

**CLIENT SCIENCE:
ADVICE FOR LAWYERS ON
INITIAL CLIENT INTERVIEWS**

By

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Introduction Regarding Authorial Intent

My intent is to offer an informed, wise, practical, and concise guide for initial lawyer-client meetings – meetings that are mostly an interview process for the client and the lawyer. It is written for the Client Science Course website to supplement my book, *Client Science: Advice for Lawyers on Counseling Clients Through Bad News and Other Legal Realities* (Oxford University Press, 2012), referred to here as *Client Science*. That book was intentionally focused on particular challenges of client counseling.

While much of *Client Science* is rather clearly applicable to any client interaction, additional thoughts, research, and discussion are needed for a serious, intentional approach to specific challenges of an initial client interview. Because law schools typically teach “interviewing and counseling” together, and lawyers who counsel clients will almost inevitably have begun with an initial interview, I decided to write this piece. It is referred to herein as “chapter” to underscore its complementary relationship to the *Client Science* book; I think of it as an additional, optional chapter for the book, but important for participants in The Client Science Course.

While aiming for concision, the chapter includes selected précis of academic research that supports recommendations made. Empirical studies of physician-patient and lawyer-client relationships and interviewing processes are systematic, rigorous observations of how these professionals work with people who rely on their learned expertise. Experimental studies of the interview process use scientific method to raise and test hypotheses, ask questions and question assumptions. For these, we are grateful. This published research informs us more broadly and deeply than any individual’s limited observation and anecdotes. It provides the evidence upon which we as lawyers should base practice choices, permitting us to define and envision “best practices” with some confidence that we are headed in the right direction.

This chapter also allocates some space to conceptual categories and language offered by theoreticians in socio-linguistics and discourse theory. I believe that familiarity with theory and its language enables us

to become keener observers and more clear-minded about practice strategies and choices we make.

A final caveat is in order: I make no claim to original research or an extraordinary quantity of examined experience in initial client interviews. My advice in *Client Science* was informed by at least 700 (now more) video-recorded counseling sessions with actor clients, as well as published social science research. The same is not true for initial interviews. While I have interviewed clients and witnesses as a law firm lawyer, a prosecutor, and a mediator over the past thirty plus years of practice, I have not observed repetitive efforts at a simulated interview with actor-clients. Thus, this chapter is very much a synthesis of published research, articles, and chapters relevant to initial client interviews.

A Lawyer's Intent

Intent matters. The defendant with evil intent is more likely to have committed the crime, and bears responsibility for its consequences. The whistleblower or rescuer with noble intent merits accolades for his deeds.

If a project is undertaken without clear intent as to its direction, how can the results be intelligently predicted? Success and failure are undefined; dumb luck operates. Even if success is recognized, it will be difficult to repeat.

Is aspiration the same as intent? Maybe. Intent might be thought of as a direction, a basic choice in approach, one that compels choices along the way. It's my intent as a parent to be both reasonable – open to reason – and compassionate, and to encourage these qualities in my children. I aspire to maintain that through times of conflict, anger and fatigue.

At the start of a legal practice, and perhaps at significant undertakings within that practice, it makes sense to establish intent and aspiration. Thus, consider: what is your intent as a lawyer? Whatever your field of practice, how do you intend to inhabit your professional role? How do you see yourself? How do you intend your clients to perceive you, to relate to you?

Making and Naming Models

It's worth imagining yourself with a serious legal problem, and asking how you would want your lawyer to relate to you? Why not set your intention, at least as a default setting? Clients' preferences will differ. If you would want a lawyer who is comfortable with lots of client questioning, ready to provide reasoning and analysis, then be that lawyer in the first instance. And, when a client expresses preferences for less rather than more information, recognize and respect that difference. (You would want that too.)

For most of us, envisioning a model or a character-type is more helpful than abstraction. The classic TV lawyer Matlock, Atticus Finch in *To Kill a Mockingbird*, respected aunt or uncle, your hometown lawyer: how would they relate to a client? When you establish a lawyer-client relationship, do you want the client to relate to you as would a student-to-professor, a camper-to-counselor, a patient-to-doctor, an artist-to-agent, a customer-to-service provider, a friend-to-another? How would you want your clients to describe your interactions?

This common-sense approach to models of lawyering omits important context, history, and patterns of practice that are worth knowing. When scholars (often law professors) began writing about lawyering models in the 1970s, based upon research-based observation of practice, they characterized a majority of lawyers as "authoritarian". The approach rests on a notion that the "traditional image of lawyers portrays them as professionals who control the choices that clients make by convincing clients as to what is in their best interests..... This traditional image generally regards clients as unsuited to the task of legal problem solving and usually satisfied to leave decision making to lawyers."²

Yet, research indicated that the authoritarian model was generally unsatisfying to clients, regardless of the legal outcome. In fact, behaviors quite opposite to those employed by authoritarian lawyers resulted in greater client satisfaction. First named by law professors David Binder

² David A. Binder, Paul B. Bergman, Susan M. Price & Paul R. Trembley, *Lawyers as Counselors: A Client Centered Approach*, 3rd ed. (West, 2012), 4.

and Susan Price in their seminal law school text:³ “Client-centered Model of Lawyering” was identified and promoted as superior to the authoritarian model.⁴ Law school and other legal services clinics and programs explicitly adopted “client-centered lawyering” and began teaching its skills. Academic and professional practice publications disseminated recommendations and advice for client-centered practice.

As its name suggests, client-centered lawyering embraces the “philosophy that clients are autonomous and therefore deserving of making important decisions that lead to the resolution of their legal problems and the achievement of their aims.”⁵ Thus, client-centered lawyering proposes that clients typically want to participate actively in counseling and decision-making; clients know better the non-legal consequences of decisions and how to judge what risks are worth taking. A client-centered lawyer elicits clients’ views and values, encourages clients to identify possible solutions and make important decisions, and provides advice based on client values. Important hallmarks of client-centered practice are understanding, acknowledging, and responding to client feelings.

Doctors First

Interestingly, examination of literature regarding medical practice and physician training reveals a similar progression, years ahead of lawyers. As early as 1956, an influential article written by mental health professionals challenged the idea of a passive patient who trusts and follows the physician without questions was inconsistent with the basic premises of psychotherapy.⁶ More recent medical and clinical journals

³ David A. Binder and Susan M. Price, *Legal Interviewing and Counseling: A Client Centered Approach* (West, 1977). The more recent edition of this text is referenced above.

⁴ Intellectual credit is also widely given to Douglas E. Rosenthal, for his important book, *Lawyer and Client: Who’s in Charge?* (Russell Sage Foundation, 1974).

⁵ Binder, Bergman, Price & Trembley, 3d ed., *supra* note 1 at 4. The balance of the description of client-centered lawyering in this paragraph draws from pages 4-11 in their book chapter.

⁶ Thomas Szasz and Mark Hollender, “A Contribution to the Philosophy of Medicine: The Basic Models of the Doctor-Patient Relationship,” *Archives of Internal Medicine*, 97 (1956): 591. I do not pretend to have surveyed medical literature to determine when consensus shifted in favor of patient-centered practice in medicine. I am indebted to Professor Linda Smith for her gathering of bibliographical references in her fine article, “Interviewing Clients: A Linguistic Comparison of the ‘Traditional’ Interview and the ‘Client-Centered’ Interview,” *Clinical Law Review* 1 (Spring 1995): 541.

consistently describe the problems of “physician [or doctor] centered practice” and the benefits of “patient-centered practice.” It’s fair to say that, long before most law schools paid attention to models of lawyering, many (though perhaps not all) medical schools embarked on mission to train medical students or residents in the method and skills needed for a patient centered approach to practicing medicine. In fact, much of the literature promoting client-centered lawyering references literature written for physicians, medical students, and medical schools.⁷

Collaborating On Balance

In their 1999 text *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling*, authors and law professors Robert Cochran, John DiPippa, and Martha Peters named a model of “collaborative lawyering” as distinct from purely client-centered, and rather clearly not authoritarian lawyering.⁸

It might be said that collaborative lawyering is a response to client-centered lawyering gone too far. It results from questioning the client-centered model’s premise that client self-interest and autonomy are primary, and that these are threatened when a lawyer provides perspective, advice, and wisdom. In some sense, a fully client-centered approach lets the lawyer “off the hook.” The lawyer provides information and articulates options to the client, but steps away from involvement in decision-making.

The medical parallel would be the physician who merely states to the patient: “You can take this medication, which has these side effects and

⁷ A small note of impatience or pessimism: if awareness first percolated of physician practices that were unsatisfying to their patients, that’s also evidence that professional culture changes too slowly. How often do we still meet with a physician whose approach to patients is infuriatingly directive, insensitive, inscrutable and fundamentally ineffective? How often do patients’ feel frustration at the physicians’ lack of social skill, unwillingness to listen, and inability to communicate in a way that can be understood? The same is no doubt true of legal practice culture. I began practicing in 1981. I don’t recall specific instruction in client-centered skills in my law firm or in the prosecutor’s office. And to this day, in my mediation practice, I routinely hear lawyers’ speak of the need for client control and some (not all) lawyers relate to clients in an entirely authoritarian manner.

⁸ Robert Cochran, John DiPippa, and Martha Peters, *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling* (LexisNexis, 1999).

this level of effectiveness, or you can undertake surgery, with [these named] risks, and [this defined] range of possible improvement.” The physician then asks: “What do you want to do?”

Well, I might want to hear the doctor’s advice. I might want to know what he would do, what he would want his sister to do. Just as importantly, I’d like to understand the way he would go about making the decision for himself, or his sister. What priorities and values would he bring to bear? What if he knew his sister’s priorities were different... how would that change his thinking? Why? A fully client-centered model of lawyering, might view the lawyer’s parallel input into a client decision as too directive, as diminishing client autonomy. That may or may not be a fair criticism.

This chapter advocates the collaborative lawyering model. Even lawyers, who intentionally choose to adopt collaborative lawyering, are wise to know their own limits: where they would feel advice and participation in the decision-making process would impinge upon client autonomy or come close, causing discomfort.⁹ I suggest awareness and then setting an intent – at what point on the authoritarian – collaborative - client-centered continuum will you anchor your practice?

Blurring the Binary

Frankly, the skills and strategies for the initial interview shouldn’t vary much between a “Client-Centered” and a “Collaborative” lawyer. The initial interview performs certain essential functions: establishing a lawyer-client relationship (or not), gathering information, learning client goals and interests, and determining next steps. The major decision to be made is whether the client will retain the lawyer and whether the lawyer wishes to work with this client or decline the representation. Even that

⁹ Author’s full disclosure: as a mediator, I believe and am on record as suggesting that mediator evaluation does not violate principles of party self-determination. In life, when someone disagrees with my position or conclusion, I don’t feel an obligation to concur. I do hope their expression of disagreement or differing perspective inspires me to thoughtfully reexamine my own. Thus, as a mediator, as long as I don’t pressure or manipulate the party or manipulate the process, as long as I respect the parties’ and lawyers’ different perspective and right to make decisions different than mine would be, their power to exercise self-determination remains inviolate. Other mediators (and authors) see this differently.

decision need not be made within the meeting itself. Differences between the two models are more apparent in the counseling stage where the Collaborative Model asserts a lawyer's unapologetic but respectful role in client decision-making.

Honoring humility with aspiration

When setting your lawyering model intent, it will and should be informed by your experience, heroes, and your vision of the lawyer you'd like to be. Your model will be worthy of a richer description than "Client-centered" or "Collaborative." And you will no doubt aspire to the highest level of skills necessary to embody your model. It's important to be aware, however, that we aren't necessarily the best judges of our clients' perceptions. In a somewhat frightening experiment by Professor Clark Cunningham,¹⁰ a number of lawyers, actor-clients, and tutors (instructors) participated in an experiment through an initial client interview exercise. At the conclusion, the lawyers, actor-clients, and the tutors were asked to rate the lawyers' performance across certain named competencies. The mismatch between their results was remarkable. In fact, the lawyers' self-scores did not correlate at all with those of the actors or the tutors (who didn't agree with each other, either).

Why mention this here? As professionals and as people, it's tremendously important that our intent is not necessarily apparent, and does not insure impact. As actors know, perception IS reality when you're working with an audience, or in any interaction. That I did not intend to be arrogant or dismissive is almost irrelevant, if my audience (client, spouse, colleague) experienced it that way, because their perception will determine their response.

So, intent matters. It's necessary, but not sufficient. Also required are awareness, strategy, skill, and feedback – either direct, or through interaction and perception.

¹⁰ Clark D. Cunningham, *The Client's Perspective on the Initial Interview: A Social Science Approach* (June 20, 2001), a research program of The Effective Lawyer-Client (ELCC Project). (Paper presented at The W G HART LEGAL WORKSHOP 2001, 26th June to 28th June 2001, Institute for Advanced Legal Studies, University of London. The paper is available at the ELCC Project website: <http://law.gsu.edu/Communication>.

