

# Better Client Counseling Begins (and Ends) With You

by Tana M. Fye

Attorneys regularly deal with clients who are under an immense amount of stress and in the midst of difficult situations. They come to us when they're facing a divorce, when they've been charged with a crime, when their children have been taken away from them, when they're facing bankruptcy, when they've been served with a lawsuit, whenever they have a problem and don't know how to solve it. Attorneys have the awesome responsibility of not only helping people to solve their problems, but also communicating with those people about their options, and helping to alleviate their stress. We are tasked with walking with clients through some of the most challenging moments of their lives. This is client counseling, and much like the practice of law in other respects, we can continue to work at it and improve over time.

## Ethical Obligations

In thinking about the necessary elements of good client counseling, it is important to begin with an eye toward our

ethical obligations to our clients. "As a representative of clients, a lawyer performs various functions. *As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.* As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. *As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.*"<sup>1</sup> Two of these functions, advocate and negotiator are outward facing functions. The other two, advisor and evaluator are inward facing functions, that the attorney does alone and with his or her client. Both advising and evaluating are included in what we as attorneys do when we counsel clients.

"In all professional functions a lawyer should be competent, prompt and diligent. *A lawyer should maintain communication with a client concerning the representation.* A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law."<sup>2</sup> Client counseling is important. It's required for us to meet our ethical obligations to our clients. It's also important because being effective communicators with our clients is the only way that we can be effective as attorneys. And it's important for us to do in order to keep clients, which keeps our law practices in business. According to a national survey, 67% of clients who leave do so "because they feel they were treated discourteously, indifferently, or simply were not given good service."<sup>3</sup> Good client counseling goes a long way to addressing these issues and keeping our clients. But how do we counsel our clients well? And what are concrete tips and strategies that we can all use to improve our skills in this regard?

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## Preparation

When meeting with either a new client for the first time or with an existing client, preparation for the meeting (or phone call) is important. And preparation includes both physical preparation and mental preparation.

Physical preparation includes looking professional and competent, dressing neatly and in a manner that demonstrates that you both take your work seriously and are competent to handle the client's legal matter.<sup>4</sup> I'm of a generation that recognizes that this is not always a business suit (though in many situations it may be), and that some clients may feel more comfortable with an attorney dressed more or less casually. Use your best judgment and think about what will most set your client at ease, but realize that appearing sloppy will not help clients, particularly of an older generation, trust that you know what you're doing.

Physical preparation also means meeting with your client in a professional setting without interruptions. This can include a conference room in your office building, in your office itself, in a conference room at the courthouse, or many other settings. Whatever the actual location, the keys elements are that the client feels comfortable, confidentiality can be maintained, and you can meet without interruption. In my own office, this looks like clearing my desk of other work and client files (both to maintain confidentiality of those other clients, and to convey a sense to the client whom I'm meeting with that he/she is a priority), closing office doors, and turning the ringers on my cell phone and desk phone off.

Mental preparation includes being punctual for your client meeting or rescheduling if you are not able to be on time. It also means that you schedule enough time before the client meeting so that you're not still thinking about the last client meeting, the brief you have due at the end of the day, the hearing that went badly yesterday, the fight that you had with a spouse or a child, or anything other than that client's issue. If we're distracted, we can't give the client the attention that he or she needs, we may miss key issues in their cases, and we can't meet them where they're at. I have found that engaging in mindful self-regulation strategies are helpful in this regard. Some of the self-regulation strategies that I've found to be most helpful are meditation, tapping, self-talk, and deep breathing. But there are many more, and it's important to find what works best for you.

Mental preparation also means having a basic understanding of the issue that the client or potential client is coming in with. If you're a new attorney without much experience, or if it is not in an area of law that you regularly practice in or just haven't handled for some time, you may need to read (or reread) statutes, cases, or primers. If you're meeting again with an existing client, you will probably also need to refresh your memory on the current status of the case, any offers that are outstanding or need to be communicated, and any other items

that need to be discussed during the meeting. This will help you to set an agenda, which will make your meeting with the client productive.

If you are meeting with a potential client for the first time, mental preparation may also involve researching the potential client. This would be more important if you were dealing with a company or organization than it would for a private individual. But having a basic understanding of the business of the client can help you to formulate questions that you may need to ask during the meeting. Potential clients may not be able to give very much legally important information at the outset of the representation, because they may not understand what the legal issues are. Research into the law, and sometimes the client, can help you to ask more probing questions at the outset to make the meeting more effective.

