
HAPLESS HARVEST
CLIENT COUNSELING EXERCISE

Memo to Actors in Jan Hapless Role

TO: Actors contemplating the Jan Hapless Role in the Client Counseling Course
Individual Final Skills Exercise
FR: Marjorie Aaron
RE: Acting Directions – Subject to Input and Working Together!

The Hapless Harvest case presents a plaintiff, Jan Hapless, who suffered knee and back injuries when he/she slipped and fell in Aisle Five of Harvest Plenty, a health food grocery store. Whether or not the back injury was caused by the fall, or was pre-existing, is a disputed issue in the case, but Jan Hapless believes that it was. You should carefully review the instructions written to plaintiff's counsel (our students) regarding the facts of the case. These instructions set forth what Jan Hapless has told her attorney, and it provides the information necessary for students to see the difficult legal issues.

As stated in the instructions to the students, the goal of this exercise is for them to demonstrate certain counseling skills and strategies covered in the counseling segment of the course. These are:

- To communicate clearly (explaining any legal jargon) concerning the procedural status of the case and the legal challenges presented by the anticipated summary judgment motion;
- To seek to understand the client's interests and discuss the impact of settlement or trial;
- To deal with psychological barriers to wise decision-making in the face of uncertainty; and
- To work effectively with Jan's strong emotions.

In order to permit all of this to happen within a fifteen-minute time slot (with time for some coaching), it will be essential for the actors to "prompt" a bit. The order is not important, but I envision that at some point:

- (1) Communicating clearly regarding process and legal issues - No legalese!

The actor would ask a question about the procedural status about the case. This might be in the form of "what is going to happen with my trial?" This indicates that the client doesn't understand there is likely to be a summary judgment proceeding and additional discovery before anyone would get to trial (if the case survives summary judgment). You could ask: When do I get to testify? Basically, I



am looking for a naïve question, indicating lack of understanding of the process. It would be the question of someone who has watched LA Law, Perry Mason or Boston Legal (depending on your decade). The student will be expected to explain what Summary Judgment is and why it matters. If the student's description sounds like legalese or is unclear, you should indicate confusion by asking a question or, better yet, making a comment that indicates lack of understanding (I'd like to see if the student is listening).

Note: I anticipate that some students will do a reasonably good job of explaining what Summary Judgment is and perhaps, what else would happen before trial, but would NOT sufficiently explain why, in this case, the legal reasons that the Summary Judgment motion poses a real threat. In Ohio, the courts take "open and obvious danger" to heart, and also generally require that a dangerous condition be known to the defendant (or that sufficient time has passed such that the defendant should have been aware). Those are real issues in the case. If the student doesn't explain this clearly, I suggest that the actor make a comment about the reality of his/her injury, and the fact that the store knows he/she fell – and thus they can't deny that for any legal reason.

- (2) To seek to understand the client's interests and discuss the impact of settlement or trial

The students should know enough to ask you how you have been doing lately, whether anything has changed since you last met, or at minimum, whether you have any worries about going to trial or settling the case.

As to "anything changed" or "how things have been going lately," a specific prompt is a bit of a cheat. I really want the students to ask. But, in the interest of time, perhaps you could mention that you need to feel on top of the lawsuit, or you want to see this lawsuit get moving, because you have "a lot going on." You might express anxiety about delay and talk about wanting to be finished. Or you could express frustration at the lawyer's inability to give you a definite answer about what will happen in the case, because "so many other things in my life are up in the air."

The fun part is making up what is going on for your Jan Hapless. I suggest sometimes, Jan Hapless will have met a "significant other" and is planning to move somewhere across the country. This Jan will want to be finished. He/she might want to settle for a lump sum instead of coming back to Ohio. This Jan would not be depressed overall (though still upset about his/her medical condition, of course).

To relieve boredom and solve the problem of students talking to each other about their Jan Hapless's secret facts, another Jan Hapless may recently have been diagnosed with depression and anxiety disorder. He/she may NOT relish the idea of testifying. She may be threatened with a lay off at work and need cash cushion.



Another Jan Hapless may be very angry. He/she may have recently inherited a VERY modest amount upon the death of a grandmother. Getting money now is not a priority. Having read about too many corporations escaping liability (this Jan was politicized by the recent election), Jan wants Harvest to pay. This Jan is also very angry at the way Harvest treated her and has been telling all of her neighbors and friends to avoid the store. She wants to make sure no one else she knows will be treated this way. Also, the back pain has flared up lately and Jan may wish to wait before settling. She is not anxious about testifying or seeing the litigation through.

The students' inquiry should elicit this type of information. Once the information is out the student should be sure that Jan Hapless understands that the results of the case cannot be predicted with certainty – that Summary Judgment will take time, may end the case, and that a trial (and final payment, if there is no appeal) will take place well into the future. The student should set forth the timeline and uncertainties and relate them to the client's interests (as described by Jan in this session).