Onto the Initial Client Interview

Intended Outcomes

Setting intent for lawyering occurs at the meta-level, its achievement to be measured in time and over time. Long-term progress is carved with each small short-term move. It makes sense to consider intended outcomes for each of the more mundane acts of lawyering. Well then, what are the intended outcomes, in the broad generic sense, of an initial interview? There seem to be several, admittedly interconnected. For both the lawyer and the client, at least the following outcomes are important:

- A strong foundation of trust and rapport between client and lawyer.
- A decision, and answer to the question: could we work productively together, address problems presented or learned during the interview? Should the lawyer decline representation? Should the client opt against retaining the lawyer?
- Joint understanding of the formal parameters of the relationship (privilege, confidentiality, fees), information or suggestions conveyed during the interview, as well as agreed upon next steps or other instructions.
- Communication of information necessary for the lawyer to determine, at least preliminarily, whether he can assist. In other words, the client should have conveyed the problem - the basic facts and circumstances - as well as his goals, interests, and constraints.
- Finally, and perhaps accomplished by those above, for the client to feel comfortable and understand the importance of informing the lawyer of new developments and information, asking questions, or expressing concerns.

Trust

“Trust in me...” sings the untrustworthy snake beguilingly as he coils around the sleepy young boy Mogli in Disney’s *Jungle Book*. Books for lawyers, negotiators, doctors and patients, financial advisers, psychotherapists – the list is long – speak of the need to establish trust. What do we mean by trust?

In 1995, Professors Barbara Bunker and Roy Lewicki published an influential essay positing three types of trust:¹¹

- Knowledge based trust: more of a prediction, based upon past patterns of action. I trust he will act in this way because he’s always done so in the past.
- Deterrence based trust – confidence that someone will be deterred by negative consequences or punishment from acting in a certain way. I trust that he will obey the prohibition because he so fears expulsion.
- Identification based trust: confidence that someone will act in service of your needs, perhaps to the detriment of their own, because they so strongly identify with you. This is described as available to us from family or loyal friends. My sister is selling me her house. I trust her not to misrepresent its value or hide mechanical flaws because she will weigh my needs and interests as equal to her own.

The paradox is that clients and lawyers are obligated to live up to expectations akin to those in identification-based trust. Yet, we begin as strangers and, unless acting *pro bono* or in a public service context, the relationship is a commercial one. The lawyer has superior knowledge about the law and the legal system; the client may have little or none. The client is at the mercy of a lawyer who would undertake unnecessary billing by inefficient time allocation, negotiate incompetently or weakly, perform slip shod legal analysis, propose a fee arrangement more likely to

¹¹ Roy Lewicki & Barbara Benedict Bunker, “Trust in Relationships: A Model of Development and Decline,” in: *Conflict, Cooperation, and Justice: Essays inspired by the Works of Morton Deutsch* 133, ed. Barbara Benedict Bunker & Jeffery Z. Rubin (Jossey-Bass, 1995).

advantage the lawyer (mentioning a contingency fee only where liability is certain).

These choices do violate professional ethics, particularly if intentional, but they are difficult or impossible for an uninformed client to detect. It's much like an experienced cab driver who could take advantage of an unsophisticated tourist by circling the city limits to drive up the fare. A lawyer could tell a client his case is a "slam dunk" winner, and encourage financial investment, and then later "discover" based on "new law" or "new facts" that a low settlement would be better than nothing. Was it really new news? Could the lawyer have seen this at the beginning? Would the lawyer be motivated to let the client know as soon as his prediction starts to change? A lawyer's ethical obligations require that we put the client's interests first, that we provide representation at high professional standards, keep the client fully informed, respect the client's decision-making authority, and offer fair fee arrangements. But who will know when corners are cut: when the *spirit* if not the letter of the ethical code and principles of professional practice has been violated?

Consciously or not, clients understand that they are vulnerable to sharp or shoddy or less-than-stellar lawyering. Unless your client is also a lawyer, he knows that he may not recognize this if it happens. He just has to trust you – and he *wants* to trust you. He seeks the peace of mind we feel when our agent merits identification-based trust. He wants to feel that you will work as diligently and efficiently on his behalf as you would for your best friend as client. He wants to believe that you are everything he would want in a lawyer.

Rapport

Many texts and articles consistently place "trust and rapport" in the same phrase as goals of the initial client interview. Perhaps rapport is in service of trust: we create rapport in order to build trust. When we feel rapport – we also feel trust. Or perhaps, when we feel a certain rapport, we build a relationship, become more familiar, and then feel trust.

Could one have rapport without trust? Surely, there are people with whom we engage in easy, friendly, banter, but without any profound level of trust. Indeed, one can think of people we mistrust – would not have them represent our interests unless theirs were perfectly aligned - but with

whom conversation involves a good deal of rapport. The opposite is also true: we can think of people who would no doubt sacrifice much for our sakes but with whom conversation is difficult.

Nevertheless, the obvious is real: rapport between lawyer and client builds relationship and trust. Not surprisingly, a great deal of research supports common sense here.¹²

Unintended and Unwelcome Outcomes

Unintended and unwanted outcomes of an initial interview would include:

- Distortions in the client's memory of facts and circumstances due to the interview.
- A client who feels more demoralized, helpless, and adrift
- A client brimming with new false hopes and unrealistic expectations as a result of the conversation. ("Now, I am even more confident we'll get this dismissed, no problem. " "I am going to win a million bucks for sure!")
- A client who retains you and whom you agree to represent, but who turns out to be impossibly difficult to work with.
- A client with whom you might have worked well (and profitably) who chooses not to retain you as counsel.

A Structure to Start With

Intent set, now on to structure and critical skills for each stage of that structure.

Except perhaps in meditation or a yoga class, it's good to have a plan. Call it an agenda, outline, checklist, structure: a professional is generally wise to begin an interaction having thought about what she'll do first, then next, and then next, even if she concludes that waiting and

¹² See Clark D. Cunningham, "What Clients Want From Their Lawyers," Prepared for The Society of Writers to Her Majesty's Signet (3 August 2006), available at:

<http://law.gsu.edu/ccunningham/>

See also Stephen Feldman & Kent Wilson, "The Value of Interpersonal Skills in Lawyering," *Law & Human Behavior* 5 (1981): 311, finding that lawyers' interpersonal skills affected clients' perceptions of competence more than the lawyers' actual competence.

responding is the best plan in particular circumstances.

There is a generally accepted, default structure for an initial lawyer client interview. It's consistent with the structure recommended for a doctor patient interview (and other professional service providers/consultants). Descriptions vary somewhat in their categorizations of parts of the structure, but it's fair to say that a recommended lawyer-client interview contains most or all of the following activities, more or less grouped in three stages, and in *roughly* this order within each stage.

Early stages of the interview

- (1) Ice breaker and early greetings, introductions
- (2) Agenda setting
- (3) Brief identification of the type or nature of the problem
- (4) Confidentiality and maybe fees

Main stages - the heart of the interview

- (5) Client narrative – client's telling of facts and circumstances motivating the visit
- (6) Lawyer's review and clarification of client's narrative
- (7) Review and discussion of goals, interests, values, and constraints

Closing stages of the interview

- (8) Agreement regarding next steps, including retention and fees, if not addressed earlier

The balance of this chapter articulates strategies and skills to enhance your effectiveness at each stage. These are in service of client-centered or collaborative lawyering, less applicable to authoritarian lawyering. Or so it seems. However, research supports the idea that some skills are indeed "one size fits all" – just plain more efficient and effective even for lawyers whose approach will be entirely directive.

What strategies and skills when? What exactly are the best lawyers doing all along or at each stage, and how will they do it?

Essential and All the Way Through

Body Basics

Across a variety of discipline, medicine, law criminal justice, sales, financial advising (and no doubt more), interviewing and counseling texts and articles recommend that doctors, lawyers police detectives, salespeople, financial brokers adopt the “SOLER” body language when meeting with clients, witnesses, customers and colleagues. They also recommend attentiveness to the body language and facial expression of the other in the conversation.

Client Science describes SOLER in Chapter 7, “Choreography of Counsel,” but a précis version is worth restating here. The SOLER acronym stands for **S**quare, **O**pen, **L**eaning, **E**ye Contact and **R**elaxed. To elaborate within the context of the initial interview meeting, lawyers should face the client squarely – head on. Make sure your body posture is open: no crossed arms in particular (and tightly crossed legs probably isn’t a good idea either). Open body posture is interpreted as openness in attitude, receptiveness. Believe it or not, the interpretation is accurate.¹³ Research indicates that when people adopt open body posture they in fact listen better and absorb more information. Leaning slightly forward and establishing eye contact is a sign of attention and engagement. (Note that in some cultures, sustained eye contact is uncomfortable. If you see this, do respect this and shift your gaze.) A relaxed body – no hunched tense shoulders, no jiggling - reflects a calm and present mind, and can help relax the client.

In fact, research establishes that when an interviewer “adopts” SOLER, the other feels greater rapport, trust and comfort.¹⁴

My advice is to start becoming more aware of body posture and language, in you and in others. Is your client’s foot moving restlessly? That may mean his impulse is to run – he’s terribly uncomfortable. Are your client’s arms crossed defensively? Does she feel accused?

¹³ *Client Science* at 224.

¹⁴ Gerard Egan, *You & Me: The Skills of Communicating and Relating to Others* (Brooks/Cole Publishing Company, 1977), 114-116, cited in Cochran, DiPippa, and Peters, *supra* note 7 at 29-30.

Mirrors: Of Vision and Vocals

Mirroring describes the fact that most people of normal social intelligence unconsciously mirror each other's body language (as well as vocal patterns). It's also true that our emotional states can be driven by the physical. If you cross your arms, tense your muscles, you will begin to feel emotional tension as well. The opposite is true, as yoga instructors, actors, and psychologists know. Take a deep breath, relax your muscles and you will start to feel more emotionally relaxed. Put mirroring and physiology of emotions together, and SOLER can be contagious. Your open, engaged, and relaxed physical language can infect your client, causing him or her to feel more positive within the interaction. Not surprising, we've added to social rapport and trust.

The benefits of mirroring extend to voice and vocal patterns. If your speech pattern tends toward monotonic and low key, and you are meeting with a client who speaks in an animated way, you might deliberately vary pitch and speed. (This topic is covered in more depth in *Client Science*, Chapter 6, "Choices in Voice.") With a slow, precise client, the naturally faster more expressive lawyer is wise to adjust in that direction. Again, for most of us, this will tend to happen naturally over time. But, given that early impressions matter, and you'd like to establish confidence from the beginning of the meeting, it's wise to be attuned. You need not become an impersonator. Such efforts would likely fail and be read as insincerity or mimicry. It's sufficient to shift within your own range, but in the direction of your client.

Finally, this idea extends to language and word choice, to a certain degree. It's important that your language remains professional. Your language will also impact the client's confidence in your lawyering competence. Again, within this range, a variety of words are available to explain concepts, register understanding, and ask questions, even for chitchat. Choose mindfully: how does your client speak? Does he use the language of an engineer, an artist, a weekend sports fan? Can you incorporate some of the client's language into your own?

Observing as Listening, and Always Listening

How is listening an essential skill for the *entire* initial meeting? The lawyer must talk too. If we define listening broadly, as listening with the eye, the mind, the heart and the ear, then it's fair to say the lawyer should be listening during the entire interaction, even while talking. I ask that you think of listening as deeper and more active than mere aural or visual observation. Listening involves seeking to understand the client's meaning and its significance for him.

The primary challenge or barrier to skilled listening is internal. It's our internal voice, the voice of our attention, which may be preoccupied with other matters. When focused on the client's words, our intellect may direct that attention toward analyzing, questioning, and seeking an analytical or factual answer. Thus, when the client states that the EEOC sent him something about sexual harassment, your attention's voice may start to wonder: *How many employees are in this business? Wasn't the supervisor a woman, or was this a lateral colleague? Does this company post its sexual harassment policies and provide easy access for reporting?..... This incident doesn't sound so bad. Does the claimant have any other psychological issues, some hyper-sensitivity?"*

All of these are legitimate thoughts. However, your mind's voice prevents you from noticing nuances in the way the client tells the story, clues to what matters most to him. If you were really listening, you would notice the client's flushed face, the tone in his voice whenever he mentions the alleged harasser. An outsider watching a video recording might notice his defensiveness and the fact that he used the strong word "humiliate" twice within a paragraph. Would that internal mind's analysis cause the lawyer to miss it?

Good listening is mindful listening, focused on the client, and without the lawyer's imposed direction or purpose. The mindful listener is acutely aware of what he perceives, but does not direct or judge it. An agenda, or hypothesis – a preconceived notion of what we are listening for - makes us blind or deaf to other unanticipated themes and information.

When the lawyer is talking, can she still be listening? Yes, though it is harder. Even while talking, you can continue to be mindful and observe

the client's physical responses. What caused your formerly open and relaxed client to cross his arms across his chest? Did you see the corners of his mouth drop, or her raised eyebrows and wide eyes of surprise? Respond, pause, watch your words register on your client's face before continuing. Maybe shift your vocal patterns or word choice. Ask about responses you observe.

Active, Responsive, and Expressive Listening

Many human resource department seminars and much literature are dedicated to the topic of "active listening." At a fundamental level, all good listening is active in that it is mindful and engaged. If you are entirely focused on the client's meaning, listening with full emotional as well as factual radar, that's active. So, one might say that good listening is active listening, and active listening is good.

