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"He Got in My Face So I Shot Him": How Defendants' Language Impairments Impair Attorney-Client Relationships

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**“HE GOT IN MY FACE SO I SHOT HIM”:
HOW DEFENDANTS’ LANGUAGE IMPAIRMENTS
IMPAIR ATTORNEY-CLIENT RELATIONSHIPS**

Michele LaVigne[†]
Gregory Van Rybroek^{††}

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“What are you supposed to do when all your client can give you is,
‘He got in my face so I shot him?’”¹

INTRODUCTION

Language has been called “the stuff of thought,”² “an expression of innate human nature,”³ and “a fistula: an open wound through which our innards are exposed to an infectious world.”⁴ At a more prosaic level, language and the ability to use it can be called the quintessential tools of human development and communication:

A child who acquires language and the ability to use it effectively can carry on a conversation with a total stranger, make friends, tell a story, laugh at a joke, follow rules, figure out what makes other people tick, control his behavior, avoid offending conversational partners, and look forward to a lifetime of learning.⁵

For all of the power of language, however, the process of acquiring it in early childhood remains singularly vulnerable, and any resulting language impairments can have serious lifelong social, behavioral, emotional, and communicative effects. Those effects can be regularly observed in the criminal and juvenile justice systems.

Decades of research have shown that language impairments—i.e., deficits in language and language usage⁶—occur at starkly elevated rates among adolescents and adults charged with and convicted of crimes.⁷ British researchers estimate that “50–60% of

¹ Attorney I, *see infra* notes 57–58.

² STEVEN PINKER, *THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE* 380 (2007).

³ GUY DEUTSCHER, *THROUGH THE LANGUAGE GLASS: WHY THE WORLD LOOKS DIFFERENT IN OTHER LANGUAGES* 6 (2010) (referring to Noam Chomsky’s theory of innate universal grammar).

⁴ PINKER, *supra* note 2, at 425.

⁵ Michele LaVigne & Gregory Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juveniles and Why It Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 37, 46–47 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1663805.

⁶ Carla J. Johnson, Joseph H. Beitchman & E.B. Brownlie, *Twenty-Year Follow-Up of Children With and Without Speech-Language Impairments: Family, Educational, Occupational, and Quality of Life Outcomes*, 19 AM. J. SPEECH-LANGUAGE PATHOLOGY 51, 54 (2010).

⁷ *See* Theresa A. Belenchia & Thomas A. Crowe, *Prevalence of Speech and Hearing Disorders in a State Penitentiary Population*, 16 J. COMM. DISORDERS 279, 281–83 (1983) (finding higher rates of voice and hearing disorders in the incarcerated population than in the general population); Nicholas Bountress & Jacqueline Richards, *Speech, Language and Hearing Disorders in an Adult Penal Population*, 44 J. SPEECH & HEARING DISORDERS 293, 295–99 (1979) (finding a high incidence of deficient language skills

young people [= 21 years] who are involved in offending hav[e] speech, language and communication needs.”⁸ Common deficiencies include “abstract language tasks . . . information processing and narrative discourse.”⁹ Other research has shown that adolescents and young adults with language impairments are substantially more likely to be arrested than their non-impaired counterparts.¹⁰ And within juvenile and adult correctional institutions, language disorders have been found at rates ranging from three to ten times that of the general population.¹¹

While these findings are certainly disconcerting, they are not surprising, at least to language professionals. Speech-language scholars have long known that language impairments frequently occur in tandem with disabilities, deficits, and early-childhood conditions endemic to defendant populations.¹²

in an adult male prison population); Abbe D. Davis et al., *Language Skills of Delinquent and Nondelinquent Adolescent Males*, 24 J. COMM. DISORDERS 251, 252 (1991) (indicating that between 58 to 84% of institutionalized delinquents had language and communication difficulties); Dixie Sanger et al., *Prevalence of Language Problems Among Adolescent Delinquents: A Closer Look*, 23 COMM. DISORDERS Q. 17, 23 (2001) (explaining that 19.4% of female juvenile delinquents studied qualified for language services); Pamela C. Snow & Martine B. Powell, *Oral Language Competence, Social Skills and High-Risk Boys: What Are Juvenile Offenders Trying to Tell Us?*, 22 CHILD. & SOC'Y 16, 22 (2008) [hereinafter *High-Risk Boys*] (indicating that 52% of young male offenders studied had a language impairment); Cynthia Olson Wagner et al., *Communicative Disorders in a Group of Adult Female Offenders*, 16 J. COMM. DISORDERS 269 (1983) (revealing that 44% of incarcerated women studied had some form of speech-language deficiency).

⁸ Juliette Gregory & Karen Bryan, *Speech and Language Therapy Intervention with a Group of Persistent and Prolific Young Offenders in a Non-Custodial Setting with Previously Undiagnosed Speech, Language and Communication Difficulties*, 46 INT'L J. LANGUAGE COMM. DISORDERS 202, 203 (2011).

⁹ *High-Risk Boys*, *supra* note 7, at 17; *see also* Pamela C. Snow & Martine B. Powell, *Oral Language Competence in Incarcerated Young Offenders: Links with Offending Severity*, 13 INT'L J. SPEECH-LANGUAGE PATHOLOGY 1, 1–2 (2011) [hereinafter *Incarcerated Young Offenders*].

¹⁰ E.B. Brownlie et al., *Early Language Impairment and Young Adult Delinquent and Aggressive Behavior*, 32 J. ABNORMAL CHILD PSYCHOL. 453, 459–60, 463 (2004). These findings are consistent with other studies that employ different methodologies. *See, e.g.*, Nancy J. Cohen et al., *Language, Achievement, and Cognitive Processing in Psychiatrically Disturbed Children with Previously Identified and Unsuspected Language Impairments*, 39 J. CHILD PSYCHOL. PSYCHIATRY 865, 866 (1998). *See also* Sanger et al., *supra* note 7, at 23.

¹¹ *See* sources cited *supra* note 7. *See also* Kathryn Stone & Karen Bryan, *Unlocking the Evidence*, COUNS. MAG., Oct. 2010, at 35–37 (U.K.) (citing Karen Bryan, Jackie Freer & Cheryl Furlong, *Language and Communication Difficulties in Juvenile Offenders*, 42 INT'L J. LANGUAGE & COMM. DISORDERS 505, 505–20 (2007)) (finding that at least 60% of young offenders have communication difficulties) (on file with coauthor Michele LaVigne).

¹² *See* LaVigne & Van Rybroek, *supra* note 5, at 45–65. This will be discussed further in Section II.

The body of research confirming the high risk of language impairments among juvenile and adult defendants raises a host of questions about the quality of substantive and procedural justice provided to these individuals. Due process and other constitutional rights in juvenile and criminal court are, by their nature, language-based and require a satisfactory level of linguistic and communicative ability if they are to be accessed and exercised in a meaningful fashion. A shortfall in an individual's language and communication skills can reverberate throughout all stages of the legal process, from interactions with law enforcement to sentencing and even beyond.¹³

In an article published in 2011, we broadly surveyed the causes and effects of language impairments, their prevalence among client populations, and the extensive range of legal ramifications for juvenile or adult defendants.¹⁴ We called that article "an attempt to begin the conversation" about language disorders.¹⁵ We framed it that way because, despite literature within the speech-language field dating back as far as the 1920s, and the patently obvious relevance of language disorders for legal and correctional professionals, the subject was virtually unknown in the American legal field.¹⁶

In this Article, we circle back to take a closer look at the impact of language impairments within the context of the attorney-client relationship. We chose to concentrate on this aspect of the justice process because the attorney-client relationship is the constitutional aspect that arguably has the most profound influence on the overall quality of justice, yet is the most susceptible to interference by language deficits.¹⁷ Language deficits are uniquely destruc-

¹³ See *id.* at 65–100.

¹⁴ See generally LaVigne & Van Rybroek, *supra* note 5.

¹⁵ *Id.* at 45.

¹⁶ See *id.* at 44–45, 91–93. Studies on the high rate of language impairments in American correctional institutions appeared in the 1970s and 1980s. Unfortunately, these studies did not gain traction and were not continued. *Id.* Studies of language impairments in correctional institutions in Australia and Great Britain are ongoing. See, e.g., Bryan, Freer & Furlong, *supra* note 11; Pamela C. Snow & Martine B. Powell, *Youth (In)justice: Oral Language Competence in Early Life and Risk for Engagement in Antisocial Behaviour in Adolescence*, 435 TRENDS & ISSUES IN CRIM. JUST. 1 (2012) (Austl.) [hereinafter *Youth (In)justice*]. For a more detailed list of the studies conducted in the U.S., Australia, and Great Britain, see sources cited *supra* note 7.

¹⁷ The late Frank Remington of the University of Wisconsin Law School anticipated *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), *Missouri v. Frye*, 132 S. Ct. 1399 (2012), and *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), by twenty-five years when he wrote that defense counsel should have "primary responsibility" for informed decision making by a defendant. Frank J. Remington, *The Changing Role of the Trial Judge in Criminal Cases – Ensuring that the Sixth Amendment Right to Assistance of Counsel Is Effective*, 20 U.C. DAVIS L. REV. 339, 339 (1987).

tive in this arena. While every client has a right to effective assistance of counsel, counsel’s ability to provide effective assistance is inextricably interconnected with the client’s reciprocal ability to effectively assist counsel.¹⁸ And the client’s ability to effectively assist counsel is inextricably interconnected with language. Or to put it more simply, in the attorney-client relationship, communication matters. In fact, communication is all there is.

In order to understand how language impairments can profoundly affect the attorney-client relationship, legal practitioners must appreciate the wide-ranging communicative and behavior implications of language impairments, as well as the idiosyncratic nature of a professional relationship that is as dependent upon the communication skills of the consumer as those of the professional. To that end, we have interwoven case law and forensic and legal scholarship with speech-language scholarship. We have also drawn heavily from the expert opinions, observations, and stories of practicing attorneys—sources too often ignored in discussions of the attorney-client relationship.

We structured this Article in a way we hope is accessible for those who may have little familiarity with the concept of language impairments, but who are interested in an issue that has ramifications for practice, policy, and research.¹⁹ As a preliminary matter, we first provide a simplified introduction to language impairments.²⁰ Even though the subject of language impairments re-

¹⁸ We have relied on Schmidt, Reppucci, and Woolard’s definition of effective assistance or participation. A client’s ability to effectively assist counsel refers to those “abilities beyond those that are constitutionally required [for competency to stand trial],” and that contribute to the development and operation of the attorney-client relationship. Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woolard, *Effectiveness of Participation as a Defendant: The Attorney-Juvenile Client Relationship*, 21 BEHAV. SCI. & L. 175, 176–77 (2003).

¹⁹ This Article is aimed primarily at juvenile and criminal defense attorneys. However, language impairments and their effects are highly relevant for attorneys who practice in civil areas such as family, consumer, landlord-tenant, employment, and disability, as well as quasi-criminal areas such as immigration and child protection.

²⁰ We encourage readers desiring more in-depth information to review some of the excellent literature on the long-term effects of language disorders and the prevalence of language impairments among juvenile and adult offenders. See, e.g., Joseph H. Beitchman et al., *Fourteen-Year Follow-Up of Speech/Language Impaired and Control Children: Psychiatric Outcome*, 40 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 75 (2001) [hereinafter *Fourteen-Year Follow-Up*]; Johnson, Beitchman & Brownlie, *supra* note 6, at 51. For over twenty years, Beitchman, Johnson, and Brownlie have been engaged in the Ottawa Language Study, a prospective longitudinal study of individuals with and without a history of early speech/language impairments. See *Fourteen-Year Follow-Up*, at 51; Johnson, Beitchman & Brownlie, *supra* note 6. Beitchman, Johnson, and Brownlie have published findings regarding the status of the individuals at ages 12, 19, and 25. See also Karen Bryan, *Preliminary Study of the Prevalence of Speech and Language Difficulties*

mains relatively unknown in the legal world, many of the behavioral and communicative effects will actually be quite familiar to practitioners.

We next look at language impairments in the context of the attorney-client relationship. Competency to stand trial is the obvious first stop, given the connection between communication and the constitutional requirement that a defendant be able to assist counsel.²¹ However, for most attorneys, it will be the client who is impaired but not legally incompetent who presents the greater (and much more frequent) challenge. Therefore, the bulk of our discussion focuses on those clients. Specifically, we look at what happens when a client's language impairments interfere with functions that are essential to the successful operation of an attorney-client relationship.

Finally, we consider potential remedies and accommodations for a problem that may, at first blush, seem intractable. These solutions are not just for lawyers, however. Given the significance of this issue for the quality of justice, language impairments cannot simply be "the lawyer's problem," but are the responsibility of all actors in the criminal justice system.

I. LANGUAGE IMPAIRMENTS IN A NUTSHELL

The term "language impairments" (or "language disorders") encompasses a broad constellation of deficits. Language impairments fall into three categories: receptive, expressive, and pragmatics. Receptive and expressive deficits are exactly what the words suggest—problems understanding or expressing language. These deficits affect skills such as syntax, vocabulary, and semantics that we typically associate with language, and can be readily tested with standardized instruments.²² On a functional level, receptive and

in Young Offenders, 39 INT'L J. LANGUAGE COMM. DISORDERS 391 (2004) [hereinafter *Preliminary Study*]; *High-Risk Boys*, *supra* note 7.

²¹ *Dusky v. United States*, 362 U.S. 402, 402 (1960).

²² E.B. Brownlie et al., *supra* note 10, at 454. Whether an individual is classified as having a "language impairment" based on test scores depends to a certain extent on who is asking and for what purpose. Researchers often use an inclusive cutoff (one standard deviation below the mean), which is consistent with speech-language pathologists' (SLP) referrals and judgments. *Fourteen-Year Follow-Up*, *supra* note 20, at 77. More stringent criteria are usually applied to determine qualification for publicly funded services. The Wisconsin Department of Public Instruction, for example, requires that a student score 1.75 standard deviations below the mean for his or her chronological age to be classified as having a language impairment for special education purposes. WIS. ADMIN. CODE CH. PI § 11.36(5)(b)(1) (2009–10).

expressive deficits affect the ability to comprehend meaning and to recall and relate information.

