Interviewing & Counseling in the Prospective Client Consultation

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Introduction

Welcome to Client Interviewing and Counseling in the Prospective Client Consultation. Like all service professionals, lawyers must be able to build rapport and trust, to understand themselves and others, to communicate effectively, and to solve problems. These skills are at the heart of client interviewing and counseling. This book is designed to help you demonstrate these skills in a professional setting and to lay the foundation for a career-long process of continual skills development. Reading a book, however, is never sufficient to learn a skill. Skills are acquired only through practice, reflection, and correction. This book provides the knowledge about these skills and suggests opportunities for practice and reflection. One of the exciting things about learning interviewing and counseling is that your everyday life also gives you ample opportunities for learning how to ask questions, to listen, to help clarify goals or devise solutions, and to build relationships.

An interview is a conversation between two people for a particular purpose. The primary purpose of most interviews is to gather information. Lawyers use interviewing skills in a variety of settings such as talking with witnesses to discover critical evidence or conducting a direct examination of an expert witness during a trial. An interview of a prospective client is also a vehicle for decision: both attorney and prospective client must gather enough information to decide whether to establish an ongoing relationship. Finally, some initial interviews also provide an opportunity for the attorney to counsel a client on how to achieve their goals.

In the materials in this text, we will focus on developing interviewing and counseling skills in the context of the initial interview with a prospective client. These initial interviews require all of the same skills as interviews in other settings, so this focus does not require that we sacrifice any core learning objectives for mastering interviewing and counseling skills generally. Moreover, the initial interview with a prospective client presents some of the most critical ethical decision-points in an attorney's practice. A focus on interviews in this setting permits a close examination of these issues.

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- *Earn a potential client's trust.* This requires the ability to build rapport, to focus on and appreciate the client's perspective, and to convey sufficient competence, confidence, and gravitas that the client will be comfortable with the attorney as their advocate.
- *Use basic interviewing techniques.* These include the ability to structure the interview effectively; use appropriate prompts and questions; listen actively and reflectively; provide nonjudgmental responses; gather complete and accurate information; and record that information accurately.
- *Use basic counseling skills.* These include the ability to recognize, name, and manage emotions; to assist the client in clarifying interests, goals, priorities, and attributed meaning; to identify potential legal issues and theories and communicate about these clearly and effectively with a client; to identify options for solutions that take into account the legal, financial, and social consequences for the client; and to assist the client in developing a preliminary approach to addressing their matter, including managing uncertainty and risk.
- *Use reflection, self-assessment, and feedback to improve.* This includes being able to identify how the student's own culture, attitudes, and experiences may influence the interviewing process.
- *Close an interview.* This includes assessing whether to engage a client and ending the interview with clarity about whether the attorney and client are entering into an attorney-client relationship and next steps.
- *Identify and appropriately address ethical issues.* These include issues of confidentiality, conflicts of interest,

candor, and limits on the attorney's conduct.

A Note on Terminology and Format

Throughout this text, we will sometimes use the term "client" in the context of these initial interviews. As you will see, however, the individuals who come to you seeking legal representation are not yet "clients" but are technically "prospective clients." Attorneys owe ethical duties to these prospective clients that are similar to, but more limited in scope, than the duties owed to clients.[1] Nonetheless, for ease of reading, we often will refer to these prospective clients as "clients" throughout the text, with the understanding that these individuals do not become your true "clients" until that relationship has been created by court order, by agreement, or by your words or actions that cause the prospective client to reasonably assume that you represent them.

Likewise, in the interests of avoiding the clumsiness of his/her or the awkwardness of alternating these gendered pronouns, we will use the now-permissible "they/them/their" to refer to a subject of unspecified gender.[2]

Each chapter begins with learning objectives. You can use these to assess your progress in mastering the skills and clarifying the perspectives that chapter addresses. Each chapter provides three different types of exercises:

"Check your Understanding" exercises test your knowledge of the materials presented. The text provides answers to these questions, either in footnotes (in the text version) or in interactive feedback (in the online version).

"Skills Practice" exercises provide opportunities for you to practice discrete skills. In some of these, you will be provided a video or written transcript of a mock interview for you to critique. Many of these exercises call for you to engage in role play. Try to work with different partners in these exercises so that you can have opportunities to interact with and get feedback from diverse perspectives. If you are playing the role of a client, be sure to prepare and play that role as authentically as possible. You will not only help your partner improve their skills but the very exercise of playing the role of a client deepens your skills of perspective taking and empathy.

"Reflective Practice" exercises ask you to prepare written reflections. These often will ask you to consider how your own personal experiences and identity influence your perspectives on the chapter's materials. Reflective practice is itself a discrete skill that is valuable in improving not only your interviewing and counseling but your skills as an attorney generally.

References to source materials are provided in endnotes at the close of each chapter.

1. Model Rules of Pro. Conduct r. 1.18 (Am. Bar. Ass'n 2023).
2. Chicago Manual of Style, § 5.48 (17th ed. 2017).

Chapter One – An Overview of the Prospective Client Interview

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Explain why the initial meeting with a prospective client is critical to ethical and effective practice.
- Identify the five components of an initial client interview.
- Identify models of the attorney-client relationship and how these models will be reflected in the interview.
- Perceive the value of reflection in professional practice and begin to acquire skills in reflective writing.

A. How does the prospective client meeting require choices that are critical to an attorney's ethical and effective practice?

An initial client meeting presents the most recurrent and important ethical choice for most attorneys: the decision whether and how to represent a particular prospective client. Knowing which clients to turn down is just as important as knowing which ones to accept. That decision, typically made during the initial client meeting, will impact every aspect of an attorney's practice. Agreeing to represent a particular client not only determines your responsibilities to that client but also determines your ability to represent other clients. Your choice of clients influences your professional development, reputation, financial stability, and overall well-being. Likewise, for your client, the decision to employ an attorney is a decision to trust another to represent their interests in some of the most important aspects of their lives. Ordinarily, both you and your prospective clients will be making this decision after a relatively brief initial meeting. You can see, then, how vital it is that you develop the necessary knowledge and skills to be able to manage this interaction well.

The initial consultation is ordinarily when both the client and the attorney decide whether to enter into an attorney-client relationship. During this first meeting, your job is to help clients decide whether hiring an attorney is a wise choice, and if so, whether you are the right attorney for them. Just as important is your own decision about whether you are able and willing to take this person as a client.

There are some cases or clients you must decline. For example, if you lack the skills, knowledge, time, and resources to provide competent representation, you must decline a prospective client's case unless you can become competent through study or association with another attorney.[1] Likewise, you must decline a potential client's matter if it presents a conflict of interest: that is, a matter in which the interest of any other person (a current client, former client, third person, or even your own interests) would materially limit your ability to represent this client competently, diligently, and with confidentiality.[2] Obviously, you will want to avoid any client who is seeking assistance to commit a crime or engage in fraud or other wrongdoing.[3]

1. Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 2023).
2. Id. r. 1.7.
3. Id. r. 1.2(d)" A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and

Additionally, you may choose to decline some clients even if the rules of professional conduct permit you to represent them. All attorneys have clients, cases, or transactions that they wish they had not accepted. These representations can present significant risks of malpractice and discipline simply because they are so unpleasant that attorneys are tempted to neglect them. When this means ignoring calls, emails, or avoiding contact with difficult clients, the attorney risks violating professional duties of diligence and communication.

Trust is critical in the attorney-client relationship and that includes your ability to trust the client.[4] Accordingly, as you consider whether to offer your representation to a prospective client, you must assess your compatibility. Is this person one whose communication style, responsiveness, resources, expectations, experience, and personality will make possible a relationship of respect and trust? At the same time, the client will be assessing you for similar compatibility.

For those clients you want to represent and who want to have you represent them, the communication in the initial meeting is critical to setting the tone for the rest of the representation. The ethical duty to communicate with a client is a core duty, expressed in the Model Rules of Professional Conduct as the duty to "keep a client reasonably informed about the status of a matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[5] Yet one of the most common disciplinary complaints against attorneys is the failure to communicate. The seeds of that failure often are planted in the initial meeting between attorney and client, when attorneys fail to attend to how their conversation may inadvertently shape (or misshape) client expectations about time, costs, communication, objectives, or approach. Clear communication in the initial meeting can prevent later misunderstandings and ensure that clients feel informed and involved in their legal matters.

We can learn from studies of doctor-patient communication about how important this communication can be to satisfy clients and to lower risks of malpractice actions or disciplinary complaints.

> Lawsuits against primary care physicians were more likely when the physicians were less skilled in educating patients, when they did not encourage or facilitate patients' expressions of concerns or opinions, and when humor or laughter was minimal in physician-patient interactions. Visit length was 20 percent longer in the no-claims group. Nonverbal expressions of affect held the strongest predictive value of any variable…[6]

Clients are similar in this respect to patients. Both want professionals who are competent and can provide straightforward and accurate information about their circumstances and options. They also want professionals who are caring people, worthy of their trust.[7] They want a professional who will listen and accept their concerns without judgment, but who will also help them to move toward solutions. They want professionals who are calm, empathetic, and patient.[8] The initial interview is the first and perhaps most important place at which you can demonstrate to a prospective client that you are competent, caring, and worthy of trust.

Setting the tone for the relationship includes managing the client's expectations about the type and scope of services you will provide, the manner in which you will deliver those services, the cost and timing of the services, and the results they can expect. In order to manage these expectations, you must first discover the client's assumptions

may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." See also, r. 1.4(a)(5) directing that an attorney shall "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

4. We will learn more about trust in Chapter Three.
5. Id. r. 1.4 (2009).
6. Kathleen A Zoppi & Ronald M. Epstein, Interviewing in Medical Settings, in HANDBOOK OF INTERVIEW RESEARCH: CONTEXT AND METHOD 355, 372 (Jaber F. Gubrium & James A Holstein, eds., 2001).
7. Clark D. Cunningham, What Do Clients Want from Their Lawyers, 2013 J. DISPUTE RESOL. 143, 146-151.
8. Marsha Kline Pruett, Tamara D. Jackson, Legal Ethics: Some Current Issues in the Practice of Family Law, The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, & Their Attorneys, 33 FAM. LAW Q. 283, 294-95 (1999).

and goals. When there is a mismatch between your approach to providing services and the client's expectations, you will need to decide whether to adjust your practice to meet the client's expectations, help the client adjust their expectations, or encourage the client to seek other counsel.

As you can see, there are many complex and critical goals you are working toward in the initial interview:

- Setting the tone for building a relationship of trust,
- Informing the client of the purposes and constraints of an initial interview,
- Providing information and managing a client's expectations about the costs, timing, scope, and utility of the legal services you can offer,
- Gathering information about the client's matter sufficient to inform the representation decision,
- Assisting the client in clarifying interests and objectives sufficient to inform the representation decision,
- Deciding whether to represent the client,
- Assisting the client in deciding whether to engage your services,
- Making clear the nature of your relationship after the initial interview (non-engagement or engagement),
- Providing value to the client as appropriate to the decision whether to represent,
- If representation is agreed upon, informing the client of possible solutions and setting a preliminary plan for representation,
- If you are going to represent the client, agreeing on the scope and terms of that relationship, and planning next steps.

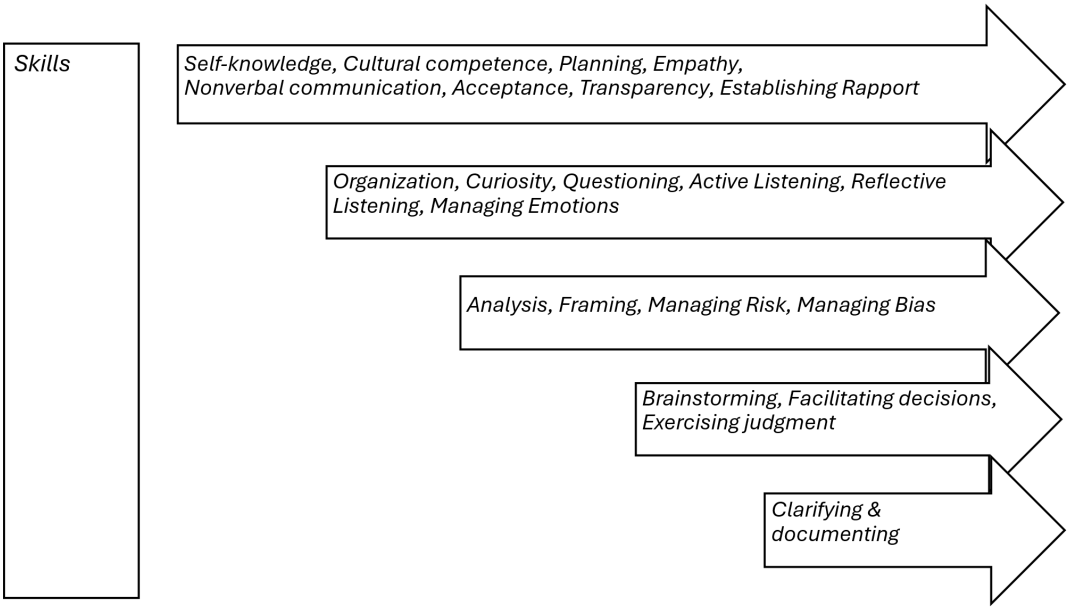
B. What is the overall structure of a prospective client interview?

The structure of most initial client interviews reflects the multiple purposes outlined above. As you are first learning the skills of interviewing and counseling, you may think of the interview as proceeding in "stages" to accomplish each of these purposes in something of a linear order. However, in practice, the purposes overlap and you frequently will find yourself emphasizing different purposes throughout the course of the interview.

Before the initial interview begins, your planning should be designed to frame the relationship. You do this through the intake process and through setting up the initial meeting. The "stages" of the interview itself then begin with introductions, when you and the prospective client get to know one another and begin to lay the groundwork for trust. You explain the nature and goals of the interview process and invite the prospective client briefly to describe the nature of the matter that has brought them to you. The interview will quickly turn to a more detailed fact gathering process. Before, during, or after this process (and often at all three times), you will also engage the client in a process of identifying and clarifying their goals and priorities. This requires identifying not only what the client wants (their objectives) but why (the underlying interests, concerns, and values driving those objectives).

As the prospective client's matter and goals become clearer, you often will move toward preliminary counseling or problem-solving. At this point, you likely will focus on preliminary legal theories you have been formulating throughout the interview and educate the client regarding rights and duties. This process may require that you return to additional fact gathering and goal clarification. You will work with the client to generate ideas about legal and practical options for pursuing their goals. As the interview closes, you will decide whether to represent the prospective client and they will decide whether to engage you to represent them. Sometimes, that decision will occur during the meeting; in other circumstances, the attorney or the client may need more time for the decision. In any case, as the interview concludes, the attorney should summarize the interview and communicate clearly with the client about the existence (or non-existence) of an attorney-client engagement.

For all stages of the interview, a number of skills are required. You must be able to: listen actively, use of prompts and questions, to identify and reflect both content and emotion, to communicate information clearly, and to describe legal theories and possible solutions.



This text proceeds through these parts of the interview, providing instruction and opportunities for practice of these key skills along the way.

