

## 6. DIFFICULTIES IN MASTERING ACTIVE LISTENING

Without doubt, many lawyers and law students find it difficult to become immediately comfortable with, and proficient in the use of, active listening. You may be tempted to use this initial discomfort as an excuse to abandon your efforts to improve your listening skills. However, most people have little difficulty mastering active listening, especially when they realize that feelings of initial discomfort are

20. See Goodman, *supra* note 2, at 227.

common. Therefore, if your initial reaction to active listening is one of discomfort, persevere. Your clients will be much better off for your patience and willingness to learn an unfamiliar technique.

To put your potential personal reactions into perspective, consider the following objections to learning active listening that some lawyers have advanced to active listening, and responses to those objections.

**A. "FEELINGS ARE FOR 'SHRINKS,' NOT LAWYERS"**

1. "I'm afraid we'll get so involved in feelings, I won't properly deal with the legal issues."

2. "Cases are decided on the basis of facts. Lawyers deal in facts; psychiatrists, psychologists, and social workers deal with feelings."

Expressions such as these reflect assumptions that feelings are irrelevant, and have no legitimate place in the rational process of legal analysis. But as the book has attempted to make abundantly clear, how people react emotionally to situations and to proposed solutions strongly influences the nature and amount of information they provide and the decisions they make.

A belief that feelings are largely irrelevant to a legal interview may come from a number of sources. For some, the word "feelings" connotes irrationality and triggers the idea that feelings must be avoided so that lawyers can function as they should, i.e., in a rational and objective manner. Others may simply lack experience with the role that feelings actually play in human affairs generally, and in attorney-client dialogues specifically. Finally, the views of some may be colored by denial and rationalization. Thinking about feelings may generate discomfort. The easiest way to avoid the discomfort is to deny the existence and importance of feelings. If the rationalization is successful, the discomfort can be put to rest.

Remember, however, that as a lawyer your role is not to analyze feelings, but to acknowledge a problem's emotional aspect when a client raises it. Active listening is simply a useful technique for carrying out this role. As one scholar has noted,

A reflection doesn't try to understand the other person's thoughts or feelings better than he does. It doesn't try to solve the other's problems. It doesn't try to add new meaning or to analyze the message. Reflections simply show that meaning has been registered. They reveal an act of empathy. They tell the listener that he or she has been *heard*.<sup>21</sup>

**B. "I FEEL EMPATHIC, BUT I JUST CAN'T FIND THE RIGHT WORDS"**

1. "Reflecting feelings make me feel awkward."

2. "It feels so mechanical, reflecting back what they feel."

21. Goodman, *supra* note 2, at 38.



3. "When I listen to myself, it sounds so hollow and forced. I'm sure the client will feel that way, too."

Acquiring a new skill can require time and effort, and reactions such as those expressed above are normal. Initially, active listening techniques may seem awkward and forced. Your uncertainty about when and how to engage in active listening may produce statements which suggest, by their content or tone, that perhaps you are not empathic. However, with practice, uncertainty generally disappears and reflective statements flow smoothly and naturally. To increase your level of comfort you may want to practice reflecting content and feelings in your conversations with family and friends, or under your breath while you watch television. It is much easier to practice new skills and cope with feelings of embarrassment and self-consciousness in low risk situations such as these.<sup>22</sup> In time, you will no longer be "consciously employing a technique" and instead will be able to comfortably reflect feelings.

Also, your comfort with active listening may be enhanced if you recognize that there is no one way to phrase an active listening response. Empathy results from a reflection of feelings, not from a magic combination of words. For example, assume a client says, "I had always trusted my broker, but then she went and bought shares over-the-counter without any authorization from me at all." Assume further that the emotion you believe that the client is expressing is "disappointment." Any of these reflections, and undoubtedly more that you can think of, would be appropriate:

"You must have been disappointed."

"You felt disappointed."

"You were disappointed."

"It was very disappointing."

"Your broker really disappointed you."

"That must have been disappointing."

"I imagine you were disappointed."

"I can understand how much that must have disappointed you."

Moreover, recall that reflections do not need to be absolutely correct to be useful. If a client feels that your reflection does not quite "fit," the client may clarify and thereby gain additional insight into his or her feelings. For example, had the client above felt that "disappointment" did not accurately capture her or his feelings, the client might have responded, "It's not just disappointment. I'm pretty angry."

Finally, note that if you find that reflecting feelings is extremely uncomfortable, you might start the learning process by reflecting only

22. Goodman notes that many people feel initially awkward when employing reflections. Goodman, *supra* note 2, at 223-

24. He describes a number of exercises which can help you learn to make empathic responses. *Id.* at 234-44.



the content of a client's statements. Once you feel comfortable making reflective statements about content, reflections of feelings will come more easily to you.

