

2013

What Do Clients Want from Their Lawyers

Clark D. Cunningham

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>

 Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Clark D. Cunningham, *What Do Clients Want from Their Lawyers*, 2013 J. Disp. Resol. (2013)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2013/iss1/7>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository.

What Do Clients Want From Their Lawyers?

Clark D. Cunningham*

I. 70% OF BIG FIRM CLIENTS ARE DISSATISFIED

The September 8, 2006, issue of the American Bar Association E-Report published an article with the attention-grabbing headline: “70 Percent of Big Companies Dissatisfied With Primary Outside Counsel.”¹ Because big companies are the most important source of revenue for large law firms, one might have thought those firms would have been doing everything in their power to give those clients what they wanted from their lawyers. This article, however, will show how the research upon which the ABA story was based—as well as substantial research with other clients ranging from large organizations to individuals—indicates that what clients want most from their lawyers is an aspect of legal services given too little attention both in legal education and professional development: effective lawyer-client communication. After reviewing extensive social science research on causes of client dissatisfaction, this article will conclude by suggesting a variety of ways—from easy to ambitious initiatives—that law schools and law firms can provide greater emphasis on the importance of effective communication with clients, teach effective interviewing and counseling, and assess competency in basic skills of listening and explaining.

The ABA E-Report article was based on the results of an extensive survey conducted by a private consulting company, the BTI Consulting Group of Welles-

* W. Lee Burge Chair of Law & Ethics, Georgia State University College of Law (<http://law.gsu.edu/ccunningham/>); Director, National Institute for Teaching Ethics & Professionalism (<http://law.gsu.edu/niftep>); Director, Effective Lawyer-Client Communication Project (<http://law.gsu.edu/ccunningham/Communication>). This article draws upon a number of prior publications: see *Legal Education After Law School: Lessons from Scotland & England*, 33 *FORDHAM URB. L. J.* 193 (2005) (special symposium issue on Professional Challenges in Large Firm Practice); *Specialty Certification as an Incentive for Increased Professionalism: Lessons from Other Disciplines and Countries*, 54 *S.C. L. REV.* 987 (2003) (co-authored with Adrian Evans); *Evaluating Effective Lawyer-Client Communication: An International Project Moving From Research to Reform*, 67 *FORDHAM L. REV.* 1959 (1999); and *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 *CLINICAL L. REV.* 1 (2006) (co-authored with Karen Barton, Gregory Todd Jones & Paul Maharg)(hereinafter *Valuing What Clients Think*). All four articles can be downloaded from: <http://law.gsu.edu/ccunningham/>. The earliest draft of this article was prepared for the Board of the Signet Accreditation Program, for which the author served as Academic Consultant from 2006 - 2008. See <http://law.gsu.edu/Communication/Signet.htm>. Later versions have been presented at the 2006 Annual Roundtable of the American Bar Association Standing Committee on Specialization; the 2006 Annual Partners Meeting of Dundas & Wilson (Scotland's largest law firm); the 2007 Annual Meeting of the Professional Development Consortium (www.pdclegal.org); the 2007 Newly Qualified Solicitors Training Day for Dundas & Wilson; and the 2009 Annual Meeting of the Law & Society Association.

¹ Sandra Prufer, *In-House Counsel Axing Law Firms, Survey: 70 Percent of Big Companies Dissatisfied with Primary Outside Counsel*, ABA JOURNAL EREPORT (Sep 8, 2006), available at http://www.americanbar.org/content/dam/aba/migrated/litigation/mo/premium-lit/prog_materials/2007_jointcle/c03.authcheckdam.pdf.

ley, Massachusetts.² BTI surveyed General Counsels at a wide range of large corporations. Twenty-seven percent of those surveyed were employed by Fortune 100 companies; nine percent were employed by one of the Global 500 companies.³ These companies collectively had a median revenue of \$ 3.4 billion.⁴ BTI started with baseline data from over 1000 interviews conducted from 2001 through 2005 and then supplemented this data with more than 200 telephone interviews conducted from July to October 2005.⁵

BTI's 2005 research revealed that "7 out of 10 clients do not recommend their primary law firm."⁶ These expressions of dissatisfaction had real world consequences. BTI's research indicated that, while in 2004 corporations typically used two primary law firms and seven secondary law firms, in 2005 many of these corporations had added four additional secondary law firms.⁷ This increase in the use of secondary firms appeared to be linked to the fact that 53% of these corporations had replaced or demoted at least one primary law firm in the past 18 months.⁸ These clients generally did not tell the demoted primary law firm of the changes in status; they just spent less and less money with the primary law firm—and more with another secondary law firm—until the law firms' roles reversed. According to BTI, most primary law firms did not recognize dwindling annual billings as a red flag until it was too late.⁹

