

## CHAPTER 4

### EMOTIONAL EFFECTS AND AFFECTING EMOTIONS

“Emotions are celebrated and repressed, analyzed and medicated, adored and ignored – but rarely, if ever, are they honored.”

—Karla McClaren<sup>1</sup>

Your shareholder client expresses disgust at his siblings’ mismanagement of the family business and at his father’s passive acceptance of their judgments. Another client sputters with anger when describing her former employer’s humiliating comments at her failure to reach sales quotas. She expresses glee at her vision of publicly humiliating him at trial and vengefully imagines bankrupting the company with a punitive verdict.

A large consumer product company manager is frustrated and incredulous at your lawyerly conclusion that the non-compete in an earlier product spin-off transaction would rob him of the right to distribute a newly developed product.

Your divorce client insists that he will not pay any alimony beyond a year, because “that witch ruined year after year after year of my life.” He is deaf to your advice that a judge’s order will require more equitable allocation of marital assets, and thus, it would be wise to make a more generous offer to his wife.

Your business client speaks of the company’s betrayal by its joint venture partner’s “scheming, deceptive, and unfaithful transaction with our competitor.”

If your clients were *Star Trek*’s android Data or Dr. Spock, you would give them logical advice: to make decisions only with reason, to put emotions aside. But, because we are human, that advice often proves impossible to follow.<sup>2</sup> Human emotions remain, visibly or invisibly directing our reactions and responses, our stated preferences, our capacity to analyze, and ultimately our decisions.

Emotion is not separable from human experience, whether that human experience is in the boardroom or the bedroom, the office or the playground. Clients and lawyers feel emotions when

thinking about past facts, current circumstances, future choices, and legal analysis. We feel emotions as we think, and we often think about what we feel. Emotions create our fierce desire for legal analysis to support the decision or prediction that FEELS best. Emotions diminish our ability to grasp complexity or subtlety, execute strategy, and overcome obstacles.

Many logical lawyers say that they prefer reason to emotion and become frustrated when people react emotionally rather than logically to a reasoned argument. Ironically, lawyers tend to be passionate (thus, emotional) on this topic, as they believe strongly in the value of reason.

With deep appreciation for the wisdom of therapists, psychologists, physicians and other researchers into the human condition, I advise lawyers to abandon futile efforts to banish or ignore emotions.<sup>3</sup> These efforts render us blind to emotions' impact, or ill-equipped to respond when banishment fails and emotions re-enter, undeniably and inescapably. Thus, this chapter suggests ways to recognize, understand, observe, respond to, and influence emotion, focusing on common emotional states and emotional reactions within lawyer-client conversations. Without claims to exhaustiveness, it presents gleanings from research into the effect of emotion on decision-making, rapport, trust, and relationships. Meta-emotions—emotions about emotions—and self-identity's impact on emotional intensity are also discussed due to their particular salience for clients in legal disputes.

Finally, this chapter offers a practical approach to working with emotion in the lawyer-client context, applying the “core concerns” model developed by Professor Roger Fisher and Daniel Shapiro, Ph.D., in their book, *Beyond Reason*.<sup>4</sup> The core concerns model was originally conceived as a “lens and a lever” for interactions at the classic negotiation table. However, my collaborative work with Dr. Shapiro confirms that the core concerns model provides insight for lawyers at two distinct levels: in the client's underlying legal dispute or problem, and in the lawyer-client counseling interaction.<sup>5</sup> The yield is practical advice for addressing the client's core emotional concerns at both levels. The result is more positive client emotion, better decision-making, and a stronger lawyer-client relationship.

First, we begin with some grounding in the literature and science of human emotion.

## **Emotional Grounding**

*The Oxford English Dictionary* defines emotion as “[a]ny agitation or disturbance of mind, feeling, passion; any vehement or excited mental state.”<sup>6</sup> Academics dispute whether the word “emotion” refers to our physical responses to an event, thought, or perception, our experience of physical responses, or the cognitive sparks generating those physical responses in the first place.

In his now famous book, *Emotional Intelligence: Why It Can Matter More than IQ*, Daniel Goleman acknowledges *The Oxford English Dictionary* definition and writes: “I take emotion to refer to a feeling and its distinctive thoughts, psychological and biological states, and range of propensities to act.”<sup>7</sup> After recounting various anecdotes in which emotions propel people to heroic, tragic, or serendipitous ends, Goleman concludes: “All emotions are, in essence, impulses to act, the instant plans for handling life that evolution has instilled in us.”<sup>8</sup>

Not surprisingly, scholar-researchers disagree about which emotions are most basic. Some posit a very few “primary” emotions from which all others are blended. Others name a wider array of elemental emotions. Goleman summarizes the “main candidates” and some of their families:

- *Anger*: fury, outrage, resentment, wrath, exasperation, indignation, vexation, acrimony, animosity, annoyance, irritability, hostility, and (perhaps at the extreme) pathological hatred and violence
- *Sadness*: grief, sorrow, cheerlessness, gloom, melancholy, self-pity, loneliness, dejection, despair, and (when pathological) severe depression
- *Fear*: anxiety, apprehension, nervousness, concern, consternation, misgiving, wariness, qualm, edginess, dread, fright, terror, and (as a psychopathology) phobia and panic
- *Enjoyment*: happiness, joy, relief, contentment, bliss, delight, amusement, pride, sensual pleasure, thrill, rapture, gratification, satisfaction, euphoria, whimsy, ecstasy, and (at the far edge) mania
- *Love*: acceptance, friendliness, trust, kindness, affinity, devotion, adoration, infatuation, and *agape*
- *Surprise*: shock, astonishment, amazement, and wonder
- *Disgust*: contempt, disdain, scorn, abhorrence, aversion, distaste, and revulsion
- *Shame*: guilt, embarrassment, chagrin, remorse, humiliation, regret, mortification, and contrition<sup>9</sup>

## **Beyond Control: Emotionality as Physicality**

Nature has wired us with an emotional infrastructure. Charles Darwin first observed the universality of facial expressions as proof of evolution in the human nervous system.<sup>10</sup> More recent research confirms that facial expressions for fear, anger, sadness, and enjoyment, or their emotional families, are recognizable around the world, even in isolated tribes without exposure to media or mass entertainment.<sup>11</sup>

Whether defined as the physical state or its trigger, emotions are physically impossible to ignore or set neatly aside.<sup>12</sup> With anger, blood flows to the hands, heart rate increases, and adrenaline surges. With fear, blood travels to large skeletal muscles for the flight response. The body also freezes momentarily, and the brain's amygdala releases hormones. When we are happy, the brain fosters an increase in energy and dampens negative feelings and anxieties; the physiological response is quiet. Love and similar feelings generate a relaxation response of calm and contentment. Sadness is accompanied by a drop in energy and enthusiasm, and when one is depressed, a slower body metabolism. Surprise is seen in lifted eyebrows and wider open eyes. Disgust is seen as a curled upper lip to one side and sometimes a slight wrinkling of the nose.<sup>13</sup> Each emotional state is characterized by a different breathing pattern.<sup>14</sup>

The acting profession relies upon the fact of emotion as physically-generated. University of Cincinnati Professor of Drama Rocco Dal Vera<sup>15</sup> informs us that, to be convincing to an audience, actors are taught to generate *genuine* emotions in themselves by adopting the facial expressions, muscle tension, breathing, and vocal patterns of the desired emotional state. Soon, the actor who scowls and frowns begins to feel angry. The actor who adopts the facial expressions, posture, breathing, and voice of happiness will feel happy. In fact, maintaining an emotional state while adopting its opposite physical markers is difficult or impossible. Thus, one who wishes to shake anger or contempt would do well to “fake” contentment and respect.

Academic research confirms that adopting an emotion's facial expression will generate its physiology and thus its sensation. In one study, researchers asked a group of volunteers to remember and relive a stressful experience, while the researchers tracked the volunteers' autonomic nervous system responses—heart beat and body temperature. The researchers then taught a different group the facial expressions of anger, sadness, and fear; asked them to adopt those facial

expressions; and tracked their autonomic nervous system responses. The facial expressions affected the subjects' autonomic nervous system as had the real experiences.<sup>16</sup> In another experiment, subjects who were asked to clench a pencil between their teeth, creating a forced smile, found a set of cartoons funnier than did volunteers holding a pen with their lips pursed around it, reading the same cartoons.<sup>17</sup> Facial expressions affect our own sensation and interpretation of emotion.

## Emotion in Cognition and Judgment

“There is no instinct like that of the heart.”

—Lord Byron<sup>18</sup>

Inevitably, emotions affect our thinking, perceptions, memory, decisions, and relationships. Emotions have the power to disrupt rational thought, triggering intense and irrational behavior. We've all observed that emotion can escalate conflict, ruin relationships, and inspire bad decisions.

On the other hand, a growing body of research indicates that judgments based on emotion, or at least unarticulated intuition, sometimes lead to faster decisions that are sometimes better. As reported in Malcolm Gladwell's popular book *Blink*,<sup>19</sup> a group of University of Iowa neuroscientists enrolled volunteers in a gambling game requiring them to choose cards from two red and two blue, in which the red cards are set to generate higher gains, but much higher losses, outweighing the gains. Long before the volunteers reported thinking something was wrong with the red cards, monitors on their hands registered emotional stress—sweaty palms—at taking red deck cards. At about the time their hands began sweating, they began switching from the red decks to the blue. In short, emotion pointed them to a decision before they became aware of its logic. In other experiments, neuroscientists found that people with brain lesions that diminish emotional responses also have diminished decision-making ability, taking excessive time to make a simple choice between appointment dates, and failing to select the cards needed to gain in a multi-choice, multi-phase game.<sup>20</sup> For better or for worse, for most of us, emotional response directs decision-making before intellectual cognizance—before we know it.

## Flash of Client Emotion Offers a Flash of Insight

“Anger is a signal, and one worth listening to.”

