

# St. Thomas Law Review

---

Volume 30  
Issue 1 *30th Anniversary Issue: Voice of the  
Homeless (Fall 2017)*

---

Article 5

2017

## Therapeutic Jurisprudence, Professionalism, and "Spikes" for Lawyers

Shelley Kierstead  
*Osgoode Hall Law School*

Follow this and additional works at: <https://scholarship.stu.edu/stlr>



Part of the [Jurisprudence Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Shelley Kierstead, *Therapeutic Jurisprudence, Professionalism, and "Spikes" for Lawyers*, 30 ST. THOMAS L. REV. 42 (2017).

Available at: <https://scholarship.stu.edu/stlr/vol30/iss1/5>

This Article is brought to you for free and open access by STU Scholarly Works. It has been accepted for inclusion in St. Thomas Law Review by an authorized editor of STU Scholarly Works. For more information, please contact [jacob@stu.edu](mailto:jacob@stu.edu).

# **THERAPEUTIC JURISPRUDENCE, PROFESSIONALISM, AND "SPIKES" FOR LAWYERS**

SHELLEY KIERSTEAD<sup>1</sup>

## **INTRODUCTION**

Lawyers, whether advocating in court, negotiating deals on clients' behalf, or writing advice letters and briefs, use words to make a living. Their aim is to use these "words" to problem-solve for clients and to deliver an outcome the clients consider positive. In reality, however, there are times in each lawyer's career when he or she is not able to help clients achieve the results the clients are looking for. When this occurs, lawyers must deliver "bad news" to the client. For the purposes of this article, I define "bad news" as being "any information which adversely and seriously affects an individual's view of his or her future."<sup>2</sup>

The analytical skills required to assess the strengths and weaknesses of a client's legal position to determine whether their desired goal is attainable are different from the skills required to effectively convey that determination to the client. To a great extent, "thinking like a lawyer" demands a dispassionate assessment of "material facts" in light of relevant legal principles. Jeffrey Lipshaw, using the term "pure lawyering"<sup>3</sup> describes it as "a mode of converting real-world narratives into a logical progression of rules and facts."<sup>4</sup> "The heart of legal training is learning how to argue persuasively that the situation in dispute bears the greatest analogical resemblance to a case precedent in which the if-then rule just happens to generate a result favorable to that lawyer's client."<sup>5</sup>

---

1. Shelley Kierstead, LLB, LLM, DJur, is an Assistant Professor at Osgoode Hall Law School in Toronto, Ontario.

2. Walter F. Baile et al., *SPIKES—A Six-Step Protocol for Delivering Bad News: Application to the Patient with Cancer*, 5 THE ONCOLOGIST 302, 302 (2000); see also Steven E. Perkel & Eric Dakhari, *C-Swot and PLA-Squared: Techniques for Avoiding and Breaking Bad News*, 23 THE JURY EXPERT 39, 40 (2011) (characterizing news "as 'bad' when it reflects the gap between expectations and outcomes").

3. JEFFREY LIPSHAW, *BEYOND LEGAL REASONING: A CRITIQUE OF PURE LAWYERING* 4 (Routledge, 2017).

4. *Id.*

5. *Id.*; see Jess M. Krannich et al., *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 382 (2009) (critiquing a traditional educational approach to thinking like a lawyer).

For the purposes of this article, I do not debate the value of traditional analytical reasoning. My point is, however, that a lawyer's task is not complete when the analytical work is finished.<sup>6</sup> Rather, the lawyer must consider how best to deliver the results of the analytical reasoning in a manner that takes into account the likely emotional impact of the information. As Lesley Townsley has noted, while emotion has traditionally been viewed as undesirable in the legal domain, there are several cognitive theories of emotion that suggest understanding emotions can foster a better understanding of the positive and negative influences of emotions on judgment.<sup>7</sup>

Consider this hypothetical: "*I have reviewed all of the evidence and the law in this area. Given that you are addicted to drugs and have no support system, your child will likely become a Crown ward<sup>8</sup> and be adopted by another family. This will mean that you will no longer be recognized as a parent to Sam.*"

I am not suggesting that most lawyers would use such cold language in delivering the message above. What I do suggest, however, is that while the profession is increasingly becoming aware of the importance of dealing with clients in a more compassionate manner, we have additional work to do.<sup>9</sup> On a view of professionalism that sees the lawyer as needing to act with "intelligence, maturity, and thoughtfulness"<sup>10</sup> to minimize the harmful

---

6. See Perkel & Dakhari, *supra* note 2, at 39 (presenting one model (C-SWOT) to analyze a case and to develop congruent lawyer-client expectations, and another model (PLA-Squared) to minimize the difficulties associated with breaking bad news).