Some articles and training programs use the term "active listening" to describe obvious discernible listener responses, often in the form of verbal interjections or interventions. Their purpose is to communicate to the speaker that the listener has, in fact, listened and understood the speaker's message and its meaning. You may be leaning forward (full SOLER), all ears, and hear my dramatic story about my son's automobile accident, serious injuries, and agonizing recovery. But I don't necessarily feel that you understand just how wrenching it was for the entire family without some response from you, my listener.

The lawyer-listener's responses might be entirely non-verbal, or verbal. He might purse his lips, wince, frown, smile, wince again, look concerned, emit an audible sigh, as he hears the story, and he may adjust hand and body postures consistent with the emotions expressed as the story is told. That may be enough for the client to feel that his narrative and its full import have registered in the lawyer: he gets it. I'd call that expressive, responsive, and non-verbal.

Often, it's helpful and more effective to respond verbally. Some texts and articles use the term "active listening" to mean verbal responses in the form of paraphrase or some reflection back of the factual or emotional content of what was said. Other sources consider only non-contentful but encouraging responses – "yes, go on" – "and so" – along with nods and other receptive signals to be active listening and "reflective listening" to

require a verbal reflection back of factual and/or emotional content in what was said. This chapter and I are agnostic on the terminology. The point is that a listener can respond in a variety of ways to communicate that he or she is “with the client” and fully understands and appreciates the client’s message and its meaning. Here’s a list of actions, all active, all responsive, some reflective:

- All non-verbal/inaudible: nodding, facial expressions, body language
- No real words, but audible: sighs, ahhh, mmhmm, oh.....
- Encouragers: “yes, go on” ,...“and so” ... that’s okay” ... “I see”
- Completers: And so you didn’t expect that it.....? That’s why you wanted to.....? Well, it’s a big problem because...
- Reflecting content, but short: “It was a complicated arrangement.”
- Reflecting emotion, but short: “What a mess!” “Ouch, that was hurtful.”
- Reflecting content, substantial restatement: Client: “The boss was an unfair, insensitive ogre to others in the office too. We all hated him.” Lawyer: “Hmmm.....He was an ogre and everyone in the office hated him.”
- Reflecting content, longer paraphrastic/interpretative: “In other words, the supervisor may indeed have humiliated her, but he did that to just about everyone so you’re saying it wasn’t about gender.”
- Reflecting emotion, restatement: Client: “It was incredibly painful to watch this happen and feel helpless and unable to stop it.” Lawyer: I understand that you felt pained and helpless against it.”
- Reflecting emotion, paraphrastic/interpretative: “I can hear that you were shocked by this.¹⁵ It came out of the blue, and it seemed like the others were making you the scapegoat. It’s profoundly upsetting when people you trusted start to turn on you.”

¹⁵ Note that: “I hear you saying...” or “If I understand it.....are introductory phrases typically associated with active or reflective listening. To some of us, they start to sound like chalk on a black board, entirely annoying. Even if your client is not-so-sensitive to these phrasings, it is good not to repeat the same one, time after time. Lawyers are well advised to come up with a variety of such phrases, or to consider doing away with the introduction. You might just start with: “So, this was really a shock” or “wow, what a terrible twist, of course it threw you off.”

Which is better? Does it matter? What are the downsides and the upsides of each?

Evaluating the not-so-verbal

The advantage of not-so-verbal responses is that they don't risk directing the client's story. Generally, an encourager (while verbal) is an invitation for the client to keep going, where he might hesitate or seem uncertain. It doesn't determine the direction in which the client takes his next thoughts or words. A neutral completer can operate the same way when it doesn't try to turn or stop the client's story. The downside to engaged but silent or largely non-verbal is that the client can't read your mind, doesn't know if you're internally disapproving or skeptical or thinking about your dinner plans.

Weighing the choice of more words

When the lawyer listens and verbally reflects information received or emotion perceived, it enables the client to know that his lawyer really DOES understand the story and its impact.

A downside risk is that the lawyer might sound wooden or insincere. The best advice is to *be* sincere: genuinely interested in empathizing, understanding and feeling from your client's perspective. Whether a legal claim exists is as *irrelevant* to the lawyer's listening as is the reliability of the client's perception and memory. *Neither matters within the realm of listening.*

Some types of paraphrasing can sound rote: "So, what I hear you saying is...." "If I understand what you're saying...." I suggest cultivating a wider range of introductory phrases or skipping them altogether and moving to: "Well, then your boss didn't pay attention and couldn't have known what you were accomplishing day-to-day." To reflect the emotion, just start with an accurate observation: "Wow, it doesn't seem fair or right that he can evaluate you without even asking people about your contribution to that major project." And by the way, forcing yourself to articulate what you heard as the client's description of events and emotional response will focus your attention on the client's experience. That will resonate, for both of you.

The more important downside risk is that the lawyer's responsive restatement or paraphrase of the client's expression may then direct the client's subsequent words. Imagine that a corporate VP client has told the company lawyer of the plant manager who criticized and teased all employees. The VP bemoaned the plaintiff's "undue sensitivity and EEOC's jump to the conclusion that she was singled out due to gender, age, and race. And now we have to pay the price!" Imagine that the lawyer responds by saying: "So, in your mind, she just couldn't see, or she ignored the fact that this guy was hard on everyone." The VP might reply: "Yes," and go on to talk about how the plaintiff "tended to be in her own little world, maybe because she traveled so much and was rarely in the office." On the other hand, if the lawyer's response is: "It sounds like the price of this is bothering you," the VP might go on to explain the company's precarious financial circumstances, but forego the office back-story.

In the lawyer's effort to listen and reflect, he has unintentionally shaped what he will hear next. This may be a real danger when there's a perceived power or status imbalance. In a study of legal aid clinic practice: lawyers interrupted clients' speech an average of nearly four times as often as clients interrupted lawyers, and 94% of lawyers' utterances served to exercise control over the topic.¹⁶ Some interactive, active listening tended to narrow the focus, frustrating the clients, and causing the interviewer to miss client concerns and issues. Researchers noted that lawyers and clients sometimes struggled for topic control. In short, this downside matters, because as discussed further below, getting an undirected client narrative is important.

Thus, good general advice is that when hearing the client's story for the first time, the lawyer should limit listening responses to the non-verbal or less verbal -- short encouragers or completers. The goal is for the client to

¹⁶ Carl J. Hosticka, "We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality," *Social Problems* 26, no. 5 (June 1979). See also Gay Gellhorn, "Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews," *Clinical Law Review* 4 (Spring, 1998):321. For a review of empirical studies at the time, see Gay Gellhorn, Lynne Robins, and Pat Roth, "Law and Language: An Interdisciplinary Study of Client Interviews," 1 *Clinical Law Review* 1 (Fall, 1994): 245.

know that you are listening intently, but to avoid impacting the flow of his narrative. This insures that the range of client concerns will come out. It prevents the lawyer's assumptions and priorities from impacting what is heard. And it also eliminates lawyer-client power struggles. Later in the interview, after the story has been told, more verbal reflective listening is recommended, as it communicates the lawyer's engagement and understanding. This helps strengthen client trust.

I suggest two qualifiers to this general advice. First, when a client seems to be repeating and re-emphasizing certain statements or themes, this may signal the client's need to feel the lawyer understands. Or, the client may fear disapproval and seek confirmation of the lawyer's acceptance. If so, it makes sense to become verbally responsive by paraphrasing factual content and reflecting back the emotional message. Imagine a potential client faced with threat of termination, telling you the story of what happened at work. She has repeatedly emphasized her boss' inattention and unfairness; she keeps providing more examples on that theme. You might respond by saying:

Based on what you've said, it seems your boss just really wasn't bothering to notice what you were doing day to day.

You might also reflect the impact or emotion:

It was not just frustrating, it was unfair and unjust that your boss would slam you with a mediocre evaluation based upon what someone else reported, without even asking about your major contribution to that successful marketing initiative.

These reflective statements serve to ease client anxiety and emotion (and reduce repetition) by non-judgmentally acknowledging her reality.

Other places where reflective statements do no harm are at the client's natural stopping points within his initial narrative. Sometimes, the client runs out of steam on a topic, or seems a bit lost in the telling. Lawyers are used to talking at some length. Many clients are not. And, a client may get sidetracked on a particular theme – his unsatisfactory dealings with the agency. He looks up: "So now where was I? What else do I need to go over?" At these junctures, the lawyer is wise to provide a summary of both the content – what happened or what legal challenge the client has

described – and the impact – what reactions and feelings the client has expressed. The lawyer might say: “Here is what I understand so far…… do I have that right? Have I missed anything?” This can be extremely helpful, as it is a good opportunity for the lawyer to learn whether his understanding is correct. Even though we can recall facts, we don’t necessarily perceive linkages, emphasis, or priority the client intended. The act of restating the summary is validating. Done skillfully, it’s an act of respect the client will appreciate. And, the lawyer’s direction to another topic, perhaps one raised early on but lost, can be entirely constructive.

Questioning the absence of questions?

Suffice it to say here that early stage questioning should be broad and open an invitation to the client’s story. Because of the importance of an initial unimpeded client narrative, this chapter defers suggestions for questioning techniques to later interview stages at which the lawyer’s questions should be more prevalent.

Stages of the Interview

1. Introductions, early greetings, ice breakers, and recording

Rapport and relationship begins here, or such is the intent. When meeting someone, anyone, for the first time, it’s just natural and polite to begin with self-introductions. If I don’t know your name, then you are a stranger – and we’re taught not to talk with strangers. “Hello, my name is” comes pre-printed on nametags to encourage strangers to converse at formal gatherings. You might initially state your first name only, or first and last name, or the formal designation Mr. Ms. or Mrs. followed by your last name. You will develop your own style, but should also consider the expectations and preferences of the new potential client.

Even as to this simple act, there are choices:

- You might introduce yourself with your first name only and then let the client introduce himself. “Hello, I’m Pat. And you are….?” The client can then introduce himself in the way he or she wants to be addressed, whether it’s “Dr. Smith” or simply “Chris”.

- One problem with offering your own first name only is that a client who prefers more formality may feel awkward asserting that in his response.
- You might say, “Hello, I’m Pat Jones, you must be Mr. Smith.” Or, “Hello Mr. Smith [if you know that], I’m Pat Jones.” Using your own first and last name seems neutral and somewhat more formal than first name only, but hardly an assertion of lofty status.
- With an older or more formally dressed client, you might begin with “Mr. Smith” as a mark of respect. Absent his correction to first name, you would then refer to yourself as Mr., Ms., or Mrs. Whatever-your-last-name.
- The hearty handshake, big smile, dressed in jeans recording artist client is likely to be comfortable with first names from the start.

The general advice is to stay in neutral, and err on the side of somewhat more formal expression of respect toward your client. And of course, then take your cue from the client.

About that Ice

Social convention generally makes us comfortable with the idea of starting a conversation with what’s known as “ice breakers” or informal chitchat. Different cultures as well as different personalities within each culture tend to value this more than others. For example, in the southern U.S. states, the length of pleasantries and banter might make a northerner impatient. Regional stereotypes aside, we all know folks who just want to “get down to business” and others who tend toward social prologue.

When meeting a client for the first time – particularly where relationship and trust will be important – I recommend taking a bit of time and effort for conversation on commonalities outside of the legal problem. Neutral topics are best. So, if you know that a neighbor referred you, you might ask how the client knows your neighbor. Despite the cliché, weather or traffic work well, religion and politics are best avoided unless you both have matching political campaign buttons, or sit in adjacent church pews.

Do pay attention to small details that suggest a link or shared interest. Is the client carrying a tote bag with a symphony logo? “I notice your bag. Are you a symphony goer, or supporter?” Follow up with *genuine, not fake* curiosity. “Oh, so your teenager is the symphony goer in the family. Is he at Hill High School? I’ve heard they have a great music department.” And so on. It’s a good idea for your office to contain indicia of your own interests, whether baseball or ballet. These enable the client to spot commonalities as well.

Part of establishing relationship is attentiveness to the other’s physical comfort. Thus, it is wise and kind to inquire about whether the client would like coffee, water, etc. Even if that’s a task generally performed by the receptionist, it is wise to check: “Did they remember to offer you some water or a soft drink out there? If not, I’ll be happy to.” Even if the weather and parking seem too clichéd to raise, you can always talk about coffee. “Ahh.... I’m a coffee drinker too, but I wish I could offer you something better than that powdered creamer.” Or, “yes, water is healthiest, how many glasses a day are we supposed to drink now? I always forget.”

Two important caveats:

- First, if you *hate* chitchat because it seems so fake, there’s no need to take on a ten-minute script. And if you are just going through the motions, checking off chitchat on your checklist, that will be obvious. For the not-naturally chatty, two pieces of advice: *be genuinely curious* – what little item could you learn about this client and she about you in this minute that you would not know otherwise? And it’s okay to keep it short before turning to the business at hand.
- Second, never force chitchat on a client who’s impatient, anxious, and entirely focused on talking about what brought him in. Imagine the client has said: “Hello, Ms. Jones, I really need your help with this subpoena and this thing the EEOC is saying my company did. I’ve been worried sick about it!” Would you really say: “Oh Mr. Smith, before we get to that may I say, I like your tie with the symphony logo, are you a subscriber?” Now, that would be foolish and bad practice! Again, take the client’s lead.

