

DEALING WITH DIFFICULT CLIENTS, DIFFICULT LAWYERS AND DIFFICULT JUDGES

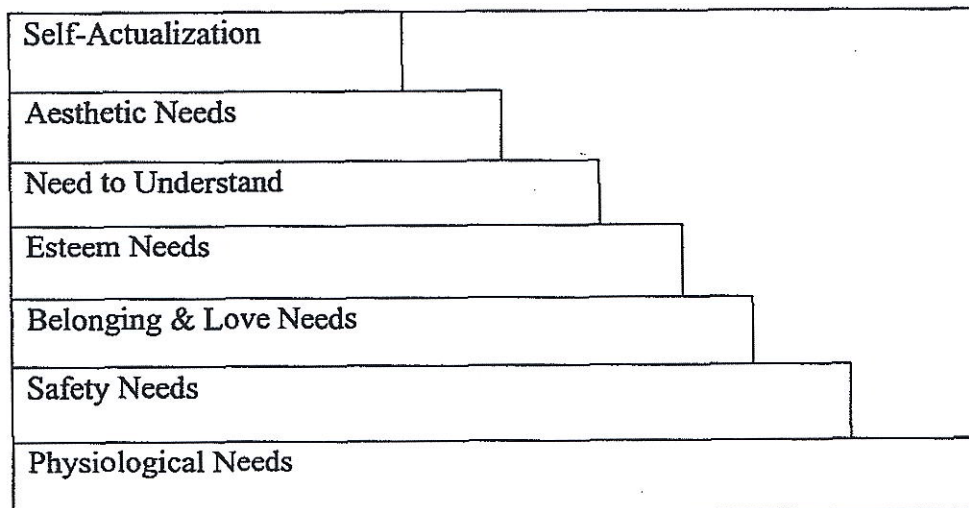
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Ours is the business of conflict resolution. Many young lawyers seem surprised by that fact. Obviously those who fancy themselves to be litigators are far more, or at least should be, aware of their role as combatants on behalf of others. My purpose in making these remarks is to share some of the wisdom I have acquired after almost twenty years of practice as a divorce lawyer.

I have been told in the past that there are no more difficult clients, or, one might add, lawyers, than those involved in divorce proceedings. The generally temporary insanity attributable to the divorce litigants should be considered contagious since the lawyers and judges involved with these cases so frequently seem to become infected.

Nice people behave very badly during a divorce. But then nice people will often behave very badly whenever they find themselves threatened in very basic ways.

Abraham Maslow established a hierarchy of needs which is proven true time and again in the divorce proceeding or any conflicted situation in which those needs are threatened.



Divorce proceedings are perhaps the most dramatic examples of the impact leaving these needs unmet can have on the individual. The most basic of needs, shelter and food, are often threatened. Maslow has taught us that when these needs are satisfied, and they can only be adequately satisfied in the sequential order of his chart, the individual is able to move on to the next level. We, as counsel to the disheartened client going through a divorce or other serious and threatening litigation, would prefer the client stay in the less needy and more intellectual functioning levels. Unfortunately, it is not going to be possible. As a result of our unwillingness to meet them at their level and their inability to get to our level the attorney/client relationship becomes troublesome leading to, at best, disgruntled former clients (not a good source of future referrals) and, at worst, ethics complaints and malpractice claims.

So what is the message. You must become psychologically minded. The first step is to become aware of the human being before you. You must become skilled in empathy. The best way to accomplish that is to learn to communicate and listen effectively. Search out and utilize opportunities to develop your skills in communication. Just because you can put together a brilliant closing argument does not mean you are a good communicator – just ask your spouse or children. In fact, trial lawyers are famously inept when it comes to interpersonal relationships. Like it or not you do have to have a relationship with your client. The quality of those client relationships may well dictate your survival in the practice and limits of your success. It may be distant; it may be friendly; it may even be all those things as well as effective and businesslike, but if you think you can survive in this business without understanding relationships and being effective in relationships you are seriously deluded.