The third category, pragmatics, is less tangible. Pragmatics are generally defined as “the behavioral effects[] of communication,” and they govern the use and understanding of language in context.²³ Pragmatics are different from other linguistic concepts such as vocabulary, syntax, and processing in that pragmatics are concerned with the effect of a speaker’s communication choices and styles on the receiver *and* with the corresponding effect of the receiver’s reaction on the speaker.²⁴ Pragmatic competence refers to the communicative and cognitive skills that enable a speaker to successfully function as a social being in variety of contexts. Pragmatic incompetence reveals itself in a lack of social cognition,²⁵ an inability to take the perspective of the other person,²⁶ and a failure to appropriately adapt in interactions.²⁷

Language impairments arise when the language acquisition process goes awry during childhood. The cause may be an underlying communication disorder such as hearing loss,²⁸ auditory processing disorders,²⁹ or external conditions such as extreme pov-

²³ PAUL WATZLAWICK ET AL., PRAGMATICS OF HUMAN COMMUNICATION: A STUDY OF INTERACTIONAL PATTERNS, PATHOLOGIES, AND PARADOXES 22 (1967); *see also* Robert L. Russell, *Social Communication Impairments: Pragmatics*, 54 PEDIATRIC CLINICS OF N. AM. 483, 484 (2007) (defining pragmatics as “the communicative use of language and gesture in context”).

²⁴ WATZLAWICK ET AL., *supra* note 23, at 22.

²⁵ “Social cognition refers to the knowledge, processing and application of culturally relevant (and often quite subtle) behaviour that assists in establishing and maintaining interpersonal relationships of varying degrees of intimacy and complexity.” *Youth (In)justice*, *supra* note 16, at 2 (citing Curtis D. Hardin & Terri D. Conley, *A Relational Approach to Cognition: Shared Experience and Relationship Affirmation in Social Cognition*, in COGNITIVE SOCIAL PSYCHOLOGY: THE PRINCETON SYMPOSIUM ON THE LEGACY AND FUTURE OF SOCIAL COGNITION 3 (Gordon B. Moskowitz ed., 2001)).

²⁶ *See* LaVigne & Van Rybroek, *supra* note 5, at 60 (citing Philip S. Dale, *Language and Emotion: A Developmental Perspective*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS 8 (Joseph H. Beitchman et al. eds., 1996)); Ethan Rimmel et al., *Theory of Mind Development in Deaf Children*, in OXFORD HANDBOOK OF DEAF STUDIES, LANGUAGE, AND EDUCATION 113, 125 (Mark Marschark & Patricia E. Spencer eds., 2003); Heidemarie Lohmann et al., *Linguistic Communication and Social Understanding*, in WHY LANGUAGE MATTERS FOR THEORY OF MIND, 245, 261–63 (Janet Wilde Astington & Jodie A. Baird eds., 2005). For a discussion of theory of mind, *see infra* Section D.

²⁷ Russell, *supra* note 23, at 483.

²⁸ For a discussion of the effects of congenital or early-childhood hearing loss, *see* Michele LaVigne & McCay Vernon, *An Interpreter Isn’t Enough: Deafness, Language, and Due Process*, 2003 Wis. L. REV. 843, 852–65 (2003).

²⁹ Auditory processing disorders are “hearing impairment(s) arising from pathology of the brain.” D-E Bamiou et al., *Aetiology and Clinical Presentations of Auditory Processing Disorders—A Review*, 85 ARCHIVES DISEASE CHILD. 361, 361 (2001).

erty,³⁰ maltreatment, or neglect.³¹ Language impairments may also co-occur with any number of associated disorders including ADHD, learning disabilities, and pervasive developmental disorders.³²

Unfortunately, despite decades of research on causes and effects, and the well-documented high rates of occurrence among certain groups of individuals, language deficits among children are often still unrecognized and untreated, and persist into adolescence and adulthood.³³ Research has shown that unidentified language impairments are especially prevalent among offenders.³⁴

Language impairments have an insidious quality. Language disorders have as much to do with long-term academic, cognitive, social, emotional, and behavioral dysfunction, as with low vocabu-

³⁰ See generally BETTY HART & TODD R. RISLEY, *MEANINGFUL DIFFERENCES IN THE EVERYDAY EXPERIENCE OF YOUNG AMERICAN CHILDREN* (1995) (connection between socioeconomic status and language deficits). For a discussion of the connection between language impairments and poverty, see LaVigne & Van Rybroek, *supra* note 5, at 51–53. The connection between language deficits and poverty is becoming an issue of great concern for many educators. See, e.g., Ginia Bellafante, *Before a Test, a Poverty of Words*, N.Y. TIMES (Oct. 5, 2012), <http://www.nytimes.com/2012/10/07/nyregion/for-poor-schoolchildren-a-poverty-of-words.html>.

³¹ See LaVigne & Van Rybroek, *supra* note 5, at 53–54; Pamela C. Snow, Martine B. Powell & Dixie D. Sanger, *Oral Language Competence, Young Speakers, and the Law*, 43 LANGUAGE, SPEECH & HEARING SERVICES IN SCHS. 496, 497–98 (2012) [hereinafter *Young Speakers*].

³² See, e.g., Joseph H. Beitchman et al., *Prevalence of Psychiatric Disorders in Children with Speech and Language Disorders*, 25 J. AM. ACAD. CHILD PSYCHIATRY 528, 532–33 (1986); Dennis P. Cantwell & Lorian Baker, *Association Between Attention Deficit-Hyperactivity Disorder and Learning Disorders*, 24 J. LEARNING DISABILITIES 88, 88–94 (1991). See also LaVigne & Van Rybroek, *supra* note 5, at 49–51. There is also a disorder known as specific language impairment (SLI). This disorder produces language deficits and associated difficulties that “are not directly attributable to neurological or speech mechanism abnormalities, sensory impairments, mental retardation, or environmental factors.” Eva Arkkila et al., *Specific Language Impairment in Childhood Is Associated with Impaired Mental and Social Well-being in Adulthood*, 33 LOGOPEDIC PHONIATRICS VOACOLOGY 179, 179 (2008).

³³ See, e.g., Gregory & Bryan, *supra* note 8, at 211–12.

³⁴ See *Incarcerated Young Offenders*, *supra* note 9, at 481; see also Pamela C. Snow & Dixie D. Sanger, *Restorative Justice Conferencing and the Youth Offender: Exploring the Role of Oral Language Competence*, 46 INT’L J. LANGUAGE & COMM. DISORDERS 324, 329 (2011) [hereinafter *Restorative Justice Conferencing*]; Bryan, Freer & Furlong, *supra* note 11, at 507–08; Cohen et al., *supra* note 10, at 866, 872–73 (demonstrating that children and adolescents with previously unidentified language disorders were more likely to show aggressive and delinquent behavior); Glyn Jones & Jenny Talbot, *No One Knows: The Bewildering Passage of Offenders with Learning Disability and Learning Difficulty Through the Criminal Justice System*, 20 CRIM. BEHAVIOUR & MENTAL HEALTH 1, 1–2 (2010) (U.K.) (explaining that in Great Britain, the Prison Reform Trust created the “No One Knows” program to deal with the “hidden problem” of inmates with “significant problems with understanding and communication”).

lary scores and poor grammar.³⁵ Their effects can be life-altering and frequently remain long after the individual has acquired sufficient language to get by on a day-to-day basis.³⁶

The array of potential deficiencies brought about by language impairments is vast, even when we confine our discussion to “only” those deficits that directly relate to communication within the attorney-client relationship. This list, culled from studies and literature reviews, illustrates the depth and breadth of potential effects that are likely to impede the ability to assist counsel:

- poor vocabulary;
- difficulty processing complex sentences;
- difficulty following directions;
- deficient auditory memory;
- staying on topic;
- poor reading skills;
- deficient narrative skills (both expressive and receptive);
- inability to grasp inferences;
- lack of background knowledge;
- difficulty learning new material;
- limited ability to seek clarification;
- limited ability to recognize and articulate emotional states;
- difficulty reading social cues;
- insensitivity to cause and effect;
- inability to recognize and control inappropriate behavior;
- inability to interpret the motivations and thoughts of others; and

³⁵ The literature on the prevalence of language disorders among those with identified behavioral, psychiatric, and emotional disorders is voluminous. For helpful literature reviews, see generally Joseph H. Beitchman et al., *Linguistic Impairment and Psychiatric Disorder: Pathways to Outcome*, in LANGUAGE, LEARNING, AND BEHAVIOR DISORDERS 493, 493–514 (Joseph H. Beitchman et al., eds. 1996) (giving a general overview of linguistic impairments and cognitive disorders); Ginette Dionne, *Language Development and Aggressive Behavior*, in DEVELOPMENTAL ORIGINS OF AGGRESSION 330, 330–52 (Richard E. Tremblay et al., eds. 2005) (covering language deficits and their result in aggression); see also Maria Carlson Törnqvist et al., *Adult People With Language Impairment and Their Life Situation*, 30 COMM. DISORDERS Q. 237, 238–39 (2009) (discussing the effects of language impairments on social development); Arlene R. Young et al., *Young Adult Academic Outcomes in a Longitudinal Sample of Early Identified Language Impaired and Control Children*, 43 J. OF CHILD PSYCHOL. & PSYCHIATRY 635, 642–43 (2002) (finding that early development of language impairments results in long-term academic problems).

³⁶ Johnson, Beitchman & Brownlie, *supra* note 6, at 60–62; Joseph H. Beitchman & E.B. Brownlie, *Childhood Speech and Language Disorders*, in DO THEY GROW OUT OF IT? LONG-TERM OUTCOMES OF CHILDHOOD DISORDERS 225, 225–53 (Lily Hechtman ed., 1996); *Fourteen-Year Follow-Up*, *supra* note 20, at 75–78.

- deficits in higher-order skills such as self-monitoring, planning, and appreciation of consequences.³⁷

Obviously, not every linguistically impaired individual will manifest deficits in every sphere of communication. The effects on a particular person will depend on factors such as the type and severity of disorder, home environment, and presence or absence of early intervention.³⁸ Nor will every deficit be readily apparent. In fact, many impaired older adolescents and adults sound “normal” (though perhaps abrupt, reluctant, or rude) to the uninitiated.³⁹ Nevertheless, as a class, language disorders are practically tailor-made to disrupt the attorney-client relationship.

II. LANGUAGE IMPAIRMENTS AND COMPETENCY TO STAND TRIAL

When considering communication dysfunction in the context of the attorney-client relationship, the question of competency to stand trial inevitably comes to mind. Courts have long relied on some variation of the *Dusky* standard, which requires that a criminal defendant have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.”⁴⁰ In 1996, in *Cooper v. Oklahoma*, the Supreme Court made the language and competency link more explicit by defining the ability to consult with counsel as the ability to “communicate effectively with counsel.”⁴¹ By that definition, language impairments are as relevant to a client’s competency to stand trial as mental illness or intellectual disability.

An individual’s language skills are evaluated by means of specialized instruments administered and interpreted by a speech-language pathologist (SLP). For example, a common assessment tool used with individuals ages five to twenty-one is the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4).⁴² CELF-

³⁷ See, e.g., Gerard H. Poll et al., *Identification of Clinical Markers of Specific Language Impairment in Adults*, 53 J. SPEECH, LANGUAGE & HEARING RES. 414, 414–17 (2010); *High-Risk Boys*, *supra* note 7, at 16–18; LaVigne & Van Rybroek, *supra* note 5, at 43–44.

³⁸ Young et al., *supra* note 35, at 635–36.

³⁹ We must not overlook the humiliation and insecurity that accompany language impairments and the resultant desire to hide personal deficits. See *Youth (In)justice*, *supra* note 16, at 1–2; see also Pamela C. Snow & Martine B. Powell, *What’s the Story? An Exploration of Narrative Language Abilities in Male Juvenile Offenders*, 11 PSYCHOL. CRIME & L. 239 (2005) [hereinafter *What’s the Story?*].

⁴⁰ *Dusky v. United States*, 362 U.S. 402, 402 (1960).

⁴¹ 517 U.S. 348, 368 (1996).

⁴² See *Assessment and Information: Clinical Evaluation of Language Fundamentals®—Fourth Edition (CELF®-4)*, PEARSON EDUCATION, INC., <http://www.pearsonassessments.com>.

4 includes a series of subtests and scales that measure a variety of essential communicative tasks such as auditory comprehension and recall, ability to follow directions, and comprehension of social rules.⁴³ Instruments like CELF-4⁴⁴ are more finely tuned to the layers of language than measures typically relied on by courts such as Verbal IQ or clinical assessments.⁴⁵ They also tell us much more about a defendant’s actual communicative capabilities and how they are likely to play out with an attorney, especially when they are used in conjunction with a dedicated competency assessment tool like the MacArthur Competence Assessment Tool – Criminal Adjudication (MAC-CAT-CA).

While language assessments are hardly standard in the competency process,⁴⁶ a few lawyers have reported that they have supplemented competency evaluations with language assessments in selected cases where they believe the client’s extremely poor lan-

com/HAIWEB/Cultures/en-us/Productdetail.htm?Pid=015-8037-200 (last visited Dec. 13, 2013).

⁴³ Teresa Paslawski, *The Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4): A Review*, 20 CANADIAN J. SCH. PSYCHOL. 129, 131 (2005).

⁴⁴ Another commonly used standardized instrument is the Test of Adolescent/Adult Language (TOAL-4). See *Test of Adolescent and Adult Language—Fourth Edition*, PRO ED, INC., <http://www.proedinc.com/customer/productView.aspx?ID=4004> (last visited Dec. 13, 2013).

