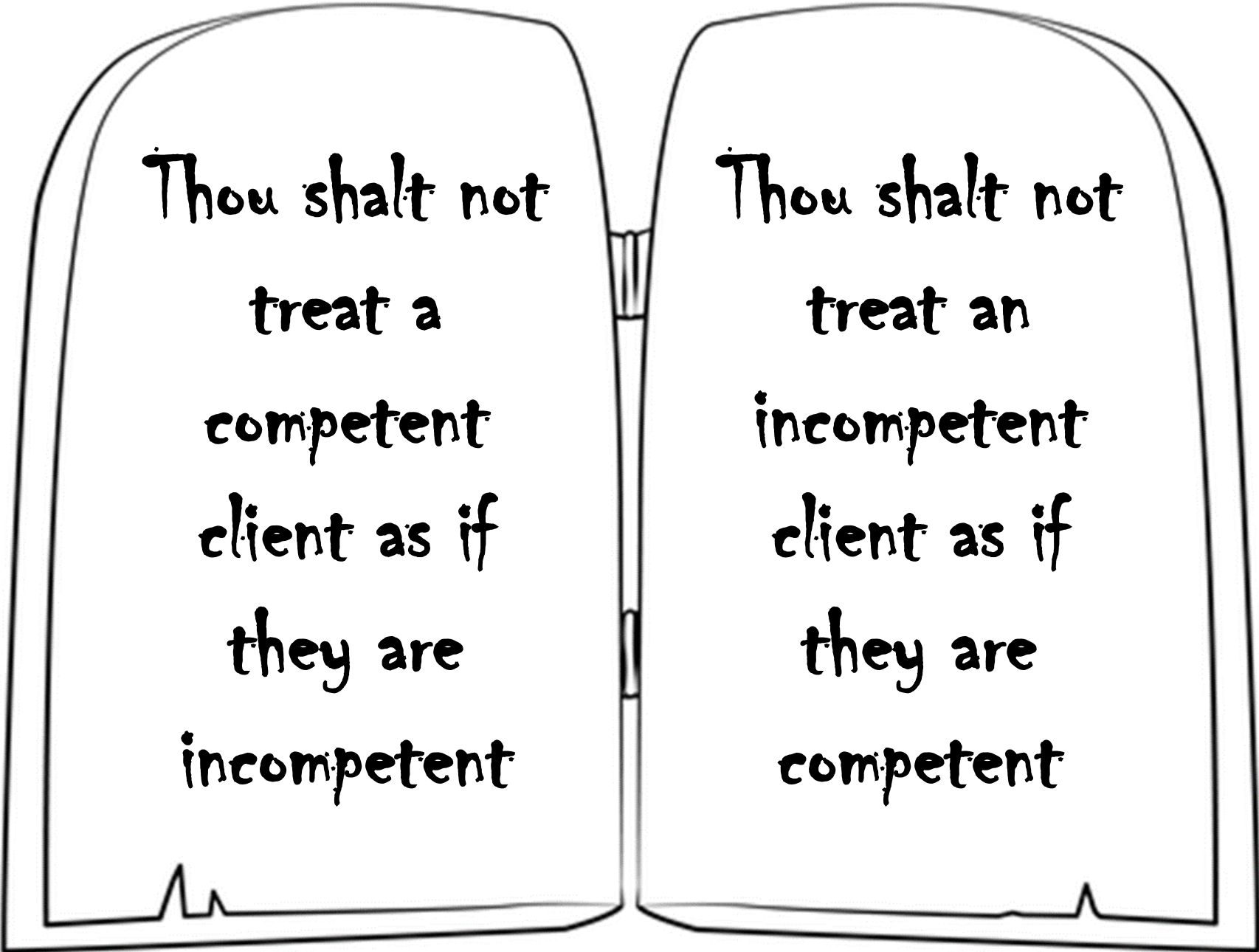


ETHICALLY REPRESENTING CLIENTS SUFFERING FROM MENTAL ILLNESS

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Thou shalt not
treat a
competent
client as if
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ETHICAL OBLIGATIONS FOR ALL CLIENTS

- Rule 1.1 Attorney Competence
- Rule 1.2 Scope of representation
- Rule 1.4 Communication
- Rule 1.6 Confidentiality

RULE 1.1 ATTORNEY COMPETENCE

- legal knowledge & skill
- thoroughness & preparation
- consider the relative complexity and specialized nature of the matter. Can obtain training or associate with skilled counsel.
- ABA guidelines – a qualified member of the team

RULE 1.2 SCOPE OF REPRESENTATION (CONTROL)

- Abide by:
 - Objectives of representation
 - Plea to be entered
 - Whether client will testify
 - [Penalty phase presentation]
- Consult
 - means by which the objectives are to be achieved