For the most part, ice-breakers and chit chat *are* helpful first steps toward building trust and rapport. The potential client may be uncomfortable. He or she is soon to confide in you regarding a legal problem that is impacting personal, business, or professional spheres. If it weren't important to him, the client wouldn't be in your office. It's nice to have an opportunity to converse as human beings, to get used to speech patterns, physical presence, voice, and other human characteristics.

At a minimum, some early ice breaking or chit chat can provide a helpful transition before focusing on substance. In any new interaction, it just takes people a while to orient and process. Most of us need a transition. All too often, a professor provides a piece of information at the beginning of a class period and, a few minutes later, fields a student question seeking precisely the information conveyed. It was too early for processing; people weren't focused yet.

Listen and Record First Words

One final piece of advice on this topic: don't let chit-chat render you deaf. Research conducted in physician-patient interviews establishes that the first words uttered by the patient are often keys to what is troubling them¹⁷. Thus medical residents and physicians are now advised to scribble a note about the very first words out of the patient's mouth. Research also suggests the client's first words upon meeting with his lawyer tend to be significant, revealing emotions, worries, and the meaning or impact of his legal problem for the client. "I've been waiting so long for this day." "It's been so hard to get here. Finally, we're going to get what's ours." "Hello Ms. [Attorney] Smith, I hope you're ready to handle a pressure-cooker of a problem," may come out within initial chit-chat phase.

¹⁷ Howard B. Beckman, M.D. and Richard M. Frankel, PhD, "The Effect of Physician Behavior on the Collection of Data," *Annals of Internal Medicine* 101(1984): 692.

I agree with the doctors' prescription – make it a habit to write down your client's first words or early phrases. They may be telling, and worthy of a later look.¹⁸

2. Agenda setting

Just as having a structure in mind for the interview helps to orient the lawyer, awareness of that structure can help orient the client. Most people are more comfortable knowing what's ahead. If the client had a topic or a concern he wants to be addressed, he will take comfort when it is put on the agenda. Finally, and not insignificantly, when the lawyer states, "I have an informal agenda" or "here's an order I suggest for this meeting," it communicates that he bothered to prepare. Whether the lawyer uses more formal language - "an agenda" - or more casual language - "a couple of things we should cover" - will depend upon the client, of course.

Consistent with a collaborative lawyering approach, I suggest referencing an agenda or structure, and asking the client whether the suggested order makes sense, and whether he has anything to add. It's such a small item, but it's an act of respect that honors transparency and shares control over the direction of the meeting. In most instances, the client will be content with your proposed agenda. But if he does raise an additional topic, or ask that an item come first, you've learned of its importance to him.

A perfectly sound agenda to propose would be that of the interview structure set out in this chapter: problem identification, with a précis of the client's goals, if possible, confidentiality and privilege, fees (these may be referenced later, as discussed below), client narrative, clarification and review of the client narrative, review and discussion of client goals and interests and constraints, next steps.

Of course, you would use different language when proposing the agenda to your client. For example, you might say that you'd like him first to quickly identify the nature of the problem or request that brought him to the office and what he hopes to accomplish. Next, before delving into the problem, you will want to discuss attorney-client confidentiality and privilege. You can also describe your fee structure at that time, or wait until the end of the meeting. Then, you'll just ask him to talk – to tell you

¹⁸ See Gellhorn, *supra* note 15 at 347.

what's going on or what has happened, and what he sees as the problem. After that, you'll want to go over what you heard, perhaps ask clarifying questions, get some details. At that point, you'll have some indication of whether you can be of service. You will each have to decide whether you'll be comfortable working together. If so, you'll have to agree on the fee arrangement and what the next steps will be.

The above admittedly reads like a script. Don't memorize it! You should choose your own words, and adapt them to the client and the circumstances. The idea is to review the order of things.

It should be noted that even this suggested order might be amended, based upon your preference. It can be awkward to ask the client to give you a brief overview – just the nature of the problem, and then stop while you explain confidentiality issues. Some clients don't stop, and it seems terribly controlling to insist on it. On the other hand, it can be helpful to know something about the client's legal problem before talking about confidentiality.¹⁹

Many law offices and clinics use an intake form, on paper or on a website, in which prospective clients write a sentence or two about the nature of the legal problem or request and the parties involved. In other offices, an assistant or intern asks for that information over the telephone and conveys it to the lawyer before the initial client interview. If that's the case, then starting your agenda with the attorney-client confidentiality may be the better practice.

3. Brief identification of the problem and the client's goals

¹⁹ You may wonder how knowing something about the legal problem matters for attorney client confidentiality. Some sense of whether the prospective client is charged with a crime or serious civil violation may make recitations of exceptions to the privilege more important. Also, early intake information can alert you to possible conflicts and other tricky issues. For example, what if the prospective client wants to blow the whistle against environmental practices in a corporation you represent? You'll want to inform him up front that you can't undertake the representation. A corporate officer accused of certain types misconduct outside the firm should be advised to seek different counsel. Your political ties may make a certain representation awkward. It can be helpful to know these things up front.

About early problem identification by the client: it's nice if you can get it, but don't try too hard. The client's description of the problem he brings and of his goals is helpful to have in mind as you listen to his full narrative. Imagine that the client tells you up front: "My company has been accused of sexual harassment by the EEOC but I fired the guy who was supposed to have done it. He was a jerk to everyone, not just the women. We are short staffed, operating on the margin, and heading into a busy season. I just can't afford to be tied up with this." You now have some guideposts as you listen, and you can begin to think of options that will satisfy his interests.

On the other hand, it will all come out eventually. It's not worth stopping and controlling the client who says, "Well, I hired this manager just a year or so ago, and I was traveling a bunch so I didn't realize for a while what a pain he was for everybody...." Relieved, nervous, or excited, this client is "off to the races." Just listen.

Recalling research that suggests a client's first spoken words at the meeting often offer valuable insight for the lawyer, this may be another moment for note-taking. The question becomes, which "first words?" Sometimes, words in perfunctory initial chit chat are just that. For some clients, the first noteworthy words occur after that, when the conversation first turns to the legal matter giving rise to the meeting. In response to the interviewing lawyer's question: "How can I help you?" or "What brings you here today?", the client might respond: "I am really worried my boss will hate me for this..." or, "my wife says this is just about money but I think they are spiteful and jealous." Such statements are clues. One client's relationship with his boss is meaningful and ongoing, possibly complex: the client may feel conflicted between loyalty to his supervisor and a principle or rule. The other client's wife may be an important source of conflict, greed or different constraint; spite and jealousy are strong forces. These themes are bound to recur or to underlie the narrative, and exert influence on the client's perceptions, meaning and decision-making. As you hear the client's statement, do be attuned, listen for them, and make note of the words.

4. Confidentiality and the Attorney Client Privilege, and Maybe Fees

A central purpose of the attorney's broad obligation to maintain client confidentiality and of the attorney-client privilege is to encourage client candor. Presumably, the client will feel comfortable conveying full information because the lawyer will maintain its confidentiality. If the client is uninformed regarding the lawyer's confidentiality obligation, its purpose is not fully served – the client doesn't know that information conveyed is secure. In fact, not everyone is aware of the lawyer's confidentiality obligation. And those who may have heard of "lawyer-client confidence" and the "attorney-client privilege" will not necessarily know their breadth or their exceptions.

Reviewing the Obligation, Rules, and Exceptions

By way of review for lawyers and law students, The Restatement (Third) of The Law Governing Lawyers sets out the scope of the attorney-client privilege in §68:

Except as otherwise provided in this Restatement, the attorney-client privilege may be invoked as provided in §86 with respect to:

- (1) a communication;
- (2) made between privileged persons
- (3) in confidence;
- (4) for the purpose of obtaining or providing legal assistance for the client.

[§69 - §79 provide further elaboration.]

The attorney's obligation to maintain client confidences, set forth in Rule 1.6 of the ABA Model Rules of Professional Conduct, is broader than the evidentiary law governing attorney-client privilege.

ABA Model Rule 1.6 applies to clients and prospective clients who consult with a lawyer regarding legal advice and representation, and requires the lawyer to keep confidential the:

- Client's or prospective client's identity, nature of the matter or advice sought, and terms of representation
- All information and facts communicated by the client or prospective client (subject to limited exceptions)
- Information learned from third parties relating to the representation; and
- Information or advice provided to the client or prospective client.

Lawyers working in a firm or organization are obligated to insure that other attorneys and staff maintain client confidentiality. For example, no one should be speaking about the client or the matter of his representation in elevators or to friends and family outside of the office. Measures should be taken to keep client documents away from public view or the view of other clients who enter the office.

The Model Rule 1.6 (b) lists a set of exceptions to privilege and confidentiality obligations, set forth below in the language of the Rule.

These permit the lawyer to disclose information necessary

- (1) to prevent reasonably certain death or serious bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's service.
- (4) to secure legal advice about the lawyer's compliance with these rules
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or court order.

In addition, under Model Rule 3.3: Candor Toward the Tribunal, a lawyer cannot "offer evidence the lawyer knows to be false." If the lawyer later learns that material and false evidence has been offered, the lawyer "shall take remedial measures, including if necessary, disclosure to the tribunal." In addition, when representing a client in an adjudicative proceeding, the lawyer who knows that a person intends to engage or is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Largely parallel to the Model Rules, The Restatement also sets forth a general obligation to maintain confidential client information, and provides for exceptions that permit disclosure when necessary for a lawyer's self-defense or in a compensation dispute, or when the lawyer believes "its use or disclosure is necessary to prevent reasonably certain

death or serious bodily harm.” However, The Restatement §66 provides more guidance as to what a lawyer should do once he learns of impending harm to another:

.....the lawyer must, if feasible, make a good faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent the harm and advise the client of the lawyer’s ability to use or disclose information as provided in this Section and the consequences thereof.

Do note that various states’ rules of professional conduct for lawyers may articulate the lawyers’ confidentiality obligation differently; some expand the lawyers’ disclosure permission or obligation. Lawyers (and law students) should become familiar with the rules in their state.

Paper as prudent and necessary but not sufficient

As a matter of good practice, it just makes sense to provide all clients with written descriptions of the attorney’s confidentiality obligations and their exceptions. These might be written into an easily readable document mailed or emailed to a prospective client before a scheduled meeting, provided by an administrative assistant or by the lawyer when the prospective client arrives, and displayed in a reception area and on a law firm’s or attorney’s website.

In a large law firm catering to sophisticated corporate clients, such steps may be unnecessary. Still, it is difficult to argue against a clickable reference to client confidentiality policies on the firm’s website and materials in a reception area.²⁰

Assume that an administrative assistant has given a new prospective client a printed document describing attorney-client confidentiality before an initial meeting. Can the attorney safely assume he will have read or understood it? While a corporate client representative might have some general awareness, will she necessarily realize that the lawyer’s confidentiality obligation applies to the corporation and not the individual? Will the corporate representative understand that ongoing

²⁰ It is of course true that the newer associate is not going to set the firm’s policies or draft the client confidentiality document.

toxic chemical releases might fall within an exception to the rule? When an insurance customer is provided with a summary of an insurance policy before meeting with an insurance broker, is that sufficient for client understanding of its terms?

To insure that the client IS informed of lawyer-client confidentiality within the initial meeting, at minimum, it makes sense for the lawyer to introduce the topic. This is best done by “normalizing” – using language to communicate that this is a normal agenda item in an initial client meeting. For example, you might say:

Make confidentiality an early agenda topic. At that point, ask: “Are you familiar with the lawyer’s obligation to maintain client confidences and where it comes from?” Or, “did you have a chance to read the sheet regarding my obligation of confidentiality to you? Do you have any questions?”

If the client responds by saying, in effect, that he is fully familiar with the idea of lawyer-client confidentiality, he has no need for or interest in your spending time on the topic, respect that. And be sure he has received a written document or, at minimum, knows that it exists on the firm’s website.

For the client who is more receptive, you might briefly summarize the essentials of lawyer-client confidentiality. For example, you might say:

I understand that my assistant handed you the sheet on lawyer-client confidentiality. I wanted to refer to it briefly to emphasize its purpose: that you feel comfortable knowing that, as a lawyer, I am generally obligated to maintain the confidentiality of the information you provide.

Or, you might choose to invoke the rules, and say:

The lawyer’s Model Rules of Professional Conduct generally require that a lawyer maintain the confidentiality of information provided by a client, and that applies to a prospective client in an initial consultation like this one, even if you decide not to retain me as counsel. Do you have any questions or concerns about this?

Though the language should be your own, ending with an invitation for questions seems an obvious good practice.

A Ruling on Exceptions?

Research suggests that an attorney who does not mention exceptions when explaining attorney-client confidentiality follows the majority²¹ but, I would argue, not best practice. It's simply not accurate to say "EVERYTHING you [client] say in the meeting is privileged and confidential." And it's unwise to be knowingly inaccurate when speaking with a client or anyone else. Thus, at minimum, I suggest the lawyer say, in words or in substance:

In general, what a client or a potential client says when speaking with his attorney is confidential and protected by the attorney-client privilege. There are some exceptions, which I would be glad to describe and discuss with you.

