



3-11-2022

Teaching and Assessing Active Listening as a Foundational Skill for Lawyers as Leaders, Counselors, Negotiators, and Advocates

Gustafson, Lindsey P.

Short, Aric K.

Hamilton, Neil W.

Follow this and additional works at: <https://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

62 SANTA CLARA L. REV. 1 (2022)

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized editor of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

TEACHING AND ASSESSING ACTIVE LISTENING AS A FOUNDATIONAL SKILL FOR LAWYERS AS LEADERS, COUNSELORS, NEGOTIATORS, AND ADVOCATES

Lindsey P. Gustafson,* Aric K. Short,** & Neil W. Hamilton***

Our students will be more effective leaders, counselors, negotiators, and advocates as they deepen their ability to actively listen. As a professional and interpersonal skill linked closely with a lawyer's success, our students' ability to listen should demand our attention as legal educators. This attention is worth the effort because studies indicate active listening is not a static ability: we can teach students to be better listeners. But "active listening" is missing from most law schools' learning outcomes or curricula, or it is only included as an undefined element of effective communication. Consequently, it is a critical lawyering skill that is routinely not being effectively, independently taught and assessed.

This article introduces the Active Listening Milestone Rubric for Law Students, which is a stage-development or milestone model in competency-based education. The rubric includes four sub-competencies, which are defined using expertise drawn from listening experts and studies then explained in the context of the practice of law: 1) Active listeners assess and accurately allocate resources necessary to the conversation; 2) active listeners work to create a shared understanding with the speaker by considering both the speaker's and the listener's lenses and how they may differ; 3) active listeners work to increase shared understanding with the verbal and nonverbal cues; and 4) active listeners move to a response only after fully exploring and understanding the speaker's meaning.

* Associate Dean for Academic Affairs and Arkansas Bar Association Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock.

** Professor of Law and Director, Professionalism and Leadership Program, Texas A&M University School of Law.

*** Holloran Professor of Law and Co-director of the Holloran Center for Ethical Leadership in the Professions, University of St. Thomas School of Law.

TABLE OF CONTENTS

I. Introduction	3
II. Stage-Development Models, or Milestone Models, in Competency-Based Education.....	5
III. Active Listening as a Foundational Skill for Lawyers as Leaders, Counselors, Negotiators, and Advocates	8
IV. The Active Listening Milestone Rubric for Law Students.....	10
A. First sub-competency: Active listeners assess and accurately allocate resources necessary to the conversation	11
1. Why Listen?.....	12
2. What Practical Considerations Exist?.....	15
3. Be Aware of Emotions	17
B. Second sub-competency: Active listeners work to create a shared understanding with the speaker by considering both the speaker's and the listener's lenses and how they may differ.....	19
C. Third sub-competency: Active listeners work to increase shared understanding with verbal and nonverbal cues.....	26
1. Use recognizable, appropriate nonverbal cues and accurately read the speaker's nonverbal cues.....	27
2. Use verbal feedback to demonstrate attention, understanding, responsiveness, and empathy	29
D. Fourth sub-competency: Active listeners move to a response only after fully exploring and understanding the speaker's meaning.....	32
V. Conclusion.....	34
Appendix	35
Table 1: The Five Core Components of Competency-Based Legal Education.....	35
Figure 1: Competency-Based Legal Education's Two Central Core Components Informing the Three Other Components in a Law School's CBE Program	36
Figure 2: Dreyfus & Dreyfus Development Model.....	37
Figure 3: Holloran Competency Alignment Model.....	37
Milestone Rubric: Active Listening	39

I. INTRODUCTION

Active listening is a core professional skill for lawyers. In their traditional roles as advocates, negotiators, and counselors, lawyers are most effective when they form relationships of trust with their clients and understand the world from their perspectives. Doing so without effective listening skills is nearly impossible. Beyond the legal system, lawyers serve as leaders of all types, helping to run governments, companies, non-profits, and even neighborhood associations. Effective leadership in these increasingly complicated and diverse settings requires a combination of professional, technical, and interpersonal skills, but none is more important than active listening. In short, lawyers will serve as more effective leaders and professionals as they become better listeners.

Despite the importance of active listening for lawyers, legal education has not prioritized the development of this skill.¹ Only twenty-three United States law schools currently include listening within their J.D. program learning outcomes.² And very little scholarship exists addressing the instruction and assessment of active listening in law school.³ Perhaps this is because many believe our capacity to listen effectively is “fixed,” or perhaps it results from a sense that the components of listening are too amorphous or obscure to articulate beyond, “[y]ou know good listening when you observe it.”⁴ Or perhaps

1. A notable exception to this statement is the treatment of listening in textbooks for experiential courses, such as interviewing and counseling or clinics. See *infra* at note 34.

2. *Learning Outcomes 302(c) and (d)*, HOLLORAN CENTER, <https://www.stthomas.edu/hollorancenter/learningoutcomesandprofessionaldevelopment/learningoutcomesdatabase/learningoutcomes302c/> (last visited July 30, 2021) (listing learning outcomes of 186 schools that have reported them as of June of 2020). The majority of these twenty-three schools use the phrase “active listening” in their learning outcomes. Law schools have also adopted other learning outcomes where listening is a key sub-competency. For example, seventeen schools have a learning outcome in Client Interviewing. Seventeen schools have Counseling. Nineteen have a learning outcome in Negotiation. Twelve have a learning outcome on Leadership. Nine have an outcome in Mediation and Conflict Resolution. In total, adjusting the total to eliminate duplication where schools have adopted more than one of the above outcomes, fifty-seven schools have learning outcomes in either listening, or competencies where active listening is an integral sub-competency. *Learning Outcomes 302(b) and (d)*, HOLLORAN CENTER, <https://www.stthomas.edu/hollorancenter/learningoutcomesandprofessionaldevelopment/learningoutcomesdatabase/learningoutcomes302b/> (last visited July 30, 2021).

3. See Susan L. Brooks, *Listening and Relational Lawyering*, in THE HANDBOOK OF LISTENING 361-71 (Debra L. Worthington & Graham D. Bodie eds., 2020); Neil Hamilton, *Effectiveness Requires Listening: How to Assess and Improve Listening Skills*, 13 FLA. COASTAL L. REV. 146-80 (2012). See also the textbooks on interviewing and counseling, negotiation, and conflict resolution cited in note 34 *infra* for discussion of the importance of listening skills in those contexts.

4. See Susan Timm & Betty L. Schroeder, *Listening/Nonverbal Communication Training*, 14 INT’L J. OF LISTENING 109, 113 (2000) (“Listening is the missing component in

law students and lawyers are not predisposed to listening well, so they devalue the skill.

In fact, despite the silent treatment that legal education has given to listening, there is a rich and developing social science literature on listening theory and practical components of effective listening. Multiple studies have demonstrated that active listening is a “trainable skill,” and there is a growing body of scholarship on how to develop listening as a competency.⁵ In addition, we know from empirical studies that legal employers and clients highly value an attorney’s ability to listen effectively.⁶

In this article, we make the case for recognizing active listening as a foundational lawyering skill that should be incorporated by schools into their J.D. program learning outcomes. We encourage schools to approach active listening as they do analytical thinking, oral communication, and legal writing—as a competency that should be introduced early, practiced over time, and developed to at least a minimum standard by each student before graduation. To assist in this process, we draw on existing social science, interdisciplinary research, and scholarship to identify and explain the components of active listening in the legal context. And we offer a framework for assessing the sub-skills of active listening along stages of development that are consistent with competency-based education.

Part II provides a brief overview of the stage-based model for developing skills—called a Milestone model—that is used in competency-based education to move learners from student to

the reading, writing and speaking areas taught in our school system; yet, it is probably the most important part of good communication in the workplace . . .”) (quoting private correspondence with the training director at Northern Illinois University).

5. Harry Weger Jr. et al., *The Relative Effectiveness of Active Listening in Initial Interactions*, 28 INT’L J. OF LISTENING 13, 15 (2014) [hereinafter *Relative Effectiveness of Active Listening*] (describing studies testing listening training in a variety of situations); Valerie Manusov et al., *Conditions and Consequences of Listening Well for Interpersonal Relationships: Modeling Active-Empathic Listening, Social-Emotional Skills, Trait Mindfulness, and Relational Quality*, 34 INT’L J. OF LISTENING 1, 7 (2018) (noting that training in active listening skills increases therapists’ overall listening skills); Harry Weger Jr., Gina R. Castle & Melissa C. Emmett, *Active Listening in Peer Interviews: The Influence of Message Paraphrasing on Perceptions of Listening Skill*, 24 INT’L J. OF LISTENING 34, 36 (2010) [hereinafter *Active Listening in Peer Interviews*]. Emotional intelligence, which improves a listener’s ability to actively engage with the speaker, can also be developed and grown. See Marjorie A. Silver, *Emotional Competence and the Lawyer’s Journey*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* 5, 11-12 (Marjorie A. Silver ed., 2007) [hereinafter *Emotional Competence and the Lawyer’s Journey*].

6. See Neil Hamilton, *The Gap Between the Foundational Competencies Clients and Legal Employers Need and the Learning Outcomes Law Schools Are Adopting*, 89 UMKC L. REV. 559, 561, 563-64 (2021).

competent practitioner and beyond to mastery. Part III provides a review of research and scholarship demonstrating that listening is critical for lawyers as leaders, counselors, negotiators, and advocates. Part IV begins with a definition of active listening, including its primary goals, drawn from existing literature, and adapted to the context of law. The section then identifies and explains the four primary stages or sub-competencies of active listening. Appendices that follow contain a number of supplementary materials, including a sample active listening rubric that breaks the skill down into its major sub-competencies and provides stages of development for each one.⁷

II. STAGE-DEVELOPMENT MODELS, OR MILESTONE MODELS, IN COMPETENCY-BASED EDUCATION

The ABA requirement to adopt institutional learning outcomes, and provide formative and summative assessments of those program outcomes⁸ means that legal educators need to move gradually toward competency-based education.⁹ Competency-based education is a different model from traditional education where the emphasis has been on student completion of a certain number of exposure hours of credit (called a tea-steeping model where the student is like a tea bag in cup of hot water for the right amount of time).¹⁰ By contrast, competency-based education is an approach to preparing lawyers for practice that is fundamentally organized around competencies derived from an analysis of client and societal needs.¹¹ Evaluating the design of

7. See *infra* Appendix. The authors developed much of the substance of this article, as well as the attached rubric, as a working group formed by the Holloran Center at the University of St. Thomas School of Law. Our working group was part of a larger effort by the Holloran Center to convene faculty from around the country to develop rubrics and teaching and assessment materials to support common professional formation learning outcomes identified by law schools. Robin Thorner, Assistant Dean of Career Services at St. Mary's University School of Law, led our active listening working group and was an integral part of our weekly collaborative discussions. She helped guide our conversations and provided useful research, thoughtful critiques, and valuable insights into our collective work. This article would not have been possible without her generous contributions.

8. AMERICAN BAR ASSOCIATION, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17, 24, 25 (Erin Ruehrwein ed., 2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf (last visited July 31, 2021).

9. Neil Hamilton & Jerome Organ, *Learning Outcomes that Law Schools Have Adopted: Seizing the Opportunity to Help Students, Clients, Legal Employers, and the Law School*, 69 J. LEGAL EDUC. 1-2 (forthcoming).

10. See Eric Holmboe & Robert Englander, *What Can The Legal Profession Learn From The Medical Profession About The Next Steps?*, 14 U. ST. THOMAS L.J. 345, 348 (2018).

