How to Get Clients to Eat Their Spinach

by Ellen C. Brotman

Many years ago, when I was a new lawyer, I was also a new mother. At home, my husband and I were coping with two children under four; at work, I was representing a difficult client in my first custody matter in family court. My young careers had much in common. Each required me to convince some very stubborn people that I knew what was best for them. No matter how strongly they believed in their positions, both my clients and my children would have to learn to take my advice: you cannot take other people's toys; you have to eat your vegetables before you get dessert; no matter how bad the medicine tastes, sometimes you just have to take it. What I had to learn was how to give advice that could be heard, understood, and followed.

At the time, I was feeling pretty shaky in both of my careers. After a federal court clerkship, I had rejected a "big firm" offer and opted for a small firm in upstate New York where I could have the client contact and courtroom experience I craved. Almost immediately after I started my new job, I felt that my cravings would be satisfied beyond my expectations and, I feared, my abilities. The firm's practice had me appearing in every court from tiny town courts to the Court of Appeals for the Second Circuit. With each new assignment, my heart would pound, my stomach would flip-flop with anxiety, and I would nervously inform my boss, "I've never done this." His curt response was always the same: "That's why we call it practice."

So I began my first foray into family court. The client was the husband of a woman who had left him, her home, and her three young children. After two or three consultations, I did not blame her. I wished I could leave him. He was a controlling, manipulative bully. His goal for the custody hearing was to cut off his wife's access to his children completely. To accomplish this goal, he wanted me to call his young daughters to testify against their mother. Even with my lack of experience, I knew that his goal was unrealistic and his proposed methods were wrong. In fact, I was sure that using his daughters to testify against their mother was a terrible mistake that could backfire and hurt him badly, if not in the litigation, then later when his children were old enough to understand these events. But, how could I get him to hear the truth through his bitterness and pain? How could I get him to shake off the habits of a lifetime and behave as a responsible parent? In short, how could I get him to take my advice?

I was reminded of this situation a while ago as I was preparing to present a seminar with my colleague John Myers, an excellent and experienced litigator in my firm. *See* John M. Myers, *Obstreperosity*, LITIGATION (Fall 2006). The CLE was about communication with clients, particularly in-house counsel. It dealt with a multitude of thorny issues, including techniques we had developed over the years to persuade and, sometimes, push our clients to follow our recommendations. John, who can be very imposing, told me that years before, at the Public Defenders' Office, it was he who went to the prisons to convince the most hardheaded clients to accept "the deal." Sometimes this involved yelling, sometimes pounding the table. I am not imposing, and I look silly pounding the table. Over the years, I had learned to play to my strengths and, as a result, I had developed a softer persuasive style. But no matter what individual style of persuasion works for you, you need to follow some basic rules in order to give credible, sound advice that your client can hear and follow.

First, as in parenting, help is at hand. New parents can choose from a dizzying array of books on child-rearing and are the happy recipients of hours of unsolicited advice. In our profession, we can find help and wisdom in the Model Rules of Professional Conduct. These are rules with a capital "R." I

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view these rules as a how-to guide for the difficult dilemmas that arise during the attorney-client relationship. For instance, in the case of my family court client, the rules tell us that, as long as the arguments are not frivolous and do not further the commission of a crime or a fraud, "a lawyer shall abide by a client's decisions concerning the objectives of representation. . . ." Rule 1.2(a). Thus, I had to advocate for full custody to remain with my client, and seek to limit drastically his wife's access to their children, even though I knew these arguments would probably not prevail, and even though I did not believe it was the best result for my client or his children.

Making decisions about *how* to achieve a client's objective, however, is a grayer area. The rules tell us that only certain strategy decisions belong exclusively to the client. In civil cases, the client decides whether to settle; in criminal cases, the client decides whether to plead guilty, whether to waive jury trial, and whether to testify. Rule 1.2(a). As to other decisions, "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." The comment to the rule explains that "on occasion" disagreements about the means used to achieve an end may arise. The comment envisions an ideal world in which clients "defer to the special knowledge and skill of their lawyer with respect . . . to technical, legal and tactical matters," and lawyers defer to their clients on "questions as the expense to be incurred and concern for third persons who might be adversely affected." The comment states that because of the variety of contexts in which these issues can arise, the rule "does not prescribe how such disagreements are to be resolved." The comment advises the lawyer to "seek a mutually acceptable resolution of the disagreement," but if no such resolution is arrived at, the lawyer may, under appropriate circumstances, withdraw. See Rule 1.16(b)(4). (Termination of representation is permitted if "the client insists upon taking action . . . with which the lawyer has a fundamental disagreement.") The comment's other helpful suggestion is that the disagreement may also be resolved by the client, who can fire the lawyer. See Rule 1.16(a)(3) (requiring a lawyer to withdraw from representation after discharge). In my situation, I did not want to fire the client, get the firm fired from the representation, or get myself fired from the firm. But, as the hearing approached, I grew more and more certain that I did not want to call the children as witnesses.