The survey results reported by BTI indicate neither outcome nor cost of services were the most frequently mentioned causes of dissatisfaction. Instead, when asked "what is the one thing your outside counsel does that just drives you crazy?" more than half of the General Counsels gave answers that can be summarily categorized as poor communication:¹⁰

21% Failure to keep client adequately informed

15% Lack of client focus: failure to listen, non-responsiveness, arrogance

10% Making decisions without client authorization or awareness

7% Failure to give clear, direct advice

53%¹¹

2. BTI CONSULTING GROUP, HOW CLIENTS HIRE, FIRE AND SPEND: LANDING THE WORLD'S BEST CLIENTS (2006) (on file with author). BTI's report is designed to encourage law firms to hire BTI to improve their levels of client satisfaction and so the findings they report – which are not based on data that can be subjected to academic scrutiny – should not be regarded as the equivalent of scholarly research.

3. *Id.* at 5.

4. *Id.*

5. *Id.* at 2, 5.

6. *Id.* at 16.

7. *Id.* at 12.

8. *Id.* at 13.

9. *Id.* at 10.

10. *Id.* at 42 - 45.

11. *Id.* at 42. Other answers were categorized by BTI as (a) inefficient service delivery (21%), (b) billing practices (15%), and (c) "other" (12%). *Id.*

BTI provided a number of illustrative quotes:

- “Responsiveness is a must, or we wouldn’t hire them.” (Fortune 500 Transportation Company);¹²
- “Being responsive and listening to your clients.” (National Real Estate Developer);¹³
- “When they put themselves in our shoes.” (Major Hospitality Provider);¹⁴
- “Sensitivity to client guidelines for rules of conduct, anticipation of what the client’s needs are.” (Global 100 Pharmaceutical Company);¹⁵
- “Provides services in a manner that makes business sense to the client.” (Major Telecommunications Provider);¹⁶
- “Being keenly aware of the goals and objectives of your client and aligning your practice accordingly.” (Financial Services Provider);¹⁷
- “Paying attention to the overall philosophy and goals of the client.” (Fortune 500 Insurance Company).¹⁸

According to BTI: “Responsiveness to clients . . . goes beyond returning phone calls and replying to e-mails. . . . Clients expect law firms to be responsive not just to their phone calls, but also to their needs. . . . Successful law firms verify client expectations frequently, both formally and informally, to ensure this result.”¹⁹ BTI reports that “[w]e find that fewer than 15% of the self-perceptions held by a firm’s attorneys are actually shared by the marketplace.”²⁰

A July 2012 publication of the International Bar Association reported data from Western Europe that is consistent with the 2005 study of American law firms by BTI, citing a survey of 219 senior corporate counsel by Martindale-Hubbell that indicated “poor communication was one of the top reasons for ceasing to instruct [i.e. employ] a law firm.”²¹ Like the companies surveyed by BTI, many of these clients stopped using law firms without telling them the causes of dissatis-

12. *Id.* at 29.

13. *Id.*

14. *Id.* at 30.

15. *Id.*

16. *Id.*

17. *Id.* at 31.

18. *Id.*

19. *Id.* at 29.

20. *Id.* at 58.

21. Mary Heaney, *Communication breakdown*, 8 IN-HOUSE PERSPECTIVE: THE MAGAZINE OF THE IBA CORPORATE COUNSEL FORUM no. 3, 13 (July 2012), available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=0265198D-B02C-4F5D-B1E4-E1E827A872AA>

faction.²²

II. WHAT CLIENTS WANT: THE SOCIAL SCIENCE EVIDENCE

The survey results reported by BTI and the IBA reveal striking correspondences with extensive social science research on causes of client dissatisfaction. Many lawyers equate client satisfaction with the outcome achieved; however, studies over the past three decades in three different countries has produced impressive evidence that clients evaluate their lawyers' competence more in terms of the process experienced by them in the representation than the outcome. Indeed the leading researcher in this area, the American social psychologist Tom Tyler, has made the following bold statement: "Clients care most about the process—having their problems or disputes settled in a way that they view as fair, second most important is achieving a fair settlement, the least important factor is the number of assets they end up winning."²³ Tyler's research findings are consistent with two important studies conducted in Australia. Australia's largest indemnity insurer for lawyers, LawCover,²⁴ commissioned a Risk Management Project to study a representative sample from over two thousand professional liability claims.²⁵ The researchers interviewed each lawyer in the sample against whom a claim had been filed; these interviews were extensive and confidential.²⁶ The researchers in most cases also interviewed the lawyer retained by LawCover to defend the claim.²⁷