11. See *id.* at 347.

competency-based education programs has been hampered by the lack of a clear shared identification and understanding of the most important components of this type of program.¹²

Law schools can borrow from medical education's experience with competency-based education to identify the core components of competency-based legal education.¹³ This scholarship identifies outcome competencies and a sequenced progression as the central core components of competency-based medical education.¹⁴ The medical education community recognized the need to build a narrative model of how development on each competency occurs through a progressive sequence of developmental stages from novice to competent graduate.¹⁵ This led to the creation of what medical educators call Milestones on each competency.¹⁶

The Milestones on a specific competency provide a "shared mental model" of professional development from student to competent practitioner and beyond to mastery.¹⁷ A Milestone model both defines a logical learning trajectory of professional development and highlights and makes transparent significant points in student development using a narrative that describes demonstrated student behavior at each stage.¹⁸ Milestones can be used for formative and summative assessment, as well as program assessment.¹⁹ These are also called rubrics.²⁰ If a faculty and staff adopt a Milestone model for a particular competency, they are also building consensus on what competent performance looks like, and thus will foster interrater reliability.²¹ Milestones also describe what a trajectory should look like so that learners can track their own progress

12. *See id.* at 345-46.

13. *See* Hamilton & Organ, *supra* note 9, at 351-52.

14. *See infra* Table 1 and Figure 1. Table 1 and Figure 1 are adapted from Elaine Van Melle et al., *A Core Components Framework for Evaluating Implementation of Competency-Based Medical Education Programs*, 94 ACAD. MED. 1002, 1002-09 (2019). In a multi-stage process drawing on scholarship from education theory and medical education, fifty-nine members on an international CBME expert panel identified five core components to CBME. *Id.*

15. *See* Holmboe & Englander, *supra* note 10, at 347-48.

16. *See* Laura Edgar et al., *Milestones 2.0: A Step Forward*, 10 J. GRADUATE MED. EDUC. 367-69 (2018).

17. *See id.* at 367-69. *See also* Holmboe & Englander, *supra* note 10, at 350-51.

18. Edgar et al., *supra* note 16, at 367.

19. Andrea A. Curcio, *A Simple Low-Cost Institutional Learning-Outcomes Assessment Process*, 67 J. LEGAL EDUC. 489, 493 (2018).

20. Georgia State professor Andy Curcio explains that, "Rubrics for outcome-measures assessment not only identify a competency, they also describe what competent performance looks like, along a continuum of development and in a way that fosters reliability among raters." Rubrics also make the faculty's expectations clearer for each student. Curcio, *supra* note 19, at 489, 493.

21. *Id.*

toward becoming competent at a particular skill, and programs can recognize students who need extra help as well as students who are more advanced.²²

A Milestone model for a learning outcome like active listening has substantial benefits for all the major stakeholders in legal education.²³ For law students, the model provides a descriptive roadmap to foster development toward later stages, increases transparency of performance requirements, encourages informed self-assessment and self-directed learning, facilitates better feedback to the student, and guides personal action plans for improvement.²⁴ For law schools, faculty, and staff, the model guides curriculum and assessment tool development, provides more explicit expectations of students and a meaningful framework/shared mental model of student development, supports better systems of assessment, and enhances the opportunity for early identification of under-performers to allow for early intervention.²⁵ Thus, Milestone models will enable continuous monitoring of programs and may allow for lengthened site visit cycles. For the public, the model allows for greater public accountability and builds on a community of practice, with a focus on continuous improvement.²⁶

It is important that a Milestone model on listening aligns with the competency models that legal employers are using to assess their lawyers on the same competency. This means both that the school's learning outcomes are meeting employer and client needs, and that students can communicate value to potential employers using the employers' language.²⁷

22. Holmboe & Englander, *supra* note 10, at 350-51. Overall, each Milestone reflects the Dreyfus and Dreyfus model of development from novice to expert shown in Figure 2, *see infra* Appendix.

23. *See infra* Milestone Rubric: Active Listening. This list adapted from CELESTE ENO ET AL., ACGME MILESTONES GUIDEBOOK FOR RESIDENTS AND FELLOWS 2-3 (2020).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See infra* Figure 3 for the alignment model developed by Holloran Center. This continuum/alignment model, developed by Jerry Organ and the author, builds on the Dreyfus and Dreyfus Model of development from novice to expert. Stuart E. Dreyfus, *The Five-Stage Model of Adult Skill Acquisition*, 24 BULL. OF SCI., TECH. & SOC'Y 177-81 (2004). A "competent learner" is ready to take the bar and begin to practice law after passing the bar exam.

III. ACTIVE LISTENING AS A FOUNDATIONAL SKILL FOR LAWYERS AS LEADERS, COUNSELORS, NEGOTIATORS, AND ADVOCATES

Clients, employers, and law schools are recognizing active listening as a foundational skill for lawyers as leaders, counselors, negotiators, and advocates.²⁸ As a leader, a lawyer attempts to influence a group of individuals to achieve common goals.²⁹ As a counselor, a lawyer influences the client by exercising independent professional judgment and rendering candid advice, referring not only to law, but also to moral, economic, social, and political factors that may be relevant to the client's situation.³⁰ As a negotiator, a lawyer influences others to obtain results advantageous to the client but consistent with the requirements of honest dealings with others. As an advocate, a lawyer influences others to benefit the client's position under the rules of the adversary system.³¹

In each of these roles, lawyers seek to influence others. Lawyers are most likely to be influential when they understand, as fully as possible, their audience's entire message and context, including the other person's emotions, goals, advantages and disadvantages, strengths and weaknesses, opportunities, fears, and constraints.³² Listening for emotions in particular is key. Peter Salovey, a leading social psychologist researching emotional intelligence and the president of Yale University, notes "[a]ny lawyer who can understand what emotions are being presented and why is at a tremendous advantage."³³ Recognizing this key skill, textbooks on teaching both lawyering skills and leadership in law schools emphasize the competency of active listening.³⁴

28. Brooks, *supra* note 3, at 363.

29. See PETER G. NORTHOUSE, *LEADERSHIP THEORY AND PRACTICE* 5 (8th ed. 2019); see also Deborah Rhode, *Leadership in Law*, 69 *STAN. L. REV.* 1603, 1607 (2017); see LEAH JACKSON TEAGUE ET AL., *FUNDAMENTALS OF LAWYER LEADERSHIP* 6 (2021).

30. MODEL RULES OF PROF'L CONDUCT r. 2.1 (Am. Bar Ass'n, 1983).

31. *Model Rules of Professional Conduct: Preamble & Scope*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ (last visited July 31, 2021).

32. Neil Hamilton, *Fostering and Assessing Law Student Teamwork and Team Leadership Skills*, 48 *HOFSTRA L. REV.* 619, 632-33 (2020).

33. Rhonda Muir, *The Importance of Emotional Intelligence in Law Firm Partners*, 33 *L. PRAC.* 60 (2007).

34. See TEAGUE ET AL., *supra* note 29, at 254; STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 45-46, 84-86 (Erwin Chemerinsky et al. eds., 3d ed. 2007) [hereinafter *ESSENTIAL LAWYERING SKILLS*]; DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 41-63 (2d ed. 2004) [hereinafter *LAWYERS AS COUNSELORS*]. See also DEBORAH L. RHODE, *LAWYERS AS*

In addition, clients identify good communication skills and particularly attentive listening skills as the two most important skills lawyers can have.³⁵ A professional's strong listening skills will lead to better outcomes for the person served. For example, there are many empirical studies indicating that patients highly value the listening skills of health practitioners.³⁶ When health practitioners listen to their patients, they increase the level of patient engagement, satisfaction, and compliance with treatments, which improves patient outcomes.³⁷ The same is true when lawyers listen well to their clients.³⁸

In the context of the most important competencies for new lawyers generally (which includes all four roles above), *Educating Tomorrow's Lawyers* did a survey of 24,137 lawyers in 2016 asking what competencies are "necessary in the short run" for new law graduates.³⁹ "Listening attentively" was the sixth most important competency.⁴⁰ The importance of listening skills is emphasized in textbooks on interviewing, counseling, and negotiation,⁴¹ and in textbooks on conflict resolution.⁴² Listening skills are also important in a lawyer's role as an

LEADERS 67 (2013) [hereinafter RHODE, LAWYERS AS LEADERS] (explaining that "many law firm leaders rank [listening] as their most important skill").

35. RANDALL KISER, *SOFT SKILLS FOR THE EFFECTIVE LAWYER* 32 (2017) (summarizing client survey data).

36. Lisa McKenna et al., *Listening in Health Care*, in *THE HANDBOOK OF LISTENING* 373, 374-75 (Debra L. Worthington & Graham D. Bodie eds., 2020).

37. *Id.*

38. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 41 ("[Y]our ability to engender clients' trust, develop rapport, elicit full descriptions of clients' problems and help clients develop effective solutions may hinge as much on your listening as on your questioning and advice-giving skills. Thus, helping clients find satisfactory solutions to their problems often depends on your effectiveness as a listener."). There is some data indicating that active listening results in better outcomes for lawyers also. A recent study of American and Finnish attorneys and their professional listening competence found that attorneys who became more aware of and then skilled with the mechanics of active listening had an "elevated sense of self-efficacy, which increase[d] their subjective sense of well-being at work." Sanna Ala-Kortemaa & Pekka Isotalus, *Dimensions of Professional Listening Competence in the Legal Context*, 21 *INT'L J. LEGAL PROF.* 233, 233 (2014).

39. See NEIL HAMILTON, *ROADMAP: THE LAW STUDENT'S GUIDE TO MEANINGFUL EMPLOYMENT* 18 (2d ed. 2018).

40. See *id.* The 2003 Shulz-Zedeck survey of 2,000 Berkeley Law alums asking "if you were looking for a lawyer on an important matter for yourself?" includes listening and "able to see the world through the eyes of others" among the twenty-six effectiveness factors identified. *Id.* at 20-21.

41. See *ESSENTIAL LAWYERING SKILLS* *supra* note 34, at 45-46, 83-87, 357-58, (discussing the importance of listening skills for the client relationship and on the importance of listening in negotiation); *LAWYERS AS COUNSELORS*, *supra* note 34, at 41; ROBERT COCHRAN JR., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 27 (3d ed. 2014).

42. CARRIE MENKEL-MEADOW, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 61-65 (2018).

advocate in pre-trial and at trial to understand the witnesses, the opposing side, and the decision makers.⁴³ Listening is particularly important in all four roles above in multi-cultural contexts.⁴⁴

IV. THE ACTIVE LISTENING MILESTONE RUBRIC FOR LAW STUDENTS

So, what is effective, active listening? Although there is no all-encompassing definition of listening,⁴⁵ experts agree that listening is “recognized as a multi-dimensional construct that consists of complex (a) affective processes, such as being motivated to attend to others; (b) behavioral processes, such as responding with verbal and nonverbal feedback; and (c) cognitive processes, such as attending to, understanding, receiving, and interpreting content and relational messages.”⁴⁶ What qualifies as effective listening depends on the specific listening processes and behaviors most useful in a specific disciplinary context.⁴⁷

“Active listening” is a type of listening widely recognized in a variety of contexts that require gathering information and problem-solving,⁴⁸ and it receives the “lion’s share of attention” in interpersonal communication textbooks and listening studies.⁴⁹ Active listening is also called empathic listening, reflective listening, and therapeutic listening because it seeks an emotional understanding, which may alleviate the anxiety of a client or a witness.⁵⁰ Active listening typically refers not only to a listener’s cognitive processes—how the listener attends to, understands, receives, and interprets the speaker’s message—but also to how the listener motivates and meets the speaker to create a shared understanding through verbal and nonverbal

43. See *Listening: The Art of Advocacy*, FINDLAW, <https://corporate.findlaw.com/litigation-disputes/listening-the-art-of-advocacy.html> (last updated Mar. 26, 2008).

44. See ALLEN IVEY ET AL., INTENTIONAL INTERVIEWING AND COUNSELING: FACILITATING CLIENT DEVELOPMENT IN A MULTICULTURAL SOCIETY 131-49 (4th ed. 2018).

45. Debra L. Worthington & Graham Bodie, *Defining Listening: A Historical, Theoretical and Pragmatic Assessment*, in THE SOURCEBOOK OF LISTENING: METHODOLOGY AND MEASURES 9 (Debra L. Worthington & Graham D. Bodie eds., 2018) [hereinafter *Defining Listening: A Historical, Theoretical and Pragmatic Assessment*].

