VIRGINIA STATE BAR
PROFESSIONALISM COURSE LECTURE

ZACHARY KITTS
K&G LAW GROUP, PLLC

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PROFESSIONALISM IN CLIENT RELATIONSHIPS

My lecture focuses on the importance of professionalism in client relationships. I don't know that there is particular order to these lectures today, but it makes sense that we should start with professionalism in client relationships. There is no doubt in my mind that your relationship with the Virginia State Bar, your relationship to the courts, and your relationship to opposing lawyers are all impacted by your client-relations skills.

Perhaps as a result of human nature, when something is done right, we rarely notice it. Instead, it is the negatives that we all notice. However, I'm going to try to keep my comments focused on the positives; I'm going to focus on the ways that we can build positive relationships with clients through taking basic steps that will not only improve our client relations but will improve every aspect of our professional lives.

First, I want to address how we interact with our clients; what we say, what we do, and how certain specific, unique aspects of our communications affect our client relations. Then I want to talk about the kinds of things that we should be communicating to our clients, and how we can improve our ability to communicate those things by taking certain basic steps. Then, I'm going talk a bit about my own experience as a lawyer; how I learned what I learned over the last 18 years.

During my career in private practice, I have represented a wide range of parties, ranging from individuals and small businesses to publicly traded corporations. I mention this because I think the same basic principles of client relationships hold true regardless of whether you represent individual plaintiffs or large corporations with their own in-house lawyers. That is because even if you represent large multi-national corporations, you will still be interacting with a relatively small number of people who have been assigned by their employer to handle some legal issue; and because their professional well-being depends at least in part on the outcome of the legal matter, they are most definitely emotionally invested in the outcome.

Also, by my comments today, I do not mean to glorify myself or to put myself above others. Most everything I will say today I regard as basic and fundamental; that does not make it any less important. Much to the contrary – in law, as in every other part of life, all you really need to do to excel is execute on the fundamentals. Lawyers lose their way, both in individual cases and in life, when they fail to execute on the basics.

Some of what I will share is stuff that I learned from two senior lawyers I had the good fortune to work with early on; some of it I learned the hard way, by making a mistake myself. I also learned a great deal by observing opposing counsel and making mental notes of the kinds of things they did right (i.e., what I admired about their practice) and the kinds of things they did wrong (i.e., the kinds of things I did not want to emulate).

One final qualifier: litigation is a rough and tumble world, and no matter how diligently you prepare, no matter how much law you know, no matter how many trials you have under your belt, if you litigate enough issues you will not always get it right, and you will definitely lose sometimes. I certainly have lost my share of issues. I realize that not all of you are or will be

litigators but I am confident that these concepts will in some way apply to your practice and to your professional life.

COMMUNICATION AND EMOTIONAL CONTAGION

Let's start with professionalism in our client communications. We all know the importance of good client communication skills. This is a fundamental part of our work as lawyers, and the importance of communicating clearly and effectively with our clients cannot be overstated. Good client communication skills will make you in demand as a lawyer and will boost your esteem in the legal world; on the flip side, bad client communication skills are a quick and easy ticket to trouble with the Bar, being fired by clients, etc.

Today, though, I want to bring your attention to an aspect of client communication that is often overlooked, even though many of us have noticed it in passing. I'm referring to something that psychologists call "emotional contagion." This concept was first addressed at length in a 1994 book of the same name by psychologists Elaine Hatfield, John Cacioppo, and Richard Rapson, but, again, it is not a new concept. Certainly, people interested in military affairs been aware of it for a very long time. I first noticed it myself in my work with numerous clients who had served as officers in the military.

The idea is simple and I dare say that many of you already realize what I mean: people tend "catch" the emotional states of others, even if we don't want to or mean to. There are a number of factors that influence emotional contagion. Some individuals are more (or less) susceptible to the emotions of others; also some individuals tend to "spread" their emotions more easily than others, despite not meaning to or even being aware of it. Also, certain emotions – like anger and above all fear – are more contagious than others.

One of the nice things about a lecture like this is that I don't really need to site a case or an academic article for everything I want to say, but I don't think it would be a controversial proposition to say that most lawyer-client relationships will involve a certain amount of emotional contagion. I think the experience of everyone in this room and a good dose of common sense will tell us that. The question is not whether we will "catch" a client's emotion or whether the client will "catch" our emotions. The question is who catches what from who and when.