**C. "THERE'S NO WAY I CAN EMPATHIZE WITH THAT CLIENT"**

1. "Look, I just feel phony. There is no way I could say, 'So you felt like you just couldn't stop yourself.' I can't say that; people can control themselves."
2. "Even if I try to be empathic, I'm sure my voice will give away the fact that I don't really mean it."
3. "Acknowledging those feelings makes me feel like I'm condoning that behavior."
4. "The guy seems so slick that it makes me feel if I respond to his feelings, he'll think I'm weak or just plain foolish."
5. "She's so aggressive, I feel that if I respond to her feelings, she'll see me as saying it's OK to act out of spite."

You are bound to encounter many individuals who tax your willingness to be empathic and non-judgmental. Many of us are reluctant to help people who have engaged in certain behavior or who have certain kinds of personalities. For example, some people may find that they have little desire to help welfare recipients, bankrupts, tax evaders, child molesters, con artists, or rapists. Others find they are reluctant to assist people who have personalities which are, say, extremely passive, dependent, aggressive or manipulative.

When a client is a person who, by dint of personality or situation, you are reluctant to help, you may experience a reaction similar to those above. If you pursue your own feelings further, you may understand that on some occasions you cannot empathize with any of a client's feelings, while on others, you cannot empathize with particular feelings. For example, you may be unable to empathize with the passions that consumed a child molester, but able to empathize with the abused childhood that helped produce those passions.

Unless you totally lack empathy for a client, you probably will be able to make some active listening responses to the emotional aspects of a client's problem. On the other hand, if you feel no empathy at all for a client, you may consider withdrawing or referring the client to another lawyer.<sup>23</sup>

**D. "USING ACTIVE LISTENING WILL MAKE A CLIENT TOO EMOTIONAL"**

1. "I really feel uncomfortable when the client starts crying."

23. Ethical rules may, however, constrain your ability to withdraw in certain circumstances. See Model Rules of Profes-

sional Responsibility EC 2-32 & DR 2-110 (1980); Model Rules of Professional Conduct Rule 1.16 (1983).



2. "I 'active-listened' to his anger and he just seemed to keep on going; I didn't know what to do."

3. "I think it might be a good idea, but I'm afraid the client will get so upset he'll fall apart. What'll I do then?"

Responding to feelings often results in an outpouring of even more intense emotions. If you are a beginner, experiencing such intense feelings may make you uncomfortable and lead you to back away from the use of active listening. You may feel that you are unable to stop the outpouring of emotion; that you inadvertently made the client feel worse; or that you are wrong to elicit all the emotion since there is little that you can do to resolve the feelings.

Your concerns about eliciting an excessive amount of emotion can usually be overcome if you recognize two propositions. First, although a client may express solely negative feelings, the client's overall reaction may be quite positive. The client has had the opportunity to get "feelings off his or her chest," along with the satisfaction of being heard and understood. Usually this experience will result in a feeling that a discussion was, as a whole, quite beneficial.

Second, often the best way to alleviate a client's distress is to let an outpouring of emotion continue. Continued empathy usually causes an emotional tide to recede. If you can struggle through the initial discomfort, admittedly a difficult task, you will generally find that a client regains composure. Thus, if you can, on a couple of occasions, continue to be empathic despite your discomfort, you will usually experience the success that comes from allowing a client the opportunity to ride out the emotion. With this success, you will likely experience less anxiety about eliciting and empathizing with intense emotions the next time they arise.

#### E. "TALKING ABOUT FEELINGS MAKES IT DIFFICULT FOR ME TO GET BACK ON TRACK"

1. "After talking about how angry she was with the Board's decision, and how it had double-crossed the employees, I felt uncomfortable having to return to questions about the specific terms of the deal."

2. "After he poured out his heart about how hurt he was when his wife left, I felt terrible having to start talking about what property they had and how title was held."

Once active listening has put a client's feelings on the table, you may find it difficult to shift gears to matters of content. It seems awkward when clients "pour their hearts out" to suddenly ask questions as if nothing of emotional importance had happened.

To smooth the transition, you may find it helpful first to summarize a client's situation, including the emotional reactions, and then to ask if the client feels ready to move to other topics. Consider this example:



Lawyer: You invested your lump sum retirement in various real estate projects with your friend Bill, whom you've known on and off since high school. He didn't follow through on his promises, and as far as you can tell you've lost most of your investment. You're extremely upset, and to make matters worse his family is calling at all hours of the night begging you to help find a way to stop him from squandering even more money. You find it hard to be sympathetic and helpful because you're so angry at Bill. And to top it off, your doctor just told you that you're headed for a heart attack, which isn't surprising given all that you've been through.

Client: That's right. Sometimes I wish I were dead and didn't have to face this mess. It's hard to live with myself, I feel so stupid for ever getting mixed up with him.

Lawyer: I can see how upset and aggravated you are, and I want to start helping as quickly as possible. If you feel ready, I'd like to ask some questions about the deal you had with Bill.

Client: I think I'm ready to get on with this, but I get furious talking about what happened.

Lawyer: That's fine, feel free to express your anger as we go along.

Note that here, in addition to summarizing the client's situation and feelings, you explicitly state your desire to help.

