# CHAPTER 1

# BAD NEWS AND THE FULLY INFORMED CLIENT

> "Bad news isn't wine. It doesn't improve with age."
>
> —Colin Powell[1]
>
> "Yet the first bringer of unwelcome news hath but a losing office."
>
> —Shakespeare, *Henry IV*[2]

## Good News Paves an Easy Path

You just received notification from the clerk's office that the court granted your defense client's motion to dismiss; the plaintiff will not appeal. There's no ambiguity or uncertainty, and no need for advice on what to say. Call your client and give him the final, bottom-line great news.

Talking with clients about positive developments in an ongoing lawsuit or negotiation is a communication task that rarely threatens client trust or rapport. Imagine that, after researching an important legal question, you explain to your defense client that he is safe from personal liability and his company will likely escape liability as well. Or, after reviewing gathered evidence, you reassure your plaintiff-client that her causation evidence is rock solid. These clients are unlikely to focus on whether your presentation of legal process or case law is crystal clear or in perfect order. Where you must inform them of some minor, lingering concerns, they will listen and appreciate your earnest (and important) disclaimers that nothing is certain.

When discussing strengths in litigation or settlement position, you bask in your clients' approval. They are so pleased to hear confirmation that the law supports their view of what is right. With a positive frame of mind, they are open to brainstorming about next negotiation moves or potential witnesses. Rapport is easy. Just remember to hold onto caution and a bit of gravitas while sharing the clients' delight.

### • *Perhaps Unnecessary, Free Advice for Delivering Good News*

*Do* remember disclaimers—don't be overconfident and don't communicate overconfidence.

*Do* articulate the nature of the uncertainties and the risks, and make sure the client understands they are real, even if unlikely. It's good practice to put them in writing to the client after your meeting.

*Do* articulate the elements that form the basis of your favorable conclusion, emphasizing that if an element changes, your analysis and conclusion will change as well. That way, if and when a problematic document surfaces or a manager's deposition reveals unwelcome surprises, your client should understand their significance. Unless you have explained the reasons for your earlier optimistic analysis, the now less-than-happy client might think you are making excuses or waffling.

## Difficult and Tricky Road to Bad News Delivered Well

On this less than sunny day, you represent a plaintiff facing a defense motion for summary judgment and, in a different case, a defendant who wants desperately to obtain summary dismissal of a personal fraud claim against him. While you could write (or have written) credible briefs supporting your clients' positions, you see a very low probability of success based upon your thorough review of the evidence, recent case law, and the judge's track record. You now strongly believe the plaintiff-client's case will be lost on summary judgment and the defendant-client will face the fraud claim at trial. You are not entirely optimistic about either client's chances of success at trial. You anticipate client anger, sadness, frustration, and resistance to this conclusion. When meeting with either one, your goals are that:

1) the client continue to *feel connection*, trust, and loyalty in his relationship with you, despite the bad news;

2) the client *fully understand* the bad news—your unfavorable conclusions, their basis in reasoned analysis, and how they impact his legal case and personal or business circumstances;

3) the client *maintain confidence in your competence*—the meeting would be unsuccessful if the client came to wonder whether a "better lawyer" would have reached a more favorable conclusion; and

4) the client continue to *believe you will zealously represent him*—the meeting would be unsuccessful if the client came to doubt whether you remain fully on his side and will fight for his cause.

If you are mindful and strategic, you can deliberately choose more effective ways to use your voice, order the presentation of bad news, difficult concepts, and unwelcome reasoning, and reduce client resistance to your message. This is not to diminish client choice: he is entitled to resist or reject his lawyer's advice regarding what choice to make. However, that choice should come only after the client is indeed fully informed and has fully integrated his lawyer's analysis of legal realities.

The next few sections of this chapter offer insight and advice directed toward the first two goals of client counseling when you must convey bad news: a continued positive client relationship, and a fully informed client. These themes are more fully developed in later chapters on meaning, emotion, psychology, voice, and gesture. This chapter concludes with advice specifically related to the third and fourth goals: maintaining client confidence in your competence and in your commitment to zealous representation.

## Insights for Lawyers from Communication Scholars on Doctors

Profoundly bad news, or even profoundly good news, with potentially life-altering impact, can cause us to experience a rupture in the fabric of our everyday lives. Professor Douglas Maynard, of the University of Wisconsin, whose research has focused on the social psychological impact of good and bad news, writes that these cause us to "experience a breakdown, however momentary or prolonged, which requires realignment to and realization of a transfigured social world."[3] People receiving extremely bad news (and also extremely good news, though that is not my focus) report disorientation or confusion as they slip into "some new world."[4]