So, by being aware of the emotions we express and by taking steps to control the emotions we reveal and the ways we reveal them, we can control, to some degree, the client's emotions. Note that I am not saying we should fake our emotions; indeed, over the last 200,000 years or so, human beings have become very skilled at detecting false behavior. Nor am I saying that we have to be perfect at all times in the emotions we display. Indeed, to never have a slip of your emotions would be a superhuman feat. At the end of the day, our ability to control our emotions will depend on many factors, and not all of us will be as skilled at it as others.

But I believe that there are some basic steps we can all take that will help us greatly as we try to instill the right kinds of emotions in our clients. One thing that is well within our control is the competence we can display in our client interactions, and the quiet sense of confidence we cultivate when we work to always be competent in our client interactions. Rule 1.1 of the Rules of Professional Conduct requires us to be competent in a general way. The rule tells us that competence "requires (1) the legal knowledge, (2) skill, (3) thoroughness and (4) preparation reasonably necessary for the representation." It is tempting to think of competence as something that you obtain, and then have forever and ever, but the kind of competence I refer to here is something that we have to work to obtain again and again. In terms of our client relations, I

mean that we should strive to display competence in each client meeting, in each phone call, in each deposition, each court hearing, in each email. This, indeed, is one of the reasons why many lawyers insist on returning client phone calls or client emails only at certain scheduled times of the day; doing so allows the lawyer time to shift her focus from some other matter and do a few minutes of preparation before talking with the client or responding to an email.

By the way, I don't mean only that we should focus only by preparing before returning a client phone call or email, although that is a good start. There are some even more basic steps we can and should take – for example, I believe strongly that we should never glance at other emails while we talk to our clients on the phone; if you think a person on the other end of the call can't tell that you just received an important email, you are dead wrong. I hope it goes without saying that we shouldn't make a habit of checking our phones during an in-person interaction. I also doubt if clients are interested in other "important" cases we are working on, in particular, cases that take our attention away from their case.

I mentioned earlier that we couldn't fake certain basic things, and I believe that a basic confidence in yourself and your legal abilities is one of them. If we know, in advance, that we are going to focus on each client's matter; if we commit thorough and diligent preparation for each client interaction to muscle memory, we will come to have confidence in ourselves and that ease will be communicated to the clients without any additional effort. Therefore, if we consistently strive to be competent in each client-interaction by thorough preparation and hard work, our clients will come to have confidence in us and in our abilities. That will put their minds at ease; moreover, because emotional contagion is a two-way street, this calm confidence will change the ways our clients interact with us. Social scientists have a name for this also, it is called a "feedback-loop," and feedback-loops, over time, create something called "relationship

norms." Given that lawyers exist to serve clients, I submit that a large part of our satisfaction or dissatisfaction with law as a career will boil down to how much we like our clients and how much they like us; we ignore these feedback loops and relationship norms at our peril.

HAZARDS OF EMOTIONAL CONTAGION

Let's look quickly at the kinds of things that can happen when we do not take basic steps to instill our clients with a sense of our competence. In my experience, lawyers who are unprepared seem to get stuck in certain behaviors. For example, I have noticed that unprepared lawyers often try to deflect attention away from their lack of preparation by mimicking the client's anger or frustration. A lawyer can no doubt score some easy points that way; a lawyer might also lull the client into a false (and temporary) sense of satisfaction with this type of behavior.

But a client who has seen his or her anger or despair reflected and magnified by their counsel will only generate more of it. It therefore becomes an unpleasant feedback loop that creates an unpleasant relationship norm. And, once that norm has been established, once a lawyer has made a habit of coddling the client and catering to his moods, it becomes very difficult – and maybe even impossible – to suddenly start telling that client the harsh facts of life. I definitely don't think we do our clients any favors when we wallow in their misery with them or when we amplify their anger.

We also do our clients no favors when we talk about the inherent righteousness of our cause, even when – perhaps especially when – we are litigating important societal issues like racial discrimination. A lawyer who weaves a self-important narrative about the role a particular litigant plays in society will definitely enjoy a boost in her esteem in the eyes of the client, but that benefit will, again, be short-lived. Instead, we owe it to our clients to keep them focused on

more concrete goals, like preparing for their deposition, or working on any of the innumerable other aspects of the case. For this reason among others, I believe that a lawyer motivated primarily by an ideology – instead of being motivated primarily by duties owed to an individual client – will normally perform poorly in comparison with a lawyer motivated by his or her professional obligations.