46. *Id.* at 3.

47. *Id.* at 10-11.

48. See generally Christine Bauer, Kathrin Figl & Renate Motschnig-Pitrik, *Introducing “Active Listening” to Instant Messaging and E-Mail: Benefits and Limitations*, IADIS INT’L J. ON WWW/INTERNET (2009) (listing contexts, like therapy, school and career counseling, medicine, etc.).

49. *Relative Effectiveness of Active Listening*, *supra* note 5, at 14.

50. *Id.* (describing qualitative research on American and Finnish attorneys on professional listening competence).

feedback.⁵¹ Active listeners work to capture the speaker's entire message, which includes not only the meaning of the speaker's words but also any critical context, including accompanying emotions, discomfort, and anxieties.⁵² Active listening, therefore, aligns with the values and competencies clients and employers use and furthers lawyers' development as leaders.

The authors define active listening for the practice of law as building a shared understanding between the speaker and the listener through the creation of a relationship built on trust and empathy, and, where appropriate, equipping the listener to reply or problem-solve at the appropriate time in a manner that corresponds to the speaker's concerns or goals. The coordinating Milestone Rubric sets out four sub-competencies: 1) active listeners assess the purpose and context of the conversation and allocate the resources and attention appropriate and necessary to absorb, interpret, and decode the information given to them by a speaker; 2) in working to create a shared understanding with the speaker, active listeners consider the lens through which the speaker speaks and the lens through which the listener listens; 3) active listeners continually assess the shared understanding between the speaker and the listener and, where necessary, work to increase the shared understanding with verbal and nonverbal cues; and 4) active listeners only move to respond or problem-solve where appropriate to the conversation and only after fully exploring, and ultimately understanding, the speakers' message.⁵³

A. First sub-competency: Active listeners assess and accurately allocate resources necessary to the conversation

The first step in the active listening process—preparing to listen, or the presage stage⁵⁴—is easily overlooked, largely because many of us unconsciously prepare to listen in our daily conversations. But for law students and lawyers, as well as other active listeners, the presage stage

51. Graham D. Bodie & Susanne M. Jones, *The Nature of Supportive Listening II: The Role of Verbal Person Centeredness and Nonverbal Immediacy*, 76 WESTERN J. OF COMM. 250, 251 (describing the “multidimensional construct” of active listening) [hereinafter *Supportive Listening II*].

52. See Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1; see generally ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 46 (“The ability to listen well is as important in the practice of law as the ability to talk well.”).

53. See *infra* Milestone Rubric: Active Listening.

54. Graham D. Bodie, Debra Worthington, Margarete Imhof & Lynn O. Cooper, *What Would a Unified Field of Listening Look Like? A Proposal Linking Past Perspectives and Future Endeavors*, 22 INT'L J. OF LISTENING 103, 112 (2008) [hereinafter *Unified Field of Listening*].

is important because it sets the intention of the listener and creates the foundation for a successful conversation. Given how critical listening is to effective lawyering,⁵⁵ taking time to intentionally prepare and allocate resources for listening is wise. This stage begins with an explicit decision to listen—to allocate time and energy to decode and understand what is being said by the speaker and to be active in the process of co-creating meaning.⁵⁶ For the purposes of this article, we assume the relevant listening context to be a professional setting for an attorney—communicating with a client, opposing counsel, co-worker, judge, or another constituent. To effectively prepare to listen and allocate the necessary resources for a successful conversation in this setting, there are several important areas that should be considered.⁵⁷

1. *Why Listen?*

There may be many reasons for lawyers to actively listen, depending on the identities of the parties involved, their history and relationship, the current setting, the broader context, next steps that might be anticipated, and other considerations. But two primary and interrelated reasons for listening in the professional legal setting are paramount. The first and most obvious reason is to decode and understand the meaning that the speaker intends to convey.⁵⁸ As a

55. See RHODE, *LAWYERS AS LEADERS* *supra* note 34 (“[M]any law firm leaders rank [listening] as their most important skill.”).

56. According to listening scholars, “[f]rom a behavioral perspective, listening is indeed not a passive act, and listeners are not mere receptors of information; they are full collaborators or co-narrators in a story-telling, partners in the meaning-making process.” Graham D. Bodie, *Measuring Behavioral Components of Listening*, in *THE SOURCEBOOK OF LISTENING RESEARCH: METHODOLOGY AND MEASURES* 123, 124 (Debra L. Worthington & Graham D. Bodie eds., 2018) [hereinafter *Measuring Behavioral Components of Listening*]; *see id.* This decision to listen in this context reflects a “positive listening attitude” and ties to the general ideas that listening is active, not passive, and involves the genuine desire to listen well. *See* Graham D. Bodie & Susanne M. Jones, *Measuring Affective Components of Listening*, in *THE SOURCEBOOK OF LISTENING RESEARCH: METHODOLOGY AND MEASURES* 97, 97 (Debra L. Worthington & Graham D. Bodie eds., 2018); *Unified Field of Listening*, *supra* note 54, at 112-13 (discussing that the “resulting affective outcome depends on the resources available and allocated” to the listening task).

57. Scholars on listening have described the resource allocation involved as influenced by a number of factors, including whether the conversation is likely to be “easy” or “hard.” *See Unified Field of Listening*, *supra* note 54, at 112 (citing another source). In the resource allocation stage, “personal and contextual presage become relevant,” including “trait-like competencies and skills as well as state characteristics, affective motivation and situational perceptions and decisions.” *Id.*

58. One of the listener’s central goals should be isomorphic attribution or attributing the same meaning to the words and actions of the speaker as the speaker intended. *See* Susan J. Bryant & Jean Koh Peters, *Six Practices for Connecting with Clients Across Culture: Habit Four, Working with Interpreters and Other Mindful Approaches*, in *THE AFFECTIVE*

starting point, the listener absorbs and processes the sounds made by the speaker, but active listening goes well beyond mechanical hearing.⁵⁹ And the listener is not passive in this experience.⁶⁰ As the label suggests, the listener is an active participant in the conversation. They are not only actively talking at times in the normal back-and-forth sequence of conversation, but also actively listening—probing, encouraging, and supporting the speaker.⁶¹ In this way, the listener and speaker are actually creating a shared meaning together,⁶² which should be the real goal of active listening in the law context.⁶³ As described in this Section and below, the listener should prepare for and engage in the conversation by taking steps to maximize the chances that the speaker will be successfully understood.⁶⁴

The second reason to actively listen is to build and develop the relationship between speaker and listener.⁶⁵ Trust is one of the most important components of an effective lawyer-client relationship,⁶⁶ and trust is developed over time.⁶⁷ A lawyer may need multiple meetings

ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 187 (Marjorie A. Silver ed., 2007) [hereinafter *Connecting with Clients Across Culture*].

59. See *Defining Listening: A Historical, Theoretical, and Pragmatic Assessment*, *supra* note 45, at 3.

60. See Janet Beavin Bavelas, Linda Coates & Trudy Johnson, *Listener Responses as a Collaborative Process: The Role of Gaze*, 52 J. OF COMM. 566, 567 (2006) [hereinafter *Listener Responses as a Collaborative Process*] (noting that the listener's "insertions and overlapping contributions" during a conversation result in collaboration with the speaker to create communication that is "joint action"); *Measuring Behavioral Components of Listening*, *supra* note 56, at 124 ("Listeners have vast influence on the trajectory of conversations and on the outcomes of those conversations, not only because of how they process information but also because of how they act, that is, how they behave as listeners.").

61. Behaviors associated with active listening are discussed *infra* at Section IV. C. a. and accompanying notes.

62. See *Listener Responses as a Collaborative Process*, *supra* note 60, at 567; *Measuring Behavioral Components of Listening*, *supra* note 56, at 124.

63. See Susan L. Brooks, *Using a Communication Perspective to Teach Relational Lawyering*, 15 NEV. L.J. 477, 482-85 (2015) [hereinafter *Relational Lawyering*].

64. Research suggests that active listeners—those demonstrating the traits described below in Section IV. C.—may be a necessary component of an effective conversation. See *Listener Responses as a Collaborative Process*, *supra* note 60, at 569 (observing that speakers with distracted or unresponsive listeners are less likely to complete their stories than those in a control group).

65. Some have argued that being an effective lawyer is less about outcomes and more about relationships. See *Relational Lawyering*, *supra* note 63, at 479.

66. See DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW 203* (2014) ("Nothing—and we mean nothing—is more important in the lawyer-client relationship than trust.").

67. See *id.* at 203. A lack of effective communication is one of the most frequently identified sources of client dissatisfaction in the attorney-client relationship. A 2005 study found that seventy percent of corporate clients surveyed did not recommend their primary law firm. See Clark D. Cunningham, *What Do Clients Want from Their Lawyers*, 2013 J. OF DISP.

over weeks or months to foster trust with the client. This is especially true because the challenges that clients bring to their lawyers are often messy with difficult emotional and personal issues attached. Only after a relationship has been formed and developed may a client feel comfortable sharing the details that are necessary for a successful representation.⁶⁸ Similarly, multiple meetings may be necessary for the listener to have enough contextual awareness to accurately understand what the speaker is trying to communicate.

After we acknowledge the two primary reasons for active listening, we should generally reflect on why we will be listening in this particular conversation.⁶⁹ What is the broader context of the conversation? Of the relationship between speaker and listener? Who is the speaker? Is there any obvious cultural or identity difference that should be considered from the outset? What are our specific goals in listening today? What do we hope to learn or convey in the broader conversation? What do we believe the speaker's goals are, both in speaking and in the overall conversation? Identifying listening goals may help set a flexible framework for the conversation.

It is worth clarifying that in the listening presage stage, it may be useful to consider how the conversation might develop, as well as possible next steps the parties might later take. Doing so may help the listener better appreciate the place that this conversation plays in the broader relationship between the parties. This may be especially valuable for lawyers, who are often in an ongoing relationship with the speakers—with both a history and a future together. But while active listeners benefit from processing “what if” scenarios before a conversation to best equip them for what might transpire, they should work hard to keep an open mind.⁷⁰ They do not know, in fact, what will

RESOL. 143, 143-44 (2013). Client dissatisfaction with their lawyers does not seem to be based on a failure to achieve a desired outcome, but with a failure to effectively handle the attorney-client relationship. *See id.* at 146. A failure to listen was among the most frequently identified weaknesses of lawyers. *Id.*

68. The need for multiple meetings to establish and foster trust and more effective communication may be greater when cross-cultural communication is involved. *See infra* at Section IV.B. and accompanying notes.

69. Listening scholars recognize various types of listeners based on the purposes for which they listen. *See, e.g.*, Graham D. Bodie & William A. Villaume, *Aspects of Receiving Information: The Relationship Between Listening Preferences, Communication Apprehension, Receiver Apprehension, and Communicator Style*, 17 INT'L J. OF LISTENING 47, 48-50, 64-65 (2003) (differentiating among listeners who are oriented to people, content, action, and time and noting that most listeners have the ability to adjust listening styles based on the circumstances or adopt multiple styles simultaneously).

70. *See Connecting with Clients Across Culture*, *supra* note 58, at 196-200 (discussing the importance of mindful listening to “assist[] the lawyer in the critical and challenging task of remaining completely open to his client’s story while skillfully assembling her legal case”).

be said, what emotions may motivate those words, and how they, as a listener, might respond in the moment. And, as a result, they cannot predict with certainty exactly what next steps might be necessary. Preparation is valuable, but it should not artificially constrain a conversation.