Most important, extensive research confirms that poor delivery of bad news can damage or destroy the relationship between the speaker and listener-recipient. When the listener feels bad news was communicated insensitively—too abruptly, after stalling, or without caring—tremendous and lasting anger or hurt will result, damaging or ending the relationship. On the other hand, sharing of bad news, done well, can enhance the relationship and sense of affinity. Social psychology thus identifies our challenge: how best to communicate bad news without doing harm to the social

relationship, and, in Professor Maynard's words, "how best to obtain recipients' *realization* (understanding and acceptance) of bad news."[5]

Professor Maynard and other scholars base advice to the bearers of bad news upon narrative data research primarily from the doctor-patient counseling and medically-related bad news, but also to some degree from family, employment, and lawyer-client contexts.[6] My experience and observation in two decades of mediation of legal disputes and hundreds of counseling sessions with actor-clients confirms the value of that research and the wisdom of this advice. With that in mind, I offer the following specific suggestions for lawyers who, mindful of the obligation to fully inform their clients, seek to deliver bad news in ways that strengthen or at least maintain lawyer-client relationships, and facilitate clients' realization and acceptance.[7]

1) Be prepared—make sure you have all the important information and are ready to articulate it. Know what your own emotional responses are likely to be.

2) Arrange for private, comfortable surroundings and an in-person conversation, if possible. History is replete with examples of outrage at bad news delivered indirectly or impersonally (by telephone or worse, e-mail or voice-mail or, in the olden days, telegrams and "Dear John" letters).

3) **Forecast or preface the bad news up front, with sensitivity and expression of caring**, to foster your client's emotional readiness for what is to come. This suggestion comes with an important caveat: don't be too blunt with your *opening* words—"your tumor is malignant," in the medical context—or "the judge threw out your case" in our legal realm.

4) After the preface, don't stall: don't delay communication of the bottom-line news by waiting until after complete delivery of lengthy and detailed explanations of law and process.

5) Be direct and scrupulously accurate—don't allow a natural instinct to "soften the blow" to deter you from conveying the reality of the circumstances, whatever they are.

6) Provide information at a pace comfortable for the client, in simple language, without jargon.

7) Attend to your client's emotion. Be caring and empathetic, not detached.

8) Allow time for your client to absorb and come to terms with the news.

The first two admonitions—be prepared, and arrange for comfortable private surrounding—are wise, but common sense. Most of us would be angered or upset if our physician hadn't prepared by informing herself about the medical consequences of a diagnosed condition before communicating the diagnosis, or if she wasn't prepared to articulate them in our meeting. We would not respond well to bad news conveyed in an elevator, waiting room, or hallway. An in-person discussion seems more kind than a phone call. And if a meeting can't be arranged, the voice-to-voice communication by telephone is better than an e-mail.

The suggestions in the latter half of the list—to be empathetic, speak without jargon at a comfortable pace, attend to emotion, and allow time and space to come to terms with the news—echo various other chapters in this book. It's nice to know that social psychologists' research and advice highlight their importance.

Academic research, consequent insight, and advice are most valuable when they lead to counter-intuitive or uncommon practice. If so, then two pieces of the listed advice bear highlighting**: (1) forecast or preface the bad news up front—avoiding bluntness but without stalling**; and **(2) be direct and scrupulously accurate.** We weren't taught this in law school, and those of us who learned client counseling on the job, perhaps from a mentor, are likely to have witnessed the opposite in practice. Lawyers often fail to provide advance warning that bad news will follow an explanation of law and process; many avoid the true magnitude of the problem and its impact, "softening" through words that distort reality.

The balance of this chapter offers advice to lawyers on how to forecast and be unflinchingly direct and accurate when delivering bad news, as these are critical to your client's realization and acceptance and to the lawyer-client relationship.

## Preface and Forecast Bad News; Neither Blunt nor Stalling Be

Imagine that you recently retained an expert to evaluate environmental hazards on your residential property, with an eye toward future sale. The moment you sit down to hear his report, he says: "Your home is dangerously toxic, and environmental law demands that it be vacated and destroyed." WHAT???!!! Imagine meeting with your physician, who begins with: "You have six

months to a year to live." You would feel as if assaulted by blunt force. Later, you would feel angry at the blunt insensitivity of that assault.

### • *Forecast Bad News Up Front*

Professor Maynard suggests that forecasting bad news through behavior, tone, and language helps prepare a "social psychological environment" more conducive to the client's comprehension and acceptance of the news.[8] Thus, he recommends a "preannouncement" as a precursor to bad news.[9] Professor Linda Smith, Clinical Program Director at the University of Utah's College of Law, observes that medical counselling literature advises doctors giving bad news to begin with a "warning shot"... to prepare the patient and reduce the element of shock."[10] She recommends that lawyers also "open with a 'warning shot,' control the conversation and get to the point promptly."[11]

Thus, when you must convey bad news, *do* gently preface or provide warning of that bad news up front—*before* launching into the whys, hows, and therefores. This approach helps your client prepare emotionally for what is coming, and, if you communicate your unhappiness about his bad news, it helps maintain the client's feeling of connection. You might begin the conversation by saying:

> *I very much regret having to tell you of some recent developments that pose serious risks for your case. I am concerned about some legal hurdles that will make it difficult to achieve your goals through litigation, the way we thought the last time we met . . .*.