C. What is the nature of the attorney-client relationship?

An attorney-client relationship is a special type of agency relationship. The client is the principal, responsible for deciding the objectives of the engagement, and the attorney is the agent, responsible for the means of achieving those objectives. However, unlike many traditional principal-agent or employer-employee relationships, the attorney-client relationship is also a fiduciary relationship. Because clients lack the specialized knowledge and training to supervise a lawyer's work, they must trust that their lawyers are carrying out professional responsibilities properly. Chief Judge Benjamin Cardozo noted that these fiduciary relationships require a greater responsibility than other agency relationships: "The trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior… the level of conduct for fiduciaries [has] been kept at a level higher than that trodden by the crowd."[9]

The fiduciary responsibilities of attorneys are embodied in state rules of professional conduct.[10] Those core

9. Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). While Justice Cardozo was speaking in this case of the fiduciary duty business partners owe to one another, the principles apply even moreso to the attorney client relationship, where there is an ever-greater imbalance of power and reliance by the client-principal.
10. All states draw from the American Bar Association's Model Rules of Professional Conduct as a model for their state disciplinary standards.

fiduciary duties include competence,[11] diligence,[12] communication,[13] confidentiality,[14] and loyalty.[15] Those duties attach as soon as the attorney-client relationship is formed. However, the rules of professional conduct also treat a prospective client as a type of limited client.[16] Accordingly, an attorney owes each of these duties to some extent even in the initial interview, even before an attorney and client have agreed to a representation.

While you can decline to represent a prospective client for any reason, or for no reason at all, once you have committed to representing a client, your ability to withdraw from that relationship is limited. In general, you cannot withdraw from a representation if it will materially harm your client. The rules of conduct provide limited exceptions to this rule. If you are unable to fulfill your duties to the client or the law, you may be required to withdraw from a representation.[17] Likewise, the rules permit you to withdraw from a representation in a very limited range of circumstances, primarily those in which withdrawal is necessary to disassociate yourself from client misconduct.[18]

The rules of professional responsibility also speak to the dynamic that should exist with respect to communication and decision-making responsibilities within the attorney-client relationship. There are some decisions that always require a client's consent such as waivers of conflicts of interest or settlement decisions. In criminal matters, defense clients always have the final say on pleas, plea agreements, jury trial waiver, and whether the client testifies.[19] Conversely, there are some client directions that you simply may not follow, such as the client's direction to ignore the law or a court order, to file a frivolous pleading or motion, or to engage in other illegal or unethical conduct. Optimally you will screen out clients who expect this kind of assistance before agreeing to represent them.

In the middle ground are those decisions for which the allocation of authority between attorney and client is less clear. Generally, you have the discretion to determine the means by which the representation is to be carried out, while the client determines the objectives.[20] Clients may believe that you should take every step possible to advance their interests, regardless of whether that step is effective, efficient, or professional. The law addressing the attorney's duty in this regard leaves much more discretion to the attorney than a client may realize:

> A lawyer has authority to take any lawful measure within the scope of representation ... that is reasonably calculated to advance a client's objectives as defined by the client..., unless there is a contrary agreement or instruction and unless a decision is reserved to the client.... A lawyer, for example, may decide whether to move to dismiss a complaint and what discovery to pursue or resist. Absent a contrary agreement, instruction, or legal obligation..., a lawyer thus remains free to exercise restraint, to accommodate reasonable requests of opposing counsel, and generally to conduct the representation in the same manner that the lawyer would recommend to other professional colleagues.[21]

11. Model Rules of Pro. Conduct r. 1.1 (Am. Bar Ass'n 2023).
12. Id. r. 1.3.
13. Id. r. 1.4.
14. Id. r. 1.6.
15. Id. r. 1.7-1.11.
16. Id. r. 1.18 (for example, an attorney owes the same duty of confidentiality to a prospective client as to a former client and information received from a prospective client can create a conflict of interest disqualifying the attorney from other representations).
17. Id. r. 1.16(a).
18. Id. r. 1.16(b).
19. Id. r. 1.2(a). Some courts have read this rule to extend beyond the enumerated decisions to a range of ultimate decisions and other states expressly add additional matters to this list of decisions reserved to clients. "Rule 4-1.2(a) requires a client to be in control of the decisions that have the capacity to affect the client profoundly, specifically referencing the decision whether to accept a settlement of the case. . . ." In re Coleman, 295 S.W.3d 857, 864 (Mo. 2009).
20. Id. r. 1.2(a).
21. Restatement (Third) of the Law Governing Lawyers §21, comment 3 (2000).

This distinction between means and ends is far from a clear line. Even as to objectives, you must "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "keep the client reasonably informed about the status of the matter."[22] If a client objects to your decision about the means for pursuing their objectives or if you object to the client's objectives, you are left to negotiate the matter with your client. If the disagreement cannot be resolved, you must withdraw from the representation.[23]

Because there is so much discretion when it comes to putting these rules into practice, you should make these lines clear from the start of the representation. Always clearly establish your boundaries, not only as to the scope of your representation but as to the means by which you will pursue the client's goals.

Attorneys have varying approaches to this allocation of decision-making. Most attorneys have a default position regarding their authority in the relationship. Commentators have noted that these positions fall within one of three models—an authoritarian approach, a client-centered approach, and a collaborative approach.[24]

Traditionally, attorneys have been understood to take an authoritarian approach to the attorney-client relationship. The authoritarian approach is best described as a "highly directive" approach. Attorneys who take this approach might talk about the importance of "controlling" their clients. One of the most extreme examples of this is reflected in a conversation one of the authors had with an acquaintance asking for suggestions of attorneys she could contact about her desire to obtain a divorce. In discussing her situation, she noted that she had an attorney who had represented her a year previously as she became legally separated from her husband. She further indicated, however, that she did not want to continue with that attorney because she was uncomfortable dealing with him. When she had contacted him about her situation, the way he talked with her suggested that she should stay out of the way: "You have asked for my help. I am the attorney. I know what to do." This is about as "directive" as one can be.

The extremes of the authoritarian approach can run contrary to the rules of professional conduct. Notably, if an attorney does not engage the client in the decision-making process, the attorney is unlikely to be meeting the demands of Rule 1.4 regarding communication with clients.[25] If the attorney does not elicit or honor the client's decision about the objectives of the representation or does not consult with the clients about the means by which those objectives are to be achieved, the attorney is acting inconsistent with rule 1.2(a) regarding the allocation of decision-making authority.[26]

Partly in reaction to the overreaching by attorneys reflected in the authoritarian approach, many commentators have suggested that attorneys should take a client-centered approach to the relationship.[27] The client-centered approach is best understood as a "highly deferential" approach. The advocates of the client-centered approach argue that this approach can be especially important when representing clients who are socially or economically disadvantaged. A client-centered approach for these clients seeks to empower these clients to exercise decision-making authority in their lives. However, client-centered practice need not mean that you cannot express opinions about the wisdom or practicality of a proposed course of action, merely that you do so only to aid the client in their own decision-making.

Taken to an extreme, the client-centered approach (especially when used in representing sophisticated and powerful clients) can move toward the image of a lawyer as a "hired gun"—someone who will advocate for whatever position a client wants. This extreme approach is also contrary to ethical rules. Rule 2.1 provides that "a lawyer

22. Id. r. 1.4(a)(2)-(3).
23. Id. r. 1.2, comment 2.
24. See, e.g., THOMAS L. SHAFFER AND ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (2d. ed. West 2009)(Ch. 1, 2, and 4).
25. Id. r. 4.
26. Id. r. 1.2(b).
27. See DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d. ed. 2004); ROBERT M. BASTRESS AND JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATION SKILLS FOR EFFECTIVE REPRESENTATION (1990).

shall exercise independent professional judgment and render candid advice" to clients.[28] The comment to that rule emphasizes that sometimes attorneys must question a client's decisions.

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client. [29]

Other commentators have suggested that both of these approaches are problematic because they are prone to "imbalance"—with decision-making authority either unduly allocated to the attorney or unduly allocated to the client. These commentators believe that the attorney-client relationship should be more balanced. Accordingly, they suggest that attorneys should pursue a collaborative approach to the attorney-client relationship.[30] Even this approach can raise ethical concerns, however. An attorney has an obligation to charge reasonable fees for their services[31] and to work to make legal services available.[32] Taking a collaborative approach can increase the costs of legal representation compared to delegating some decision-making to either the attorney or client.

For an attorney to rely on any one of these models requires a client who is able and willing to work within the model's framework. Consider, for example, the client who has a limited capacity for decision-making. The rules of professional conduct suggest that "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[33] The attorney may find that the collaborative or client-centered models may not fit as well with these clients, who may require more direction than others.[34]

Of course, in actual practice, these different models for communication and decision-making are rarely exclusive. The role of the attorney in the attorney-client relationship is not easily confined to any one of these three categories or approaches. To be in a "collaborative" attorney-client relationship does not mean that the relationship won't have aspects in which the attorney is directive or authoritarian or in which the attorney is deferential or client-centered. Indeed, it is not hard to imagine a conversation between an attorney and a client in which the relationship spans all three approaches within a fifteen- or twenty-minute period. While there are appropriate reasons to be concerned about abuses resulting from imbalances inherent in the authoritarian and client-centered approach, and corresponding reasons to gravitate toward the collaborative model, the collaborative model in reality will encompass situations in which the attorney appropriately will need to direct the client or defer to the client.

Check your Understanding

Suppose a client had been in an auto accident and was consulting with an attorney regarding possible claims. The conversation might encompass the following exchanges:

28. Id. r. 2.1.
29. Id. r. 2.1, cmt. 1.
30. See Shaffer and Cochran, supra n. 24, at Chapter 4.
31. Id. r. 1.5(a).
32. Id. r. 6.1 and Preamble ¶1.
33. Id. r. 1.14.
34. Rodney J. Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?, 1988 WIS. L. REV. 65 (1988); Stanley S. Herr, Representation of Clients with Disabilities: Issues of Ethics and Control, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989-90).

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=28#h5p-1

We think it is important for students to think broadly about how they conceive of their role in the attorney-client relationship. We are attorneys and people. Who we are as attorneys should not be divorced from who we are as people. The values and perspectives that shape our lives as individual members of a community also must inform our understanding of who we are as lawyers within society.

D. Why is reflective practice a habit of effective professionals?

Reflective practice is a habit of expert learners and practitioners. You have likely heard the expression "practice makes perfect." It's not true. It is only practice plus reflection and correction that leads to improvement. That process of reflection requires observing and critiquing your own performances regularly and evaluating how your daily actions are shaped by your values, preferences, and perspectives. Attorneys who neglect this reflection will never be aware of their own strengths (so as to capitalize on these), weaknesses (so as to improve), or passions (so as to sustain themselves). Reflection gives meaning to experience and turns experience into practice. Reflective practice can also be used to learn from observation of others.

Often the most useful way to incorporate regular reflection into your professional development is through reflective writing. Writing engages your thoughts in a different (and sometimes deeper) manner than just thinking about a topic. Accordingly, a journal or log can be an important tool for improving your professionalism. Because reflection is so critical to skills development, this text includes regular reflective writing exercises.

How do you structure a written reflection?

First, describe in concrete terms the activity upon which you are reflecting (whether a reading, question, observation, or your own actions). The very act of summarizing the observation/activity can lead to additional observations and evaluations. This can be especially so when you describe something in present rather than past tense. You can even experiment with reflections from a second- or third-person point of view. Authors know all about the value of varying points of view in describing and understanding a situation. Trying out different points of view in your reflections can not only support rich reflection but can also help you to develop the skill of viewing a situation through multiple perspectives.

Describing what you are reflecting upon is also important if you want to share the reflection with others or you want to review the reflection at a later time. Without a description to preface the actual reflection, you (or your reader) will not have critical context to understand your evaluation. In practice, you may be asked to share with other attorneys your reflections (evaluations) on a witness, negotiation, or other interaction. Even if your readers or listeners also were present for the event, what they saw and heard is unlikely to be precisely the same as what you saw and heard. Beginning with rich descriptions, then, sets the stage for rich reflection.

Second, engage in a critical evaluation (questioning, examining more closely) the situation. In his book, "The Reflective Practitioner," MIT Professor Donald Schon[35] suggests that professional behavior is guided by theory. Schon

35. DONALD A. SCHON, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1984).

describes two types of theories: "theories-of-action" which are the values, strategies, and underlying assumptions that affect behavior, and "theories-in-use" which are the theories implicit in one's habitual actions. In other words, professionals don't always behave in ways that are consistent with how they talk about their professional values and beliefs. Through reflection, professionals can examine their own theories (both explicit and implicit) and align their behavior and theory. Carefully examine the ideas or actions upon which you are reflecting to identify your own explicit and implicit beliefs and theories. What surprised you? Challenged you? Confused you? How are your personal assumptions, habits, or values connected to the opinions or behaviors upon which you are reflecting?

Third, use the reflection for further learning. What additional action or reflection will you use to develop your skills, improve your understanding, or refine your beliefs? The more concrete your plans for building upon your reflection, the more you will learn.

Here is an example of reflective practice from one of the author's experiences working on a clemency project.[36] The author began with a description of the event. The clemency petitions workgroup had met to review the cases of women who had been incarcerated for the murder of their batterers at a time before evidence of battered spouse syndrome was admissible. One of the key elements in consideration was creating a powerful package of petitions that would persuade the governor to grant clemency. Who should be included in this package was the topic of discussion.

Notice how detailing exactly what was said and the emotions and thoughts that were involved helped the author gain insights and lessons that would be applied to future representations:

> Assisting in our deliberations was a secretary who had been incarcerated and released. "Kay" quietly listened and took notes during much of our discussion, speaking only to answer questions about prison procedures or personnel.
>
> The discussion turned to the consideration of individual petitions. Some petitions were stronger than others, but some presented more sympathetic petitioners than others. Where should we draw the line? I suggested that we include only those petitions that presented a strong possibility of success. I thought it would simply be one more cruel blow to put forward the names of women with less than optimal petitions and have them denied any relief once again. It seemed to me that this would simply replay the entire trauma of their original conviction. I thought I was exercising empathy and compassion to inform my independent professional judgment. I summarized all these thoughts by interjecting: "But we don't want to give these women any false hopes."
>
> At my comment, Kay fled the room in tears. I went after her, hoping to offer an apology or comfort, as the situation demanded. When I walked up to her in the hallway, she blurted out through her tears, "You just don't understand. Hope is all they have. You live every day holding onto hope. If one hope is dashed, you find another. That's how you survive. If you don't have hope, you don't survive."
>
> Going into that meeting… I was fully aware that I had no idea what prison life was like…. I knew full well that I really couldn't fully appreciate the circumstances these women had lived through. I knew what I didn't know. But that didn't stop me from assuming. Kay's admonition—"You just don't understand"—rings in my ears to this day, reminding me that my first job as a counselor and advocate is to listen to the client: the true experts in everything except the law.

Reflective Practice

Think about a personal circumstance in which someone has come to you with a problem or concern, and answer the following questions.