⁴⁵ “Although verbal IQ and language ability are related, the two constructs are conceptually distinct. The differences between verbal IQ and language ability are reflected in their measurement and scoring. Language ability includes . . . receptive and expressive semantics, morphology, and syntax. Verbal IQ measures do not systematically assess these aspects of language. For instance, Wechsler verbal IQ scales focus on acquired knowledge rather than language ability.” Brownlie et al., *supra* note 10, at 454. According to Australian psychologist Pamela Snow, speech-language pathologists (SLPs) do not rely on Verbal IQ as a measure of language skill:

One problem is that verbal IQ represents . . . quite “static” skills, and . . . it is unrealistic to reduce a wide variety of complex sub-skills down to one score. SLPs think in a number of dimensions – receptive language (comprehension) [versus] expressive language, and also look at a number of aspects of language – phonology (use of the sounds system in one’s language), semantics (vocabulary), syntax (sentence complexity), and pragmatics (the culturally determined set of social “rules” about how language is used). We . . . “dissect” language competence, which is why we use a number of different measures. . . . One of the most important composite skills is narrative language – the ability to apply a “template” that enables the logical sequencing of novel information for a listener who is naive about events. This has obvious forensic implications, but a verbal IQ score would only have a modest correlation with narrative skill.

E-mail from Pamela Snow, Assoc. Prof., Monash University-Australia, to co-author Michele LaVigne (Aug. 11, 2011) (on file with co-author Michele LaVigne).

⁴⁶ Given that the legal profession is just beginning to recognize the existence and significance of language impairments, the absence of language assessments is to be expected. See LaVigne & Van Rybroek, *supra* note 5, at 43–45.

guage skills exacerbate his or her immaturity or learning disabilities. These assessments shed important light on functional deficits that were overlooked in the ordinary competency process. In a Dane County, Wisconsin case, for example, a language assessment placed the juvenile client's expressive and receptive skills in the bottom percentile of individuals his age, deficits that had been missed not only by the client's school, but also in the initial competency evaluation.⁴⁷ Based on these low scores, both the evaluating psychologist (who had originally opined that the juvenile was likely to become competent within a year) and the court determined that the juvenile was incompetent, and unlikely to become competent within the statutory time period.

Although such low language scores may seem extreme, research and experience have shown that they are not uncommon among individuals in the juvenile and criminal justice systems.⁴⁸ These findings are a clear indication that the number of juvenile and criminal defendants who lack the constitutionally required ability to "communicate effectively with counsel" is probably much

⁴⁷ In this case the evaluating psychologist originally found that the juvenile was "likely to become competent with further education about the legal system and his legal rights." After receiving a copy of the language assessment that placed the juvenile in the bottom fourth to fifth percentile in ability to follow directions and recall information, the evaluator revised her opinion to state: "He is not likely to become competent within a 12 month period." Significantly, despite the youth's severe language impairments, his school had determined that he "did not have special education or learning disability needs." Reports from *In re* D.S., Dane Cnty., Wis. (on file with co-author Michele LaVigne) (permission to use documents granted by trial court judge, defense attorney, and prosecutor). In Massachusetts, a juvenile was found incompetent when her attorney provided the court a language assessment that placed the client's receptive and expressive skills below the first percentile. E-mail from Attorney A.P. to co-author Michele LaVigne (Jan. 10, 2013) (on file with co-author Michele LaVigne).

⁴⁸ At Mendota Juvenile Treatment Center (MJTC), a mental health facility for male offenders in juvenile corrections in Madison, Wis., testing has revealed that up to 25% of the boys have receptive and expressive language skills in the *bottom first percentile*. When asked about these children's ability to comprehend the legal process, a staff member questioned, "How could these kids possibly be competent?" LaVigne & Van Rybroek, *supra* note 5, at 41–42, 67. See also Bryan, Freer & Furlong, *supra* note 11, at 515 (indicating that 46 to 67% of offenders in juvenile correctional facility scored within poor or very poor category on language assessments, compared with 9% of general adolescent population); *Young Speakers*, *supra* note 31, at 502 (citing Debra J. Blanton & Paul A. Dagenais, *Comparison of Language Skills of Adjudicated and Nonadjudicated Adolescent Males and Females*, 38 LANGUAGE, SPEECH & HEARING SERVICES IN SCHS. 309, 309–14 (2007)) (positing that international studies show that between 19% and 60% of young offenders experience clinical levels of impairment); Sanger et al., *supra* note 7, at 23 (19.4% of female juvenile offenders studied qualified for language services); *Preliminary Study*, *supra* note 20, at 391–400; *High-Risk Boys*, *supra* note 7, at 16–28; *Incarcerated Young Offenders*, *supra* note 9, at 480–89.

higher than we have allowed ourselves to believe, and that questions of functional language ability properly belong in competency considerations.

III. THE ATTORNEY-CLIENT RELATIONSHIP: WHAT LAWYERS SAY

*“Doctors and judges don’t understand the subtle level of assisting counsel.”*⁴⁹

Most defendants with language impairments will be found or presumed competent, not because they are able to competently assist counsel, but because of the nature of the entire competency enterprise. While forensic scholars consider competency to stand trial to be “the most significant mental health inquiry pursued in the system of criminal law,”⁵⁰ as a statistical and practical matter it is only of marginal relevance in the actual operation of the juvenile and criminal justice systems.⁵¹ The constitutional threshold for a finding of competency is low⁵² and inconsistently applied.⁵³ Legal prac-

⁴⁹ Attorney D, *see infra* notes 58–59.

⁵⁰ Gianni Pirelli et al., *A Meta-Analytic Review of Competency to Stand Trial Research*, 17 *PSYCHOL. PUB. POL’Y & L.* 1, 2 (2011) (citing ALAN A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* 200 (1975)).

⁵¹ *See, e.g.*, Norman G. Poythress et al., *Client Abilities to Assist Counsel and Make Decisions in Criminal Cases*, 18 *LAW & HUM. BEHAV.* 437, 450 (1994) (demonstrating that lawyers actually raised competency to stand trial with only a fraction of the clients whose competency they doubted).

⁵² *See, e.g.*, *Newman v. Harrington*, 726 F.3d 921 (7th Cir. 2013), *aff’g* *United States ex rel. Newman v. Rednour*, 917 F. Supp. 2d 765 (N.D. Ill. 2012) (granting habeas relief for defendant with IQ of 62). In *Newman*, the trial court had denied a post-conviction request for an evidentiary hearing on competency, stating: “If he was drooling or if his eyes were going someplace, counsel, I assure you, I would have sua sponte asked for a fitness hearing.” 917 F. Supp. 2d at 771. In *Pierce County, Wis.*, a trial court judge denied a request for a competency evaluation, stating: “I think we have to keep competency to the very few cases where, clearly, this person doesn’t have a clue what’s going on.” *In re Zachary A.*, No. 2009AP2091, 2010 WL 916879, at *1 (Wis. Ct. App., Mar. 16, 2010) (reversing the trial court). *See also* *Hibbert v. Poole*, 415 F. Supp. 2d 225, 240–41 (W.D.N.Y. 2006) (finding defendant with an IQ of 59 competent because he had lived independently and been employed, and because the defendant “himself never informed anyone at any time that he was having difficulty understanding what was occurring in his criminal proceeding”); *United States v. Wenzel*, 497 F. Supp. 489, 490–91 (D. Nev. 1980) (finding defendant with an IQ of 55–60 competent); *People v. Henderson*, 404 N.E.2d 392, 395–96 (Ill. App. Ct. 1980) (finding defendant with IQ of 62 competent, despite psychiatrist’s testimony that a person with the defendant’s IQ would have great difficulty understanding concepts and reading and understanding language).

⁵³ “Because judicial determinations almost always rest entirely on the recommendation of experts, and because those experts generally do not explain either their methodology or the basis for their conclusions, it is very difficult to know *what* underlies most adjudicative competence decisions.” Terry A. Maroney, *Emotional Competence, “Rational Understanding,” and the Criminal Defendant*, 43 *AM. CRIM. L. REV.* 1375, 1400 (citing THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND IN-*

tioners regard the whole process with skepticism, and rarely raise it, even when they have doubts about a client's ability to adequately communicate.⁵⁴

The fact that a client clears the competency bar in no way means that the attorney-client relationship can operate as it should.⁵⁵ There is vast territory between the minimal standard for competency and the ability to effectively participate in the attorney-client relationship.⁵⁶ It is in this expanse that the effects of language impairment on both the lawyer's and the client's ability to do their jobs are most likely to be felt.

Anybody who wishes to understand the implications of a client's communication deficits on the attorney-client relationship and the quality of representation must be willing to delve into the nuanced and often messy world of juvenile and criminal defense. For us, the authors, that meant talking to lawyers. Scholarship and commentary, practice standards, and traditional case law obviously factor into the discussion, but we have chosen to give lawyers a leading voice because they are on the frontlines, bearing the ethical, constitutional, and practical responsibility for the attorney-client relationship. It is therefore vital that they be allowed to explain the often-painful realities of representing the client who lacks the tools to effectively communicate and assist in return.

For this Article, we talked with eleven lawyers with seven to forty-two years of experience in criminal or juvenile defense. These attorneys were handpicked based on several criteria including geographic and practice diversity (i.e., state vs. federal; juvenile vs. adult; private practice vs. public defender).⁵⁷ We have labeled the

STRUMENTS 69, 79 (2d ed. 2003)) (emphasis in original). See also Mark C. Bardwell & Bruce A. Arrigo, *Competency to Stand Trial: A Law, Psychology, and Policy Assessment*, 30 J. PSYCHIATRY & L. 147, 149 (2002).

⁵⁴ Poythress et al., *supra* note 51, at 450. See also Ron Kuby & William M. Kunstler, *So Crazy He Thinks He Is Sane: The Colin Ferguson Trial and the Competency Standard*, 5 CORNELL J.L. & PUB. POL'Y 19 (1995).

⁵⁵ See *State v. Shields*, 593 A.2d 986, 987, 993, 1011 (Del. Super. Ct. 1990) (finding defendant with a serious language disorder competent, placing burden on defense attorney to compensate for any deficits, and stating, "[t]he fact that a defendant might not understand the proceedings unless they are explained to him in simple language would put an additional burden on defense counsel, but certainly does not establish that the defendant is incompetent to stand trial").

⁵⁶ Schmidt, Reppuci & Woolard, *supra* note 18, at 176-77.

⁵⁷ The attorneys practice in three Midwestern states and one Western state. They practice in jurisdictions that range from major metropolitan areas with dozens of judges on the criminal or juvenile bench to rural counties with a single judge. Five of the attorneys are women and six are men. Two of the attorneys are African-American; the rest are white. The attorneys were selected based on reputation within the profession as practitioners, policymakers, leaders, and trainers. Their standing was signifi-

lawyers as *Attorneys A to K* in order to protect their anonymity, since most of them were quite open—and not always favorable—in their assessments of the legal process.⁵⁸

The overarching themes in the conversations included what it means to provide effective representation in the best practices sense; how a client’s language and language-based skills factor in the effective operation of the attorney-client relationship; and the problems that arise when those skills are missing. The subject of competency to stand trial did come up occasionally, but competency was seen as a parallel universe that is seldom if ever visited;⁵⁹ a universe that is more concerned with moving cases along⁶⁰ than with the attorney-client relationship.⁶¹ The constitutional standard for effective assistance of counsel was similarly mentioned, but it was dismissed as unhelpful, or worse.⁶²

cant for us because it meant that the attorneys had spoken with and observed countless other lawyers, and had considerable experience identifying, conversing about, and helping to remedy issues confronting lawyers in the trenches. Co-author Michele LaVigne conducted the actual interviews. Nine were in person and two were by phone. All observations and conclusions about the lawyers’ attitudes, moods, and behavior are the responsibility of co-author LaVigne. The attorneys were all provided with a copy of this Article for comment before it was submitted for publication.

⁵⁸ For each attorney we have provided the date of the attorney’s initial bar admission in parentheses and a general statement of the type of law practice:

Attorney A: (1983) public defender (county), now clinical professor of law.

Attorney B: (1977) appellate defender (state).

Attorney C: (1992) private practice, former public defender (state).

Attorney D: (1985) public defender (state).

Attorney E: (1985) private practice (federal and state), former federal defender.

Attorney F: (1971) private practice (federal and state), death penalty defense.

Attorney G: (2006) private practice, half-time contract defender (county).

Attorney H: (1989) public defender (state).

Attorney I: (1982) private practice, former public defender (state).

Attorney J: (1980) public defender (state).

Attorney K: (1983) public defender (state), former federal defender.

⁵⁹ Attorney F said that his state does not use competency assessment instruments such as the MacArthur (MA-CAT-CA) but still relies on “a drive-by” method of assessing competency. *See* LaVigne & Vernon, *supra* note 28, at 927. He said that the client has “got to be really dysfunctional before you get to the evaluation.”

⁶⁰ Attorney E noted that a finding of incompetency means the system must “commit money and time”—both of which are in short supply, especially in state courts. Co-author Gregory Van Rybroek teaches psychology graduate students how to conduct competency assessments. He tells the students that the evaluator is always under pressure to participate in the process of “mushing” defendants through the system. In fact, on the ground, the system is specifically designed to “mush” toward a disposition. The competency question simply slows the process.

⁶¹ Attorney H said that forensic specialists and judges have “no idea what it means to participate or communicate with counsel.” Attorney I was in agreement: “Judges don’t all know how difficult it can be to communicate with clients and what it takes to represent someone.”