—Harriet Lerner, *The Dance of Anger*<sup>21</sup>

Within the realm of conflict, emotional experience reveals morality and ideology. Our emotions reflect what we value, what we see as right and wrong. *Without* emotion, we are not interested or engaged and may not be capable of morality or ethics.<sup>22</sup>

Any strongly expressed or evident client emotion also provides clues to his past, or his understanding of the present, as well as his values. For example, a client's sadness in response to a question about his initial meeting with the company president suggests that the meeting caused the client great discomfort. Did he feel intimidated and powerless at the meeting? What was the consequence? Were those emotions exploited in the deal they negotiated? The lawyer is wise to follow up with careful, gentle questions about the meeting and the president.

Imagine a different conversation between a lawyer and her client, a township council member, about the zoning of a parcel of land. When the lawyer raises the issue of how the zoning might affect the interests of the members of an adjacent golf club, the council member explodes: "***I DON'T GIVE TWO HOOTS ABOUT THEM! OUR TOWNSHIP HAS ITS OWN INTERESTS.***" The idea that the council member would be concerned about her township's interests is not surprising; the emotional explosion is. The lawyer's ear should be attuned and he should respectfully ask whether there is any history involving the golf club. It will not be surprising if the club previously rejected her (or a friend or family member's) application or if, when she was a member, the club failed to extend grace during a difficult financial period. Perhaps the club's chairman is a political party leader on the opposite side of the fence, as are many of its members . . . perhaps, perhaps . . . .

Don't just speculate or assume. Curiosity is well advised where emotions run hot and deep. Understanding their source will be necessary to resolving the current problem, or at least to help your client make wise decisions.

## **Authority of the Amygdala**

The medically curious reader will be interested to know that our emotions are regulated by the amygdala, an almond-shaped organ in the medial temporal lobe of the brain, above the brainstem, near the internal ear structure. Considered part of the limbic system, it is responsible for the

processing and memory of emotional reactions. When a patient's amygdala is severed from the brain, he loses most, if not all, of his ability to recognize his feelings. Assuming a normal brain connection, when the amygdala is stimulated into action by an emotion, it immediately triggers hormones that mobilize heartbeat, muscles, blood pressure, breathing, and concentration.<sup>23</sup>

The amygdala acts quickly. And, once in an amygdala-heightened state, we are literally incapable of processing complexity or subtlety. Thus, physiological responses we feel as emotions often explode before rational faculties can process and reason through information.<sup>24</sup>

## Watch for Uncommon Floods

Lawyers are advised to be mindful that a client may experience “emotional flooding.”<sup>25</sup> When in that state, one is overcome by a deluge of emotions and is incapable of real interaction. This should not be confused with just very strong emotion, expressed as an outburst. I might be very upset by a crank phone call, launch into a sputtering rant about political idiocy, or yell in high decibel, red-faced anger at a family member. But there I would be functioning and mostly coherent, even if emotionally charged. Emotional flooding is much rarer. It might be understood as an exponential escalation and intensification, rather than some degree stronger than the average emotional reaction. Experts suggest that a minimum of 20 minutes is required for anyone to recover from emotional flooding. There is no sense in seeking conversation or much interaction of any kind before then.<sup>26</sup>

## About Anger

“Anger is a brief madness.”

—Horace, *Epistles* (Book I)<sup>27</sup>

“If a man be under the influence of anger, his conduct will not be correct.”

—Confucius, *The Wisdom of Confucius*<sup>28</sup>

Lawyer-client counseling challenges are more often presented where your client is experiencing anger or other strong negative emotions<sup>29</sup>: his deposition was a disaster; the settlement offer is outrageously low; you've explained that the judge is likely to dismiss his case; the accusations in the complaint are insulting lies; the other party is insisting on an unpalatable contract, but he has no other alternative for saving his business. Your client must make a decision. As the lawyer, you must

explain legal issues, choices, and trade-offs. Your client may feel anger, frustration, indignation, disgust, anxiety, shame, despair . . . name the negative. Here, the amygdala's capacity to shut down his cognitive abilities to think rationally and process complexity or subtlety is important, cruel, and ironic. Under the influence of that strong amygdala-generated negative emotion, his failure to grasp your explanation of complex concepts or nuanced reasoning is neither willful nor unintelligent. He is not being disingenuous when he fails to acknowledge his lawyer's point. He is not ignoring reason—he cannot process it.

At that point, where client emotions are strong, the lawyer must stop explaining, stop reasoning: stop talking like a lawyer. Instead, the lawyer must consider how to address and calm his client's emotion, or simply allow time for his client to regain balance. Later sections of this chapter provide some guidance for addressing and calming emotion triggered by the client's legal problem.

## **An Upside to Anger**

Professors Jennifer Lerner and Larissa Tiedens of Stanford University have summarized research showing that while angry people may approach a problem with negative thoughts about others, their anger may also bolster their confidence and sense of control.<sup>30</sup> Consider how many times you have thought or said words to the effect: “*Dammit that makes me mad – they make me mad! Let's just go ahead and do it!*” (Whatever “it” is). Anger's value is in diminishing indecision, risk aversion, and avoidance by overanalysis. On the other hand, anger also makes us more susceptible to the psychological traps of overconfidence and foolish risk-taking, aggression and escalation (as discussed further in Chapter 5 on psychology).

## **Clusters and Meta-Emotions**

When an event or interaction triggers a negative emotional state, more than one emotion is often in play. Assume my professional colleagues unanimously and unkindly reject my draft language and design for a marketing brochure, with little discussion of its merits. I might feel frustrated and angry, or disappointed, sad, and embarrassed. When something great happens, I might feel proud and joyful, or touched, wistful, and delighted—all at the same time. These emotions come in clusters.



We may see some order in that chaotic emotional cluster—a hierarchy that includes meta-emotions—emotions about underlying emotions.<sup>31</sup> I might feel angry and frustrated about rejection of my brochure, but also guilty, embarrassed, or a little silly at having taken the professional rejection so personally. If I feel a surge of pride and joy in my son’s freshman year success, I may also feel embarrassment at being so invested in his performance. A parent might feel tremendous anger at his child’s wrongdoing, and also experience the meta-emotion of guilt at his own anger. Once you start looking for it, a layer of meta-emotion is easy to recognize, in yourself or your client.

## **The Identity Kicker: Threats, Quakes, and Value Packages**

When people experience very, very strong emotions, I propose an “identity kicker” as the likely suspect.<sup>32</sup> I may feel frustrated if I am unable to learn to ice skate backwards, when others in the skating class are able to master it. But being athletically talented (at all), much less an ice skater, is not part of my identity. My frustration will not be strong and will dissipate quickly. But, if I learn that a book proposal has been rejected (albeit with a nice rejection letter) and being an author is part of my identity, I will feel VERY frustrated, angry, dejected, or despondent, and perhaps embarrassed by my response. After all, a professional should be able to take this in stride; she would maintain confidence in the merits of her book proposal. So, the rejection itself, and then my reaction, will trigger issues of identity, perhaps a full crisis in self-confidence or an “identity quake.” Maybe I should have gone to medical school instead!

Within a legal dispute, when your client is accused of gender discrimination by a terminated employee, he may be indignant, angry, fearful, or hurt: *How dare she or anyone else tell me who I can and cannot terminate? How dare she accuse me of such a twisted motive? How could she sue me for millions when she knows this could destroy everything I’ve built?* His meta-emotion may be guilt at his anger or embarrassment at his fear or hurt feelings. Often, that meta-emotion relates to identity. Your client may be angry with himself about feeling upset, thinking that a real executive would not let this get to him. If his identity is wrapped up in the persona of the impervious executive, this emotion will be strong.

## **The Value of Positive Emotions**

Not all clients and lawyers can be happy, and no one can be happy all of the time. Yet, a lawyer will better serve her client when their interaction is as emotionally positive as possible. Why? Consider author Daniel Goleman's reflection on a body of research linking laughter with cognitive performance:

Laughing, like elation, seems to help people think more broadly and associate more freely, noticing relationships that might have eluded them otherwise, a mental skill important not just in creativity but in recognizing complex relationships and foreseeing the consequences of a given decision. The intellectual benefits of a good laugh are most striking when it comes to solving a problem that demands a creative solution.<sup>33</sup>

Quite simply: positive emotions enhance cognitive skills, focus, patience, and creativity for clients and lawyers; negative emotions have the opposite effect.<sup>34</sup> The body of research establishing the power of positive emotion is growing, but here are some notable examples:

- People shown a short film of bloopers were over three times more likely to then solve a puzzle used to test creativity than were people shown a short math film. The researchers confirmed this result in a subsequent study where blooper-watchers were more than five times as likely to solve the puzzle as were math-watchers.<sup>35</sup>

- Internist participants were asked to diagnose a patient based solely on the patient's history and presenting symptoms. Some internists received a bag of candies as a token of appreciation before receiving the patient information. A control group did not receive candy. Those who received candy tended to be more flexible in their reasoning process and more quickly diagnose the patient correctly than did those who did not receive candy.<sup>36</sup>

- Participants shown *New Yorker* cartoons prior to a negotiation were less contentious in the negotiation, revealed more valuable information, and were more likely to achieve high outcomes.<sup>37</sup>

Researchers theorize that “[w]hen negotiators display positive affect, they signal that they are trustworthy and are ready to cooperate—a signal that should lead other parties to trust them more. The increased trust should then trigger communication of interests and priorities, and to the discovery of compatible and tradable issues, giving negotiators more opportunities to expand the resource pie.”<sup>38</sup>

- Researchers instructed some buyers in simulated interest-based negotiations to mimic sellers' mannerisms (face touching, foot tapping, etc.) on the theory that mimicry or mirroring creates feelings of social rapport and thus positive emotion. Buyers who mimicked were more likely to reach a mutually-beneficial deal than were members of the control group who did not mimic.<sup>39</sup> (See chapter 7 on the social power of mirroring.)
- Negative emotion has the opposite power to impair cognition. In a University of Michigan study, when a group of math test-takers were told that the test usually produces gender differences, women's test scores dropped (more than half) and men's increased by 33 percent.<sup>40</sup> When the test was administered without conveying this (false) information to test-takers, NO gender differences occurred in test results.<sup>41</sup> Another found that asking test-takers about their race before a test of verbal ability caused African-American students to perform 25 percent worse than when not asked.<sup>42</sup> And white students with high math proficiency performed worse on a math test when they were primed with a statement that Asian students consistently do better than white students on math tests and that their scores would be compared to Asian students' scores.<sup>43</sup> The reference to negative stereotypes may be understood to have negatively affected test-takers' emotions, and thus, performance.