The results of this unusually in-depth study were "clearly disturbing,"²⁸ showing how easy it was for the average lawyer—one whom other lawyers might choose and trust—to become entangled in the events that inexorably lead to a professional negligence claim. The lawyers did not seem to understand the dynamics of the claims against them. The researchers concluded most lawyers "need help to see the patterns and to understand how they should act differently in the future to reduce their inherent exposure."²⁹ By far the most significant cause of professional negligence claims was not dissatisfaction with outcome but instead related to the handling of the client relationship; the most frequent problems were failure to listen to the client, failure to ask appropriate questions, and failure to explain relevant aspects of the matter.³⁰

22. *Id.*

23. Tom Tyler, *Client Perceptions of Litigation – What Counts: Process or Result?*, TRIAL 40 (July 1988).

24. RONWYN NORTH & PETER NORTH, MANAGING CLIENT EXPECTATIONS AND PROFESSIONAL RISK: A UNIQUE INSIGHT INTO PROFESSIONAL NEGLIGENCE EXPOSURE IN THE AUSTRALIAN LEGAL PROFESSION, at ix (1994), available at <http://law.gsu.edu/ccunningham/PR/North&North.htm>.

25. *Id.* at xi.

26. *Id.*

27. *Id.*

28. *Id.* at xii.

29. *Id.*

30. *Id.* at 11, 21-26. LawCover was so concerned by these findings that it began to offer premium reductions to lawyers who participate in a series of workshops on lawyer-client communication. Robin Handley & Damien Considine, *Introducing a Client-Centred Focus into the Law School Curriculum*, 7 LEGAL EDUC. REV. no. 2, at 197-98 (1996).

A different empirical study in Australia, an evaluation of specialist accreditation that included client focus groups and surveys, found “practitioners and their clients [we]re selecting divergent indicators of performance with which to assess satisfaction with service.”³¹ Although there was widespread client satisfaction with the specialists’ legal knowledge and skills, the evaluators also found “consistent evidence of client dissatisfaction with the provision of services, and the quality of the service-delivery process.”³² According to this study:

Practitioners are concentrating on developing their knowledge and skills to deliver better outcomes; but their clients, expecting both technical competence and results, are being disappointed by the process of getting there. Clients complained about the quality of their lawyers’ services in terms of inaccessibility, lack of communication, lack of empathy and understanding, and lack of respect³³

The evaluators concluded that:

consideration should be given by the profession to introducing additional training to redress identified performance deficits in the related areas of inter-personal skills and client management techniques. This training should be client focused, rather than transaction focused; it should train practitioners to recognise that client needs are not confined to attaining objective outcomes; and it should help lawyers to listen to clients more attentively, diagnose their various levels of needs and demonstrate empathy.³⁴

A qualitative study commissioned by the Law Society of England and Wales, of solicitors³⁵ and clients regarding their perspectives on quality service, provides very useful concrete examples of how “poor communication” leads to client dissatisfaction. As part of this study, Hilary Sommerlad interviewed 44 clients of 21 solicitors in the north of England.³⁶ Fifty percent said they had previously used a solicitor whom they did not like; these clients were then asked an open-ended follow-up question about why they were disappointed with the prior legal ser-

31. Livingston Armytage, *Client Satisfaction with Specialists’ Services: Lessons for Legal Educators*, in 1 SKILLS DEVELOPMENT FOR TOMORROW’S LAWYERS: NEEDS AND STRATEGIES 355, 365 (1996).

32. *Id.* at 357.

33. *Id.* at 365.

34. *Id.* at 366 (emphasis in original).

35. The legal profession in England and Wales consists of two branches: (1) solicitors, who are the first contact for any client and who take responsibility for most matters apart from litigation, and (2) barristers, who specialize in trial advocacy and only represent clients on referral from solicitors. See Nigel Duncan, *Gatekeepers Training Hurdles: The Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911, 911 (2004). At the time of Sommerlad’s research, the Law Society of England and Wales was the regulatory authority for the solicitors’ branch of the profession. *Id.* at 912.

36. Hilary Sommerlad & David Wall, *Legally Aided Clients and Their Solicitors: Qualitative Perspectives on Quality and Legal Aid*, The Law Society, Research Study No. 34, at 2-6 (1999) [hereinafter Law Society].

vices.³⁷ Some persons interviewed by Sommerlad, like the following client, were also dissatisfied with their current solicitor:

I went to [this solicitor] because of her reputation and expertise – she is a part-time registrar– but she just doesn’t listen. She listens for part of what I have to say, and then interrupts, saying something like ‘OK, I’ve got the picture, what we’ll do is . . .’ and she hasn’t really got the picture, she’s only got half the picture. I think it’s partly because she so busy, and also because she’s simply not used to giving clients a voice. . . . [W]hat’s more she has actually made me frightened of expressing my views. I am about to change to another solicitor.³⁸