There is one more rule that must have a prominent part in any discussion of how to give advice that can be heard, understood, and followed. Rule 2.1, denominated simply "Advisor," requires us to "exercise independent professional judgment and render candid advice." This advice is not restricted to legal considerations; it may also include "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." The comment makes clear that the requirement to give "candid advice" means we cannot shirk our responsibility to deliver bad news; though we can soften the blow as long as we are still being truthful. As the comment says, "[l]egal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. . . . [A] lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." On the issue of unsolicited advice, the comment states that while a lawyer "ordinarily has no duty . . . to give advice that the client has indicated is unwanted, . . . a lawyer may initiate advice to a client when doing so appears to be in the client's interest."

Thus, the rules told me that my client could determine the goals of the representation, we should try to agree on the methods, and I had an ongoing obligation to give it to him straight about both. Meanwhile, at home, my toddler and I were also clashing about goals and how to meet them. There I was, learning that the terrible twos could be managed through some little "r" rules arrived at through experience, judgment, instinct, and selectively accepting the advice of others. In conjunction with the big "R" rules, these little "r" rules have helped me develop a client base that trusts my judgment, follows my advice, and knows that I mean business when I say spinach before dessert. I present these rules in what I believe are their order of importance.

My first rule is "listen." Our ability to persuade clients is measured by how much they trust us. Building trust with clients, as with children, requires understanding and empathy. Whether you represent a corporation or an individual, clients need to know that you have heard their story, that you understand how they feel, and that you care about their concerns. Often in client meetings, we have so much expertise that we want to share that it is hard to just stop and listen. But before we can work with our clients to develop realistic goals and successful strategies, we need to do more than just wait for the client to stop talking so that we can start.

I am a firm believer in the power of "active listening," a skill I learned when I had my second child. My first child, who was not yet four at the time, was not happy about this interloper and would frequently tell me that she hated him. Like other parents, I was dismayed and tried to convince her that this was not true. Then one day, I tried some "active listening" skills I had been reading about. Here is how the conversation went:

My daughter: "I hate the new baby. Let's give him back."

Me: "You hate the baby and wish he wasn't here."

My daughter: (surprised!) "Yes!"

Me: "You liked it better when he wasn't here."

My daughter: "Yes! Let's give him back."

Me: "I hear you say that you want to give him back. We can't do that. Is there something else we can do that would make it easier for you to get used to him?"

My daughter thought this over and came up with some ideas, including keeping her brother out of her bedroom while I read to her before she went to sleep. Once my daughter felt that I had heard her concerns and understood how she felt, together we could move forward to establish some reasonable goals.

As I learned to use active listening to help me with my children, I began to try it with my clients. With my difficult family court client, I stopped trying to persuade him that his goals and methods were wrong and instead listened carefully to his description of how his wife's leaving the home had affected him and his children. As I listened, I heard the pain and humiliation, the abandonment and rejection. This did not change my opinion that the client was a bully whose anger was preventing him from doing what was best for his children and whose controlling temperament had probably driven his wife away. What active listening helped me hear was that, no matter what his culpability in the situation was,

he was a human being in pain. I could also hear that my client believed that any emotional harm his daughters suffered as a result of testifying would be their "mother's fault," not his. This insight helped me see the futility of trying to persuade him to avoid that harm. Instead, I tried another argument: I advised the client that using his children as witnesses was simply a poor litigation strategy because there was a danger that the court would see his daughters' testimony as evidence that he was not acting in the children's best interests and would hold this against him in deciding the custody issue. The client could hear this advice and was receptive to its reasoning, whereas my earlier attempts to persuade him based on what I believed was better for all the parties had fallen on deaf ears.