- (3) To deal with psychological barriers to wise decision-making in the face of uncertainty

This course covered a number of psychological barriers to wise decision-making, including:

- partisan perception bias and judgmental overconfidence. We tend to be biased in our own favor – to disregard or discount information that doesn't support what we want – biased assimilation of information feeds partisan perception bias. We also tend to be confident of our own judgment or opinions even where there is little basis for that – where we lack expertise.
- We tend to be risk averse as to gain and risk seeking as to loss. (We favor the bird in the hand – will take discounts if a “gain” or sum is certain even if we have a chance of more. But we hate to take certain losses, preferring to gamble that we won't lose, even if the odds are not with us.)
- Positive and negative framing impacts the way we make decisions. If something is positively framed, as a gain (over a certain reference point), we will want to keep it. But if something is negatively framed, as a loss, then we may prefer to gamble to avoid the certain loss.

Students should be able to demonstrate that they understand at least one of these things. I would like the actors to “prompt” their use of positive and negative framing of gains and losses.



My suggestion would be that Jan Hapless raise the notion that she had counted on getting \$X (a large sum – perhaps \$100,000 or more) because she knows other people have obtained that much or more. This should come in the context of a discussion about settlement, and what it would be reasonable for her to authorize as a settlement figure.

(If the lawyer isn't getting to a discussion about settlement, Jan should interrupt at some point and ask about it. Perhaps Jan could say to the attorney: You mentioned on the phone that you wanted to talk about settling..." and direct the conversation there.)

Jan would characterize anything less than \$X as losing because it less than she had counted on. We would be looking for the student attorney to characterize a settlement in the \$50,000 range as a gain, because it is far more than Jan's out of pocket losses. And the attorney should emphasize that the settlement amount (\$45,000 or \$50,000 etc.) would be CERTAIN gain – NO RISK.

My bullet pointed list above includes notions of partisan perception bias and judgmental overconfidence as two other psychological barriers. If Jan Hapless is expressing certainty and confidence in what will happen in the case and seems not to be listening to (or processing) the attorney's discussion of difficult legal hurdles and trial risks, the student may choose to point out these common psychological tendencies. Rather than making it that explicit, the student may decide to reference other cases in which clients may have felt confident, but the result was summary judgment or a defense verdict. If the student does this effectively, and time is running short, it is fine to "skip" the positive vs. negative framing around risk and loss.

(4) To work effectively with Jan's strong emotions.

Last but not least – emotions. I am assuming these are the "most fun" for the actor/actresses. The students have been taught to look for five core emotional needs: Appreciation; autonomy; rapport or attachment; status, role. (Hmmm... I have a feeling one of these is wrong, but it's close enough for this memo). The idea is that strong emotions will be provoked when someone (the client) feels "unappreciated", a threat to autonomy; lack of autonomy; lack of attachment or rapport; low status; or placed in a useless or inappropriate role in the interaction. Different people may react to each of these triggers with different emotions. For one person, when autonomy is threatened (or simply not an option), anger may result. Another person may feel insecure or inadequate. For some people, lack of "attachment" or personal rapport may evoke resentment or belligerence. Without becoming psychologists, it is fair to say that stronger and more complex emotional states may be aroused where one's self identity is involved. So, if a great deal of my identity involves being in control – the one in charge – a challenge to autonomy may spark STRONG anger, denial, and self-doubt, and so on...



The students have been taught to be aware of these triggers, to anticipate and respond to them. I will suggest that you pick one or two: Jan might express frustration that he can't make the defendant pay, that he can't get Harvest Plenty to "clean up its' act, march in and make the store a safer place. The student would simply have to demonstrate some empathy – express appreciation for the fact that Jan is an effective manager and a smart guy/gal and wants to be able to do right. That same Jan might be trying to compete with the lawyer in the conversation, to show that he/she has status by asserting greater knowledge than he has.

As a teaching goal, I really want the students to express appreciation for the client's circumstances, and to establish rapport with the client as a person. Part of the goal of this segment of the course is to move from technical lawyering of the case to lawyer as counselor for a person. So, if you, as the actor, do not feel any rapport – feel that the lawyer is behaving as if you are a case or a person – I want you to respond to that – with negative emotion. If you do not feel understood or appreciated – or that you are being treated as having low status – please respond accordingly. I or you the actor/actresses should stop the action, name what you are feeling, and I will coach through what the student lawyer might do better.

Of course, the plan is to do all of this in 30 minutes with each student (25 would be better but it never happens).

I should add that, we call these sessions with actor-clients the "final dress rehearsal." The students are then required to do it again with a classmate, family member or friend (anyone) in the client role. Because of your fine work and our coaching, they should be able to do it perfectly. They submit the recording of this perfect session to me for their final grade.

I hope this memorandum has proven useful. I very much looking forward to meeting and working with you!

Marjorie