### • *Where Appropriate, Consider Inquiry and Confirmation*

Research from the medical context suggests that a doctor should begin by inquiring as to the patient's awareness of likely bad news. For example, the doctor might ask: "What do you feel these symptoms might mean?" If the patient indicates that he understands the symptoms to be troubling signs of a serious condition, or suspects the imminence of bad news, the doctor can then confirm the patient's intuition, and undoubtedly elaborate. Even if the patient doesn't fully recognize the extent of an illness, his suspicions begin the conversation, which the physician then moves to the more grave medical realities.[13] In some sense, the patient's bad news has come from within, which helps to prepare him emotionally for his physician's confirmation and elaboration.

The legal context sometimes presents opportunities for the lawyer to begin with an initial inquiry and then to confirm suspected bad news. For example, imagine that your defense client attended the deposition of her staff manager. She witnessed plaintiff's counsel's deliberate and prolonged questioning on the chain of decision-making with respect to the plaintiff's termination and sexual harassment claim. This deft questioning paid off; the lawyer was obviously satisfied—virtually triumphant in tone. When you meet with your defense client to break the bad news that summary judgment is just not going to happen (and may not be worth filing), you might begin by asking what her impressions were of the deposition. Perhaps she will comment: "I could see it didn't go well, because their lawyer was much too happy by the end. It made me wonder whether we will get rid of this case as quickly as I had hoped." You would then confirm your now entirely pessimistic estimate of the chances of avoiding trial in the case. Your inquiry and the client's response will have laid the foundation for bad news in a way that may be easier for her to recognize and accept.

- ***After the Forecast, Be Direct; Don't Stall***

Imagine that the expert you retained to assess environmental conditions at your home is a close friend as well as an accomplished chemist. He invites you to lunch to review his findings. While across the lunch table, he launches into a matter-of-fact, careful, logical description of spontaneous combustion, the circumstances in which it occurs, the chemistry it involves, and the fires it can create. He then informs you that he received a call from the fire department stating that your house and all your possessions went up in flames that morning due to spontaneous combustion.

Wouldn't it seem strange that your friend didn't mention your house fire until the end? If you thought about it (after that initial shock), wouldn't it seem odd—wouldn't it make you angry—that he was so calm and matter-of-fact, while knowing all along that, upon reaching the end of explaining spontaneous combustion, he was going to tell you the sad fate of your house? Obviously this friend doesn't care much about you. Your house fire did not affect him. It was just an opportunity for him to prove that he's a very articulate chemist.

Experience in hundreds of student-lawyer to actor-client counseling sessions supports this advice. When the actor-clients first learn of bad news only after their lawyers' matter-of-fact explanation of legal process and case law, they report feeling as if the lawyers had heartlessly

walked them to the edge of a cliff and dropped them over the side. In contrast, they express appreciation for their lawyers' early and empathetic signal of bad news to come, followed by concise summary of that reality. Thus, we advise the lawyer first to say (in words or in substance):

> *I very much regret having to tell you of some recent developments that pose serious risks for your case. I am concerned about some legal hurdles that will make it difficult to achieve your goals through litigation, the way we thought the last time we met . . . .*

The lawyer should move to the real bad news, by saying:

> *I will explain these legal hurdles and issues and how and why they work, but you should know that, unfortunately, I am concerned because I think they create a strong risk that your case would be dismissed before we ever get to trial. I would of course fight that risk, for you and with you, but as your lawyer, I have to be straight with you about the chances of succeeding in litigation and why you might want to consider settling your case instead of continuing to litigate. After I've explained all of the risks, issues, and arguments, the direction we take will still be your choice.*

Explanation of legal process, issues and risks follow. The lawyer must explain summary judgment, how deposition testimony or documents discovered affect defenses and evidentiary burdens, how case law and precedent work, and all of the rest, whatever the realities in the particular case. But these must *follow* communication, in essence, that the news is bad. To do otherwise is to stall, which feels insensitive to the client, and renders it more difficult for the client to integrate and process information received along the way.

### • *Don't Soften and Thus Distort Reality*

When a lawyer "softens" bad news—*this* [nuclear bomb] *might be a little problem*—he obviously distorts reality.