The communication problems identified in the quote above do not arise from carelessness—although the lawyer is described as “busy”—but instead seem to be related to a fundamental way the lawyer interacts with clients. This specialist with a “big reputation” interrupts the client precisely because she assumes from her expertise that she has heard enough to “get the picture” and to decide what needs to be done. This behavior prevents the solicitor from learning what the client considers important information, not only because she cuts off the client at an important moment in the interview, but because her attitude makes the client “frightened” of expressing her views throughout the representation. Other clients in the Law Society study also emphasized a solicitor needs to be a good listener in order to learn necessary information:

- “One client explained that she had sacked her former solicitor because she wouldn’t listen: ‘that is absolutely fundamental; this was our case, only we knew the full circumstances’;³⁹
- “They must be able to give you time. If solicitors haven’t got enough time, they can’t get enough out of you. You have to have time to be able to tell your story’;⁴⁰
- “It’s very important to be able to have trust and friendship with your solicitor because then you can talk about your case and you remember things’;⁴¹
- “Regular communication is key . . . the quality of being able to talk things through is very important. No one knows their problem as well as the plaintiff. . . . It’s crucial that [the solicitor] enable [the plaintiff] to talk it through. That listening and communication is crucial. So they

37. Question 16 in the structured interview, conducted in person with each client, was: “Have you ever used a solicitor whom you did not like? Was there any particular reason why you did not like them?” *Id.* at 21.

38. Hilary Sommerlad, *English Perspectives on Quality: The Client-Led Model of Quality – A Third Way?*, 33 U.B.C. L. REV. 491, 509-10 (2000).

39. *Id.* at 509; Law Society, *supra* note 36, at 12.

40. Sommerlad, *supra* note 38, at 507.

41. *Id.* at 506.

have to be prepared to give you time, so that you can establish a personal relationship with them.”⁴²

The clients wanted not only to be heard but also to understand what the solicitor said to them:

- “If they communicate clearly you feel on the same wavelength with each other. It has got to be a mutual rather than a one-way relationship”;⁴³
- “At my first meeting with [my current solicitor] . . . I was impressed by his natural ability to talk about technical things with knowledge, but on a level that I could understand. . . . we actually talked, and he explained in clear language. . . . Other people just had a job to do but [he] took time to clearly explain technical things. . . . He explained how the system works”;⁴⁴
- “She speaks of legal matters in a way that is knowledgeable and she explains it well”;⁴⁵
- “She communicates clearly. She puts things in layman’s terms.”⁴⁶

The Law Society study showed that effective two-way communication—attentive and patient listening and clear explanations—was valued by clients not only because it improved the exchange of information but also because it was essential to the development of rapport, trust, and mutual respect:

- “Just coming here and have someone listen to you, treat you with respect, be on your side . . . that’s marvellous”;⁴⁷
- “She talked to me, as a person, with respect”;⁴⁸
- “I wanted the law to be explained. . . . The way the solicitor views the client is important. He has to be interested in our views”;⁴⁹
- “I felt I couldn’t talk to him. He’d fob you off . . . didn’t really sit and explain to you. It was just the lack of communication to me”;⁵⁰

42. *Id.* at 505.

43. *Id.*

44. *Id.* at 502.

45. *Id.* at 505.

46. *Id.*

47. *Id.* at 510.

48. *Id.* at 503.

49. Law Society, *supra* note 36, at 17.

50. *Id.* at 14.

- “I never liked him [describing a former solicitor]. . . . We couldn’t have had a solicitor like him for this; I think he was perfectly competent, but there was no sympathy”⁵¹
- “If you do not have communication you might as well go elsewhere. It was quite hard to get in touch with [my former solicitor] . . . he was a bit ‘uppity’ But [my current solicitor] is excellent . . . we communicate . . . I trust her.”⁵²
- “[I like my current solicitor because] I can have a chat with her, I trust her . . . [she’s] much better than other solicitors I’ve had. . . . The other solicitor—I was just a file for him, but for her I’m a real person and that comes across in court.”⁵³
- “[My current solicitor is] very easy to talk to—some solicitors can be intimidating.”⁵⁴

It is not unusual to hear lawyers describe these communication practices—of patient listening and translation of legal issues into terms the client can understand—as “hand-holding,” something to be done to make the client feel good if you have the time and inclination but not really essential to effective legal representation. For example, one of the solicitors interviewed in the Law Society study said:

- “Clients cannot assess the quality of the service. What they really need and respond to is reassurance. . . . They want to feel you care.”⁵⁵

Sommerlad, though, reports “for many clients, their engagement with the law was not simply about achieving a result; their responses indicated that the process itself was important.” According to her research:

[from the clients’ perspective] the realisation of their legal goals depended upon the establishment of an individualised relationship of trust with the practitioner. Thus clients tended to view the subjective aspects of quality, such as empathy and respect, not as luxury items but as fundamental to the service so that their absence would . . . ‘limit the solicitor’s effectiveness even within the narrowest definition of his responsibilities as a legal adviser.’⁵⁶

51. *Id.* at 21.