If a document explaining confidentiality was previously provided, a reference to that document and the exceptions it describes will be easy. In other words, at minimum, mention that there ARE exceptions. You might go on to explain: "There are some exceptions that have to do with activity that would harm others, or perjury, or future conflicts with a lawyer. I would be glad to discuss these in more detail, if you'd like, or answer any questions."

Why do lawyers' fail entirely or scrimp on describing exceptions to confidentiality? The obvious answer is that the exceptions are off-putting and confusing. It's awkward to say to a potential client: "Well, if you were to tell me that you're going to cause serious injury to someone, I would have to disclose that." It sounds as if you think this person might be a criminal. And before the client has decided whether or not to retain you, it sounds odd to talk about future fee disputes or professional misconduct.²²

²¹ Fred C. Zacharias, "Rethinking Confidentiality," *Iowa law Review* 74 (1989): 351, cited and discussed in Cochran, DiPippa, and Peters, *supra* note 7 at 69.

²² Leaving awkwardness aside, particularly (but not only) in criminal defense practice, lawyers may be concerned that listing exceptions will encourage the client to lie or to withhold information to avoid the exceptions. There is no glib answer to this. Lawyers

On the other hand, lawyer who does describe the scope of attorney-client confidentiality and its exceptions in plain language demonstrates commitment to communicating accurately and completely regarding legal issues. This warrants client trust and respect. Normalizing is particularly important here: you don't want the client to feel insulted by your description of the exceptions. Thus, do state up front that it is your practice to fully explain the rules concerning lawyer-client confidentiality and its exceptions to all clients at this stage in an initial meeting.

Mitigating Awkwardness and Incongruity

As discussed in *Client Science* (Chapters 6 through 9), body language, voice and gesture impact the client's perception and feelings of trust and rapport. Chapter 9, "Channel Navigation Notes," describes a channel of space between lawyer and client seated at a conference table or desk, and a preference for placing issues jarring to the lawyer-client relationship outside of that channel. Chapter 8, "A Gesture to Clarity," reviews the way that gesture and hand motions can make an idea seem more concrete, immediate, and important, or more vague, unlikely, and inconsequential. Applied to the specific challenge of explaining exceptions to attorney-client confidentiality, *Client Science* yields the following advice:

- Use the third-person. Don't say: "If you were to inform me of your plan to assassinate your business partner..." Instead, explain: "If a potential client was meeting with my partner, the lawyer in the next office, and told him of his plan to rob a bank because of what the lawyer told him of bankruptcy laws, that would be a problem and he would have to disclose it."
- Avoid direct eye contact when speaking of possible client misdeeds; make your focus a bit indirect or move back and widen your gaze.

neither seek to entrap clients nor to facilitate activity harmful to others. In some initial client meetings, then, perhaps reliance upon a written document and asking whether the client has questions is a reasonable compromise. Lawyers must be guided by both conscience and professional obligations here.

- Body language matters. Use a “wave away” arm gesture when referencing the potential bank robber meeting with your law partner.
- When speaking of the exceptions, try not to direct your hand motions or your gaze inside that channel of space between lawyer and client.

Unavoidable Fees, Maybe Now or Later

ABA Model Rule of Professional Conduct 1.5 (b) provides:

The scope of representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

The next section, (c), permitting contingency fee arrangements, provides:

A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined...”

Notwithstanding the distinction ABA’s “preferring” a written record of other fee arrangements and mandating it for contingency fees, putting any fee agreement in writing is CLEARLY a best practice. Most attorney-client disputes involve fees, and in most of these, there was no written agreement.²³ Disputes arise from misunderstandings or, at the least, different understandings as to the fee arrangements. Given that clarity regarding fees is fair to all and avoids future disputes, providing a written fee schedule and description of different fee arrangements just makes sense.

Many of us are uncomfortable discussing money in general, and particularly uncomfortable discussing what we are to be paid for our services. Moreover, the topic of fees is awkward in an introductory

²³ Cochran, DiPippa, and Peters, *supra* note 7 at 70, fn. 19.

meeting where trust and rapport are under construction. Thus, it may seem strange to discuss fees early – before hearing client’s narrative or understanding his goals - when it is not clear what value the lawyer will provide.

On the other hand, if the initial consultation is going to be billed, the lawyer *must* state this up front. (The lawyer might refer to the written document on this point, in which the consultation fee should be prominently mentioned.)

This would seem to be a matter of contract!

The question remains: assuming the initial consultation will be without charge, when and how should the attorney raise the issue of fees? Should this be done early, in initial phase of a client interview, or later in connection with retention and next steps? Is it better to wait until the end, by which time the client will be better able to judge that the lawyer will be worth the price of his services. Or is it better to discuss fees early, to avoid client concern and uncertainty on the issue as the meeting proceeds?

Some practical advice: by providing a document that outlines a range of fees and other costs that might apply, the attorney HAS raised the issue early, indeed, before the meeting.

As the reader is aware, this chapter generally recommends that an attorney begin by setting forth an informal agenda for the initial client meeting: a statement of the topics and sequence normally followed. It’s best to “normalize” by noting that this is the agenda or order you usually follow in a meeting such as this. That informal agenda should include the topic of fees, as something that should be discussed. When stating the agenda, the attorney can deliberately place fees toward the beginning. He might say:

After I get a quick sense of the overview or type of problem, it’s my practice to spend a few moments discussing lawyer-client confidentiality and fees. Then, I’ll ask you just to tell me in your own words, about the problem or the question that brought you here....

Or, the attorney could state the agenda differently, beginning with an overview statement, then confidentiality, then the client's narrative. He might conclude the agenda, as follows:

After I've really heard what brought you here, the whole story, I will undoubtedly want to go over it, and ask you some specific questions about details. We'll then want to talk about your overall goals – to know what's important for you. Finally, we'll want to decide if we can work together, whether you'd like to retain me as your attorney, and of course, what the fee arrangements will be. Then we'll agree upon next steps for both of us, moving forward.

Finally, the option that seems most “collaborative” is for the lawyer to name the topic and invite the client to state when he would prefer to discuss it. So, after referencing attorney-client confidentiality as a topic on the agenda, the attorney might say:

Another topic to be addressed in a first meeting with a prospective client is that of fee arrangements. I'm happy to wait and discuss that in more detail at the end of this meeting. Or, if you'd prefer, I'd be happy to answer any fee questions up front, before we start to talk about the question or the problem that brought you here.

With this option, the lawyer invites the client to determine the sequence and thus offers easy permission for a client worried about fees to ask questions early. For others, discussion of fees may make more sense at the end.

For the attorney, it is easier to provide details regarding fee structures after having heard more about the legal problem. Even if fees were discussed earlier, the attorney may be advised to revisit the issue at the end, based upon information learned. Some cases are clearly appropriate for a contingency fee. In others, a partial contingency fee arrangement makes sense. Generic rate information will not answer the question of how much the attorney's representation in a particular matter is likely to cost. Attorneys may work together²⁴ at blended or distinct rates. Expert

²⁴ ABA Model Rule of Professional Conduct, Rule 1.5 (e) provides for a division of fee between lawyers who are not in the same firm only if it is proportional, agreed to by the

witness and consultation costs may or may not be necessary. Hourly rates or flat rates may make sense for certain stages of representation. It's complicated! Ultimately, the fee agreement must be discussed and should be reduced to writing.

5. Client Narrative – Client's Telling of Facts and Circumstances Motivating the Consultation

Uninterrupted Narrative as the Primary Directive

The most important, fundamental, and rarely accomplished best practice is NOT to interrupt your client's first telling of the story – the narrative of facts, circumstances, feelings, understanding, meaning – all of it.

This advice draws in part upon research in the patient-physician context, demonstrating that a physician's interruption - to ask a question, make a statement or complete a patient statement - results in a loss of patient information and reduced accuracy in diagnosis and less effective treatment. In one study that recorded 74 patient office visits,²⁵ the physicians interrupted approximately 52 of 74 patients' opening statement of concerns. And they interrupted quickly – after an average of only 18 seconds. While almost all of patients' uninterrupted opening statements were completed, 1 out of 52 interrupted openings statements were completed. Related research indicates that 94% of all interruptions concluded with the physician gaining control of the conversation. And yet neither patient nor physician returned to discuss the client's topic at the time of the interruption.²⁶ Most significant is the finding that, by interrupting early, the physicians' diagnoses were sometimes premature, as they were developed primarily from the patient's earliest expressed concern.

client, and client agreement is confirmed in writing. See ABA Model Rule of Professional Conduct 1.5 (e) (1)-(3).

²⁵ Beckman, and Frankel, *supra* note 16, 692-696.

²⁶ Richard M. Frankel, "From sentence to sequence: understanding the medical encounter through microinteractional analysis," *Discourse Process* 7 (1984): 135, and R. C. Burack and R.R. Carpenter, "The predictive value of the presenting complaint," *Journal of Family Practice* 16, no. 4 (1983): 749. (Both cited in Beckman and Frankel, *supra* note 16, at 694.)

In the aftermath of a prestigious medical conference in 1991, the “Toronto consensus statement”²⁷ published conference findings and recommendations from research on physicians’ clinical communications and patient health outcomes. The statement highlights findings that patient satisfaction and measured stress are positively affected by expressing their health concerns without interruption.²⁸ The question posed is: “What are the most important things that could be done now to improve clinical communications by doctors?” The consensus statement responds: “Physicians should first encourage patients to discuss their main concerns without interruption or premature closure. This enhances satisfaction and efficacy of the consultation....” In the next paragraph, the statement goes on to note: “Experience also supports the value of learning methods of active listening and empathy.”

While it’s fair to say there have been fewer studies of lawyer and client interaction, these too suggest the rarity of uninterrupted client narrative. Studies of bankruptcy lawyers, legal aid lawyers, and family law practitioners, and law students conducting client interviews found that lawyers took control early and often, and weren’t necessarily interested in the client’s feelings or message.²⁹ For example, in the study of legal aid lawyers, they interrupted an average of 10.4 times per interview, and

²⁷ Michael Simpson, Robert Buckman, Moira Steward, Peter Maguire, Mack Lipkin, Dennis Novack, James Till, “Doctor-patient communication: the Toronto consensus statement,” *BMJ* 303 (30 November 1991).

²⁸ Interestingly, the Toronto consensus statement referenced in note 26 above describes a study in which patients who were not interrupted showed significantly reduced blood pressure, at fn. 26, citing J. E. Orth, W.B. Stiles, L. Scherwitz, D. Hennritus, and C. Valbona, “Patient exposition a provider explanation in routine interviews and hypertensive patients’ blood pressure control,” *Health Psychology* 6, no. 1(1987): 29.

²⁹ See summary Linda F. Smith, “Always Judged – Case Study of an Interview Using Conversation Analysis,” *Clinical Law Review* 10 (2003-2004): 423. Professor Smith’s citations, at fn. 2, include (but are not limited to) Austin Sarat & William L. F. Felstiner, “Lawyering and Legal Consciousness: Law Talking the Divorce Lawyer’s Office,” *Yale Law Journal* 98 (1989): 1663; Austin Sarat & William L. F. Felstiner, “Law and Strategy in the Divorce Lawyer’s Office,” *Law & Society Review* 20 (1986): 93; Bryna Bogoch & Brenda Danet, “Challenge and Control in Lawyer-Client Interactions: A Case Study in an Israeli Legal Aid Office,” *Text* 4 (1984): 249; Carl J. Hosticka, *supra*, note 15; and Gary Neustadter, “When Lawyer and Client Meet: Observations of Interviewing and Counseling Behavior in the Consumer Bankruptcy Law Office,” *Buffalo Law Review* 35 (1986): 177.

more than 94% of the lawyers' interruptions involved taking control of the topic.³⁰

Why? Why is uninterrupted narrative so rare and yet so important? And what are the negative consequences of failure – of narrative interrupted?

Reasons for Rarity

Interruptions are motivated by a myriad of lawyerly impulses, many benign or admirable. The first is curiosity – usually a positive – as a lawyer wants to achieve the same picture or story in his mind as in his client's mind, to completely understand what his client is saying. A second and related motive is to create order, when a client's paragraphs seem to lack sequence or logic or relationship to the story or event. Clients ramble, they "go off on tangents," give too much detail about unimportant things, jumble time frames. They can be difficult to follow. Lawyers ask questions to understand relevance, to determine what happened first, and what is most significant. We may be motivated to learn a client's broader interests and more about the context within which a legal problem arises, as the client tells of certain events. After all, without learning of interest and context, how can we interpret significance or provide helpful advice? And so, we ask questions: "Wait, can you explain your business before you go on?" Or, "Was the accident the reason you didn't finish the assignment?" "How was your sister involved?"

We defend our questions as evidence of interest, of engagement, or as simply required in order to understand the story. The questioner often (mistakenly) believes that his questions lead to greater efficiency by obtaining missing links, clarifying order, reducing lengthy tangents. Yes, our questions DO indicate interest, engagement, and commitment.

