

Building Strong and Effective Attorney/Client Relationships: Communicating To Understand And Be Understood

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Rethinking How We Communicate:

- Are we communicating in the best way to be understood by our client?
- Are we communicating in the best way to understand our client and the case?
- “Adequate communication with clients is an integral part of competent professional performance as an attorney.” *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.

Duty to Communicate:

- *Applicable* rules:
 - [California Rules of Professional Conduct](#), Rule 1.4 (effective Nov. 1, 2018)
 - Business & Professions Code § 6068: Duties of Attorney
- *Appellate attorneys have a duty to:*
 - Reasonably consult with the client about the means by which to accomplish the client’s objectives (Rule 1.4(a)(2))
 - Keep the client reasonably informed about significant developments relating to the representation (Rule 1.4(a)(3); B&P Code § 6068(m))
 - Promptly comply with reasonable requests for information and copies of significant documents (Rule 1.4(a)(3); B&P Code § 6068(m))
 - Explain a matter to the extent reasonably necessary to permit the client to make informed decisions about representation (Rule 1.4(b))
- *Also consider* [ABA Criminal Justice Standards for the Defense Function](#)

Finding our client:

- If on probation: look in the record for the address, and possibly a phone number and email
- In custody, go to FDAP's webpage: [Locating and Contacting a Person in Custody](#)

First communication with the client:

- *Importance:*
 - Important opportunity to lay the groundwork for the attorney-client relationship, gain trust, elicit the client's input, and set expectations.
 - The client is at a vulnerable point in the process, where they have recently been sentenced and incarcerated or put on supervision; this is sometimes when reality starts to set in for the client and the client's loved ones.
 - If your client is a parent, grandparent, or child in a dependency proceeding, this initial contact is important, to garner trust and to invite them to keep you informed of new developments in ongoing court proceedings.
- *Timing and format:*
 - Usually by letter, because we need to communicate several matters: our appointment, our role, the appellate process, the rough timeline of events, etc.
 - Send out immediately upon appointment, even if the record preparation is still in process. *Consider* ABA Standard 4-3.1: "(a) *Immediately upon appointment* or retention, defense counsel should work to establish a relationship of trust and confidence with each client."
- *Readability:*
 - Before drafting this first letter, consider your client's reading comprehension:
 - What is the age of the client and education level?
 - Is the client fluent in English? If not, should there be a translation included?
 - Are there competency issues that you can discern from the record?
 - Also consider whether the client has been through the appellate process before or if this is the first time and they are wholly unfamiliar.
 - To test readability in Microsoft Word, enable Show Readability Statistics

- *Ethics implications:*
 - “[O]n any matter which requires client understanding, Attorney must take reasonable steps to ensure that the client comprehends the legal concepts involved and the advice given, irrespective of the mode of communication used, so that the client is in a position to make an informed decision. Attorney is not truly ‘communicating’ with the client if the client does not understand what Attorney is saying – whether because of a language barrier or simply a lack of understanding of the legal concepts being discussed. This would be the case whether Attorney is communicating with the client in person, on the phone, by letter, or over the internet.” If not communicating in person, “it may be more difficult for Attorney to form a reasonable belief that the client understands her, as Attorney will be without nonverbal cues (such as body language, eye contact, etc.) or even verbal clues (such as voice inflections or hesitations). Thus, Attorney may need to take additional reasonable steps to permit her to form a reasonable belief that she truly is ‘communicating’ with her client.” [State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-184](#)
 - *Also consider:* ABA Standard 4-3.1(d): “In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability.”

Communications geared toward understanding our client and the case:

- *Communicating with trial counsel:*
 - Contact early, while the case is still fresh and the file is not in storage
 - Ask about the client to understand the client’s level of comprehension and involvement in the process, any language barriers, or any competency issues
 - Figure out what issues were most important to the client and trial attorney
 - Ask whether there were family members who were important in the case that might be helpful (to help with communications, or the parent of a minor client, etc.)
 - Have the trial attorney keep the file handy or transfer it to you
 - Ask trial counsel how to best communicate with client