36. The author incorporated this reflection from her journal into an essay on the topic. Barbara Glesner Fines, Clients as Teachers, 91 A.B.A.J. 54 (2005). Available at: https://irlaw.umkc.edu/faculty_works/78.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=28#h5p-3

Check your Understanding

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=28#h5p-4

Chapter One Endnotes

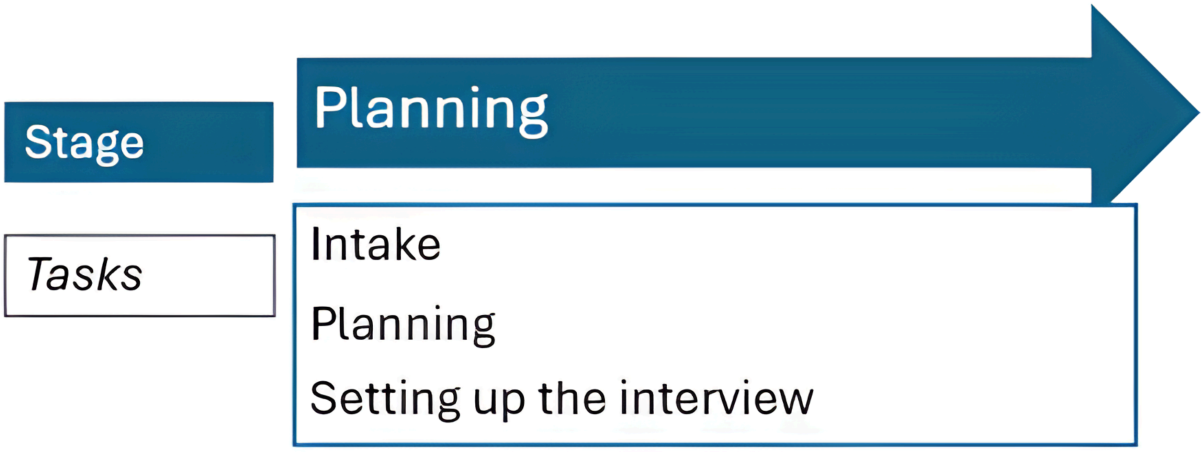
Chapter Two – Preparing for the Interview

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Identify key information an attorney should gather prior to the initial meeting with the prospective client.
- Describe the advantages and disadvantages of various intake and preparation methods.
- Describe how to screen prospective clients for factors that disqualify the attorney from representation.
- Identify factors in selecting a method and location for the initial interview.
- Describe the importance of nonverbal communication in interviewing a prospective client.

Like any other lawyering task, a preliminary interview with a prospective client requires preparation. That preparation includes gathering preliminary information from the prospective client, preparing a plan for the interview, and confirming the interview. In this chapter we will explore the choices you will need to make in preparing for a prospective client interview.



A. What information should be gathered before the initial interview?

In nearly all practice settings, you will want to gather some information before the first interview. Certain information is critical no matter what the situation. Other information will be helpful in making certain types of interviews more efficient and effective.

There are two stages to this preliminary information gathering. First, you will want to determine whether a prospective client or matter is one that you are able and willing to explore. Thus, you will need to gather the information that permits you to decide whether to conduct an interview at all. For example, you will want to ensure that the prospective client's matter is within your field of practice. A brief description of the prospective client's problem and the outcome or assistance they are seeking will suffice for this purpose. Where and when the events or transactions giving rise to the legal matter occurred or are planned is essential for determining whether the matter is within your jurisdiction and what deadlines may apply.

The rules of professional conduct require that attorneys check for possible conflicts of interest. Comments to the Model Rules of Professional Conduct warn that "A conflict of interest may exist before representation is undertaken…"[1] and directs attorneys to "adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved."[2] Accordingly, attorneys will want to gather enough information about the client and the other parties involved in the matter to conduct a preliminary conflict check. Keep in mind that this check is not a "one and done" process. You need to continue to monitor for conflicts throughout any representation. For a preliminary check, you will need the client's full name, the names of any associated entities (businesses, organizations, etc.) and the names of any other parties involved in the matter, along with a brief description of the matter. Asking for the client's employer can be relevant to conflict checks and may also help an attorney to determine the client's financial situation.

If a prospective client fits within your practice area and jurisdiction and no disqualifying conflicts of interest are apparent, a second step of intake will be to gather additional information to prepare for an initial interview. How much information to gather depends on the nature of your practice and the nature of the prospective client. More information helps you begin to assess the prospective client and the matter and facilitates a more efficient meeting. However, remember that you owe a duty of confidentiality to prospective clients regarding the information you have gained from them, even if you ultimately decide not to represent them.[3] The more information you gather, the greater the risk that you will create conflicts of interest that will later disqualify you from other representations.[4] Moreover, the more information you gather from a prospective client, the greater the risk that the prospective client will expect that you have already agreed to represent them. An attorney-client relationship can be created not only by express agreement or by court appointment, but also by giving advice that a client reasonably relies upon.[5] You can see, then, that more information is not necessarily better.

B. What are options for intake procedures?

Increasingly attorneys are using technology tools that triage prospective clients through an online form.[6] These forms might even be provided on the attorney's website as the sole method for prospective clients to contact the attorney. Most commercial practice management programs include intake forms that integrate with the program's conflicts, billing, and case management systems. Because these forms limit the amount and types of information a prospective client can provide, they limit the risk of creating expectations of representation or of gathering confidential information that might create a conflict of interest. They can increase efficiency as the information provided can be

1. Model Rules of Pro. Conduct r. 1.7, cmt. 3 (Am. Bar Ass'n 2023).
2. Id.
3. Id. r. 1.18(b).
4. Id. r. 1.18(c).
5. Restatement (Third) of the Law Governing Lawyers § 14 (2000). A relationship of client and lawyer arises when: 1. a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or 2. a tribunal with power to do so appoints the lawyer to provide the services.
6. An example of such a tool is Lawbrokr Storefront (https://www.lawbrokr.com/). Similar tools are used by nonprofits to support self-represented litigants or to streamline intake. See, Ayyoub Ajmi, COVID 19: A Catalyst to Automate Protection Order Petitions to Support Self-Represented Litigants, 60 FAM. CT. REV. 165 (2022) https://doi.org/10.1111/fcre.12635 (describing guided interview and document assembly program for self-represented individuals seeking orders of protection from abuse or stalking).

incorporated automatically into templates for follow-up actions. However, these web-based forms can make an attorney seem remote and impersonal if not balanced with other tools.

For prospective clients whom you decide you do want to interview, you might ask the prospective client to provide even more information ahead of the interview. You might send the client a more extensive questionnaire to bring to the interview or you might ask them to complete a form in the office while they are waiting for their appointment. These intake forms can allow the client to provide detailed information privately at their own pace and can ensure that you have gathered all basic biographical information, facts about the legal matter, and conflicts screening information. These intake forms can also be an important documentation of the reason for the interview and the client's initial expectations. However, some individuals may not fully understand all questions, may provide incomplete information, or may even resent the request for detailed information before they have had an opportunity to meet you and build some trust.

In addition to or instead of an intake form, some attorneys prefer to schedule a brief intake call with potential clients to determine whether a full interview is appropriate. Often attorneys may delegate this task to a paralegal. The advantage of this model is that it begins the potential relationship with human contact. The interviewer can explain the process to the client and start building rapport. Through these intake interviews, the interviewer can ask follow-up questions to gather more details, clarify ambiguities, or identify conflicts or other issues requiring your attention early on. This approach is expensive, however, especially if you are the one who conducts these interviews. However, even the paralegal model can be expensive. Not only does it require the time of a paralegal for these interviews, but you must provide thorough training so that the paralegal does not provide legal advice[7] and accurately conveys information.

The availability of generative AI provides the option of using chatbots or programmed guided interviews to conduct these initial intakes. As with an intake form, clients can initiate intake conversations with a chatbot at their own convenience. A chatbot can, like a paralegal, also ask clarifying questions based on user responses using conversational AI. Carefully designed, a chatbot can provide consistent intake, so that no key information is overlooked. Such an approach might be well suited to intake in high-volume, lower complexity areas of practice. Current chatbots have limitations understanding complex legal matters and may not adequately identify conflicts or critically analyze appropriateness of representation. Potential clients may perceive these tools as impersonal and lacking human rapport. Efforts to make the chatbots appear to be interactions with living humans are misleading and therefore unethical. As with any delegation, you have the duty to ensure that the chatbot is conducting interviews in a manner that complies with the rules of professional conduct.

The ideal approach may involve a hybrid model—using pre-screening programs or chatbots to triage potential clients, intake forms to capture basic details, and paralegal/attorney interviews for matters requiring professional discretion and judgment. This leverages technology but still provides the human interaction important for complex legal intake.

Reflective Practice

As you make choices about intake procedures (that is, scheduling meetings with and gathering initial information from prospective clients), try thinking about these choices through several lenses. One lens can be your own experience. Think about times that you have had to schedule a meeting with a service provider—whether a doctor, financial aid advisor, or mechanic, and answer the following questions.

7. Model Rules of Pro. Conduct r. 5.3 (Am. Bar Ass'n 2023).

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=30#h5p-5

C. How do you screen prospective clients for factors that disqualify you from possible representation?

Identifying at the start those cases or clients that you will want to decline is an important part of preliminary intake. There are some clients that you can easily screen out based on a few simple questions in the intake process. These questions also may help you identify clients that are more likely to result in productive attorney-client relationships. Consider the following questions and their utility in conducting this screening.

1. Where is the client and the matter located?

Attorneys may not practice law in jurisdictions where they are not licensed. How do you know if you are practicing law in a jurisdiction in which you are not licensed? Unfortunately, the answer is not always clear. Despite the efforts by courts and the profession to create clarity, the law is often confusing and difficult to predict. You are at highest risk for unauthorized practice in another jurisdiction if you are:

- representing a client from another jurisdiction,
- that involves a matter that concerns events or transactions primarily located in that jurisdiction,
- before a tribunal in that jurisdiction, and
- that requires your physical presence in that jurisdiction.

Obviously, the highest risk would be if you are misrepresenting your licensure limitations.

On the other hand, if you have the court's permission to practice in a particular case ("pro hac vice" admission) or you are providing brief and temporary services in another state in collaboration with an attorney from that state, your risk is less. Your Professional Responsibility course will provide more opportunities to gain a more nuanced understanding of this issue.

The biggest mistake you are likely to make early in your practice is not that you will knowingly push the boundaries of jurisdictional limits of your license. The more common mistake is simply not seeing the issue at all because you haven't asked about where the client and the matter are located.

2. When does the matter require action?

Another especially important screening topic concerns timing and deadlines. For litigation matters, knowing when a cause of action arises (generally by identifying when an event occurred) is critical to deciding whether you can or will help a client. There is a great deal of risk in taking on a case that is close to the statutory limitation, as you may need to set aside other client work in order to give undivided attention to meeting that deadline. Sometimes the very reasons that a client has delayed are reasons for declining the representation. The purpose of statutes of limitations is, in part, to

require that lawsuits begin while witnesses and evidence are still available and memories are fresh. Taking a case close to a filing deadline may be challenging then, with evidence more difficult to find and witnesses whose memories are less reliable. Similar considerations caution against taking cases when clients have delayed in non-litigation matters in which there are looming legal deadlines, such as filing requirements for business or investment matters. These filings often require detailed and exacting reporting that is difficult when time is short.

Some prospective clients are in a hurry for reasons apart from legal deadlines. Perhaps you've seen the popular saying, "Poor planning on your part does not necessitate an emergency on mine." Before you get swept up in a client's frantic request for immediate help, consider carefully whether you wish to and will be able to meet the expectations of these clients. While service is a core value of the profession, you are certainly not required to accept every client who comes to you for assistance.

3. What kind of matter?

Before accepting a case, assess whether the client's legal needs match your expertise and capacity. In the language of sales, this is the process of "qualifying a lead"—evaluating potential clients to determine if they are a good fit for your firm's services. Obtaining a brief description of the prospective client's issue is usually sufficient for you to determine if the matter is within your field of practice.

Some people will contact an attorney just wanting some general information without a clear need for legal services. This is less common today, as more legal information is more readily available online. To meet this need, many attorneys today post short informative articles on their website. This can be an effective way to highlight your expertise and preferred areas of practice, while also expanding access to legal information. Providing this information upfront also helps to screen out those clients who have not yet decided whether they need legal services but who need some preliminary information to make that decision.

Another aspect of qualifying a prospective client is a financial determination. For certain types of practice, knowing some financial information is critical to determining whether an initial interview is warranted. For example, attorneys providing contingent fee representation will need to have some sense of the possible damages at stake to know whether a case is financially viable. For these practices, obtaining some preliminary information on likely amounts in controversy will be helpful in preliminary screening. Asking these questions in a sensitive manner is important, lest you exacerbate the public perception that attorneys are simply interested in money, rather than client service. The finances of a particular client's case may not justify a full-service representation, but you may still want to provide a limited scope consultation to advise the client on one particular aspect of the case or provide alternative resources to assist them.

Some practice settings require more specific qualification of a prospective client. For example, attorneys working in offices funded by the Legal Services Corporation may not accept clients who do not meet certain income, citizenship, and case-type guidelines. Private firms too may have particular guidelines for screening clients.

Not all of this screening for case, client, or complexity can be conducted in an online intake or even a preliminary phone intake. Understanding the client's issues and expectations fully will usually require a preliminary consultation. However, screening can eliminate some of those matters for which that consultation would not be an efficient or effective use of time for either the attorney or the prospective client.

4. Who is involved?

The earlier you identify a conflict of interest, the better. If possible, you should conduct a basic conflict of interest check before setting up an initial interview with a prospective client. This is the first and most crucial step in fulfilling

your ongoing duty to watch for conflicts throughout the representation. If you do not discover that a current client's interests conflict with a prospective client until after you have obtained confidential and material information from the prospective client, you may have to decline the proposed new representation and also withdraw from representing your current client as well.

What is a conflict of interest? There are two primary values that conflict of interest rules are designed to protect: loyalty and confidentiality. Your loyalty may be threatened any time that you are asked to represent someone in a matter in which the interest of any other person (a current client, former client, third person, or even you) could materially limit your ability to represent that prospective client competently or diligently. Confidentiality is threatened any time that you have confidential information from one client (whether a prospective, current, or former client) that you could use to advance contrary interests of another client. To make matters even more complicated, conflicts are imputed from one attorney to all attorneys in a firm.[8] Thus, if another attorney in your firm has a conflict of interest that prevents them from representing a particular client, you generally cannot represent that client either.

Conflict of interest rules are detailed and complex. Your Professional Responsibility class will undoubtedly thoroughly address this doctrine. Moreover, different jurisdictions may have variations on these rules. For purposes of understanding how conflicts might arise in a preliminary interview, consider this very simplified and incomplete summary of common examples of conflicts:

- You cannot represent a client if your loyalty to anyone else (you, another client, a former client, a third person) would materially limit your ability to provide competent, candid, diligent representation.[9]
- You cannot represent someone whose interests are adverse to a former client if the two matters are so related that you are likely to have gained relevant confidential information from the former client that you could use against them in this representation. Suppose an attorney has been in-house counsel for a company handling their employment policies and human resources matters. The attorney leaves the company and begins private practice representing employees in discrimination matters. The attorney would be unlikely to be able to represent an employee in an action against the attorney's former company because the employee's case would ordinarily be considered the "same or a substantially related matter" as the attorney's work at the company.[10]
- You cannot give a litigation client money except to advance court costs and litigation expenses or in some limited cases to provide humanitarian assistance to a client in poverty.[11]
- You cannot ask the client to waive malpractice claims against you ahead of time. You cannot settle a malpractice claim with an unrepresented or former client unless the deal is reasonable, fully disclosed in writing, and you've advised them in writing to get an attorney and given them time to do so.[12]

This is just a partial list of the types of situations that can give rise to conflicts of interest. You can see why large firms often hire an attorney whose primary job is to screen new cases for these conflicts.

A common situation presenting a conflict of interest in the prospective client interview is when two individuals come to you to seek a joint representation. Perhaps they want to form a business or some other joint venture together. Perhaps they are both potential plaintiffs in a suit. Sometimes they may even be suing one another, as in a so-called "friendly divorce."

Some of these representations are simply prohibited. For example, you cannot represent someone whose interests are directly adverse (i.e., someone who is currently suing) someone you currently represent as a client.[13] This

8. Id. r. 1.7, 1.9 (Am. Bar Ass'n 2023).
9. Id. r. 1.9.
10. Id. r. 1.10.
11. Id. r. 1.8(e).
12. Id. r. 1.8(h).
13. Id. r. 1.7.

applies even in situations in which both parties want you to represent them. For example, in most jurisdictions an attorney cannot represent both spouses in a divorce—even a so-called "friendly divorce." Most attorneys will agree to represent only one spouse and leave the decision up to the other spouse as to whether they wish to engage counsel or represent themselves.

