

It's a Dialogue, Not a Monologue

Communicating effectively with clients who are strong-willed,
mentally ill, intellectually disabled,
or just plain mad!

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Taking the Relationship Seriously: Communication Models & Resources

- Practice LEAP (Listen, Empathize, Agree, Partner). See Xavier Amador, *I AM NOT SICK I DON'T NEED HELP: HOW TO HELP SOMEONE WITH MENTAL ILLNESS ACCEPT TREATMENT* (2007).
- Consider medical/clinical models. See Karen Barton, et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLIN. L. REV. 1 (2006); Marjorie Corman Aaron, *CLIENT SCIENCE* (2012); Greg Greer, *Avoiding Plea-Bargaining Problems: The Medical Model of Client Communications*, 42 COLO. LAW. 63 (Dec. 2013).
- Embrace neurodiversity. See Gregory M. Duhl, *Over the Borderline – A Review of Margaret Price's Mad at School: Rhetorics of Mental Disability and Academic Life*, 44 LOY. U. CHI. L.J. 771 (2013); Elizabeth Svoboda, "I am Not a Puzzle, I am a Person," SALON (Apr. 27, 2009).

KRPC 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

"I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel."

–Maya Angelou

Client-Relationship Goals

- The client *chooses sensibly* from available options to achieve a good (or tolerable) outcome.*
- The client *perceives* the lawyer as highly competent.**
- The client *feels* strong trust and rapport with the lawyer, and would recommend the lawyer to others.

See CLIENT SCIENCE, *Preface* at xiv.

KRPC 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

*A good outcome may mean something very different to the client than to the lawyer.

**Actual competence is a separate matter – it means little to the relationship if the client has no chance to recognize it.

Curiosity may have killed the cat, but it carries the client relationship

- Observe (but don't presume): Age, race, gender, physical condition/ability, hearing, vision, speech, teeth, hair, literacy, tremors, eye-contact, sniffles, clothing, odors, tics, jewelry, tattoos.
- Ask: Immediate concerns (medical needs, contact with family, contact with employer). Daily concerns (how can the lawyer help the client tolerate detention?). Expectations, fears, and goals (legal and personal).
- Investigate: How might your bond/social history/mitigation investigation inform your communications with your client?
- LISTEN. LISTEN SOME MORE. LISTEN AGAIN. KEEP LISTENING.

Take a Chill Pill

Speak

Slowly

and

PAUSE . . .

ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-3.1(d)

In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.

Lessons from Marjorie Corman Aaron, CLIENT SCIENCE (2012)

Content

- Curb those predictions. Studies suggest that lawyers are bad at predicting outcomes – and that their predictions get *worse* with experience and age (perhaps because these factors render us overconfident). Wrongly predicting outcomes is fatal to client trust.
- Preface bad news (avoid bluntness), but don't stall. Get to the point. Be direct and truthful. Let it sink in and attend to the client's emotional response.

Vocabulary

- Would your mother understand?
- Avoid legalese.
- Calling a rescheduling a "continuance" is using legalese.
- Speak to the client's intelligence level (don't speak down).

KRPC 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Voice

- You are talking too fast.
- You are still talking too fast.
- Imagine speaking in short paragraphs. Pause at the end of each paragraph. Look at the client. Read the client's facial expression. Look for signs of understanding. Is the client looking down? Wait for the client to look up. Keep waiting. Allow time for the client to respond or ask questions.
- If you are naturally high-pitched, try speaking in a lower register.
- Use vocal synchrony to increase rapport and persuasiveness. Do not mimic the client's vocal tone, but move toward it. If the client is excited and speaking animatedly, use a livelier tone. If the client's tone is despondent, speak in a lower key. For clients on the outer borders, meet them halfway (demonstrate that you are *with* them), and then shift into a cooler zone. The client may well follow you there.

KRPC 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Body language

- Avoid arm-crossing, fist-clenching, leaning back, and key-jingling or other fidgety habits (empty those pockets!).
- Nod as appropriate when listening, but avoid constant head-bobbing, and don't nod when you are speaking.
- Don't smile when giving bad news.
- Place your elbows & forearms on the table. If you are a large person, allow extra space between yourself and the client.
- Show empathy by moving a hand toward the client.

- Use SOLER: Squarely facing; Open position; Leaning forward; Eye contact; Relaxed.

Props

- Notetaking is appreciated by clients (it shows that what they say is important), but don't let it become a distraction.
- Some people learn by reading; some by listening; and some are visual learners. Most of us learn best with all three types of input. Draw pictures; use charts; move props around the table to make your point.