Recently, I was counseling a client who was about to be arrested for a large-scale fraud scheme affecting hundreds of victims and involving millions of dollars. The jig was decidedly up, and it was time for another in a series of difficult conversations about this case. Of most immediate concern was whether the government or the court would agree to pretrial release or whether we would be preparing for trial in a detention center. I met with the client and tried to explain to him the probable outcomes and our different options. The client repeatedly told me that he could not go to prison, that I would have to find a way to keep him out of prison, and that he knew of many cases of larger frauds where the defendants did not get prison terms, implying that any prison term here would be a result of my shortcomings. Although I felt myself getting impatient, I forced myself to focus on my client and listen. What I heard was not his fear of punishment but his anxiety about his family. I said to the client, "You feel that you can't go to prison and that your children and your wife will not be able to manage without you. I have to tell you that I see prison as a real possibility, even a probability. What can we do to help your family?" Together we focused on his immediate concerns and devised a safety net for his family. Once we had some plans in place, the client could participate in a rational discussion of his options and what the future would probably hold.

The corollary rule to active listening is empathizing: understand your clients' motivations without judgment. I do not mean that you must endorse all their past or future actions. I mean that we suspend judgment of our clients so that we can exercise our judgment on their behalf. One of the other cases that I worked on in my first law firm involved the defense of an individual accused of stealing a valuable piece of art. The owner of the stolen art was a woman who had serious mental health issues; our client was her trusted employee. The employee insisted that she had "given" him the artwork and that her illness was causing her to forget the gift. I did not believe this story and uncomfortably felt that our defense exploited her illness and was itself part of the original criminal scheme. When I broached this topic with my boss, his advice was impatient, sharp, and just right: "Let me tell you what we do for a living: we don't judge, we defend. The government has a different job, and so does the jury, and so does the judge. We all have to do our jobs as well as we can for the thing to work right." For me, it was a moment of liberation. In my personal life, I am definitely on the judgmental side, but in my work life, I understand that my clients are in deep trouble, usually of their own making, and my job is to stand by them.

Whether your clients are in civil litigation, commercial litigation or, like mine, in just plain trouble, letting your client see that you understand and do not judge strengthens the bond between you and helps you arrive at a place where you can work together. For several years, I have represented indigent criminal defendants in federal court, first as an assistant federal defender, and now as Criminal Justice Act panelist. Most of the appointments I take now are from district court judges who appoint me to take on difficult clients who have complained, reasonably or not, about their court-appointed lawyers. In one such case I met one of my favorite clients, Mr. X.

Mr. X was accused of participating in a drug trafficking conspiracy. The evidence against him was substantial, including a wiretap and evidence that he had flown to California to purchase cocaine. In our first meeting, Mr. X complained that his previous lawyers refused to discuss trial strategy even though the government had "nothing" on him. Instead, his lawyers had repeatedly tried to persuade him to cooperate against his co-defendants, many of whom were already cooperating against him. On top of all this, Mr. X's criminal conduct had occurred only a few months after his release from a 10-year stint in prison after a state conviction on robbery charges. He was in deep trouble.

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Mr. X's prior lawyers had warned me that Mr. X was both foolish and stubborn. I asked Mr. X why he did not want to cooperate. He said, "I'm a lot of things, Miss Ellen, but I'm no snitch. Nobody is doing an extra day because of me." I did not think that answer was either foolish or stubborn. Mr. X did not have money, education, or employment prospects. His 10 years in state prison had not prepared him for a new career. When he was released back to the old neighborhood, he quickly took up with his old friends and his old ways. Now he was back in prison, facing a 10-year mandatory minimum. In this situation, I completely approved the strategy choices that his prior lawyers had urged. But what I heard in Mr. X's response was not bravado or foolishness. He was just a person who had only one thing left: self-respect.

I told Mr. X that I thought the most important thing was to minimize his prison time but that I understood and respected his decision and would not ever press him to change it. I explained, however, that I would always be willing to discuss it and that I would act promptly if he changed his mind. I also told Mr. X that I would be happy to take his case to trial and make the government prove it beyond a reasonable doubt. This was the truth—I am always happy to go to trial. But I did not tell Mr. X that I was already fairly convinced that he would have to plead guilty in his case. I did not tell him at that meeting, or the next, or the next.

This brings me to my third rule: Timing is everything, also known as "you can't plant the seed until the ground thaws." This is another principle of child-raising that I was able to apply successfully in the office. It started with my son; he

hated bedtime. I learned that his anxiety about it could be allayed by reminding him many times during the evening that certain things would happen in a certain order: dinner, cleanup, bath, books, and out with the lights. He knew what to expect and he could prepare.

With clients, the conversation might go like this: "Next time we meet, we will need to talk about the tax consequences of this," or "Soon we will need to deal with the forfeiture issues," or "Eventually we might want to discuss what type of plea offer you would consider taking." This rule works best when you have been successfully applying the first two rules: listening and empathizing. What I have found is that while I am listening to a client and understanding what he feels, I am also preparing him to hear news he does not want to hear. The time spent learning about him and his circumstances demonstrates that I care about him and I am doing the best I can to accomplish his goals. He knows that I am on his side, and I know that when he needs to hear the bad news, he will.