## Communication and Advice

"Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."<sup>5</sup> Communication can be written and oral, and both involve elements of client counseling. The method of communication that we're most concerned with in this article though is oral communication. "The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved...The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."<sup>6</sup>

"In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication."<sup>7</sup> But "[a] client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client."<sup>8</sup> But when you have bad news to deliver to the client about his or her case, do so simply, directly, and honestly.<sup>9</sup> Bad news doesn't get better with the passage of time, it only gets more difficult to deliver.

## Diminished Capacity

"The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When

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the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects...Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being.”<sup>10</sup> “The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.”<sup>11</sup>

Practically speaking what does this actually look like? I often work with children, teens, and people of all ages who suffer from mental illness or developmental disabilities. I use simpler language when talking with these individuals about their cases. I repeat information for them. I ask them questions to check their understanding of what we're discussing. I

often follow up with a letter confirming what we talked about and decided on, or send a letter in advance so that they have time to think about the information before even walking into my office. And I use reflective practice in my meetings with these individuals. All of this has carried over to how I engage and talk with my normal functioning adult clients. And I have found that it is more effective, because none of our clients really understands legalese or complicated legal concepts. If we can simplify to the point that an adolescent or teenager understands, then our adult clients is more likely to understand too. And this has the added benefit of making us better communicators in court and in legal writing as well.

## What is Reflective Practice

Fundamentally, reflective practice involves an examination of feelings, exploration of issues, brainstorming solutions, and integrating these areas together to become more resilient.<sup>12</sup>



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Reflective practice builds capacity “to imagine, think, and plan; to generate new awareness; to construct new understandings; and to use this process to transform practice.”<sup>13</sup> There are many models of reflective practice used in different contexts, but the fundamental elements of the models are largely the same.<sup>14</sup>

Reflective practice can either occur through consultation or through supervision.<sup>15</sup> Reflective supervision occurs between leaders and their staff. This can include managing attorneys and associates, as well as between managers and their employees. Reflective consultation can be done in groups of individuals with a consultant who engage in the reflective process with them. Reflective consultation can also be done one-on-one with a single individual and the consultant, as well as with a client and an attorney.

Practically what happens during a client meeting which uses reflective practice, is as follows:

- (1) Ensuring that the attorney of the reflective practice session is self-regulated (i.e., calm, not distracted by other issues or cases, prepared to meet the client wherever he/she is emotionally and cognitively);
- (2) Setting an agenda that both the attorney and the client want to cover;
- (3) Listening for strong feelings experienced by the client and helping to contain them;
- (4) Exploring the problem or issue that needs to be addressed in this meeting;
- (5) Brainstorming and discussing possible solutions to the problem, while helping the client to feel empowered to decide the best path forward with input from the attorney’s experience; and
- (6) Integrating the information together and either arriving at a decision, outlining when the client needs to respond to the attorney, or when another meeting needs to occur.<sup>16</sup>

If the client becomes dysregulated and responds emotionally later in the process, the attorney will need to circle back and help the client to again contain his/her emotions so that the process can move back to either exploring the problems or brainstorming solutions, as the process is not always linear.

## Why Use Reflective Practice

Reflective practice has not been studied in the context of client counseling, but has been studied in other contexts where it has been applied. The benefits have been universal in those contexts studied.

In the context of using reflective practice among managers of staff, the managers reported “a greater understanding

of their own ‘triggers’ in interactions [which] allowed them to be less reactive and use more proactive approaches to problem solving. With greater ability to reflect, they were more able to step back and see issues from the staff’s perspective and then to build more on staff strengths.”<sup>17</sup> When used by those interacting directly with families, the workers reported that reflective practice enabled them to better work in spite of their own adverse feelings toward a family, talk about stresses of their roles, process relationships with providers, and deal with feelings of overwhelm, undervalue, and lack of respect.<sup>18</sup> There are benefits to those engaging in reflective practice, no matter which side of the interaction they are on. This is important because “[c]ertain types of legal work lend themselves to increased stress...[and] may expose attorneys to information that is sensitive and sometimes traumatic in nature. It may present dilemmas about humanity and fairness, which include the inherent limitations within the rules of evidence. When exposed to traumatic and emotionally difficult information repeatedly, attorneys risk developing vicarious trauma or secondary traumatic stress.”<sup>19</sup>

But the benefits of better client counseling are easily understood by practitioners. Clients whose emotions are contained are able to think more rationally about their cases and options. This eases interactions between the attorney and client, as well as interactions with others (the Department of Health and Human Services case managers, visitation workers, a former spouse, etc.). It ensures that the client has a better understanding of their case, which helps to ensure due process for the client. It can also (but as practitioners know, doesn’t always) lead to better case outcomes. And when client meetings run more smoothly, the benefits to attorneys include less angst about cases, less stress in our own lives, and a generally more positive feeling about the work that we do.