RULE 1.4 COMMUNICATION

- Inform sufficiently for informed consent as needed
 - Keep reasonably informed about status of a matter
 - Promptly comply with reasonable requests for information
 - Reasonably consult about the means to achieve objectives
-
- Fully informing may be impracticable where mental disability: counsel may temporarily withhold where possible harm to client (e.g. psychiatric diagnosis)

RULE 1.6 CONFIDENTIALITY

- A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent but
 - disclosure is impliedly authorized in order to carry out the representation
 - disclosure permitted if reasonably necessary to prevent reasonably certain death or substantial bodily harm;

ETHICALLY REPRESENTING A MENTALLY
ILL BUT COMPETENT CLIENT

RULE 1.14 CLIENT UNDER A DISABILITY

- Diminished capacity to make adequately considered decisions: not the same as the competence standard
- Maintain normal client-lawyer relationship, as far as reasonably possible
- Take reasonably necessary protective action to prevent harm where client cannot act in own interests
- Implied authorization to disclose confidential information to take protective action: “but only to the extent reasonably necessary to protect the client's interests.”

REASONABLY NECESSARY PROTECTIVE ACTION

- Consult those that can take protective action;
- Seek guardian ad litem, conservator or guardian
- Also
 - consulting with family members;
 - reconsideration period
 - voluntary surrogate decision making tools such as durable powers of attorney
 - consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client

CONSIDERATIONS IN REASONABLY NECESSARY PROTECTIVE ACTION

- Wishes and values of the client to the extent known
- Client's best interests
- Intruding into the client's decisionmaking autonomy to the least extent feasible
- Maximizing client capacities
- Respecting the client's family and social connections.

IDENTIFYING & UNDERSTANDING MENTAL ILLNESS

- Simple things to look for and track
- Learn to understand your client's experience of mental illness

SIMPLE THINGS TO LOOK FOR AND TRACK

- Grooming and hygiene
- Body language
- Affect
- Clothing and makeup
- Interactions with others
- Communication
- Speech
- Speech/thought process
- Thought content
- Mood
- Intellectual Functioning
- Pre-arrest context
 - Home
 - Arrest
 - Interactions
 - behavior
- Obtaining mental health history
- Substance use history
- Trauma

UNDERSTAND YOUR CLIENT'S EXPERIENCE OF MENTAL ILLNESS

- Anosognosia & lack of insight
- Delusions & over-valued ideas
- Hallucinations
- Disorganized thought and speech
- Trauma & traumatic reactions
- Mood – depression, mania, mood swings
- Anxiety, paranoia, grandiosity
- Cognitive impairment
- Co-morbidity with drug use

COMMUNICATING & PARTNERING

- Structural obstacles to communication
- Tools for communication and partnering

STRUCTURAL OBSTACLES TO COMMUNICATION WITH THE MENTALLY ILL CLIENT

Optimal

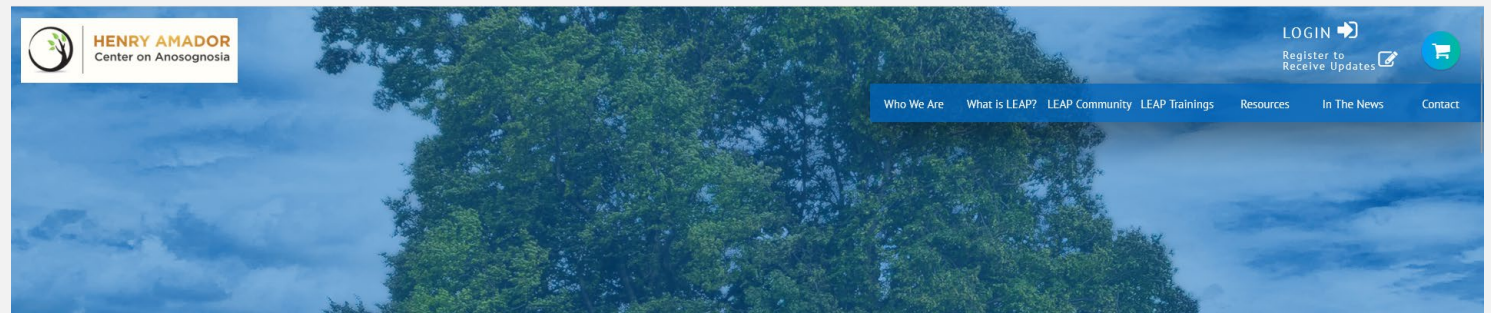
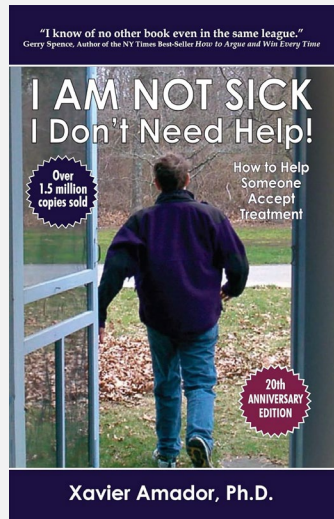
- Low stress
- Few distractions
- Safe and Calm
- Take your time
- Observe as well as listen
- Relationship
- Identifying what the client wants & needs

