.

- People have selective attention to avoid overload, so they may not take in everything you say.
- The information must have personal significance to 'register' and be retained by the client.
- People can't remember what they don't understand.
- People can only remember a few points at once.
- People usually don't remember exactly what was said, they only remember their interpretation of what was said, seen or read.

Example

1 Selective hearing

A practitioner had used a livescribe/smart pen in conference with the client. At the end of the matter the client stormed into his office accusing him of having said at the start that the matter would cost no more than \$20,000. The client's bill was \$35,000. The practitioner was able to call up the audio of the meeting and it was clear he had said 'the matter could cost between \$20,000 and \$40,000 depending on how complex it became'. The client had thought his matter was pretty simple so would cost no more than \$20,000 – he only remembered his interpretation of what was said.

Getting your message heard

Practitioners can significantly improve their communication with clients and consequently reduce their exposure to claims by giving explanations that are more easily absorbed, understood and remembered.

- Capture the client's full attention and make sure you are giving your full attention to the client. Minimise distractions. Check the client is not bursting to tell you something else. Tell the client what you are about to say is important and why. Be able to answer the client's imaginary question "Why should I listen?" Some people will be more motivated by the penalties they might suffer by not cooperating in the legal process rather than the gains.
- Actively confirm what the client already knows so you can put the explanation in proper context, gauge where to start and how detailed your explanation needs to be. People process information more effectively if they move from familiar to unfamiliar territory. The logical starting point for you may not be the starting point for the client. Also, avoid making assumptions about what the client knows and doesn't know. Claims history shows that experienced clients may need a more detailed

explanation than practitioners think. (See *Dealing with experienced business people* below)

- Deliver your explanation in a way that is simple, logical and interesting. Use simple language. People can't remember what they don't understand. Break information into manageable sections or chunks, repeat key points and consider using visual aids for the visual learners. Actively involve the client by encouraging them to ask questions or take notes. People have a short attention span when it comes to listening. Unless their attention is continually recaptured their minds will wander.
- Actively check and confirm understanding. Don't assume the client understands and be wary of accepting a 'yes' or nod of the head at face value. Observe the client's body language. Listen to the questions the client asks. Ask questions that test the client's understanding or ask them to summarise what they understand or are taking away.
- Stand up to clients who won't listen. If you don't think you are getting your message across, tell the client so. Don't ignore the issue. Create a climate where misunderstandings, underlying concerns, unstated motivations and unrealistic expectations can be aired. Assert yourself or disengage/terminate the relationship.
- Keep records or have independent confirmation of understanding. Your files notes should record what the client told you they understood. Confirming letters serve the dual purpose of reinforcement and record. Have a member of the team present, maybe taking notes. Make greater use of interpreters where the client has language differences but avoid using family members where possible. Young children may not be able to translate the concepts or family members might have a potential conflict of interest or stake in the matter.
- Give your client something to take away. A brochure or fact sheet is an effective way of explaining routine things like what is involved when you sell a house and what the firm will do for you or how the process of winding up an estate works.

Experienced business people

Practitioners face hurdles when trying to communicate with any clients and communicating with experienced business people has its own challenges and issues.

- These clients think they know a lot more than they might about particular areas of law and the impact of various laws or consequences of doing or not doing something. As a result, they often don't actively listen to what is said.
- The practitioner does not explain the full consequences/meaning because they assume the client knows a lot more about a particular area of law, the impact of various laws or consequences of doing or not doing something.

- The type of work the practitioner does for these clients is often repeat work. The practitioner's guard is often down about how they manage the retainer with the client because they feel the client understands how these things work. They may not document the retainer properly because they have done the same thing for the client before.

The problem is that in some instances the client does not know about the impact of a law or a certain legal requirement and the practitioner fails to properly inform the client about an issue. Worse still, the client may know it but because the practitioner didn't explain it and document that explanation, the argument is open to the client to say they didn't know.

It could be commercial suicide to assume your important sophisticated client has no knowledge and tell them absolutely everything. It is a fine line to walk to ensure you are giving the client the right advice, pitched at the right level.

How do you handle this type of situation?

Do you ask for feedback from your clients?

See *Marplace v Chaffe* [2006] EWHC 19191 (Ch) at [404] it quotes *Pickersgill v Riley* [2004] UKPC 14 where it says

'the scope of the duty depends on the characteristics of the client. A client, unversed in business affairs, might need explanation and advice from the solicitor before entering into a commercial transaction which it would be pointless, or even sometimes an impertinence, for the solicitor to offer to an obviously experienced businessman.'

Example

2 Assumed too much

A firm was asked to advise on the contractual obligations and the appropriate process for removing several senior employees from a local council. The advice was given in terms of the employees' contracts of employment. It transpired that one of the employees was not yet 55 years of age and had been employed by the council for many years. As a result, he was entitled to a defined benefit scheme superannuation payout and the council was required to repay a significant amount of that payout to the superannuation fund.

The council complained the practitioners failed to advise about this liability. The firm replied that it was not part of its retainer to advise on that issue and in any event, they did not have sufficient information about the employee to know he was entitled to a defined benefit. The firm assumed the council's CEO would know about the issue and look into it.

This was such a well-publicised issue for local councils that it went without saying, so the firm thought the council would manage it.

Risk management strategies

- Get to know the level of understanding the client has of the legal issues involved. Don't take for granted what the client does or does not know.
- Develop systems to ensure the required information is covered in regular transactions with the clients. Don't take for granted that because you have done it before you don't need to explain it again.
- Carefully document the scope of the retainer agreed upon with the client, making it clear what you are doing and not doing as well as what the client is doing. Ensure follow up documentation if anything changes during the retainer.

Improve your active listening

Below are some useful tips to help improve your active listening.

