

Everybody's Talkin': A Primer on Communicating Effectively with Your Attorney

BY STEVEN K. YODA

Everybody's talkin' at me
I don't hear a word they're sayin'
Only the echoes of my mind

— Fred Neil
“Everybody's Talkin'”

“Everybody's Talkin'” is a song originally written and recorded in 1966 by singer-songwriter Fred Neil. A remake of the song recorded by Harry Nilsson became a Top 10 hit in 1969, when it was featured as the theme song to the movie *Midnight Cowboy*. The opening lines of the song capture the feelings of frustration and emptiness that can result from poor communication. If you are not careful, they are also feelings that can arise from poor communication during family law cases.

The purpose of this primer is to provide you with some basic tips on communicating effectively with your attorney during family law cases to maximize your chances of a favorable result. If you keep these points in mind, you hopefully will avoid some of the disasters that can result from miscommunication.

Communicating Effectively With Your Attorney

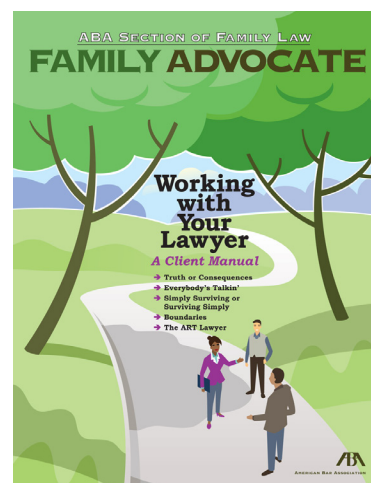
Listen Carefully

Let's start with the basics. You hired your attorney for her expertise in family law. Your attorney will be familiar with the legal issues presented by your case. The saying that “good communication begins with good listening” applies here.

When your attorney explains the law, which is often complex, you should *listen carefully* to what she says. After all, that is partly what you are paying her to do—know the law. Let her do her job. This may seem self-evident, but all too often clients seem to resist the law. The rule of law, by definition, means that the law rules your case. Your attorney is your trusted guide to the law. By listening carefully to your attorney, you will better understand the legal battlefield you face. The sooner you understand the law (even if you disagree with it), the sooner you can begin to intelligently plan your case. If you refuse to listen to the law, you most certainly will get lost in the fog of war.

Set Realistic Expectations

You also must develop realistic expectations for the outcome of your case. Doing so will require you to understand what your attorney can and cannot do for you. Your attorney can explain the legal process, your attorney can explain the law, your attorney can help formulate a coherent case strategy, and your attorney can help put your best case forward. However, your attorney cannot guarantee results.



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Clients often press their attorneys to assure a certain outcome, as in “Please assure me that I will receive at least X dollars in spousal support” or “Please assure me that I will receive at least X amount of custodial time with my children.” Such dialogue is a waste of time. Certainly, an attorney can give you her opinion about *possible* outcomes and their *probabilities*, but that is the best she can do.

Much like a doctor faced with a complex medical issue, an attorney can plan a strategy of attack and advise about possible outcomes, but she cannot guarantee results. If you fixate on an issue that cannot be guaranteed, you will not be an effective listener. So, part of communicating effectively with your attorney is understanding realistically what she can do for you.

“Just the Facts, Ma’am”

Your attorney is an expert in the law. You, however, are the expert on the *facts* of your case. After all, it is your life that is being litigated. You know where relevant documents are, you know where relevant witnesses are, and you know how events transpired. Just as you should listen carefully to what your attorney says about the law, so should your attorney listen carefully to what you say about the facts. It is through this dialogue that case strategies will emerge.

When communicating the facts of your case, though, you should de-emotionalize your narrative as much as possible. Everyone knows that family law litigation can be painful. That is a given. Years of resentment, mistreatment, or abuse often boil to the surface. But you should keep the name-calling and invective to a minimum. For those who remember the late actor Jack Webb and his character Sergeant Joe Friday from the classic TV show *Dragnet*, his (often-misattributed) catchphrase “Just the facts, ma’am” is worth keeping in mind. Just convey the facts.

Clients commonly refer to their spouses as “jerks,” “bullies,” or worse. These labels are legally meaningless. Likewise, clients commonly invoke the labels of psychology, as in, “My spouse is a narcissist,” or “My spouse is bipolar,” or “My spouse is manic,” or “My spouse suffers from borderline personality disorder.” More often than not, the speaker is not a mental health professional and there have been no clinical findings to that effect. Even if there were, it does not automatically mean that “you win.” You still would have to discuss with your attorney what legal effect, if any, such findings would have on your case.

The point is: emotionally-laden labels impede effective communication. They inflame passions and often promote a victim-like mentality. Stick to the facts. You and your attorney can then discuss how to frame those facts to maximize your chances of achieving a favorable outcome.

Remember: There Are Two Sides to Every Story

While sticking to the facts, you should always remember that there are two sides to every story. You will see the facts of your case one way, and your spouse will see the facts of your case another way. To litigate effectively, you must “know thine enemy.” To quote Sun Tzu’s *The Art of War*: “If you know the enemy and know yourself, you need not fear the result of a hundred battles.” To know thine enemy, you must remain open-minded to different points of view.