The bottom line: a positive emotional state is important when clients will have to absorb complex information, consider their lawyer's advice, develop out-of-the-box options, or make difficult decisions.

## **From the Outside In**

When affected by a dramatic negative event—loss of a job, death of a family member, failure on an important test—our negative emotions inevitably carry into our relationships and professional activities. Research indicates that even relatively trivial negative or positive experiences affect or “prime” our subsequent emotional states.

Thus, negative or positive emotions primed outside of a lawyer-client meeting affect the client's emotional state, as does the lawyer-client interaction at their meeting. A client may enter the lawyer's office feeling dejected and hopeless because her job search has been fruitless. Interaction with her lawyer may deepen those feelings, if the client feels frustrated and incompetent at her

failure to grasp a legal concept. A different client may enter in a more neutral or positive state: company earnings are stable; his division is up; and his teenager's report card was good. Yet, the meeting itself may generate negative emotion if the lawyer seems arrogant and the client struggles to understand or make himself heard.

“Negative emotion” need not mean a strong or articulable negative state. According to Goleman, even mild mood changes can affect the way we think.<sup>44</sup> The impact may be more subtle: feeling vaguely uncomfortable, somewhat ill at ease, edgy. If I read of a recent tragedy and view the heart-wrenching picture, see disappointing program evaluations, or become involved in a minor conflict with my teenager, my emotion will be affected as I move to the next activity. If my supervisor initiates a telephone call while we are speaking—an act of disrespect—or her eyes wander off as I speak, I will experience negative emotion. Not tragic, not overwhelming, but negative. However, if I learn great news before entering or if, at the start of the meeting, my supervisor deliberately blocks incoming calls, listens attentively, and values my work, my emotional state will be more positive—even if the meeting was set to address a significant problem.

A lawyer should not aspire to turn a generally sad client into a generally happy one (except to the extent that transformation will occur by virtue of the lawyer's legal work). Nor should a lawyer decorate her office in balloons or start memorizing comedic one-liners. The latter portion of this chapter offers a strategy for lawyers seeking to generate more positive client emotions within lawyer-client conversations—by attending to the client's “core concerns.” However, the research indicating that minor experiences can prime emotions in a measurable way underscores the importance of attending to small things, such as:

- Welcoming receptionist or administrative interaction
- Comfortable reception areas, with good magazines, music, etc.
- Other comforts: coffee, water, food (chocolate is good!)
- Validated parking or detailed advice if parking, directions, or traffic are likely to be tricky

## Returns from an Unhappy Client?

“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.”

On a practical note for lawyers aspiring to repeat clients or referrals: it is reasonable to believe that, all things being equal, most people return to those toward whom they feel positively and avoid those toward whom they feel negatively.<sup>46</sup> Imagine that you are new to town and you ask your neighbor to recommend a pediatrician for your young children. She recommends a nearby pediatric group practice with a top reputation and admitting privileges to the best local hospital. Within a month, your son gets his first ear infection. You bring him in to the pediatric office for an appointment with anyone available. The doctor who sees you and your son is professional and thorough but he is also abrupt, uses medical jargon, and seems annoyed when you ask for translation. He asks exactly what time the fever started. You explain that you don't know; the child was with his grandparents over the weekend. He raises his eyebrows and asks, in a tone you interpret as disapproving: "How old are the grandparents and how long was your vacation?" Now here's an easy question: how likely are you to choose him as your child's regular pediatrician or refer him to your friends? Doesn't the same likelihood apply for a client who feels similarly after an interaction with his lawyer?

## **Toward Positive without Punch Lines**

*"Empathy is full presence to what's alive in the other person at this moment."*

—John Cunningham<sup>47</sup>

### ***By George, He's Got It!***

Psychologists are trained to do it. Mediators are trained to do it. People in parenting classes are trained to do it. Counselors of all sorts (except perhaps lawyers) are trained to do it. What is it? Active listening and reflective dialogue: a continuum of ways to demonstrate and express attentiveness, understanding, and empathy.<sup>48</sup>

First, let's settle on what active listening and reflective dialogue look like and how they are practiced, even if a random group of mediators, psychologists, and counselors might not agree on precise definitions or descriptions. For the purposes of this book, I define active listening as "listening in a way that is fully attentive, fully present with the speaker, in a way that demonstrates that full attention."<sup>49</sup> Thus, at minimum, the active listener maintains eye contact, nods, and

registers what is heard through her responsive facial expressions. The active listener may also paraphrase or concisely restate what she has heard.<sup>50</sup> Imagine that the speaker has described reaching a dead end on a project and a difficult but inescapable choice between options, driven by a deadline. When the speaker pauses, the active listener might restate or paraphrase by saying: “Sounds like you were forced to make a choice at that point.”

Classic introductions to the active listener’s restatement are: “So, I hear you saying that . . . .”; “What I hear you saying is . . . .”; and “So, if I hear you correctly. . . .” After a time, these phrases can be as annoying as squeaky chalk on a black board and, in my view, are best omitted. However, the substance of the paraphrase seeks to clarify meaning and demonstrate attentiveness. If the speaker’s intended message was not captured in the listener’s paraphrase, the speaker can correct it. The effort demonstrates the listener’s engagement and attentiveness to the speaker.

Empathetic listening may be thought of as similar to active listening, only more so—more attuned to and expressive of emotional content or meaning. Empathetic listening is characterized by reflective dialogue,<sup>51</sup> in which the listener-counselor goes beyond paraphrase to express the import, impact, or meaning behind the speaker’s original statement. Where a client-speaker is highly emotional on recounting an event, evident from voice, tone, gesture, and language chosen, the lawyer-listener skilled at reflective dialogue would communicate that he “gets” that emotion. For example, a divorce client might say:

*Oh, I just don’t know what I’m going to do. I know I can’t make my soon-to-be ex give up this ridiculous new business idea. And I know that the judge isn’t going to order him to pay all of his income to me and the kids, if he has any. But what am I going to do? I haven’t worked in years. The mortgage is high. The kids are counting on me.*

The lawyer skilled at reflective dialogue might say:

*That is scary. Your husband is going to take risk and leave you without a net. You can’t stop him. You’re very worried about your kids, and whether you’ll be able to pay for what they need.*

The lawyer’s voice and tone might implicitly convey empathy, as he does indeed empathize with his client’s fear and anxiety. Indeed, it would be difficult to say those words without feeling empathy. But to expressly articulate empathy within the dialogue, the lawyer might also add:

*I would be fearful too, and angry. It would make me want to shake him and say, “Wake up! This new plan of yours is a long shot and this is not the time. Your kids can’t afford your mid-life crisis.” And I understand why you’d have sleepless nights.*

## “Getting It” Gets Emotionally Better

“Before you can inspire with emotion, you must be swamped with it yourself. Before you can move their tears, your own must flow. To convince them, you must yourself believe.”

—Winston Churchill<sup>52</sup>

“Anger as soon as fed is dead,

‘Tis starving makes it fat.”

—Emily Dickinson<sup>53</sup>

Skeptical or not of the touchy-feely, a lawyer correctly disclaims any obligation, or any right, to become a client’s therapist, psychologist, or guidance counselor. Yes, it’s important to have enough “emotional synchrony” to establish rapport (see chapter 6), and to get the client’s facts straight. Then why so much emphasis on listening, attentiveness, reflection, and empathy? Why do these fall within a chapter on emotion?

It’s one thing to say that people cannot ignore or successfully suppress emotion. But surely, the lawyer is NOT wise to paraphrase, reflect, and empathize with an emotionally out-of-control client? Surely the lawyer’s task is to move the client back to reason and reality. Assume, based upon earlier portions of this chapter, that the lawyer’s task includes helping a client come to a more positive emotional state. Then, is it really wise to wallow in the client’s negative emotional state—restating, reflecting, empathizing with the client’s anger, fear, anxiety, disgust, embarrassment, etc.?

The answer is yes, the lawyer is well-advised to do so, just for a while. When we are highly emotionally charged, our emotions are calmed when someone gets what we are feeling, and why. Our listener doesn’t necessarily have to share our circumstances, or even our world view, but he or she does have to register and accept what we feel as real and legitimate. After a number of years mediating gender discrimination and sexual harassment cases in a class action claims resolution process, a plaintiff’s counsel explained to the mediator [in paraphrase]: “My clients like you

because you get it. You don't always have to say they're going to win. But they know you get it. They feel that you understand what they went through and what it felt like. That really matters."<sup>46</sup>

Thus, the advice of mediators, psychologists, therapists, and all manner of other counselors is that we lawyers learn to use active listening and reflective dialogue and, where genuine, express empathetic understanding to our clients. It will help clients feel better and regain emotional balance, if not wander into positive emotional territory. And then, these clients should be better able to hear our reasoning.

## **Fundamental Strategic Advice**

We'll next turn to the emotional core concerns model set forth by Professor Roger Fisher and Dr. Daniel Shapiro in *Beyond Reason*. The last portion of the chapter illustrates how each core concern might arise and be addressed in lawyer-client counseling.

A fundamental piece of advice informs all of it: *use the core concerns for targeted and strategic active listening, reflective dialogue, and empathetic expression*. In other words, when you see that a core concern is operative in the client's story, reflect *that* core concern when you restate, reflect, or empathize. This will immediately let the client feel that you *do* get it; you do understand why his emotions run strong and deep. You will not yet have solved the underlying problem, but you will have moved the client toward more positive emotions in your meeting.

## **The Core Concerns Model for Lawyer-Client Counseling**

“Were we fully to understand the reasons for other people's behavior, it would all make sense.”

—Sigmund Freud<sup>54</sup>

As a non-psychologist, without deep background on clients' emotional histories, what can a lawyer do to generate positive client emotions in the law office? When a lawyer meets with a client to review the status of his case, it is difficult enough to explain legal concepts. Must the lawyer also diagnose precisely when and whether a client is angry, depressed, frustrated, remorseful, hurt, upset, and which meta-emotions sit on top?