## Case Studies<sup>20</sup>

Reflective practice is best understood in action. In order to demonstrate this in a written format, I am including a couple of case studies drawn from previous clients and scenarios to show how I’ve utilized reflective practice with clients.

### *Case Study: Robert*

Robert is a man who is lower functioning and has difficulty with speech, making him difficult to understand. I represent Robert in a criminal case, where he faces the potential for incarceration. He struggles to understand complex concepts, but is not low enough functioning such that competency is in question. Robert feels like people are out to get him, which causes him to be verbally aggressive. He shouts when he feels as if he isn’t being understood or heard.

To prepare for my meeting with Robert, I needed to ensure that I was calm, wasn’t holding on to particular emotions or

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feelings from other cases, and ready to be patient. This is step one from the process outlined earlier.

Step two involves setting an agenda, so we started our meeting by doing just that (outlining upcoming court dates, discussing the plea offer, discussing the facts of his case—his version and the version in police reports, discussing pros and cons of the various options, and arriving at a decision about how to proceed). I outlined what I wanted to cover and asked Robert if he wanted to discuss anything else during our meeting. He advised that he did not have any other topics that he wanted to cover.

Knowing what was going to happen in our meeting helped Robert to feel in control which immediately made him less agitated. After advising Robert of the upcoming court dates and of the plea offer, I then let him take over and talk about what had occurred. At times he was so upset that he shouted about how ‘it wasn’t right’ what the cops had done to him. Telling the story illustrated Robert’s strong feelings of persecution and feeling misunderstood. I validated his feelings, which calmed him further. I contained his emotions by telling him that I understood how hard the situation was for him, and asked if he was ready to explore the options for dealing with his case. He agreed, and we were able to move out of step three.

In our meeting (and most of my meetings with criminal defense clients) we essentially handled steps four and five together. I asked some questions to clarify information that he’d given to me. We discussed the charges in his case, the possible penalties, what information was in the police reports and what likely would be presented at trial, and the options for going forward—trial or accepting the plea offer. I gave him advice based on my experience and answered questions. I told him that the decision was his to make, but made clear that I’d support whatever decision he arrived at. Once all of his questions had been answered, and he seemed as if he understood all of his options and what they meant, we moved to step five.

In step six, we integrated our meeting. He told me that he wanted to accept the plea offer. I asked if he had any additional questions for me or other things that we needed to cover that we hadn’t already covered. I asked if there was any other information that he wanted me to remember from our meeting. He advised that his questions had all been answered, and that he’d told me everything. We ended the meeting with Robert feeling calm and that he’d been heard, and with a clear path forward in his case.

### *Case Study: Emily*

Emily’s two children have been removed from her home and are in the care, custody, and control of the Department of Health and Human Services. They were removed due to domestic violence between Emily and her boyfriend, as well as a dirty house. Emily loves her children and her boyfriend,

and is tearful at nearly every meeting. She is, however, a young mother without job or life skills, and is easily overwhelmed by the expectations on her.

Step 1—To prepare for my meeting with Emily, I again needed to ensure that I was calm and focused on her case, rather than be distracted by outside matters. I also needed to remember to be patient, as the process is new for Emily and she doesn’t know what to expect.

Step 2—We first met after the Pre-Hearing Conference (PHC), approximately one week after her children were removed. It was clear to me from how she responded in the PHC that she was already overwhelmed. To keep from making this worse, and to try to calm her, I limited our agenda for that first meeting. I told her that we were going to discuss the general process of juvenile cases, talk about the things that she could start doing right away to help get her kids returned quickly, and just decide when we wanted to meet again to decide on a course of action. I asked her if this was alright, or if there were other things that she wanted to talk about right away. She told me that she also wanted to talk about whether she and her boyfriend could stay together, so I agreed that we could cover that as well.

Step 3—I asked her how she was holding up with this situation. She started crying and telling me how much she missed her children. I told her that I heard how hard this was for her and how difficult it was. I validated her love for her children and her desire to get them back quickly. Once she had stopped crying, I asked if she was ready to hear about the process and the next steps that she could take.

Step 4—I then outlined, in a very general sketch, the juvenile court process from pre-adjudication through disposition. Because of her fragile emotional state, and to avoid moving her back to a place where her emotions, rather than her thinking controlled, I avoided telling her about the possibility of termination of parental rights at that stage. Knowing that we’d be talking again regularly, I covered this in a later meeting with her. I asked if she understood what the terms meant, and what the next steps were. She asked a few questions to clarify, and I knew that she understood at least generally.