- *Discussing issues with the client:*
 - Once you have identified issues for appeal, check in with the client
 - Are you understanding the full picture of the incident or events that gave rise to the case?
 - What aspects of the process, sentence, or orders of the court are most concerning for the client? Maybe one of the charges is particularly impactful for reasons other than would be obvious from a legal standpoint.
 - Have you explained why you intend to raise certain issues but not others? Have you explained what types of errors the court will consider, the need to have the error documented, the levels of deference for different types of errors, and the harmless error standard, if the client is engaging on the issues and is able to understand these concepts?
 - *Consider:*
 - Rule 1.4(a)(2): “A lawyer shall: . . . reasonably consult with the client about the means by which to accomplish the client’s objectives in the representation”
 - ABA Standard 4-9.2(c): “After examining the record and the relevant law, counsel should provide counsel’s best professional evaluation of the issues that might be presented on appeal. Counsel should advise the client about the probable and possible outcomes and consequences of a challenge to the conviction or sentence.”
 - Warmth: are you reflecting empathy, support, and patience?
- *Investigating further, if needed:*
 - Investigate and question the record
 - Is there something troubling you have learned from your client that is not reflected in the record?
 - Do you need to examine documents that were produced but not put into evidence?
 - Do you need to consider competence issues that were not raised?
 - Do you need to further investigate possible ineffective assistance of counsel?
 - *Consider:*
 - ABA Standard 4-9.3(k): “Appellate counsel should consider, in preparing the appellate briefing, whether there might be any potential grounds for relief using other post-conviction

remedies (such as habeas corpus), and consult with the client regarding timing and who might represent the client in such actions.”

- ABA Standard 4-9.6(a): “If appellate or post-appellate counsel is satisfied after appropriate investigation and legal research that another defense counsel who served in an earlier phase of the case did not provide effective assistance, new counsel should not hesitate to seek relief for the client.”

Ongoing communication considerations:

- *Letter communications:*
 - Are you sure that your client is receiving your correspondence? If not, confirm that you have the right contact information.
 - *Ethics implications:*
 - “[O]nce Attorney begins the representation, she must keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents. . . . Attorney must take reasonable steps to determine that the client in fact is receiving the information in a timely manner.” Ethics Opinion No. 2012-184, *supra*.
- *Legal calls and video conferencing:*
 - May be suspended during COVID-19 pandemic
- *Prison makes communications hard, but does not excuse duty:*
 - See ABA Standard 4-3.1(f): “Defense counsel should actively work to maintain an effective and regular relationship with all clients. The obligation to maintain an effective client relationship is not diminished by the fact that the client is in custody.”
- *Duty to supply documents, if requested:*
 - The original file and transcripts belong to the client and, normally, should be sent to the client when the case is over. But, the client may want copies of the record during the appeal. In no-issue cases, counsel should normally send the record to the client upon filing the no-issue brief, unless there is a strong indication the client does not intend to file a supplemental brief. In cases in which merits briefs are filed, appointed counsel will be reimbursed for copying up to 200 pages of the record for the record.

- If the client requests extensive records before the case is over, counsel should explain that they need the originals for the on-going representation; if the record is digital, offer to send it to a family member or a friend for reproduction; if paper only, suggest that a family member or a friend could pay for the reproduction.
- In sending records to the client, take great care in ensuring confidential information the client is not entitled to is redacted and that the records do not contain the type of sensitive information (e.g. sex offense cases) that would put the client at risk in prison.
- *Consider:*
 - Rule 1.4, comment 2: the lawyer may supply documents “by electronic or other means.”
 - ABA Standard 4-3.9(b): “Defense counsel should promptly comply with the client’s reasonable requests for information about the matter and for copies of or access to relevant documents, unless the client’s access to such information is restricted by law or court order. Counsel should challenge such restrictions on the client’s access to information unless, after consultation with the client, there is good reason not to do so.”

Texting with clients who are not in custody:

- *Pros:*
 - Expedient and likely to be read immediately -- 95% of texts are read within 3 minutes of being sent¹
 - Familiar to many clients as their usual mode of communication, especially younger clients -- at least 97% of smartphone users text regularly and texting is the most frequently used form of communication among Americans younger than 50 years old
 - More likely to elicit a response or confirmation from the client than a letter -- the average response time for a text is only 90 seconds

¹ Kenneth Burke, 107 [Texting Statistics That Answer All Your Questions, Text Request](#), Jan. 24, 2019, at; Tom Kulik, [To Text, Or Not to Text, Clients: An Ethical Question for a Technological Time](#), Above the Law, Feb. 11, 2019; Jaliz Maldonado, [What About Attorney-Client Privilege When Text Messaging](#), National Law Review, Dec. 17, 2018.