⁶² The ineffective assistance of counsel framework has been criticized as a “doctri-

Prior to becoming involved in this project, none of the attorneys were aware of language disorder or impairment as a diagnostic category *per se* and none recalled seeing language impairments mentioned in clients' records.⁶³ This lack of awareness was not surprising, given the high rate of unidentified language impairments and the general lack of familiarity about language deficits in the legal system.⁶⁴ Nevertheless, all of the attorneys instinctively "knew" they had represented many clients with language impairments (the term "inarticulate" was commonly used) and had observed many of the manifestations and symptoms described in Section II. A number of the attorneys also expressed relief at having an evidence-based explanation for difficulties that previously seemed unexplainable or attributable to a character flaw. Of course, none of these experienced attorneys were so naïve as to believe that all of their clients' problems are language-based. They were well aware that they have clients whose difficulties are caused by personality disorders or just a general desire to disrupt or not cooperate. However, the fact that default characterizations such as "bad attitude," "lying," "no remorse," or "non-compliant" are not always accurate was welcome news and affirmed what the lawyers had already intuited.

What emerged from these conversations is a portrait of the attorney-client relationship as a complicated, organic event, one that transcends the mechanistic descriptions that too often inform competency assessments, ineffective assistance of counsel analyses, or judges' observations. As we discuss below, the attorney-client relationship is not a series of tasks centered on the exchange of information and "facts." Rather, it is a sophisticated, symbiotic relationship in which the lawyer's ability to effectively respond to a client's needs depends directly on the client's ability to provide informative narratives, articulate emotional states, anticipate the

nal placeholder—something that had to be recognized in principle . . . but that ought in practice to be discouraged." Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G REP. 110, 111 (2012). Attorney E called the Sixth Amendment "the floor" and said that the standard for ineffective assistance of counsel was "ridiculous."

⁶³ Prior to each interview, the attorneys were either asked to read LaVigne and Van Rybroek, *supra* note 5, which reviews social science literature describing language impairments and their effects, or received an oral summary. We took this step because, despite decades of research and volumes of literature about language impairments, they are not yet widely recognized or discussed within the legal world.

⁶⁴ See *Incarcerated Young Offenders*, *supra* note 9, at 481; *Restorative Justice Conferencing*, *supra* note 34, at 329; Bryan, Freer & Furlong, *supra* note 11, at 507–08; Cohen et al., *supra* note 10, at 866, 872.

thoughts and reactions of others (including the lawyer), and contextualize the abstractions of the legal system. When this relationship breaks down because of the client’s inability to meet those demands, the effects can scuttle the representation.

IV. THE ESSENTIALS OF THE ATTORNEY-CLIENT RELATIONSHIP AND THE IMPACT OF LANGUAGE IMPAIRMENTS

*“Lawyers and people who can’t communicate are a bad combination.”*⁶⁵

A. *Navigating the Attorney-Client Relationship Itself*

A fundamental requirement for any client is the ability to understand what the attorney-client relationship is about and to function appropriately within it.⁶⁶ In fact, many of the attorneys we talked with considered this a make-or-break skill that will influence the entire course of any representation. The ability to work with an attorney means more than an understanding that the lawyer is the client’s advocate. Absent some kind of delusional thinking, even the most unsophisticated defendants usually have some sense that the lawyer is there to help, though they may be confused or mistaken about what that help might entail.⁶⁷ Rather, the lawyers were talking about a client’s ability to appreciate and maneuver within a seemingly counterfactual agency relationship in which the client is the “boss.”⁶⁸

The attorney-client relationship has long been recognized as a principal/agent relationship with the lawyer acting on behalf of the client. This rationale is behind the legal concept of “waiver,” in

⁶⁵ Attorney A.

⁶⁶ “[T]he quality of the attorney-client relationship is important in the effective representation of all clients regardless of their categorization as competent or incompetent.” Marcus T. Boccaccini & Stanley L. Brodsky, *Attorney-Client Trust Among Convicted Criminal Defendants: Preliminary Examination of the Attorney-Client Trust Scale*, 20 BEHAV. SCI. & L. 69, 70 (2002). See Schmidt, Reppuci & Woolard, *supra* note 18, at 177.

⁶⁷ Lack of understanding of what an attorney can and cannot do is hardly limited to poor, linguistically deficient individuals charged in criminal court. Middle-class divorce clients make similar mistakes. See, e.g., Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer’s Role During the Divorce Process: Perceptions of Parents, Their Young Children and Their Attorneys*, 33 FAM. L.Q. 283, 296–97 (1999). However, the type of dysfunction we are talking about here is much more basic.

⁶⁸ We have borrowed the term “boss” from Attorney Ben Gonring of Madison, who tells his juvenile clients that they are his “boss.” Interview with Ben Gonring, Assistant State Public Defender, Juvenile Division, in Madison, Wis. (Sept. 4, 2009). We presented that term to the attorneys during the interviews as a shorthand means of describing the agency relationship between attorney and client. A number of them ran with it.

which an attorney's actions or inactions are attributed to the client. As principal in this relationship, the client is responsible for all decisions relating to the objectives of the representation and the lawyer is responsible for carrying out his or her wishes.⁶⁹

Researchers have known for at least two decades that this model is difficult for younger adolescents.⁷⁰ Attorney A described her juvenile clients as having no idea “what they’re supposed to do with a lawyer.” However, individuals with language disorders may not grow out of those misconceptions and interactional difficulties even at age twenty, or twenty-five.⁷¹ Studies have repeatedly shown that older juveniles and adults with language impairments are less likely to have developed a skill set which would enable them to assume the “directive role” with an attorney. Individuals with language impairments will have achieved lower levels of education,⁷² will be more likely to be dependent on parents, siblings, and—in more severe cases—social services,⁷³ and will have increased levels of anxiety and social phobia.⁷⁴ This will leave them greatly diminished in any situation where language is power. Not only will they be less likely to be comfortable with their directive role, they may not know what it means or how to do it because they will have never done it.

The standard response is usually to exhort the attorney to spend more time and “explain carefully,” but such simplistic advice overlooks the fact that such a relationship represents a tectonic shift in how these clients interact with the world. Moreover, the client must be able to receive and process that information about the role of counsel, make sense of it, and apply it.⁷⁵ Attorney E, a

⁶⁹ MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2012) (“[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . 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 In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”).

⁷⁰ See, e.g., Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 641–44 (1995).

⁷¹ See generally Johnson, Beitchman & Brownlie, *supra* note 6, at 60–63.

⁷² *Id.* at 61.

⁷³ See, e.g., Törnqvist et al., *supra* note 35, at 238; Michael Rutter & Lynn Mawhood, *The Long-Term Psychosocial Sequelae of Specific Developmental Disorders of Speech and Language*, in BIOLOGICAL RISK FACTORS FOR PSYCHOSOCIAL DISORDERS 233, 249 (Michael Rutter & Paul Caesar eds., 1991).

⁷⁴ See, e.g., Sabrina C. Voci et al., *Social Anxiety in Late Adolescence: The Importance of Early Childhood Language Impairment*, 20 ANXIETY DISORDERS 915, 924–27 (2006).

⁷⁵ Schmidt, Reppucci & Woolard, *supra* note 18, at 177–78.

veteran defense attorney with state and federal experience, reflected on how the principal/agent relationship would make little sense to the uninitiated: "You're the boss and I'm your agent.' What does that mean? 'Help me help you.' What are you asking me to do?" Attorney A, who has long specialized in the defense of young juveniles and adolescents raised in extreme urban poverty, cut to the chase when she said, "You're the boss' means nothing if you have never been the boss of anything, and simply telling someone it's so doesn't make it so."

Even if a linguistically impaired individual can grasp a relationship in which he is in charge of the professional with the education and status, he must still have the skills to make that relationship work. A crucial skill is the ability to ask questions.⁷⁶ Attorney F, a private practitioner who specializes in complex criminal litigation, specifically defined the clients' role as asking "a lot of questions." Yet as he and others noted, many clients do not ask questions. Attorney F attributed some of this to a lack of power: "People are so used to not being allowed to ask questions, the whole notion of asking a question doesn't compute."

But the lack of questions must also be attributed to clients' linguistic and emotional inability to ask them. Indeed, language disorders are often marked by a long-standing lack of ability to seek clarification,⁷⁷ and to use questions as a means of negotiating difficult or unfamiliar circumstances.⁷⁸ Individuals with language disorders have also developed the ability to "hide incompetencies,"⁷⁹ and to adopt a survival mechanism that Attorney A claimed was very much like that seen in first-year law students: "I don't have a clue what you're talking about but don't make me look stupid." Meanwhile, the lawyer has no way of gauging how much the client does or does not understand of the attorney-client relationship and

⁷⁶ The consumer's ability to ask questions also factors into the successful doctor-patient relationship. S. Willems et al., *Socio-economic Status of the Patient and Doctor-Patient Communication: Does It Make a Difference?*, 56 *PATIENT EDUC. & COUNSELING* 139, 140 (2005).

⁷⁷ See DENNIS C. TANNER, *EXPLORING COMMUNICATION DISORDERS: A 21ST CENTURY INTRODUCTION THROUGH LITERATURE AND MEDIA* 121 (2003).

⁷⁸ Mendota Juvenile Treatment Center (MJTC) in Madison, Wis., includes sessions in social skills training for delinquent adolescent males. One of the skills taught is how to ask questions. Interview with Rachel Fregien, SLP at MJTC, in Madison, Wis. (Dec. 13, 2011). For an explanation of MJTC see LaVigne & Van Rybroek, *supra* note 5, at 41-42.

⁷⁹ Attorney B. See also *What's the Story?*, *supra* note 39, at 248 (explaining that juveniles rely on well-known "scripts" to cover incompetencies); Stone & Bryan, *supra* note 11, at 36 (indicating that defendants attempt to cover incompetencies by nodding frequently, agreeing with counsel, and "talk[ing] a lot but saying very little").

the work to be done within it. The good attorney will probe to find out⁸⁰ but can usually count on some version of what Attorney F portrayed as “‘nope I get it,’ [although] the student of human nature knows they don’t.”

B. Narrative Skills

*“Effective assistance of counsel is impossible unless the client can provide his or her lawyer with intelligent and informed input.”*⁸¹

Even the most crabbed views of assisting counsel and the attorney-client relationship generally concede that a defendant should be able to communicate about the allegation and his background with his attorney.⁸² Often this is couched as the ability to provide “facts” or recall “events.”⁸³ A slightly more expansive model of attorney-client interaction suggests that a defendant should possess “the ability to provide relevant information about crime events, personal feelings, and social background when working with counsel to develop a defense.”⁸⁴ However, as the attorneys we spoke with made clear, barebones information, facts, and even feelings, while obviously critical, are far from sufficient. What lawyers need from their clients are narratives.

Grossly defined, narratives “are stories that adhere to a broad temporal template so that an account can be provided that follows a logical, coherent order, taking into consideration the listener’s presumed prior knowledge.”⁸⁵ Narratives allow the unfamiliar listener to make sense of a story that involves persons and situations the listener knows nothing about.⁸⁶ However, narratives are not simply a factual chronological recitation. They are complicated linguistic, cognitive, and psychological structures that require setting or context, characters, temporal sequence, action, internal and external response, and cause and effect, all of which are moderated

⁸⁰ See STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-3.2 (3d ed. 1993).

⁸¹ *United States v. Mosquera*, 816 F. Supp. 168, 173 (E.D.N.Y. 1993).

⁸² See, e.g., *Bardwell & Arrigo*, *supra* note 53, at 155. See also *Youth (In)justice*, *supra* note 16, at 4 (“The opportunity to ‘tell one’s story’ to . . . one’s legal counsel . . . is a basic right in a civilized society.”). *But cf.* *New Jersey v. Miller*, 216 N.J. 40, 72 (2013) (finding that trial court did not abuse its discretion when it denied an adjournment for a defendant who met his newly appointed attorney for the first time for twenty-five minutes in a stairwell on the morning of trial and was obviously not able to communicate about much of anything). The dissent in *Miller* noted the majority’s “crabbed view of constitutionally effective counsel.” *Id.* at 82 (Albin, J., dissenting).

⁸³ See, e.g., *Dusky v. United States*, 362 U.S. 402, 402 (1960).

⁸⁴ Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 16 (1997) [hereinafter *Competence of Adolescents*].

⁸⁵ *Youth (In)justice*, *supra* note 16, at 2.

⁸⁶ *What’s the Story?*, *supra* note 39, at 247.

by the characteristics of the individual listener.⁸⁷

These components are exactly why clients' narratives—or stories—are so important for lawyers. A defense case is not a law school exam with a checklist of objectively verifiable facts that can be matched up with the elements of an offense or an affirmative defense. More often than not, the defense case is found in the human factors—the story or stories—that lurk below the surface of timelines, police reports, and witness statements.

Narrative skills are often weak in individuals with language impairments.⁸⁸ In fact, poor narratives are frequently the first sign of previously undiagnosed language deficits in older adolescents and adults.⁸⁹ Narrative skills, or the lack of them, have been called "the canary down the coalmine" of language development,⁹⁰ and researchers have closely studied their effects.⁹¹ As a general matter, impaired individuals have difficulty relating a story that could be understood by a listener who does not share the same experience or knowledge.⁹² They tend to describe "significantly fewer bits of information about the *context* of the story and the events that initiated it."⁹³ Narratives from linguistically impaired individuals will be about what happened rather than why.⁹⁴ Of particular significance for lawyers is the fact that individuals "who lack adequate story grammar skills 'will have difficulty reconstructing their own experiences and sharing them with others.'"⁹⁵

Narrative difficulties have been identified as a particular source of difficulty for young men (thirteen to nineteen years old) involved in the criminal or juvenile justice systems. Studies have revealed that, when compared with non-offenders of the same age, or even younger, the offenders' narratives are noticeably poorer. Offenders are less able to describe a character's plan, the cause

⁸⁷ *Id.*

⁸⁸ *Young Speakers*, *supra* note 31, at 499.