52. Sommerlad, *supra* note 38, at 505.

53. *Id.* at 504.

54. *Id.* at 505.

55. *Id.* at 496 n.13.

56. Law Society, *supra* note 36, at 22 (citing Gwynn Davis, PARTISANS AND MEDIATORS: THE RESOLUTION OF DIVORCE DISPUTES at 91 (1988)).

Sommerlad's point is illustrated by the following scathing conclusion by one client about a former solicitor: "[s]he was efficient but a total waste of space I could not communicate with her."⁵⁷

III. COMMUNICATIVE COMPETENCE AS A GOAL FOR LAW SCHOOLS AND LAW FIRMS

For most lawyers, the core of their professional work is found neither in legal research nor courtroom advocacy but in their relationship with clients. However, the client survey information and social science data reported above suggest clients of lawyers in many settings are often fundamentally dissatisfied with the legal services they receive because their attorneys do not appear to value the importance of good communication or simply lack necessary communication skills.⁵⁸ Much of the blame for this problem can be assigned to law schools, where lawyer-client communication is rarely given a central place in the curriculum.⁵⁹ Despite frequent marketing claims that law firms "put the client first,"⁶⁰ competence in client communication is often not part of firm training programs or criteria for advancement.

A. What Can Law Schools Do?

1. Easy Initiatives

In the so-called "Socratic classroom," the teacher in effect plays the role of an appellate judge, placing students in the role of appellate counsel who state the relevant facts, apply rules and precedent, and answer hypothetical variants on the fact pattern posed by the teacher-judge. This role-playing approach is generally

57. Sommerlad, *supra* note 38, at 507.

58. Close analysis of individual case studies provide further insight into the challenge of effective lawyer-client communication. See Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1346 (1992); *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459, 2460 (1989), and sources cited therein.

59. In 2010 the Section of Legal Education and Admissions to the Bar of the American Bar Association (ABA) conducted a comprehensive survey of law school curricula. Although 116 schools reported offering a course on interviewing and counseling, no school required that the course be taken in order to satisfy the ABA's requirement that each student receive substantial instruction in professional skills generally regarded as necessary for effective and responsible participation in the legal profession. SEC. OF LEGAL EDUC. ADMISSIONS TO THE BAR, A.B.A., *A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010*, 41, 75 (Catherine L. Carpenter ed., 2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf. No school included interviewing and counseling as one of the courses it highly recommended that students take; notably only 25% of schools highly recommended a clinical experience, which is another course in the curriculum likely to devote substantial emphasis to lawyer-client communication. *Id.* at 68. Although 140 schools reported teaching professional skills other than legal research and writing in the first year "research and writing course," less than one third of those schools included interviewing or counseling among the "other professional skills" that were taught. *Id.* at 60.

60. According to the BTI report, "Most advertising . . . has little or no impact on clients' impressions of a law firm. 43.3% of corporate counsel report that they remember nothing about the law firm whose ad they saw most recently." HOW CLIENTS HIRE, FIRE AND SPEND, *supra* note 2, at 57.

praised as both promoting student engagement in the substantive material and teaching students how to “think like a lawyer.”⁶¹—though this pedagogy might more appropriately be described as learning how to “speak like a lawyer,” specifically a lawyer talking to a judge.

This traditional method of classroom teaching can be easily enhanced by having the teacher sometimes take the role of a client rather than a judicial interrogator. The teacher could ask a student to explain to her how facts (e.g. taken from an appellate decision but treated as communicated by the client) give rise to a possible cause of action. A student could be presented with a complaint or contractual offer and asked to explain to the teacher, who takes the role of the defendant or recipient of the offer, possible defenses to the complaint or the proposed obligations stated and implicated by the offer. Simulating a discussion whether to make or accept a settlement offer also offers rich teaching opportunities. Each of these role plays requires the student to demonstrate understanding of relevant legal concepts to an extent similar to “Socratic teaching” but further emphasizes and promotes development of skills rarely emphasized in law school: listening to a client and explaining legal concepts accurately in language that the client can understand.⁶²

A slightly more complex teaching exercise that could be added to any class, and especially appropriate during the first year, is based on the research methodology discussed above and used by Hillary Sommerlad for the study commissioned by Law Society of England & Wales.⁶³ Students are given the following instructions:

Find a person you know fairly well who is not a lawyer (such as a family member or neighbor) who has used a lawyer in the past and was dissatisfied in some respect. You are required to contact up to three people for this project. (If you have not been able to find a person who has been dissatisfied with a lawyer after three attempts, you may satisfy this assignment by certifying that you have contacted three people.) When you find someone who has been dissatisfied in some respect with a lawyer in the past, ask simply: “Was there any particular reason why you were dissatisfied?”⁶⁴

Particularly in a small class, the results of the students’ own research can be discussed. In a larger class, the use of free online survey software to record and analyze the responses is recommended.⁶⁵ If students also record the gender and

61. See, e.g., WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 47-86 (2007); ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER” (2007).