"Softening" merits attention here because it is so terribly, understandably common. People much too often use euphemism, choose weaker adjectives, and insert hedge words when delivering bad news. I have seen lawyers who believe their clients' case is **highly likely to lose** at trial say, "Well, the trial might be a little bit risky." Might be a little bit? If and when the lawyer eventually communicates the harsher truth, after stalling and hedging, the client will be frustrated:

You *said that the recent development could be "a little bit of a problem." Why didn't you TELL me that our motion is dead in the water?!*

*You said the dollar offer was "a little bit low." Why didn't you TELL me it was less than a tenth of our* bottom line?!

As discussed in the next section, even without euphemism or inaccurate adjectives and adverbs, people often use vocal patterns that could be heard to convey (misplaced) optimism.[14] These too confuse and mislead—the client hearing upbeat vocal tones may make a different choice than he would have if the bad news been accurately communicated.

Why are stalling, euphemism, softening, and hedging so very common? The answer of course is that we wince at the thought of inflicting pain on another person and we fear their reaction. In a good lawyer-client relationship, we anticipate and seek to avoid our client's disappointment, anger, or despair. So, it's understandable. But it's no excuse. A lawyer should foreshadow, sensitively—"I wish I didn't have to give you this news, but there have been some developments that cause me great concern"—and then directly, accurately, carefully, and empathetically inform the client of the realities.

## Voicing Bad News

In normal speech, when you refer to something negative—anticipated to have sad effect—your voice naturally lowers and slows. A lowered voice expresses seriousness, graveness, foreboding, and warning of the ill to come.[15] Imagine talking about your neighbor's grave medical condition or destructive house fire in a high-pitched, perky voice. You wouldn't speak that way unless you were perversely happy at the news, as in "ding dong, the witch is dead." Generally, where a lawyer has a positive relationship with a client and is talking about a subject of grave concern to the client, his voice will not be breezy, light, or casual. People, including lawyers, of normal social intelligence and empathic capacity generally use appropriate vocal tones indicating concern.

In fact, adopting a vocal tone in complete contradiction to the meaning of your words is usually difficult. Imagine saying to a real client: "I regret to tell you of some serious concerns about your case. Based upon some very recent case law, I fear that the judge is likely to dismiss it." Just saying those words will impact your voice, lowering the tone and slowing you down. Thus, articulating the

fact of bad news upfront also serves as a natural antidote for client disconnection through vocal miscues of flat matter-of-factness or perverse perkiness.

## • *Don't Let your Voice Send False Signals*

Even after prefacing in an appropriate tone, a lawyer should be mindful of vocal tone and speed when discussing bad news. Yet, as noted above, our voices normally reinforce our intended meaning. Then why worry about voice when discussing that bad news in more detail? Why wouldn't effective voice come naturally?

It happens that legal doctrine and process underlying "bad news" are often complex and unfamiliar to the client. As a lawyer labors to explain difficult concepts, the cerebral takes over. Enmeshed in the intellectual exercise of explaining what summary judgment is, or how jurisdictional challenges work, empathy fades to the background. The brain is focused on black letter law, logical sequence, and decisions about how much technical description of legal process is necessary. While the words chosen may be clear, the voice used tends to reflect the intellectual task occupying the lawyer's brain.

I have observed many law students deliver perfectly accurate explanations of summary judgment to their actor-clients and then—without break in tone or speed—conclude with the bad news, stating, "That is why the other side is likely to win on summary judgment, and you will not recover anything." Our actor-clients note that the lawyer's matter-of-fact, even-keel voice pattern makes them feel as if the lawyer was just strolling along a logical road and is unaffected by its conclusion.

In addition to getting lost in logic, it can be natural for a lawyer to feel internal satisfaction at successfully conveying complex concepts, and for that to be reflected unintentionally in her voice. Some of us enjoy speaking of argument, counter-argument, and case analysis. Yet, if the lawyer's voice lightens or reverts to sing-song as she successfully walks through the legal analysis, the client may interpret the lighter tone to mean that circumstances are less dire, more optimistic. The client might begin to anticipate possible avenues of success. The lawyer's light vocal tone may unintentionally and subliminally reassure the client.

## • *Perverse Habits of Nerves and Feelings*

Ironically, not just logic but also the lawyer's emotions may generate vocal miscues. When a lawyer nervously and empathetically anticipates a client's reaction to bad news, he may nod, smile, and speak more quickly, in a higher pitch or with an up-tone at the end of a sentence—behaviors usually associated with positive emotions. The lawyer may understandably be uncomfortable, wishing he could make the news seem "not so bad." He may fear the client will blame the messenger. His nodding or smiling may reflect unconscious seeking of his client's approval, despite bad news. These signals may also diminish the client's recognition of the seriousness of the case development. Or, if the client does fully recognize the problem, he may again feel alienated by his lawyer's insensitivity.

When discussing bad news in full doctrinal and procedural detail, the lawyer should be mindful of slowing, deepening, and dipping his voice empathetically at appropriate junctures, to enhance connection as the client absorbs more fully the import of the bad news. If the news is really all bad, the lawyer's voice should reflect and reinforce that reality.