Moreover, emotions and emotional dynamics shift in the course of an interaction. What causes anger in one person might cause alienation in another and not much of a reaction in someone else. And different people express the same emotion in different ways.<sup>47</sup> Some people become quiet when angry, others explode. To accurately read emotional responses, the observer needs a baseline—familiarity with that person’s responses in ordinary contexts. In practice, a lawyer is unlikely to be equipped to identify shifting emotions in real time or to measure them against a baseline.

The good news is that a lawyer can anticipate and influence his client’s emotional state without micro-analysis of emotional shifts, personal history, or baseline effect. Fisher and Shapiro’s “core concerns” model is directed toward recognizing and influencing emotion “as a lens and a lever” in negotiations. In the client-counseling context, their core concerns can also help lawyers see and influence the client’s emotional map at two levels: in the client’s underlying legal problem *and* in the lawyer-client interaction.<sup>55</sup> Before discussing their application to lawyer-client counseling, it’s important to summarize the model.

## **The Five Core Concerns**

Fisher and Shapiro posit that everyone has five core emotional needs or concerns. If these are not addressed, negative emotions will be triggered. However, affirmatively addressing these concerns will stimulate positive, helpful emotions. Fisher and Shapiro identify the five core concerns as:

1. Appreciation—One’s experience of feeling heard, understood, and valued
2. Affiliation—One’s sense of emotional or interpersonal connection with another
3. Autonomy—One’s freedom to make decisions without imposition from others
4. Status—One’s social or particular standing, often relative to another
5. Role—One’s function or “job label”<sup>56</sup>

The text that follows offers somewhat more complete explanation and commentary on each of these core concerns, and some suggestions as to how a lawyer can address them in client counseling. Explanations are gratefully drawn from Fisher and Shapiro’s work. The elaborations and examples are intended to place that work within lawyer-client counseling contexts.

## Appreciation Calms the Conversation<sup>57</sup>

*Appreciation—The experience of feeling heard, understood, and valued.* Appreciation requires that you demonstrate respect for the speaker and his perspective by listening and then expressing your understanding and recognition of his point. You need not agree! Dismissing or ignoring his perspective will not generate a feeling of appreciation. In this sense, when a listener “appreciates” a speaker, the synonym for appreciation is not gratitude for a gesture or gift, except perhaps gratitude for the speaker’s act of communication.

A client may feel appreciated by his lawyer’s simple, non-judgmental, active listening with a healthy dose of paraphrase. Fisher and Shapiro’s advice for generating felt appreciation goes further, suggesting that you listen to understand the other’s point of view, demonstrate your understanding, and find and articulate *some* merit in it. Again, you do NOT have to express agreement. You just have to express respect for it. Then, and not before then, you may express your own point of view.<sup>58</sup>

Imagine counseling a client regarding a tough negotiation stance on severance, or a possible legal action against his former employer. He says:

*I had an opportunity to join an international consulting firm based in Tokyo two months before I was let go. If I had known that my company would be sold, and I would be let go, I would have bailed then, but I was too loyal. I think they should pay me for lost opportunity. This company’s financial mess was their idiotic fault. The top brass could make risky decisions because their multi-millions were already in the bank.*

As the lawyer, assume that you know the client has little or no legal claim. The company hit hard financial times in the interim. The employee never told his superiors of the Tokyo opportunity and even if he had, it was his choice to take it or not. There is no indication of deception or reliance. Moreover, it’s impossible to know how the “Tokyo opportunity” would have worked out. Nevertheless, you can express appreciation for his perspective by saying:

*It seems unfair that you were loyal to them, and they weren’t equally loyal to you. Their financial decisions do appear to have been irresponsible. Sometimes it seems that people should be required to think and care about the fact that other people will suffer from their mistakes.*

See if your client's shoulders don't relax a bit: you've got it!

Now, he will be more likely to listen when you explain that there is no such law and that he needs to focus on a decision that will best serve his interests.

Now, imagine a difficult conversation<sup>59</sup> with your client about payment of attorneys' fees. Your client has been offered \$100,000 in settlement, which would entitle her to receive \$66,666 under your contingency fee contract. After taxes, she would net approximately \$45,000. Your client desperately needs \$10,000 more than that to pay off outstanding debt. Still, you believe it would be better for your client to accept the offer than to take the risk of losing at trial. Imagine that your client (or a mediator) raises the possibility of your compromising the fee, given the efficiency of settling before trial. You and your law firm have expended enormous time on his case, fielding far too many phone calls, pouring effort into producing top quality briefs and preparing carefully for depositions. Even if you see it makes economic sense, you might *feel* angry or, at a minimum, "a bit ticked." Now imagine that your client says directly:

*I very much appreciate the top quality work and the quantity of time you and your associates poured into this case . . . and that it's what brought about this settlement offer.*

You may or may not be willing to negotiate the fee, but you will likely *feel* better within the interaction.

Reversing roles in the same circumstance, you could "appreciate"—acknowledge and respect—your client's perspective by saying:

*I understand that this is YOUR claim and your case, and you could have chosen any lawyer. I very much appreciate your selecting me to work with you. I also recognize that \$33,000 seems like a large chunk, given that I didn't have to try the case to a jury.*

If you are watching, you will see your client visibly relax, perhaps nod her head. That may not change the fact that she would rather pay less than more, but you will have lightened the accompanying emotional response. She is more likely to listen now, when you explain the value of time and the risk you undertook.

## **A Look Underneath**

Leaving aside lawyer-client interactions, it is worth considering how a perceived lack of appreciation has played a role in your client's underlying dispute. For example, in an employment context, employees laid off in a reduction-in-force, commonly known as an "RIF," are often angry because of their employer's failure to acknowledge their value to the company, and their continuing ability to contribute. Yes, people elect to sue, or at least seek legal advice, because they may genuinely believe their employer discriminated on the basis of gender, age or race in designating employee terminations in the RIF. It is also true that financial loss and insecurity following termination might be more than sufficient to inspire legal action. Emotions in such cases often run very, very high due to the employer's perceived lack of appreciation for the employee's work. This can cause deep feelings of anger, hurt, or humiliation—yielding a highly emotional, not entirely rational client.

Recognizing that lack of appreciation triggers negative emotional responses, the lawyer might defuse client emotion by acknowledging what the employer failed to acknowledge. Assume that in an initial interview, the client has told the lawyer of his selection for the RIF, the pink slip, and being sent to the HR office. The lawyer could articulate *her* recognition that the company violated her client's core concern for appreciation, by saying:

*You clearly dedicated fifteen years of your time and talent to fulfilling the company's mission.*

*They could at least have expressed appreciation for your work.*

Assuming the employee-client is rankled by the company's choice to retain a different employee in his department, the lawyer might acknowledge that by saying:

*I see that with your demonstrated loyalty and knowledge of the history of the company, you were the keeper of the institutional memory of what had and hadn't worked over the years. I can see that, if they had kept you instead of the one with a more advanced engineering degree, you could have prevented them from going down blind alleys, making the same mistakes twice.*

The lawyer obviously cannot undo the termination, nor should the lawyer offer an apology for the other side. However, acknowledging and respecting a client's anger at lack of appreciation in the underlying dispute context may work to reduce the client's emotional temperature, as the lawyer reviews the status of the case and options going forward.

To enhance the likelihood of successful settlement negotiations, a lawyer for either side, or a mediator, could be similarly attuned to the appreciation issue. The lawyer or mediator might suggest an expression of appreciation for the strengths the employee brought to the organization, for his contribution to the corporate mission, and respect for his point of view on the termination question. Then, and only then, reasons for the RIF decisions may be proffered.

## **Autonomy**

Autonomy is another of Fisher and Shapiro's core concerns<sup>60</sup> and, I believe, is often the culprit in lawyer-client tensions. Autonomy is defined as "the freedom to make decisions without imposition from others." As anyone dealing with a corporate executive (or a teenager) will readily testify, impinged autonomy can lead to strong resentment, anger, and frustration—negative emotions in one form or another. The degree and nature of the emotional response will inevitably vary by a person's expectations or normal degree of autonomy. A high-level corporate executive unaccustomed to constraints and more comfortable issuing orders than obeying them may have a strong emotional response to the threat of injunction—the legal system's removal of autonomy. A mid-level employee would of course recognize a threatened injunction as bad for business, but might be better able to rationally analyze its consequences and likelihood. Professional power is not the only predictor. Generally, adults expect and enjoy some level of autonomy and chafe at being "treated like a child," or deprived of autonomy. At the risk of venturing too deeply into pop psychology, it is not hard to see that as a teenager's identity is tied up in being recognized as adult, even minor challenges to his autonomy may evoke strong emotional responses.

Lawyers should be mindful that much about the legal system itself constrains client autonomy. Litigation presents a rigid set of rules and timetables to which the client must submit. Discretion in the operation of those rules and timetables rests with the court. Variance requires special request and is not always granted. The lawyer must convey the court's order to search through three years of documents, without regard for a business' low manpower and seasonal rush. The lawyer must counsel disclosure of corporate exposure in public filings, without regard for its impact on stock value and bonuses. The judge passes judgment on motions; the judge or the clerk determines placement on the docket. Viewed from this perspective, litigation is an exercise in the surrender of

autonomy, even if your client initiated the suit. So much more so for the defendant, who did not choose litigation but is compelled to follow its rules.

The transactional arena presents its share of challenges to autonomy, too. Lawyers advise that certain contemplated terms violate anti-trust laws or public policy and cannot be included. One side to the transaction may enjoy greater power and demand certain provisions. The client must agree to the demand or step away from the transaction, an untenable choice for his business. Transactional free will often exists only in the abstract, not in reality.