KRPC 1.2 SCOPE OF REPRESENTATION

a) A lawyer shall abide by a client's decisions concerning the lawful objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means which the lawyer shall choose to pursue. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Core concerns, and how to address them

- Appreciation (feeling heard, understood, and valued). Learn to be an active listener (more on this in the LEAP section below).
- Affiliation (feeling a connection). Find common ground (sports? music? parenthood?), and return to it. Be sensitive to affiliation breaches (“my best friend snitched on me”) that may drive the client’s emotional state.
- Autonomy (control over decisionmaking). Acknowledge constraints on autonomy, especially for detained clients, and offer micro-control whenever possible (“We have three things to talk about today, but I want to hear from you first – where would you like to start?”).
- Status (social or other standing in relation to others). Offer equal status as a rule, and find a way to acknowledge and appreciate the client’s higher status as to *something* (“I could never even hold a hammer right, much less build anything”; or “I’ve always wanted to learn more about chemistry”).
- Role (“It’s Shake ‘N Bake – and I helped!”). This is the client’s case. Help the client feel a part of it.

**NORTH CAROLINA STATE BAR
2015 FORMAL ETHICS OPINION 4**

Disclosure of an error to a client falls within the duty of communication.

*** * ***

The lawyer must candidly disclose the material facts surrounding the error, including the nature of the error and its effect on the lawyer’s continued representation. If the lawyer believes that she can take steps to remedy the situation or mitigate or avoid a loss, the lawyer should discuss these with the client while informing the client that the client has the right to terminate the representation and seek other counsel.

Lessons from Xavier Amador, I AM NOT SICK I DON'T NEED HELP: HOW TO HELP SOMEONE WITH MENTAL ILLNESS ACCEPT TREATMENT (2007).

ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION 4-3.1(f)

Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.

- A client's "stubbornness" (lack of insight) may be more than simple denial – it may be a manifestation of mental illness.
- The "lawyer knows best" approach *will not be effective*.
- LEAP = Listen; Empathize; Agree; Partner.

Listen

- Listen actively. Don't just nod or offer a general response ("mm-hmm" or "I hear you"), but specifically reflect back the content of the client's concerns: "It sounds like your health problems were really taking a lot out of you." Reflecting back the content will help you test whether you heard the client correctly.
- Set aside your fears. Simply listening will not make delusional thinking worse or further entrench it. Nor is it dishonest *not* to disagree with (or muzzle) the client's perspective.
- Delay giving your own opinion. "I'll be glad to answer that in a minute, but I'd like to hear more about what you were saying first. Is that okay?"

Empathize

- Strategically express empathy. "It must be hard to have that image in your mind," or "I would be really angry if that happened to me, too," or "I understand why pleading guilty would seem like a cop-out now."

- Normalize the client's experience. "I think anyone in your position would feel the same."

Agree

- Find a point of common departure: "I think we both agree that the officer overreacted."
- Agree to disagree.

Partner

- "We can do X. Will that address your concerns?"
- "Let's talk about the pros and cons of that."
- "How do you see that playing out?"
- "What information would *you* like to see presented at your sentencing?"
- ~~"Trust me. I'm the lawyer. That's for me to decide."~~

UTAH STATE BAR ETHICS ADVISORY OPINION No. 96-06

On any matter that requires client understanding, the attorney must take all reasonable steps to insure that the client comprehends the legal concepts involved and the advice given by the attorney. The attorney must take all reasonable steps to insure that the attorney understands what the client is saying, so that the attorney can make intelligent judgments about the case and so that the client can make informed decisions.

NEW YORK CITY BAR FORMAL OPINION 1995-12

It is axiomatic that adequate communication between lawyer and client is necessary to render competent legal services.

Exit Interview

- Did your lawyer make you feel comfortable?
- Did you understand what your lawyer said?
- Did your lawyer treat you with respect?
- Did your lawyer understand what was important to you?
- Did your lawyer listen well?
- Did your lawyer explain what he or she would do for you?
- Was your lawyer interested in you as a person?
- Did your lawyer ask confusing questions?
- Was your lawyer someone you could trust?
- Did you get to say everything you wanted to say to your lawyer?
- Do you know what you need to do next?
- Would you recommend your lawyer to someone else?
- Would you want the same lawyer if you were ever in trouble again?

Adapted from Barton, et al., *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLIN. L. REV. 1 (2006).

Sovereign citizen resources

George F. Parker, [*Competency to Stand Trial Evaluations of Sovereign Citizens: A Case Series and Primer of Odd Political and Legal Beliefs*](#), 42 J. AM ACAD. PSYCHIATRY LAW 338 (2014).

United States v. Hakeem El Bey, N.D. Ill. No. 1:14-cr-00447 ([Order filed Feb. 20, 2015](#)) (Posner, J., ordering pro se sovereign citizen to stop injecting irrelevant, frivolous matters into case or forfeit right to self-representation).