⁸⁹ See, e.g., *What's the Story?*, *supra* note 39, at 248–49.

⁹⁰ *Young Speakers*, *supra* note 31, at 499.

⁹¹ See, e.g., Elsa Eme et al., *Oral Narrative Skills in French Adults Who Are Functionally Illiterate: Linguistic Features and Discourse Organization*, 53 *J. SPEECH, LANGUAGE, & HEARING RES.* 1349, 1352–53 (2010).

⁹² *Id.* at 1366.

⁹³ Doris Cole, *Narrative Development in Aggressive Boys*, 26 *BEHAV. DISORDERS* 332, 339 (2001).

⁹⁴ See generally Anne McKeough et al., *Conceptual Change in Narrative Knowledge: Psychological Understandings of Low-Literacy and Literate Adults*, 5 *J. NARRATIVE & LIFE HIST.* 21 (1995).

⁹⁵ *Young Speakers*, *supra* note 31, at 500 (citing Natalie L. Hedberg and Carol Stoel-Gammon, *Narrative Analysis: Clinical Procedures*, 7 *TOPICS IN LANGUAGE DISORDERS* 58, 68 (1986)).

and effects of the character's actions, and the character's motivations.⁹⁶ Researchers have expressed particular concern over how these young men would have fared when they attempted to tell their story in the forensic context, such as during an interrogation or a conversation with counsel.⁹⁷

The attorneys we met with were familiar with clients' narrative deficits, even if they did not use the term. They knew that they were missing large segments of many clients' stories because the clients simply could not tell them. When asked to elaborate, the lawyers gave descriptions that bore striking resemblance to the research findings discussed above.

Attorney C remarked that many clients "don't have narratives" and lack "the ability to think in narratives." According to Attorney B, clients often "can't tell the story well enough for the attorney to determine whether there's a defense." Attorney I described clients' narratives as "*thin*" and offered up an example: "He got in my face so I shot him.' And they are unable to explain how or why." Two attorneys specifically mentioned the lack of "narrative arc" in clients' stories. Instead, clients provide their lawyers with a series of chronologically connected but unexplained or underexplained events.⁹⁸ These are the "and then . . . and then . . . and then" types of narratives typically associated with children.⁹⁹

The paucity of detail was a particular source of difficulty, especially detail relating to inner states. In fact, the absence of "emotional content" or "an emotional layer" was specifically raised by a number of the lawyers. Attorney A observed that many of the young men she represented had "no emotional vocabulary. They have two major emotions—pleasure and anger—but anger may also mean fear." She suggested that the stock cliché "Tell us how you felt?" was "ridiculous" with these clients.

The impact of clients' "thin" narratives on the quality of representation can be substantial and far-reaching. A client's narratives are the raw materials of the case and when they are not available,

⁹⁶ See *What's the Story?*, *supra* note 39, at 246.; Cole, *supra* note 93, at 340.

⁹⁷ *What's the Story?*, *supra* note 39, at 247–48; see also *High-Risk Boys*, *supra* note 7, at 17 (describing the difficulties impaired offenders would have during interrogations).

⁹⁸ Milwaukee Public Schools (MPS) Special Education Teacher Arthur Gosselin works with Milwaukee County Jail inmates (who are twenty-one years old or younger) who are eligible for MPS services and are in jail awaiting trial. His specific focus is improving "thin narratives" that are common among his students. He helps his students build narratives that include character, motivation, and context. Interview with Arthur Gosselin, Special Education Teacher, MPS (Sept. 2011).

⁹⁹ See generally *What's the Story?*, *supra* note 39, at 246–47. See also *Young Speakers*, *supra* note 31, at 498.

the attorney operates from a distinct disadvantage throughout the representation. Attorney I’s offering of “He got in my face so I shot him” provides a textbook example.¹⁰⁰ On the surface, such a statement may paint a “stereotypical picture of a . . . gangbanger” with a blasé disregard for human life.¹⁰¹ But is that what the client is really saying? What if “got in my face” actually means threatening or assaultive behavior? What if the client did in fact feel and taste fear but lacks the language to describe it? Despite its seemingly callous exterior, “He got in my face so I shot him” may be the story of self-defense, and the basis for a finding of mitigation or even justification.¹⁰² But absent the narrative grist from the client, the lawyer may not see that possibility or may not be able to make the case in a credible fashion.¹⁰³

And the effects will not just be felt at trial. Negotiation will also suffer. Attorney D, a public defender, rhetorically asked, “How do you negotiate if the client can’t give you the details of the story?” Motion practice is likewise affected. Attorney B, an appellate defender, referred to a case where the client was unable to describe what the police said or did when they interrogated him, which left voluntariness and *Miranda* questions unanswerable for trial counsel.

Ironically, the attorneys we spoke with said very little about the effects of narrative deficits in what would be the most visible context—a client’s testimony. Perhaps this general silence is because, as Attorney H concluded, clients with language impairments “can’t testify.” That conclusion makes unfortunate sense since “the way in

¹⁰⁰ Attorney I was the second attorney interviewed. Her example of “He got in my face so I shot him” was mentioned in subsequent meetings and some of the attorneys used it as a reference point.

¹⁰¹ *United States v. Allen*, 603 F.3d 1202, 1210 (10th Cir. 2010).

¹⁰² *See, e.g.*, MODEL PENAL CODE §3.04(1) (1962) (“Use of Force Justifiable for Protection of the Person. Subject to the provisions of this Section and of Section 3.09, the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.”). Depending on the circumstances, “He got in my face so I shot him” may also be the language of provocation or heat of passion. *See id.* §210.3(1)(b) (“Manslaughter. Criminal homicide constitutes manslaughter when . . . [it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.”).

¹⁰³ Attorney J talked of negotiating a settlement in a homicide case that had a number of mitigating circumstances that could not adequately be presented at trial, because the client did not possess “enough language to get to the emotional aspect” necessary to build the defense.

which witnesses are allowed to tell their stories in court are ‘very strange, and are subject to a number of restrictions which do not exist in other storytelling contexts to anything like the same degree, if at all.’¹⁰⁴ Attorney E mused that even highly educated clients have trouble telling a story under the “very strange” formats of direct and cross-examination, subject to the equally strange rules of evidence. To ask an individual with already limited receptive and expressive skills to sit in front of a room full of people who will be judging his credibility by his words, demeanor, and ability to hold up under an arcane questioning form seems cruelly farcical.¹⁰⁵

C. *Understanding the Legal Process*

“*I can explain it to you but I can’t understand it for you.*”¹⁰⁶

Dusky and its progeny attempt to treat the ability to understand the legal process as a concept that exists independent of the attorney-client relationship—at least for purposes of competency to stand trial. In practice however, the two are inseparable. They are inseparable because the attorney bears responsibility for ensuring that the client does in fact grasp the elements of the offense, the nature of the defenses, the risks and benefits of a guilty plea versus a trial, the constitutional rights waived upon a plea of guilty, and the collateral consequences of any plea.¹⁰⁷ Even where the trial court is the final arbiter of the client’s understanding, the court is usually dependent on the work of counsel.¹⁰⁸

And indeed, no one has ever suggested that circumstances should be otherwise. As the Supreme Court observed in *Padilla v. Kentucky*, “[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue[.]”¹⁰⁹ Where problems arise, however, are in those many instances in which an ostensibly “competent” client lacks the linguistic ability to process and apply

¹⁰⁴ *Young Speakers*, *supra* note 31, at 499 (citing Diana Eades, Telling and Retelling Your Story in Court: Questions, Assumptions, and Intercultural Implications, Presentation at the 25th Australasian Institute of Judicial Administration Conference, Melbourne, Austl. (Oct. 14, 2007), available at <http://www.aija.org.au/ac07/Papers/Eades.pdf>).

¹⁰⁵ See LaVigne & Van Rybroek, *supra* note 5, at 85–87.

¹⁰⁶ See “*I Can Explain it to You But I Can’t Understand it For You*” T-Shirt, ZAZZLE, http://www.zazzle.com/i_can_explain_it_to_you_but_i_cant_understand_tshirt-235130839083184659 (last visited Dec. 15, 2013) (also attributed to a proverb).

¹⁰⁷ See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010); *Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012).

¹⁰⁸ See, e.g., *Hill v. Lockhart*, 474 U.S. 52 (1985); *Remington*, *supra* note 17, at 350–51.

¹⁰⁹ *Padilla*, 130 S. Ct. at 1484.

even the best advice and the clearest explanation from counsel. In these instances many of the lawyers we spoke with see judges abandoning their obligation to due process and quality control. Attorney H called it “judges tak[ing] cover behind the lawyer.”

It is no secret that legal concepts and the legal process do not lend themselves to ready explanation. They are abstractions couched in jargon. Attorney D, commenting on the difficulty of explaining legal concepts to anybody, including the most capable clients, suggested that even a concept as routine as “right” is opaque: “A right—who even knows what that is.” Nevertheless, attorneys have an ethical and constitutional obligation to translate not only the jargon, but the concepts behind it, and very often, the process itself.¹¹⁰

But the fact that a lawyer may have translated or explained the legal process is hardly the end of the inquiry. Translation is effective only when it is understood, and comprehension, especially in the legal context, takes a large quiver of sophisticated linguistic tools. First, the listener must have the receptive skills, including vocabulary and the ability to decipher a series of sentences, many of which will be complex or at least compound. The listener must also possess a fund of knowledge upon which to build his understanding of the new information. Similarly, the listener needs the knowledge base, in combination with the appropriate pragmatic skill, to grasp the inferences in the speaker’s language—i.e. the listener must be able to read between the lines. Physiologically, the listener must possess sufficient auditory processing capacity to enable him to make auditory sense of what the lawyer is saying. Finally, the listener must have auditory memory so that he can remember what he is told and incorporate it into his decision-making.¹¹¹

All the lawyers we spoke with recognized that many of their clients lacked some or all of the skills to allow them to adequately comprehend and work with the plethora of information that accompanies even a misdemeanor. Attorney B estimated that when dealing with adolescents and young adults, the number could be as

¹¹⁰ STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-3.8(b) (3d ed. 1993) (“Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”).

¹¹¹ See, e.g., Thomas Grisso, *What We Know About Youth’s Capacity as Trial Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 139, 146–50 (Thomas Grisso & Robert G. Schwartz eds., 2000) [hereinafter *What We Know*]; *Restorative Justice Conferencing*, *supra* note 34, at 329–30.

high as 75%. The attorneys were also quite adamant about their own profession's lack of qualification and skill to address the problem.¹¹²

The lawyers were noticeably exasperated and at times angry about their clients' inability to understand legal information. This was the area where they could most readily recognize the implications of language impairment and could see the failure of the legal system to acknowledge the problem. The frustration was with both the competency process and the prevailing attitude that the lawyer can fix whatever deficits the client may have by "carefully explaining" the process.¹¹³ "The client has one, two, three deficiencies and rudimentary language, but if the lawyer explains then the client is 'competent.'"¹¹⁴ This so-called solution essentially says that "if you have the perfect lawyer, then you are competent."¹¹⁵ This approach, which has been called "facilitating competency," often asks the lawyer to do the impossible.¹¹⁶

At the same time, courts seem to turn a blind eye to the opacity of the entire legal process. Words and procedures that are carefully crafted by appellate courts, and which might make sense to the legally trained, have no substantive meaning to the individual whose spoken language comprehension is in the bottom tenth percentile of the entire population. Yet we continue to insist that such individuals can be made to understand.

Though it has no technical bearing on the attorney-client relationship, three of the lawyers offered *Miranda* as an iconic example of the opaque form-over-substance ritual that pervades so much of the criminal and juvenile justice systems; and of the systems' willingness to suspend disbelief in order to find that undereducated, linguistically deficient individuals have sufficient comprehension.¹¹⁷ Attorney A openly mocked the notion that *Miranda* warn-

¹¹² Commentators have suggested that lawyers are not particularly skilled at translating or explaining legal concepts to anyone, impaired or otherwise. See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 99 (2007); THOMAS GRISSO, *JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE* 117 (Bruce Dennis Sales ed., 1st ed. 1981).

¹¹³ Cf. e.g., *Competence of Adolescents*, *supra* note 84, at 23–25.

¹¹⁴ Attorney I.

¹¹⁵ Attorney E.

¹¹⁶ Emily Buss, *The Role of Lawyers in Promoting Juveniles' Competence as Defendants*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 243, 253–62 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹¹⁷ Psychologist Richard Rogers has studied the *Miranda* warnings extensively and has found them widely incomprehensible, despite a general assumption that "everyone knows their *Miranda* rights." Richard Rogers et al., "Everyone Knows Their *Miranda* Rights": *Implicit Assumptions and Countervailing Evidence*, 16 *PSYCHOL. PUB. POL'Y & L.*

ings, however much they are a part of the national culture, convey constitutional rights to verbally deficient young men: “Oh yes, they’ve seen [the Miranda warnings] on TV and they know what it means—it means you are going to jail. It’s a mantra. It doesn’t say, ‘This is your lucky day; this is the day you get to assert your full rights as a citizen.’”¹¹⁸

The lawyers were perplexed that trial judges in particular (at least some of whom had been criminal defense lawyers earlier in their careers) seemed to have no idea how difficult communicating with clients could be. Attorney D quipped that judges seem to think “you just have to say it slower and louder.”¹¹⁹ He reported that judges also place great stock in the power of repetition, but this too is no solution: “It’s the evanescent nature of understanding [with clients]. You explain it and in that moment it’s OK. But a half an hour later, no. So you explain it again. And again.”¹²⁰

Research confirms the lawyers’ impressions about their clients’ poor comprehension and the lack of an easy fix. Simply repeating and explaining, even in plain English, does not necessarily work.¹²¹

300, 301–02 (2010). Rogers et al. tested 119 college students on their understanding of the Miranda warnings and found that barely one third had an “accurate working knowledge of their rights.” *Id.* at 305, 314. Meanwhile, courts continue to find knowing and voluntary waivers in cases where the defendants’ IQ is low enough to place them in the “retarded” category. *See, e.g.*, *Otis v. State*, 217 S.W.3d 839, 845–46 (Ark. 2005) (explaining that a fourteen-year-old defendant with an IQ of 68–69 validly waived Miranda rights); *Bevel v. State*, 983 So. 2d 505, 515–16 (Fla. 2008) (demonstrating that a defendant with an IQ of 65 validly waived Miranda rights); *In re MAC*, 761 A.2d 32, 34, 38–39 (D.C. 2000) (showing that a fifteen-year-old defendant who was mildly mentally retarded validly waived Miranda rights).