2. *What Practical Considerations Exist?*

This second presage area for consideration includes all of the practical and logistical considerations that precede active listening.⁷¹ Sometimes a listening opportunity or conversation arises spontaneously. But often, particularly in the lawyer-client context, planning is possible. Assuming the listener has some control over the practical aspects of the conversation, below are planning questions to consider. In doing so, the listener should retain focus on the two primary goals of listening: to accurately understand the meaning of the speaker and to enhance the relationship between speaker and listener.⁷²

Where should the conversation be held? The physical setting may be relevant for various reasons, including to speak privately, to make the speaker comfortable, or to provide a neutral space to meet. The lawyer's office may make sense for a variety of reasons, including efficiency for the lawyer's overall schedule and access to law-related resources. But the active listener should also consider any downsides associated with that choice. For example, some clients unaccustomed to the business setting might find certain lawyer offices intimidating, which might stifle communication. More sophisticated corporate clients might, instead, expect their lawyers to come to them for various reasons. And for certain causal work-related conversations, perhaps an informal setting like a coffee shop would provide the best backdrop. In any case, considering the impact of the conversation's physical setting is an important step in planning to listen effectively.⁷³

How much time should be allotted to the conversation? The listener should allocate sufficient time for the speaker to fully communicate his message and to feel comfortable doing so.⁷⁴ But practical considerations may come into play to limit the available time, including scheduling conflicts and deadlines. If those external considerations could

71. *Unified Field of Listening*, *supra* note 54, at 112-13.

72. *See supra* Section IV.A.a.

73. *See Emotional Competence and the Lawyer's Journey*, *supra* note 5, at 14 n.35.

74. Some people, labeled by listening scholars as "time-oriented listeners," are "overly concerned with time limitations" and may be more likely than others to "interrupt others and give off nonverbal cues that signal disinterest." *See Bodie & Villaume*, *supra* note 69, at 50. Listeners oriented to time should guard against these tendencies when engaging with clients.

artificially limit a conversation, the listener should alert the speaker to these possibilities in advance. And sufficient time should be scheduled later to explore the conversation in adequate detail.

What work preparation should the listener undertake before the conversation? The lawyer may need to research legal arguments, read transcripts or the case file, consult with other attorneys or experts, or prepare a list of questions to ask or important ideas to convey. Directly related to this research and organization, the lawyer may need to plan a possible structure for the conversation. Particularly when working with a client, a lawyer may need to provide background, context, options, chances of success, or various alternatives before the client is in a reasonable position to communicate effectively and the lawyer is ready to listen well.⁷⁵

Will the conversation be recorded? If so, how? Will the listener take notes? While it may be necessary to take notes during certain conversations, active listening requires a focus on the speaker that includes being aware of the speaker's behavior while talking, which may be difficult if the listener is also taking notes. The listener should also take into consideration how the speaker might interpret note-taking during a conversation—perhaps as evidence of the listener's engagement or as a barrier to bonding between the speaker and listener.⁷⁶ As described later, some of these activities may be useful in conveying active listening to the speaker.

Should anyone else be present or available to participate in the conversation if necessary? For example, will a translator or someone to take notes be needed? Should the attorney expect or plan for the client to bring family members or others into the meeting? If anyone else is expected in the conversation, adequate space should be planned to accommodate everyone involved.

75. In fact, "listeners" rarely only listen in conversations. There is a back-and-forth nature to most conversations, in which both parties oscillate between speaker and listener. See Susan L. Brooks, *Interpersonal Communication*, in *THE HANDBOOK OF LISTENING* 114 (Debra L. Worthington & Graham D. Bodie eds., 2020) [hereinafter *Interpersonal Communication*]; see Janet B. Bavelas, Linda Coates & Trudy Johnson, *Listeners as Co-Narrators*, 79 *J. OF PERSONALITY AND SOC. PSYCHOL.* 941-51 (2000) [hereinafter *Listeners as Co-Narrators*] (describing the impact of both generic and specific listener responses and their impact on the storyteller's narrative).

76. See Graham D. Bodie, Kellie St. Cyr, Michelle Pence, Michael Rold & James Honeycutt, *Listening Competence in Initial Interactions I: Distinguishing Between What Listening Is and What Listeners Do*, 26 *INT'L J. OF LISTENING* 1, 3, 21-24 (2012) [hereinafter *Listening Competence*] (discussing various attributes and behaviors and whether they correlate to the perception of effective listening).

3. Be Aware of Emotions

Emotions in the context of active listening, and more broadly, effective communication, are complicated—and perhaps especially difficult for lawyers. As a starting point, lawyers are traditionally trained in cold, hard legal analysis to “think like a lawyer”—not “feel like a lawyer.”⁷⁷ The people attracted to law school may even score lower in empathy and emotional intelligence than the average population.⁷⁸ Emotions can, at times, cloud our judgment and negatively affect our ability to process information and communicate effectively.⁷⁹ In particular, they may cause us to listen less mindfully than we might otherwise. They may also make lawyers feel out of control⁸⁰ or uncomfortable, or they might trigger challenging emotions for the listener.⁸¹ Perhaps these are reasons why “lawyers are notorious for being poor listeners.”⁸²

Nevertheless, emotions are a fundamental part of what it means to be human. We experience emotions every day, particularly surrounding events or relationships that are so important, high-stakes, or problematic that we visit an attorney about them.⁸³ While strong emotions may affect our analytical thinking,⁸⁴ they also convey meaning—both in substance and depth. As a result, being aware of the emotional component of a

77. See generally *Emotional Competence and the Lawyer's Journey*, *supra* note 5, at 8-9.

78. See Susan Daicoff, *Lawyer Know Thyself: A Review of the Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1365-66 (1997) (discussing how law students often prefer “thinking over feeling” in the decision-making process).

79. See *Emotional Competence and the Lawyer's Journey*, *supra* note 5, at 12-13 (noting that strong emotions “might be problematic” in a given situation, and lawyers should “recognize the situations where they may impair our representation of clients in order to avoid these consequences”).

80. See generally ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 52 (discussing tactics used to respond in situations where emotions could cloud progress).

81. See LAWYERS AS COUNSELORS, *supra* note 34, at 24. Noticing the emotions that arise for the listener-lawyer is an important part of the process of relational lawyering. See *Relational Lawyering*, *supra* note 63, at 505.

82. See Brooks, *supra* note 3, 361, 363. Most client complaints about their lawyers relate not to poor outcomes, but to a failure or lack of communication. See *id.*

83. See Timothy W. Floyd, *Spirituality and Practicing Law as a Healing Profession: The Importance of Listening*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 473, 473 (Marjorie A. Silver ed., 2007) (explaining that lawyers “often deal with the individual manifestations of [] brokenness: people who seek legal counsel are often wounded—sometimes physically, often psychologically and emotionally—by the events that gave rise to the legal problem.”).

84. See generally Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 CLINICAL L. REV. 259, 260 (1999) (discussing how the lawyer-client relationship “may be enhanced by the lawyer’s recognition and resolution of strong emotional reactions—positive or negative—towards a client.”).

situation makes a lawyer more effective.⁸⁵ If we fail to recognize meaning in the speaker's emotion, we may, as a listener, jump to conclusions to fill in the gaps.⁸⁶ Beyond meaning, an expression of emotions by the speaker and an acknowledgment of those emotions by the listener can help deepen the relationship between the parties.⁸⁷ This sensitivity to emotions, then, supports and encourages further effective communication between the parties.

But recognizing the existence of strong emotions may take work. Some emotions for some speakers may be obvious in their tone or word choice. Other people's emotions may need to be probed because of what is left unsaid.⁸⁸ Either way, preparation for active listening should include being ready to identify, acknowledge, and even deal with strong emotions—both the speaker's and the listener's.⁸⁹ If the lawyer ignores those emotions or moves past them too quickly to get to the "real issue" in question, both primary goals of active listening may be undercut. Beyond missing important clues about meaning, this approach would likely make the client feel unheard and unappreciated, creating distance between the lawyer and client.⁹⁰

85. See *Emotional Competence and the Lawyer's Journey*, *supra* note 5, at 6.

86. See *Relational Lawyering*, *supra* note 63, at 505 (recognizing that lawyers "are not good at not knowing" and may "jump to conclusions . . . partly because we may be disconnected from what we truly feel.") (emphasis in original).

87. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 27-28. Employer studies have consistently ranked emotional intelligence as an important lawyering competency. ALLI GERKMAN & LOGAN CORNETT, *FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT* 9 (2016), https://iaals.du.edu/sites/default/files/documents/publications/foundations_for_practice_whole_lawyer_character_quotient.pdf.

88. In this work, attorneys may need to direct their attention to what is not explicitly stated. In the parallel medical context, "exemplary physicians" described their listening as a "multisensory process" that included "the importance of listening for what is not being spoken, of both intuiting and analyzing the circumstances around what each patient might have to say A few also mentioned that some patients may say little but display significant nonverbal cues." See Helen Meldrum, *The Listening Practices of Exemplary Physicians*, 25 *INT'L J. OF LISTENING* 145, 157 (2011) [hereinafter *Listening Practices of Exemplary Physicians*].

89. Meditative practices may be especially useful for a listener before entering into a stressful or emotional conversation. See Leonard L. Riskin, *Awareness in Lawyering: A Primer on Paying Attention*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* 447, 464-66 (Marjorie A. Silver ed., 2007).

90. Prof. Susan Brooks discusses the importance of "relationship-centered lawyering," which focuses on the quality of the underlying relationship between lawyer and client, as well as interpersonal, cultural, and emotional issues. See *Relational Lawyering*, *supra* note 63, at 480. She contrasts this approach with the traditional law school and lawyering approach that has an instrumental focus. See *id.* As Prof. Brooks correctly notes, even instruction on listening in the traditional law school model is approached from an instrumental, rather than a relationship-focused, perspective. See *id.*

B. Second sub-competency: Active listeners work to create a shared understanding with the speaker by considering both the speaker's and the listener's lenses and how they may differ

Active listeners help create a shared understanding by recognizing that the speaker communicates using not just words, but also silence, tone and cadence of speech, body language, and even broader behavior.⁹¹ When absorbing and decoding all of these communications, the listener must consider that each person filters speech and behavior through a unique lens of cultural identity. That lens helps define how they fundamentally engage with the rest of the world. Within a conversation, filtering creates contour, nuance, and detail for words and behavior that can dramatically affect the meaning of communication.⁹² Failure to appreciate the existence of these lenses can disconnect speaker and listener, making a shared understanding elusive and undermining trust,⁹³ respect, and the overall relationship between the parties.⁹⁴

Each person's cultural identity lens is influenced by many factors, including race, gender, religion, sexual orientation, nationality, sexual identity, education, and income.⁹⁵ The various components that affect a person's lens combine in different groupings depending on the context

91. See *Measuring Behavioral Components of Listening*, *supra* note 56, at 123 (observing that when people listen “interpersonally,” they are processing information cognitively and “acting toward another” and “enacting various behaviors to convey specific meaning to their interlocutor.”); *ESSENTIAL LAWYERING SKILLS*, *supra* note 37, at 56; *LINDER & LEVIT*, *supra* note 66, at 250.

92. See Paul R. Tremblay & Carwina Weng, *Multicultural Lawyering: Heuristics and Biases*, in *THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* 143, 146 (Marjorie A. Silver ed., 2007) [hereinafter *Multicultural Lawyering: Heuristics and Biases*] (observing that the varied personal characteristics of clients “matter a great deal in the interviewing and counseling process”).

93. Trust has been called the most important component of the lawyer-client relationships. *LINDER & LEVIT*, *supra* note 66, at 203 (“Nothing—and we mean nothing—is more important in the lawyer-client relationship than mutual trust.”). Not surprisingly, trust is also central in the parallel doctor-patient relationship, where patients “will only open up once they feel they can trust a physician, and sensing that deep listening is present further solidifies that sense of trust.” See *Listening Practices of Exemplary Physicians*, *supra* note 88, at 157 (noting that this “cycle . . . once established, fosters a level of mutual understanding that benefits both physician and patient”).

94. Appreciating and taking into consideration that lens can help the listener fully understand not just what the speaker is communicating, but who the speaker is. See *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 45; see also *id.* at 53 (“A lawyer can be effective only if the lawyer understands cultural differences and knows how to recognize and deal with them.”). In addition, the initial communications between parties will help “decide our preferences for future interaction, and our first impressions can strongly influence subsequent relational progression.” See *Listening Competence*, *supra* note 76, at 2.

95. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 143, 148 (defining culture as “all of the customs, values, and traditions that are learned from one’s environment”); *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 53.

and the person's overall life experiences. This resulting intersectionality makes each person's lens a unique and complex mix of factors.⁹⁶ That, in turn, makes the job of an active listener even more challenging.⁹⁷ The task is not simply to decipher meaning from the speaker's words, behavior, and silence; the listener must also factor into the analysis the speaker's cultural identity lens and how it may account for a difference between the meaning the speaker intends to convey and what the listener perceives.⁹⁸ But the challenge is even more daunting. How a listener communicates engagement or interest to a speaker may depend on cultural context and background. So, in addition to filtering content effectively, active listeners should be aware of how their responses and behavior during the conversation will be perceived by the speaker, and whether they will help facilitate or hinder effective communication.⁹⁹

Differences in cultural identity affect perception, understanding, and reactions associated with a wide range of important issues that may be relevant within a lawyer-client communication.¹⁰⁰ For example, a person's cultural identity lens may account for very different perspectives about the role of the lawyer, the importance of hierarchy,¹⁰¹ formality,¹⁰² deference that should be accorded elders or people occupying positions of power, the importance of emotions in understanding a situation,¹⁰³ the information that should be assumed or

96. The importance of cultural identity lenses may be heightened in situations where the speaker and listener are from very different backgrounds and share little in the way of identity. But they are important in all conversations involving all people. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 151 (“[A]ll counseling is cross-cultural—even an interaction between a male WASP lawyer from Newton Centre, Massachusetts and his male, WASP client from the same city.”).

97. See *id.* at 149 (describing culture as “neither static nor easily knowable”).

98. See generally *Connecting with Clients Across Culture*, *supra* note 58, at 185.

99. There are multiple ways of thinking about this. From a general perspective, participants in a conversation may have very different ideas of what effective listening means and how it is demonstrated, especially if there is a cultural difference between them. See Margarete Inhof & Laura Ann Janusik, *Development and Validation of the Imhof-Janusik Listening Concepts Inventory to Measure Listening Conceptualization Differences Between Cultures*, 35 J. OF INTERCULTURAL COMM. 79, 92-93 (2006) (identifying significant cross-cultural differences in what listening means, as well as the relational and informational goals of listening). And in the law setting, lawyers may undercut effective communication and skew a speaker's meaning by focusing on “crafting the strongest legal case.” See *Connecting with Clients Across Culture*, *supra* note 58, at 197.

100. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 32-40; *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 148 (“[A] better lawyer will understand that the cultural background of a lawyer or a client matters—it can affect how that person will behave and respond to behaviors suggested by skill models or theories of good lawyering.”).

101. See *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 55.

102. See *id.*

103. See *LINDER & LEVIT*, *supra* note 66, at 1-35; *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 55.

expressly stated,¹⁰⁴ the role and importance of body language.¹⁰⁵ Cultural norms and identity may also drive perspectives on areas that relate to a particular issue being discussed by the lawyer and client, such as a police traffic stop and subsequent interaction between a police officer and the client.¹⁰⁶ And critically, cultural differences may shape a client's different point of view on what a desired or acceptable outcome in a case might be.¹⁰⁷ They can even affect and shape opinions about how, where, and when conversations about important topics are held, as well as the format¹⁰⁸ and duration of those conversations.

Imagine that a lawyer brings a prospective client into his office for an initial consultation, and then closes the door. As the lawyer begins asking questions, the prospective client seems uncomfortable—shifting in her seat and averting eye contact with the lawyer. As the conversation progresses, the prospective client appears less and less comfortable, and her answers to questions are short and inconsistent. At this point, a busy lawyer might reasonably begin to infer that the woman is hiding something or is perhaps being evasive or lying. That judgment, if not actively suspended by the lawyer, could cloud everything the lawyer hears from the potential client.

Failing to accurately take into consideration the unique cultural identity of the speaker results in a problematic default state: the listener simply assumes that the speaker shares his own cultural identity lens—meaning that he takes the speaker's words, body language, and general behavior to mean what they mean to listener, rather than what they might mean to the speaker.¹⁰⁹ It is entirely possible, of course, that the prospective client is lying. But it is also possible that she is simply uncomfortable with the perceived power imbalance between the lawyer and her. Or perhaps within her culture, important conversations customarily occur with family present for support, so she is nervous

104. See *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 55.

105. See *id.* at 56.

106. See *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 66.

107. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 36.

108. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 161-62 (discussing narrative preferences based on culture).

109. This is the opposite of isomorphic attribution. See *Connecting with Clients Across Culture*, *supra* note 58, at 187 n.9 (“A capacity to make isomorphic attributions requires the lawyer to focus on the differing connotations that a word or act may have in the different worlds inhabited by the client and lawyer.”). Failure to take the speaker's culture into consideration when evaluating lawyer-client communication has been referred to as “cultural imperialism.” See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 152 (“[A] critical responsibility of cross-cultural practice is to understand, respect, and work with your client's preferences and values . . . [and] privilege your client's cultural preferences and values, but not yours . . .”).

alone with the lawyer. Or perhaps she was a victim of an assault and becomes anxious when in a confined space with a man. If any of these possible scenarios were true, the prospective client's behavior that appeared suspicious to the lawyer would not, in fact, accurately signal anything about her honesty. If the lawyer is able to identify and then decode the prospective client's behavior, he might be able to address it in a way that would foster trust and respect, enhancing the relationship and thereby facilitating communication between the parties.

An approach is necessary, then, to decipher the speaker's cultural identity lens. One direct option would be to simply ask the speaker questions that would reveal aspects of the speaker's lens, such as the following: "I want you to be as comfortable as possible during our meetings. Is there anything I should know about your background before we get started that would help me represent you?"¹¹⁰ Or perhaps a more focused question: "So I can better serve as your attorney, we're going to need to talk about some sensitive issues. Would you be more comfortable if I sat behind my desk or if I were sitting next to you in that chair?" But assuming that most listeners will not ask these kinds of questions, or assuming that the answers would not be self-reflective enough to be of value,¹¹¹ the listener needs another strategy.

An alternative approach would be to generalize based on the perceived identity characteristics of the speaker that the listener believes are important in communication. Certainly, this approach would move the listener off an assumption that everyone communicates the same way—i.e., like the listener communicates. But it seems fraught with potential missteps, bad judgment, and faulty assumptions, and it appears unlikely to lead to shared understanding between speaker and listener.¹¹² Stereotyping based on gender, race, national origin, etc., ignores many realities that may affect communication patterns, including whether the value in question is more central or marginal to the culture,¹¹³ how long the individual has been a part of the relevant culture, and the extent to which this particular individual reflects the behaviors or attitudes typically associated with the culture to which she belongs.¹¹⁴ Beyond being poorly calibrated to lead to shared understanding in a particular

110. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 38-39 (discussing, generally, asking direct questions of the speaker to elicit details about her cultural identity lens).

111. The speaker may alternatively find these kinds of questions to be rude, although that response may be balanced against another reasonable client perspective, which would appreciate the listener's attempt to understand the speaker. See *id.* at 39.

112. See *id.* at 33-34.

113. See *id.*

114. See *id.*

conversation, this approach would almost certainly be detrimental, long-term, to effective communication in a diverse society.

A different tack tries to find a middle ground, aided by the listener's curious, informed, and flexible mind.¹¹⁵ This approach begins from the assumption that "discrete communities tend to share certain preferences, styles, patterns, and values" that may affect how a client communicates with a lawyer.¹¹⁶ If the client has a different cultural identity lens, the lawyer should educate himself about that culture, including any dominant values and practices.¹¹⁷ The lawyer-listener enters into a conversation armed with this knowledge, sensitizing him, at least to some extent, in cross-cultural communication.¹¹⁸ While the task of fully preparing for all possible cultural differences may be overwhelming, the listener's preparation should focus on areas where we can reasonably expect cultures to differ.¹¹⁹ These areas include¹²⁰ proxemics (relating to personal and interpersonal space),¹²¹ kinesics (the use and interpretation of bodily movements),¹²² the importance of time,¹²³ narrative preferences,¹²⁴ tolerance of uncertainty,¹²⁵ and individualism

115. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 148.

116. See *id.*

117. See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 18-19 (1997); *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 154 ("A culturally competent lawyer ought to have available to her resource materials which would explain the cultural traits, customs, and values that she can expect to encounter in her work with diverse clients."); *Connecting with Clients Across Culture*, *supra* note 58, at 205-07 (discussing the importance of gathering culture-specific information related to the client); *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 57-58.

118. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 34, 36-37 (providing generalized listings of countries as feminine or masculine, long term or short term, and collective or individualistic, among other categories). Another benefit of this approach is to reduce the distractions the lawyer-listener may experience during a conversation, so his attention can be focused on the substance of the conversation. See *id.* at 44 (discussing client distractors as one obstacle to effective listening).

119. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 154.

120. Scholars in other disciplines have identified various dimensions of human interaction that might be especially contingent on cultural and identity perspectives, at least in the abstract. See, e.g., *LAWYERS AS COUNSELORS*, *supra* note 34, at 34-37 (including the dimensions of "Masculinity/Femininity," "Long-Term/Short Term Orientation," and "High Context/High Content Communication").

121. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 154-57.

122. *Id.* at 157-60.

123. *Id.* at 160-61.

124. *Id.* at 161-63.

125. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 34-35 (citing JACK SCARBOROUGH, *THE ORIGINS OF CULTURAL DIFFERENCES AND THEIR IMPACT ON MANAGEMENT* 10 (1998)) (discussing how this dimension assesses the extent to which an individual prefers formal rules and structured situations, as compared to flexibility and low-rule situations).

vs. collectivism.¹²⁶ In these areas, the listener should be prepared to make adjustments based on the cultural identity of the speaker.¹²⁷ But this is just the starting point.

The listener's cultural sensitivity and perspective should be tempered by humility and even a recognition that he will be wrong about some of this—a state described as “informed not-knowing.”¹²⁸ As the conversation progresses, the lawyer should be on alert to explore with curiosity¹²⁹ any areas in which the speaker's preferred or default behavior does not conform to that usually attributable to her cultural identity. In those areas, the listener should be prepared to adjust based on the unique individual who is speaking.¹³⁰ By approaching listening in this way, the attorney is essentially engaging in relational lawyering—spending time and effort getting to know the client as a human being,¹³¹ as opposed to focusing on stereotypes or instrumental ends in the relationship.¹³²

As the listener takes stock of how the client's cultural identity lens may affect communication, he should not overlook that he has a unique cultural identity lens as well.¹³³ We all carry implicit biases that we may not even be aware of.¹³⁴ This is, of course, dangerous for a listener seeking to create a common understanding with a speaker. It would be natural for a listener to slowly move from biases about the client's culture to negative conclusions about the client's behavior and speech.¹³⁵ Accurately appreciating the full content of the listener's lens and how it

126. See *LAWYERS AS COUNSELORS*, *supra* note 34, at 35; *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 163-66.

127. See *Interpersonal Communication*, *supra* note 75, at 112. By focusing on the unique characteristics of the individual speaker and adjusting accordingly, the active listener maximizes interpersonal listening. In this context, “one does not try to speak for the other or to impose one's own language, concepts, and interpretive schemes on the other.” *Id.*

128. *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 150-51.

129. See *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 58.

130. See *id.*; see also *Connecting with Clients Across Culture*, *supra* note 58, at 188 (observing that with the proper approach, “[c]ulture takes its rightful place as one but not the only explanatory theory for shaping and interpreting interactions with clients”).

131. See *Relational Lawyering*, *supra* note 63, at 482.

132. See *id.* at 481.

133. See *Measuring Behavioral Components of Listening*, *supra* note 56, at 125 (describing one component of being a competent listener as “attend[ing] with an open mind,” which includes having “an awareness of personal, ideological, and emotional biases” and “awareness that each person has a unique perspective”); *Relational Lawyering*, *supra* note 63, at 485-86 (noting that “[r]ecognizing the importance of context begins with appreciation of one's own context, and needs to include a similar effort to appreciate the context of another person,” and that “each individual brings a context into every interaction” as a core principle of communication perspective).

134. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 169.

135. See *id.* at 171.

filters information he perceives is critical to effective absorption of information.

Combatting these normal stereotypes and biases for the listener is hard work and requires a conscious and intentional practice.¹³⁶ One approach to this challenge is for the listener to begin a searching examination of his own cultural identity, including the embedded assumptions that have developed over time.¹³⁷ The goal here is not necessarily to immediately eliminate those deeply ingrained biases, but to appreciate that they exist and may cloud the listener's perception of communication. Once those biases can be at least partially uncovered, they can be challenged by facts. And then the lawyer-listener can proceed, to the extent possible, based on facts.¹³⁸ This process of self-inquiry, self-awareness, and introspection has at its core a deep mindfulness and emotional intelligence that may not come naturally for lawyers who are trained primarily in rational, analytical thinking.¹³⁹ But, it is crucial to appreciating the cultural identity lens through which the listener absorbs and makes sense of speech and behavior.

Recognizing and taking into account the cultural identity lens of both the speaker and listener is a significant amount of work. It requires advanced planning and study, which brings it within the ambit of the work described above in Section IV. A. b. But this work is worth it: accurately appreciating the filters in a conversation will help a listener more accurately understand the meaning of the speaker. And at least as importantly, it should help reinforce and support the relationship between speaker and listener.

136. See *Connecting with Clients Across Culture*, *supra* note 58, at 196-200 (discussing the value of mindfulness in the listening process to better understand and connect with the speaker).

137. *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 173-74 (citing JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTION PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 249-50 (2d ed. 2001)).

138. In reality, the listener should perhaps be most focused on understanding and appreciating the subjective lens of the speaker-client. See *Listening Practices of Exemplary Physicians*, *supra* note 88, at 157 (explaining, in the medical context, that the "listener deliberately suspends his or her own experience temporarily in order to be available to fully enter the patient's model of the world").

139. See *Connecting with Clients Across Culture*, *supra* note 58, at 196-200. For a general discussion of mindfulness in the context of lawyering, see Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Benefits of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

C. Third sub-competency: Active listeners work to increase shared understanding with verbal and nonverbal cues

The third sub-competency assesses the listener's ability to build a shared understanding with the speaker through appropriate verbal and nonverbal behaviors.¹⁴⁰ In short, this sub-competency focuses on the concrete behaviors that "operationalize" active listening.¹⁴¹ These verbal and nonverbal skills are often called "immediacy behaviors" because they communicate to the speaker the listener's interest and engagement throughout the conversation.¹⁴² Nonverbal and verbal cues work together to communicate a listener's involvement in a conversation.¹⁴³ An active listener is not just a "Speaker-in-Waiting," but is instead communicating steady, respectful engagement to the speaker.¹⁴⁴ The listener's engagement may be communicated through animated facial expressions or expressivity, conversation management with effective turn taking, the composure of the listener when it is appropriate to the message and context, and positive affect, which may include general vocal pleasantness, communicating warmth and openness, and a mirroring of the speaker's posture.¹⁴⁵

Predictably, studies demonstrate that these immediacy behaviors frequently reduce a speaker's uncertainty, encourage clear "information management,"¹⁴⁶ and help reveal the core of the client's problem.¹⁴⁷ As

140. See Ala-Korteesmaa & Isotalus, *supra* note 38, at 235 (listing "behavioral" or "what I do when I listen" as an essential dimension of listening competence); *Active Listening in Peer Interviews*, *supra* note 5, at 35 (describing value of both verbal and nonverbal cues, but focusing study on message paraphrasing); *Supportive Listening II*, *supra* note 51, at 263 ("[B]oth verbal and nonverbal behaviors are important when judging others as supportive listeners."). Some experts break down listening responses into generic and specific, rather than nonverbal and verbal; generic responses come earlier in the conversation and specific responses come later. See *Listeners as Co-Narrators*, *supra* note 69, at 950.

141. See *Supportive Listening II*, *supra* note 51, at 251.

142. Graham D. Bodie et al., *The Role of "Active Listening" in Informal Helping Conversations: Impact on Perceptions of Listener Helpfulness, Sensitivity, and Supportiveness and Discloser Emotional Improvement*, 79 W. J. OF COMM. 151, 153 (2015) [hereinafter *Informal Helping Conversations*].

143. *Id.* at 153.

144. *Listeners as Co-Narrators*, *supra* note 75, at 941-42.

145. See Susanne M. Jones, *Supportive Listening*, 25 INT'L J. OF LISTENING 85, 88 (2011) (describing a variety of immediacy cues recognized through studies as being influential); see also *ESSENTIAL LAWYERING SKILLS*, *supra* note 34, at 83 ("What might help a client tell you as much as possible? You can build a relationship in which the client feels comfortable and trusts easily.").

146. *Relative Effectiveness of Active Listening*, *supra* note 5, at 15 (noting increased instrumental and relational effects) (citing another source).

147. See Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1; Susanne M. Jones & Laura K. Guerrero, *The Effects of Nonverbal Immediacy and Verbal Person Centeredness in the Emotional Support Process*, 27 HUM. COMM. RES. 567, 570 (2001) (describing both long-term and short-term benefits); *Relative Effectiveness of Active Listening*, *supra* note 5, at 17

one listening expert noted, “[w]hether the reader opens a scholarly journal or trade publication, textbook or handbook, flyer or self-help manual, part of the advice relevant to being a good support provider will include one or more skills like paraphrasing, asking questions, and reflecting feelings.”¹⁴⁸ But the common, pedestrian advice turns out to be solid. In a 2015 study of listeners, speakers were asked to describe a recent stressful event.¹⁴⁹ When a listener displayed more verbal and nonverbal immediacy behaviors, speakers perceived the listener as more emotionally aware and felt better about the interaction.¹⁵⁰ The study authors noted the behaviors of listening are “part of a joint contribution to discourse,” and that they communicate to the speaker that “there is a building of mutual knowledge between interlocutors.”¹⁵¹ In addition, as discussed earlier, core verbal communications skills, including the ability to decode the verbal communication of others and to knowingly manage one’s social self-presentation—have been linked to leadership effectiveness.¹⁵²

1. Use recognizable, appropriate nonverbal cues and accurately read the speaker’s nonverbal cues

What does active listening look like? Listeners should know not only what it actually looks like when someone is interested or bored with the conversation, but also—and likely more importantly—what people believe it looks like.¹⁵³ In their interpretation of nonverbal behavior, participants in a conversation may also be influenced by the context, their cultures, or even their gender.¹⁵⁴ Some studies show “a strong and consistent superiority of women in both expressing and decoding

(describing the increased instrumental and relational effects gained with use of immediacy behaviors).

148. *Informal Helping Conversations*, *supra* note 142, at 152.

149. *Id.* at 151.

150. *Id.* at 165.

151. *Id.* at 166.

152. Manusov et al., *supra* note 5, at 113 (citing Riggio’s core elements); *Active Listening in Peer Interviews*, *supra* note 5, at 36-37 (noting active listening appears to benefit the person who engages in it because it builds confidence in problem solving skills and increases work satisfaction).

153. Catherine S. Fichten et al., *Verbal and Nonverbal Communication Cues in Daily Conversations and Dating*, 132 J. OF SOC. PSYCHOL. 751, 753 (1992).

154. See Manusov et al., *supra* note 5, at 113 (describing studies finding that participants’ gender was a “confounding variable”); Fichten et al., *supra* note 153, at 763 (noting the nature of the interaction—everyday conversations or more formal interactions—influenced the way speakers interpreted social listening cues).

nonverbal cues.”¹⁵⁵ But studies on the actual differences between men and women have inconclusive findings,¹⁵⁶ and if we assume, for example, that women are stronger listeners, a woman who appears not to be listening carefully is more surprising and off putting to the speaker.

Generally recognized nonverbal immediacy cues may include head nods, appropriately responsive or mirroring facial expressions, eye contact, and a forward body lean.¹⁵⁷ Other nonverbal behaviors, such as touch, may be inappropriate in particular contexts, including an initial interview with a client.¹⁵⁸ The listener’s entire presence may signal “social readiness and availability for communication” or “avoidance and inaccessibility.”¹⁵⁹ People expect behavior within a normative or polite range, and deviations may create negative impressions of the listener or of his attentiveness or empathy.¹⁶⁰

Active listeners increase the understanding between the parties when they attend to and accurately read the speaker’s nonverbal cues.¹⁶¹ This attentiveness has been referred to as “listening with the third ear.”¹⁶² This attentiveness to the speaker’s nonverbal cues allows listeners to capture the speaker’s message more accurately and completely. And nonverbal cues are not an insignificant portion of the communication: one study found that ninety-three percent of the total impact of a message comes from the nonverbal aspects of that message, both vocal and visual.¹⁶³

Because a speaker will decode nonverbal cues according to what she believes they mean given the context and her experience, a speaker will likely be less able to view listeners as active listeners if those listeners have poor social skills, social anxieties or disorders, or an

155. Fichten et al., *supra* note 153, at 754 (“The literature on gender differences in communication behaviors reports a variety of discrepancies between men and women in the use of language and nonverbal behaviors . . .”).

156. Compare Corine Jansen, *Sex Differences in Listening*, <https://www.globallisteningcentre.org/sex-differences-in-listening/> (last visited Oct. 17, 2021) (describing a study finding men and women employ different listening styles and actually have different brain activities while listening); Fichten et al., *supra* note 153, at 753 (noting in the study that male and female subjects did not differ on the number of different communication cues they reported in the contexts).

157. See *Supportive Listening II*, *supra* note 51, at 262; Jones & Guerrero, *supra* note 147, at 568 (describing physical behaviors that “reflect empathy, interpersonal warmth, and psychological closeness”); LAWYERS AS COUNSELORS, *supra* note 34, at 45-46 (categorizing silence and minimal verbal prompts as “passive listening”).

158. *Informal Helping Conversations*, *supra* note 142, at 156.

159. Jones & Guerrero, *supra* note 147, at 570.

160. *Supportive Listening II*, *supra* note 51, at 253.

161. See Timm & Schroeder, *supra* note 4, at 109-10.

162. *Id.* at 109.

163. *Id.* at 112.

autism spectrum disorder. Likewise, some listeners may similarly be less able to accurately interpret the speaker's nonverbal cues, leading to a deficit of understanding. Speakers and listeners may also misinterpret nonverbal cues because of cultural, ethnic, or even generational differences.¹⁶⁴ Listeners who become more aware of how their nonverbal cues are interpreted may be better able to improve them or compensate for them with stronger verbal cues. However, even when a listener is aware of the impact of his nonverbal cues, his efforts to improve them may distract him from actually listening to the speaker. Contrary to what a speaker may perceive, listeners who struggle socially may actually be more able to listen to a conversation by closing their eyes or by keeping a more rigid body posture.

At its core, true effective communication is “deeply personal,” so effective nonverbal cues must be rooted in each listener's personality and must reflect actual engagement in the conversation.¹⁶⁵ Listeners may learn better practices, but they must be applied genuinely, or the immediacy cues will not lead to greater understanding. Techniques of listening must be external manifestations of actual inner attention;¹⁶⁶ otherwise, “such pretended usage will soon become evident and the whole listening process will lose its promotive effect.”¹⁶⁷ Training in nonverbal cues should therefore also include suggestions for mindful listening, such as note-taking, eye contact, and any other technique to pull the listener back to conscious listening.¹⁶⁸

2. Use verbal feedback to demonstrate attention, understanding, responsiveness, and empathy

Although effective listening often requires the listener to remain quiet, most experts agree that a listener's verbal cues are “the most important contributor to judgments of others as good (or bad) listeners.”¹⁶⁹ While nonverbal immediacy cues are generally “processed as gestalt,” verbal cues tend to be processed “linearly,” so verbal cues become central in the speaker's judgment of the listener's attention,

164. See *Multicultural Lawyering: Heuristics and Biases*, *supra* note 92, at 157-60 (noting people from different cultures often differ on their “kinesics,” or the way in which bodily movements are used and interpreted).

165. Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1 (quoting another source).

166. *Connecting with Clients Across Culture*, *supra* note 58, at 196 n.25 (warning that “[t]oo many lawyers know from good experience that it is possible to employ active listening techniques without a high quality of listening taking place.”).

167. Bauer, Figl & Motschnig-Pitrik, *supra* note 48, at § 2.1 (quoting another source).

168. See *Connecting with Clients Across Culture*, *supra* note 58, at 200.

169. *Supportive Listening II*, *supra* note 51, at 263 (reporting that in all but one reported judgment task, “the verbal dimension was seen as more relevant to listening-related judgments than the nonverbal dimension”).

understanding, and responsiveness.¹⁷⁰ Verbal cues include: 1) “minimal encouragers” like “yeah,” “right,” and “hmm,” which communicate to the speaker the listener is following and understanding the message;¹⁷¹ 2) reflecting-back statements, “that must have been difficult for you,” which demonstrate empathy for emotions the speaker shares;¹⁷² 3) message paraphrases, which summarize what the listener has heard;¹⁷³ and 4) questions that check assumptions and then shift the conversation into particular directions.¹⁷⁴

Minimal encouragers function similarly to nonverbal cues in that they provide a generic response that can fit anywhere in the narrative.¹⁷⁵ They are “receipt tokens” that may be used to indicate the listener understands what the speaker has said—which may shorten the speaker’s message—or to indicate the listener is still paying attention to the message—which may lengthen the speaker’s message.¹⁷⁶ Again, context is key: minimal encouragers are generic and may be less effective in actually building understanding between the parties than more meaning-specific verbal cues.¹⁷⁷ Generally, generic cues are more useful early in the conversation and meaning-specific verbal cues are more encouraging and appropriate as the conversation continues.

These more meaning-specific verbal cues, like message paraphrases and questions, may likewise be used in a way that stops the speaker or disrupts the speaker’s train of thought.¹⁷⁸ Lawyers should be hesitant to interrupt a client’s narrative, especially when the narrative is core to understanding the client’s problem.¹⁷⁹ Lawyers may miss key information if they “pursue a strategy of interaction structured by their

170. Manusov et al., *supra* note 5, at 3 (stating that active listeners can be active and empathetic in sensing, processing, and responding stages).

171. See *Informal Helping Conversations*, *supra* note 142, at 153; *Relative Effectiveness of Active Listening*, *supra* note 5, at 14.

172. See ESSENTIAL LAWYERING SKILLS, *supra* note 34, at 84 (noting that active listening “reassures the client that what the client is saying has an effect on you”); LAWYERS AS COUNSELORS, *supra* note 34, at 11 (explaining that a listener’s goal is not to eradicate emotions, but to recognize and analyze them and then to figure out how to respond appropriately).

173. *Active Listening in Peer Interviews*, *supra* note 5, at 24.

174. *Informal Helping Conversations*, *supra* note 142, at 153.

175. *Id.* at 166.

176. Carsta Simon, *The Functions of Active Listening Responses*, 157 BEHAV. PROCESSES 47, 47 (2018).

177. See *Informal Helping Conversations*, *supra* note 142, at 166 (hypothesizing that the difference in impact between verbal and nonverbal cues may be a difference in impact between specific and generic cues).

178. See LAWYERS AS COUNSELORS, *supra* note 34, at 48.

179. See *Connecting with Clients Across Culture*, *supra* note 58, at 190 (noting that narrative is the best default mode to allow a client to tell the full story).

questions rather than by a client narrative.”¹⁸⁰ If a speaker’s narrative fails to provide key information, then the listener may ask open-ended questions intended to redirect the conversation while still showing a commitment and engagement with the conversation.¹⁸¹

Throughout the conversation, how the listener hears and responds to the speaker’s emotions can be key to encouraging more trust and greater understanding. Listeners should mirror, but not judge, the speaker’s feelings.¹⁸² Lawyers often pay too little attention to clients’ feelings, which can be messy, time consuming, and even obstructive.¹⁸³ Lawyer listeners should practice not only how to listen to emotions, but also how to respond to vaguely expressed feelings, unstated feelings, and nonverbal expressions of feelings.¹⁸⁴

Closely connected to how a listener hears and respects the speaker’s emotions is how the listener views the speaker. In counseling contexts, experts describe “verbal person centeredness” as the degree to which the listener acknowledges, legitimizes, contextualizes, and possibly elaborates on the perspective and story of the speaker.¹⁸⁵ Listeners with high person-centered perspectives “view others as psychological entities possessing unique intentions, feelings, and perspectives that are extensively elaborated in talk.”¹⁸⁶ In contrast, listeners with low person-centeredness perspectives view others primarily through their “concrete characteristics, such as physical qualities, demographic categories, and especially socially defined roles.”¹⁸⁷ A listener with a low person-centered perspective generally, or for the speaker specifically, is more likely to respond with verbal cues that simply regulate the conversation, and ignore feelings and emotions the speaker may be sharing.¹⁸⁸ A listener with a high person-centered perspective is more likely to invite for elaboration or extensive contextualization.¹⁸⁹ For example, a listener may find himself or herself reacting to a certain person with defensiveness, so he or she listens while inwardly critiquing

180. *Id.* at 190-91.

181. *Id.*

182. *LAWYERS AS COUNSELORS*, *supra* note 34, at 48 (“[A]ctive listening responses probably fulfill the empathic ideal of ‘non-judgmental acceptance’ . . .”).

183. *Id.* at 49.

184. *Id.* at 49-55 (providing specific guidance on each skill).

185. *See* Jones & Guerrero, *supra* note 147, at 567; *Supportive Listening II*, *supra* note 51, at 4 (noting that beneficial emotional support must be person centered).

186. Jones & Guerrero, *supra* note 147, at 569.

187. *Id.*

188. *Id.* at 659.

189. *Id.*

or structuring a rebuttal.¹⁹⁰ A listener who is aware of this defensiveness is more likely to move past it and listen more openly to the actual speaker.¹⁹¹

Speakers are likely to view a listener giving strong verbal cues as effective and socially attractive, and as being attentive and responsive to their concerns. Speakers tend to disclose more to listeners they like and trust.¹⁹² “Research in a variety of settings suggests that cues that communicate sincere concern and interest for the speaker, no matter how they are expressed, outweigh particular types of verbal strategies such as advice giving or questioning.”¹⁹³ Again, however, context is key: some studies found that certain speakers preferred advice giving to active listening message paraphrasing.¹⁹⁴ For example, college counseling clients preferred advice-giving over active listening, even early in the counselor-client relationship.¹⁹⁵ This study has obvious implications for lawyers.

D. Fourth sub-competency: Active listeners move to a response only after fully exploring and understanding the speaker’s meaning

Even when a client speaker would prefer to hear advice over a message paraphrase from the listener, the listener should not move to advice until he or she has fully explored and understood the speaker’s meaning. No matter the discipline or context, active listening requires the listener to understand the full message being conveyed before responding.¹⁹⁶ The listener must ground his response in a full understanding of the speaker’s meaning, which requires the speaker’s presentation and the listener’s acceptance of that meaning.¹⁹⁷ The speaker and the listener are engaging in a “joint construal process,”

190. See *Relational Lawyering*, *supra* note 63, at 491-92 (“[W]hen I find it difficult to listen to a client or an opponent, I am being defensive. There is something about me I am defending. When I am defending, I am not listening.”).

191. *Id.* at 484 (“In the context of the attorney and client relationship, the goal is to encourage law students to be interested in the client as a human being Taking a communication perspective means trying to remain curious and open-minded about the client.”).

192. *Active Listening in Peer Interviews*, *supra* note 5, at 45.

193. *Id.*

194. See *Relative Effectiveness of Active Listening*, *supra* note 5, at 16-17; See *Active Listening in Peer Interviews*, *supra* note 5, at 37 (citing another source).

195. See *Active Listening in Peer Interviews*, *supra* note 5, at 36-37.

196. See *id.* at 35 (concluding that waiting to respond, along with verbal and nonverbal cues, is a universal trait of active listening); see generally *Supportive Listening II*, *supra* note 51 (noting the importance of nonverbal response strategies for listeners); see Babita Tyagi, *Listening: An Important Skill and Its Various Aspects*, THE CRITERION 1, 1 (2013).

197. *Informal Helping Conversations*, *supra* note 142, at 167.

where “the listener and the speaker are collaboratively settling on what the speaker is to be taken to mean.”¹⁹⁸

As mentioned above, specific verbal cues, rather than generic minimal encouragers, become more effective at this final evaluation stage. Active listeners should use message paraphrases and questions to verify, clarify, and sort the information (including emotions) received, continuing to consider whether there may be bias or prejudice impacting the understanding of either party in the conversation.¹⁹⁹ Again, to confirm the parties understand the message similarly, a listener may ask probative questions to help the speaker discuss relevant facts or topics that she may be avoiding.²⁰⁰

The principle that effective listeners make sure to fully understand the speaker’s message has become part of practical training provided sales associates to help them build relationships with potential customers. For example, Carew International’s LAER system stands for listening, which must be non-judgmental and “without preconceived judgments or overreaction;” acknowledgment, which includes both nonverbal and verbal cues showing interest and understanding; exploring, which “is NOT probing or interrogating” but rather an identification and understanding of the relevant underlying issues; and finally the response, which is the answer, recommendation, or solution to address the speaker’s needs.²⁰¹ Carew International stresses in its training that the first three steps should be repeated in a loop until the listener is confident he understands the message, and only then is he encouraged to move towards a response.²⁰²

Like sales associates, lawyers are also looking to satisfy clients and build protective relationships. To meet this objective, lawyers should hold back the urge to respond and advise the speaker until the lawyer actually understands their needs and the client feels understood. If the listener begins giving advice too soon, the listener will stop listening, and any remaining relevant information the speaker needs to convey may be lost.²⁰³ A lawyer may also need to listen for “red flag moments of

198. *Id.*

199. Tyagi, *supra* note 196, at 2.

200. See PETER STOYKO, ACTIVE LISTENING (2020) <http://www.elanica.com/collaboratory/ActiveListening2020-pages.pdf>.

201. Scott Stiver, *LAER Bonding Process Essential for Effective Selling*, CAREW INTERNATIONAL (May 30, 2014), <https://www.carew.com/sales-training-blog/laer-bonding-process-timeless-essential-effective-selling>.

202. *Id.*

203. See Tyagi, *supra* note 196, at 2 (“The effective listener makes sure that he or she doesn’t begin this activity too soon; beginning this stage of the process before a message is completed requires that we no longer hear and attend to the incoming messages—as a result, the listening process ceases.”).

disconnect,” determine when the client looks bored or distracted, recognize when they take over the conversation and when the client stops asking questions, or discern when the emotions in the conversation shift to anger or judgment.²⁰⁴ A lawyer listening to a client may extend his or her active listening to a post-conversation debrief where the lawyer considers tricky moments of the conversation and plans for the next.²⁰⁵ A regular debrief of a conversation can become the first sub-competency of listening—preparing for the conversation.²⁰⁶

V. CONCLUSION

A lawyer who knows how to actively listen will be a better advocate, negotiator, counselor, and leader. Lawyers who actively listen attain better outcomes for clients, employers, and themselves. We know legal employers and clients alike value and prioritize active listening, so a competency-based education in law should include intentional training in active listening as a discrete skill. The Active Listening Milestone Rubric, presented fully in the appendix below, draws on listening research to help law schools make this training and assessment as thoughtful and productive as possible.

204. See *Connecting with Clients Across Culture*, *supra* note 58, at 220.

205. *Id.* at 219.