Courts and prisons

- Very high stress
- Many distractions
- Client is under threat and in an elevated mood
- Hurried encounters
- Physically constrained environments – video, cuffs, wire mesh
- Limited contact, relationship or trust
- Want something from the client

TOOLS FOR COMMUNICATION AND PARTNERING

- ALL team members should be trained to communicate and partner with seriously mentally ill clients
- LEAP method – especially with psychosis



TOOLS FOR COMMUNICATION AND PARTNERING

- Listen: listen reflectively to delusions, anosognosia, desires
- Empathize: express empathy – normalize feelings (I would feel same if ...)
- Agree: Discuss perceived problems/goals/costs/benefits
- Partner: Partner on goals - - - don't rush to your goals
- Delay: delay your opinion
- Opinion 3A's: Apologize, acknowledge fallibility, agree to disagree

WHEN IS THE LINE CROSSED TO INCOMPETENCE

The test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.

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

It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.

Drope v. Missouri, 420 U.S. 162, 171 (1975)

ETHICALLY REPRESENTING AN INCOMPETENT CLIENT

We cannot ethically represent an incompetent client at trial

But we don't get to adjudicate incompetence. So:

- We need to understand and investigate competence
- Dealing with mental health assessments

UNDERSTANDING AND INVESTIGATING INCOMPETENCE

- We need to conduct an investigation that:
 - Establishes a mental condition/“mental disease or defect”
 - Establishes an inability to consult with counsel with a reasonable degree of rational understanding;
 - Eliminates malingering
- A thorough investigation of documentary, lay and expert evidence across the course of the client’s life and culminating in the client’s current functioning as it relates to competence.

THE DEFENSE MENTAL HEALTH EXPERT

- Using consulting experts
 - To understand what you are seeing and what to investigate
 - To improve communication
- Using a testing expert
 - Not within privilege
 - Managing the test parameters
- Using a testifying expert
 - Challenging the finding

DEALING WITH MENTAL HEALTH ASSESSMENTS

- Understanding the psychological and psychiatric assessments that are used
- Access to raw test data from psychometric tests

UNDERSTANDING THE PSYCHOLOGICAL AND PSYCHIATRIC ASSESSMENTS

- Must know the waiver our client will be asked to give
- Must know the instruments being administered to our clients: content, limitations, strengths and weaknesses
- There is no test of competence
- Some competency screening instruments provide normative data or highlight areas for further clinical exploration
- The main ones all involve a subjective component in scoring

UNDERSTANDING THE PSYCHOLOGICAL AND PSYCHIATRIC ASSESSMENTS

- GCCT: Georgia Court Competency Test
- MacCAT-CA: MacArthur Competence Assessment Tool–Criminal Adjudication
- ECSTR: Evaluation of Competency to Stand Trial

UNDERSTANDING THE PSYCHOLOGICAL AND PSYCHIATRIC ASSESSMENTS

- None of the tests are designed for assessing the particular competencies in a capital case
- Many psychologists do not have a deep understanding of the instruments
- Non-standardized administration and errors are not uncommon
- Protective measures re: testing of the client should be sought – See example in materials

ACCESS TO RAW TEST DATA FROM PSYCHOMETRIC TESTS

- We must obtain and review raw test data and materials
 - errors in recording responses;
 - scoring errors;
 - misapplication of scoring rules;
 - non-standardized testing methods;
 - impeachment of conclusions to be drawn from test results;
 - undisclosed evidence of incompetence.

ACCESS TO RAW TEST DATA FROM PSYCHOMETRIC TESTS

- It is not sufficient for your psychologist to see the results
 - Don't trust psychologists to critique psychology
 - Only you will have sufficient information about your client and your case
 - Right to effective assistance of counsel
- It is just as important to see your own expert's test data

ACCESS TO RAW TEST DATA FROM PSYCHOMETRIC TESTS

- Psychologists, test publishers and neuropsychs are mobilized to oppose access – see article in materials
 - Test security
 - Misinterpretation of results
 - Copyright & Trademark
 - Coaching by attorneys
- Obtain access with a protective order – see example
- It is unethical to coach a client to beat a psych test!

ETHICAL REPRESENTATION AFTER YOUR CLIENT IS FOUND INCOMPETENT

- Keep working the case
- Rule 1.14 continues to govern the relationship
- Maintain contact and continue to investigate competence
- Do not expect gratitude from a client lacking insight
 - empathize with your client's subjective experience of betrayal, persecution and trauma
 - Use your skills in communication to rebuild your relationship

REMEMBER THE 4 PILLARS
AND RESPECT YOUR CLIENT'S INHERENT
DIGNITY AS A HUMAN BEING

- Competence
- Control
- Communication
- Confidentiality