Step 5—We talked about some of the things that she could control and start on right away. During the PHC, Emily had stated that she wanted to start on counseling and had already contacted an agency to set up her first appointment, so I highlighted her effort. I offered Emily some other services that she could get started on right away, and explored with her whether they seemed reasonable. I also told her some of the non-negotiable expectations of the case—that she attend her visits consistently, and that she have the house cleaned up within two weeks so that visits could return to her home. She agreed that she could do these things.




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I asked her if we'd covered the things she wanted to talk about, and she reminded me that she wanted to talk about her relationship with her boyfriend. I thanked her for reminding me. We talked about how if her relationship were to continue with the boyfriend, he'd be expected to comply with a case plan, and that he needed to get started on the same types of things that she was expected to do. She stated that she understood and that she was going to talk with him about this, as well as talk to her counselor. I agreed that this was a good plan, and that we could continue to check-in and talk about this topic as the case progressed.

Step 6—I again asked if we'd covered everything that she wanted to talk about on that date, and she agreed that we had. I asked if there was any other information that she wanted me to remember from our meeting to discuss in the future, and she told me that she just wanted me to remember that she loved her kids and would do anything for them. I agreed that this was the case, thanked her for taking the time to meet with me, and told her that I'd be in touch to set up a time to meet with her again. She left the meeting much calmer than we'd started, and even smiled at the end. She appeared to feel empowered by knowing what she could do to help get her children back home.

## Conclusion

Client counseling is not easy. But there are things that we can do to make it easier. Reflective practice, in particular is a great tool for improving interactions with clients in many types of cases. It is particularly useful for cases and situations which are very stressful and in which clients are particularly emotional. And this means that attorneys who are using it can better meet our ethical obligations and the needs of our clients simultaneously with ensuring that we can better manage the stress of practicing law and how it affects us. 

## Endnotes

- <sup>1</sup> Preamble, Nebraska Rules of Professional Conduct [2] (emphasis added).
- <sup>2</sup> Preamble, Nebraska Rules of Professional Conduct [4] (emphasis added).
- <sup>3</sup> Foonberg, Jay G., *How to Start & Build a Law Practice*, 4th Edition, 201 (1999).
- <sup>4</sup> Law Firm Suites, *How to Make the Best First Impression with Your Law Firm's New Clients* (2019).
- <sup>5</sup> Comment [1] to Nebraska Rules of Professional Conduct § 3-501.4.
- <sup>6</sup> Comment [5] to Nebraska Rules of Professional Conduct § 3-501.4.
- <sup>7</sup> Comment [7] to Nebraska Rules of Professional Conduct § 3-501.4.
- <sup>8</sup> Comment [1] to Nebraska Rules of Professional Conduct § 3-502.1.
- <sup>9</sup> Foonberg, Jay G., *How to Start & Build a Law Practice*, 4th Edition, 527 (1999).
- <sup>10</sup> Comment [1] to Nebraska Rules of Professional Conduct § 3-501.14.
- <sup>11</sup> Comment [2] to Nebraska Rules of Professional Conduct § 3-501.14.
- <sup>12</sup> Linda Gilkerson, *Fussy Baby Network Supervisor FAN Pocket Guide: Things to Remember in Blended Supervision*, Erikson Institute Fussy Baby Network, 2010, rev. 2017.
- <sup>13</sup> Angela Tomlin & Sherryl Scott Heller, *Measurement Development in Reflective Supervision: History, Methods, and Next Steps*, Zero to Three Journal Vol. 37 No. 2 p. 6 (2016) (citing K. Brandt et al., *Transforming Clinical Practice Through Reflective Work, Infants and Early Childhood Mental Health: Core Concepts and Clinical Practice*. 293-308 (2014)).
- <sup>14</sup> Casey, *supra* note 1, at 327.
- <sup>15</sup> Alicia Henderson et al., *Lawyering from the Inside Out*, 20 Neb. Law. Note 3 (2017).
- <sup>16</sup> Gilkerson, *supra* note 4.
- <sup>17</sup> Linda Gilkerson & Carolyn Cochran Kopel, *Relationship-based Systems Change: Illinois' Model for Promoting Social-Emotional Development in Part C Early Intervention*. Erikson Institute Occasional Paper, 13 (2004).
- <sup>18</sup> *Id.* at 14.
- <sup>19</sup> Henderson et al. *supra*, 30 (citing Levin, A. & Greisberg, S., *Vicarious Trauma in Attorneys*, *Pace Law Review*, 245-252 (2003)).
- <sup>20</sup> Names and details have been changed to protect the identities of clients past and present. And case studies may reflect composites of multiple meetings with the same client or multiple clients.