#### F. "THE CLIENT IS SO CONFUSED THAT I DON'T KNOW WHICH FEELINGS TO REFLECT"

"He says he's eager to go ahead with the deal, yet in the same breath says he's afraid of committing himself."

Sometimes clients express confused and contradictory feelings. You may feel stymied—should you focus on all the feelings, or just on one?

Recognize that contradictory feelings are the norm, not the exception. For example, when buying their first home, people typically have a variety of contradictory feelings such as wanting to put down roots vs. being afraid of feeling trapped; wanting to save money vs. being worried about taking on a big debt. Here, a young woman describes her feelings about buying a house alone:

"I want to put an offer on this house. I've been looking for months and I know this one will be a good investment. Best of all, I like this house. But the mortgage payments scare me and I'll be living there alone and it feels so disappointing. But my accountant says I'd be crazy to go on paying so much rent and taxes . . ."



When clients have contradictory feelings, your professional role is not to try to decipher and resolve the conflicts. Your most helpful response is to try to reflect the contradictory feelings:

1. "It seems like you feel very torn about buying this house all alone."
2. "Right now you seem to have very mixed feelings. On the one hand it seems like a good investment, but on the other hand living there alone feels very empty."

**G. "ACTIVE LISTENING IS MANIPULATIVE"**

1. "Maybe she's not stating her feelings because she doesn't want to talk about her feelings. I don't think I should do things to try to make her talk about feelings."
2. "I don't think lawyers should manipulate people to expose their feelings. It's an invasion of their privacy."
3. "Look, I can go through the right motions to make the person believe I feel understanding and supportive, but I'm really just doing it to get information."

The use of active listening skills is in part the use of a technique to gain information. However, you do not employ active listening simply out of a voyeuristic interest in a client's private feelings. Rather, active listening is one among many techniques you employ in order to assist a client in finding an adequate solution to a problem. If any technique which produces information that a client might not otherwise reveal is to be denounced as "manipulative", then perhaps such standard practices as putting clients at ease with a bit of chit-chat and a cup of coffee, eliciting information in chronological fashion, probing for details with closed rather than open questions, and showing clients documents to refresh their recollection are all unfairly "manipulative."

For us, the answer to the claim that active listening is unfairly "manipulative" is this: Clients come to you for assistance and advice, and a client's full participation is necessary if you are to help a client find a solution that addresses all dimensions of a problem. Active listening, which provides non-judgmental understanding, is an essential technique for gaining full client participation.<sup>24</sup>

24. As suggested in section 5(C) above, you may sometimes limit your use of active listening when you sense that a client is consciously avoiding a discussion of feelings. In the absence of client reluctance to discuss feelings, you need not routinely tell clients what active listening is, and secure permission to use it. Such routine requests are likely to drive a wedge into an attorney-client relationship, as clients do not normally come to attorneys for enlightenment as to lawyer techniques, whether it be active listening, forms of questions, sequencing of questions, or the inclusion or omission of particular topics. Moreover,

seeking client permission to employ active listening, or any other "technique", would almost certainly lead to the informed consent dilemma discussed in section 5(C). Finally, if one could not use any information-gathering technique without warning a client in advance that a response may in some way hurt the client's cause, it would seem that attorneys would have to preface all remarks with warnings. Others may disagree with this view. See S. Ellmann, "Lawyers and Clients," 34 UCLA L.Rev. 717 (1987). But see J. Morris, "Power and Responsibility Among Lawyers and Clients: Comment on Ellmann's 'Lawyers and



## 7. HOW MUCH ACTIVE LISTENING?

Clients typically reveal emotions repeatedly as you gather information about their problems and seek to resolve them. Given this continual emotional presence, how often should you reflect feelings?

There is no single, right, or easy answer to this question.<sup>25</sup> You might think that some kinds of legal matters (say, marriage dissolution and wrongful termination) are inherently more prone to emotion than others (say, antitrust litigation or a simple lease deal), and thus give rise to more active listening. Or, your reaction may be that the extent to which you use active listening typically depends on how open, reticent or emotional a client is. However, none of these categories are a sure guide to how much active listening is appropriate with any individual client.

For example, if a client is talking fully and openly, you may make a number of active listening responses simply to be empathic. But if a client is not participating fully in a discussion, you may make a like number of active listening responses in an effort to encourage the client to "open up." Similarly, of two clients involved in antitrust litigation, one may be an eager participant in a discussion, while the other may be the opposite. Hence, despite the subject matter similarity, you may use active listening in the latter matter more than in the former. Finally, whatever a client's general personality, the same client may be quite open in one matter, and rather reticent in another. Hence, in any individual matter, you must ultimately rely upon your judgment when deciding how frequently to reflect a client's feelings.

Clients'," 34 UCLA L.Rev. 781 (1987); Ellmann, "Manipulation By Client and Context: A Response to Professor Morris," 34 UCLA L.Rev. 1003 (1987).

marks consisted almost entirely of reflections. See Goodman, *supra* note 2, at 53. In lawyer-client dialogues, you probably will not active listen to this extent.

25. Psychologists have praised helping conversations in which the helper's re-