Effective communication skills permit you to hear what is being said to you – to really hear what is being said to you not just what you want to hear being said. Have you ever interviewed a client in detail in order to get all the facts about what happened? You notice that they tend to not finish their sentences. You resist the rude practice of actually finishing the sentence for them, but in the pressure of time to complete the interview you begin drawing conclusions and noting them down. You finish those sentences in your mind. The conclusions are the ones the client, who is looking for an advocate for their cause, want you to draw. You go forward with that motion based on those “facts” only to discover that the facts are not as you suspected. Your client feels absolutely no responsibility for the debacle since he/she did not actually tell you the untruths – you concluded them and they never stopped you.

Thus the first lesson is the simple technique known as active listening. It is as simple as this:

Mirror back what was said and insist on affirmation;

“What I am hearing you say is..... Is that right? Is there more?”

Then summarize the essence of what was said and, again, insist on affirmation or clarification.

This simple technique, as irritating as it can be in it’s inept application, performs a remarkable function of gathering correct information, but also allows the client to feel heard.

During client interviews, when you validate a client's feelings by actively listening and then actually say something like, "I can understand, because....., it makes sense because....., you are not necessarily agreeing but you are acknowledging that you are listening and most important confirming that you get it.

Lawyers know they have an ethical duty to communicate, we usually think in terms of returning phone calls and copying correspondence to the client. Perhaps more important and rarely considered is the duty to make sure the client understands and the lawyer gets what the issues really are.

The practice of family law is the ultimate arena since that is the place lawyers and judges most often lose the *self* they created in law school. We may not have experienced a personal injury or a theft of intellectual property but each and every one of us has experienced the presence or absence of family relationships. Thus we bring to these disputes the thoughts, feelings and fears of our own life experiences. We make judgements about the rights and wrongs based on our own experiences. The law in this area is highly subjective and applied in a discretionary fashion. The values and beliefs we have acquired through our life experience affect our representation of these facts in the courtroom.

We are trained to be advocates – warriors. Hired to defend the weak. Very few of us can let go of that mission when the battlefield becomes a quagmire and issues obscure. Seasoned warriors are aware of the pitfalls that await the advocate who blindly sets out to wage war with only the client's description of the battlefield. They know to listen to the client's tale with some gracious skepticism and curiosity – will the story be proved true? The disease of the young lawyer is indignation and righteous enthusiasm, based on little substantiated fact but a lot of energy.

It is here that the next important skill comes into play – establishment of boundaries. Boundaries involve setting a limit. Marking out the place where the client can not go and you will not be found. Limit setting is perhaps the most important skill of the lawyer – certainly the family lawyer. These clients, in particular, want someone else to be responsible for their problems and when their unhappy life continues after they got rid of the spouse who made them so miserable you are next in line to blame. Tens don't marry ones. It's not your fault. It is not your life.

Keep your distance from all clients. For some that simply means lunch meetings are fine, but no socializing with family members. Some corporate practices require the attorney and client to be particularly close. Such intimacy is always troubling – how does the lawyer advocate the client's best interests (which may be in conflict with their immediate desires or the best interests of the entity ultimately represented). Well-established boundaries mean that your phone number can be in the book and the clients do not abuse the privilege. Well established boundaries also mean that you can try a case in front of a judge, get a result that is absolutely contrary to every law known to all humankind and still exchange a friendly greeting with that judge the next morning. The irony for the lay person is that we can engage in vigorous litigation with a dear friend on the other side and have dinner together the next weekend. We have to be able to separate *ourselves* from our roles. The moment things get personal is the moment to, as they say in the chemical dependency community, "check yourself".

| Professional | Personal |
|--|-----------------------|
| paid | not paid |
| time-limited | may be forever |
| structured | spontaneous |
| power over | more equal power |
| greater responsibility | equal responsibility |
| requires preparation | does not |
| orientation, training contractual agreement | personal choice |
| can I work with this person? | do I like this person |

Establishing and maintaining appropriate boundaries is the responsibility of the professional, not the client. Clients may also need to work on their boundaries but the professional is in charge of this particular relationship.¹

Understand the victim/abuser model. While the application in family law matters, domestic violence and the ex parte proceedings is obvious, the model applies to other areas and interactions as well. The aggressive entrepreneur may find it necessary to victimize each young lawyer in your firm as a way of measuring his or her worth. The opposing counsel who is lovely to you on the phone but rude and demanding with your staff is exceeding appropriate boundaries and abusing your relationship. The judge who does little to control the courtroom – allowing all sorts of shenanigans from opposing counsel is setting the stage for a victim/abuser model. In each instance the individual described can be continuing to play out his or her own particular brand of personal history as an abuser or victim. Trust your intuition, trust your stomach. Follow that most basic of ethical precepts “avoid the appearance of impropriety”.