62. See, e.g., Clark D. Cunningham, *How to Explain Confidentiality?*, 9 CLINICAL L. REV. 579, 598 (2003) (hereinafter *How to Explain*) (simulation exercise in professional responsibility that requires students to explain to a client in an initial meeting the duty of confidentiality, and its exceptions, under the rules of professional conduct, in a way that is both accurate and comprehensible to the client).

63. See generally Law Society, *supra* note 36.

64. Clark D. Cunningham, *Causes of Client Dissatisfaction*, INT’L F. ON TEACHING LEGAL ETHICS & PROF. (2010), <http://www.teachinglegalethics.org/causes-client-dissatisfaction>.

65. *Id.* (providing sample survey: <http://www.surveymonkey.com/s/ClientDissatisfactionwww.surveymonkey.com>).

approximate age of the person surveyed, along with choosing among a small set of case categories,⁶⁶ then the reasons given can be sorted by gender, age, and type of case. In the professional responsibility course where this exercise has been used over a number of years, students are put into discussion groups and given one subset of responses (e.g. men, older person, transactional cases) to review for common themes. The students have found that, consistent with the social science data reported above (which is assigned reading for the course), neither outcome nor cost are the most frequently reports complaints.⁶⁷ Instead, issues relating to communication always dominate regardless of gender, age, or type of representation.⁶⁸

2. Modest Initiatives

Slightly more ambitious projects than the two “easy” initiatives described above would be to incorporate into required “research and writing courses,” as well as other courses, client communication writing assignments such as an engagement letter stating the scope of representation or a letter explaining the pros and cons of a settlement offer.

Simulations of client meetings can also be enacted during a traditional class, with students playing both lawyer and client role⁶⁹ or the teacher playing the client role;⁷⁰ this teaching method is particularly appropriate for courses in professional responsibility.⁷¹

3. Ambitious Initiatives

In recent years, both Scotland⁷² and England⁷³ have pioneered the use of performance-based assessment—first developed through decades of rigorous research in medical education⁷⁴—in order to employ a valid and reliable test for a law licensing requirement that the applicant demonstrate competence in basic client interviewing skills. The key to these assessment methods is the use of a “standardized client,” a paid layperson—often an actor—who is carefully trained not only to present the “same” client in recurrent interviews by different candidates but also to perform much of the actual evaluation of competence, particular-

66. See *id.* at 4 (including in survey report case categories of divorce, other family, residential sale/purchase, wills & estates, traffic, criminal (non-traffic), personal injury, business, and other).

67. Data on file with author.

68. Clark D. Cunningham, *Impressions of Lawyers in the Community*, INT’L F. ON TEACHING LEGAL ETHICS & PROF. (2010), <http://www.teachinglegalethics.org/impressions-lawyers-community> (webcast of workshop presentation describing use of client survey exercise in professional responsibility course and reporting results).

69. *How to Explain*, *supra* note 62, at 595 – 615.

70. See, e.g., Clark D. Cunningham, “How Can We Give Up Our Child?” *A Practice-Based Approach to Teaching Legal Ethics*, 42 L. TCHR.: INT’L J. LEGAL EDUC. 312, 320–328 (2008) (hereinafter *Teaching Legal Ethics*), available at <http://ssrn.com/abstract=1498676>.

71. See, e.g., *Id.*; *How to Explain*, *supra* note 62, at 590.

72. See *Valuing What Clients Think*, *supra* note *.

73. See Eileen Fry et al., *The Qualified Lawyers Transfer Scheme: Innovative Assessment Methodology and Practice in a High Stakes Professional Exam*, 46 LAW TCHR.: INT’L J. LEGAL EDUC. 132 (2012).

74. See *Valuing What Clients Think*, *supra* note *, at 2–3.

ly issues where a lay person's reaction is inherently valid—such as whether the client understood what the lawyer was saying.⁷⁵

Passing a standardized client assessment is now part of an innovative bar exam alternative approved by the Supreme Court of New Hampshire. Students at the University of New Hampshire School of Law who complete a special honors program in the second and third years are now being granted bar admission immediately upon graduation if they are certified to be “client-ready.”⁷⁶ The primary component of this certification is the on-going review during the two year program of each student by specially designated bar examiners.⁷⁷ However, the certification now also requires passage of a standardized client assessment designed on the model of the testing methodology used in Scotland.⁷⁸

B. What Can Law Firms Do?

1. Easy Initiatives

Law firms can communicate to rising associates the importance of the client relationship and the challenge of effective communication by adding the observation of client meetings as part of formal associate training. Just as beginning lawyers observe experienced attorneys conduct depositions, cross-examine witnesses, and negotiate, they should also engage in structured observation of lawyers who have exemplary client-relationship skills. Mentors should explain their plan for conducting the client meeting in advance and then debrief with the observers after the meeting, encouraging the observers to offer their own analysis of the meeting before the mentor discusses how the actual meeting might have differed from the plan. The mentor might also share his or her impression of how the client experienced the meeting.