In fact, research and experience strongly and rather conclusively establish that uninterrupted narrative is MORE time-efficient. The speaker – the client – constructs his path for telling his story. It may not be the path his listener would have chosen. But, once on his path, every interruption by the listener constitutes a diversion or distraction, requiring the speaker to

³⁰ Hosticka, *supra* note 15.

get back to his own path. Thus, in Professor Linda Smith's comparison of two lawyer-client interviews, Lawyer A's interview, in which he interrupted the client four times (only once coded as "non competitive") took 29 minutes, while Lawyer B's interview, peppered with (46) interruptions to the client, took more than 35 minutes. Most telling, Lawyer A permitted an uninterrupted initial client narrative that took 2:20 seconds; Lawyer B's questioning meant that he didn't reach the client's real concern for more than 9 minutes. Research from physician-patient interviews suggests that, if uninterrupted, a patient's initial statement of concerns is quite efficient – taking a "maximum of 2 ½ minutes or an average of 90 seconds."³¹ Questioning by the doctor during the initial statement does not increase efficiency, and may cause the doctor to miss important information.

Risks of Interruption

Not only does interrupting with questions prove inefficient, it also risks missing important information. Looking again to parallels in the medical arena, when physicians interrupted patients' initial descriptions of their medical problems, the patients inadvertently omitted reference to potentially significant symptoms or complaints.³²

Surely, any lawyer subjected to questions by a "warm bench" in argument on a motion or on appeal has later lamented: "Those questions got me off track!" That's true even though a lawyer prepares for oral argument by anticipating questions and devising strategies for smooth return to points. The lawyer maintains a well-constructed outline in mind or on paper. Most clients do not prepare for the initial interview with a lawyer in this way, by anticipating distraction and outlining critical assertions or interests. Thus, when a lawyer's questions break the client's natural order, and the client responds, he may miss or skip elements he would otherwise have included. And these may matter greatly!

Assume for the moment that the distracted client did come in with mental

³¹ Simpson, Buckman, Steward, Maguire, Lipkin, Novack, Till, *supra* note 26 at 1386, citing Beckman, and Frankel, *supra* note 16, 692-696.

³² See discussion in, Beckman, and Frankel, *supra* note 16 at 694, citing to Burack and Carpenter, *supra* note 25, 749-754.

or written notes of all he wanted to include. And so, despite the lawyer's interruptions, the client does manage to convey all critical information. Still the way it was conveyed – the order, the emphasis, the connections – were determined by the lawyer's questions, not by the client. There is much to be learned about the way a writer or a storyteller constructs a narrative. A client's understanding, interpretation and intended meaning may be found in his path through his story. Thus, the lawyer may learn much more about the clients' perspective by simply listening and deferring any questions to a later stage.

What About a Pass for Active Listening, As Not Quite Questioning?

When learning active and reflective listening in a class or workshop, people often observe it's necessary to interrupt the speaker in order to practice the skill. The true emotional client or a highly convincing role player may generate an agitated stream of words and leave no space for the listener to paraphrase emotions or facts. It is hard to practice if you can't get a word in edgewise!

An actor-colleague³³ offers a trick to avoid the rudeness of interruption – to avoid cutting the speaker off – is for the active listener to sit up straighter and take a deep breath from the diaphragm, as if about to start speaking. Many speakers will stop or pause upon seeing and hearing a conversation partner draw that deep breath. This provides a natural opening for the intentional active listener to interject an "active listening paraphrase" without seeming obviously rude.

Given that active, reflective listening restates speaker's thought or emotion, its purpose isn't to distract, divert, or redirect but rather to follow the speaker. For that reason, one could argue that active listening is not *quite* as bad as a straight interrupting/redirecting question. But the active listening interruption to paraphrase may nonetheless shift focus in a particular way, and thus risks diverting the client's narrative.

Consider these two alternative dialogues that include a well-intended paraphrase by a skilled lawyer as active listener:

³³ Professor Rocco Dal Vera, University of Cincinnati College Conservatory of Music, for the CLE program, "Actors Directions for Winning Trial Performance" presented at the University of Cincinnati College of Law", beginning in 2009, and beyond.

Dialogue #1

Client: As soon as my father appointed my brother to be company president and me as VP for finance, my brother stopped listening to anything I had to say around the company. He kept saying that he was boss, and Dad trusted him. Even when I raised questions relating to expenditures and, well, finance, my area, my brother would just ignore it.....

Lawyer: So, your brother paid no attention even to your finance ideas.

Client: That's right. One time I made the perfectly reasonable suggestion that we move to monthly account statements to be provided to each departmental manager and he wouldn't hear of it.

Dialogue #2

Client: As soon as my father appointed my brother to be company president and me as VP for finance, my brother stopped listening to anything I had to say around the company. He kept saying that he was boss, and Dad trusted him. Even when I raised questions relating to expenditures and, well, finance, my area, my brother would just ignore it.....(This initial statement is identical to that above.)

Lawyer: So your brother seemed to act as if your father made him king and you feel that he was lording it over you, so to speak?

Client: Yes, he was always like that: little brother wanted to get one over on big brother and use Dad to do it. Frankly, I think my father made me head of finance because he knew my little brother couldn't be trusted with money.

Lawyer: So, you feel the VP appointment was your Dad's way of protecting the company.

Client: Yes, I remember one time that my brother wasted money on a lame brain idea and.....

The point here is that the active listener's choices – whether reflecting emotion or paraphrasing facts – necessarily impacts the speaker's

response and the next conversational turn. Neither of the above responses above is better or worse, but each results from the lawyer-listener's intervention, not the speaker's.

What's a lawyer to do? If we don't listen actively during the initial narrative, we lose an opportunity to build rapport, to communicate full engagement and understanding of the client's predicament. But some aspects of active listening violate the "no interruption to avoid distraction" rule. For this reason, the *less verbal form* of active listening is best during the client's initial narrative. Eye contact, reflective facial expression, encouragers in the form... "uh huh," "yes", "I see", "go on" seem wisest. These should be expressed with empathetic tone or facial expression to avoid seeming rote or perfunctory. When working with a client for whom emotional reflection would appear to be helpful, try to keep them minimal: "I get it," "what a mess", "ah, a victory," or "a real shock." In other words, keep it to shorter fragments, coupled with an encourager for the client to go on with his story, in his own way.

As a mediator and a lawyer, I would offer two friendly exceptions to this general rule. First, when the client has taken a lengthy pause – seems to have run out of steam or be lost within the story – it is helpful to provide a reflective summary paraphrase of what he has heard. "So far, I understand that...." At the end, however, the lawyer should invite the client to direct the next conversational turn, with words such as: "What else would you like me to know about?" or "What else is important for you to tell me?" The second circumstance in which a lengthier (more unabashedly verbal) active listening interruption can be helpful is where the client's emotions are cycling up, and he is repeating himself on a certain topic. Repetition is a sign that the client doesn't feel you've understood his meaning or its importance to him. A full blown, fully verbal, reflective interjection in the event of a pause, or even a quick interruption of what you've heard may be the best antidote. You'll know it when the client's emotions calm and his refrain ceases. But after that, make sure to express a most open invitation for the client to continue with his story.

Interlude On Narrative and Principles of Conversation

Academic scholars of communication and discourse theory offer richer insight into lawyer-client interviews, particularly relevant to hearing the client narrative and questions of interruption.³⁴ Professor and Clinical Program Director Linda Smith of the University of Utah S.J. Quinney College of Law deserves primary credit for introducing these ideas into legal scholarship and for providing guidance as to their practical lessons. As Professor Smith explains, communication scholars would call a client interview “institutional talk” as it is embedded in and bounded by a certain legal institutional framework.³⁵ Most important is recognizing it as a conversation. Thus, theories of conversation and discourse very much apply and enable us to recognize and understand certain patterns.

Lawyers are advised to recognize three clusters of theory and research that yield insight and practice advice for lawyer-client interviews:

Prototypical Spoken Narrative

Communication scholars have identified the elements of a “Prototypical Spoken Narrative”³⁶ These are:

- A beginning ABSTRACT, a short phrase or sentence indicating the point or purpose of the story;
- An ORIENTATION, a segment briefly filling in background information
- A COMPLICATING ACTION – description of the event, usually in sequence that is the meat of the story and moves it along
- A CODA – a shift to the present, stating the story’s meaning or moral
- An EVALUATION – in which the narrator comments on the story from the outside

³⁴ Full credit to my main source on application of conversational analysis, discourse theory to legal context to Linda F. Smith, Professor and Clinical Program Director, University of Utah S.J. Quinney College of Law, author of: “Always Judged – Case Study of An Interview Using Conversation Analysis,” *Clinical Law Review* 16 (Spring 2010): 423; “Was it Good for You, Too? Conversation Analysis of Two Interviews.” *Kentucky Law Journal* 96 ((2007-8): 579; and “Client-Lawyer Talk: Lessons from Other Disciplines,” *Clinical Law Review* 13 (Fall 2005): 505.

³⁵ Smith, “Client-Lawyer Talk: Lessons from Other Disciplines,” *ibid.*

³⁶ William Labov & Joshua Waletzkey, “Narrative Analysis” in *Essays on the Verbal and Visual Arts*, 12-44, ed., J. Helm (University of Washington Press, 1967).

It can be useful to listen for these as your client tells his story. Is an element missing? Has your client explained what happened, without coda or evaluation? Why? Did he skip the “orientation” or background phase? What additional information would be useful to understand the events described? Given that people [proto]typically narrate with these elements, this order, is there some significance to his omissions? Inquiry into these elements should not be off-putting, as it is generally accepted that a listener would wish to learn them.

Goffman on “Face Work”: Accountings and Disclosures

Erving Goffman, a world renowned sociologist and linguist, famously wrote about the way people present themselves in conversation, in his works: “On Face-Work: an Analysis of Ritual Elements in Social Interaction” (1955) and the *Presentation of Self in Everyday Life* (1959).³⁷ Goffman wrote that conversants present their “faces” to each other. We generally try to create or preserve our own positive self-images and social images in the face we present. And, we often cooperate in conversation to preserve face for others.

Goffman also observed that, in conversation, we must sometimes “self-disclose”- reveal information about ourselves that was not previously known. When a self-disclosure threatens face, we tend to be indirect and to delay. Why? We place negative self-disclosures later in the story to prolong and strengthen our listeners’ favorable evaluation, and postpone our own discomfort. Self-disclosures are often accompanied by “accountings” – Goffman’s term for justifications or excuses to reduce or eliminate responsibility for negative self-disclosures. Accountings are intended to mitigate the listener’s negative evaluation of the speaker. They help us “save face.”

³⁷ Erving Goffman’s important works include (but are not limited to): “On Face-Work: an Analysis of Ritual Elements in Social Interaction,” *Psychiatry Journal for the Study of Interpersonal Processes* 18 (1955):214, reprinted in Erving Goffman, *Interaction Ritual, Essays on Face-to-Face Behavior* (Pantheon, 1967), Erving Goffman, *The Presentation of Self in Every Day Life* (Anchor, 1959), Erving Goffman, *Frame Analysis* (Northeastern, 1986), and Erving Goffman, *Forms of Talk* (University of Pennsylvania Press, 1981). I am indebted to Linda Smith’s article, “Client-Lawyer Talk,” *supra* note 34, for her excellent discussion of Goffman’s work applied to lawyer-client interviews.

People are more likely to feel a threat to “face” and Goffman’s labeled conversational patterns are more likely to occur when conversants perceive different relative power, social distance, and imposition. So, if a client has lower power, social status, and seeks assistance he cannot otherwise obtain, he may feel “face threatened” from the start of the conversation. In some circumstances, the shoe will be on the other foot. The lawyer may have lower power and status, and seek client action: the lawyer may feel face-threatened. Within legal practice, consider the “threat to face” experienced by a divorce client seeking a lawyer’s assistance to prevent her soon-to-be ex-spouse from raiding their bank account or incurring reckless credit card debt in her name. Imagine a small business owner seeking a lien on a contractor, a corporate client charged in an environmental enforcement action, and of course, a client facing criminal charges.

Recognizing that threats to face often result in delayed self-disclosures and accountings, enables the lawyer to be more patient. Assume that, when telling his story, the client provides a certain (self-disclosing) piece of information later than he logically should have. Understanding that the client fears loss of face, lawyer might provide assurance that he is not sitting in judgment. At the least, the lawyer may be less frustrated by the client’s failure to supply the information earlier, less likely to conclude that he’s shifty or unintelligent. The same is true for accountings. Without knowing of Goffman’s work, a lawyer might harshly evaluate a client who creates weak excuses or far-fetched justifications. The lawyer may find greater tolerance and patience by understanding that it is normal for people to use “accountings”. The client may someday take appropriate responsibility but not quite yet, while seeking to save face and avoid the lawyer’s negative evaluation.

Gricean Principles of Conversation.

Philosopher and sociolinguist H. Paul Grice describes conversation as a cooperative activity and observed that certain principles apply to any conversation. These are known as “Gricean Principles of Conversation”, first articulated in his William James Lecture at Harvard University in

1967.³⁸ Grice observed that in conversation, we try to speak in appropriate: quantity, quality, relation and manner, in other words, to be:

- As informative as necessary (but not more – quantity)
- Accurate and truthful (quality)
- Relevant (in relationship to the topic at hand)
- Brief, orderly, and clear (manner)

For a client who generally follows these principles of conversation, a lawyer's questions may result in failure to convey certain information the client's [uninterrupted] narrative might have included: Why?