- *Cons:*
 - Client has your cell phone number
 - Client may be texting you outside business hours
 - Requires new ethical considerations
- *Best practices:*
 - Use for non-substantive exchanges, such as scheduling or confirming that the client has received a letter
 - Remember that text message histories are not stored on your phone indefinitely, unless you use a special app that keeps all of the messages
 - Remember that new text messages might pop up on your screen and show the client's name and/or phone number and potentially some portion of the message. Adjust your settings accordingly to avoid an unwanted breach of attorney-client privilege.
 - Your phone should be password protected (for many reasons!)
- Consider:
 - *Confidentiality rules:*
 - A lawyer has a duty to “maintain inviolate the confidence, and at every peril to himself or herself, preserve the secrets of his or her client.” B&P Code § 6068(e)(1).
 - Rule 1.6(a): “A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.”
 - Technology competence expectations: ABA Model Rules of Professional Conduct Rule 1.1, states that “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” In Comment 8 to that Model Rule, such competence now includes technological competence — “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”

Showing that the client has been heard:

- If the client has asked about including certain issues in the briefing that you do not believe are colorable, have you explained your reasoning to the client?
 - If the client is actively involved in his or her own research, consider including citations and copies of case law for the client.
- As the attorney, you have control over what issues to raise, but should seek to find agreement and understanding with the client.
 - *People v. Beckstrom* (1974) 43 Cal.App.3d 996,1001–1002: “There is nothing ... which says that an appellate attorney should abdicate his responsibilities as a professional man and become the lackey of his client. It is the lawyer, not the client, who after a review of the record chooses the issues.”
 - *Jones v. Barnes* (1983) 463 U.S. 745, 751: “[No] decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press non-frivolous points request by the client, if counsel, as a matter of professional judgment decides not to present those points.”
 - *But also consider*: ABA Standard 4-9.2(g): “Appellate counsel should discuss with the client the arguments to present in appellate briefing and at argument, and should diligently attempt to accommodate the client’s wishes. If the client desires to raise an argument that is colorable, counsel should work with the client to an acceptable resolution regarding the argument.”
 - *And consider*: The client decides what issues should be waived because of their potential detriment to the client. For example, the client might want to forego issues that could highlight an error in the defendant's favor. If there is an issue regarding the legality of a plea, the client determines whether to attack the plea and thereby lose its benefits as well as its burdens. These decisions require clear communication about the pros and cons from the attorney.
- Oftentimes, the statement of facts is a major point of sensitivity for the client. Have you explained the constraints that you are working under, but also thought creatively about how to address your client’s concerns?

Oral argument access:

- For many clients, oral argument is their “day in court,” even if you explain that it does not play a large role in their appeal relative to the briefing. Keeping them informed about the oral argument date and their options for involvement is important.

- If the client is in custody, they will not be transported for the argument. Consider, however, whether they might be able to make a request to prison officials to observe the oral argument on video, now that arguments are streaming online. This presents a new access to the courts question.
- Remind the client that their family and friends can attend (in person, or by video or phone if the argument is remote).
- If the client is out of custody, offer for the client to attend, and explain the process and how it is different from a trial court appearance. Set expectations for how the client should be dressed, when the client should arrive, where you will meet the client, the security process, and the courtroom decorum.
- *Consider:* ABA Standard 4-9.3(h): “If the appeal is set for oral argument, appellate counsel should explain to an out-of-custody client that the client is permitted to attend, and that attending the argument may have certain strategic advantages and disadvantages. If after consultation the client desires to attend the argument, counsel should help the client to be present. If the client is in custody, counsel should request a tape or transcript of the oral argument, and consider filing a motion for the government to transport client to the argument.” *This latter suggestion is not an option for an appointed case.*

Avoiding client dissatisfaction:

- It can help to set expectations early in the process about how and when you will communicate, and the stretches of time during an appeal that are mostly inactive on your part.
- Be responsive to the client’s communications. If they are too numerous, explain that you have received the communications, need to focus on finishing the brief (etc.), and will respond to the communications as soon as possible.
 - *Remember:* A lawyer shall “promptly comply[] with reasonable requests for information.” (Rule 1.4(a)(3) [emphasis added].)
- Be proactive about timely communicating anything that affects the timing of the appeal. Send a copy of all extensions (yours the AG’s, and County Counsel’s) as soon as they are granted.
 - *From a client:* “[W]hat frustrates me is . . . [counsel] not updating me on things. [Counsel] will say we will have a response by the 23rd and then the 23rd comes and I’m not contacted until the next week so now I’m oblivious to what’s going on.”

Dealing with difficult communications:

- Some clients engage in excessive communications or inappropriate or unwanted communications. In those instances, set boundaries and, if the client does not respect them, involve the Project if needed.
- If a client sends excessive communications, explain that you have to focus on finishing the client's brief, etc., and that you will respond within a certain timeframe. You can respond to multiple communications with one single response.
- If the client is trying to rehash the record or facts of the case, remind the client that the appeal is confined to the record and that you already have all of the information that the Court of Appeal will consider.
- If the client insists on debating the same issue repeatedly, assure the client that you have fully understood his or her position and that you need to move on to other issues.
- If a client sends inappropriate communications, let the client know that it is unwanted and will not be responded to in the future. Document and keep copies of these communications. Involve the Project if you are concerned.
- If you have any concerns about a challenging relationship with a client, consult the appellate project.