7. See Lesley Townsley, *Thinking like a Lawyer Ethically: Narrative Intelligence and Emotion*, 24 LEGAL EDUC. REV. 69, 70-71 (2014) (citing a body of scholarship seeking to demonstrate the interrelationship between law and emotion).

8. See *Ward (law)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Ward\\_\(law\)](https://en.wikipedia.org/wiki/Ward_(law)) (last visited Dec. 24, 2017) (defining a Crown ward). A ward of the state, also known as a "Crown ward," is a term used in Canada to describe a foster child who has been made the legal responsibility of the government. *Id.*

9. See Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, INST. FOR ADVANCEMENT AM. LEGAL SYS. 1, 14 (July 2016), [http://iaals.du.edu/sites/default/files/reports/foundations\\_for\\_practice\\_whole\\_lawyer\\_character\\_quotient.pdf](http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf) (discussing the challenges facing law school graduates, particularly the skills new attorneys are lacking). For example, out of 24,000 respondents to a survey of necessary lawyer attributes, 4.1% indicated that exhibiting tact and diplomacy are advantageous but not necessary. *Id.* Approximately 10% of respondents gave the same response about the ability to demonstrate tolerance, sensitivity, and compassion. *Id.* In addition, 12.6% of respondents considered the ability to read others and understand others' subtle cues to be likewise advantageous but unnecessary. *Id.*

10. See Chief Justice of Ontario's Advisory Comm. on Professionalism, *Working Group on the Definition of Professionalism: "Elements of Professionalism"* 1 (Oct. 2001), <http://www.oba.org/en/pdf/definingprofessoct2001revdec.pdf>.

emotional impact of the law and legal process where possible,<sup>11</sup> bad news delivery must implement an empathetic strategy that facilitates clients' abilities to cope most effectively with the information and make informed decisions about how to best move forward.<sup>12</sup> In addition to better serving clients, this approach can have positive effects for lawyers.

The articulation of professionalism animating this article is consistent with the core concepts of Therapeutic Jurisprudence ("TJ").<sup>13</sup> Not only does TJ search for ways to foster more healthy emotional outcomes for parties,<sup>14</sup> it also embraces learning from other disciplines.<sup>15</sup> In the context of the current discussion, medical literature focusing on the development of therapeutic patient-doctor communications has much to offer lawyers.

I am certainly not the first to make this observation. For example, in 1998, Linda Smith wrote an article titled *Medical Paradigms for Counseling: Giving Clients Bad News*.<sup>16</sup> And more recently, Marjorie Corman Aaron's *Client Science: Advice for Lawyers on Counseling Clients through Bad News and Other Legal Realities*<sup>17</sup> makes these connections as well. This article simply aims to highlight ways that adapting a medical framework for doctor-patient communications to a legal context can help clients hear and be heard with respect to their own legal cases. I argue that

11. See Shelley Kierstead, *Legal Writing, Therapeutic Jurisprudence, and Professionalism*, 3 SUFFOLK U.L. REV. 29, 30–31 (2015).

12. See Douglas W. Maynard, *Comment—Bad News and Good News: Losing vs. Finding the Phenomenon in Legal Settings*, 31 LAW & SOC. INQUIRY 477, 481 (2006) ("What is particular about bad and good news in certain cases, or venues (courtrooms, chambers, law offices, jails and prisons, etc.), or jurisdictions? What is it like when an attorney with bad news is dealing with a corporate client rather than an individual?").