Once again, the attuned lawyer is wise to scrutinize her interactions with the client and the underlying circumstance using the autonomy lens. To what extent have you laid down legal rules and requirements that conflict with the client's priorities? Have you presented legal constraints that the client would experience as impinging on his or her company's autonomy? Look back to the underlying dispute or transaction: to what extent did it present conflicts over autonomy? Imagine a family business dispute in which the older son challenged his father's decision not to invest in plant improvements, but rather to draw cash bonuses. Consider the employee instructed to leave her work team for an important R&D project to help with software troubleshooting. Try to identify with the developer working with a town committee insistent on drawing the boundary lines for green space, dwellings, and commercial structures before approving a zoning variance. Anticipate and understand that any of these challenges to autonomy will generate negative emotions for most. This will be true, apart from or layered over responses to the merits or consequences of the intended action.

We're back to the question: what's a lawyer to do? I suggest three strategies, each directed at the context in which client autonomy has been challenged. First, when listening to the client's narrative, you might choose to acknowledge explicitly that the client's autonomy was constrained, and that it was perhaps unusual and uncomfortable. You need not use these words. But do use the fundamental strategy of active listening and reflective dialogue *targeted to the autonomy concern*.

For example, when a client recounts his son's attempt to challenge his bonus vs. investment decision, the lawyer might say: "Hmm . . . . Had your son ever tried to reverse you before? Given that you own the company, his bucking your decision must have been hard to take." If autonomy is

indeed the source of conflict (or one among many), he will agree that his son's second-guessing angered him. He may then elaborate in one emotional direction or another: on lack of appreciation for his prior sacrifice, on failure to respect his status, or on other ways the son has sought to challenge his authority. If you listen and express understanding over his response to these challenges, your client will trust that you "get it." Your reflective comments may calm him and encourage some self-reflection.

The lawyer should employ the same strategy regarding lawyer-to-client instruction or advice. Thus, when you must communicate regarding your client's legal obligation to produce documents or the need to adjust a deal structure, you could directly acknowledge the autonomy constraint. For example, imagine a court's order to search through and produce a large volume of documents and provide answers to interrogatories just before Christmas, the client's busiest season. A request for extension of time and reduction in scope has been denied. You might say to your client:

*I understand that this is your business and that your good decisions about the product and the market have grown it to this point. It seems crazy that some judge can tell you what to do, forcing you to take key employees away from the phones to chase a bunch of documents. What chutzpah! It must make you mad to think the judge or the other side can order you around.*

Once again, lawyers can't change the fact that compliance is necessary. But acknowledging the level and source of frustration can reduce the emotional heat.<sup>61</sup>

To address autonomy concerns in negotiation, Fisher and Shapiro dispense the classic advice: ACBD—Always Consult Before Deciding, with the caveat that this risks NGAD—Never Get Anything Done.<sup>62</sup> Model Rule of Professional Conduct 1.2(a)<sup>63</sup> codifies and strengthens ACBD, giving ultimate authority to the client for key decisions in a legal matter.

A third strategy for meeting the client's emotional autonomy concerns suggests ACBD regarding even minor decisions and interactions. In practice, lawyers sometimes make "inconsequential" or "normal" moves without client knowledge or permission. For example, a lawyer may casually raise the question of settlement with opposing counsel or agree to an extension of time for filing a brief as a professional courtesy. Where the core concern of autonomy is salient for a particular client, it's

wise to err on the side of consulting with your client, even on the smallest of details, unless and until your client tells you it's unnecessary.

So, before you agree to opposing counsel's reasonable request for an extension of time, check with your client. Of course, you will explain that failure to agree will lead to a hearing and attendant costs, the judge's granting the request, and possibly the judge's negative impression of your uncooperativeness. Before you go to the deposition, explain to your client that it's not unusual to raise the possibility of settlement, particularly after the principal witnesses have been deposed. Ask if she would be comfortable with your exploring the other party's interest in settlement. Ask whether she would like you to raise it when you see opposing counsel in court, the next day by letter, or by e-mail today. Ask how she would like you to respond if opposing counsel raises the question with you.

If opposing counsel DID raise the idea of settlement (before you discussed this possibility), be sure to report to your client that "opposing counsel raised the idea of settlement and so I must discuss it with you," instead of saying "opposing counsel and I discussed settlement." Both reports are accurate, but the former makes clear that you did not broach the subject without authorization and emphasizes the client's authority.

You can also offer your client some autonomy at the micro-conversational level, in subtle ways, from the start of your next meeting. Consider a deliberate "agenda stage," after any chit-chat, when conversation turns to the subject at hand. In general, experience establishes that lawyers are wise to informally articulate a meeting agenda, as evidence of preparation and professionalism. (The agenda need not be written, if topics are simple and not too numerous.) Most clients happily interpret an articulated agenda to mean the lawyer views the meeting as important. However, for a client whose autonomy needs are high and who is chafed by legal process rules, you might opt to inject client autonomy at this stage. Thus, rather than leading with the agenda, you might say: "I've obviously come with several topics that we need to discuss, but it's important to hear what you have in mind, and then tackle them in the order you choose."



Ceding authority to determine the order is such a small move, but it fosters greater feelings of autonomy. The client is free to obtain information and advice from her lawyer in the order she chooses. Obviously, if one topic bears logically upon another, the lawyer might say:

*I'd be happy to proceed in the order you suggested, but I think that you'll want to know something about [issue B] before you make a decision on [issue A]. We could defer the decision on [A] until we reach [issue B]; what do you think?*

You can also offer the client a choice in the level of detail you provide, by saying:

*This meeting could take 15 minutes or it could take much longer, depending on how much of my analysis you want to hear about the issues on summary judgment. I'm happy to walk through these issues with you with some care or just to give you my bottom-line predictions and leave it at that. Or, I can give you the shorthand version, and you ask me questions on particular conclusions you find troubling or annoying. How would you like to proceed?*

Your client will feel some autonomy by the invitation to direct your discussion. There is no cure for the client's real lack of autonomy to determine the litigation or transactional outcome. However, a high measure of autonomy in the conversation may compensate, and bring down the emotional temperature.

## **Affiliation**

Fisher and Shapiro name affiliation—a feeling of interpersonal connection with another—as a core emotional concern, even at the professional level.<sup>64</sup> Imagine that you are talking with a colleague about your tension and lack of sleep over an upcoming presentation. His response is cold, unmoved, and unaffected. Or, you are representing your company in joint venture negotiations. Your counterpart attorney is brusque and expressionless, even during meals and breaks. He engages in no chatter, just looks away and consults e-mail whenever there is a down moment. You try to strike up a conversation. He displays no interest. Your core concern for affiliation is unmet, and you are likely to experience negative emotions as a result.

Fisher and Shapiro note that feelings of affiliation can be generated by structural connections: as classmates, clients, family members.<sup>65</sup> These connections provide sources of commonality and familiarity, creating the basis for relationship. For some, finding commonality is extremely

important. I once witnessed a conversation between two scholars, one quite senior, and the other much younger. While greatly respecting the senior scholar's contribution to the field, the more junior had challenged some of his ideas. The senior scholar relished the intellectual engagement. Still, both men were observably guarded. When talk turned to personal histories, it was discovered that both had attended the same suburban high school, some 25 years apart. In an instant, this affiliation changed the entire chemistry of the discussion. The senior scholar was utterly delighted. In the language of this chapter, he clearly experienced an onslaught of positive emotions. The nature and depth of the conversation shifted as well, leading to a long friendship and years of candid, thoughtful, and enjoyable intellectual exchange.

At the risk of trivializing the work of the great philosopher Martin Buber, I suggest that his contrast between “I-Thou” and “I-It” explains the distance between affiliation and its lack.<sup>66</sup> In an I-Thou relationship, the other—thou—is understood, appreciated, and related to as a whole being, just as one's self. The relation is mutual. However, in an I-It relationship, I relate to the other—it—as an object, of concern only in its usefulness or difficulties for me. In the transactional context, the I-It negotiators regard each other solely as means to achieving a favorable deal. In the lawyer-client context, the I-It client is a source of revenue, or not. In litigation, the witness on deposition may be seen as the “it,” who may or may not help your case. There is no mutual “whole being” relationship. We understandably experience negative emotions when we sense only objectification by another. In other words, we do not enjoy being used or exploited as a means to someone else's end.

### • *Chit-Chat and Bric-A-Brac*

Initiating chit-chat regarding areas of personal connection or commonality with your client is wise and easy. If you know of a common interest, highlight or ask about it. If a client came to you by way of recommendation from a law school classmate, ask how he knows him. If your classmate's and the client's sons play basketball together, you could ask about the team's season or mention your junior high basketball travails. Or you might connect on the challenges of raising teenagers. In other words, spend a moment thinking about what you and your client have in common. Are you both East Coast transplants to the Midwest? You might reference that in conversation, perhaps to explain why Midwest-based opposing counsel is reluctant to risk an innovative or “new fangled”

deal structure. When a friend or colleague informs you of a client referral, it is worth asking about the client's background, neighborhood, or role in the community.

Of course, there's no harm in a quick Google search to obtain information about favorite charities, political or religious activities, sporting accomplishments, or other hobbies. The client may have reached the quarterfinals in an amateur tennis league; she may have contributed to NPR and the Nature Conservancy, or serve on the Junior League and Children's Hospital Auction boards. If you are an enthusiastic tennis player, or your daughter is an intern at Children's Hospital, you have immediate areas of connection.

One natural way to find affiliation is to become a keen observer of your client's belongings—briefcase, jewelry, picture frames. Take note if your client comes in wearing a lapel pin or brooch that is a cultural symbol. Watch for team sports insignias on canvas briefcases and other bags; notice college rings, men's ties, women's scarves. If you meet in your client's office, DO take the opportunity to look for family pictures, trophies, photographs, or paintings reflecting your client's hobbies and passions. You may see sheet music on the side desk or an opera-themed poster on the wall; perhaps you too sing, play, or enjoy classical music. Your interest and expression of commonality will create natural feelings of affiliation.

At this point, the skeptical reader might observe that such affiliations are superficial. True, initially. But that little bit of found commonality or connection at the beginning makes us feel more comfortable. That comfort facilitates greater ease in conversation, creating rapport and, eventually, a stronger lawyer-client relationship. It enables the client to trust that the lawyer's interest in providing assistance is genuine, not merely mercenary.