Others are only sometimes prohibited but nearly always unwise. For example, you may not want to represent co-defendants in a criminal matter, because it is not unusual for these defendants to have irreconcilable views about cooperating with authorities, accepting plea agreements, testifying, or making other critical decisions. Those views sometimes do not emerge until well into the representation, when your withdrawal could significantly prejudice your clients' interests. This is an example of a situation in which even a potential for future conflicts of interest is sufficient to warrant declining a representation.

Some joint representations are not uncommon but still require caution. For example, several individuals may seek your assistance in forming a business or making an investment. These types of potential conflicts cannot be resolved in a preliminary intake but will require a conversation with the prospective clients in a preliminary consultation.

5. Have you worked with an attorney before?

This simple question can provide you with very important information you will want to know from the beginning. Learning about a prospective client's prior experiences with legal services can give you insights into their expectations and familiarity with the legal system. As to the particular matter, you will want to know if they have talked with other attorneys or spoken with others about the case. If the client has spoken to other attorneys on the matter, you will want to know why they chose not to work with those attorneys.

Before agreeing to a consultation, you may want to consider the reasons that a prospective client may be looking for representation despite having worked with other attorneys on the matter. Some reasons present very little risk—a prior attorney may have been disqualified for a conflict of interest or may no longer be practicing law or may have provided incompetent representation. Other reasons are more problematic. If you are one in a long line of attorneys with whom the prospective client has already met to discuss their issue, this may be a red flag for a client who has unrealistic or even unethical expectations. An attorney will want to know as soon as possible if the prospective client is one whose prior attorney has withdrawn because the client has not paid, or is difficult to work with, or demands that the attorney provide services that are unreasonable, unethical, or even illegal. Especially if the client had previously engaged an attorney on the matter, you may wish to ask for permission to speak to these attorneys.

If you are currently representing a client in a matter, you cannot speak to anyone that you know is represented by another lawyer in the same matter, unless the other lawyer consents, or the court permits the communication.[14] This rule does not preclude your communication with a represented person who is simply seeking advice or a second opinion. Nonetheless, most attorneys are reluctant to provide these consultations. Many attorneys facing these requests for second opinions will ask the prospective client for permission to contact the first attorney to discuss the matter. This awkward situation is another reason why it is a good idea to ask a prospective client if they have spoken with others, especially other attorneys, about their matter.

14. Id. r. 4.2.

Skills Practice

Review the following two client intake forms in a personal injury practice. Consider each one, and then answer the questions that follow.

INTAKE FORM #1 – WEST CASE (taken over phone by paralegal)

I. CLIENT INFORMATION

Last Name West First Name Linda
Date of Birth 2/25/1993
Address 14900 60th St #27, Our City, Our State
Home or Cell Phone number 816-123-4567 Work Phone 816-235-1000
E-mail Westreal@realmail.com Marital Status single

II. EMPLOYMENT INFORMATION

Employer Deerhorn Stables Client's Occupation Stable Assistant
Address 8300 60th St. N, Our City, Our State
Annual Earnings: $27,000 Date Employment Commenced June 2017
No. of Hours Worked Per Day 8 No. of Days Worked Per Week 5
Supervisor Frank Fetzer

III. PARTIES/WITNESSES

Opposing party Roland South
Witnesses Tammy MacTaggart

IV. BRIEF DESCRIPTION

I was riding my horse along the road when a man came out of his house screaming, threatened to shoot me, hit my horse, and made me lose control of her, and threw rocks at me as I left. My horse can't be shown anymore because he is head shy.

INTAKE FORM #2 – BROWN CASE (online form)

I. CLIENT INFORMATION

Last Name Brown First Name Barbara
Date of Birth 2/25/1952
Address 205 Park Avenue #800, Kansas City, MO
Home Phone 816-500-0001
E-mail Brownreal@realmail.com
Case type: ✓ Personal injury
Problem Description (125-character limit): I was trying to fill my prescription at Walgreens when they accused me of shoplifting which I didn't do, and then they stole

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=30#h5p-6

6. Declining a consultation

What do you do if you have concluded that you are not interested in speaking with a prospective client? The key in these situations is to be prompt, clear, and simple. If you cannot represent a prospective client because the matter is not one within your practice area or jurisdiction, simply say so. If the reason is because of a conflict of interest, your response must be dictated by the nature of the conflict. You could say that you have identified a conflict and cannot represent the prospective client in this matter. For some sophisticated clients of large law firms, this will not necessarily be unexpected news. Beyond identifying that a conflict exists, however, you certainly should not provide details regarding your representation of another current or former client, as that would be violating your duty of confidentiality to that client. Sometimes even simply saying that you have a conflict might reveal confidential information. Suppose a client comes to you asking for assistance in filing for a divorce from their spouse. Telling that client that you have a conflict may lead the client to realize that their spouse has also consulted with the firm. Another approach is to simply indicate that you are not able to take on the client at this time.

If you could, but do not wish to, consult with or represent a prospective client, you can simply say that you are not in a position to be able to help them at this time. You needn't give any specific reason. Be sure that you do not inadvertently suggest that they should not seek out other attorneys or that you are declining to meet with them because you have evaluated their matter as without merit. You lack sufficient information from a preliminary intake to make that determination. Moreover, communicating an opinion about the client's matter could be deemed legal advice, creating potential malpractice liability if the advice proves faulty.

In declining a prospective client, many attorneys like to have a list of attorneys for a referral, but you need not provide such a referral. If you do, be sure to let the client know that they shouldn't feel obligated to contact or engage the referred attorney. Some attorneys provide the number of a state or local bar association lawyer referral service. Regardless of whether you give a referral, be sure to follow up with a nonengagement letter or other written confirmation of your decision.

Whatever you do, do not come up with a sham excuse for declining the prospective client. For example, saying that you are not accepting new clients, while an easy way to decline this client, may result in your losing other clients whom you would want to represent. Remember that one of the largest sources of clients for attorneys is referral, either from clients or other attorneys. In addition, if the potential client later discovers that you are taking on new clients, they will be left to wonder why you were not more forthright with them.

Skills Practice

Suppose you are an attorney in a litigation practice specializing in bringing medical malpractice claims against negligent medical care providers. Your paralegal has conducted a preliminary intake with a prospective client asking about a suit against a doctor who treated her 94-year-old mother. The mother fell at home and fractured her hip. She was admitted to the hospital and died one week later. The daughter indicates that the mother was in failing health with several pre-existing conditions. She is unable to identify how precisely she believes the doctor was negligent. You know that the mother's advanced age and health conditions would make establishing causation difficult and that the economic damages (such as lost wages or future earnings) would be minimal. The daughter wants you to represent her in a wrongful death action on a contingent fee basis.

How would you communicate that you do not want to meet with the daughter for an initial consultation on the case? Rate each one of the following examples as a "poor," "neutral," or "good" response.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=30#h5p-7

D. What are the advantages and disadvantages of in-person intake interviews?

The final step of preparation requires choosing the format you will use to conduct the initial interview. For an effective initial interview, you will want to choose a method that supports the client's connection with you, permits dialogue, gives you an opportunity to monitor the client's attention and understanding, and facilitates sharing of documents or other materials. In nearly any circumstance, an in-person meeting is best at meeting these conditions.[15] In certain practice areas, however, the efficiencies gained from telephone or video meetings may lead the client to prefer this format.

In general, face-to-face meetings work best, especially for clients who rarely hire lawyers. In-person interaction builds trust and helps both you and the client better understand each other. Sharing physical documents or evidence is easier in person, assuming a prospective client remembers to bring these materials to the meeting. In-person meetings often best ensure privacy and confidentiality, as the conversation is not recorded or transmitted over networks and the attorney can be assured of who is present and able to hear the conversation. Finally, in-person meetings may make communication easier for individuals for whom English is not their first language or who otherwise rely heavily on nonverbal supports to understanding. In some fields of practice, such as criminal defense[16] or guardian ad litem[17] practice, an in-person meeting is considered essential to competent practice.

One reason that in-person meetings are superior to all other methods is the importance of nonverbal communication. The classic research regarding non-verbal communication was conducted by UCLA Psychology Professor Albert Mehrabian, who found that only seven percent of the meaning of communication is conveyed by words. The rest is nonverbal. This is especially so when words convey one message and nonverbal expressions convey another.[18] If this seems difficult to believe, consider that tone of voice is a part of nonverbal communication. Dr. Mehrabian's research concluded that tone of voice conveyed 38% of meaning in these circumstances. Think of the many different ways you might say "okay" in response to someone's request and you can quickly see how nonverbal communication carries significant meaning. While remote modes of communication may permit an attorney to hear tone of voice, it omits the 55% of meaning that comes from facial expressions and body language.[19] When you can observe your client's

15. Sean D. O'Brien, Quinn C. O'Brien, & Dana Cook, Put Down the Phone! The Standard for Witness Interviews Is In-Person, Face-To-Face, One-On-One, 50 HOFSTRA L. REV. 339, 340 (2022)[hereafter "Put Down the Phone"]("It is well-established that the standard for investigation in any human services profession, including law, requires in-person, face-to-face, one-on-one interviews.")
16. CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, Standard 4-3.3(a) Interviewing the Client (2017)(advising that criminal defense attorneys should "make every reasonable effort to meet in person with the client.")
17. See, e.g., Mo. Sup. Ct. STANDARDS WITH COMMENTS FOR GUARDIANS AD LITEM IN JUVENILE AND FAMILY COURT DIVISION MATTERS, Standard 4.4 comment " The guardian ad litem should conduct regular face-to-face meetings with the child, to the extent appropriate, to observe the child's physical, mental, social, educational, and familial well-being and to form opinions concerning the child's best interests.") https://www.courts.mo.gov/file/GAL_standards_with_comments_08-30-11.pdf.
18. Albert Mehrabian, Silent Messages: Implicit Communication of Emotions and Attitudes 75 (2d ed. 1981).
19. Id. at 76.

body language, eye contact, and tone of voice, you can pick up important clues to their emotions, perceptions, and the reliability of their information. Of course, nonverbal communication is not precise, and you cannot form accurate judgments about someone's feelings or forthrightness from non-verbal cues alone.[20] Without these clues, attorneys cannot explore what the nonverbal signals might convey.

Your nonverbal communication to the client is equally important. Nonverbal signals can encourage disclosure without interrupting the client. They can signal attention, acceptance, and care as well as, if not better than, verbal assurances. Consider, for example, the difference in the meaning conveyed by an extended pause in an in-person conversation versus a phone conversation:

> A sensitive interviewer will know when a long pause, even several moments of silence, would allow a witness to collect herself before continuing, communicate empathy, or signal an expectation of further information. But in a remote interview, the subject may conclude the discussion is over, or that the connection has been lost.[21]

Remote modes limit much of the nonverbal communication provided by an in-person meeting, which can lead to misunderstandings or missed nuances. One of the most important nonverbal cues missing in these modes of communication is eye contact. Even in a video conversation, eye contact is impossible as one must choose to either look at the camera or look at the speaker.[22]

When interpreting nonverbal communications, attorneys should be aware of differences in communication across cultures and should avoid drawing judgments about a client's attitudes or emotions based on nonverbal communication alone.[23] However, to conclude that nonverbal communications can be misread is not to say that they have no value.

After the pandemic, many people are familiar with video meetings. Familiarity does not necessarily mean comfort. The increasing use of video meetings during the pandemic revealed the extent to which this mode of communication also can increase anxiety for many speakers, as they are faced with watching themselves on camera. For younger clients, who may rely on chat rather than phone calls, a phone conversation can be alienating and uncomfortable. Any of these remote modes require reliable internet or cellular connectivity and compatible hardware/software for all parties. All pose the risk of technical issues disrupting the consultation.

Obviously then, a critical factor in determining the mode for meeting must be the client's preferences. Sophisticated consumers of legal services may prefer telephone or video conferences to in-person meetings. An officer of a business may be perfectly comfortable using the phone to call an attorney from the in-house counsel office for advice or consultation. Likewise, the in-house counsel might prefer the efficiencies of remote meetings when conducting preliminary interviews to determine whether to engage outside counsel for a particular issue. Providing multiple options for meeting with prospective clients may be the best option for attorneys in many areas of practice.

For some types of practice or for some clients, the inconvenience and cost of in-person meetings can limit access to legal services and remote consultations may be an important option to consider. For example, clients who rely on specialized technology to communicate, such as captioning or text readers, may find online meetings more accessible. Many rural areas in the United States are "legal deserts" with few local attorneys who can provide a full range of legal services. Just as tele-health expands availability of health services, so too, the availability of remote methods

20. See Christian A. Meissner & Saul M. Kassin, "He's Guilty!" Investigator Bias in Judgments of Truth and Deception, 26 L. & HUM. BEHAV. 469, 469-70 (2002) (describing the tendency of individuals to overestimate their ability to perceive whether a speaker is telling the truth).
21. Put Down the Phone, supra n. 14, at 348.
22. One study found that the listener in a video conversation will remember less of what is said if the speaker looks at the screen rather than the camera. Christopher Fullwood & Gwyneth Doherty-Sneddon, Effect of Gazing at the Camera During a Video Link on Recall, 37:2 APPLIED ERGONOMICS 167 (2006) doi:10.1016/j.apergo.2005.05.003.
23. We explore these topics more fully infra in Chapter 3, Section C "What are some important differences among people that can lead to misunderstanding?"

of conducting preliminary interviews can significantly expand the availability of legal services. Low-income clients may find it difficult to arrange transportation, childcare, or time away from work for a meeting and may find a phone or video meeting more accessible.

Regardless of whether consultations are in-person or remote, the attorney must think about location. Where will the meeting take place? For in-person meetings, the attorney might consider the benefits of meeting the client away from the attorney's office. In some fields of practice, such as a guardian ad litem's representation of children or incapacitated adults, conducting an interview in the client's home may be essential to getting a complete picture. In representing a business, meeting at the business headquarters or location may not only be more convenient for the client but may facilitate further investigation by having ready access to documents, witnesses, or other important information. An attorney's willingness to "make a house call" can communicate the attorney's responsiveness to the needs of the client. In representing persons who are incarcerated, an attorney has little choice but to visit the client in the institution where they are being held.[24] Similarly, for remote consultations, the attorney should think about where the client will be during a phone or video call. These calls need to be in a location that provides private and clear communication. The attorney should advise the client to make their calls in a private location, without third persons who can overhear the conversation.

In limited settings, an attorney might conduct an initial consultation through email or other written communication. This has the obvious advantage of providing a written record of the communication, which can be useful for documentation and reference. It also allows both parties to carefully consider their responses and provide detailed information. It is the most flexible mode of communication as it can take place asynchronously. However, this approach is rarely effective except with sophisticated clients, often who already have a relationship with the attorney. Email is especially unsuitable for any urgent, complex, or sensitive matters that require timely response and nuanced discussion.

Ultimately, your choice of how and where you will conduct an initial meeting with a prospective client will depend on various factors, including the nature of the legal matter, the client's preferences, the availability of resources, and your capabilities and preferences. You will need to aim to strike a balance between efficiency, privacy, and the ability to communicate effectively with your clients.

Skills Practice

Regardless of the format, preparation for the meeting requires making sure that the client knows how, when, and where the interview will take place and that they have the necessary directions and contact information. Whether you use mail, email, or text to confirm an appointment with a prospective client, think about the impact of this communication. This will be one of the first official communications you send to a prospective client. Suppose for example that you had decided to meet with the client in the prior exercise. Recall that this case involves a daughter's interest in filing a wrongful death action after her mother's death due to possible medical malpractice. Your intake has confirmed the client is comfortable with email communications.