13. See *Therapeutic jurisprudence*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Therapeutic\\_jurisprudence](https://en.wikipedia.org/wiki/Therapeutic_jurisprudence) (last visited Nov. 19, 2017) ("Therapeutic jurisprudence ("TJ") studies law as a social force (or agent) which inevitably gives rise to unintended consequences, which may be either beneficial (therapeutic) or harmful (anti-therapeutic).").

14. See J. KIM WRIGHT, *LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW* 43 (American Bar Association 2010).

15. See, e.g., Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 776 (1997) (proposing "an interdisciplinary approach to resolve family legal proceedings . . . [that] helps judges consider the many influences on human behavior and family life . . . resulting in more pragmatic and helpful solutions to contemporary family legal issues").

16. See generally Linda F. Smith, *Medical Paradigms for Counseling: Giving Clients Bad News*, 4 CLINICAL L. REV. 391 (1998) (comparing patient counseling in the medical field to client counseling in the legal field).

17. See generally MARJORIE CORMAN AARON, *CLIENT SCIENCE: ADVICE FOR LAWYERS ON COUNSELING CLIENTS THROUGH BAD NEWS AND OTHER LEGAL REALITIES* (Oxford University Press 2012) (applying social science research and insights to the legal practice concerning effective communication with clients regarding legal realities and difficult decisions).

the ability to facilitate this outcome in turn enhances lawyers' professionalism.

While there are a number of medical frameworks for doctor-patient communications in existence,<sup>18</sup> I will focus on one in particular—SPIKES<sup>19</sup>—which provides a comprehensive approach to compassionate, patient-centered communication of bad news that will facilitate client involvement in future planning.

This article will progress as follows. In Part 1, I discuss both the medical profession and the legal profession's challenges in relation to effective communication with patients and clients.<sup>20</sup> I suggest that the medical profession's response, specifically as it relates to delivering bad news, has been more proactive and widespread than the legal profession's response.<sup>21</sup> Part 2 briefly reviews research dealing with legal clients' emotional responses to different forms of communication, with a view supporting the argument that clarity of information, empathic responses to clients' reactions, and collaborative problem-solving are important elements of a professional relationship.<sup>22</sup> Part 3 introduces the SPIKES model, applies it with some modifications to a legal setting, and discusses the benefits to lawyers of adopting this type of model.<sup>23</sup> In Part 4, I engage in a hypothetical "bad news" client discussion using the SPIKES model.<sup>24</sup>

## PART 1: DOCTORS, LAWYERS, AND THE PUBLIC

### A. Doctors

While it seems intuitive to suggest that "bedside manner" is a core function of practicing doctors, the emphasis on training doctors to communicate with patients has strengthened in the past number of decades as a result of a concern that medical professionalism had waned in the era of more research-focused practice.<sup>25</sup>

---

18. See, e.g., Gregg K. Vandekieft, *Breaking Bad News*, 64 AM. FAM. PHYSICIAN 1975, 1977-78 (2001) (providing a five-step approach, the A, B, C, D, E approach, to delivering bad news); Pelin Güneri et al., *Breaking bad medical news in a dental care setting*, 144 J. AM. DENTAL ASSOC. 381 (2013) (discussing the A, B, C, D, E approach).

19. See Baile et al., *supra* note 2, at 305-08.

20. See *infra* Part 1.

21. See *infra* Part 1.

22. See *infra* Part 2.

23. See *infra* Part 3.

24. See *infra* Part 4.

25. See Barry D. Silverman, *Physician behavior and bedside manners: the influence of William Osler and The Johns Hopkins School of Medicine*, 25.1 PROC. (BAYLOR UNIV. MED.

Medicine has experienced a fascinating evolution in its characterization of professionalism: from very careful, somber mannerisms rooted in the Greek tradition that saw medicine as art,<sup>26</sup> to minimized focus on patient communications as medicine grew to be characterized as "science."<sup>27</sup> The overemphasis on medicine as science rather than art led, according to some within the profession, to a diminished focus on professionalism in terms of relationships with clients. Only after public expressions of diminished trust for doctors was there a shift back to training doctors to communicate accurately and compassionately with patients.<sup>28</sup> A number of medical organizations have called for a sustained "focus on the three core principles of professionalism: patient autonomy, patient welfare, and social justice."<sup>29</sup>