What if your client is a punk-rocker and you majored in classics? You can't imagine expressing admiration for her amazing (read frightening) tattoo with a straight face. It would be disingenuous, foolish, and undoubtedly unsuccessful to fabricate commonality. With or without any common background, most important is to cultivate and express *genuine* interest in your client's circumstance. You might ask how she first started in music or whether her band has a local gig.

Affiliation may be generated through your lawyer-client interaction. Observe and show concern for your client's reactions to the reality of uncertainties in litigation or negotiation. You might

acknowledge the difficulty of making a decision when these uncertainties may determine the fate of his business. Commiserate: it's hard to make decisions when the future is unpredictable. When your client explains the way his co-venturer deceived him in the negotiations to structure the joint venture, you might note that you too were once deceived by a former partner (assuming it's true) and express empathy for that hollow feeling of betrayal.

### • ***Listen for Affiliation Breaches under All***

Often, your client will feel strong emotion about her underlying legal problem or dispute because it involves lack or breach of affiliation. When a patient perceives her surgeon as cold and unfeeling, as having made no effort at a connected relationship or to express apology or regret, she is more likely to take legal action.<sup>67</sup> Family business disputes obviously involve breached affiliation, whether or not suit has been filed. In any employment termination or demotion case, emotions run high. But they run higher when the employee and the decision maker were “like family,” sharing family cookouts, birthdays, and weddings before termination or demotion.

As you learn underlying facts, be mindful of where affiliation might have been expected and where it has been withheld or breached. If you think the core concern of affiliation is fueling your client's high emotions, be particularly attentive to affiliation within your interaction. In other words, spend a bit more effort on chit-chat and finding commonality than you might otherwise. And, when your client speaks of what happened, do articulate your understanding of your client's discomfort with the cold or severed relationship.

## **Status**

Fisher and Shapiro write of generally recognized social status and particular status.<sup>68</sup> While some of us are more generally status-conscious than others, no one *enjoys* being made aware that he is viewed as lesser. One who has studied and worked to achieve particular status in a profession or vocation naturally chafes when status and expertise are ignored or dismissed.

Again, the strength of negative emotion from unmet status concerns depends upon expectations. An accomplished adult does not want to be spoken to like a first-grade child; a senator may not take kindly to a clerk's brusque manner in a department store; a socialite may bristle when her golf

caddy is not deferential. Yet, the first-grade child, the frequent shopper, or the casual golfer is likely to be unfazed by similar treatment. People acquire social status expectations and experience negative emotions (typically anger) when they perceive treatment that is not up to par.

### • ***In General, Offer Equal and Higher Status***

When someone of apparently lower general social status is treated with great respect by one of higher social status, powerful positive emotion and a lasting impression may be generated. Radio reporting on the passing of the late Senator Edward Kennedy was filled with story after story by grieving citizens testifying to his habit of manifesting respect and equality. They expressed love for the way the late senator spoke to them as equals, no matter how “lowly” the citizen’s social station, education, income level, and speech pattern. In the lingo of this book, the senator’s willingness to make people feel equal status inspired strong positive emotions and abiding loyalty.

Is it too obvious to suggest that a lawyer MUST accord ANY client respect in manner and tone at least consistent with equal status? To do otherwise will be to risk client anger, frustration, or alienation—all negative emotions. Some clients, perceiving their own social status as much lower than their lawyer’s, will not expect this. Thus, a “street kid” or day laborer meeting with his lawyer may not be particularly angered or upset if the lawyer seems to be talking down. It was anticipated. However, these clients will feel so positively about the lawyer who elevates their status within the conversation.

Sometimes, the lawyer is the lowly one. Your client may be a corporate CEO, a university president, or other who perceives himself to be of higher status. In French, the verb *tutoyer* refers to using the less formal *tu* rather than more formal *vous* for the pronoun meaning “you.” One does not *tutoyer* unless invited, particularly with one of higher social status. Translated to high-status English speaking clients, refrain from casual or familiar language or manner unless and until invited to do so by your client. Continue to address your client as Mr., Ms., Dr., or Professor, followed by a surname. While some chit-chat is still helpful to establish connection, be careful to stay within social boundaries.

This is not to say that a lawyer must be the obsequious servant to the high-social status client. After all, the client who seeks the lawyer’s legal advice implicitly recognizes the lawyer’s particular

status—her legal expertise. However, when a client’s higher social status is important to him, the lawyer is wise to recognize it. Predictably, failure to treat one with the deference he believes to be due will generate negative emotions. Bottom line: it’s not worth fighting your client over general status issues.

### • ***Elevate Expertise and Experience as Status***

My friend and neighbor is a physician. I am certain she does not consider her general social status to be higher than the rest of ours. However, imagine a neighborhood gathering at which the conversation turns to the season’s flu virus, vaccination, contagion, prevention, and treatment issues. She would be understandably angered, indignant, or insulted if we did not seek her opinion and accord it some respect. She has particular medical expertise that merits recognition. In a legal context, your partner whose practice specializes in wage and hour law cases will experience negative emotions if you dismiss his opinion on such issues. Your electrician client will feel marginalized or angry (or both) if you dismiss his explanation of why the electrical system caught fire.

Highlighting *particular* status of experience or expertise can reduce or eliminate discomfort due to lower general status. Imagine that your client is that same electrician, with little formal education, unfamiliar with the legal system and apparently ill at ease in the formal law office setting. He seems painfully aware of lower social, education, or income status. The lawyer might ask the client about his work, about his progression from apprentice to master electrician. The lawyer might comment that he “could never get those electrical circuits to go in science class,” or recount a mishap that proved “wiring is no job for an amateur.” When the lawyer expresses admiration and respect for the difficulty of the client’s particular expertise, the client’s status is raised, generating more positive emotions.

### • ***Word to the Wise on Working with Work***

To a mediator of innumerable employment cases, it’s clear that clients who are “involuntarily unemployed,” whether through termination or reduction in force, keenly experience lowered status. Employment is often an enormous part of our felt status. As the conversation inevitably focuses on the circumstances of the termination and difficulties in finding new employment, feelings of lower

status deepen. The lawyer or mediator first met the client as someone who was terminated, not as a productive, competent, employed adult. Even if the lawyer or mediator would relate no differently to someone employed, the client may feel uncomfortable being known only as someone who was terminated. This engenders feelings of low status.

Given these endemic status concerns, lawyers working with an involuntarily unemployed or demoted client should initiate conversation about the client's positive work experience. When the client describes his education or training, followed by good work placements, or a period of success at the current job, the lawyer should express appropriate interest in and admiration for the challenges of that work. Be curious about the industry, about the client's role in the development of a product at a former job, even if irrelevant to the case at hand. As the client speaks of the substance of his earlier work, he re-inhabits that earlier, higher status self. Within the conversation, he becomes not just another "terminated unemployed person" but a normally productive and competent adult with a particular legal problem. He will feel higher status and more emotionally positive.

### • ***Check for Status Issues in the Underlying Case***

Once again, the core concern of status may be salient in the underlying legal dispute or transaction at hand. The lawyer who understands this and communicates his understanding will strengthen the lawyer-client relationship. Imagine that your client is a university professor and department chair who recommended against tenure for a departmental faculty member. The department's vote on the tenure issue was close. Your client reviewed the faculty member's entire scholarship and laboratory work and found them lacking. Your client recounts how a tenured but junior faculty member sought a confidential meeting for reconsideration of the negative recommendation. This was against all protocol. Your client refused to meet. His recommendation went up. The provost asked your client for an additional written explanation. Ultimately, tenure was denied, and suit was filed, accusing your client and others on the committee of religious and gender discrimination.

As your client recounts the story, you might hear a status issue.

As department chair and senior faculty, his status was slighted by the junior faculty member's challenge. His particular status was also disregarded, as the research and scholarship were directly in his field. Strategic active listening is recommended here. The lawyer might comment:

*What audacity for your junior to suggest you hadn't heavily weighed and considered all of the factors. Didn't they recognize that, as chair and senior member, you are well aware of your responsibilities? I can understand your being insulted.*

Or, as the client explains that his own chemistry research and the candidate's overlapped, the lawyer might say:

*It must have been frustrating when the provost—who I assume has never gone near a chemistry lab—forced you to spend yet more of your time justifying your evaluation of the science.*

Hearing his lawyer articulate the status concern, the client feels that the lawyer really DOES understand the problem.

## **Role**

The final core concern raised by Fisher and Shapiro in *Beyond Reason* is that of role.<sup>69</sup> One might think of role as a function label or associated set of activities. Not to be confused with general or particular status, role refers to the part one plays in an interaction, relationship, or context. Everyone wants to believe that she has a meaningful role in joint or collective tasks; no one wants to feel superfluous.

When a lawyer meets with his client to explain legal circumstances and discuss options and decisions, some clients are apt to feel lack of a meaningful role. Even if the client technically makes the ultimate decision, she may feel powerless or passive as the lawyer reviews the legal issues. The more passive, the less of a role, and perhaps the more withdrawn, unengaged, and negative.

One way to address the role concern is to emphasize the client's power at the beginning of the session, and to offer input or control regarding certain aspects of the discussion addressed. The lawyer might ask the client to raise details about the personalities and work habits of potential witnesses whom she knows best. In short, before meeting with your client, consider ways to



enhance her role within the interaction. It is particularly important where your client felt lack of meaningful role in the circumstances that brought her to your office.

## **Core Concerns and the Identity Kicker**

As suggested earlier, very strong emotions arise with an “identity kicker.”<sup>70</sup> Applying the core concerns model: when one’s identity is highly linked to a particular core concern that is unmet or violated, anticipate a STRONG emotional reaction. For example, if being “the [autonomous] boss” is an important part of your client’s identity, her anger at challenge to autonomy will likely be stronger than that of someone who doesn’t see herself that way. If your guidance counselor client identifies himself as someone who forges strong interpersonal relationships, a perceived attack on affiliation will lead to high emotion.