- The client will follow Gricean principles when responding to questions posed, even if the questions are not in line with his original conversational direction.
- When responding to a question, face needs may be strong. If so, the client's responses will be circuitous, delaying self-disclosure and full of accountings. *All of this may cause the speaker to lose his way within the story.*
- It will take longer.
- Your client (and perhaps you, the listener-lawyer) will be annoyed.
- The listener- lawyer may miss important clues available when the narrative comes out naturally.

These observations suggest why patients describing medical complaint and symptoms so often fail to mention medically significant information if their descriptions are interrupted by a doctor's questions. It also explains why a legal client might easily be deflected from explaining important aspects of his story as well as its meaning and impact for him.

³⁸ This lecture was later published in Grice's essay, "Logic and Conversation," in ed., P. Cole and J. Morgan, *Syntax and Semantics* 3 (Academic Press, 1975): 45-46. Once again, Linda Smith's article, "Client-Lawyer Talk," *supra* note 34, must be credited, this time for its discussion of Gricean principles in this context.

6. Lawyer's review and clarification of client's narrative

Open and closed questions in funnel sequence

AFTER the client's initial narrative, the lawyer is advised to review it with the client, and ask questions. It's wise to acknowledge that your review might seem (and indeed, might be) repetitive, and explain that you don't want to risk missing important points. Moreover, legal claims and theories are often built upon or impacted by time lines and other details. It's important to pin these down while fresher in the client's mind.

The lawyer's review of the client's statement involves questions to clarify sequence and elicit details. Most texts suggest that the lawyer ask questions in a "funnel sequence." Ideally, knowledge of the legal issues involved would drive each "funnel" of questions. The lawyer would focus on a part of the story, start with open questions and then move to closed questions, shaped by the legal elements relevant to a claim or defense. For example, imagine that your client owns a business and has been accused by young female employee of sexual harassment, including her supervisor's creation of a hostile work environment by her supervisor. One common sense defense would be that the plaintiff provided no indication of discomfort. She seemed entirely comfortable with sexually suggestive banter and contributed willingly to the environment, in the presence of the supervisor.

An open but focused review question would be: "You said that the office banter was pretty casual with lots of teasing. Can you tell me more about that?"

Assume the client's response is: "Well, after a weekend, we would joke about what people did, whether they had wild times. A lot of the younger, single workers would brag about their exploits... you know....."

The lawyer might then asked a closed question: "Do you remember if the plaintiff was one of those who bragged?"

The client's response might be: "It was all of us – everyone in the department, including the plaintiff."

Another closed question: "Does that include Pat.. who later became her supervisor?"

Answer: "Yes"

Now back to an open question: “Can you recall any stories the plaintiff ever told?”

Closed questions would follow as to details, time and place of the story telling.

In a different case, where a plaintiff has claimed race and age discrimination for failure to promote, the lawyer might first ask the client to describe hires, fires and promotion within the last few years, particularly within the employee’s department. As information is gathered about a round of lay-offs and a round of promotions, the lawyer might ask specific questions about how many employees in a recent promotional round were over and under 40, etc. The lawyer zeros in on possible theories, to build or eliminate them. That would be a traditional funneling sequence.

Questions to Avoid Disasters

Krieger, Neumann, McManus, and Jamar’s text, *Essential Lawyering Skills: Interviewing, Counseling, Negotiation and Persuasive Fact Analysis*, deserves credit for tremendously important and practical advice: “Ask whatever questions are needed to prevent The Three Disasters,”³⁹ defined as “(1) accepting a client who creates a conflict of interest, (2) missing a statute of limitations or other deadline that extinguishes or compromises the client’s rights, and (3) not taking emergency action to protect a client who is threatened with immediate harm.” Failing to do so won’t serve your client well, and may give rise to a malpractice claim as well as an ethics complaint.

While theoretically, the lawyer would have checked his solo practice or firm’s database regarding an obvious conflict, he should be alert to possible conflicts as the story unfolds. If the client may have a claim against his large company employer or building contractor, the lawyer must follow up with questions sufficient to learn of a potential conflict. Is it the construction company owned by the lawyer’s brother-in-law? Does the firm represent the client’s employer? It’s not possible to eliminate

³⁹ Stefan H. Krieger, Richard K. Neumann, Jr., Kathleen H. McManus, Steven D. Jamar, *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis* (Aspen Law & Business, 1999) at 79. See Rules 1.7, 1.8, 1.9, 1.0 and 1.11 of the ABA Model Rules of Professional Conduct.

every surprise – one can't anticipate every witness who might be deposed – but it's wise to make an effort.

While no lawyer can be expected to spot every possible legal issue in the initial interview, it is important to be alert to substantive and procedural deadlines. For that reason, do ask the client when the wrong occurred and when he first learned of it, or when others in his company might have. Has the client received any papers, notices, summons, a complaint, a subpoena? When? Is a deadline for response stated on the document? If not, the lawyer should be aware of time frames for responding, and check the deadline.

Related to timing: sometimes the lawyer can and must inform the client of an immediate action needed to protect his important interests. For example, should a lien be placed on property or assets? Should an errant partner's access to company funds be limited? Should a divorcing wife undertake action to protect her credit? Should a spouse or a corporation seek a civil or criminal protection order or injunction? Should certain documents be preserved? Should the lawyer take action to prevent or delay the client's eviction from his home?

Thus, during or after the client's description of the problem, the circumstances, the story, and his goals, do consider what information would be necessary to avoid "the three disasters." Assuming the client will seek to retain you as counsel, what is it imperative that you know from the beginning? Do remember those questions.

Don't Fret Much Over Form

No matter how experienced, no lawyer can be fully expert regarding every possible legal issue a potential client's claim or defense might raise. Understandably, less experienced lawyers will be versed in a narrower range of legal issues. It's difficult to ask that perfect funnel of questions, targeted to particular legal questions, without expertise on nuances of the legal issues. Not surprisingly, research suggests that, less experienced lawyers, less familiar with the law, are less adept at asking questions in a doctrinally driven funnel sequence.⁴⁰ The good news is that less

⁴⁰ Smith, "Was it Good for You, Too? Conversation Analysis of Two Interviews," *supra* note 34 at 644-645.

experienced lawyers fare just as well – learn as much critical information – with questions that proceed chronologically, driven by curiosity about the facts and circumstances. Doctrinally driven tunnel form is not essential; thoroughness is.

While it's generally good practice to begin with open questions, when seeking more complete information and explanation and closed questions for details, we can also take comfort in Professor Smith's finding that many clients ignore question form altogether. When a short answer closed question won't serve the purpose, they go ahead with a full explanation. People generally communicate what they want you to know.

Unreliability and Suggestibility of Memory and Perception Require Humility, Skepticism, and Understanding

Much information is obtained even in the initial interview, as well as other meetings during the course of representation. The client usually is a witness to at least some of the events giving rise to the legal problem. Even the corporate representative who did not observe what gave rise to a claim or defense, brings observations, perceptions and memories of corporate priorities, policies, projections, and personnel to the initial interview.

An irrefutable raft of social science research establishes the unreliability of human memory and perceptions, and soundly undermines legal preferences for eyewitness testimony (found in biblical and western legal traditions). Some but not nearly all of this research is summarized in Client Science's Chapter 5, "Predictable and Potent Psychology". While focusing predominantly on the psychology related to decision-making, that chapter also discusses common distortions in memory and perception. Within the context of an initial client interview, lawyers should be familiar with two important clusters of research conclusions, the first regarding unreliability and the second regarding suggestibility of perception and memory.

Strong advice and a disclaimer: having now read but a small sampling of writings available on these topics, it is clear to me that lawyers conducting witness interviews for trial, deposition, or to significantly inform case

research or preparation should become well versed in this material. Barely scratching the surface of this work, I have included the briefest summary below of conclusions drawn by researchers regarding observation and memory. Drawn from research of eyewitness records and experimentation, they are directly applicable to client interviewing (as well as to deposition and trial preparation with the client and other witnesses).

Factors Affecting Observation and Memory⁴¹

Professor Elizabeth Loftus, the most influential scholar and author on eyewitness testimony, wrote of the “extraordinary malleability of memory” in her important book, *Eyewitness Testimony*,⁴² recommended for all lawyers who ever inquire into a human being’s observation and memory. Her work identifies categories of concern:

Original observation - the accuracy of a person’s original observation is affected by:

- *How much the observed event or detail was different from its context or surroundings.* We are likely to see a bright blue balloon in a drab conference room than at a carnival or brightly colored pre-school room.
- *Other conditions or events.* Lighting, music, commotion, clutter will affect what we observe. Yesterday’s train ride was full of raucous young soldiers drinking, joking and playing music. It would have been more difficult for me to reliably discern the conversation or observe the behavior of the women in the next row.
- *How the witness was occupied at the time.* On that train ride, was I curiously watching the Swiss passengers to learn of culture and custom? Or, was I involved in my own conversation, or scanning

⁴¹ This section draws heavily from discussion and research summarized in “Observation, Memory, Facts, and Evidence,” chapter 5 in: Krieger, Neumann, McManus, and Jamar,, *supra* note 38 at 47-62.

⁴² Elizabeth F. Loftus, *Eyewitness Testimony* (Harvard University Press, 1979). Later editions as well as an expanded version have since been published. The latter is now in its fourth edition, with a co-author: Elizabeth Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal*, 4th ed. (LexisNexis 2007).

landmarks and the clock to determine where we were and when we would arrive?

- *Particular focus.* When primed to watch for something particular, we are more likely to observe it. Thus, if you suggest that I watch for members of various branches of the military who might board the train wearing different uniforms, I am more likely to observe their number and types of uniforms. The flip side, of course, is “inattentional blindness”. (See discussion of the classic “invisible gorilla” experiment in *Client Science*, Chapter 5 at 144.) Because I was directed to watch for military members and their uniforms, I am less likely to observe the circus performer who boarded the train at the same time.
- *Stress level.* A bit of stress renders us more observant, but severe stress has the opposite effect.
- *Talent for observation.* Some people are more naturally observant than others, noting and recording detailed impressions of sights and sounds.
- *Self-interest, expectation and preconception.* We are more likely to see what we want or expect to see and hear. Images inconsistent with preconception may register less easily. Leaving the train and entering the station, I will note the stationmaster who fits my stereotype for the post, but miss the one who does not. I may be unaware of my uncharacteristic clumsiness in blocking the café waitress in the aisle, but I do note my own adeptness at translating the menu.

Retained memory - the accuracy of a person’s retained memory of an observation is affected by:

- *The length of time available for the original observation.* It’s more difficult to remember something we saw for only a short while.

- *Length of time since the original event.* Memory fades over time. That is true even for memories of events with great emotional impact: natural disasters, violence, and wondrous romance.⁴³
- *Past experience with what (or who) was observed.* If the eyewitness already knew the accused, or was familiar with the car or the piece of clothing, their memory of whom or what they saw is more likely to be reliable. But memory of a face or an item seen for the first time is less likely to be accurately retained.⁴⁴
- *Ease with which the memory might blend with other memories.* Did the witness experience many interactions with this set of co-workers, or with her supervisor? Memories of each might blend together.
- *The conduct of others.* Have others deliberately or unwittingly contaminated the witness' memory? What did the chief of police say about what was suspected about the accused? What did the neighbor say about the driver of the other car? About the road conditions? What did your client's co-workers say about the events on the day she was terminated?
- *Witness contamination of memory.* When the witness has previously told and retold the story, has he blended inferences and suppositions with observations? Has he speculated about what he didn't actively remember? Were those speculations unwittingly incorporated as imagined memory?
- *Individual variance.* Just as some people observe with greater accuracy, some retain memories with more accuracy over time.

In light of cognitive limitations in perception and memory, cognitive psychologists Edward Geiselman, Ronald Fisher and colleagues

⁴³ See Marjorie Aaron, *Client Science: Advice for Lawyers on Counseling Clients Through Bad News and Other Legal Realities* (Oxford, 2012), 151-152.

⁴⁴ This factor and those immediately below might also be understood as giving rise to "source confusion" – where memory of a single event is constructed from confusion between memories of other related events or between one's own and others' comments, suppositions, and stories. See *Client Science*, Chapter 5, and sources cited there.

developed and named “cognitive interview” techniques.⁴⁵ Their goal was a set of practical recommendations for interviewing techniques that incorporates current knowledge about what tends to enhance or distort memory and perception. Observing that an interview should occur in stages, they suggest:

(1) *Begin by asking for an open-ended narrative, and don't interrupt.*

The technique for a cognitive interview here wholly overlaps with that stated earlier in this chapter. Do make the interviewee feel comfortable, try to establish rapport, and then don't interrupt the story as it's told. This is not the time to gather details, rather to listen and observe the way your witness (in this case, your potential client) relates his or her story.