## B. Lawyers

Criticism of lawyers is neither new nor relenting. A 1999 survey of one thousand respondents asked to report on their perceptions of the American Justice System<sup>30</sup> revealed that 42% of respondents lacked confidence in lawyers.<sup>31</sup> A similarly poor perception was revealed in a 2014 Ipsos Reid poll surveying approximately 4000 Canadians where only 16% of respondents considered lawyers trustworthy.<sup>32</sup> In 2013, the Ontario Bar Association launched a public-relations media campaign with the objective of persuading "people that, far from their time-worn image as greedy and over-aggressive manipulators, lawyers are actually problem-

---

CTR.) 58, 58 (2012) (discussing the importance of bedside manners in the practice of medicine).

26. See Moira Stewart et al., *The Impact of Patient-Centered Care on Outcomes*, 49(9) J FAM PRACT. 796, 796 (2000) ("The principles of patient-centered medicine date back to the ancient Greek school of Cos, which was interested in the particulars of each patient.").

27. See Silverman, *supra* note 25, at 58–60.

28. See Michael Simpson et al., *Doctor-patient communication: the Toronto Consensus statement*, 303 BMJ 1385, 1385–87 (1991) (explaining that most complaints about physicians concern communication rather than competency).

29. See MICHAEL A. BARONE ET AL., *TEACHING, PROMOTING AND ASSESSING PROFESSIONALISM ACROSS THE CONTINUUM: A MEDICAL EDUCATOR'S GUIDE*, ch. 1 (2d ed. 2016), <https://www.abp.org/sites/abp/files/pdf/professionalism.pdf> (outlining the three fundamental principles within the physician's charter).

30. AMERICAN BAR ASSOCIATION, *PERCEPTIONS OF THE U.S. JUSTICE SYSTEM* 3 (1999), [https://www.americanbar.org/content/dam/aba/publishing/abanews/1269460858\\_20\\_1\\_1\\_7\\_uplo\\_ad\\_file.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/abanews/1269460858_20_1_1_7_uplo_ad_file.authcheckdam.pdf).

31. *Id.* at 49–50 (demonstrating that the medical profession/doctors fared much better than lawyers in this survey, with 46% of respondents reporting that they were extremely or very confident in doctors, and 39% indicating they were "somewhat confident").

32. See Daniel Tencer, *Canada's Most And Least Trusted Professions: Sorry, CEOs and Politicians*, HUFFINGTON POST (Jan. 20, 2015), [http://www.huffingtonpost.ca/2015/01/20/most-least-trusted-professions-canada\\_n\\_6510232.html](http://www.huffingtonpost.ca/2015/01/20/most-least-trusted-professions-canada_n_6510232.html).

solvers, pillars of their communities and an indispensable cog in a healthy democracy.”<sup>33</sup>

Public opinion seems to reflect a stark contrast with the lofty definitions of professionalism the profession espouses.<sup>34</sup> Unfortunately, the profession’s ability to act professionally has been called into question by various accounts of Canadian lawyers involved in a range of negative behaviors.<sup>35</sup> In the United States, William L.F. Felstiner has commented that “[a]ll too often lawyers are thought [by clients] to be inattentive, unresponsive, insensitive, non-empathetic, uncooperative, and arrogant.”<sup>36</sup>

## PART 2: PROBLEMS WITH LACK OF EFFECTIVE COMMUNICATION

Client complaints to regulating bodies suggest that communication difficulties account for at least some of the difficulties that arise between lawyers and clients. Complaints to the Law Society of Upper Canada<sup>37</sup> in 2014 showed that 52% of complaints related to problematic client service.<sup>38</sup> A similar statistic appeared in 2005 when “client service” was further broken down into the following categories: “1) service issues-other (11.53%); 2) service-withdrawal/abandonment (5.02%); 3) service-failure to follow instructions (8.56%); 4) service-failure to communicate (12.31%); and 5) service-failure to serve client (19.74%).”<sup>39</sup> At the very

---

33. Kirk Makin, *Tired of Being the butt of jokes, Ontario lawyers plan image overhaul*, THE GLOBE AND MAIL (Feb. 6, 2013), <https://beta.theglobeandmail.com/news/national/tired-of-being-the-butt-of-jokes-ontario-lawyers-plan-image-overhaul/article8321520/?ref=http://www.theglobeandmail.com&>.