206. *Id.*

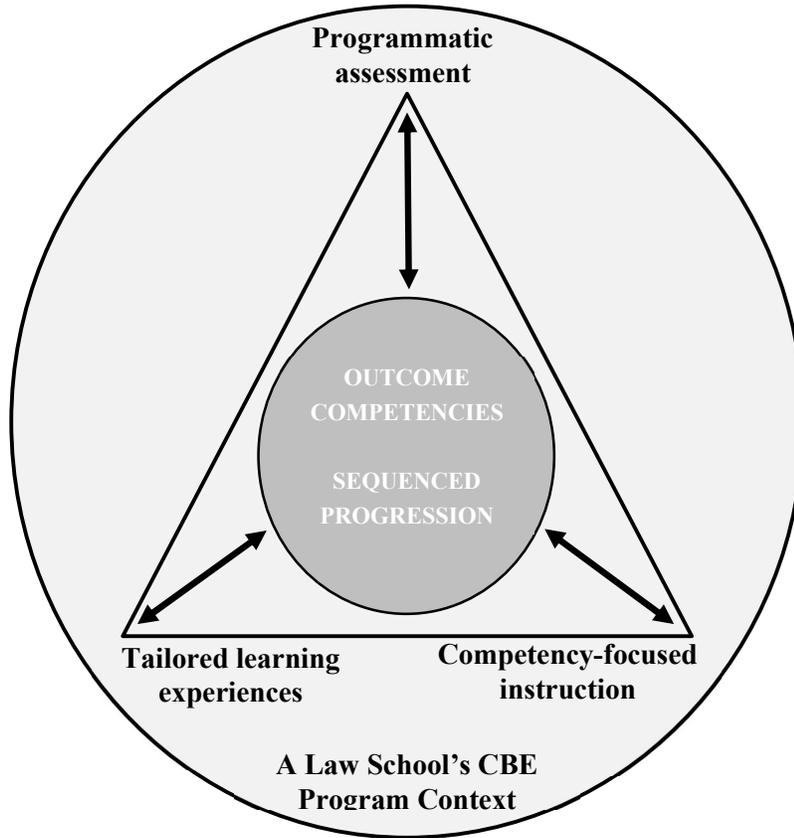
APPENDIX

*Table 1: The Five Core Components of Competency-Based Legal Education*²⁰⁷

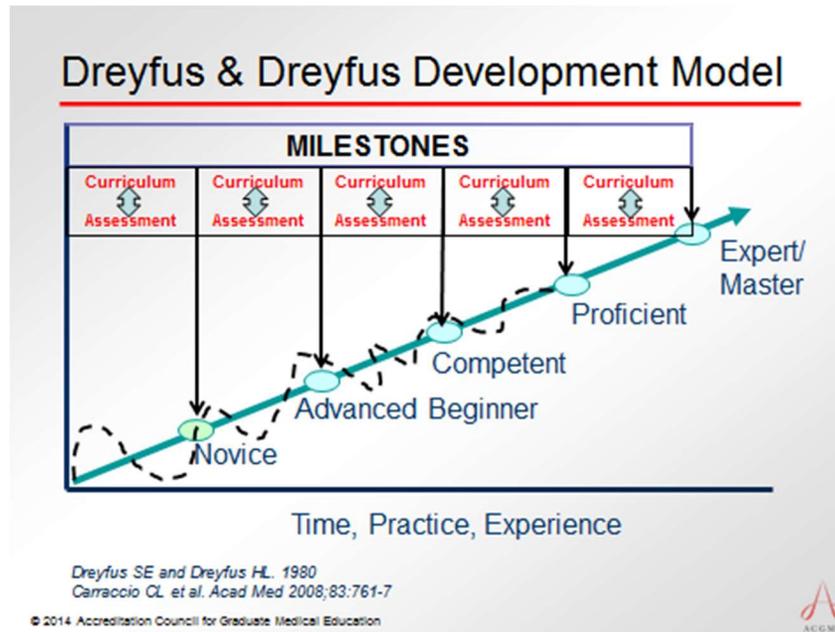
Competency-based legal education is an approach to preparing lawyers for practice that is fundamentally organized around competencies derived from an analysis of client and societal needs				
CORE COMPONENTS				
OUTCOME COMPETENCIES: Competencies required for practice are <i>clearly articulated</i> .	SEQUENCED PROGRESSIVELY: Competencies and their developmental markers are <i>sequenced progressively</i> .	TAILORED LEARNING EXPERIENCES: Learning experiences <i>facilitate</i> the developmental acquisition of competencies.	COMPETENCY-FOCUSED INSTRUCTION: Teaching practices <i>promote</i> the developmental acquisition of competencies.	PROGRAMMATIC ASSESSMENT: Assessment practices <i>support & document</i> the developmental acquisition of competencies.
PRACTICE: What the core component should look like in practice				
Required outcome competencies are based on a profile of graduate and/or practice-based abilities.	Competencies are organized in a way that leads to a logical developmental sequence across the continuum of legal education or practice.	Learning takes in settings that model practice, is flexible enough to accommodate variation in individual learner needs & is self-directed.	Teaching is individualized to the learner, based on abilities required to progress to the next stage of learning.	Learner progression is based on a systematic approach to decision-making including standards, data collection, interpretation, observation & feedback.
PRINCIPLE: How the core component is supposed to work in practice				
Specification of learning outcomes promotes focus and accountability.	A sequential path supports the development of expertise.	Learning through real life experiences facilitates membership into the practice community & development of competencies.	Development of competencies is stimulated when learners are supported to learn at their own pace and stage.	Programmatic assessment systems allow for valid and reliable decision making.

207. Table 1 is adapted from Melle et al., *supra* note 14, at 1005. In a multi-stage process drawing on scholarship from education theory and medical education, 59 members on an international CBME expert panel identified five core components to CBME. *Id.*

Figure 1: Competency-Based Legal Education's Two Central Core Components Informing the Three Other Components in a Law School's CBE Program²⁰⁸



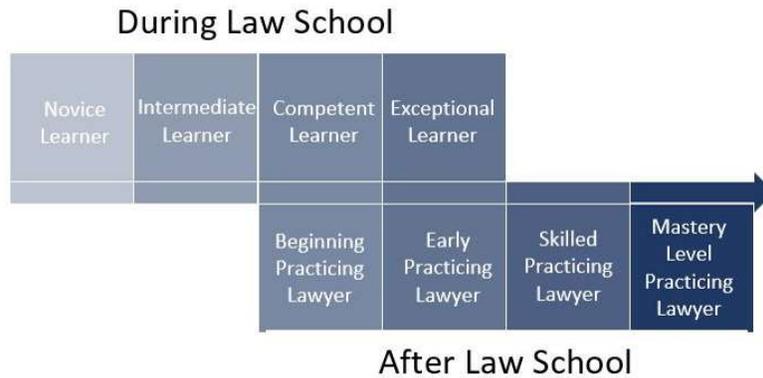
208. Adapted from *id.*

Figure 2: Dreyfus & Dreyfus Development Model²⁰⁹

209. Neil Hamilton, *Formation-of-an-Ethical-Professional-Identity (Professionalism) Learning Outcomes and E-Portfolio Formative Assessments*, 48 U. PAC. L. REV. 847, 853 (2017).

Figure 3: Holloran Competency Alignment Model

Stages of Development of Learning Outcome Competencies: A Continuum from Entry into Law School Throughout a Career²¹⁰



210. *Holloran Competency Milestones*, HOLLARAN CENTER, <https://www.stthomas.edu/hollorancenter/hollorancompetencymilestones/> (last visited July 31, 2021). This continuum/alignment model, developed by Jerry Organ and the author, builds on the Dreyfus and Dreyfus Model of development from novice to expert. Dreyfus, *supra* note 27, at 177-81. A “competent learner” is ready to take the bar and begin to practice law after passing the bar exam.

2022]

TEACHING AND ASSESSING ACTIVE LISTENING

39

Milestone Rubric: Active Listening

The goal of active listening is to show empathy for the speaker, to build a shared understanding between the speaker and the listener, and—where appropriate—to equip the listener to reply or problem solve in a manner that corresponds to the speaker’s concerns or goals.

Sub-Competencies	Novice	Intermediate	Competent	Exceptional
1. Active listeners assess the purpose and context of the conversation and allocate the resources and attention appropriate and necessary to absorb, interpret, and decode the information given to them by a speaker.	<i>RARELY assesses the purpose and context of the conversation and allocates the necessary resources and attention.</i>	<i>SOMETIMES assesses the purpose and context of the conversation and allocates the necessary resources and attention.</i>	<i>OFTEN assesses the purpose and context of the conversation and allocates the necessary resources and attention.</i>	<i>CONSISTENTLY assesses the purpose and context of the conversation and allocates the necessary resources and attention.</i>
2. In working to create a shared understanding with the speaker, active listeners consider the lens through which the speaker speaks and the lens through which the listener listens. Those lenses may have many components, including the history of the parties, the context in which the conversation takes place, the relative power	<i>RARELY considers the speaker’s lens and his or her own lens to work towards creating a shared understanding.</i>	<i>SOMETIMES considers the speaker’s lens and his or her own lens to work towards creating a shared understanding.</i>	<i>OFTEN considers the speaker’s lens and his or her own lens to work towards creating a shared understanding.</i>	<i>CONSISTENTLY considers the speaker’s lens and his or her own lens to work towards creating a shared understanding.</i>

dynamic of the parties, their gender, race, culture, or other aspects of their identity, and any personal experiences that may affect how they communicate. Taking into consideration these lenses is critical to accurately decoding the meaning of the speakers' words and emotion.				
Sub-Competencies	Novice	Intermediate	Competent	Exceptional
3. Active listeners continually assess the shared understanding between the speaker and the listener and, where necessary, work to increase that shared understanding. Work to increase shared understanding may involve the use of both verbal and nonverbal cues.	<i>RARELY assesses the shared understanding or works to increase it.</i>	<i>SOMETIMES assesses the shared understanding or works to increase it.</i>	<i>OFTEN assesses the shared understanding or works to increase it.</i>	<i>CONSISTENTLY assesses the shared understanding or works to increase it.</i>
3a. Active listeners may provide nonverbal cues to demonstrate attention, understanding, responsiveness,	<i>RARELY makes effective use of nonverbal cues to demonstrate active listening.</i>	<i>SOMETIMES makes effective use of nonverbal cues to demonstrate active listening.</i>	<i>OFTEN makes effective use of nonverbal cues to demonstrate active listening.</i>	<i>CONSISTENTLY makes effective use of nonverbal cues to demonstrate active listening.</i>

2022]

TEACHING AND ASSESSING ACTIVE LISTENING

41

and empathy. To engage the speaker in the ongoing conversation and follow respectful conversation pacing and collaboration, active listeners may use open, natural body language, reflect the speaker's emotions, employ silence, and maintain or break eye contact.				
3b. Active listeners may provide verbal feedback to demonstrate attention, understanding, responsiveness, and empathy. Active listeners may reflect back to the speaker, paraphrasing and restating the speaker's words, meaning, and feelings. Active listeners may ask for additional information, using elaboration, clarification, and repetition when necessary.	<i>RARELY makes effective use of verbal feedback, as appropriate, to demonstrate active listening.</i>	<i>SOMETIMES makes effective use of verbal feedback, as appropriate, to demonstrate active listening.</i>	<i>OFTEN makes effective use of verbal feedback, as appropriate, to demonstrate active listening.</i>	<i>CONSISTENTLY makes effective use of verbal feedback, as appropriate, to demonstrate active listening.</i>
4. Active listeners only move to respond or	<i>RARELY waits to respond or problem-solve until fully</i>	<i>SOMETIMES waits to respond or problem-solve</i>	<i>OFTEN waits to respond or problem-solve until fully</i>	<i>CONSISTENTLY waits to respond or problem-solve until fully</i>

problem-solve where appropriate to the conversation, and only after fully exploring, and ultimately understanding, the speaker's meaning.	<i>understanding the speaker's meaning.</i>	<i>until fully understanding the speaker's meaning.</i>	<i>understanding the speaker's meaning.</i>	<i>understanding the speaker's meaning.</i>
--	---	---	---	---