(2) *Move to the probing stage in which interviewee (client or witness) memory is called upon.* The probing interviewer should direct the interviewee to each stage or topic in his story, using one or more of the four following cognitive interview techniques:

- *Ask the interviewee to “reinstatement the context” or remember as much as possible about everything he saw, heard, felt.* Ask him to place himself back in the scene or circumstance as much as possible.
- *Ask the interviewee to tell everything he remembers, even if it seems irrelevant or unimportant; these can help jog memory of things that are important.* When asking for the full memory, the lawyer should specifically request that the interviewee refrain from guessing or inferring, or to explicitly differentiate from what he remembers and knows from what he believes or “figures” must have happened, or

⁴⁵ For more complete exposition of the cognitive interview, see Ronald P. Fisher, et al., “Improving Eyewitness Testimony with the Cognitive Interview,” in: eds., David F. Ross, J. Don Read, and Michael P. Toglia, *Adult Eyewitness Testimony: Current Trends and Developments* (Cambridge University Press, 1994); Ronald P. Fisher and R. Edward Geiselman, *Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview* (Charles C. Thomas Pub. Ltd., 1992); R. Edward Geiselman, et al., “Enhancement of Eyewitness Memory: An Empirical Evaluation of the Cognitive Interview,” 12 *Journal of Police Science & Administration* (1984):74, all cited in Richard C. Wydick, *The Ethics of Witness Coaching*, *Cardozo Law Review* 17 (1995-1996) 1 at 45, notes 136-140.

why. When the interviewee is talking, about a particular scene or event, the lawyer should avoid interrupting.

- *If helpful to jog memory, suggest a change in order.* People naturally try to remember and recount events in chronological sequence. Particularly if the interviewee is having trouble recalling detail or order, the lawyer can suggest that he try to remember what happened in reverse order, or by thinking about separate elements in what he considers their order of importance (or any other order). Sometimes, that will yield additional memory.
- *If helpful, suggest a change in perspective.* Again, when an interviewee is having trouble remembering, the lawyer might ask him to try to shift perspective on the scene, to think about what others present might have seen or heard.

In an interview informed by cognitive science, do **NOT** direct the interviewee's move from one observation to another, or from topic to topic. Do allow him to exhaust his memory on one topic first. For example, a skilled cognitive interviewer would NOT ask first: "How big is the corporate headquarters building?" Then, "you said you took the elevator. Did you see anyone else in the elevator?" Then, "how far down the hall was the Vice President's office?" Then, "Where was the Vice President positioned in his office?"

This way of questioning too quickly distracts the interviewees mind from one image or memory cluster to another. First he has to think about the outside of the building – how big is it? Then he has to switch to people in the elevator (without having time to remember the whole elevator ride), then to the hall. Instead, the questioning should proceed in this fashion:

"You said you approached the headquarters office. Can you tell me what you remember about the outside of the headquarters' building that day? Try to imagine you're there and remember whatever you saw."

[After the interviewee has completed that description]

"Okay, you said you walked into the lobby and went into the elevator, can you describe that in as much detail as you remember?"

[After the interviewee has completed that description]

“Okay, you got into the elevator: “What do you remember about the elevator ride?” “Was there anyone else there? “Can you describe them and what they did?”

The “no interruption rule” still holds. Do not interrupt a description. And DO allow for hesitation and pausing. Recall can take time. Silence is not empty space; it is the sound of thinking and remembering. If the interviewee is struggling, you might use short encouragers... “that’s okay” ... “go on” ... “whatever comes to mind”. Only when nothing more comes to the client’s or the witness’ mind should you move to the next inquiry, noting that discussion can always go back if something is remembered later.

Serious Suggestions

The suggestibility of memory bears highlighting. As indicated in *Client Science*, Chapter 5, “Predictable and Potent Psychology,” lawyers should not suggest facts within their questions. People’s memories become altered by the suggested fact itself. The lawyer asks: “Was the woman in the elevator wearing red?” The client may eventually come to believe there was a woman in the elevator, and maybe her coat was reddish. Perhaps the secretary down the hall frequently wears red, and oh yes, she must have been the woman in the elevator. The mind configures and constructs sense, and then we seem to remember it. That is one reason to specifically ask your client or witness interviewee to refrain from guessing or inferring, and to explicitly differentiate what he remembers and knows from what he believes or “figures” must have happened. Sometimes, we believe that something must have happened in a particular way or for a certain reason, and we describe that – even if we didn’t see it or don’t know it. Later, our own words construct an imagined memory. As happens in family legends, we hear the story, we retell it, and eventually believe we were there. It’s not a problem for the family; it is a problem when the secretary was wearing purple and decided to take the stairs instead of the elevator that day.

Perhaps then, the wisdom we gain from all of this is to be humble about presumed knowledge, tolerant but skeptical of claimed certainty, and understanding of inaccurate observation and memory. Your client may

indeed be telling the truth as he saw and now recalls it. Yet his narrative may remain unconfirmed or be contradicted by other witnesses or other evidence. Absent documentation, photographs, or other NON-eyewitness evidence, the truth – what actually happened and why - if such are ever determinable - may never be determined in this case for this client.

7. Review and Discussion of goals, interests, values, and constraints

Finally, the client's full story is out. The client feels that the lawyer has heard and fully understood it. The lawyer has followed prescriptions offered by cognitive science in eliciting the story. Aware of inevitable fallibilities of memory and perceptions, the lawyer has not exacerbated them.

It's a good idea to summarize and affirm key aspects of the story. Then, the lawyer is advised to articulate a transition to the next agenda item: review of the client's goals, interests, values, and constraints. The reader might observe that this chapter suggested asking for a brief overview of the problem and asking about the client's goals, earlier in the interview (at "step (3)"). As noted, that step sometimes gets short shrift (or none), if the client just launches into his story. This is particularly likely when the client is aggrieved and has strong emotions about what gives rise to the legal problem.

Even if the client has articulated his goals at the earlier stage, it's wise to spend some time refocusing on goals and interests after the story has been told. What would the client see as success? What matters most? What other personal business circumstances does the client want to impact or protect? What outcome would he value most highly? Why? It's my experience that, while explaining his own story, its context, its characters, and its significance, the client has been listening too. Thus, at the end stages of the interview, he is better able to consider and reflect upon goals, interests, values and constraints. Thus, this chapter's obvious advice is to ask such questions in an open way, without a lawyer's presumptions or assumptions. Filing a complaint or filing a lien are not goals, they are means to an end, with certain consequences. The client may not be eager to file suit or take another defined legal action. His broader interest may be better served by waiting, by other actions, not necessarily involving the lawyer. The client's responses to open questions about his goals, interests,

values, and constraints will shape the next steps – whether he should retain counsel and what should happen next.

8. Agreement regarding next steps, including retention and fees, if not addressed earlier

Finally, the interview is almost finished.

It is true that, in some instances, the client will seek advice and counsel before the close of the interview. It's also true that advice may appropriately be provided – if the answer is clear and simple and the lawyer is experienced and knowledgeable enough to provide it. This chapter does not address the counseling task –the subject of the *Client Science* book. Thus, for the purposes of this chapter, we'll assume that the initial interview did not provide sufficient basis for the lawyer's assessment or counsel. Documents have not yet been reviewed; necessary research has not yet been done; facts have not been gathered through discovery, investigation, or less formal means. Thus, the best advice for the lawyer is not to provide any. To do so is bound to create unmet expectations, disappointment, and confusion. If a client presses you for an opinion or advice, explain why it's not wise at this point.

At the end of the interview, the lawyer and client should address:⁴⁶

- *Retention*: Whether the client will retain the lawyer and whether the lawyer will undertake the representation.
- *Scope*: While the client and lawyer need not agree regarding the question of representation at that moment, the lawyer should discuss and clarify what the scope of the representation will be. For example, is the lawyer undertaking to represent the small company in all employment matters, or just in a pending arbitration? If the lawyer will file suit on a plaintiff's behalf, will the representation agreement cover the case through an appellate level or only through trial? Will the lawyer represent the divorcing husband only in the divorce action or also in matters pertaining to his will and restructuring ownership of his small business, which

⁴⁶ The ideas in this section are borrowed liberally from Cochran, DiPippa, and Peters, *supra* note 7, at 103-106.

may affect divorce assets? Best practice is for the lawyer to create a formal representation agreement setting out the scope of the representation.

- *Fees:* Unless the case is being handled on a *pro bono* basis or in the context of a free legal service provider, the lawyer and the client must agree upon the fee structure. If the topic wasn't raised previously, that must be done now. If the lawyer would entertain alternative fee structures or rates, these options should be discussed. For example, in some cases, the lawyer will only be comfortable with an hourly rate, billed against an initial retainer. In a simple case, a flat fee may make sense. In other cases, it will be clear that the client can only proceed if a contingency fee is in place. But sometimes, a blended arrangement will be made, involving a minimal hourly rate and reduced contingency fee percentage. Or, it may be best to seek early settlement with representation at a discounted hourly rate before discovery, or different contingency fee percentages at different stages of litigation (recognizing the lawyer's increased investment of professional time as discovery, motions, and trial preparation proceed). The lawyer is bound to offer a reasonable fee arrangement.⁴⁷ And, the lawyer should be clear regarding which direct expenses will be borne by the client as they are incurred and which delayed, and how any final fee and cost calculations shall be made. While the ABA Model Rules only require a written fee agreement in contingency fee cases, the rules "prefer" written fee agreements in all cases. Best practice demands it.
- *Joint decision upon next steps, and timing.* The lawyer should explain what she will do next on the client's behalf, and by when. For example, the lawyer might commit to interview some company witnesses within the next two weeks and respond to an EEOC complaint by a certain date. Or the lawyer may indicate that research is essential to determine the client's options, and commit to a time frame within which she will communicate with the client to review the results.

⁴⁷ ABA Model Rule of Professional Conduct 1.5 discusses fees, including a definition of "reasonableness" in Rule 1.5(a).

Often the lawyer will need critical information, financial records, corporate transactional history, past notices, or other important documents from the client. Or it may be important for the client to take steps to preserve files, or notify key employees of the importance of guarding certain types of information. The lawyer should explain what steps he's asking the client to take, why, and within what time frame.

- *Or, a list of "to dos" for future client decision.* Life and legal problems can be messy and complicated. It's not necessarily simple to decide upon next steps. The client may want to consult with his wife or a key employee about goals, values, risks, and financial or other business constraints. Because options in the form of legal action may be limited, the client may want to consider other "moves" to make: securing an alternative supplier for contracted goods, gathering information about transactions of a competitor, or reviewing the equity value of business or personal assets. It's helpful to suggest a clear "assignment" or, more collaboratively stated, an agreement to carefully consider goals, values, interests and constraints as well as alternatives available. Do remember to set a date and time to check in on the client's progress and decision.

Of course, the lawyer must inform the client if there's an external deadline for his decision, or for a change of that decision. A client who is considering whether to file suit should be informed if the statute of limitations is looming. The client who is considering an injunctive action should be informed that the longer he waits, the less likely temporary relief will be granted. The spouse considering a divorce action should be told of a pending legislative change in alimony formulas, unavailable if she waits to file. The dissatisfied business partner who has sourced an inventory shipment should understand that if the goods are delivered and the company is dissolved, the shipment's value will be lost to a pool of creditors. This will affect his decision to force dissolution or to file claims against his partner. It may also affect his ability to do future business with the supplier. And what if the supplier is his brother-in-law? How will that affect the family table? Sometimes, timing matters.

- *Contact information exchange and invitation to follow up.*
Presumably, if the client has appeared in the lawyer's office, or on the computer screen for a virtual interview, the client knows how to contact the lawyer. The lawyer's direct email and telephone number are often (though not always) on the firm's website. Still, it's wise to let the client know what is the best way to reach you. Do you prefer email or telephone? Perhaps you have a Facebook or a Linked-In account. It's best to advise the client that he should not post messages there for you as the world will see them. Leaving aside confidentiality concerns, you should let the client know if you check these sites or other electronic media only rarely. A note there maybe unread for days or weeks. Some clients will send an email assuming that you'll receive it anytime, wherever you are, on your cell phone. Perhaps not, if you don't have email directed automatically to your cell phone. Because the technology for contact is now so diverse, it may be important to articulate which technology to use (and not to use) in this lawyer-client relationship.

Of course, the lawyer should seek reciprocal information from the client about the best way to contact him. If a matter may be sensitive, would the client prefer that the lawyer call him only at home, or only on his cell phone, or only in the office and never at home or on a landline? Is email safe, or does his assistant, boss, or wife sometimes scrutinize his email? If the lawyer wants to send a document, should he attach it to text or a personal or office email message, or send it via regular mail? What contact information does he have for others at the company whom the lawyer might wish to interview or consult?

- *Anticipated unavailability.* In the interest of avoiding client frustration, it's also wise to let clients know if you anticipate being unavailable for an extended period in the near terms. Are you scheduled to fly to New Zealand for depositions (or vacation) tomorrow? Even if this client's matter does not need immediate attention, he may be disappointed by lack of quick response to a voice mail. I am not suggesting that you convey the details of your personal and professional calendar to every client. However, if you do anticipate a significant upcoming period of time during which contact will be difficult, why not flag it? This may be particularly important for a new client, with whom you have not yet set a

promptly responsive professional communication pattern. For similar reasons, it's useful to ask whether your client anticipates an extended absence or period of unavailability.

Conclusion

When the interview ends, inevitably, much has been left unsaid, unheard, and undiscovered. Lawyer and client hope the unexpected and unforeseeable prove fortunate; oversights prove to be of little consequence; and insights prove to be of value. And so it is with this chapter. Much more evidence could be brought to bear; more bullet points could be written. Potentially useful advice or rumination has no doubt been omitted, intentionally or unwittingly. This chapter does not purport to be the comprehensive and final word on the initial client interview. However, in fulfillment of the original intent to provide a piece that is concise, these are my last words. For now.