With clients who are accused of wrongdoing, whether they are lawyers facing disciplinary proceedings, doctors facing accusations of Medicare fraud, or bank employees accused of embezzlements, the most delicate and difficult aspect of the relationship is how to help a client decide not to fight the charges but to negotiate a plea. When I meet a new client who wants to go to trial, there are several reasons why I do not begin the relationship by arguing about that decision. First, it is not my decision. Second, it is usually too early in the game to decide. Third, it is too early in the relationship for the client to hear my advice. My clients are being investigated or prosecuted by either the United States or the Disciplinary Board of the Supreme Court of Pennsylvania, and they are looking for an advocate who is tough and ready to fight. I learned as a young assistant federal defender that mentioning a plea or cooperation too early in the representation could be fatal to a client's ability to trust me as his advocate. With Mr. X, the time to talk about a possible guilty plea was when he was convinced that I was ready to and could take the case to trial.

This brings me to another rule that I learned from my children: When faced with a new and challenging situation, demystify it. Explain the process step-by-step in a way that is consistent with your client's level of sophistication. Once we had fully explored the evidence and litigated some motions together, Mr. X knew that I was fully prepared to try the case. When he heard about cases that he thought would help his case, I read them and explained why they did or did not help. When Mr. X heard about other cases in which individuals in similar circumstances had received probation sentences, I investigated those cases and explained why they were not applicable. When I began to advise him to accept a deal for closer to five years, rather than the possible 12 or 15 years he could face after trial, he was ready to listen. He knew that I was giving him the advice after a careful, thorough analysis of the evidence, not because I was not ready to go to trial or lacked the toughness to fight the government. He accepted my advice because he trusted and had faith in me.

Another rule I learned from my children is "never let them see you sweat." By this, I mean that our clients and our children need to hear us speak with authority and certainty. If we are unsure about our advice, we cannot expect it to be followed. Recently, I showed a tiny chink in my armor when giving some advice to a client about what to say to the court at sentencing. Again, this was a court-appointed case, and again I was the client's third attorney. As we were discussing the sentencing, I knew full well that in his march through his first two attorneys, the client had not endeared himself to the judge.

Talking to the court at sentencing is a very sensitive thing. Usually, a judge comes on the bench, knowing about where the sentence is going to end up, depending on the outcome of certain arguments. If a defendant has something truly mitigating to say to the court, that is almost always handled through a carefully drafted letter submitted with a sentencing memorandum, many days prior to the actual sentencing. But every defendant has the "right of allocution," the right to address the court face-to-face. It is a scary moment for a defense lawyer because a defendant might help himself, but the risk of hurt is much greater.

In this particular case, the night before the sentencing, I advised the client, who had lost at trial, to say something very brief: "I know this isn't the time to talk about guilt or innocence, and I want the Court to know that I will appreciate any mercy Your Honor can show me." I also advised the client to thank his family for sticking with him and the court for its patience. The client had instead prepared a rather lengthy discourse on several topics: the unfairness of the prosecution, the prosecutor's vindictive nature, the FBI agent's long-term grudge, the lack of honesty in the government testimony. I presented all the reasons why a discussion of these topics could not help and would potentially hurt us. But as I was stating these reasons, I was feeling some doubt: Would the client always regret that he had failed to take the opportunity to speak his mind to the court when he had the chance? I hesitated in my argument and, thinking out loud, said, "Look, I guess it's ultimately your decision; you're the one being sentenced." That was it: game over. The client saw my hesitation and felt empowered to take the reins. The next day at conclusion of the arguments, many of which we won, the court invited my client to speak before sentence was imposed. The client started out well; he thanked me for my hard work, thanked his family, and thanked the court for its patience. Then he started to talk about a range of topics that demonstrated his complete lack of judgment and maturity. After several minutes, I asked the court for permission to consult with my client. I pulled the client aside and told him firmly, with no hesitation and not a bit of uncertainty, that he had said quite enough and it was time to wrap it up. He did. Luckily, the judge was a seasoned, fair, and kind man who did not take umbrage at the client's diatribe and sentenced him to the statutory minimum sentence.

Of course, to speak with real certainty and authority, you have to know your stuff. In parenting, our children (before their teenage years) see us as all-knowing and all-seeing. We know what we are talking about when we tell them how much sleep they need, what they should eat, whether to wear mittens, and when to send a thank-you card. Our clients need to be convinced that we know what we are doing. My friend, Richard Zitrin, a professor of Legal Ethics at the University of California Hastings College of the Law, says, "Know what you are doing to the point of super-expertise on your client's matter, and then make it clear to your client just how much you know. Then when you tell them what you think they should do, they will listen and do it."