- Give your client your full attention.
- Don't assume you know what the client will say.
- Don't mentally prepare a response while the client is talking.
- Let the client tell you in their own words.
- Observe the client's body language.
- Show you are listening with your own body language.
- Reflect what the client has said by paraphrasing back.

Where are you most vulnerable?

To avoid the pitfalls of ineffective communication, identify where you are most vulnerable. Weak points in your communication armour could be:

- not communicating about the right things (content)
- not communicating things right, for example having communication habits that inhibit full and frank two-way exchange (processes)
- not checking and recording your own or others understanding of or satisfaction with your communications (outcomes)
- not being interested in feedback about or improvement of your communications (attitude).

Litigation and transaction communication tips

Here are some tips to keep in mind when communicating litigation and transaction issues with clients.

Litigation communication tips

- Take time at the outset to obtain comprehensive instructions from your client.
- Write a comprehensive file note of that conference and send it to your client with confirmation of how you have been instructed to proceed.
- In the first letter, advise your client of the time limit and the consequences for your client if it is missed.
- Confirm initial advice in writing and qualify it, as appropriate.
- Give written advice from time to time as circumstances change.
- Consult with your client face to face when major developments occur or important decisions need to be made.
- Sensitively confront your client with the risk of decisions not to take certain steps or to act in a way detrimental to their interests.
- Confirm settlement instructions in writing.
- If a client fails to provide instructions or disappears terminate the retainer, reiterating your advice on the limitation period.

Transactions communication tips

- Be upfront and honest with your clients in establishing the limits of your retainer.
- Provide clear advice as to how the transactions should be handled to ensure your clients' interests are protected.
- Obtain clear instructions as to the basis on which you are to proceed.
- Warn clients of the risks they are taking.

Confirm your retainer and advice in writing, particularly where the retainer is limited. Set out any areas where the clients have chosen not to take your advice and therefore accept the resultant risk.

Quiz: Are you a good communicator?

The following 20 statements/questions draw on research that correlates communication with client satisfaction and avoidance of claims and complaints*.

1 Practice information

The practice provides clients with written information about the practice (hard copy or electronic), for example range of services, personnel, practice hours and client care standards.

2 Access and appointments

Clients can obtain appointments within a reasonable time. The practice has a system whereby urgent cases can be accommodated or the client assisted with a referral. Consultations are scheduled at times and, if necessary, places convenient for the client and long enough to allow quality client care.

3 Punctuality

Practitioners are on time for appointments. Clients are informed on arrival if there is likely to be any delay and given updates about further delays. Clients are given the option of rescheduling if a delay is lengthy.

4 Environment conducive to communication

Interviews and conferences are held with regard to client privacy and confidentiality, and where possible in a meeting room at a side table rather than across the practitioner's desk. Arrangements are made for holding communications such as telephone/mobile calls, email notifier and interruptions by staff.

5 Rapport

The practitioner greets the client appropriately. While the practitioner's manner is business-like, they make an effort to put the clients at ease from the outset and show concern for the person and the problem.

6 Service arrangements and outcomes

At the first meeting on a matter the practitioner outlines as far as possible the processes that will take place, the likely time and costs involved, and invites client input into the arrangements. The practitioner explores the client's expectations of the practitioner as well as taking legal action. The practitioner should also address any unrealistic expectations.

7 Communication arrangements

Clients are informed of arrangements for communication throughout the matter, for example how and how often the client can expect contact and the channels of communication if the practitioner is not available for client queries including the levels of authority of more junior legal staff or support staff.

8 Motivation to share information

The practitioner makes it easy for the client to talk and deals effectively with non-disclosing behaviour by being a good listener. Traits of a good listener are being attentive, non-judgmental and empathic, using appropriate questioning techniques and giving appropriate feedback about the effects of disclosure or non-disclosure.

9 Note taking

The practitioner takes notes and encourages the client to do so as well.

10 Client questions

The client is encouraged to raise questions or concerns and enough time is allowed to discuss them.

11 Appropriate language and checking understanding

The practitioner uses everyday language and explains technical terms. Before concluding the meeting the practitioner ensures the client has clearly understood what has been communicated including how the legal system operates so as to avoid negative feelings about 'the system' impacting on the relationship.

12 Conflict of interest

Conflicts are properly disclosed to the client. If appropriate, safeguards are outlined and client consent obtained in writing.

13 Costs disclosure

Requirements are met including basis of charging, estimates of fees and disbursements, billing arrangements and other statutory disclosures.

14 Decline and referral

If the practitioner declines to take the case the client is given the reasons. If the reason is the practitioner's lack of skill or experience, the client is assisted with an appropriate referral.

15 Language differences

The practice has processes for communicating with clients who are not proficient in the primary language of the legal staff.

16 Progress reports

The client is kept fully informed of all major steps and developments. Progress reports are confirmed in writing and include updates as to overall progress towards agreed outcomes and steps to conclusion of the matter.

17 Cost updates

Fee estimates are updated in a timely manner and adequate reasons for increases are given.

18 Reliability

The practice keeps its promises regarding communication, particularly accessibility of practitioners and frequency of communication.

19 Involvement of other practitioners

Where consultations with other practitioners are involved such as barristers, experts or agents, the practitioner explains their role and expected contribution.

20 Client feedback and improvement

The practice has in place procedures for assuring itself that clients are satisfied with communication processes, for example surveying clients about their level of satisfaction with the matters above and actively seeks to improve its communications practices.

* Sources for the quiz include *What clients want* survey by the Victorian Legal Ombudsman reported in *With Respect* September 1998, *Managing Client Expectations and Professional Risk* by P & R North, Streeton Consulting 1994, *Quality Assurances Standards for GPs*, Royal Australian College of General Practitioners.