Communicating with family members:

- Sometimes family members can help facilitate communications with clients, especially if the client is a juvenile or hard to reach. Family members may be an important source of information about the client's needs. Cultivating a sense of partnership is important.
- *Ethical consideration:* An attorney cannot share attorney-client information without informed consent of the client. (Rule 1.6(a); B&P Code § 6068(e)(1).)
- Best role for family members: helping ensure that communications are received; prompting clients to return correspondence; seek involvement in participatory defense hubs.²

² [“Participatory defense is a community organizing model for people facing charges, their families, and their communities to impact the outcome of cases and transform the landscape of power in the court system.”](#) Participatory defense hubs are local organizations which provide a space for participatory defense. The [Participatory Defense Network](#) has helpful list of participatory defense hubs.

Communicating with clients with mental illness:

- Context:³
 - 45% + of the men and women in our state’s prisons have mental illness
 - In locally-run jails: 44% +
 - Number of people experiencing “serious psychological distress” in jails: 1 in 4 +
 - The proportion of incarcerated people in California jails with an active mental health case rose by approximately 63 percent between 2009–2019
 - It is estimated that up to 80% of parents with mental illnesses have lost custody of their children
- *Basic tips:*
 - Work to avoid characterizations that reinforce negative mental health stereotypes. Instead of *My client is paranoid*, consider *My client is afraid*.
 - Remember that mental health issues do not equate to incompetence or lack of intelligence.
 - Attempt to understand the limits of your own communication style and try to adjust to the needs of the client.
 - Pay attention to your own reactions to your client’s behavior.
 - Mental health is not static and might change through the course of your representation.
 - If the mental illness affects your client’s ability to focus, use short statements or questions to help them stay engaged with you.
- If you want more information on common mental illnesses, visit the [National Alliance on Mental Illness](#)

³ Data comes from the following sites:

<https://www.thebatterysf.com/batterypowered/givingtheme/california-prison-system/>; https://www.prisonpolicy.org/research/mental_health/;

[https://calhps.com/wp-](https://calhps.com/wp-content/uploads/2020/02/Jail_MentalHealth_JPSReport_02-03-2020.pdf)

[content/uploads/2020/02/Jail MentalHealth JPSReport 02-03-2020.pdf](https://calhps.com/wp-content/uploads/2020/02/Jail_MentalHealth_JPSReport_02-03-2020.pdf)

Julie Wertheimer, [The Statutory Stigmatization of Mentally Ill Parents in Parental Rights Termination Proceedings](#), 98 Neb. L. Rev. 746, 749 (2019)

A Word About Communicating With Youth:

Remember: *Young people are neurologically and developmentally different from adults.*

- Children and adolescents do not possess fully developed decision-making capacities. Their lack of knowledge and experience places limits on their ability to make decisions or understand the range of choices available to them.
 - They often exhibit immature judgment. Research shows that a number of developmental factors can contribute to a youth's immature judgment, including adolescents' susceptibility to peer pressure, differences in risk perception, tendency for risk-taking, and a focus on short-term rather than long-term consequences. They tend not to anticipate the consequences of their actions, minimize danger, and they are limited in making choices under fearful situations. Adolescents also experience labile emotions and greater impulsivity. Moreover, adolescence is marked by ever-evolving identity and moral development.
 - Research shows that the brain continues to develop into a person's twenties, with the areas of the brain responsible for the highest-level functioning, such as abstract reasoning, maturing last. The developmental delay in these parts of the brain affects judgment and decision-making by impeding the ability to plan ahead and learn from past experience. (Patricia Puritz, Katayoon Majd, *Ensuring Authentic Youth Participation in Delinquency Cases: Creating A Paradigm for Specialized Juvenile Defense Practice* (2007) 45 Fam. Ct. Rev. 466, 474.)