## Confidence in Competence and Zealous Representation

Assume the client's feeling of connection with her lawyer remains intact despite the lawyer's having communicated the bad news that winning on a motion or at trial is unlikely. What if the client suspects the news is bad because her lawyer is less than effective in the litigation arena? The client might feel that the lawyer understands and cares about her, but conclude that he is not sufficiently forceful. Particularly where the bad news is predictive—a future defeat at trial or on a preliminary motion—how can the lawyer maintain client confidence in his analytical and persuasive competence and his willingness to advocate zealously on her behalf?

There is a bit of a paradox here, as some personal qualities of empathy and caring may be viewed as inconsistent with forcefulness. Excellent lawyers have both, but when the lawyer displays the "softer" characteristics, does he negatively impact the client's confidence in his ability to be aggressive? Some clients complain about the personal impact of a lawyer's insensitivity, but then seek the "tough mercenary" as best suited to wage war on their behalf.[16]

For a client to be fully informed, the lawyer must enable her to anticipate and understand legal arguments and counter-arguments, case or statutory analysis, process twists and turns, the

magnitude of risks, and a range of possible negative and positive outcomes, including their costs. That means that, even if the news is not all bad, the lawyer must ensure that his client fully appreciates what is potentially bad, and why. Thus, lawyers need strategies for communicating the realities of risk and costly consequences to clients, while enhancing clients' confidence in their competent, forceful, and zealous representation. The balance of this chapter suggests such strategies, with full respect and appreciation for the difficulty of the lawyer's role and obligations.

## Communicating the Force of the Other Side's Arguments (especially if you think they are likely to win)

The most challenging and important bad news for a lawyer to convey is a prediction that the other side's arguments or evidence are likely to prevail. Of course, lawyers sometimes must communicate a *fact* that is bad news—the court *did* grant the other side's motion for summary judgment—rather than a negative prediction. However, because negative predictions arise in contexts where the client is more likely to have choices and a decision to make, the lawyer's success in conveying them matters most. If the client understands and accepts the bad news prediction, he will carefully consider settlement options and, presumably, make a wise and informed decision.

So, what's the best strategy for ordering and structuring your presentation of your legal analysis and its conclusions—the negative prediction? Should you just state arguments that will be made by opposing counsel and explain that these were successful in too many similar cases? If you articulate the arguments for your client's position, will your client listen only to those and ignore or forget the opposition's strengths? Will your client then fail to accept your unwelcome conclusion that, despite valiant effort, her position is unlikely to succeed?

Unfortunately, many lawyers do just that: begin their explanation by presenting the other side's arguments. Fearing their clients will draw unwarranted optimism from review of their own arguments, the lawyers focus exclusively on the stronger arguments of the other side and their support in common law or statute. My experience suggests that the opposite strategy is far more effective.[17]

## • *Start with Your Side, and Articulate Your Client's Arguments Forcefully Before Moving to the Other Side and a Full Analysis*

Our actor-clients join me in recommending that your presentation to the client proceed in roughly the following order:

1) First, articulate the arguments you would make to the court or jury on your client's behalf;

2) then move on to articulate the opposition's arguments; and

3) finally, explain why you have concluded, in light of the applicable law, that the other side is more likely to succeed.

This order is more powerful—more likely to persuade the client while maintaining his confidence in your representation—than stating the opposition's arguments first, followed by a de-emphasized summary of your arguments.

Why? Imagine the conversation that starts with presentation of the opposition's arguments. As he listens, the client begins thinking: "Hey, wait a minute, that's not right! What about this fact and that circumstance? Did my lawyer forget that fact? We have something to counter that . . . ." The client isn't absorbing the strength of the opposition's arguments; he's pushing them away. He may become agitated and argue back, troubled or angry that his lawyer appears to be on the other side.

Now imagine that the lawyer *begins* by articulating the client's position first, saying, "Here is how I would argue on your behalf, in writing and before the court . . . " and then outlining all of the facts, circumstances, and legal points on the client's side. These are easy for the client to hear, and he listens. The lawyer should present them with echoes of the tone, manner, and polish she would use before the court. Impressed by his lawyer's command of the case and her forceful representation, the client hears her make all of the arguments supporting his position. He harbors no doubt about his lawyer's zealousness, loyalty, or advocacy skills.

*Then*, the lawyer can and should say: "It's important for you to understand the arguments of the other side and why I believe they are problematic." She should then proceed to articulate the other arguments with equal skill. While the client still may find this difficult to hear, he will not have the reaction described earlier—questioning whether the lawyer remembered that fact and this counter-

argument. He is also less inclined to question his lawyer's forcefulness in making his arguments. He just heard her do so.