¹¹⁸ Comprehension of Miranda warnings is made all the more difficult because they do not mean what they say. *See, e.g.*, *Duckworth v. Eagan*, 492 U.S. 195, 203–05 (1989) (indicating that despite pre-interrogation language that says “you have the right to an attorney and if you cannot afford one, an attorney will be appointed,” defendants have the right to appointed counsel only if and when they go to court; otherwise, they have the right to pay for counsel prior to their proceeding); *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259–60 (2010) (explaining that in order to invoke his right to remain silent, a defendant must specifically state that intention; silence does not suffice). Attorney Michael Cicchini, a frequent contributor to the Marquette University Law School Faculty Blog, has posited that a “new and improved” Miranda would begin, “Actually, you really don’t have the right to remain silent, unless you first speak,” and would continue in that vein. Michael Cicchini, *The New Miranda Warning*, MARQ. U. L. SCH. FAC. BLOG (Nov. 8, 2010), <http://law.marquette.edu/facultyblog/2010/11/08/the-new-miranda-warning>. Of course, even the improved model would be difficult for an individual with auditory processing and memory deficits.

¹¹⁹ Attorney C was more irreverent: “Repeating to a person who can’t understand what you are talking about is like speaking loud to a deaf person.”

¹²⁰ This fleeting understanding is typical of individuals with auditory memory deficits.

¹²¹ *See* Barbara Kaban & Judith Quinlan, *Rethinking a “Knowing, Intelligent, and Vol-*

And contrary to the prevailing wisdom, prior experience with the juvenile or criminal justice systems does not necessarily improve an individual's comprehension of the process.¹²²

A defendant's youth is a widely known and widely accepted impediment to comprehension of legal information.¹²³ But it turns out that poor language skills can interfere with the ability to understand legal information as much as youth, and in certain instances, even more. Research on language impairments in correctional institutions has shown in that a significant percentage of older adolescent and adult inmates have language deficits that leave them with listening and comprehension levels below those of an average eleven-year-old.¹²⁴ These difficulties are especially likely to affect "the ability to 'decode' abstract language," a category which certainly includes most legal terminology.¹²⁵

All of the lawyers were asked about the types of legal information that cause the most difficulties, even after explanation. Noticeably absent from their responses were the civics catechism—e.g., "Who is the judge?" "What does your lawyer do?"—that often informs competency decisions and competency training.¹²⁶ Rather, the lawyers talked about ingredients essential to knowledgeable and rational decision-making: the real-life meaning of charges and defenses (as opposed to a recitation of statutory language),¹²⁷ the

untary Waiver" in *Massachusetts' Juvenile Courts*, 5 J. CENTER FOR FAMILIES, CHILD. & CTS. 35, 45–49 (2004).

¹²² *What We Know*, *supra* note 111, at 151. An interesting aspect of this line of research is that, while its focus is juveniles (under eighteen) and whether juveniles "age in" to comprehension of legal information, the incidental findings about the comparison group of adult subjects clearly demonstrate that many individuals experience substantial impediments to comprehension well beyond age eighteen. *See, e.g.*, Jennifer L. Woolard et al., *Examining Adolescents' and Their Parents' Conceptual and Practical Knowledge of Police Interrogation: A Family Dyad Approach*, 37 J. YOUTH ADOLESCENCE 685, 694–97 (2008).

¹²³ *See, e.g.*, Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1160–66 (1980); *What We Know*, *supra* note 111, at 146–53.

¹²⁴ Bryan, Freer & Furlong, *supra* note 11, at 507; *Preliminary Study*, *supra* note 20, at 396. Note: the studies all controlled for performance or non-verbal IQ. Pamela C. Snow & Martine B. Powell, *Developmental Language Disorders and Adolescent Risk: A Public-Health Advocacy Role for Speech Pathologists?*, 6 INT'L J. SPEECH-LANGUAGE PATHOLOGY 221, 226 (2004) [hereinafter *Developmental Language Disorders*] (offenders with LI performed "significantly more poorly [on language measures] than a group of demographically similar youths who were 2 years younger.").

¹²⁵ *Developmental Language Disorders*, *supra* note 124, at 226.

¹²⁶ *See, e.g.*, *United States v. Duhon*, 104 F. Supp. 2d 663, 666, 673–74 (W.D. La. 2000).

¹²⁷ Attorney A believes that "a defendant's ability to articulate statutory defenses is a piss-poor way to determine ability to understand."

significance of a guilty plea, potential penalties, other direct and collateral consequences of a conviction, risks and benefits of a trial, and how a trial actually operates.

D. *Decision-Making*

In any criminal or delinquency case, the client must make all decisions regarding the “objectives of the representation.”¹²⁸ The ultimate decision is, of course, the decision whether to plead guilty (generally in connection with a plea offer) or to go to trial.

Informed and rational decision-making is a complicated process that depends on a well-developed skill set. Decision-making at the level required of juvenile and criminal defendants involves: 1) comprehending and communicating choices; 2) understanding relevant information; 3) appreciating the situation and its consequences; and 4) manipulating information rationally.¹²⁹ When decision-making is viewed in this light, it is easy to see the central role of expressive, receptive, and pragmatic language skills. It is also easy to see why the attorneys we spoke to were skeptical about many of their clients’ decision-making capacities.

As we might expect, the attorneys took client decision-making very seriously and repeatedly mentioned the chasm between clients’ capacities and the life-altering types of decisions they are expected to make. Lawyers are often taken to task for questioning the rationality of a client’s decision-making because the client does not agree with them,¹³⁰ but the lawyers we interviewed were very much in touch with the meaning of “rational decision making.”¹³¹ They also believed that courts and forensic specialists grossly underestimate the complexities of client decision-making in the criminal and juvenile justice arenas. Attorney C expressed the disconnect this way: “To say they have decision-making capability because they

¹²⁸ MODEL RULES OF PROF’L CONDUCT R. 1.2 (2012).

¹²⁹ Paul S. Applebaum & Thomas Grisso, *Assessing Patients’ Capacities to Consent to Treatment*, 319 NEW ENG. J. MED. 1635, 1635–36 (1988). As discussed in Applebaum & Grisso’s article, these four categories define legal standards for a patient’s competency to consent to medical treatment. However, this model applies equally to decision-making in the legal context. *See, e.g., Competence of Adolescents, supra* note 84, at 8–9; *What We Know, supra* note 111, at 157–62.

¹³⁰ *See, e.g., Kristin Henning, Denial of the Child’s Right to Counsel, Voice, and Participation in Juvenile Delinquency Proceedings*, 89 CHILD WELFARE 121, 131 (2010).

¹³¹ The lawyers tended to have a holistic view of decision-making. *See Maroney, supra* note 53, at 1400–08; *but cf. Poythress et al., supra* note 51, at 451 (showing that lawyers were more likely to express doubts about their clients’ competence when clients rejected their lawyers’ advice).

can repeat back is the same as saying that a child who knows that a red ball is not blue understands the truth.”

As a threshold matter, Attorney B saw insurmountable problems with “the things we ask [clients] to decide. We ask them to answer such hard questions.” She described how just the concept of a long versus a longer sentence can be difficult for a defendant to grasp.¹³² And on top of those years of incarceration, clients are “bombed with consequences.” Attorney B gave the example of a nineteen-year-old charged with having sexual intercourse with his fifteen-year-old girlfriend: “Do you want to claim third degree [sexual assault] which means no exemption from the [sex offender] registry or do you want to stick with second degree [sexual assault], which means you might be able to get exempt from the registry, or maybe not. But then you might be facing a [sexually violent persons commitment].” It boggles the mind to think of the level of linguistic processing that it takes to make sense of such a proposition.

Attorneys also voiced strong doubts about many clients’ ability to weigh the strength of their case and the risks of taking a case to trial. First, many clients lack complete factual information when they make their decisions. While they may know something about good facts and bad facts, clients do not have the same information as the professionals in the system. Attorney A compared a lawyer’s assessment of a case with that of a typical client: attorneys, unlike clients, have a broad fund of knowledge about “[other] cases, the judge and the judge’s reputation, and witnesses,” along with courthouse culture and prevailing trends. Adding to the clients’ disadvantage is the fact that “we [lawyers] rarely state the universe of information.” And even if lawyers did state that universe of information, clients with linguistic shortcomings could not begin to process and comprehend such a complex universe.

The other missing piece for many clients is the pragmatic language skill known as theory of mind, which has been called “the basis for human interaction as it underpins our ability to understand, predict, and interpret the thoughts and feelings of others in

¹³² Attorney K noted that written plea agreements in federal cases are even more difficult to understand since they deal with a guideline range that is stated in terms of months rather than years. Numeracy is a cognitive task that influences decision-making. Fabio Del Missier et al., *Decision-making Competence, Executive Functioning, and General Cognitive Abilities*, 25 J. BEHAV. DECISION MAKING 331, 333 (2012). Numeracy is also one of the functions that is negatively affected by language disorder. See *Preliminary Study*, *supra* note 20, at 392.

our world.”¹³³ Theory of mind is thought to be acquired “through the acquisition of social and linguistic competencies” and is the means by which one person can take the perspective of another.¹³⁴ Theory of mind and perspective-taking are as critical to client decision-making as legal and factual information because, as Attorney E reminds us, the legal system is ultimately “humans making decisions about you.” In functional terms, this means that a client “need[s] to know how others perceive the case . . . to assess whether an offer is good” or to realize “how the state could prove you guilty. [A client must be able] to have a conversation about alternatives . . . to look at a case technically and in the audience’s perspective.”¹³⁵

All of the lawyers reported that they regularly see clients with an underdeveloped ability to take the perspective of their audience. The attorneys’ observations match extensive research that has found poor theory of mind and perspective-taking among individuals likely to be in the criminal justice system.¹³⁶ Attorney F said that the “common thread” for so many clients is “no ability to grasp the other person, . . . no ability to understand someone else.” Attorney I described clients who “don’t know what other people think.” Attorney G concurred, noting the many clients who “do not understand what people are motivated by or what other people believe.”

The attorneys felt that as a result of their clients’ lack of complete information and their comprehension deficits, including deficiencies in theory of mind and perspective-taking, many of them made decisions with a deeply flawed understanding of the case against them and of the risks they faced, particularly the risks of going to trial. These decisions can have stark consequences since

¹³³ *Young Speakers*, *supra* note 31, at 499 (citing Janet Wilde Astington & Terri Barriault, *Children’s Theory of Mind: How Young Children Come to Understand that People Have Thoughts and Feelings*, 13 *INFANTS & YOUNG CHILD*, 1, 2 (2001)).

¹³⁴ *Young Speakers*, *supra* note 31, at 500 (citing Jay L. Garfield, Candida C. Peterson & Tricia Perry, *Social Cognition, Language Acquisition and the Development of the Theory of Mind*, 16 *MIND & LANGUAGE* 494, 496 (2001)).

¹³⁵ Attorney H.

¹³⁶ A substantial body of research correlates language deficits, behavior problems, and poor theory of mind. *See, e.g.*, Francesca Happé & Uta Frith, *Theory of Mind and Social Impairment in Children with Conduct Disorder*, 14 *BRIT. J. DEVELOPMENTAL PSYCHOL.* 385 (1996); *Young Speakers*, *supra* note 31, at 497–98 (probable theory of mind deficits among victims of childhood maltreatment); Dante Cicchetti et al., *False Belief Understanding in Maltreated Children*, 15 *DEV. & PSYCHOPATHOLOGY* 1067, 1086–87 (2003); Katherine C. Pears & Philip A. Fisher, *Emotion Understanding and Theory of Mind Among Maltreated Children in Foster Care: Evidence of Deficits*, 17 *DEV. & PSYCHOPATHOLOGY* 47, 49–50, 60–61 (2005); Dionne, *supra* note 35, at 333, 346–47.

“the trial penalty is very real.”¹³⁷ Attorney G probably spoke for attorneys everywhere when he called clients’ inability to appreciate the risks of their decisions “the most frustrating part” of his representation, especially since, in the end, it is the attorney’s role to facilitate those decisions.¹³⁸

E. Empathy, Trust, and Pragmatics

The success of an attorney-client relationship is as dependent on intangibles like empathy (a lawyer’s for her client) and trust (a client’s of his lawyer) as it is on substantive aspects like narrative ability and comprehension of legal information. Unfortunately, these intangibles are highly susceptible to a client’s communication deficits. The problem arises because both trust and empathy are built on a foundation of communication and mutual understanding; when that foundation is flawed, trust and empathy—and thus the attorney-client relationship itself—may not develop properly, or even at all.¹³⁹

Once again pragmatics is an important factor. Pragmatic deficits, as discussed earlier, are manifested by an inability to read social situations and social cues, to comprehend the perspective of others, and to conform to the rules of social engagement, making the person appear “uncooperative at the least, or more seriously, rude or insulting.”¹⁴⁰ Meanwhile, in keeping with the theory of pragmatics, the “other variable in the equation”—i.e., the lawyer—can be expected to react.¹⁴¹ The attorney-client relationship after all is “a two-way street; it is one of give and take. It is not the lawyer reciting constitutional rights.”¹⁴²

This can easily lead to a downward spiral in which the client then responds poorly to the lawyer, who reacts to the client, and so on. Such a chain reaction is virtually guaranteed to destroy empathy and trust, and can take a genuine toll on the quality of the

¹³⁷ Attorney F. See also *Bordenkircher v. Hayes*, 434 U.S. 357, 363–65 (1978).