I also think we owe it to our clients to give them a very real sense of just how tricky litigation can be. The hard truth is that none of us know exactly where a case will go from the start. We can of course evaluate general patterns of litigation and give the client a rough roadmap but we have to bear in mind that sometimes cases can take wild turns. So, for example, while we all know that most civil cases settle short of trial, I think it is generally unwise to communicate it that bluntly to a client. Instead, I submit that we need to communicate to them – both verbally and through emotional contagion – that we are going to work hard to prepare our case for trial, and the harder we work together on that, the greater our chances for an acceptable settlement.

If we transmit a calm, secure, prepared sense of professional confidence to our clients from the start, if we avoid turning them into pitiful creatures or building them into heroes, we will be better prepared to cross the types of difficult terrain that lawyers and clients sometimes have to cross together.

So, to review our points so far, there is going to be a transmission of emotion between you and your clients, so you had best make yourself aware of it. Take steps to make sure you're communicating only the right kinds of emotions to clients. You can start by focusing on the basics and executing on the fundamentals, like being competent for each client interaction. By focusing on your own competence each time you interact with the client, you will by necessity

need to carefully schedule your time and that will make you calmer and less rushed; as a result of that, you will start cultivating a calm sense of professional confidence in yourself, which you will communicate to the client with no additional effort. If you do that, you will build the client's confidence in your abilities, which will come right back to you in the form of their positive emotional states when they interact with you. Having clients that are comfortable when they speak to you creates a positive feedback loop; over time, this positive feedback loop will create a favorable relationship norm with the client.

MY OWN EXPERIENCE

I started thinking about professionalism in client interactions, including most of the stuff I've talked about today, during my judicial clerkship. During my first weeks of private practice this interest in lawyer and client behavior suddenly became something other than academic. So what I would like to do now is to walk you through some of my experiences, what I learned, and how those things affected me.

I graduated from law school in 2001 and joined the Virginia Bar that same year. From 2001 to 2002 I was a law clerk in St. Mary's County, Maryland, to Judge John Hanson Briscoe. During my clerkship I learned many important lessons but none more important than this: it is obvious to Judges which lawyers have control of their cases and their clients and which ones don't.

Following my clerkship I joined a small firm in Vienna, Virginia. As an associate, I was excited for the opportunity to work with and learn from more senior lawyers; I also wanted the chance to handle my own cases and work directly with my own clients, and this firm offered me the chance to do both things. I had known since my summer associate days that I wanted to be at a small law firm. I also liked the compensation model of this particular firm, which paid a low

base salary plus a significant percentage of my gross receipts. Finally both of the senior partners at the firm were long-time family friends, so I never seriously thought about accepting any of the other offers I received.

Sure enough, within the first few days I was indeed meeting with my very first clients. During my clerkship I had learned a great deal about motions practice, jury trials, and everything else to do with a busy Circuit Court docket. And, because lawyers in Maryland routinely talk to judicial law clerks (something that is generally discouraged in Virginia) I also learned a fair amount about dealing with (and not being intimidated by) more seasoned lawyers. But until those first weeks of practice, I had exactly zero experience dealing directly with clients.

RETAINER AGREEMENTS

My first day at work, I sat down with the two senior partners at the firm to discuss the fundamentals of law practice. They told me that day about the importance of client communications and how we had to make every effort to build the client's trust, right from the start. They explained how we begin each meeting with a new potential client by telling them about the attorney-client privilege and explaining to them that the things they tell us are privileged and confidential in a way that was absolute. I was told that from time to time, some lawyers – including some very good ones – were in the habit of gossiping about their clients to other lawyers outside their firms, but that that was not something we ever wanted to do.

They showed me the retainer agreements they used and explained the important elements of a retainer agreement. (Because people use different terms in different ways, let me clear. When I use the term "retainer agreement" I mean an engagement letter, or lawyer fee agreement, whatever you want to call the agreement that a client signs when they hire a lawyer. I call it a "retainer agreement" because the client "retains" the lawyer by signing the agreement.)

The senior partners told me that some lawyers use agreements that consist of 15 or 16 pages of 10- point, single spaced font that attempts to provide maximum protection for the lawyer. They told me that some lawyers use agreements that actually suggest that a client hire a neutral third-party lawyer to review the agreement with the potential client before they sign. In other words, some lawyers use agreements suggesting that you need to hire a lawyer to help you hire a lawyer.

They convinced me quickly that this was all unnecessary and possibly even harmful. An agreement consisting of 15 pages of single-spaced 10-point font isn't necessary to explain the relationship between and attorney and a client and many – perhaps most – clients would be turned off by it; at a minimum, it would be harmful to the sense of trust that needs to exist between lawyers and clients. On the other hand, they said, all clients appreciate and deserve a simple, straightforward agreement. The agreement shouldn't require a careful parsing of each sentence. If a person reasonably fluent in the English language can't understand the lawyer's agreement on a first read-through, then it is too complicated.

