

# The Ethics and Effectiveness of Client Counseling

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## Background

- Lawyer, 25 years
  - Mediator, Tribal Court Judge pro tem
  - Associate, High Conflict Institute
  - Graduate Credit Certificate Interpersonal Neurobiology (sort of like an LLM in client relations), Portland State University
  - Trauma and Attachment, Bessel van der Kolk
  - Attachment and Psychopathology, Family Relations Institute, Patricia Crittenden
- Full resume <http://markbaumann.com/resume/>

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## Overview

1. Ethics and effectiveness are one in the same
2. Ethics review
3. Client centered counseling is our ethical model
  - Parentalism vs. paternalism
4. **Psychological, Neurobiological, Relational (PNR) sciences inform client counseling**
5. 6 primary PNR concepts are very useful for ethical and effective counseling
6. A 2 part, 4-step process helps guide ethical counseling and integrated client decision making

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## Hypothetical

The difficult case

“I want you to make him stop....”

“I want the court to [do something that seems patently unreasonable”

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## Part I. Ethics of Counseling: RPC's

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## RPC 1.2

- “\* \* \* a lawyer **shall abide by a client's decisions concerning the objectives** of the representation, and, as required by rule 1.4, shall consult with the client as to **the means** by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. \* \* \*.” [Emphasis added.]

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## RPC 1.4

- (a) A lawyer shall;
  - (1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
- (b) A lawyer **shall explain a matter to the extent reasonably necessary** to permit the client to make informed decisions regarding the representation. [Emphasis added.]

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## RPC 1.0(e) Informed Consent

- "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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## Withdrawing

- CR 71, detailed procedures including technical service requirements, 3 ways to withdraw
  - 10+ day Notice of Withdrawal
  - Order for Withdrawal
  - Substitution of Counsel (not substitution of a party)
- CR 5 ("Automatic withdrawal?")
- RPC 1.16 (duty to comply with withdrawal rules)

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## Right to Withdraw?

- *Kingdom v. Jackson*, 78 Wash. App. 154, 158, 896 P.2d 101 (1995)
- New case
- *In re Discipline of Lopez*, 153 Wn.2d 570, 106 P.3d 221 (2005)
- *In re Marriage of Padrta*, 2000 Wash. App. LEXIS 433 (unpublished);  
*In re Marriage of Bays*, 2006 Wash. App. LEXIS 163 (2006) (unpublished).
- *Lockhart v. Greive*, 66 Wn. App. 735, 834 P.2d 64 (1992)
- "Yay, they won the right to withdraw, on appeal. Or didn't."

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## Immediate Notice of Withdrawal (INOW)

- CR 71 prohibits notice of immediate withdrawal, requires order
- What is the effect of substantial compliance with rules?
- What is effect if not substantially complied?
  - Voidable or void notice?
- What is the difference between an invalid summons or subpoena and an invalid Immediate Notice of Withdrawal (INOW)?
- *Lockhart v. Greive*, 66 Wn. App. 735, 834 P.2d 64 (1992)
- *Barry v. Ashley Anderson, P.C.*, 718 F. Supp. 1492
- *Mentor v King*, 2001 Wash. App. LEXIS 1877 (unpublished)
- *Roderick v Ricks*, 2002 UT 84, 54 P.3d 1119, 454 Utah Adv. Rep. (2002).

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## INOW & Void Notice Problems

- Not protecting client's interests? RPC 1.16
- Continuing duty to represent? RPC 1.16, CR 71, *Lockhart v. Greive*, 66 Wn. App. 735, 834 P.2d 64 (1992)
  - Client's subjective expectation?
- Responsible for client's losses due to lack of representation?
  - *In re Discipline of Lopez*, 153 Wn.2d 570, 106 P.3d 221 (2005)
- For non-withdrawing lawyer
  - Limit on communicating with still-represented party? RPC 4.2 including comment 6
  - Who to serve? CR 5(b)

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## “You’re Fired. Stop Working!”

- See interplay of RPC 1.16 (a)(3), (c) and (d), and CR 71 (c).
  - You may need to keep working to protect client’s interests, and
  - Seek order for withdrawal.
- Client ambivalence
  - “I hate you, don’t leave me.”
  - “Leave me alone. Uh oh, now I am unprotected!”
- These are based on implicit relationship strategies developed in childhood, and the client is unlikely aware of their needs and the maladaptive strategies they have developed to meet those needs.

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## When Are You Done?

- CR 5, “Automatic withdrawal” after 63 days?
- The “attorney client relationship is an ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand that the relationship is no longer to be depended on.” *In re Weiner*, 586 P.2d 194 (Ariz. 1978).
- *How Long Does the Attorney-Client Relationship Last?*, 19 J. Legal Prof. 277, 287 (1995).
- Termination of the case terminates the representation. *Panattoni v. Superior Court*, 250 Cal. Rptr. 390 (1988).