Draft an email confirming your appointment with the daughter. Your email should be attentive to tone and should include whatever information you think would be particularly helpful.

After drafting your confirmatory email, evaluate your email using the following checklist:

24. We examine the unique challenges of these interviews in How do you conduct an interview with a client who is incarcerated? infra in Chapter Ten, Section C.

Checklist

- Did your email provide a short and clear subject line that limits confidential information but catches the recipient's attention?
- Personalize the email by using the prospective client's name and identifying the circumstances precipitating the meeting?
- Use an empathetic tone?
- Make the time and date of the appointment clear, including how long to expect the appointment to last?
- Provide the address including directions and parking instructions as appropriate?
- If virtual, provide clear instructions for how to access the meeting?
- Briefly describe the purpose of the meeting?
- Request the prospective client to bring or send any documentation or other evidence relating to the mother's medical history, hospital stay, or communication with medical staff?
- Provide the attorney's contact information for questions or in case of a need to reschedule or cancel?
- Explain the costs of the initial consultation, if any?
- Include an easy way to confirm the appointment? A link to "Confirm Appointment" or "Add to Calendar" can reduce the risk of no-shows.
- (optional) Provide links or attachments of additional information: e.g., explanations about wrongful death cases, medical malpractice, or how to prepare for the meeting?
- Use a warm closing and complete signature line, including your name, firm, contact information, and any state prescribed disclaimers or notices?

E. How can an attorney efficiently and effectively prepare for the content of the initial meeting?

How do you prepare for a prospective client interview? At a minimum, you must identify your goals for the interview, which should help you identify the information you want to gather and the questions you should consider asking. You may also gather resources to provide the prospective client or even conduct some preliminary research. To the extent you know ahead of time the client's general concern or issue, you can review the law and prepare a list of topics or information you may need. In doing so, however, guard against the tendency to decide too quickly that you know what the client's issue is. Your preparation should identify "just in case" topics to explore and information to gather rather than set out a definitive path.

Checklists, forms, and systems are all tools that permit attorneys to standardize information gathering, even in an intake interview. These tools can help to ensure that you do not overlook critical information or steps in the representation. Just as checklists and routines for airline pilots have dramatically reduced accident rates in that industry, so too can these tools help you avoid critical gaps in representation.[25] These routinizations are critical to meet the

25. DOUGLAS O. LINDER & NANCY LEVIT, THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW 129 (2014).

demands of today's clients, many of whom want "better, faster, cheaper" legal services. In addition to promoting efficiency, a checklist can help you to document important aspects of the initial interview. For example, an interview checklist might document that the attorney has explained the limited nature of the prospective client relationship or the attorney's duty of confidentiality. Generative AI can be especially useful in this pre-interview preparation. These tools can get you started on structured interview guides based on the initial intake information, with suggested questions based on the legal matter type.

You can use these checklists to help the prospective client better prepare for the initial interview as well. For example, suppose you have been contacted by an individual who has discovered a buried tank in the backyard of their residence. The tank is at least fifty years old, left over from a time when the home was heated with fuel oil. The tank contains some residual oil which is leaking into the soil. They would like your guidance regarding their legal obligations as they prepare to sell the property. You could ask the client to send or bring relevant documents, including the deed, any real estate sales disclosure forms (both from their initial purchase of the property and their contemplated sale), and any environmental testing they have done. Similarly, before meeting with a prospective client seeking advice about an employee's misconduct, you may want to obtain a copy of the employee's contract, the company's employee handbook or policies, or human resources communications.

There is a difference between asking for additional information that could permit you to prepare for the interview and independently investigating your prospective client's matter. For most clients, you should at least alert the prospective client about any additional independent fact gathering before the initial meeting. Going one step further to ask the prospective client's permission to look at these documents in advance of the meeting will further transparency and trust. For example, an attorney being asked to represent a client in enforcing a prior judgment may want to read that court decision or order ahead of time. A public defender appointed to represent a defendant will want to review police reports and charging documents, but their client may prefer to tell his or her side of the story first.

In general, you should not try to conduct any fact investigation ahead of the interview unless you are certain you will be representing the client. Investigation before the initial interview can be time-consuming and costly, especially if the interview does not result in representation. Moreover, in some circumstances, investigating a client's factual situation before the client has engaged your representation can be seen as taking for granted the client's trust and invading their privacy.

The most important reason to wait until the initial meeting for fact investigation, however, is the need to avoid early judgments about the matter. The prospective client is the best source for the critical information that you need to decide on representation. Factual investigation from other sources could lead you to develop premature judgments about the prospective client's situation. This could potentially influence your objectivity during the initial interview.

Another way to prepare for an initial interview might be to review or even research the area of law that appears relevant. For newer attorneys, this overview or review can help to build confidence and ensure that key questions aren't overlooked. However, there are downsides to extensive preparation on the substantive law. This time is uncompensated and may turn out to be entirely wasted if the prospective client's matter is not as it first appears, or they do not hire you. This preparation can also prime your assumptions about the nature of the client's matter, leading to premature conclusions.

A prospective client frequently may come to an attorney's office believing that the legal issue they are facing is X only to discover that it is in fact Y. Consider the example of the client who has come to an attorney concerned about a buried oil tank in their yard. The attorney learns from the intake that the client is in the process of preparing the house for sale. It would be natural to assume that the client's primary concern is how the presence of this environmental hazard would affect their duties in selling the house. The attorney might spend time preparing for the initial meeting by researching the law of real estate disclosures. Suppose, however, that the prospective client's actual concern is for their family's health and safety. The attorney who goes into the initial interview assuming the problem is a real estate sales issue has wasted time in researching and preparing for that issue. Worse still, however, the attorney may be so sure that they understand the client's issue that they may fail to listen to the prospective client's real concerns, confusing or frustrating the client by focusing on the wrong target.

In sum, there is no one-size-fits-all level of preparation for all cases. You will learn to fit your preparation to

your purposes. While advanced preparations are often important and helpful, the preparation you need most is to be prepared to be surprised.

Chapter Two Endnotes

Chapter Three – Building a Relationship: Understanding Yourself and Others

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Employ techniques to build rapport.
- Define false consensus effect and describe why it is important to be aware of similarities and differences between you and your client.
- Describe some common differences among people in preferred communication styles.
- Define implicit bias and explain how it can cause us to make unfair judgments about people.
- Identify and use tools to increase your understanding of yourself and your clients.

An interview is more than simply a way to transfer information from one person to another or to sell our legal services. It is how we form and build the fiduciary relationship of attorney and client. The first part of the interview, then, must be devoted to building trust.

Before we look at the details of the interview process, it is helpful to establish a framework for understanding more about people in general and the factors that shape human relationships.

Pre-reading Reflection

Think about a time when something very difficult or hurtful has happened to you and you needed some help responding to the situation. Answer the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=31#h5p-10

A. How do you build trust with a client?

A primary objective in an initial interview is to establish rapport and trust with the potential client. Rapport is a relationship in which a client feels that you are genuinely concerned for them and will accept their experiences and perspectives without judgment. When rapport exists, information flows freely and there is mutual trust.

An effective initial interview requires this mutual trust. At a fundamental level, you and the individual seeking your services must each trust one another first as people. No matter how competent potential clients believe you are, they must also believe that you care about them enough to be trustworthy in exercising that competence on their

behalf. Similarly, you must be able to trust that the individuals you choose to represent will be honest and cooperative. In addition, both you and the client must trust that you are competent to represent them. Early in the interview, both attorney and client will be asking themselves questions to determine how much trust to invest in the other.

The following chart outlines some of the questions that go to both personal and professional trust:

Attorney must trust the client	**Client must trust the attorney**
Personal trust: Who is this client? Can I trust them? Will they judge me?	**Personal trust:** Who is this attorney? Can I trust them? Will they judge me?
Professional trust: Do I know what I am doing? Can I help them?	**Professional trust:** Does this attorney know what they are doing? Can they help me?

What are the conditions that make it more likely that clients will trust you or that you will trust them? According to Psychologist David DeSteno, several factors will influence how easily one individual will trust another.[1] One factor is an individual's personality. Some people simply are more trusting than others. An individual's experience will also shape their likelihood of trust. If a client or people close to them have had negative experiences with attorneys, trust will be more difficult to build. Likewise, your own experience with prior clients will influence your likelihood of trusting future clients.

Trust is often higher between individuals who share similar values, beliefs, and backgrounds. This is one of the reasons that diversity in the profession is so important to access to justice. Even with very different individuals, trust increases with familiarity. Accordingly, some patience is called for as trust needs to be built over time.

Some factors correlated with increased trust are especially important in the attorney-client relationship. Interdependence increases trust. When individuals rely on each other to achieve common goals or outcomes, trust tends to be higher. While many attorneys and clients might view dependence as one-sided, you can facilitate a client's view of the relationship as interdependent by emphasizing the need to work together as a team, marrying the client's expertise in their situation with your expertise in the law. Trust flourishes in these relationships when there is mutual respect and recognition of each other's capabilities and contributions. Similarly, trust is enhanced when individuals perceive that they share common goals or interests. Clients who perceive that your goal is to help them achieve their goals will more readily trust you.

Transparency and consistency are important to trust. Clear systems of accountability and transparency can increase trust by providing assurance that your actions are monitored, and consequences are in place for violations. This is one reason that you may wish to note you are subject to rules of professional conduct in your representation. Likewise, consistent behavior over time builds trust by demonstrating reliability and predictability. The importance of consistent and clear communication with clients is critical for building trust.

The most essential trust-building elements are not skills but attitudes. Building effective rapport requires an affect that is client focused. If you want your clients to give you their trust, you must give them your non-judgmental attention. Techniques and skills that can help you manifest this attentiveness are of little value if they are not accompanied by a genuine concern for your client. Indeed, without a genuine concern for your client, these techniques may appear insincere and clumsy at best and deceptive and manipulative at worst.

Accordingly, to build rapport with your clients, you must sincerely want to know who they are, and you must genuinely care about their goals and concerns. That means you must suspend your ego and focus on the client. You must want to truly know and understand what the speaker is saying, not what you think they should be saying. Your primary purpose must be to understand the other person—their feelings and ideas from their own unique experience.

1. DAVID DESTENO, THE TRUTH ABOUT TRUST: HOW IT DETERMINES SUCCESS IN LIFE, LOVE, LEARNING, AND MORE (2021).

Reflective Practice

Read the profiles of the three clients below. Consider your own identity, values, and strengths. For each client, reflect on how easy or difficult you might find it to establish trust. What is one thing you could say or do with respect to each client to help foster a relationship of trust?

Client #1 – Patent
Name: Karen Davis
Age: 50
Occupation: Financial advisor
Case Details: Karen has created a software program that she believes will revolutionize financial advising. The program creates a profile of clients based on a background search of all publicly available data (including social media posts, etc.) to create a risk assessment score and targeted investment profile. Karen is excited to explain how her program will revolutionize her work and will give her a significant advantage in her business by cutting down on the time she must spend getting to know her clients. She wants you to obtain a patent and advise on any risks involved in using the product to identify prospective clients.

Client #2 – Divorce
Name: Maria Hernandez
Age: 35
Occupation: School Teacher
Case Details: Maria is seeking a divorce from her spouse, with whom she has two young children, ages 3 and 5. She is concerned about custody arrangements and ensuring a stable environment for her children. Maria's spouse has been uncooperative, making the situation more stressful for her. English is Maria's second language.

Client #3 – Criminal Defense
Name: Laura Peterson
Age: 37
Occupation: Nurse
Case Details: Laura has been accused of prescription fraud. She has no prior criminal record and is highly anxious about the potential impact on her career and reputation. Laura is detail-oriented and prefers to be kept informed about all aspects of her case. She is wary of legal professionals due to a negative experience with a previous attorney in an unrelated matter.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=31#h5p-11

B. Why should you pay particular attention to building rapport at the beginning of the interview?

Rapport building begins from the moment the client arrives. Think about the messages your office sends about your competence and caring. You can communicate a great deal about yourself and your practice by the décor you select, what you hang on your walls, and the arrangement of furniture in your office. Make sure those are intentional messages.

Extend basic hospitality. If your client's first encounter at your office is with a member of your staff, ensure that you select and train these staff members to be attentive. Make sure seating is comfortable. Offer a beverage. Begin your interview on time. Pay close attention to your nonverbal communication. You will be exchanging important information from the very beginning of an interview by attending to both your own and your client's non-verbal cues. As we have discussed in choosing the mode of the initial meeting, the content of most communication is conveyed nonverbally. Adopt an open posture, face the client, and maintain eye contact. Learn to adopt a pleasant and accepting facial expression. Now is not the time to begin taking extensive notes or reviewing a checklist. One of the important reasons to gather preliminary information in an intake procedure is that it permits the attorney to focus the initial stage of the interview on establishing rapport. In your demeanor with the client, create an effective first impression, one conducive to establishing a relationship of trust.

Frame the beginning of the interview using a "person-first" approach rather than a "client-first" approach. Begin your interview by introducing yourself. For most clients, engaging in some "small talk" or "getting to know you" conversation helps establish rapport. However, don't engage in small talk without purpose. Be genuinely curious about the client and care about their circumstances. Small talk can communicate this attention and care. Did they have any trouble finding the office? How are they finding the weather? Ask about family, employment, or hobbies. In other words, take a few moments to get to know the individual with whom you are meeting before you turn to engaging with them as a prospective client. The best way to do that is to ask questions and to listen.

How quickly you move from this more general conversation into the prospective client's legal matter will depend largely on the client and your local culture. Be sure to follow your client's lead. Different individuals have different understandings of the content and length of greetings. Some clients may view you as rude and uncaring if you begin the interview without engaging in some "getting to know you" talk. Other clients may feel you are wasting their time and will want to get right to the business of discussing their legal concerns. Clients who are incarcerated may want to discuss the immediate concerns of their confinement before they discuss their legal case. Sophisticated legal consumers may want to hear about your qualifications to assist in their matter before they begin to disclose sensitive information. Often an open-ended, "How can I help you?" or "Do you have any questions before we get started?" can provide an opening to determine the client's greatest need or concern.

> Professor Marjorie Corman Aaron provides an interesting additional perspective on these opening conversations:
>
> 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 them. 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 chitchat phase. 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.[2]

Help the prospective client to feel comfortable with the interview by providing a roadmap. Let the client know how long the interview will last, what you hope to accomplish during the interview, and, if relevant, any charge for the consultation. Knowing what to expect will place your client at ease and motivate them to share information with you freely. If the client has anxiety associated with fear of the unknown, this effort to help the client know what to expect may help alleviate some of the anxiety the client is feeling. If the client has fears about loss of control and is anxious because they are concerned that retaining a lawyer may start a series of events over which they will have little control, discussing the decision-making opportunities the client will have (whether to hire the attorney, whether and how to

2. Marjorie Corman Aaron, Client Science: Advice for Lawyers on Initial Client Interviews (2013) available at http://clientsciencecourse.com/wp-content/uploads/2013/11/Advice-for-Lawyers-on-Initial-Client-Interviews.pdf.

pursue information gathering, whether and how to pursue problem resolution) may help assuage this anxiety. This is also a good point at which you can explain your duty of confidentiality to the client, so that they can feel comfortable fully disclosing their situation. This is an especially important point at which to emphasize that the purpose of the interview is to decide whether your client's legal issue is one with which you can help and for the client to decide whether they would like to engage your assistance.