34. See, e.g., Gerkman & Cornett, *supra* note 9, at 9.

35. See generally Adam M. Dodek, *Canadian Legal Ethics: Ready for the Twenty-First Century at Last*, 46 OSGOODE HALL L.J. 1, 10–20 (2008) (providing several examples and an overview of the changes in professionalism requirements mandated by the Law Society of Upper Canada).

36. William L.F. Felstiner, *Professional Inattention: Origins and Consequences*, in THE HUMAN FACE OF LAW: ESSAYS IN HONOR OF DONALD HARRIS 122 (Keith Hawkins ed., Clarendon Press 1997).

37. LAW SOCIETY OF UPPER CANADA, <http://www.lsuc.on.ca/printversion.aspx?id=905> (last visited Dec. 26, 2017). The Law Society of Upper Canada is the governing body for Ontario’s lawyers. *Id.*

38. Lesley Cameron, *Executive Director’s Report: Analysis of Complaints Received by Professional Regulation in 2014*, LAW SOCIETY OF UPPER CANADA 8 (Apr. 14, 2016), <http://www.lsuc.on.ca/uploadedFiles/Analysis%20of%20Complaints%20Received%20by%20Professional%20Regulation%202014%20-%20Report%20to%20PRC%20-%20April%202016%20FINAL.pdf> (describing percentages of the total complaints received during the years 2009–2014).

39. Shelley Kierstead & Erika Abner, *Learning Professionalism in Practice*, 59 OSGOODE HALL L.J. 1, 81 n.160 (2013) (outlining the statistics in client service in the Complaints to the Law Society of Upper Canada).

least, it is arguable that failure to communicate and failure to follow instructions—approximately 21% of the total complaints filed<sup>40</sup>—may be related to problems lawyers have communicating with clients in an effective manner.

My proposition is that “effective” communication allows clients to both understand the messages they are receiving, and respond to those messages in as positive and forward-looking a manner as possible. Large scale research from the United States and Europe supports the assertion that indeed, clients respond to the manner by which their problems are processed.<sup>41</sup> Clark D. Cunningham describes a number of studies leading to the conclusion that

[m]any lawyers equate client satisfaction with the outcome achieved; however, studies over the past three decades in three different countries [have] produced impressive evidence that clients evaluate their lawyers’ competence more in terms of the process experienced by them in the representation than the outcome.<sup>42</sup>

Further, he suggests that “law schools and law firms can provide greater emphasis on the importance of effective communication with clients, teach effective interviewing and counseling, and assess competency in basic skills of listening and explaining.”<sup>43</sup> This approach complements the findings of studies concluding that clients derive significant benefits simply from feeling heard within legal proceedings.<sup>44</sup> Surely they can derive similar benefits from being heard (and responded to) by their lawyers within those legal proceedings.<sup>45</sup>

---

40. See *id.* at 82.

41. See, e.g., Clark D. Cunningham, *What Do Clients Want from Their Lawyers?*, 2013 J. DISP. RESOL. 143, 146–50 (2013) (discussing surveys that targeted corporations and individuals, and determined that a principal reason for firing an attorney was the attorney’s poor communication skills).

42. *Id.* at 146.

43. *Id.* at 143.

44. See, e.g., E. Allan Lind et al., *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY AND SOC. PSYCHOL. 952, 952 (1990) (explaining the “voice effect” and the “process control effect”); Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 171–72 (2005) (noting litigants feeling heard through the legal process via mandatory arbitration lead to quicker case settlements). See generally DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 2–13 (3d ed., West 2012) (expanding on the principles of client-centered lawyering to include client participation in the counseling process, enabling clients to make important decisions, and acknowledging and recognizing the importance of clients’ feelings).

45. See, e.g., Felstiner, *supra* note 36, at 123–24 (“When a client, for instance, is treated politely and with dignity and when respect is shown for and attention is paid to her needs and opinions, her feelings of positive social status are enhanced.”).