When working with clients, the good news is that everyone has multiple self-identities or value-packages. A corporate CEO may resist compliance with a demand that seems to challenge a core autonomy concern—linked to his identity as boss. If so, his lawyer is advised to reframe compliance by raising a different identity or value set. The lawyer might suggest: “I know you are someone who would never cheat, who plays by the rules.” Or the lawyer might raise the salience of status by suggesting:

*While the demand does seem unnecessary or petty, surely a company of the stature of yours wouldn’t want to be seen fighting about this. Saying yes might just give you the upper hand, or at least the moral high ground.*

## **Summary**

Emotions matter. They affect interactions, relationships, cognitive processing, creativity, energy, patience, and decision-making. Human beings cannot just turn their emotions off or set them aside. As lawyers, ignoring or denying emotions in ourselves or our clients is unwise. Generally, more positive emotional states lead to better decision-making, through enhanced cognition, creativity, energy, and patience. Positive emotions—the client’s good feelings when speaking with her lawyer—also foster trust, rapport, and loyalty.

Fisher and Shapiro's core concerns model offers a practical heuristic, a lens for scanning the emotional map of the client's underlying legal problem as well as the lawyer-client interaction itself. The core concerns facilitate insight into what might cause a client's high emotions. If the dispute in a client's family business is likely to challenge autonomy and status concerns, the lawyer should attend to these. When actively listening to that client speak, the lawyer should demonstrate understanding of what makes him angry. The lawyer can also find ways to offer "micro" autonomy—suggesting that the client set the initial agenda. The lawyer can acknowledge the client's status by noting the success of his business venture, congratulating him on election to the presidency of his professional organization, or conversing about his particular technical expertise. Of course, recognizing the core concerns enables the lawyer not only to compensate for the negative, but also to generate positive emotion when interacting with any client.

Lawyers cannot cure all of their clients' worries or ills. But lawyers can seek to foster positive emotions in lawyer-client meetings, and thereby build rapport, communicate complexity, and facilitate wise client decisions.

---

<sup>1</sup> "Karla McLaren Quote" Wisdom Quotes, <http://www.wisdomquotes.com/quote/karla-mclaren.html> (accessed May 26, 2011).

<sup>2</sup> For a discussion of the privileged status of analytical intelligence in law study and practice and an argument that this privileging is appropriate, see Marjorie Silver, "Emotional Intelligence and Legal Education," *Psychology, Public Policy & Law* 5, no. 4 (1999): 1173–1203.

<sup>3</sup> Roger Fisher and Daniel Shapiro were among the first in popular negotiation literature to strongly assert that, even in a professional context, one must work with emotions (rather than attempt to blot them out), in their book *Beyond Reason: Using Emotions as You Negotiate* (New York: Viking, 2005).

For those interested in further reading on emotion, the "Works Consulted" section at pages 213–230 of *Beyond Reason* contains terrifically helpful, accessible, and erudite descriptions of books and articles focused on emotion-related topics.

<sup>4</sup> Fisher and Shapiro, *Beyond Reason: Using Emotions as You Negotiate*.

<sup>5</sup> I am indebted to Dr. Shapiro for his collaboration on the program "Counseling and Convincing Difficult and Emotional Clients," which was offered as Continuing Legal Education through the University of Cincinnati College of Law's Center for Practice in Negotiation and Problem Solving in 2004–2005.

<sup>6</sup> *Oxford English Dictionary*, 3rd ed., s.v. "emotion."

<sup>7</sup> Daniel Goleman, *Emotional Intelligence: Why It Can Matter More than IQ*. (New York: Bantam Books, 1995), 289.

---

<sup>8</sup> Ibid., 6.

<sup>9</sup> Ibid., 289–291.

<sup>10</sup> Goleman gets credit for this link to Darwin. Ibid., at 7.

<sup>11</sup> Paul Ekman, “Expression and the Nature of Emotion,” in *Approaches to Emotion*, ed. Klaus R. Scherer and Paul Ekman (Hillsdale, NJ: Lawrence Erlbaum Associates, 1984): 319–343. For a summary of this evidence, see Hillary Anger Elfenbein and Nalini Ambady, “On the Universality and Cultural Specificity of Emotion Recognition: A Meta-Analysis,” *Psychological Bulletin* 128, no. 2 (2002): 203–235. Further evidence for the universality of emotional expression comes from David Matsumoto and Bob Willingham’s study finding no significant differences between the facial expressions of sighted, congenitally blind, and noncongenitally blind Olympic and Paralympic medal-winners. “Spontaneous Facial Expressions of Emotion of Congenitally and Noncongenitally Blind Individuals,” *Journal of Personality and Social Psychology* 96, no. 1 (2009): 1–10. However, Matsumoto and Willingham, and many other researchers who favor an evolutionary explanation, also note the influence of cultural “dialects” on expression and interpretation of emotional expression. Ibid., 9; Hillary Anger Elfenbein, Martin Beaupré, Manon Lévesque, and Ursula Hess, “Toward a Dialect Theory: Cultural Differences in the Expression and Recognition of Posed Facial Expressions,” *Emotion* 7, no. 1 (2007): 131–146.

<sup>12</sup> James J. Gross, Jane M. Richards, and Oliver P. John describe research showing that efforts to suppress emotion impair cognitive processing. The authors theorize that suppression uses cognitive resources that could be used more productively. “Emotion Regulation in Everyday Life,” in *Emotion Regulation in Families: Pathways to Dysfunction and Health*, ed. D. K. Snyder, J. A. Simpson, and J. N. Hughes (Washington, D.C.: American Psychological Association, 2006), <http://www-psych.stanford.edu/~psyphy/pdfs/everyday.pdf> (accessed March 26, 2010).

<sup>13</sup> This is a summary and sometimes a paraphrase of Goleman’s descriptions in *Emotional Intelligence*. Goleman acknowledges having drawn from various sources, including Robert W. Levenson, Paul Ekman, and Wallace V. Friesen, “Voluntary Facial Action Generates Emotion-Specific Autonomous Nervous System Activity,” *Psychophysiology* 27, no. 4 (1990): 363–384.

<sup>14</sup> Rocco Dal Vera, “The Voice in Heightened Affective States,” in *The Voice in Violence and Other Contemporary Issues in Professional Voice and Speech Training*, ed. Rocco Dal Vera (New York: Applause Books, 2001), 54.

<sup>15</sup> This advice was also conveyed by Professor Dal Vera while teaching lawyers and law students in “Actors Directions for Winning Trial Performance,” offered through the University of Cincinnati College of Law’s Center for Practice in 2009 and 2010.

<sup>16</sup> Levenson, Ekman, and Friesen, “Voluntary Facial Action,” 376. Another discussion of this experiment is found in Paul Ekman, “Expression and the Nature of Emotion,” in *Approaches to Emotion*, 324–327.

<sup>17</sup> Fritz Strack, Leonard L. Martin, and Sabine Stepper, “Inhibiting and Facilitating Conditions of the Human Smile: A Nonobtrusive Test of the Facial Feedback Hypothesis,” *Journal of Personality and Social Psychology* 54, no. 5 (1988): 768.

---

<sup>18</sup> “Lord Byron Quotes,” ThinkExist,

[http://thinkexist.com/quotation/there\\_is\\_no\\_instinct\\_like\\_that\\_of\\_the\\_heart/146410.html](http://thinkexist.com/quotation/there_is_no_instinct_like_that_of_the_heart/146410.html) (accessed May 26, 2011).

<sup>19</sup> Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (New York: Back Bay Books, 2005), 59–61. The original experiment is found in Antoine Bechara, Hanna Damasio, Daniel Tranel, and Antonio R. Damasio, “Deciding Advantageously Before Knowing the Advantageous Strategy,” *Science* 275, no. 5304 (1997): 1293–1295.

<sup>20</sup> Antoine Bechara, Daniel Tranel, and Hanna Damasio, “Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions,” *Brain* 123, no. 11 (2000): 2189.

<sup>21</sup> “Quote Details: Harriet Lerner,” The Quotations Page, <http://www.quotationspage.com/quote/1839.html> (accessed June 3, 2011).

<sup>22</sup> Sidney Callhan argues that “[e]motions energize the ethical quest. A person must be emotionally interested enough and care enough about discerning the truth to persevere despite distractions. Even more, a person who wrestles with moral questions is usually emotionally committed to doing good and avoiding evil. A good case can be made that what is specifically moral about moral thinking, what gives it its imperative “oughtness,” is personal emotional investment. When emotion infuses an evaluative judgment, it is transformed into a prescriptive moral judgment of what ought to be done.” “The Role of Emotion in Ethical Decisionmaking,” *The Hastings Center Report* 18, no. 3 (1988): 9.

<sup>23</sup> Graham V. Goddard, “Functions of the Amygdala,” *Psychological Bulletin* 62, no. 2 (1964). A comprehensive collection of articles regarding the amygdala is found in Paul J. Whalen and Elizabeth A. Phelps, eds., *The Human Amygdala* (New York: Guilford Press, 2009).

<sup>24</sup> Robert S. Adler, Benson Rosen, and Elliot M. Silverstein, “Emotions in Negotiation: How to Manage Fear and Anger,” *Negotiation Journal* 14 (1998): 161.

<sup>25</sup> Goleman, *Emotional Intelligence*, 139.

<sup>26</sup> Andrea Bodtker and Tricia Jones, “Mediating with Heart in Mind: Addressing Emotion in Mediation Practice,” *Negotiation Journal* 17 (2001): 217; for further discussion of flooding, see Goleman, *Emotional Intelligence*, 138–141.

<sup>27</sup> Horace, *Epistles (First Book of Letters)*, epistle 2, line 62.

<sup>28</sup> “Confucius Quotes,” Notable Quotes, [http://www.notable-quotes.com/c/confucius\\_quotes.html](http://www.notable-quotes.com/c/confucius_quotes.html) (accessed May 25, 2011).

<sup>29</sup> However, difficult decisions are less likely to be required when your client processes jubilation upon receipt of great news—*the judge ruled in your favor and this case is a slam-dunk winner*.

<sup>30</sup> Jennifer S. Lerner and Larissa Z. Tiedens, “Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger’s Influence on Cognition,” *Journal of Behavioral Decision Making* 19, no. 2 (2006): 132 (Angry people “approach a situation with the tendency to feel confident, in control, and thinking the worse of others.”).