Remember that your attorney must not only advance your case but also defend against your opponent’s case. The more your attorney understands your opponent, the better she will be able to defend you. To communicate effectively with your attorney in this regard, you will have to suspend your own biases and step into your opponent’s shoes. Indeed, you will *want* to understand your opponent as much as possible in order to prepare for trial. By removing your blinders to your opponent’s

point of view and discussing your opponent's case dispassionately with your attorney, you will open frank lines of communication with your attorney that will only serve to strengthen your own case.

The Attorney-Client Privilege and Its Limits

Now that you know how to effectively communicate with your attorney, you should know how the law protects those communications. You might have some vague notion, whether from the news, movies, or TV shows, that your communications with your attorney are protected by "the attorney-client privilege." You would be right. However, you might not know how exactly the attorney-client privilege works or its outer limits. So this section is designed to give you a basic understanding of it. Keep these rules in mind when communicating with your attorney.

The U.S. Supreme Court, in the 1981 case of *Upjohn Company v. United States*, called the attorney-client privilege "the oldest of the privileges for confidential communications known to the common law." Although each of the fifty states has its own particular rules and variations on those rules regarding the attorney-client privilege, the privilege essentially covers: (1) communications, (2) that are confidential, (3) made between an attorney and a client, and (4) made for the purpose of obtaining legal advice.

The purpose of the privilege, according to the U.S. Supreme Court, is "to encourage full and frank communication between attorneys and their clients." Indeed, as discussed above, you will *want* to discuss your case frankly with your attorney to receive sound advice. Most of your communications with your attorney should be protected by the attorney-client privilege, which means that no one will ever be able to discover what you and your lawyer discuss.

There are, however, limits to this rule. You should be mindful of them. Three of the limitations are discussed below.

The Attorney-Client Privilege Only Protects Confidential Communications

First, the attorney-client privilege only protects attorney-client communications that are "confidential." Confidential means that the communication is conveyed in confidence. In other words, the communication should not be conveyed to any unnecessary third persons.

One way to think about this is: if you do not treat your communications with your attorney confidentially, the law will not treat them confidentially, either. The attorney-client privilege is a powerful legal principle, but you must respect it. If you blab about your attorney-client communications to others, talk loudly to your attorney in a restaurant or elevator, talk to your attorney on speakerphone while others are present around you, post about your attorney-client communications on social media, or bring unnecessary people to sit in on your meetings with your attorney, a judge could conclude that the attorney-client privilege will not protect those communications. So, treat your communications with your attorney cautiously and judiciously.

As an aside, it should be noted that the attorney-client privilege does protect communications between you and your attorney's staff, which includes paralegals, secretaries, and clerks, because they are reasonably necessary to further your legal representation. (In fact, in many instances, you may prefer to speak to your attorney's staff members because their hourly billable rates will be lower than your attorney's.)

The Attorney-Client Privilege Only Protects Communications Made for the Purpose of Obtaining Legal Advice

The attorney-client privilege only protects communications “made for the purpose of obtaining legal advice.” If you speak to your attorney about a tangential matter having nothing to do with her legal representation of you, that communication will not be privileged. Or if you hire an attorney to perform nonlegal services, your communications with her will not be privileged because they are not for the purpose of obtaining legal advice.

The Attorney-Client Privilege Does Not Protect Communications Made to Perpetrate a Crime or Fraud

Even if a communication falls squarely within the scope of the attorney-client privilege, it will not be protected if the attorney’s services were sought to perpetrate a crime or fraud. This is known as the “crime-fraud exception” to the attorney-client privilege. Its purpose is obvious: it ensures that the attorney-client privilege will not shield communications made for the purpose of committing a crime or fraud.

Different states apply the crime-fraud exception differently, but, generally speaking, in order for it to apply, the attorney-client communication must have been made with an intent to further a crime or fraud. It is not enough that the client simply revealed her crime or fraud to her attorney. Instead, the communication must have been made to *further* that crime or fraud. Also, in many jurisdictions, the crime or fraud does not actually have to be completed in order for the privilege to be waived.

Keep in mind that the crime-fraud exception covers crimes *or* fraud. Since most clients are law-abiding citizens, they tend to dismiss this exception the moment they hear the word “crime.” “I would never use my attorney to perpetrate a crime,” they think, and rightfully so. But the exception also covers “fraud,” and it is not always clear what types of wrongful conduct constitute a “fraud” for purposes of this exception. For example, in family law cases, each party must disclose his or her finances to the other party. A client who communicates with her attorney about concealing assets from the other party could fall within the crime-fraud exception. Likewise, a client who communicates with her attorney about deleting unflattering emails or destroying relevant evidence could also fall within the crime-fraud exception.

Conclusion

If you keep these basic tips in mind, you will have the tools necessary for communicating effectively with your attorney. Effective communication will lead to better teamwork. Better teamwork will (hopefully) lead to a better result. Even if it does not, if you communicated effectively with your attorney along the way, you will at least better understand the final outcome and the process that led to it. So, in that way, win or lose, you can only benefit from communicating effectively with your attorney. **FA**

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