Accordingly,

- “Counsel must take all necessary steps to ensure that differences, immaturity, or disabilities do not inhibit the attorney-client communication or counsel’s ability to ascertain the client’s expressed interests. Counsel must work to overcome barriers to effective communication by being sensitive to difference, communicating in a developmentally appropriate manner, enlisting the help of outside experts or other third parties when necessary, and taking time to ensure the client has fully understood the communication.” (Nat’l Juv. Defense Standards, Rule 2.6 ([Overcoming Barriers to Effective Communication with the Client.](#)))

- *Take time to explain your role.* Many youth believe that attorneys work for the court, that they only defend the innocent, and that they will share attorney-client communications with judges and the police. (Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by in Re Gault* (2007) 60 Rutgers L. Rev. 125, 165 [hereafter, “*Joining the Legal Significance of Adolescent Developmental Capacities*”].) It is imperative that we anticipate a lack of understanding and confusion about these matters, and educate our young clients about our role in a manner that is developmentally appropriate.
- *Be on the lookout for language impairments.* While the rate of severe language disorders among adult prisoners has been estimated to be at least four to five times that of the general population, communication and language impairments among youth are even higher. Studies show anywhere from 58%-84% of institutionalized delinquents had language or communication difficulties many of which would be classified as “severe.”⁴ (Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters* (2011) 15 U.C. Davis J. Juv. L. & Pol’y 37, 44, fn 12 [hereafter: “*Breakdown in the Language Zone.*”]) The record may disclose an Individualized Education Plan, which may reveal conditions like ADHD and learning disorders, which have a high correlation with language disorders. (*Id.*, 102.) A trusted and involved family member may also be a source of such information. Communicating with language impaired youth requires more than converting legalese to plain English. Role-play, diagrams, and story-telling may be necessary. (*Id.*, 103–104.)
- *Be on the lookout for trauma,* which can interfere with the formation of strong client-attorney relationships by impairing the youth’s capacity to trust others, process information, and communicate. Telltale trauma reactions typically represent some version of fight, flight, or freeze.

⁴ “Poverty, ADHD, learning disabilities, poor academic performance, substandard literacy, behavior problems, and conduct disorders: these conditions are the stock in trade for the juvenile and criminal justice systems and are also closely associated with impaired language skills. This means that the individuals most at risk for language deficit are the very same people who are regularly on the docket in criminal and juvenile court and on the rosters in correctional facilities.” (*Breakdown in the Language Zone*, 65.)

(The National Child Traumatic Stress Network, Justice Consortium Attorney & Workgroup Subcommittee, *The Impact of Trauma on the Attorney-Client Relationship* (2017) 36 Child. L. Prac. 109.) Note that approximately three in five children in the U.S. experience at least one exposure to one of the following types of violence (physical assault, sexual victimization, maltreatment, property victimization, and witnessing violence). U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Bulletin: [*Children's Exposure to Violence, Crime, and Abuse: An Update \(2015\), 2*](#). An Office of Juvenile Justice and Delinquency Prevention report in 2013 found that 92.5 percent of youth confined in a Cook County detention facility had experienced at least one trauma, 84 percent had experienced more than one trauma, and 56.8 percent were exposed to trauma six or more times. ([U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention: Juvenile Justice Bulletin: PTSD, Trauma, and Comorbid Psychiatric Disorders in Detained Youth \(June 2013\)](#).) The [National Juvenile Defender Center website](#) provides tips on communicating with youth impacted by trauma.

- *Build a relationship with your client.* This is absolutely critical to effective representation. Research shows a direct correlation between the amount of time an attorney spends with a youthful client and the youth's understanding and appreciation of: the legal process and the roles of key participants; the consequences of proceedings; available legal defenses and likely outcomes. (*Joining the Legal Significance of Adolescent Developmental Capacities*, 169.)
- *Be warm, interested, and empathetic with your client* to facilitate effective communication and build trust. Adapt a client-therapist relationship model in which the client feels valued, safe, and understood. Be aware of, and tend to, your client's fears, stresses, and anxieties, to allow access to the executive center of the child's brain without competing with the social-emotional region. (*Joining the Legal Significance of Adolescent Developmental Capacities*, 170.)
- *"Translate" legal information in ways your young person can understand.* Youth process and use language differently than adults. Encourage the youth to participate, talk about what is on their mind. Use plain English, phrasing language and concepts simply, and avoiding compound questions or statements. Also avoid lengthy questions, and long narratives, which can be difficult for youth to

process. Encourage the youth to participate, talk about what is on their mind. To improve understanding, repeat ideas and information in a conversation with a youth, presenting the same concepts phrased in different ways. To promote greater understanding, limiting the number of issues discussed at a time is recommended. Too much information and too many questions creates confusion and anxiety. (*Joining the Legal Significance of Adolescent Developmental Capacities*, 171.)

- *Letters should be short, employing short sentences, communicating concepts simply.* Letters communicating important or complex matters should be followed up with a phone call or, if necessary, a visit. Representation of all youth should begin with a call to establish trust.