The agreement should explain what work the lawyer is – and is not – going to perform and what the client is expected to do. If the lawyer chooses to place restrictions on communications (which it was suggested to me is a good idea) those restrictions should be explained. The agreement should provide for the lawyer's fee, and state clearly how that fee will be earned and how it will be paid. The agreement should provide for how the costs of the case will be paid, and the types of charges that make up those costs. The agreement should also reserve the lawyer's right to withdraw from the case if the client does not meet his or her obligations in any way including, but not limited to, paying the fee.

The agreement should also make clear that the lawyer cannot guarantee any specific outcome, but other than this one caveat, I still believe now what I was taught then: that excessive "covering of your assets" by lawyers is undignified and unprofessional. Clients come to lawyers because they need help with difficult situations; they are seeking advice and input from someone they can trust, and we owe it to them to build that trust. Excessive "covering of your assets" does nothing to help you earn the confidence and trust of your client.

I know some lawyers – including some very good ones – who believe that certain advice to clients should be communicated only in certain ways and should always be couched in numerous qualifiers and explained in a way that protects the lawyer to the maximum extent possible. Certainly some communications need to be delivered in a certain way and we should always protect ourselves, but we shouldn't fear our clients and we shouldn't fear telling them what we think or giving them advice about difficult situations. They pay us for that and they are entitled to it.

CLIENT COMMUNICATION

They also showed me the administrative support system they had built. This was in mid-2002, so electronic filing was just starting in a few federal courts. In a litigation practice, they showed me how when a motion or order arrived, the administrative staff made three copies before the lawyer ever sees it. One copy went directly into the case file, one copy was mailed to the client along with a cover letter from the admin, and a copy of the motion or order, together with a copy of the admin's cover letter, went into the lawyer's office inbox. This is something that absolutely had to happen like clockwork, I was told, so that clients would always have an exact record of their cases. That also puts the client's mind at ease, because they can see that other people in the firm (i.e., the admin staff preparing the letter) are also working hard on their

behalf, even though the admin time to prepare the letter was never billed to the client. But this was just one important aspect of client communications, I was told, and there were in fact many others.

BILLING AND INVOICES

Among those other important client communications, I learned, was a regular invoice or statement of services for each client. Regular preparation and communication of these kinds of records is important for many reasons. We stay on top of our cases and files more easily when we review a list of open client matters and the time we have spent working on those matters. This will also contribute to our internal sense of calm, professional confidence, because it will help us avoid ugly crisis situations if we are at least aware of each open client matter.

Generally speaking, over the years I have also come to believe that monthly statements are an excellent marketing device for your practice. (The statements don't have to be monthly, they can be at other regular intervals if you choose). This is true even for client work that you determine is non-billable; such time should still be included on the invoice, even though the client is not charged for it. Even in contingency fee work, regular "invoices" should be generated and shared with the clients to remind them of their cases and the hard work that is being performed on their behalf month in and month out. Contingency fee clients in particular will sometimes believe that lawyers dedicate less time and effort to contingency fee matters. Those sorts of clients will be impressed when they see how much work you are putting into their case.

CONFIDENCE IS THE KEY TO PROFESSIONAL SUCCESS

It was also explained to me that in the 30-odd year history of their firm, they had seen many young lawyers and come and go, but they were always able to tell within the first year or

so whether a lawyer would be a success in the private practice of law, because that determination was based on a just a couple of things.

I was naturally curious about the key to success in my career, so I asked them how I could be successful. The most important factor, they said, was how I felt about myself and about the services I provided to my clients. It was important, they said, that I know in my heart I was going to work as hard as I could for each client, because that would give me confidence.

And, when you know that you won't be outworked; when you know that you will do whatever it takes to get the job done – long hours, nights, weekends, additional research, additional sustained effort – you will fully experience the toll that professional work takes on your life, and you will insist on being paid for it. In short, lawyers who are confident in their abilities will believe in the value they provide for their clients and will insist that clients pay for their work.

On the other hand, they said, a lawyer who does not feel confident in his work generally will not be able to make a good living. In the first place, the best kinds of clients generally aren't going to be interested in a lawyer that lacks self-confidence, even if they don't understand why. So right from the start, you will be generally representing less than ideal clients if you lack basic self-confidence.