¹³⁸ MODEL RULES OF PROF’L CONDUCT Rs. 1.2(a), 1.4(b).

¹³⁹ For example, the first-known empirical study of attorney-client trust found that trust was more likely to occur where the defendant had sufficient knowledge of the process and of the role of defense counsel. Boccaccini & Brodsky, *supra* note 66, at 71 (citing Christine Schnyder Pierce & Stanley Brodsky, *Trust and Understanding in the Attorney-Juvenile Relationship*, 20 BEHAV. SCI. & L. 89 (2002)).

¹⁴⁰ LaVigne & Van Rybroek, *supra* note 5, at 58; see also Kathleen Bardovi-Harlig et al., *Developing Awareness: Closing the Conversation*, in POWER, PEDAGOGY, AND PRACTICE 324 (Tricia Hedge & Norman Whitney eds., 1996).

¹⁴¹ Attorney I.

¹⁴² Attorney C.

relationship, and the quality of a lawyer's legal work.¹⁴³ Attorney K believed that a lawyer's negative reaction to a client's inappropriate comments or behavior "can easily create bias, which will affect not only how the attorney perceives the client but the client's case." And of course we cannot simply command a lawyer to feel empathy for her client any more than we command a client to trust his lawyer. As Attorney F told us, "'Trust me' is stupid."

All of the relational difficulties presented by the clients with language disorders are exacerbated in the context of indigent defense.¹⁴⁴ Whether the attorney is an institutional defender, appointed counsel, or a contract defender, time and resources are in short supply. Meanwhile, establishing an acceptable working relationship with a linguistically deficient client takes extra time. In addition, communicating with this person will take skill and, in many cases, special knowledge and assistance, neither of which is available in standard defender offices.¹⁴⁵

As a result, the needs of the linguistically impaired client can easily come into direct conflict with the attorney who has too many cases, is overscheduled, and lacks the necessary internal and external resources to adequately cope.¹⁴⁶ Consequently, the relationship will suffer. Attorney F believed that pragmatic deficits would be particularly toxic for the lawyer with an excessive caseload. With the client who is personally difficult and unrealistic in his or her demands, the lawyer's lack of time and patience could easily play itself out as "'[expletive] you, make your own mistakes.'" ¹⁴⁷

But even with a "polite" client, high caseloads and court-imposed time pressures will amplify the effects of communication deficits on the attorney-client relationship.¹⁴⁸ Attorney G, a part-time

¹⁴³ Trust is cultivated when the attorney is receptive to the input of the client. Boccaccini & Brodsky, *supra* note 66, at 82.

¹⁴⁴ For example, in one study, "[l]ow-attorney trust was associated with having a court-appointed attorney." Boccaccini & Brodsky, *supra* note 66, at 82.

¹⁴⁵ Attorneys H and J, who are both training directors in statewide public defender systems, noted the lack of special assistance or training. Attorney J complained that "lawyers aren't trained and law schools aren't training students [to work with linguistically impaired clients]. And where is the support for lawyers with these clients?"

¹⁴⁶ See, e.g., Heather Baxter, *Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations*, 25 FED. SENT'G REP. 91, 91-92 (2012).

¹⁴⁷ During co-author Michele LaVigne's conversations with the attorneys, they freely used language that might be considered vulgar or profane in another professional context. This was to be expected, since LaVigne is a former public defender and thus a member of the "closed subculture" of defense attorneys. See Dean A. Strang, *Becoming What We Pretend to Be: Signs of Values in the Casual Rhetoric of American Criminal Justice*, 24 WIS. J.L. GENDER & SOC'Y 313, 321, 329 (2009).

¹⁴⁸ Attorneys A and B both expressed concerns about the "polite" client. Attorney B

contract defender with a high felony caseload in an urban court system, was matter-of-fact about the grim realities of his practice: Court “starts at noon . . . Things need to keep plugging and chugging. . . With some clients who don’t really get it, I have to say ‘I can’t sit here any longer.’ In a perfect world we would do that of course, but I can’t. Do you ever have enough time?”¹⁴⁹

V. GETTING BEYOND “HE GOT IN MY FACE SO I SHOT HIM”

A. *For Lawyers*

In a perfect world, every attorney would have ready access to the services of an SLP who could assess clients’ communicative abilities and facilitate communication with any client. Of course, the world of indigent defense is far from perfect, and access to an SLP for even a small percentage of impaired clients is wishful thinking. This means that counsel will be forced to address clients with language impairments on a case-by-case basis and to develop an assortment of strategies for dealing with communication issues.

At the most extreme end will be the cases where the impairment interferes with the right to counsel at a fundamental constitutional level. Generally these cases will involve clients with severe language impairments that co-occur with other disabilities.¹⁵⁰ In those cases counsel should aggressively pursue the issue of competency and seek a court-ordered evaluation that includes a language assessment. A forensic evaluation that includes an evidence-based “second-generation adjudicative competency measure,”¹⁵¹ such as the MacArthur Competence Assessment Tool – Criminal Adjudica-

believes that judges conflate polite with intelligent. She gave a case example where the trial court said that the “polite” defendant was “highly intelligent,” but he had an IQ of 80. Attorney A said that “we confuse malleability with competence” and that judges overestimate the “kids who are well-behaved, looking intently, nodding.”

¹⁴⁹ Attorney G works half time as an associate in a law firm and half time as a contract defender. In his defender position, he is required to provide representation in 100 major felony cases, including child sexual assaults and non-capital homicides. At the time of the interview (Nov. 2011), he was paid \$250 per case. The National Legal Aid and Defender Association (NLADA) Standards for the Defense recommend a caseload of no more than 150 felonies per year for a full-time defender. STANDARDS FOR THE DEFENSE §§ 13.7, 13.12 (1973). NLADA also recommends that complex cases be given more “case points,” thereby reducing the number of felonies handled per year well below 150. NAT’L LEGAL AID & DEFENDER ASS’N, AM. COUNSEL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS 4–5 (2007), available at <http://www.nlada.org/DMS/Documents/1189179200.71/>.

¹⁵⁰ See LaVigne & Van Rybroek, *supra* note 5, at 42.

¹⁵¹ GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 149–55 (3d ed. 2007).

tion (MAC-CAT-CA)¹⁵² or the Evaluation of Competency to Stand Trial – Revised (ECST-R),¹⁵³ combined with a specialized language assessment by an SLP,¹⁵⁴ provides the best chance for accurate, reliable information about an individual’s actual abilities to consult with counsel, comprehend information, and make rational decisions.¹⁵⁵

Experience tells us, though, that clients with even severe language impairments can be found competent, especially in jurisdictions where courts and forensic examiners continue to rely on “crude method[s] of assessing [competency].”¹⁵⁶ What then? Counsel will still be facing communication deficits that make effective assistance a stretch, yet will be required to compensate. A responsible accommodation would be to hire an SLP as a consultant. SLPs are trained to work with areas “such as listening, understanding, vocabulary, narrative skills, speech production, fluency management, language skills, non verbal communication, appropriate assertive communication, social communication, and [even] interview[ing] and court preparation.”¹⁵⁷ An SLP would be able to assess a client’s communication levels, advise the attorney on her own communication methods to ensure maximum comprehension, and help the client provide a complete, meaningful narrative.¹⁵⁸

¹⁵² NORMAN G. POYTHRESS ET AL., THE MACARTHUR COMPETENCE ASSESSMENT TOOL-CRIMINAL ADJUDICATION: PROFESSIONAL MANUAL 6 (1999).

¹⁵³ RICHARD ROGERS ET AL., EVALUATION OF COMPETENCY TO STAND TRIAL – REVISED: PROFESSIONAL MANUAL (2004).

¹⁵⁴ For a description of standardized and non-standardized approaches for assessing communicative ability, see Vicki A. Reed, *Adolescents with Language Impairment*, in AN INTRODUCTION TO CHILDREN WITH LANGUAGE DISORDERS 168, 201–09 (3rd ed. 2005). We also recommend that counsel contact the examining psychologist to discuss the communication difficulties presented by the particular client.

¹⁵⁵ “Specialized tests of language functioning [used in conjunction with competency instruments] . . . often give a meaningful representation of what a defendant will actually hear or process, and what he or she will be able to communicate within the complexities of a real-time courtroom.” Mark Siegert & Kenneth J. Weiss, *Who Is an Expert? Competency Evaluations in Mental Retardation and Borderline Intelligence*, 35 J. AM. ACAD. PSYCHIATRY L. 346, 349 (2007). Even if the evaluating psychologist is not persuaded by the results of the language assessment, this information can be important fodder for cross-examination and the basis for arguing that the court should look beyond the psychologist’s opinion.

¹⁵⁶ Attorney H, who expressed serious doubts about the way competency is assessed in her state, used this phrase. Attorney F referred to these types of evaluations as “drive-bys.” Attorney B said that while competency assessments were improving for juveniles, they were still rudimentary for adults. Thus, in her experience, the issue was rarely raised in adult cases.

¹⁵⁷ Gregory & Bryan, *supra* note 8, at 207.

¹⁵⁸ See, e.g., Stone & Bryan, *supra* note 11, at 35–36. An SLP would also be an inval-

The SLP may also serve as an intermediary or “cognitive interpreter.”¹⁵⁹ This recommendation borrows from a model developed in Great Britain under the Youth Justice and Criminal Evidence Act 1999 for witnesses with learning disabilities.¹⁶⁰ The purpose of the act was to “improve the quality of a witness’s evidence in terms of completeness, coherence and accuracy.”¹⁶¹ Under the 1999 law, the intermediary helps the witness to understand the questions put to them by law enforcement or in court, and enables the court or police to understand the responses.¹⁶² In the attorney-client context, the intermediary would have a similar function. He or she could rephrase questions and comments from counsel and could actively participate in teasing out the client’s narrative.¹⁶³ When used in this fashion, the SLP has the same constitutional underpinnings as an interpreter.¹⁶⁴ The SLP/intermediary, just like an interpreter, may be necessary to ensure linguistically impaired defendants a meaningful right to counsel and justice.¹⁶⁵

And then there are the rest of the cases—the many cases in which the client is “competent” (though it is probably more accurate to say “not incompetent”) but impaired, and limited resources do not allow for an assessment, consultant, or intermediary. In these cases, counsel may feel that she is expected to handle yet another dilemma—for which she is not qualified—on her own. Luckily, speech-language experts who specialize in the forensic as-

able asset in helping counsel determine whether competency is an ongoing issue, whether a client’s statements to police were voluntarily made, and whether the client made a knowing, intelligent, and voluntary waiver of Miranda. Given the prevalence of language impairments among defendant populations, an in-house SLP would be a sound investment, at least in larger defender offices.

¹⁵⁹ Pamela Cooke & Graham Davies, *Achieving Best Evidence from Witnesses with Learning Disabilities: New Guidance*, 29 BRIT. J. LEARNING DISABILITIES 84, 85 (2001). Northern Ireland has begun using SLPs as intermediaries for defendants as well. Email from Alison McCullough, Northern Ireland Country Officer, Royal College of Speech & Language Therapists, Belfast, N. Ir. (Aug. 30, 2013) (on file with co-author Michele LaVigne).

¹⁶⁰ Cooke & Davies, *supra* note 159, at 84.

¹⁶¹ *Id.*

¹⁶² *Id.* at 85.

¹⁶³ In these cases, we envision that an SLP would function more as a deaf relay interpreter, used with a deaf client with limited language. See LaVigne & Vernon, *supra* note 28, at 880, 926.

¹⁶⁴ Most courts have refused to find a *per se* constitutional right to an interpreter. Rather, the right is derivative as a means of ensuring the right to counsel. See, e.g., *United States v. Mosquera*, 816 F. Supp. 168, 172–73 (E.D.N.Y. 1993).

¹⁶⁵ See AM. BAR ASS’N, STANDARDS FOR LANGUAGE ACCESS IN COURTS 19–25 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf.

pects of language impairments have anticipated that lawyers and other legal professionals will often be forced to address the needs of linguistically deficient clients without the aid of a live speech-language professional, and have articulated techniques for addressing some of the issues.¹⁶⁶

The first task is to recognize a potential language disorder, bearing in mind that for many clients, the impairment will often not have been identified. There are well-established signs of language impairments that will be familiar to any experienced defense attorney.¹⁶⁷ These include: forgetting instructions; confusion when confronted with non-literal language such as idioms, metaphors, or sarcasm; talking a lot but saying little; difficulty asking questions; and a tendency to stray from the topic.¹⁶⁸ Narrative deficits may reveal themselves when the client “is required to respond to an unfamiliar topic or formulate answers to specific questions in extended discourse, especially when the answers are expected to be complete and fully explained.”¹⁶⁹

Where counsel suspects language and communication deficits, the initial step for the attorney is to not assume that the client is being difficult, although it may certainly appear that way, especially if the client is trying to hide his or her deficits.¹⁷⁰ In order to maximize the client’s comprehension, speech-language experts recommend that the attorney provide information in small chunks and make use of visuals such as gesture, role-play, and drawings.¹⁷¹ Attorneys are also encouraged to pay attention to the non-verbal signals that they themselves are giving.¹⁷² Individuals with language impairments, many of whom have gone through life labeled as “failures,” can be sensitive to facial expressions that show frustration or ridicule.¹⁷³

Professionals have similarly developed techniques for improving clients’ narratives. Sally Miles, a speech pathologist with a special interest in narrative deficits, describes the attorney seeking a narrative as “an archaeologist looking for shards.”¹⁷⁴ As this vivid analogy suggests, attorneys should not expect the client’s narrative

¹⁶⁶ Stone & Bryan, *supra* note 11, at 36.