This order of presentation facilitates the client's acceptance of his lawyer's analysis. It is tremendously powerful for a client to see his loyal and forceful attorney hold all of his arguments in one hand, and then all of the other arguments in the other hand, and still, regrettably, reach an unfavorable or strongly pessimistic conclusion. That client is more likely to come to terms with the bad news, consider the consequences, and make a wise decision.

## • *Reduce Resistance by Preserving Ego and Identity*

A lawyer's choice of language, metaphor, elaboration, and inference in explaining a legal issue can greatly affect client response. Yes, the primary goals are clarity and accuracy. However, where a legal rule would suggest culpability on your client's part, clarity and accuracy are best achieved diplomatically, with attention to preserving ego.

Consider the plaintiff-client who slipped and fell on carrot juice spilled in a grocery store aisle. The defendant grocery store has filed a motion for summary judgment, under the "open and obvious" state law doctrine. Assume the lawyer has explained what summary judgment is and how the process works, and has signaled the bad news that the defense is likely to succeed on its motion. The lawyer now launches into a description of "open and obvious." He could say:

• *Applying the open and obvious doctrine, the court is likely to rule that the accident was more than 50 percent your fault because you could have and should have seen it and avoided the hazard.*

Or

• *Under the open and obvious doctrine, the defense will argue that it was your responsibility to watch where you were going and the carrot juice on the white floor was so obvious that anyone who was paying attention would have seen it.*

Or

• *Under the open and obvious doctrine, if a person is injured because of a dangerous condition that a reasonable person would have seen, the court holds them responsible. Here they are arguing that a reasonable person should have seen the carrot juice on the white floor.*

These characterizations of the open and obvious doctrine are all more or less accurate and clear. Your client would UNDERSTAND but would also resist, voicing a reaction, either internally or outwardly to the lawyer, such as this:

> *My fault?! My responsibility?! I didn't spill the carrot juice. How dare they?! I was paying attention, even if I wasn't staring at the floor while shopping for groceries. They weren't paying enough attention to clean up that spill. A REASONABLE person would have seen it?! I am a reasonable person, and I didn't see it. If I had seen it, I wouldn't have walked right into it, OBVIOUSLY!*

Driving the resistance is a personal identity/ego, making it difficult for the client to acknowledge that the court might indeed rule against him. If he acknowledges that risk, he must acknowledge himself to be a careless klutz, responsible for his consequent injuries and life upheaval.[18] That's painful, especially if it is inconsistent with his self-image (as it would be for most of us).

## • *Avoid Blaming the Client*

With the benefit of having observed hundreds of attempts at explaining the open and obvious doctrine, let me suggest this one instead to illustrate a different strategy of word choice:

> *If a hazard is out in the open, not covered or hidden, and there's an accident, and someone is injured in it, the law does not hold the property owner liable.*

Most clients will be more receptive to hearing that description and less inclined to fight it. What's different? This phrasing doesn't directly blame the client. It uses the neutral word "accident" and emphasizes the non-liability of the property owner. The reasonable person is absent because most clients bristle at any suggestion that they are not reasonable.

Of course, the phrasing *implies* most of what was troubling in the other explanations of the open and obvious doctrine. After all, the law doesn't impose liability on the store because the circumstances suggest the plaintiff's responsibility for this accident. Implication and inference are easier to let pass. This phrasing allows some time and some ego space for the client to listen, understand, and integrate his lawyer's conclusion about the risk posed by the open and obvious doctrine on summary judgment.

## • *Remove the Safe Harbor of Unfair and Abstract*

I have observed clients who, at some level, have come to understand the relevant law. However, because that law seems entirely and obviously unfair, they simply don't believe "deep down" that it would actually be applied against them. Lawyers and mediators become frustrated when clients hear patiently delivered, entirely clear explanations of the "open and obvious" doctrine, or "at-will-employment," or the "elements necessary to prove discrimination" and yet persist in certainty of victory, despite directly contrary case law or a lack of evidence. The lawyer has explained why the defense is *extremely* likely to prevail on summary judgment and why accepting a settlement offer makes sense. The client nevertheless looks forward to trial and requires infinitely more to settle. Is it about anger? Is the client saying he doesn't care about the risks? Maybe, but not necessarily. Sometimes, the client does *understand* the law, and *says* he accepts the lawyer's dire assessment, but he doesn't *really believe* it will come out that way.

Why doesn't he believe it could happen to him? Why can't he accept that his case will almost certainly end, before trial, without any recovery? Why isn't he worried that if he rejects settlement, he will come to regret it later? Has the client seen a dramatic film or read a novel on jury nullification of evil laws? Barring that theory, I suggest two reasons:

1) He can't imagine his case being dismissed. It doesn't seem real.

2) Losing would contradict his firm belief in the myth of our legal system as always just and fair, where the good guy always wins at the end.