I completely agree that a thorough grasp of the facts and

law should inspire most clients with confidence in your abilities and your advice. Unless, like my teenagers, they think they know more than you do. In that case, another rule I learned at home comes into play. Sometimes clients, like children, have to suffer the consequences of their actions. You don't need a coat? Go right outside without one. You didn't have time to make your lunch? Buy the dreaded school lunch. You don't need to study for the test? Okay with me—I already got into college. If a client will not take your advice about how to manage a case, then let him get a feeling for how the case will play out if he continues on his course of action. Recently, I represented Ms. Y, a young attorney who had a terrible car accident while going the wrong way on a highway. Ms. Y's blood alcohol content was more than twice the legal limit, and a child in an oncoming car suffered serious injuries. Ms. Y pled guilty to a felony and was lucky enough to receive probation from the state court despite some earlier alcohol- and drug-related problems with the law. Then Ms. Y had to face disciplinary charges. That is where I came in.

Disciplinary counsel offered to agree to a period of suspension of Ms. Y's law license that I regarded as a gift, but the client insisted that she was not an alcoholic, had no problem with drinking, and had simply been confused on the road that day. I was facing a level of denial that no amount of listening, empathy, expertise, timing, or explaining would reach. So we proceeded to have a hearing on the disciplinary charges. It was a disaster. In Pennsylvania, the first level of judicial inquiry is conducted by three Hearing Committee Members—all experienced and well-respected lawyers. While counsel for the parties conducts the hearing, the members also ask questions. The day of this hearing, they had many good questions. The next day Ms. Y agreed to take the offer of suspension.

The last rule I want to discuss, and the one I personally have had the toughest time with, is pick your battles. When my son Tom was three, he got a hand-me-down pair of Batman pajamas. He loved those pajamas and wanted to wear them every night. One day, my husband dropped him off at day care, and I picked him up; there was Tom, reading in the book corner, wearing his Batman pajamas. That night, when I asked my husband why Tom had worn his pajamas to day care, his answer was simple: Tom wanted to. From then on, whenever those pajamas were clean, Tom wore them. Added bonus: They look good in photos!

This rule came in handy when I represented a woman who, along with her husband, had decided that no federal income tax could ever be owed on domestically earned income. The result of this decision was an indictment for willful failure to file tax returns, a misdemeanor, and one that is an exception to the rule that ignorance of the law is no defense. In fact, if a crime is committed willfully, it must be committed with knowledge of the breached legal duty. One of the many problems with this case was that, for my client, "the principle" was what mattered, and that is never a good litigation position. I did not want her trial to become a "bully pulpit" for her questionable tax theories.

My client's case was severed from her husband's. He went first and lost. (Try convincing a jury that you actually believe you do not have a legal duty to pay income tax.) We went next, before the same judge. My theory at trial was that my client's husband had convinced her that he had a legal position that was defensible and correct. Actually, this was more of a sentencing strategy than a trial strategy, and to be successful, I had to keep her from testifying. My client was articulate, intelligent, and stubborn, but she looked pretty and demure. I did not want the judge or the jury to get to know the real her; they would find her a lot less sympathetic than the sweet-looking wife sitting next to me. I decided that the best way to convince my client was to let her control as much of her defense as possible. She would win the battles, and I would win the war. Throughout the trial, I involved the client in every decision: how to question the government's witnesses, what documents to challenge, whether to use character evidence. But when it came time to make the decision on whether to testify (ultimately her decision), I advocated strongly for her not to take the stand, based on my belief that her testimony would be very unhelpful and that it could and would hurt her at sentencing, in the likely event that we lost. After some persuasion, my client agreed not to testify. Ultimately, we lost the trial. (In fact, I think the jury took longer to order lunch than it did to reach a verdict.) At sentencing, however, I was able to convince the judge that my client was a minimal participant in the failure to file her own tax returns. Rather than 15 months in jail, she received 30 days.

Sometimes clients have to suffer the consequences of their actions.

Many years have passed since I embarked on my two challenging, stimulating, and rewarding careers, and as we all know, the passage of time is bittersweet. My children have grown up, and no matter what "rules" I apply, my ability to influence them has waned. On the other hand, when a new client comes in with an interesting and difficult problem, when I stand up to address the jury, when I argue an appeal before the court, my heart still pounds with excitement, but my stomach behaves.