## PART 3: THE SPIKES MODEL

As my work becomes more focused on the development of professionalism among lawyers,<sup>46</sup> I am convinced that continued emphasis on lawyers building communication skills that go beyond conveying the results of an analytical exercise is essential to the integrity of the legal profession.<sup>47</sup> I believe this is particularly critical in situations where lawyers must deliver bad news and help clients develop a strategy for moving forward in as emotionally healthy a manner as possible after receiving that news. While there may be other medical models that could be applied equally effectively, I have chosen the SPIKES model to demonstrate how its framework might be adapted to the legal context.

SPIKES is an acronym for a number of steps to be taken in the process of discussing delivery of bad medical news: (1) setting up the interview; (2) assessing the patient's perceptions; (3) obtaining the patient's invitation to share details of the illness; (4) giving knowledge and information to the patient; (5) addressing the patient's emotions with empathic responses; and (6) discussing strategy and summarizing.<sup>48</sup> In the table below, I suggest how the description for medical meetings could be tailored to legal meetings.

---

46. See generally Kierstead, *supra* note 11 (discussing the interaction of two specific ideals of professionalism: public service and "collegiality/civility"); Shelley Kierstead & Erika Abner, *Text Work As Identity Work for Legal Writers: How Writing Texts Contribute to the Construction of a Professional Identity*, 9 OSGOODE HALL L.J. 327 (2012) (discussing the process of developing a professional identity); Shelley Kierstead, *Therapeutic Jurisprudence and Child Protection*, 17 BARRY L. REV. 31 (2011) (explaining methods that professionals working in the child welfare system can adopt to facilitate the emotional well-being of the parties); Kierstead, *supra* note 39 (discussing professionalism, ethics, and civility in the legal system).

47. See, e.g., David B. Wexler, *Therapeutic Jurisprudence: An Overview*, INT'L NETWORK ON THERAPEUTIC JURIS. (Oct. 29, 1999), <https://law2.arizona.edu/depts/upr-intj/intj-o.html>. See generally DAVID B. WEXLER & BRUCE J. WINICK, *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* xvii (Carolina Academic Press, 1996) (explaining how TJ can help go beyond the legal and more rigorous aspects of law, suggesting "that the law itself . . . [be used] as a kind of therapist or therapeutic agent"). One of the important aspects of the TJ focus is that it does not seek to diminish the value of important democratic values such as due process and the rule of law. Wexler, *supra*. Rather, it aims to consider how, while recognizing the value of existing legal foundations, the law and legal actors can foster more therapeutic outcomes for clients. *Id.* By no means am I suggesting the legal analytical rigor ought to be diminished. *Id.* Rather, it needs to be augmented by an understanding of "law's impact on emotional life and on psychological well-being." *Id.*

48. Baile, *supra* note 2, at 305–08.

	<b>Description for Medical Meeting</b>	<b>Thoughts for Tailoring in Legal Context</b>
S – Setting Up – Set up the interview.	Rehearse plan for delivering bad news; expect negative patient reaction; set up appropriate physical surroundings (private, with support persons when appropriate); sit down with patient; and manage time constraints and interruptions.	Apply the same principles. Note that it may still be useful to have support persons attend, but need to make sure the client understands solicitor and client privilege implications.
P – Perception – Assess the patient's perception.	Before delivering the news, assess 'patient's perception of the situation. This may allow you to tailor the information based on your understanding of the 'patient's perception.	Assessing the client's perception of the situation is equally important in a legal context. Without this understanding, you may be "diving in" with your legal analysis at a level that just does not connect with the client's mindset.
I – Invitation – Obtain patient's invitation to share details of the illness.	Some patients may want more or less details at this stage. They may want less detail about the diagnosis and more detail about the treatment plan options.	Some care may be needed here. Accuracy is extremely important in terms of the client's legal status. The need for the details of the legal provisions underlying the legal conclusion may depend on the client's ability/ desire to hear and understand them. However, full

		disclosure of the client’s legal position is critical.
K – Knowledge – Give knowledge and information to the patient.	Provide information in manageable chunks and without jargon. Check in to make sure the patient understands. Avoid being excessively blunt.	It is impossible for clients to move to an informed decision-making stage without understanding the information you are giving them. Many of the complaints about lawyers failing to act in accordance with the client’s wishes probably stem from a communication breakdown at this stage. Delivering information without legal jargon is critical, in both written and oral contexts. <sup>49</sup>