Firms could also routinely set aside a few minutes at the outset of an initial meeting with a new client to ask a variant of Sommerlad's research question:⁷⁹ “Have you been in any way dissatisfied with a lawyer who has represented you in the past? If yes, please don't identify the lawyer or law firm, but just tell me what caused you to be dissatisfied.” Asking this question communicates to the client that the law firm wants to understand how legal representation is experienced from the client's point-of-view and signals the firm's commitment to client-centered lawyering.⁸⁰ This practice will allow a firm to learn “what clients want

75. *Id.* at 2–4.

76. Clark D. Cunningham, *Should American Law Schools Continue to Graduate Lawyers Whom Clients Consider Worthless?*, 70 MD. L. REV. 499, 506–512 (2011).

77. *Id.* at 510–511.

78. *Id.* at 509–510. For additional information on the development of the standardized client methodology in Scotland and its implementation in England and New Hampshire, see Clark D. Cunningham, *Performance-Based Evaluation of Lawyer-Client Communication: The Development of the Standardized Client Assessment*, INT'L F. ON TEACHING LEGAL ETHICS & PROF. (2013), <http://www.teachinglegalethics.org/development-standardized-client-assessment>.

79. Law Society, *supra* note 36, at 21.

80. At the request of one major firm, I conducted confidential interviews with a number of their commercial clients and began by asking this question. During the interview I also asked how the client would feel if a lawyer began a first meeting with this question. With the caveat that some would want

from their lawyers” through the firm’s own first-hand inquiry, tailored to their specific client base. The client’s responses should serve as a useful guide for representing that client. Recording those responses in a firm database would assist other lawyers involved with that client in any current and future matters and, if many clients are queried, the database can be analyzed to identify patterns of client dissatisfaction specific to the firm’s practice areas.

2. Modest Initiatives

According to a recent Martindale-Hubbell survey of senior corporate counsel employing firms in Western Europe, over half said their outside law firms never did a client satisfaction survey with them.⁸¹ Only 15% of the corporate counsel said surveys were regularly conducted.⁸² However over 90% said they would participate in client satisfaction surveys if asked to do so.⁸³ The need for systematic client feedback is strongly suggested by BTI’s report that most large law firms did not recognize their clients were dissatisfied until it was too late and that law firm self-perceptions are rarely shared by the marketplace.⁸⁴

Perhaps the most common method used by large law firms to measure client satisfaction is to conduct an annual informal discussion between the client-relationship partner at the firm and the top client representative—typically the General Counsel. Unless the General Counsel herself has in place a systematic procedure for reporting to her all unsatisfactory interactions with outside counsel, such conversations are not likely to capture all of the events in the past year in which a firm’s lawyer could have been a better communicator. This is particularly so for communications between a lawyer and lay employees of the client, especially employees below the top executive level. Furthermore, if the decision has already been made by the client to shift business to another firm, the client has little incentive to provide feedback to the current, unsatisfactory firm.⁸⁵

Limitations also exist with another common method: sending a written client satisfaction survey at the conclusion of the matter. Response rates to such surveys can be low and either very satisfied or very dissatisfied clients can be overrepresented. Measuring client satisfaction only at the end of a matter can encourage firms to dismiss indicators of dissatisfaction as merely resulting from an outcome that was below the expectations of the client but not the fault of the lawyers—reinforcing the misperception that client dissatisfaction is driven by outcome.

Firms can supplement end-of-matter surveys with an additional method that can produce both a 100% response rate and results that are not skewed by out-

assurance they were not being billed for this discussion, all said they would feel comfortable responding to such a question and that they would have a favorable opinion of the lawyer for asking it.

81. Heaney, *supra* note 21, at 13.

82. *Id.*

83. *Id.*

84. *Supra* note 2 and accompanying text.