<sup>31</sup> Horst Mitmansgruber, et. al., “When you don’t like what you feel: Experiential avoidance, mindfulness, and meta-emotion in emotional regulation,” *Personality and Individual Differences* 46 (2009): 448–453; John M. Gottman, Lynn

---

F. Katz, and Carole Hooven, *Meta-Emotions: How Families Communicate Emotionally* (Mahwah, NJ: Lawrence Erlbaum Associates, Inc., 1997).

<sup>32</sup> Authors Stone, Patton, and Heen discuss the “Identity Conversation” and under the header “An Identity Quake Can Knock Us Off Balance,” observe that sometimes a conversation seems to be saying something “about us that rips the ground from beneath our feet . . . . Getting knocked off balance can even cause you to react physically. Images of yourself or of the future are hard wired to your adrenal response, and shaking them up can cause an unmanageable rush of anxiety or anger, or an intense desire to get away.” Douglas Stone, Bruce M. Patton, and Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (New York: Penguin Books, 1999), 113.

<sup>33</sup> Goleman, *Emotional Intelligence*, 85.

<sup>34</sup> At least one physiological cause is that positive emotions trigger the neurochemical dopamine which improves cognitive ability and creativity. This and related research is synthesized by Daniel Shapiro in “Emotion in Negotiation: Peril or Promise?” *Marquette Law Review* 87 (2004): 737.

<sup>35</sup> Alice M. Isen, Kimberly A. Daubman, and Gary P. Nowicki, “Positive Affect Facilitates Creative Problem Solving,” *Journal of Personality and Social Psychology* 52, no. 6 (1987): 1122–1131.

<sup>36</sup> Carlos A. Estrada, Alice M. Isen, and Mark J. Young, “Positive Affect Facilitates Integration of Information and Decreases Anchoring in Reasoning among Physicians,” *Organizational Behavior and Human Decision Processes* 72, no. 1 (1997): 117–135.

<sup>37</sup> Peter J. D. Carnevale and Alice M. Isen, “The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiation,” *Organizational Behavior and Human Decision Processes* 37 (1986): 1–13. See also, e.g., Joseph P. Forgas, “On Feeling Good and Getting Your Way: Mood Effects on Negotiator Cognition and Bargaining Strategies,” *Journal of Personality and Social Psychology* 74, no. 3 (1998): 565–577 (“The main consequence of good mood seems to be a marked inclination to be more cooperative and less competitive.”).

<sup>38</sup> Cameron Anderson and Leigh L. Thompson, “Affect from the Top Down: How Powerful Individuals’ Positive Affect Shapes Negotiations,” *Organizational Behavior and Human Decision Processes* 95 (2004): 126.

<sup>39</sup> William W. Maddux, Elizabeth Mullen, and Adam D. Galinsky, “Chameleons Bake Bigger Pies and Take Bigger Pieces: Strategic Behavioral Mimicry Facilitates Negotiation Outcomes,” *Journal of Experimental Social Psychology* 44 (2008): 461–468.

<sup>40</sup> Steven J. Spencer, Claude M. Steele, and Diane M. Quinn, “Stereotype Threat and Women’s Math Performance,” *Journal of Experimental Social Psychology* 35 (1999): 13; see also Catherine Good, Joshua Aronson, and Jayne Ann Harder, “Problems in the Pipeline: Stereotype Threat and Women’s Achievement in High-Level Math Courses,” *Journal of Applied Developmental Psychology* 29, no. 1 (2008): 17–28.

<sup>41</sup> Spencer, Steele, and Quinn, “Stereotype Threat and Women’s Math Performance,” 13.

<sup>42</sup> Claude M. Steele and Joshua Aronson, “Stereotype Threat and the Intellectual Test Performance of African Americans,” *Journal of Personality and Social Psychology* 69, no. 5 (1995): 797–811.

---

<sup>43</sup> Joshua Aronson, et al., “When White Men Can’t Do Math: Necessary and Sufficient Factors in Stereotype Threat,” *Journal of Experimental Social Psychology* 35 (1999): 29–46. It is noteworthy that white students with only moderate math proficiency performed better when primed with the same statement, suggesting that the impact of stereotype threat depends in part on one’s degree of emotional investment.

<sup>44</sup> Ibid.

<sup>45</sup> “Don’t Break the Elastic-Maya Angelou,” The Leadership Hub, <http://www.theleadershiphub.com/blogs/don039t-break-elastic-maya-angelou> (accessed May 25, 2011).

<sup>46</sup> For example, Stephen Feldman and Kent Wilson had student participants watch videotapes of lawyers in mock initial client interviews. The students then rated the lawyers in terms of expertise, attractiveness, trustworthiness, likelihood of satisfying the client, and probability of being referred and returned to. On all measures except expertise, students rated lawyers with low competence but high relational skill higher than lawyers with low relational skill but high competence. “The Value of Interpersonal Skills in Lawyering,” *Law and Human Behavior* 5, no. 4 (1981): 311–324.

<sup>47</sup> “John Cunningham Quote,” Wisdom Quotes, <http://www.wisdomquotes.com/quote/john-cunningham.html> (accessed May 25, 2011).

<sup>48</sup> For further description of active listening, see Bernard Moss, *Communication Skills for Health and Social Care* (London: SAGE Publications, 2008), 14; Kathryn Robertson, “Active Listening: More Than Just Paying Attention,” *Australian Family Physician* 34, no. 12 (2005): 1053–1055.

<sup>49</sup>For thorough discussion of collected descriptions of active listening, see Dana Heller Levitt, “Active Listening and Counselor Self-Efficacy: Emphasis on Microskill in Beginning Counselor Training,” *The Clinical Supervisor* 20, no. 2 (2002): 101–115 (internal citations omitted).

<sup>50</sup> Moss, *Communication Skills for Health and Social Care*, 18.

<sup>51</sup> Arthur J. Clark describes a method of “empathic understanding” (which I call reflective dialogue) in which a counselor “attempts to sense the feelings and personal meanings that a client experiences on a moment-by-moment basis in the therapy process. This awareness is then communicated verbally and nonverbally to the client in the immediacy of a human encounter.” *Empathy in Counseling and Psychotherapy: Perspectives and Practices* (Mahwah, NJ: Lawrence Erlbaum Associates, 2007), 22–23 (internal citations omitted); Clark, *Empathy in Counseling and Psychotherapy*, 28 (describing research); Sandra C. Paivio and Christine Laurent, “Empathy and Emotion Regulation: Reprocessing Memories of Childhood Abuse,” *Psychotherapy in Practice* 57, no. 2 (2001): 218 (“Empathic responses can reduce arousal by providing understanding, acceptance, and support.”).

<sup>52</sup> Winston S. Churchill, “The Scaffolding of Rhetoric,” in Randolph S. Churchill, companion volume, pt. 2, to *Youth: 1874–1900*, vol. 1 of Winston S. Churchill (London: Heinemann, 1967), 816–821.

<sup>53</sup> “Emily Dickinson: Complete Poems,” Bartleby, <http://www.bartleby.com/113/1068.html> (accessed May 25, 2011).

<sup>46</sup> Linda D. Friedman, Esq. (plaintiff’s class action attorney at Stowell & Friedman, LLC, in Chicago), in a conversation with the author, approximately 2003, paraphrased from the author’s memory.

---

<sup>54</sup> “Sigmund Freud Quote,” Wisdom Quotes, <http://www.wisdomquotes.com/quote/sigmund-freud-7.html> (accessed May 25, 2011).

<sup>47</sup> For a review of research on individual variation in facial expression, see Dacher Keltner and Paul Ekman, “Facial Expression of Emotion,” in *Handbook of Emotions*, ed. Michael Lewis and Jeannette M. Haviland-Jones, 2nd ed. (New York: Guilford Publications, 2000), 236–249.

<sup>55</sup> Author’s discussion and preparation with Daniel Shapiro for Continuing Legal Education program, *Dealing With Difficult and Emotional Clients*, first presented by the Center for Practice, University of Cincinnati College of Law, 2007.

<sup>56</sup> Fisher and Shapiro, *Beyond Reason*, 15–21.

<sup>57</sup> *Ibid.*, 25–31.

<sup>58</sup> *Ibid.*, 37.

<sup>59</sup> This phrasing is a deliberate and made with grateful reference to the book by that name, *Difficult Conversations: How to Discuss What Matters Most*, by the author’s former colleagues at Harvard’s Program on Negotiation, Douglas Stone, Bruce Patton, Sheila Heen, and Roger Fisher. The advice contained in this chapter, and indeed in this book, should be read as consistent with that in *Difficult Conversations*. I am indebted to these former colleagues and their insightful work.

<sup>60</sup> Fisher and Shapiro, *Beyond Reason*, 72–93. Fisher and Shapiro list autonomy third in their order. They do not purport to list the concerns in their order of importance. However, lest the reader tire, I have taken the liberty of discussing it second because of its importance in the client counseling context.

<sup>61</sup> As a mediator, your author is sorely tempted to suggest a next move to reframe by noting that the quarterback always plays by the rules to win, even when the rules are tough or the ref seems unfair. However, to move to discussion of reframing here would be to digress.

<sup>62</sup> Fisher and Shapiro, *Beyond Reason*, 84.

<sup>63</sup> Generally, “a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. 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.”

<sup>64</sup> Fisher and Shapiro, *Beyond Reason*, 52–71.

<sup>65</sup> *Ibid.*, 54–59.

<sup>66</sup> Martin Buber, *I and Thou*, trans. Ronald Gregor Smith (New York: Scribner, 2000).

<sup>67</sup> Philip J. Moore, Nancy E. Adler, and Patricia A. Robertson, “Medical Malpractice: The Effect of Doctor-Patient Relations on Medical Patient Perceptions and Malpractice Intentions,” *Western Journal of Medicine* 173, no. 4 (2000): 244–250.

---

<sup>68</sup> Fisher and Shapiro, *Beyond Reason*, 94–114.

<sup>69</sup> *Ibid.*, 115–140

<sup>70</sup> Stone, Patton, and Heen, *Difficult Conversations*, 113.