Ironically, abusers and victims need each other to continue their pathology. Like the snarling dog smelling your fear, the abuser personality and even the victim personality will need the relationship they have with you to take on the character with which they have the most comfort. Hence, that eerie feeling that you want to abuse the domestic abuse victim sitting across from you in your office or your opposing counsel reminds you of your mother at her worst.

That victim may have a difficult time interacting with you, or anyone who sits in a position of authority, without the roles being played out. How else to explain the pattern both victims and

¹ Materials from the Boundaries Course taught by _____.

abusers employ to generate seemingly endless litigation: the sense that the lawyers and judge are just playing out the family pathology.²

Believe it or not, I have found the answer to dealing with this behavior in etiquette books. Obviously you first have to be aware of and vigilant to identify the behavior, but then once discovered simply refuse to engage. You have the power of refusing to accept the rude and inappropriate conduct. When opposing counsel is verbally abusive, loud and shouting over the phone, simply advise him that you are terminating their privilege of doing business with you over the phone – all further communication will have to be in writing – and confirm that by fax. When your obsessive compulsive client faxes you documents four to six times a day, calls you and your paralegal and your associates two or three times daily and demands weekly 90 minute meetings, set a limit. Do it with courtesy and respect, but lay the ground rules and establish a baseline for expected conduct. Failure to comply is non-cooperation and grounds for terminating the attorney/client relationship.

A trial judge who humiliates you on the record before opposing counsel and clients may well be worth your effort of a separate later contact, after the matter is concluded, to explore the reasons for the judge's attitude. Many people are not aware of how they sound and that is why the communication techniques I discussed earlier are so important. It is possible to say to an opposing counsel or judge "did you intend your remarks to be insulting, because that's how I heard them." I have approached judges and asked them for 15 minutes of their time to discuss "something personal" and presented in a respectful manner my concern that there was something about my court room presence which was offensive or alienating. While I may not receive an acknowledgment or an apology – in each and every instance future court appearances have been much more successful. Courtesy reduces stress, greeting opposing counsel and their client with a handshake and making introductions does not weaken your case. The courtesy of a phone call to express regret that the pressure of other matters will not permit you to respond to a request immediately allows everyone to relax.

Everyone needs to find their own technique and ways to survive in the practice. Don't ignore the time honored rules for acceptable social interaction.

² These concepts were drawn from the work of James Maddock, Ph.D., L.C.P., Meta Resources, St. Paul, Minnesota, Power, Control and Victimization, 1990. "Everyone has been victimized in some way; therefore, the basis for empathy with the victimized individuals is already established....[assault, verbal abuse, divorce, illness, poor grade, missing a promotion or raise] Victimization, while not always overtly 'traumatic,' always involves an 'ego wound,' an injury to the sense of self. The primary emotional components of victimization are shame (vulnerability of the self; a sense of defectiveness) and rage (undirected frustration; the urge for violence). Both of these are very 'primitive' emotions that are largely irrational and not amenable to 'rational' explanation. Victimization almost always triggers a need to blame – either someone/something else or oneself. The pain of victimization is so great that denial (non-recognition) is a major defense mechanism. This mechanism is both useful (providing protection from negative emotions or from cognitive re-living of traumatic experiences) and problematic (creating an inability to deal with certain situations realistically or to acknowledge certain experiences). The mechanism of denial is not the same as 'lying,' although it may include a kind of 'lying to oneself'. Experiences with the perpetrator/victim interaction pattern teach the participants both roles. All perpetrators have been victims; victims are capable of perpetration."