85. In my confidential interviews with one firm’s commercial clients, discussed above, *supra* note 80, I asked the clients whether they had told the prior firms about their dissatisfaction. With one exception, they had not; their general response was that they had a number of comparable firms to draw from and saw no reason to help the firm that they were going to leave, nor any reason to risk the firm’s irritation. The one client who had communicated her dissatisfaction with the prior firm’s supervising partner received an unsatisfactory response, reinforcing her decision to stop using that firm.

come. The simple method is to ask clients to fill out a short survey immediately after the initial client meeting, ideally before leaving the meeting room. The Effective Lawyer Client Communication Project⁸⁶ has developed such a form applicable to a wide variety of practice settings after extensive pilot project development. A copy of this form is appended⁸⁷ and may be freely used for noncommercial purposes as long as proper attribution is provided. The usefulness of this method is enhanced if the lawyer conducting the initial meeting also fills out a parallel form in which the lawyer predicts the client's responses to the same questions.⁸⁸ For example, Question 2 on this form asks whether the lawyer said things the client did not understand. Obviously if the client says "yes" to this question, the client is right, which by itself makes the response of considerable importance since the lawyer never wants to say things to the client that the client cannot understand. The method produces even more important information if the lawyer states on her form that that the lawyer expects the client to say she did understand everything. This mismatch between client and lawyer evaluation of the initial meeting indicates a need to the lawyer and her supervisors for follow-up to determine what the client did not understand in order to maximize effective representation; the mismatch also provides important feedback as to the lawyer's need to be more self-reflective and self-critical as to the lawyer's communicative skills.

3. Ambitious Initiatives

Law firms with a strong commitment to providing "what clients want from their lawyers," would formally assess their lawyers' communicative competence as part of the training, retention, and promotion process. Client feedback could be one valuable source of information for such assessment.⁸⁹ Firms could also arrange for partners to observe and evaluate associates as they met with clients and/or review audio recordings of such meetings with client consent (easily accomplished in a non-intrusive way with an MP3 recorder the size of a thumb drive or a smartphone, e.g. the Voice Memo function on the iPhone).

An ambitious law firm program to maximize client satisfaction would use performance-based assessment both for training and evaluation, such as the

86. See *Evaluating Effective Lawyer-Client Communication*, supra note *, at 1964-67; *Valuing What Clients Think*, supra note *, at 6-12. The forms appended to this article provided the basis for development of the Standardized Client assessment instrument; see text accompanying note 70, supra.

87. Appendix, Client Interviewing: The Client's View.

88. Appendix, Client Interview: The Lawyer's View.

89. For example, one large healthcare provider collected patient satisfaction data on 160 physicians representing 25 specialty areas. Individual physicians received the survey results with information comparing their individual results with those of other physicians in the same department. The medical director and each department chair also reviewed the report as part of a comprehensive annual assessment process. *Evaluating Effective Lawyer-Client Communication*, supra note * at 1960. See also, Anemona Hartocollis, *New York City Ties Doctors' Pay to Care Issues*, N.Y. TIMES, Jan. 11, 2013, at A1 ("In a bold experiment in performance pay, complaints from patients at New York City's public hospitals and other measures of their care ... will be reflected in doctors' paychecks under a plan being negotiated by the physicians and their hospitals. ... The public hospital system has come up with 13 performance indicators. Among them are how well patients say their doctors communicate with them"), available at <http://www.nytimes.com/2013/01/12/nyregion/new-york-city-hospitals-to-tie-doctors-performance-pay-to-quality-measures.html?smid=pl-share>.

Standardized Client methodology discussed above.⁹⁰ A number of large law firms in Scotland have supported the development of an assessment program that includes client-relationship skills operated by an independent professional body: The Society of Writers to Her Majesty's Signet—one of the world's oldest organizations of lawyers.⁹¹ This program accredits Scottish lawyers in specialist areas of practice early in their career and is thus intended to be similar to board certification in medicine. One component of the rigorous assessment is a videotaped simulation of an extended client meeting; the person playing the client is typically someone with actual experience in the business world relevant to the specialization being accredited. Recognized experts in the practice area carefully review the videotape using a variety of criteria including effective lawyer client communication.⁹²

IV. CONCLUSION

After decades of empirical research, the medical profession has concluded good doctor-patient communication is not only what patients want from their physicians but also leads to better health outcomes.⁹³ As a result—unlike the legal profession—effective communication is not only a standard component of the medical school curriculum but also must be demonstrated, through successful performance of a series of Simulated Patient assessments, in order to receive a medical license in the United States.⁹⁴ The legal profession has a long way to go to match this level of commitment to assuring professional competence in communication, but the first step is the recognition that effective lawyer-client communication is not only an essential component of client representation but also the most important thing many clients want from their lawyers.

90. See text accompanying notes 68–73, *supra*.

91. See Signet Accreditation Program, www.thesignetaccreditation.co.uk (last visited Aug. 17, 2013).

92. *Id.* See also *The Development of the Standardized Client Assessment*, *supra* note 78,.

93. ROBERT C. SMITH ET AL., PATIENT-CENTERED INTERVIEWING: AN EVIDENCE-BASED METHOD 5 (3rd ed. 2012).

94. *Valuing What Clients Think* *supra* note *, at 2–3.