In addition to getting to know the client, help the client get to know you. Let them know if you have particular experience or expertise in the type of matter they have brought to you. Some attorneys like to include a brief description of their philosophy or approach to the attorney-client relationship. However, how you attend to your client, your preparation and organization, the questions you ask, and assistance you provide all will prove your competence far better than a description of your experience, expertise, or skill.

Skill Practice and Reflective Practice

Schedule a 15-minute appointment with your professor or with a classmate whom you do not know this week. Practice the skills of focusing your attention to the speaker and the message. You need not pretend this is a client interview; rather, you can simply take the opportunity to practice getting to know another person. After your meeting, prepare a brief reflection on your comfort with this kind of introductory small talk.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=31#h5p-12

C. What are some important differences among people that can lead to misunderstanding?

How do we better understand ourselves and others? In this section, we will examine characteristics that influence how a person communicates and relates with others.

Our human tendency is to assume that most people see and interact with the world in the same way as we do and that others agree with our opinions and perspectives.[3] These biases, sometimes referred to as the "false consensus effect" can create significant misunderstandings and barriers to communication. Researchers point to a number of factors that reinforce these biases. First, most people today tend to spend time with people who are like them. We need to be especially aware of this tendency today, as more people live, work, and communicate in communities of cultural, political, age, race, and class isolation.[4] Second, our self-esteem is enhanced when we believe that our opinions

3. Lee Ross, David Greene, & Pamela House, The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes, 13 J. EXPERIMENTAL SOC. PSYCH. 279 (1977). https://doi.org/10.1016/0022-1031(77)90049-X. (reporting that individuals "see their own behavioral choices and judgments as relatively common and appropriate to existing circumstances while viewing alternative responses as uncommon, deviant, or inappropriate.") The authors note that similar processes have been termed egocentric attribution" and "attributive projection."
4. Id. at 298.

and behavior are common or within the norm rather than exceptional.[5] Third, we are more familiar with our own attitudes and behaviors. Thus, we tend to notice and recognize these attitudes and behaviors more readily in others. (This is another type of cognitive bias, called the availability heuristic.[6] We tend to base our estimates of how common or probable something is on readily available information.) Finally, the false consensus effect tends to be stronger in situations in which we are especially confident of our opinion or believe very strongly that we are correct.[7]

Understanding these biases and how they affect our beliefs and actions is very important in building an effective attorney-client relationship. Rather than automatically assuming that our clients are like us, we must be able to recognize differences in communication styles, experiences, outlooks, and values.

1. Differences in communication styles

The judgments you and a prospective client will make about each other in the initial interview are grounded in your communication with one another. Your client and you may have very different preferred communication styles.[8] It is easy to misread these stylistic preferences and draw inaccurate conclusions from these differences. In this section, we will consider several different aspects of a communication style. As you read about each, consider the following questions:

- How would you describe your communication style on each of these aspects?
- Does the legal profession have a preferred communication style?
- What kinds of assumptions might you make about someone whose communication style differs from your own?
- How can you manage that bias?

Formality

Individuals vary in the preferred degree of formality or distance. Watch and follow the lead of your client regarding formality. For example, in the past, etiquette would suggest that you offer your hand for a handshake. The pandemic has now made this gesture ill-suited for more people. For some cultures, a handshake has never been appropriate. If, for example, your client is not the same gender as you and their religion frowns upon cross-gender touching, you will be placing your potential client in a most uncomfortable position by offering your hand when they must decline the handshake.

Likewise, in choosing how to refer to a client, it is usually best to err on the side of formality at first. Use your client's last name and only using first names if you get permission. That might look something like this: "Welcome. Please have a seat. I'm Barb Glesner Fines. You must be Jane Doe. How do you prefer to be called: Ms. Doe? Jane?" If the client suggests first names, you can confirm that you too are comfortable with first names. If they prefer more formality, still give them the option for how to refer to you. Repeat the client's name as they prefer to be called. This can be especially important for clients who have frequently experienced disrespectful treatment because of their minoritized identity or

5. Id. at 297-98.
6. Availability Heuristic, APA DICTIONARY OF PSYCHOLOGY (Nov. 15, 2023). https://dictionary.apa.org/availability-heuristic.
7. Zoe Leviston, Iain Walker, & Sarah Morwinski, Your Opinion on Climate Change Might Not Be as Common as You Think,. 3 NATURE CLIMATE CHANGE 334 (2013) doi:10.1038/nclimate1743.
8. ThinkCulturalHealth.hhs.gov

their life experiences. Approaching an initial interview with a casual or overly friendly affect may signal disrespect rather than a desire for connection.[9]

Likewise, in your language use, err on the side of formality. Speaking in an overly casual or excessively informal way can indicate a lack of respect.[10] That doesn't mean you need to "speak like a lawyer" with jargon and inflated diction. Just as plain English in writing is critical to understanding, so too, you must be able to communicate in a way that your client will understand.

Tone, volume, and speed of speech

Individuals vary the volume, rate, and tonal variety of their speech. The degree to which pauses and silence are comfortable or uncomfortable varies among individuals as well. Some of this difference may be because of the meaning of silence, which can vary in different cultures. Some of this is a function of personality. For example, extroverts generally prefer to think out loud whereas introverts generally prefer to gather their thoughts before sharing them. If you and your client do not share the same default speaking style, you can easily draw mistaken assumptions about the speaker or misunderstand the meaning of what they are saying. For example, compare these two speakers and the assumptions one might make about them because of these differences.

A speaks loudly, quickly, and with varieties of pitch, intonation, and expressiveness. A fills any pauses or silence quickly.	B prefers quiet voices, a slower pace, and flat tone and expressiveness. B pauses more often while speaking and is less likely to fill silence.
A views others who share their conversational style as open, honest, and easy to understand. A may view B as shy, reluctant to share, and lacking in confidence or even competence.	B views others who share their conversational style as mature, even keeled, and rational. B may conclude that A is rude, aggressive, and immature.

Eye contact

You have probably been told that maintaining eye contact is an important part of non-verbal communication. Research shows that when you maintain eye contact with a listener, the listener is more likely to perceive you as confident and intelligent, is more likely to have positive feelings about you, and is more likely to remember and believe what you have said.[11] However, eye contact, like so many other aspects of nonverbal communication, is highly contextual. For some neurodiverse individuals, for example, eye contact during face-to-face conversations can make it difficult to hear and process information and can even be physically and psychologically painful.[12] Likewise, some cultures consider

9. Rachel Godsil, et. al., THE SCIENCE OF EQUALITY IN EDUCATION: THE IMPACT OF IMPLICIT BIAS, RACIAL ANXIETY, AND STEREOTYPE THREAT ON STUDENT OUTCOMES 5-6 (Feb. 2017). https://perception.org/wp-content/uploads/2017/05/Science-of-Equality-Education.pdf.
10. Id.
11. See generally, Laurence Conty, Nathalie George, & Jari K. Hietanen, Watching Eyes Effects: When Others Meet the Self, 45 CONSCIOUSNESS AND COGNITION 184 (2016) https://doi.org/10.1016/j.concog.2016.08.016 (noting five categories of effects of direct gaze: increasing attention, enhancing self-awareness, increasing memory, activating pro-social behaviors, and inducing favorable evaluations of others).
12. Dominic A. Trevisan, et. al., How Do Adults and Teens with Self-Declared Autism Spectrum Disorder Experience Eye

eye contact either while speaking or while listening to be rude, aggressive, or a sign of dishonesty.[13] Thus, maintaining eye contact with your client is generally a good idea in most circumstances. However, you should monitor for signs of discomfort with your gaze, and refrain from drawing quick conclusions based on a client's eye-contact patterns.

Expressiveness and self-disclosure

Individuals differ on the degree to which they are "open" or "closed." Expressiveness refers to the degree to which an individual openly conveys their inner thoughts and feelings, either through facial expression or speech. Similar to expressiveness, individuals and cultures vary in the degree to which self-disclosure (talking about difficult personal situations) is considered appropriate. These differences often reflect one's culture,[14] gender,[15] and personality.[16] Even in cultures that value high expressiveness or self-disclosure, the appropriateness of sharing emotions or problems may depend on the relationship between speaker and listener.

C's facial expressions, gestures, and speech are often emotive and spontaneous, sometimes even exaggerated to make a point. C freely shares emotions and takes emotions into account in making decisions.	D minimizes the expression of emotions both non-verbally and in speech. Reason may influence D's behavior more than feelings.
C may view others high in expressiveness as open, charismatic, and authentic. D may view C as immature, volatile, and attention-seeking.	D may view others who are low in expressiveness as cool, in control, and rational. C may conclude that D is cold, uninterested, or unable to understand.

Context and directness

One frequently noted difference in communication styles is the degree to which context is necessary to understand meaning. Low-context communication allows one to gain meaning primarily from the speaker's explicit words. Low-context communicators tend to prefer verbal directness. High-context communication conveys meaning more implicitly, through subtle verbal cues, silence, and other non-verbal cues. Research examining how individuals in different cultures and languages make requests is especially interesting as an example of preferences regarding directness. In some cultures, direct requests are appreciated as efficient and honest, while indirect or more subtle requests are interpreted as a "waste of time" and even "devious and manipulative."[17] In contrast, other cultures may see

Contact? A Qualitative Analysis of First-hand Accounts, 12:11 PLOS ONE (Nov. 28, 2017) doi: 10.1371/journal.pone.0188446. PMID: 29182643; PMCID: PMC5705114.

13. Paul R. Tremblay, Interviewing and Counseling Across Cultures: Heuristics and Biases, 9 CLINICAL L. REV. 373, 394 (2002).
14. Itziar Fernández, et. al., Differences Between Cultures in Emotional Verbal and Non-verbal Reactions, 12 PSICOTHEMA 83, 84 (2000) https://www.redalyc.org/pdf/727/72796009.pdf ("displays rules are socially learned norms that regulate the communication of emotions within a cultural context.").
15. Ann M. Kring & Albert H. Gordon, Sex Differences in Emotion: Expression, Experience, and Physiology, 74:3 J. PERSONALITY & SOC. PSYCH. 686 (1998) https://doi.org/10.1037/0022-3514.74.3.686.
16. Heidi R. Riggio & Ronald E. Riggio, Emotional Expressiveness, Extraversion, and Neuroticism: A Meta-Analysis, 26:4 J. NONVERBAL BEHAVIOR 194, 199-200 (Winter 2002).
17. Eva Ogiermann, Politeness and In-directness Across Cultures: A Comparison of English, German, Polish and Russian Requests, 5:2 J. POLITENESS RESEARCH 189, 191-92 (2009) https://doi.org/10.1515/JPLR.2009.011.

a direct request as a rude imposition, putting the other in a position that makes it difficult to say no. Since the attorney-client interview involves multiple requests for information, advice, and assistance, attorneys should be alert to their own and their client's preference for directness.

Some researchers suggest that the degree to which an individual or culture's value system prefers collectivism or individualism relates to whether communication is high- or low-context. In a collectivist culture, relationships are central and these cultures prioritize respectful communication that builds rather than disrupts these relationships. Individualistic cultures value freedom and autonomy of the individual. Because these cultures also tend to value diversity, low-context communication may be preferred in order to avoid misunderstanding.[18]

Reflective Practice

Review the differences in communication styles above. Reflect in writing on your own communication style by answering the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=31#h5p-13

2. Differences in experiences and bias

In addition to these differences in communication styles, attorneys and clients have very different identities and experiences. Here, too, cognitive biases can lead attorneys to make assumptions that are inaccurate or even unfair.

Nobel Prize Laureate Dr. Daniel Kahneman, Professor of Psychology and Public Affairs at Princeton, has spent decades researching how our brains work.[19] Dr. Kahneman explains that our brains have two modes of thought. Fast thinking includes all of the things we do automatically without even "thinking" about it. For example, when you see your best friend on the street and you instantly recognize them, that's your automatic, intuitive system at work. When you see your friend and it instantly brings a smile to your face, that's another example of fast thinking. You don't have to *do* anything to recognize them or experience that moment of happiness. Our emotions are grounded in fast thinking. Indeed, emotions can close off any other kind of thinking. Every law student who has been called on in class and is nervous about speaking or is ill-prepared can tell you that fear makes it impossible to think! Fast thinking is automatic, subconscious, and prizes speed over accuracy. In contrast, slow thinking is deliberative and logical, and it takes effort. But it is far less prone to error than fast thinking.

The majority of our thinking is fast thinking. Our brains process 11 million *bits* of information every second. But we can only consciously process 16 to 40 bits. So, our unconscious, fast-thinking, error-prone brain is in the driver's seat most of the time.

There are hundreds of ways in which our fast-thinking brains deal with four basic problems: [20] First, our brain

18. STEPHEN W. FOSS, & KAREN A. LITTLEJOHN, THEORIES OF HUMAN COMMUNICATION 375–376 (10th ed. 2011).
19. DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).
20. For a useful graphic representing the over 200 cognitive biases identified by psychologist and behavioral economists,

has to take in too much information—remember 11 million bits per second. We need shortcuts and rules for filtering out the barrage of information we are constantly receiving. Second, that information comes in as raw meaningless data—our brains have to have some way of assigning meaning, even when meaning is vague or missing. Third, we need to act on all this data often instantaneously. Of all of the information we take in, which will we prioritize in determining our response? Our brain has shortcuts and rules—heuristics and biases—for this problem too. Fourth, our brains have to encode all this data into memory. Imagine if your computer did not have a system of files or folders or search algorithms but was simply one gigantic data file. Our brain needs some structure for memory just like our computers. Thus, our brain simplifies, condenses, generalizes, and organizes that data. And these structures and stories and generalizations we use to store information then affect how we take in new information.

As necessary as these fast-thinking shortcuts are, they are not always accurate and sometimes are exceedingly harmful, especially when it comes to making judgments about people. When we make judgments about people, our cognitive biases lead us to fill in the blanks of our understanding with subconscious associations we have developed between concepts (e.g., Black people, old people) and evaluations (e.g., good, bad) or stereotypes (e.g., athletic, clumsy).

Where do these associations come from? Everywhere—from our experience, our media, our education. We place labels on people in order to make sense of the world. And we carry labels ourselves. These are part of our identity and affect how we think about ourselves and how others think about us. Social identity dimensions include age, body type, citizenship status, disability, education, ethnicity, family structure, gender identity, gender expression, language, mental health, race, religion, sexual orientation, and socioeconomic status, among others. Attorneys share a professional identity—the content and culture of which they have learned from the time they first understood there was such a thing as a lawyer through the intense socialization process of law school and the first years of practice.

No matter how strong our explicit commitments to impartiality might be, we all carry assumptions and stereotypes that our fast-thinking brain uses to judge people. These implicit biases that we have developed over our lifetime may not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse. For example, in the 1960's some of the most popular television series were premised on southern/hillbilly stereotypes that today are cringeworthy.[21] Most people who grew up on these television series would never espouse ideas that poor rural white folks are ignorant and simple, yet hours of television programming reinforced those stereotypes. Likewise, we learn lessons from an early age about men and women, people of color, people with disabilities, young and old, gay and straight, or people with different faiths. In addition to developing stereotypes about people different from us, we all have a strong cognitive bias that causes us to favor people who are more like us. That in-group, or familiarity bias, can be even more powerful than any out-group bias we may hold.

We cannot change the fact that our brain needs biases to operate. But, with conscious and regular work, we can uncover and interrupt cognitive biases and heuristics that are unfair or harmful. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of de-biasing techniques.