49. See, e.g., RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 3–5 (Carolina Acad. Press, 5<sup>th</sup> ed. 2005) (criticizing lawyers for using legal jargon that complicates rather than simplifies a matter, and advocating for a “plain English” approach). It will come as no surprise that I am in favor of the move to “plain English.” See *id.* While much of the work in this area focuses on writing, the principles apply to oral communication as well. See *id.*

<p>E – Emotions – Address the 'patient's emotions with empathic responses.</p>	<p>Observe the patient for any emotion. Identify the emotion experienced by the patient by naming it to yourself. If a patient appears sad but is silent, use open questions to query the patient as to what they are thinking or feeling. Identify the reason for the emotion and make sure it relates to the bad news. After you have given the patient a brief period of time to express his or her feelings, let the patient know that you have connected the emotion with the reason for the emotion by making a connecting statement.</p>	<p>Apply the same principles. While this may be the most uncomfortable stage for lawyers, and the initial response may be to say that lawyers are not therapists, the reality is that oncologists are not therapists either. That does not stop them from being required to express empathy. Until you have dealt with the client's emotion, it will be difficult to move to the next stage of the framework. Additionally, it may be very beneficial to help clients understand that there is a risk of the client's own emotional response negatively influencing their legal decision-making.<sup>50</sup></p>
<p>S – Strategy and Summary – Discuss strategy and summarize.</p>	<p>Patients who have a clear plan for the future are less likely to feel anxious and uncertain. While it is difficult to discuss treatment options where the</p>	<p>The same principles apply. Too often, clients feel left out of the legal decision-making process. Making them part of the decision-making</p>

50. See Shelley Kierstead, *Parent Education Programs in Family Courts: Balancing Autonomy and State Intervention*, 49 FAM. CT. REV. 140, 149 (2011) (discussing the potential relationship between emotional reactions and legal decision-making in a family law context).

	outcomes are unfavorable, following the preceding steps may make it easier to do so.	both helps them to be accountable and to feel that they have had a voice. <sup>51</sup>
--	--	---

The authors of the SPIKES model state that its “goal is to enable the clinician to fulfill the four most important objectives of the interview disclosing bad news: gathering information from the patient, transmitting the medical information, providing support to the patient, and eliciting the patient’s collaboration in developing a strategy or treatment plan for the future.”<sup>52</sup> It is arguable that similar goals could be articulated from a legal point of view.

In addition to fostering therapeutic outcomes for clients, another reason to follow this model is that it has the potential of enhancing the professional identity that the Carnegie Foundation’s 2007 study of professional schools’ education of lawyers, physicians, nurses, clergy and engineers<sup>53</sup> sought to enhance. Specifically, the Foundation’s president concluded that “[i]n every field [that] we studied . . . the most overlooked aspect of professional preparation was the formation of a professional identity with a moral and ethical core of service and responsibility.”<sup>54</sup> Service and responsibility are clearly at stake in this analysis.

Further, I am cognizant of the fact that client retention is a practical motivator.<sup>55</sup> While it should not, in my view, be the driving force for adopting empathetic communication methods that aim to facilitate client knowledge and foster informed decision-making, it falls within the

51. See *supra* Part 2.

52. Baile et al., *supra* note 2, at 305–08.

53. See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3 (Jossey-Bass 2007) [hereinafter the CARNEGIE REPORT]; WILLIAM M. SULLIVAN ET AL., SUMMARY: EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 3 (2007), [http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary\\_pdf\\_632.pdf](http://archive.carnegiefoundation.org/pdfs/elibrary/elibrary_pdf_632.pdf) (summarizing and examining the legal education in law schools).