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## Part II. Effectiveness of Client Counseling

1. Can an ethical approach be an effective approach?
2. How do the relational neurobiological sciences inform the question?

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## What Do Clients Really Want?

- **Clients care about the process more than the outcomes or “winning”**
- Cunningham, Clark D., (2001) *The Client's Perspective on the Initial Interview: A Social Science Approach*, A Research Program of The Effective Lawyer-Client Communication (ELCC) Project, Presented at The W G Hart Legal Workshop, Institute for Advanced Legal Studies University of London, online at <http://law.gsu.edu/Communication/HARTART2.pdf>.
- Cunningham, Clark D. (2006), What Clients Want From Their Lawyers, prepared for the Society of Writers to Her Majesty's Signet, Scotland, online at <http://law.gsu.edu/Communication/WhatClientsWant.pdf>.

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## What Do Client's Really Want?

- Effective client counseling skills involve much more than using plain language, prompt work, returning phone calls, and being clear about fees.
- Its about interpersonal communication skills:
  - making sure the client has been **heard**,
  - feels the lawyer **cared** for them,
  - **understand** the lawyer's advice, and
  - **has a voice** in the process.
- Malpractice claims are more common when these skills are neglected
- (Cunningham, 2006).

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## Client Centered Counseling

- Concept originated by famous American psychologist **Carl Rogers**
  - Use empathy to understand
  - Be genuine/authentic with client
  - Give Unconditional Positive Regard
  - Rogers, C.R. (1995). *A Way of Being* (p. 159). Houghton Mifflin Harcourt.
- Client Centered Legal counseling is a process designed to foster client decision making, and focuses on the client's needs, desires, values, and attitudes which the lawyer uncovers with careful listening, empathy, respect and compassion.
  - Dinerstein, Robert, Client centered counseling: Reappraisal and refinement, online at [http://www.law.indiana.edu/instruction/profession/doc/20\\_1.pdf](http://www.law.indiana.edu/instruction/profession/doc/20_1.pdf).
  - Burtch, Jack W. Jr. (2010), *The Lawyer as Counselor*, 58 Virginia Lawyer 26, and online at <http://www.macbur.com/global/Article-Lawyers-as-Counselors.pdf>.

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## Naïve Realism

- “If the client can just see the problem as I do, they would understand the solution, as I do.”
- “They don’t see the right solution, so I need to tell them.”
- Would empathy help with this problem?
  
- Ross, L. & Ward, A. (1995). Naive Realism: Implications for Social Conflict and Misunderstanding, Working Paper No. 48, Stanford Center on Conflict and Negotiation.
- Pearce, R.G., & Wald, E. (2011). The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law, 34 U. Ark. Little Rock L. Rev. 1

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## Lawyers as Counselors

- Binder, D.A., Bergman P., Tremblay, P.R., Weinstein, I.S. (2012, 1991). *Lawyers as Counselors: A Client Centered Approach*. West Publishing.
- Pre-eminent book on client centered counseling for lawyers
  
- Mediation theory (not necessarily practice) is infused with client autonomy
- Bush, R.A.B., & Folger, J.P. (2005 rev. ed.). *The Promise of Mediation: The Transformative Approach to Conflict*, San Francisco: Jossey-Bass. Elucidates an ultimate form client centered counseling for mediators

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## Binder’s Essential Client Centered Assumptions

- Clients are autonomous owners of their problems
- Clients can identify what is important to them
- Clients can assess value of consequences
- Clients can assess the risks
- There are legal and non-legal values, consequences and risks
- Clients are capable of decision making

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## Binder's Client Centered Counseling Characteristics

- Explore non-legal consequences
- Explore solutions -ask clients
- Encourage clients to make decisions
- Provide advice based on client's values
- Acknowledge client's feelings and recognize their importance

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## Paternal vs. Parental

- Paternal: the policy of restricting the freedom and responsibilities of subordinates or dependents in their supposed best interest.
- Parental: Imagining a bright future, encouraging towards it, accepting the future is not the parents choice

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## Psychological, Neurbiological, Relational Constructs of human behavior

- Shakespeare "hell hath no fury..."
- Psychopathology, personality dysfunction
- Neurobiological (e.g., genes, neurotransmitters)
- Autonomic nervous system
  - Fight-Flight-Freeze vs. Social Engagement System
  - Withdraw vs. approach
- Emotional-cognitive systems
- Attachment -relationship strategies to avoid danger
- Family/relational systems

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## Social Rejection

- Mark's RBA rule
  - Rejection Begets Aggression
- Definition of relationship rejection: subjectively perceived dramatic relational devaluation
- Leary, M., Twenge, J. & Quinlivan, E. (2006). Interpersonal rejection as a determinant of anger and aggression. *Personality and social psychology review*, 10(2), 111-132.