Consider the strategies below when you sense your client understands your dire assessment but *can't imagine* or doesn't *believe* it.

## • *Assist Imagination with Real Stories*

Some clients are able to imagine the unimaginable upon learning of real people in similar circumstances for whom predicted bad news became reality. When lawyers refer to "comparable case law," we know that's what it means and, in the abstract, the client may also. Still, it is worth taking a moment to tell one of its stories:

*In a recent Ohio case, a 32 year-old man broke his back when he slipped and fell, not in a grocery store but in a cafeteria, on some splattered tomatoes. The court applied the open and obvious doctrine and granted summary judgment, and he recovered nothing, even though he had severe injuries – $60,000 in medical bills and $50,000 in lost wages.*

The client can identify with another person who has a name, slipped and was injured, and perhaps faced a similar decision about whether to settle. Rather than just talk about it, make it tangible. Give your client a copy of the case decision (or two) to touch, read, and re-read.

### • *Remember to Separate Liability from Harm*

Well-educated and intelligent clients may simply assume that claims are won on proof of injury alone. When a lawyer notes the risk of losing at trial or on motions, the client may assume the reality of his injury is at issue. Thus, he may disregard any lawyerly concerns about risk because he *knows* the injury will be easily proven. The client may also feel insulted and reject the idea of risk because it suggests he is lying or exaggerating. Lawyers should anticipate this by clarifying up front:

*There is no doubt that you were seriously injured and that you will be able to prove it to the jury. Even the defense recognizes and will certainly admit that you were injured in the accident. The problem is that we have to prove they were legally at fault and thus legally liable for the accident. Based on the witnesses and other information gathered in discovery, I see a serious risk of losing the liability question. If that happens, then even though everyone can see you were injured, you would lose and wouldn't recover anything.*

## On Myth, Belief, and Reality

Sometimes, resistance arises from the direct conflict between the lawyer's assessment and the client's strongly held myths about the legal system, discussed more fully in chapter 3. In the slip and fall example discussed above, the lawyer's conclusion that the client is likely to lose on summary judgment conflicts directly with the myth that the legal system is always fair and just and the good guy always wins. To the client, this is not fair and he is the good guy.

### • *Banish the Fairness Myth*

Too often, the lawyer's only choice is to expose and banish the myth directly. You might say: "I know we are taught that our justice system is perfect and fair, but it isn't, at least not all of the time." Reviewing examples of dismissals or verdicts that seem obviously unfair is important here, too. You can explain why and how, within our system, this can and does happen.

Leaving aside the summary judgment example, imagine a case in which you strongly predict your client will lose at trial, but the client can ONLY believe the jury will see the truth, and that is, of course, his truth. Address the myth of perfect truth head-on and note that the jury wasn't present and has to rely on witnesses and expert witnesses to try to reconstruct what happened. He may lose if there are conflicting witnesses—even if he knows and testifies to what happened.

Consider this example: your plaintiff-client maintains that his back injury was directly caused by the accident and the defense maintains he had a pre-existing condition in his back that was aggravated by lifting weights a few days before her fall. The experts disagree, of course. Your client knows his back was fine that day and he injured his back in the fall, and, because it is true and he is truthful (and good), the jury will recognize that. He doesn't really believe it could come out any other way.

The best advice for the lawyer is to acknowledge that perspective, first by articulating it directly:

*I know it's difficult to imagine that the jury would find your back injury wasn't caused by the fall, because it's your back and you know that's what happened. You are an entirely truthful person. The problem is that the jury doesn't really know you – they don't have your back, and they can't feel it. Unfortunately, the system is not perfect. The jury has no crystal ball that enables them to recreate the truth.*

## • *Or, Leave Myth Alone; Locate Reality Within It*

Myths tend to maintain residence; we believe them despite banishment orders. After all, if I can no longer believe our laws are always fair, what other pillars must fall? However, if your client comes to see how a law might sometimes be viewed as fair, he will acknowledge its power and reality and, only then, its potential impact.

Assume you have explained the very high risk of the judge granting the defense motion for summary judgment, based upon the open and obvious doctrine explained earlier. The client says he

understands, but he is determined to press on and asks what could happen at trial if he gets by the motion. You can tell your client is imagining himself testifying at trial, because he can't imagine that summary judgment will end it. When you raise the open and obvious problem again, the client responds: "The law isn't fair. It lets the grocery store get away with this. It helps the big corporation and not the little guy."