Understanding our own implicit biases begins with identifying them. There are a variety of tools one can use to uncover bias and reduce the tendency toward unfair and inaccurate judgments. One tool is the Harvard Implicit Association Test (Project Implicit). These are online tests that are designed to measure implicit biases in about 28 different categories. Since 1998, more than 20 million people have taken the Implicit Association Test (IAT), an online assessment at the Project Implicit website (implicit.harvard.edu). The data from these studies point to the pervasiveness of implicit biases. For example, more than 80 percent of people who completed the IAT related to age bias exhibited an association between older people and negative judgments. In addition, about 75 percent of White and Asian respondents

see Buster Benson, Cognitive Bias Cheat Sheet (September 2016) at https://medium.com/better-humans/cognitive-bias-cheat-sheet-55a472476b18.

21. One could watch hours of television episodes weekly that provided comedic portrayals of poor whites from rural areas. Shows with this rural theme included The Beverly Hillbillies (CBS, 1962–71), Petticoat Junction (CBS, 1963–70), Green Acres (CBS, 1965–71), Hee-Haw (CBS, 1969–71), The Andy Griffith Show (CBS, 1960–68), Gomer Pyle, U.S.M.C. (CBS, 1964–69) and Mayberry R.F.D. (CBS, 1968–71).

demonstrated an implicit bias in favor of White persons compared to Black persons. Of course, understanding that you have a negative or positive implicit bias doesn't necessarily predict your behavior nor does it mean you can't work to de-bias your shortcuts, but it is a thought-provoking and useful starting point.

A second tool is to educate yourself about how bias operates in practice. Some aspects of our identity give us an advantage in certain situations. On the basketball court, being tall is an advantage. In a submarine, it is not. Some aspects of our identity give us power or advantages. Being an adult gives us power and advantage over being a child in most situations. We have all experienced some situations in which our identity was an advantage and other situations in which our identity marginalized or disadvantaged us. Our individual histories and identities are layered within the political, economic, and social histories of those who share our identities. Legacies of bigotry, hatred, and oppression of minoritized communities leave their mark. Attorneys have a special obligation to be aware of this history and the role of law in both reinforcing oppressive systems and ensuring equal justice.

An individual whose identity doesn't fit the dominant identity in a particular setting often faces similar patterns of bias. Suppose for example that you represent an engineer who was discharged from her employment. Women in male-dominated fields often find themselves trying to balance between being seen as too feminine to be competent, and too masculine to be likable. Professor Joan C. Williams, a Distinguished Professor of Law at University of California-San Francisco and expert on social inequality, refers to this as "The Tightrope."[22] When some aspect of our identity clashes with the behaviors required by our work, we are forced to walk a tightrope, constantly checking and balancing our behaviors. Moreover, Professor Williams's research and the caselaw in discrimination cases reveals that these women often find that they must prove themselves over and over again, a phenomenon Professor Williams terms the "Prove it Again" bias.[23] Any person whose identity doesn't fit the dominant culture of their workplace may face these biases. How will being aware of these biases impact your representation of your client?

Yet another impact of bias is characterized as "masking" or "covering."[24] There are various ways in which one might change in order to fit in: We might alter our appearance. We may avoid behaviors associated with our identity in order to negate stereotypes or unconscious biases. We might decline to speak up against biased behavior against ourselves or others like us to avoid seeming overly sensitive. Finally, we might avoid contact with individuals who share our identity in order to avoid calling attention to that identity.[25] Expecting people to suppress parts of their identity to avoid stigma or unfair treatment can be a barrier to their ability to be authentic and feel included. We have all experienced a situation in which we have been outside of what is considered standard or conventional in our culture or region in one or more ways. That means we have all likely felt pressure to change some aspect of our behavior in order to fit in. When this demand is constant and requires us to alter some core aspect of our identity, it can be harmful to our sense of self. At a minimum it is exhausting. It can impact our work and our relationships.

Being aware of pervasive negative biases that some of our clients may have experienced throughout their lives is critical to being able to build trust. The skills of listening, empathy, and reflection we develop to become competent interviewers and counselors are also critical skills for cross-cultural competence. Professor Paul Tremblay suggests that, in some circumstances, having a conversation with your client about your racial or cultural differences can help to bridge these differences. He acknowledges the challenge of these conversations:

> For many of us conversations about difference will be difficult, but a lot of professional learning will be challenging. If you share that discomfort, your effectiveness may hinge on your developing comfort with

22. Joan C. Williams, The 5 Biases Pushing Women Out of STEM, HARV. BUS. REV. (March 24, 2015) https://hbr.org/2015/03/the-5-biases-pushing-women-out-of-stem ("More than a third (34.1%) of scientists surveyed reported feeling pressure to play a traditionally feminine role, with Asian Americans (40.9%) more likely than other groups of women to report this. About half of the scientists we surveyed (53.0%) reported backlash for displaying stereotypically "masculine" behaviors like speaking their minds directly or being decisive.")
23. Id.
24. KENJI YOSHINO COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006).
25. Id.

this skill. In appropriate circumstances, by acknowledging the effect of racism, sexism, or other injustices on the problems your client has come to you with, or by asking about the ways he sees oppression and the exercise of privilege as having influenced his story, you can begin to reduce the mistrust that a culturally different client may feel in the professional relationship.[26]

Sometimes thinking of the client means recognizing that you may not be able to bridge those barriers without help. In his article on providing competent defense in capital punishment cases, Professor Sean O'Brien discusses the many reasons that developing mitigation evidence is a challenge.

> A competent mitigation investigation will invade dark, shameful family secrets.... More often than not, lawyers and clients come from different racial, cultural and socio-economic backgrounds, and these differences "create barriers to disclosure of sensitive life-history information." Additional communication barriers between clients and counsel "typically include nationality, ethnicity, language, class, education, age, religion, politics, social values, gender, and sexual orientation."[27]

Professor O'Brien concludes that "Overcoming these barriers will often mean involving someone in the defense team with whom the client will feel more at ease." [28] Being aware of our limits in bridging gaps with our clients and asking for help are important skills that require humility and self-understanding.

In sum, both familiarity and difference present challenges to understanding our clients. Even when the speaker is someone with whom we believe we share culture and opinion, we must monitor our attitude. The more we share in common with our speakers, the more likely we are to assume that we know what they are saying or feeling or their goals or motivations. Yet such assumptions undermine our motivation to discover the client's perspective and are more likely to cause us to prematurely close off our investigation.[29] When our clients are very different than ourselves, we must closely monitor our tendency to fill in gaps with stereotypes and assumptions and we must be sensitive to the barriers to trust that these differences might cause for our clients and ourselves.

Reflective Practice

Think about what aspects of your identity are most important to you. Consider a range of components of identity, such as race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status.[30] Answer the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=31#h5p-14

26. Paul R. Tremblay, supra n. 10 at 413–15.
27. Sean D. O'Brien, When Life Depends on It: Supplementary Guidelines for The Mitigation Function of Defense Teams in Death Penalty Cases, 36 HOFSTRA L. REV. 693, 739 (2008)(citations omitted).
28. Id.
29. Alexis Anderson, Lynn Barenberg & Carwina Weng, Challenges of "Sameness": Pitfalls and Benefits to Assumed Connections in Lawyering, 18 CLINICAL L. REV. 339, 348 (2012).
30. These are the components listed in ABA Model Rule 8.4(g), which defines as misconduct "conduct that the lawyer knows or reasonably should know is harassment or discrimination" when based on one of these characteristics. Model Rules of Pro. Conduct r. 8.4(g) (Am. Bar Ass'n 2023).

Check your Understanding

Check your understanding of the materials in this chapter thus far. Can you confidently answer each of these questions? Click on each question to compare your answers.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=31#h5p-15

D. What tools can you use to better understand yourself and others?

There are multiple tools[31] designed to categorize individuals by personality traits. Some, like Astrology or "What Character are You?" are used by most people solely for entertainment. Some, like the Myers-Briggs Type Indicator,[32] have gained a great deal of popularity even though they are criticized as lacking in scientific rigor or accuracy. The Enneagram[33] model was originally developed as part of spiritual practices and gained popularity among religious communities. The Clifton Strengths Finder[34] is another popular tool used in organizations to build teams and guide professional development. The Big Five Personality Model (OCEAN), also known as the Five Factor Model, is a more recent, research-based approach widely used in education[35] and psychology. Some tools measure aspects of international cultural traits.[36]

Any one of these tools can be helpful in your professional development as attorneys. This is especially so if we view these tools not as labels for judging others but as tools for understanding the varieties of preferences and perspectives. We sometimes speak of personality traits or preferences as though they are clear and separate categories that define individuals. We say that someone is an "introvert" or an "extrovert." Likewise, we characterize cultures as having distinctive traits that members of that culture share. These rigid characterizations are rarely helpful in understanding individuals. Rather, it is far more accurate to view these traits or characteristics as a spectrum of preferences rather than categories. Be attentive to looking at each client as an individual with a distinctive mix of preferences rather than as a member of a category or a set of categories.

31. A catalog of numerous open-source personality tests of varying sophistication or validity can be found at the International Personality Item Pool https://ipip.ori.org/.
32. https://www.myersbriggs.org/.
33. https://www.enneagraminstitute.com/.
34. https://www.gallup.com/cliftonstrengths/en/252137/home.aspx
35. AE Poropat, A Meta-Analysis of The Five-Factor Model of Personality and Academic Performance, 135:2 PSYCHOL. BULLETIN 322 (March 2009) doi:10.1037/a0014996. hdl:10072/30324. PMID 19254083.
36. https://cultureinworkplace.com/.

Reflective Practice

Nearly all of our clients are very different from us in one respect—they are not attorneys. The process of legal education and practice forms a professional identity that becomes part of who we are and, in some ways, separates us from our clients. Reflect on the formation of your own professional identity. Answer the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=31#h5p-16

Role Play Practice

In this exercise, you will conduct an intake interview with Jo Williams, who has a dispute with a neighbor.

INTAKE FORM

PROSPECTIVE CLIENT(S): Jo Williams
ADDRESS: 3600 Bellview, Our City, Ourstate
HOME TELEPHONE: 001-500-0002 WORK TELEPHONE: same
EMAIL: JOWILL123@gmail.com
EMPLOYMENT: Retired (University Health Respiratory Therapist)
MARITAL STATUS: Widow (Wesley Williams)
PLACE OF EMPLOYMENT: N/A
AREA OF LAW: Neighbor disputes – property
ATTORNEY: Student attorney
PRIOR REPRESENTATION BY FIRM: None found
DEFENDANT(S): Joe Fowler
ADDRESS:3604 Bellview, Our City, Ourstate
TELEPHONE: 500-0001
DEFENDANT(S) ATTORNEY: None/Unknown
OTHER PROTECTED PARTIES: None
OTHER AFFECTED PARTIES: None
INSURANCE INFORMATION: Safe Family Insurance, 80 Main Street, Our City, Ourstate
LEGAL ISSUE: Jo Williams has a conflict with her neighbor, who has threatened to sue Jo because of a very bright security light on Jo's house that shines into the neighbor's home. Jo has the light because of security concerns after a recent burglary in her home while she was on vacation. Jo is also upset that the neighbor allows his dog to roam loose and the dog has dug up some of Jo's landscaping.

Recruit a partner to play the role of Jo Williams. Take ten minutes to get to know the client and decide what Jo's goals are for a legal representation.

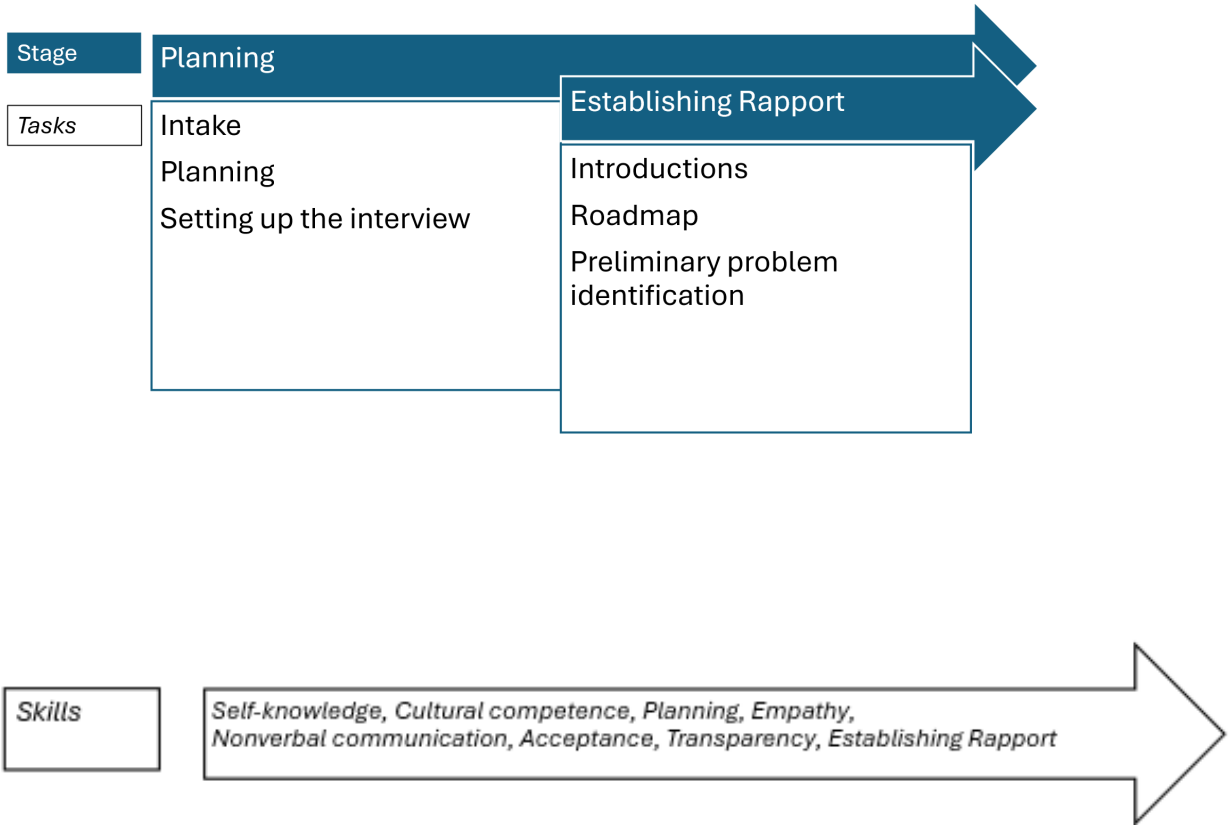
Chapter Three Endnotes

Chapter Four – The Initial Phase of the Interview: Building a Relationship

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Provide a structure for the initial consultation.
- Select and effectively use intake forms.
- Screen for conflicts, discuss fees, and explain the ethical duty of confidentiality.
- Employ techniques to manage assumptions and avoid premature judgment.



A. How does a transparent structure for the interview build trust?

As we read in Chapter Three, trust depends on many personal factors for both you and your client. One of the

ways that you can help to build any client's trust is to provide a clear structure that conveys your competence and caring and that reduces anxiety and fear of the unknown.

To begin your meeting with your client, introduce yourself clearly. When the client arrives, greet them warmly with a smile and a firm handshake (if appropriate). Speak slowly and clearly. Ask the client's name. Repeat it. This initial interaction sets the tone for the meeting and helps the client feel comfortable. By addressing the client by name and introducing yourself, you begin to establish a personal connection. As we have discussed previously, depending on the client, you may want to start the conversation with some light, non-legal topics to build rapport. Asking about their day, mentioning something relevant to their interests, or discussing a neutral topic like the weather can be effective. These small talk elements help break the ice and show the client that you are approachable and interested in them as a person.