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## Rejection: More Finely Parsed

- **Belonging**, and/or
- **Control**
  - prosocial
  - antisocial (dominance, aggression, revenge)
- Gerber, J., & Wheeler, L. (2009). On Being Rejected: A Meta-Analysis of Experimental Research on Rejection. *Perspectives on Psychological Science* 4, 468-488.

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## Linkage and Differentiation

- All systems with multiple parts involve connecting and distinguishing the parts
- Functioning from one part of a system can produce sub-optimal results
- Integration of the whole can produce optimal results
- E.g. left and right brain hemisphere functioning
- Siegel, D. J. (2010). *Mindsight: the new science of personal transformation*. Bantam Books. See also Siegel, D. J. (2012)
- Siegel, D. J. & Payne-Bryson, T. (2011) *The whole brain child: 12 revolutionary strategies to nurture your child's developing mind*. Delacorte Press.
- McGilchrist, I. The Divided Brain. RSA Video at <http://www.thersa.org/events/rसानimate/animate/rsa-animate-the-divided-brain>

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## Seven Psychological Concepts for Lawyers

1. Danger-safety
2. Relationship (belonging)
3. System dynamics
4. Mastery (control)
5. Autonomy (choice)
6. Transcendent purpose (e.g., children's future)
7. Linkage and differentiation

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## Client Centered Elements: Reframed with a stronger foundation

- Provide safety
- Be in "relationship" (belonging)
- Consider "systems" (e.g. family system)
- Provide mastery (control)
- Promote development and exercise of choices
- Promote focus on higher transcendent purpose
- Promote optimal autonomy and decision making
- Link with and differentiate from client/problem

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## Comparing & Contrasting

- | Baumann   | Binder  |
|---|---|
| <ul style="list-style-type: none"><li>• Safety</li><li>• Relationship</li><li>• Systems</li><li>• Mastery (faux/actual)</li><li>• choices</li><li>• transcendent purpose</li><li>• integration</li><li>• link &amp; differentiate</li></ul> | <ul style="list-style-type: none"><li>• acknowledge feelings</li><li>• explore non-legal</li><li>• explore solutions</li><li>• encourage client DM</li><li>• advice based on values</li></ul> |

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## 2-Part, 4-Step Integrating Model

- **Link:** Step 1- **Safety and relationship**
  - Listen nonjudgmentally, deeply understand
- **Link:** Step 2 – **Faux mastery** (practice control)
  - maintain safety and explore issues and options
- **Differentiate:** Step 3 – **True mastery**
  - Pace and lead (safety), reality testing, mastery over options
- **Differentiate:** Step 4 – **Integration, control**
  - promote ability-based autonomy and decision making

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## Elements of Listening

- **Caring**
  - Empathy, sympathy, compassion, altruism, warmth, kindness, delight in the other.
- **Observing**
  - Presence, attention, fully experiencing the moment, labeling feelings with words.
- **Curious**
  - Interest, playful, lean into the emotion and feeling, explore.
- **Openness**
  - Nonjudgmental, non-attached, free from one's own internal evaluation, transparent.
- **Accepting**
  - Non-evaluative, unconditional positive regard, of what is, validation, accept thoughts and feelings without being "hooked."
- **Reflections**
  - Reflecting other back, micro-reflections, large and small summaries, reflecting on oneself and one's own feelings.
- **NonVerbal and unverbialized awareness**
  - Prosody, facial & body gestures, implicit (unknown and unstated) childhood &/or trauma memories, (most communication is nonverbal).

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## Practical Everyday Techniques

1. Set and maintain appropriate boundaries
2. Set reasonable expectations based on party abilities
3. Deeply listen and hear (especially what is not said) before assessing (listen:tell 10:1)
4. Interrogate with kindness and without judgment
5. Don't work (much) harder than your clients
6. Pace and lead, gently encourage movement towards a brighter future, just as you would your children
7. Promote or give choices
8. Stay detached from the outcome
9. Notice how you feel during the interaction
10. Maintain awareness of your own biases

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## Additional Resources

- Daicoff, Susan, (1997), *Lawyer, Know Thyself: a Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U.L. Rev. 1337.
- Burtch, Jack W. Jr. (2010), *The Lawyer as Counselor*, 58 Virginia Lawyer 26, and online at <http://www.macbur.com/global/Article-Lawyers-as-Counselors.pdf>.
- Wilcox, Gloria, *The Feelings Wheel*, online at <http://www.wecarewelistenwehelp.com/Feeling-Wheel.html>
- Zhang, L. (2006). Your money or your self-esteem: threatened egotism promotes costly entrapment in losing endeavors. *Personality & social psychology bulletin*, 32(7), 881.
- Krogh, Egil, Krogh, Matthew D. (2007) *Integrity: good people, bad choices, and life lessons from the White House*, Public Affairs Press.

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