If possible, I recommend that you describe a hypothetical case in which that law would seem fair for your client. You might say:

> *Yes, the way the law applies here, it helps the store and not you. Of course, it could work the other way. Imagine that a storm blew a tree branch across the front walkway to your house. Your neighbor then came over to borrow the proverbial cup of sugar, tripped on the tree branch, and sustained real and costly injuries. She sued you, seeking payment. In that case,* ***you*** *would use the open and obvious doctrine to argue that the tree branch was out in the open and you shouldn't be liable to your neighbor. Of course, in your case, we will argue that the carrot juice was NOT as obvious as a tree branch and the defense will argue the opposite. As we discussed, I am concerned because I found a number of other cases in which judges applied the doctrine to some large spills and potholes. My point is that the open and obvious doctrine would protect you from your neighbor's suit, and you would find it fair. It does worry me here.*

While the client is asked to shift perspective in the example above, it is NOT for the purpose of generating empathy for his nemesis—the store. Rather, it is for the client to recognize that the law has a fairness rationale that he could accept in other circumstances. Not all "unfair" legal doctrines are so easily shifted for a client to see how he might seek their protection. However, it is well worth the effort to imagine and discuss such a circumstance, where your client is wrestling with a conflict between reality and the myth of fairness. Our actor-clients confirm that, when led to understand how the law *could* be fair, even to the "little guy"—and thus fit within the law's fairness myth — they will accept its reality.

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[1] "Gen. Colin Powell to speak at FGCU in March," *FGCU Vision*, Fall 2006, http://www.fgcu.edu/CRM/Files/Issue2-Volume6.pdf (accessed May 23, 2011).

[2] William Shakespeare, *Henry IV*, part 2, act 1, sc. 1, http://www.opensourceshakespeare.org.

[3] Douglas W. Maynard, *Bad News, Good News: Conversational Order in Everyday Talk and Clinical Settings* (Chicago: University of Chicago Press, 2003), 4.

[4] Ibid. 12.

[5] Ibid. 24 (emphasis in original).

[6] E.g., Maynard, *Bad News, Good News*; Douglas W. Maynard, "On 'Realization' in Everyday Life: The Forecasting of Bad News as a Social Relation," *American Sociological Review* 61 (1996): 115; Linda F. Smith, "Medical Paradigms for Counseling: Giving Clients Bad News," *Clinical Law Review* 4 (1998): 391; Jeremy Freese and Douglas W. Maynard, "Prosodic Features of Bad News and Good News in Conversation," *Language in Society* 27, no. 2 (1998): 198. Maynard has been on the forefront of "bad news" research, and the discussion in this chapter draws primarily from his work, even as applied in legal settings. See Douglas W. Maynard, "Bad News and Good News: Losing vs. Finding the Phenomenon in Legal Settings," *Law & Social Inquiry* 31, no. 2 (2006): 477. Professor Linda Smith's discussion of delivering or receiving bad news in the legal context largely echoes Maynard's insight and advice.

[7] Much of this specific advice can be found throughout Maynard, *Bad News, Good News*, and in Smith, "Medical Paradigms for Counseling."

[8] Maynard, "On 'Realization' in Everyday Life," 110.

[9] Maynard, *Bad News, Good News*, 38.

[10] Smith, "Medical Paradigms for Counseling," 406.

[11] Ibid. 411.

[13] "Forecasting in the sense of preparation more effectively provides for recipients' realization because it enables recipients' own forecasting of the news in the second sense." Maynard, "On 'Realization' in Everyday Life," 110.

[14] Increased speech rate and higher pitch indicate eagerness and excitement. Freese and Maynard, "Prosodic Features of Bad News and Good News in Conversation," 198.

[15] Freese and Maynard, "Prosodic Features of Bad News and Good News in Conversation," 198.

[16] A number of experiments report that an attorney's personality, expression of understanding (client orientation), and relationship skills were linked to greater client satisfaction. See Marcia Hillary and Joel Johnson, "Selection and Evaluation of Attorneys in Divorce Cases Involving Minor Children," Journal of Divorce 9, no.1 (1985): 93-104 and Stephen Feldman and Kent Wilson, "The Value of Interpersonal Skills in Lawyering," *Law & Human Behavior* 4 (1989): 311. In another experiment, clients tended to choose lawyers they perceived as competent but the clients were not skilled at perceiving competence. Surprisingly, in that experiment, lawyers scripted to use "sophisticated comforting skills" in a divorce case scenario were viewed as less competent by clients. The authors posit, however, that the personal nature of the case and "comforting" interventions at the beginning stages of an initial interview may have seemed inappropriately and uncomfortably intimate. I tend to agree, given the actual script used. David Dryden Henningsen and Iona Cionea, "The Role of Comforting Skill and Professional Competence in the Attorney-Client Relationship," *Journal of Legal Education* 57, no. 4 (2004): 530–538.

[17] This approach draws upon insight into the "tension between empathy and assertiveness" described in the influential book written by Robert Mnookin, Scott Peppet, and Andrew Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, MA: Belknap Press of Harvard University Press, 2000), 44–68.

[18] Douglas Stone, Bruce Patton, and Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (New York: Penguin Books, 1999), 111–116.