54. Lee S. Shulman, *Foreword: On the Shoulder of Flexner* to MOLLY COOKE ET AL., EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY ix (Jossey-Bass 2010); see, e.g., Daisy Hurst Floyd et al., *Learning from Clergy Education: Externships Through the Lens of Formation*, 19 CLINICAL L. REV. 83, 84–85 (2012) (analyzing the ways that law schools could benefit from the experience of clergy externships to better foster professional identity formation in law students); Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation’s Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763, 764–65 (2012) (applying the Carnegie Foundation study to legal education).

55. Margaret McCaffery, *When Lawyers Leave: Client Retention Strategies*, SLAW (Apr. 14, 2014), <http://www.slw.ca/2014/04/14/when-lawyers-leave-client-retention-strategies/>.

definition of professionalism that recognizes the value of "balanced commercialism."<sup>56</sup> Quite simply, engaging in more effective communication with clients may improve client retention while giving clients a greater sense of both satisfaction and voice. Surely this is a win-win proposition.

#### PART 4: SPIKES MODEL APPLIED

Finally, I would like to return to the bad news hypothetical introduced at the beginning of this article, and work through a possible "SPIKES" approach. The initial statement was:

"I have reviewed all of the evidence and the law in this area. Given that you are addicted to drugs and have no support system, your child will likely become a Crown ward and be adopted by another family. This will mean that you will no longer be recognized as a parent to Sam."

S – Set Up the Stage – You clearly want a private place. Note that sometimes these conversations happen in busy courthouses—in front of many other people. Arguably, this compromises the sense of respect one would want in this situation.

P – Perception – "You've told me that you've been struggling with the rehab program. What's your sense of how this is likely to impact your ability to care for Zoe in the future?"

I – Invitation – "Unfortunately, because there are pretty strict timelines in place, I'm afraid it's quite likely that the court is going to decide that it may be better for Zoe to be cared for by somebody else. Would you like me to tell you more about the law that sets up these timelines?"

K – Knowledge – "When judges make decisions in child protection cases, the first thing they have to do is find that the child is 'in need of protection.'" I think we agree that you aren't parenting well when you're using drugs heavily. Am I right on that front? So again, it may be that a judge is going to decide that Zoe is in need of protection. If she does, the next thing that she needs to do is decide where Zoe should live. To do that, she will think about what is in Zoe's best interest. She may decide that it would be better for Zoe to live with somebody else. Do you have any questions about what I've told you so far? If you do have questions as we keep talking, feel free to ask me. You should know too though that

---

56. Chief Justice of Ontario's Advisory Comm. on Professionalism, *supra* note 10 (identifying "balanced commercialism" as an element of professionalism); *see supra* Part 2.

sometimes, even when parents don't get to live with children, they can get to see them."

E – Emotions – "I can imagine how frustrating this is for you, because you parent well when the drugs aren't a problem. And I know that you are sad because you love Zoe so much. But I think I can safely say that you want what is best for her. Let me stop here so that you have a chance to tell me what you're thinking at this stage. It's hard to think about what might be best for Zoe without bringing the emotions into it, but I'm hoping we can work together to think up a plan for moving forward in the event that the judge does find Zoe to be in need of protection."

S – Strategize and Summarize – Invite discussion of possible supports for continuing harm reduction or drug abstinence plan. Think about family members who may be able to care for Zoe while the client is working to get healthy. Brainstorm ways to propose visits with Zoe that will be workable for the client and will allow the bond with Zoe to be maintained.

Of course, there may be other equally good (or better) ways to approach this conversation. The key point though is to consider the potential benefits of a framework that intentionally allows clients to ask questions, express emotions, and work with the lawyer to problem-solve.

## CONCLUSION

Facilitating clients' ability to engage with the law and legal processes is an important role that involves developing rigorous analytical skills. But we shortchange both clients and the legal profession if we understand the lawyer's role as being limited to legal analysis. Studies from other disciplines confirm that clients value participating in the legal processes that affect their lives, even when the outcomes are not the ones anticipated.<sup>57</sup> Similarly, doctors develop important analytical skills in learning how to diagnose and treat patients. But the medical profession has recognized that communicating with their patients about diagnosis and treatment in an empathetic manner is an important part of their professionalism mandate. There is value to be gained by examining the tools developed in the medical context in an effort to enhance the therapeutic aspects of the lawyer-client relationship.

---

57. See *supra* note 45, 52.