And things will only get worse from there, because there is a cascade effect to these types of things. Lawyers lacking confidence will charge their clients too little or will allow themselves to be negotiated down on the rates they charge. Lawyers lacking confidence will be quick to accept only partial payment of their invoices or forego payment of an invoice altogether, often as part of a bargain to get a client to do something the client should be willing to do anyway.

When the lawyer is not properly compensated for the time and effort put into one case, that triggers an urgent need for more income, and lawyers are then forced to take additional clients or cases that they would not normally take in order to make ends meet. Those additional new clients, of course, will be only make the lawyer's life more hectic, with the result that the new clients will be treated the same way as all other clients, or even worse.

As if all of this weren't bad enough, they said, the types of less-than-ideal clients that will hire a lawyer lacking confidence will also make your life miserable. Generally they are the kinds of clients who will seize on your lack of confidence and seek to turn it to their advantage. They will make a constant stream of threats and accusations; often the lawyer will come to fear the client. The client will then be in the driver's seat; and, naturally, only misery can result from a case where the client is in the driver's seat on important legal issues.

Lawyers lacking confidence are afraid of their clients for many reasons, not the least of which is that they fear an independent review of their work via a bar complaint or by some other lawyer. Confident lawyers, on the other hand, will not fear the threat of a bar complaint, because they have demonstrated thoroughness and preparation in all aspects of the client relationship, and they are confident that the bar investigators (or anyone else who might care to review their work) will see that also.

MY FIRST FEW CLIENTS

Armed with the above wisdom I set about organizing my office. It was suggested to me that I try the different kinds of work that a busy general practice firm had to offer before picking a few areas in which to specialize. That is exactly what I did, and within the first few days I was meeting with my first clients. I had anticipated getting questions about my lack of experience, and I was prepared to explain to each client that even though I might be new to the practice of

law, I was going to work hard for them, and that my hard work and preparation would more than make up for my lack of experience.

But no one asked; in fact, people seemed to care not at all that I was the new guy. This wasn't always because I had impressed them somehow – several people in that first year or so told me point-blank that my office was not far from their homes or offices and it was important that their lawyer be in a convenient location. Most surprising to me at that time was that some clients of the lawyer I was replacing chose to go with me, the new guy, site unseen, rather than go with the more experienced lawyer to his new firm. "He never had the time to talk to me before, and that's not going to get better now that he has left and started his own firm" they said.

COMMUNICATING WITH DIFFICULT CLIENTS

At some point in those first few weeks, I also observed my first difficult client interactions. Thankfully, these weren't my cases, but I was specifically asked to sit in for the meetings. (This "war story" is of course a composite scenario to protect client communications and confidences.) I was asked to sit in on a client meeting from a criminal case; the client had been accused of billing his customers repeatedly over a course of years for work he hadn't actually performed. The client of course loudly asserted his innocence, arguing that billing in his business was "complicated" and that "errors will always happen unless someone is perfect." This client had all kinds of theories about why he was being prosecuted, and some of them were quite elaborate. The senior partner in charge calmly listened to each and every explanation, and simply analyzed each of them, one by one, demonstrating that each particular explanation wasn't going to be enough.

For example, in response to his argument that "innocent mistakes will always be made in billing" we agreed with that simple statement, which is non-controversial. My boss then asked

the client how we could explain that these were "innocent mistakes" always ended in additional income for him. After all, true errors and mistakes would usually result in underbilling at least some of the time. We went through all of his arguments, one by one, until finally he was out of rationalizations. Exasperated, the client finally concluded: "For all of the money I am paying you guys, you should at least believe me!"

It was then that I got to hear an old Chestnut of legal wisdom for the first time: "We do believe you" the senior partner said, calmly and not unkindly. "But that is not the problem here. The problem is that no one else is ever going to believe you."

CONCUSION

I hope that someone will find some value from my remarks today. As I mentioned in the beginning, my qui tam False Claims Act practice takes me to state and federal courts all across the country. In every foreign court where I have practiced, I have found lawyers and Judges exhibiting the highest levels of professionalism, but I have never yet found a state with a general level of professionalism matching that of the Virginia State Bar. Virginia lawyers are, at least in my opinion, consistently the most prepared, most thoughtful, hardest working, advocates and Judges I have ever encountered. By being admitted to practice in Virginia, you don't just join another state bar, you become part of a long and distinguished tradition of professionalism; even more important, by being a Virginia lawyer you inherit part of the responsibility for seeing to it that our long and proud tradition of professionalism is maintained.