¹⁶⁷ *Id.*; see also LaVigne & Van Rybroek, *supra* note 5, at 101–02.

¹⁶⁸ *Id.*

¹⁶⁹ *What’s the Story?*, *supra* note 39, at 247.

¹⁷⁰ Stone & Bryan, *supra* note 11, at 36.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Interview with Sally Miles, Ph.D., CCC-SLP, in Madison, Wis. (Apr. 18, 2012).

¹⁷⁴ *Id.*

to be delivered intact; rather, it will come in pieces and will emerge over time. Attorneys should be willing to revisit the narrative and to employ techniques such as role-playing and visuals. Where details are missing, the attorney should focus the client's attention to those areas and enlist the client's assistance in helping the attorney understand. This will often involve a combination of open-ended questions ("Tell me more about that.") with closed-ended directive questions ("When you say 'he got in your face,' show me exactly what he did.").¹⁷⁵

The lawyers we spoke with had their own ideas for improving the quality of communication. Narratives were of special concern, given their central role in the building of a defense. Attorney B likes to tell a client to "pretend that this is a movie," and asks for descriptions of what is on the screen.¹⁷⁶ She also tries to "walk [the client] back far enough" in order to develop context that might be missing from the client's original telling. Attorney A believes she can extract a meaningful narrative only if she and the client have a "long, slow conversation" geared primarily toward "uncovering the emotional content."¹⁷⁷ Attorney F uses a more formalized approach, putting the incident "into action" via the psychodrama technique taught at Gerry Spence's Trial Lawyer's College.¹⁷⁸ When confronted with a thin narrative like "He got in my face so I shot him," he will work with the client and shift the tense and person of the telling: "Dude shows up—what's he wearing? Become dude for me. Tell me what dude is thinking." If the client says some version of "I don't know," Attorney F will persist: "You can't give me that. What do you think dude is thinking? What's your guess?" Attorney F then asks the client to act out both roles. "You grab your gun. You have a little voice in your head. What's it saying?" Attor-

¹⁷⁵ Interview with Sally Miles, *supra* note 173. These are the same types of techniques found in programs designed to improve the narrative skills and overall communication abilities of adolescents and young adults in correctional institutions. *See, e.g.,* Gregory & Bryan, *supra* note 8, at 207 (intervention plans for youthful offenders include narrative skills). Special education teacher Arthur Gosselin uses a template with visual prompts to help inmates develop narratives that reflect more than just a time line. Interview with Arthur Gosselin, *supra* note 98.

¹⁷⁶ In contrast, Attorney J said she did not like the movie technique. However, Attorney J did agree with Dr. Miles' notion of "get[ting] the story in small pieces."

¹⁷⁷ Attorney D also emphasized the importance of eliciting "the emotional layer." Attorney A believed that "if you don't know how to uncover the emotional content, then the kid is incompetent."

¹⁷⁸ *See generally* Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1 (2001). Attorney F is a faculty member at the Trial Lawyer's College.

ney F believes that through this technique "a less verbal person can maybe get there, or can come close."

Making legal information comprehensible was the other obstacle the attorneys wrestled with. Attorney I suggested that attorneys develop "an array of ways of explaining" the myriad legal concepts, rules, and consequences. She saw this becoming all the more critical as the legal system moves toward increased reliance on densely worded forms and continues to impose "lists of rules that get longer." Attorney A recognized that "the language of informing the accused is difficult" whether in the police station or the lawyer's office, and described the job of the lawyer as "unpacking [the language and concepts] every step of the way." That means that attorneys cannot simply assume that "everybody knows that," but must start further back in explanations and should break free from legal language.¹⁷⁹ Attorney A also offered some very practical tips that she has picked up along the way in her extensive career:

Have the client describe non-criminal events in order to get a sense of his speech patterns and thought processes. This will give you a sense of the kind of language that may work with him.¹⁸⁰ And find out how the client covers "I don't understand." He may give a seemingly sophisticated response even though he doesn't get it.

Of course, we should not overlook the importance of training. As three of the lawyers told us, attorneys are not trained to either recognize or address language and communication deficits, despite the fact that they confront them regularly. The attorneys who discussed training were adamant that law school and continuing legal education programs need to incorporate communication with a range of clients, including those with limited language skills.

Finally, we would be remiss if we did not discuss the elephant in the room for all lawyers: time. There is no doubt that a meaningful, custom-designed conversation with a linguistically deficient client can take more time than a standard, checklist-type interview. But the attorneys who talked about this issue also believed that the extra time is worth it, paying dividends in important details, a deeper narrative, and enhanced comprehension by the client. Speech-language professionals concur, maintaining that because of the improved communication, taking the extra time and effort will

¹⁷⁹ LaVigne & Vernon, *supra* note 28, at 862–64 (knowledge deprivation is an effect of language deprivation); *see also* LaVigne & Van Rybroek, *supra* note 5, at 103–05.

¹⁸⁰ Attorney A's suggestion is similar to a recommendation made by noted SLPs Kathryn Stone and Karen Bryan. Stone & Bryan, *supra* note 11, at 36 ("[O]bserve what helps.").

often be more efficient and may, in the end, even save time.¹⁸¹ Moreover, as counsel becomes more familiar with techniques for recognizing and addressing language impairments, many interviews will become less of a struggle.

B. Not Just for Lawyers

Although the quality of communication within the attorney-client relationship rests primarily with the individual lawyer, we cannot overlook the fact that attorneys operate within a larger system, and too often that system is at odds with effective representation, especially for the client with special needs. The main problem is that all segments of the legal system place a premium on speed and numbers, and too often adequate communication, effective assistance of counsel, and due process are far down the priority list.¹⁸² More than one commentator has likened the criminal justice system “to fast-food restaurants.”¹⁸³ Attorney D described it as “a system built on ‘got to run these clients through.’”

Excessive attorney caseloads are of course a major contributor to poor attorney-client communication. The staggering number of cases shouldered by many public defenders and contract defenders often make it impossible to communicate in more than a perfunctory way.¹⁸⁴ And lack of resources for expert assistance only makes the situation worse.

But courts and prosecutors exert their own pressures that compromise the quality of communication. Attorney K offered the extreme example of a homicide case where, because of a scheduling conflict, he had not had the opportunity to discuss the presentence investigation with his client prior to the sentencing hearing. Rather than grant a continuance, the trial judge gave Attorney K “one hour to read the PSI [presentence investigation] in the bullpen¹⁸⁵ to [the] client before sentencing.” To which Attorney K could only

¹⁸¹ Stone & Bryan, *supra* note 11, at 36.

¹⁸² See generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013) (describing the effects of inadequate funding and high volume on the quality of defense services).

¹⁸³ *Id.* at 2172.

¹⁸⁴ In some defender offices, caseloads are so high that the average amount of time spent per case is measured in minutes. Hannah Levintova, *Why You're in Deep Trouble If You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013, 3:00 AM), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts>.

¹⁸⁵ In Attorney K's county, the bullpen is a large holding cell for multiple jail inmates waiting to be brought into court. The PSI was not submitted to the court until three days before the sentencing. Meanwhile, Attorney K was in a three-day jury trial in another court.

say, “What am I supposed to do with that?” More routine are the judges who give defense attorneys “five minutes to explain the proceedings to your client” or prosecutors who make a plea offer “good for only a half an hour.”¹⁸⁶

Trying to improve the quality of communication within such an entrenched system of “McJustice”¹⁸⁷ can seem like a fool’s errand. Yet there are remedies that are not out of reach.

The first source of system improvement must be lawyers themselves. Four of the attorneys we spoke with thought that lawyers bear some responsibility for the external conditions that prevent adequate communication. Two of the attorneys used the word “complicit” as they talked about how attorneys accede to time and caseload pressures, knowing that communication has been substandard, that clients lack adequate comprehension, and that they (the lawyers) may have missed part of the client’s story. Another was perhaps less circumspect, but equally aware: “Sometimes [expletive] just has to proceed . . . I just proceed.” Attorney C posited that attorneys have both an ethical and a constitutional obligation to stop the conveyor belt—to inform supervisors and courts when there are communication problems and to advocate for additional time and resources. Attorney C’s position is supported, and in fact mandated, by the Rules of Professional Conduct.¹⁸⁸

Governmental agencies and funding sources have a corresponding constitutional and ethical obligation to bring defender caseloads within acceptable limits, as countless others have argued.¹⁸⁹ But clients with language disabilities present an additional layer that requires a more nuanced approach beyond pure numbers. Resources for speech-language experts would obviously be an important start. We also recommend case weighting or “case points” for a client with severe language disabilities. Case weighting is a system that acknowledges that certain types of cases take more time than others, and should be worth more points when calculat-

¹⁸⁶ As a former public defender, co-author Michele LaVigne is well-acquainted with these practices. Commonly, plea offers have expiration dates and times. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

¹⁸⁷ Bright & Sanneh, *supra* note 182.

¹⁸⁸ *See State ex rel. Mo. Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592, 607–12 (Mo. 2012); MODEL RULES OF PROF’L CONDUCT RS. 1.1, 1.3, 1.4, 1.7 (2011); Bright & Sanneh, *supra* note 182.

¹⁸⁹ Even *USA Today* has bemoaned the fact that “[a]n explosion in the number of criminal cases has overwhelmed the indigent defense system, which represents about 80% of all accused.” Rick Hampson, *You Have the Right to Counsel. Or Do You?*, USA TODAY (Mar. 12, 2013, 7:09 PM), <http://www.usatoday.com/story/news/nation/2013/03/12/you-have-the-right-to-counsel-or-do-you/1983199/>.

ing an attorney's workload.¹⁹⁰ A client with serious language and communicative deficiencies warrants that same attention. This type of approach would create incentives for identifying and meeting the myriad needs connected with language impairments.

Judges have their own obligation to improve the quality of communication. Judges frequently make a determination of a client's comprehension on the attorney's assurances that she has "explained" the process, the charges, and the consequences, and that she has had enough time with her client. Those assurances are not sufficient.¹⁹¹ The judge should make an independent inquiry to determine whether the client in fact understands. As part of this inquiry, judges should engage in a dialogue with the defendant, even if for only a short period. If done properly, these conversations can reveal language and communication deficits that require further exploration.¹⁹² And if more time is needed, it should not be treated as a crisis. While "most trial judges are under considerable calendar constraints," the client's constitutional rights are of "paramount importance."¹⁹³

The same can be said of prosecutors, whom Attorney J maintains have been "insulated" from the communication problems that attorneys confront with clients. After *Missouri v. Frye*¹⁹⁴ and *Laf-ler v. Cooper*,¹⁹⁵ a lawyer's ability to communicate effectively with her client is an issue that prosecutors can no longer ignore. A prosecutor's acquiescence to, or insistence on, "meet 'em and plead 'em" deals flies in the face of a client's right to effective assistance of counsel. The lawyer who wisely says, "I need more time with my client," should not be risking enhanced penalties for her client.¹⁹⁶ To place counsel in such an untenable position may be depriving

¹⁹⁰ See, e.g., NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 140–151 (2011), available at http://www.americanbar.org/content/dam/aba/publications/books/lis_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf.

¹⁹¹ *State v. Brown*, 716 N.W.2d 906, 921–22 (Wis. 2006); but cf. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

¹⁹² Judges, like lawyers, should also be trained about language impairments. Judges should be encouraged to deviate from "the standard script of 'yes-and-no' type colloquies that permeate so many of our judicial tasks." *Strook v. Kedinger*, 766 N.W.2d 219, 231–32 (Wis. 2009); see also LaVigne & Van Rybroek, *supra* note 5, at 116–17.

¹⁹³ *State of Wisconsin v. Bangert*, 389 N.W.2d 12, 28 (Wis. 1986) (citing *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969)).

¹⁹⁴ 132 S. Ct. 1399, 1408 (2012) ("Defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.").

¹⁹⁵ 132 S. Ct. 1376, 1383–84 (2012) (finding lawyer's performance deficient when he erroneously told defendant the state could not prove intent).

¹⁹⁶ Prosecutors have wide latitude to condition plea offers on waivers of rights, ac-

the client not only of his right to effective assistance of counsel, but of his right to counsel period.¹⁹⁷

VI. CONCLUSION

It is probably inevitable that the attorney-client relationship is the aspect of the legal system hardest hit by the insidious effects of language impairments. By its very nature, the defense function depends on the ability of two human beings to interact at a deeply intimate and complex level. Attorney F put it this way: "What is the attorney-client relationship? It's us trying to help [clients] through a minefield and to help them find ways to make the best possible choices . . . to help them manage an impossible situation." Though he did not use the words "communication" or "language," Attorney F was telling us in no uncertain terms that in the attorney-client relationship, communication matters.

At first glance, the problems posed by language impairments may seem insurmountable, especially for lawyers who are already under tremendous caseload, resource, and time pressures. But adequate communication is so essential to the effective operation of the attorney-client relationship, and ultimately to the overall quality of justice, that we cannot ignore the prevalence of language impairments among the people on attorney caseloads and court dockets. We cannot let ourselves be satisfied with fractured comprehension of legal information, inability to work meaningfully with counsel, uninformed decision-making, and "thin narratives." Addressing communication and language issues will never be a complete fix for all impaired clients whose multitude of needs are in direct conflict with an overloaded legal system; but for many it can improve the connection between attorney and client, increase the quality and quantity of information exchanged, and facilitate better-informed analysis and decision-making. That would be a good result all around.

cess to information, and acceptance by a certain date and time. *See* Bright & Sanneh, *supra* note 182. *See also* Bordenkircher v. Hayes, 434 U.S. 357, 363–64 (1978).

¹⁹⁷ United States v. Cronin, 466 U.S. 648, 659–60 (1984) (noting circumstances when, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate").