Before you dive into asking the client questions, take some time to provide a roadmap for how the meeting will proceed. By providing this structure, you set the client's expectations and clear up uncertainties. For example, you might say something like "We have about 30 minutes for today's meeting. In that time, I hope we will be able to decide we are a good match for working together on your matter. We'll spend most of our time with me learning some more details about your situation and your goals. Then we can discuss some possible solutions and decide whether our firm can help you. How does that sound?"

We have previously discussed the value of asking whether the client has worked with an attorney before. Their answer can help to shape how much you need to orient them to the structure and function of the initial interview. Depending on the client's prior experience with attorneys, you may want to describe a bit more about yourself and your practice. Avoid giving a "sales pitch" but do answer the implicit question that may be on many client's minds: "Am I in the right place?" Again, for clients who do not regularly work with attorneys, explain the attorney-client relationship and how you work with clients. At a minimum, you will want to explain that you owe a duty of confidentiality to the prospective client, even if they decide not to retain your services. You will also want to clarify the charges, if any, for the initial consultation. We will explore more carefully the question of when and how to explain confidentiality and fees more fully in the initial interview in this chapter.

You may need to address some potential problems very early on. For example, a common scenario might have a client coming in to secure your services for someone else or for a business. If they are asking you to give them advice about a situation their business or employer or family member is involved in, you need to clarify whether they are speaking on behalf of that third party or whether they want advice for themselves personally. If they are speaking with you about a business issue, you will want to know if they want representation for themselves or for the business. If for the business, you need to know if they are authorized to speak on behalf of the business and engage legal representation for the business. Likewise, sometimes clients will come to the initial interview with a friend, family member, or other third person. Again, you need to take great care to quickly clarify the role that third person is playing in the possible representation. These are conversations that have to occur at the beginning of the initial client consultation.

Finally, give the client a chance to confirm their understanding or ask questions before you begin gathering details about their matter. By beginning the client consultation with these overviews and previews, you give the client important structure and context for the conversation that will follow.

Skills Practice

As you have seen, an important question to ask early in many interviews is "Have you worked with an attorney before?" Consider each of the following answers a client might give to this question. Think about what concerns the client's answer might raise and how you would respond to these clients. Click on each example to compare your analysis.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=36#h5p-17

B. How do you use intake forms as a reference and guide in the initial interview?

The intake form discussed previously should give you a fair amount of information regarding the client's problem so you can begin the interview with a general idea of the likely focus of the interview. Indeed, you should begin the interview by referring to the intake form because doing so is efficient and provides an opportunity to show clients that you appreciate their effort in completing the intake form.

Consider how you would feel as a client in each of the following circumstances. In both situations, assume you spent roughly 10-15 minutes completing an intake form, either online or in consultation with a paralegal.

Ex. 1 – When you meet the attorney, he shakes your hand, and welcomes you to his office, saying "Tell me what brought you here today."

Ex. 2 – When you meet the attorney, she shakes your hand, and welcomes you to her office, saying "I understand you have a domestic relations issue about which you want to consult with me. I'm anxious to hear more about the situation and see if I can help."

Not surprisingly, in the first example, your client might be frustrated by your question. Think about times that you have had an experience with the automated service protocol during a call to a company. After spending a couple of minutes working your way through the automated service protocol—which included: "For faster service, please enter your 10-digit telephone number starting with your area code."—you get to the customer service representative who asks for your 10-digit telephone number beginning with the area code. I imagine you have had this experience and may have thought (or even asked): "Why did I just enter the telephone number for 'faster service' if you are going to slow things down by asking me for it again?"

Similarly, clients who have spent time filling out an intake form are going to be puzzled (and possibly irritated) by the fact that you had them fill out the form but apparently paid no attention to it. Indeed, these clients may perceive that they are not very important to you (given that you did not take the time to review the intake form prior to talking with them). This presents another example of why you need to be attentive to implicit messages that you may communicate to clients, not only by what you say but by what you do not say.

By contrast, in the second example, the attorney implicitly communicates to you her appreciation for the time you took filling out the intake form by referencing the information in the intake form. (Indeed, there is no reason the attorney could not explicitly reference the intake form by saying, for example: "Thank you for taking the time to complete the intake form—I see that you have contacted me because of an auto accident in which you were involved approximately seven months ago. Why don't you tell me a little more about the situation?")

Some attorneys like to use the intake form to ease the client into the interview by asking if they can confirm some of the details on the form. However, asking a series of questions from the intake form can sometimes undermine the message that you are interested in the client as an individual rather than simply "a case." If you choose to use the "confirming details" approach to opening the conversation, be sure to include other indications of interest and acceptance, such as asking questions about basic facts such as family or employment that show an interest in getting to know the client beyond the legal matter that has brought them into the office.

One cautionary note about using the intake form as the basis for starting the interview: beware of limiting yourself to the client's stated problem. Clients lack legal training and often can't accurately classify their issues. Just as a doctor needs to take care that the "presenting" illness of a patient is not masking a different or more serious problem, you should consider your client's description of the matter as merely a presenting problem. You must thoroughly

investigate to understand the complete situation, as the stated issue may obscure more significant legal concerns. One way to consider visualizing this is to think of the problem as described by the client on the intake form as a doorway. It is not a doorway from a large universe of potential problems to the client's one small problem—rather it happens to be the doorway into the client's life and the large universe of problems that may be implicated in the client's life.

C. How do you talk about conflicts of interest in the initial interview?

As we have previously discussed in the context of intake forms, you may be able to identify some disqualifying conflicts of interests in the initial intake process. However, even if you do not appear to have a conflict from the intake, you have an ongoing duty to monitor for conflicts. In many instances, you can simply explain to the prospective client that this duty is the reason you need to have the names of all other persons and entities involved in their matter.

Some interviews require more in-depth explorations of possible conflicts of interest. A common situation in which conflicts must be addressed in the preliminary consultation is when you are asked to represent more than one person in the same matter. Two or more individuals might seek your assistance in starting a business, securing a patent, or making an investment, for example. How do you determine whether you can ethically represent all of these prospective clients?

First, you should speak with each of the prospective clients separately to determine whether they have compatible interests and are comfortable fully sharing information and decision-making. Second, if you believe that you can ethically represent both of these clients, you should obtain a waiver of your ethical duty of confidentiality from each client that would allow you to share information freely between these represented parties. If you don't, and one tells you a secret they don't want shared with another, you are in a very bad situation. You will breach your duty of confidentiality[1] with one client or your duty of communication[2] with the other. Your only answer is to withdraw,[3] but even that won't solve the problem. You are simply in trouble. If they sue one another, one client cannot object based on attorney-client privilege if the other client wants you to testify or produce documents about your conversations with either of them. Make sure that these conversations are well documented and that the clients sign waivers before proceeding with the representation.

A related conflict problem that may arise during the initial consultation is when the individual who is seeking your services is not the actual client you will be representing. Perhaps a parent is seeking your representation for a child or an insurance company is seeking to hire you to represent an insured. You have two duties in these circumstances. First, you must make it very clear who your client will be and speak with that person separately. If a third person who is not necessary to a consultation is present in an attorney-client interview, the conversation is not considered private and so is not protected by the attorney-client privilege.[4] If both individuals are seeking your joint representation, you still will need to address with each one separately the implications of a joint representation and whether they are comfortable with that arrangement.

Second, you cannot accept payment from a third party unless you make it clear that they may not direct the representation and that they will not be entitled to have confidential information about the representation.[5] The

1. Model Rules of Pro. Conduct r. 1.6 (Am. Bar Ass'n 2023).
2. Id. r. 1.4.
3. Id. r. 1.16.
4. The Restatement defines "privileged persons" and identifies who, besides the client and lawyer, is considered part of the privileged communication circle for purposes of the privilege. Generally, the privilege is waived when a client voluntarily discloses confidential communications to a third party who is not protected by the privilege. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 71-72 (2000).
5. Model Rules of Pro. Conduct r. 1.8(f) (Am. Bar Ass'n 2023).

prospective client may have an agreement with the third-party payor in which the client agrees to waive some of these latter protections, but you should not agree to such a waiver without proof of that agreement and without consulting with the client about the implications of that agreement. Both the client and their representative should understand this relationship.

Role Play Practice

The following clients present a challenge in being clear about the identity of the prospective client and whether the individual has the authority to secure that representation. Pair up with a classmate and practice the opening to the interview in each case.

Your professor will provide additional confidential information for the client whom you will be portraying. If you are working with this book independently, recruit a partner to play the role of the client and invent the facts that you will ask about.

Case #1 – Client Information	
Full Name	Ann Bond
Address:	4803 Maple Street, Our City, Our State
Phone Number (Work)	(600) 567-8901
Phone Number (Cell):	(600) 678-9012
Email Address:	Ann.Bond@realmail.com
Preferred Method of Contact:	Email

Case Information	
Name of Arrested Individual:	David Bond
Date of Arrest:	Three days ago
Location of Arrest:	City park near downtown
Current Status of Arrested Individual	In custody
Relationship to Arrested Individual:	Mother
Incident Details	
Brief Description of the Issue Leading to Seeking Legal Assistance:	David Bond was arrested during a peaceful protest at City Park. The protest was designed to raise awareness about gun violence in Our City. According to witnesses, the protest remained peaceful until a small group of individuals started causing disturbances. David was caught in the commotion and arrested, though he maintains that he was not involved in any illegal activities. David has been offered a public defender but Anne would prefer he have a "real attorney."
Charges Filed	Disorderly conduct, resisting arrest
Arresting agency	Our City Police Department
Has the arrested individual been assigned a public defender?	No
Has there been any court appearance yet?	Yes
If yes, provide details:	David had an initial hearing two days ago, where bail was set at $5,000. He is in custody pending posting of bail, which his mother is attempting to arrange.
Additional Information	
Are there any witnesses to the incident?	Yes
If yes, please provide names and contact information:	Sarah Johnson, sarah.johnson@realmail.com, (816) 654-0987 Michael Lee, michael.lee@realmail.com, (816) 123-4567

Any other relevant information or concerns:	David is a student with no prior history of involvement in protests or criminal activities. Ann Bond is concerned about the impact of this arrest on his future and is seeking legal advice on the best course of action and whether private representation is available and wise.
Is the client seeking representation for:	☒ Initial Consultation Only ☐ Full Legal Representation
How did the client hear about our law firm?	Web search
Has the client previously worked with an attorney from our firm?	No
Financial Information	
Does the client have legal insurance?	No
Is the client currently employed?	Yes
If yes, please provide occupation and employer:	
Occupation:	Nurse
Employer:	Our City Children's Hospital
Does the client anticipate any difficulty in paying for legal services?	Unsure
Consultation Scheduled:	Yes – see calendar reservation
Attorney Assigned:	Yes – see calendar reservation
Confirming email sent:	Yes

Case #2 – Clie	
Full Name	Mi
Business Name:	Ca
Business Address:	456 Ou
Phone Number (Work):	(60
Phone Number (Cell):	(60
Email Address:	mi
Preferred Method of Contact:	Pho

Case Information

Primary Reason for Seeking Legal Assistance:	Potential violatio the lease by a ne
Name of New Store:	The Book Nook
Date New Store Opened:	Three months ag
Location of New Store within the Mall:	Suite 5
Nature of Business:	Bookstore and ca

Relationship to the Mall:	Tenant
Does the client have a copy of the lease agreement?	Yes
Incident Details	
Brief Description of the Issue Leading to Seeking Legal Assistance:	Michael Carter o Cafe, a bookstor mall. Recently, a Nook opened in concerned that T violates an exclu agreement, whic bookstore or caf mall. Michael see this new store is what actions can
Specific Clauses or Sections of the Lease in Question:	See attached exc
Have there been efforts to resolve the matter?	Yes
If yes, provide details:	Michael contacte week after the B never received a
Additional Information	
Are there any witnesses or other potential claimants?	Yes
If yes, please provide names and contact information:	Lisa Wong, Own lisa.wong@lisasw
	Tom Reynolds, C tom.reynolds@re
Any other relevant information or concerns:	Michael is conce Book Nook on hi considering the was a major facto store in this loca
Legal Representation	
Is the client seeking representation for:	☒ Initial Consult ☐ Full Legal Rep
How did the client hear about our law firm?	Referred by a bu
Has the client previously worked with an attorney from our firm?	No
Financial Information	
Does the client have legal insurance?	Maybe business
Is the client currently employed?	Yes

If yes, please provide occupation and employer:	
Occupation:	Business Owner
Employer:	Carter & Sons Bo
Does the client anticipate any difficulty in paying for legal services?	Maybe. Depends severe hit from t
Consultation Scheduled:	Yes – see calend
Attorney Assigned:	Yes – see calend
Confirming email sent:	Yes

D. When is the right time to talk about fees?

Many clients will be concerned about the costs of hiring an attorney. A common source for disciplinary complaints against attorneys relates to problems in communicating fees to clients. Since an attorney's fee is not displayed on a menu at the front door, attorneys have a fundamental duty to communicate with their clients about fees. Model Rule 1.5(b) requires communicating your fee and the client's responsibilities for expenses "before or within a reasonable time after commencing the representation."

Clients who have not consulted with an attorney before—or have indicated that they have concerns about the fees—may be particularly anxious and nervous about consulting with an attorney. When a client has highlighted this information on an intake form, the office staff helping the client complete the intake form should work with the client to help them understand what is likely to happen in the initial interview and to provide them with information about fee structures. This information may help the client move past the anxiety that comes with "fear of the unknown." Nonetheless, you should be sensitive to these concerns and how to address them briefly at the commencement of the interview to help set the client at ease before getting into the interview.

It is your responsibility to raise the issue of fees early on in the interview. Of course, the fee discussion need not be the first words out of your mouth, but clients should not be the ones to have to raise the issue. For many new attorneys, these are not easy conversations. Clients are often reluctant and fearful to discuss fees.

If the client seems especially concerned about fees, you should have a more extensive conversation at the beginning. At a minimum, you should confirm whether there is a charge for the initial consultation (and how much it is). You should also at least let the prospective client know when you will be discussing fees. Some clients may wish to learn about costs before proceeding. There is little to be gained by wasting your client's time collecting extensive case information or explaining other aspects of your representation if the client ultimately cannot afford your services. In most instances, however, a client will appreciate that it makes more sense to defer the details of fees until it is clear that the client wants to hire the you and that you want to represent the client.

Whether at the beginning or end of the interview, discussing fees is a challenge. Clients want transparency and certainty of costs. However, even after understanding the nature of the client's matter and their objectives, you may not be able to readily estimate the time and expense involved. Very experienced attorneys can sometimes provide prospective clients with estimated ranges of fees and attorneys offering flat fee services can provide costs for various services. However, very often, your most honest answer to "How much is this going to cost?" must be "I don't know."

You can and should explain to your client factors that can increase or decrease costs and pledge to keep the client well informed of those costs as the representation proceeds.

Though not necessarily required by the rules of conduct (check your state for its approach),[6] you should think twice before ever undertaking a representation without a written agreement. Attorneys often use the fee agreement as a tool for communicating how fees and expenses will be charged and collected. A written fee agreement documents the client's understanding of your fees, and it also can be an important tool for communicating other aspects of the representation, such as the scope and limits of representation and allocation of responsibility.

Skills Practice

In many areas of practice, attorneys have written explanations of their fee structures that they provide to prospective clients to help in explaining fees. Consider this sample fee schedule and answer the questions that follow.

6. Am. Bar. Ass'n, Jurisdictional Rules Comparison Charts, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/

ABC LAW GROUP
Civil Litigation Fee Schedule

Thank you for considering our firm for your legal needs. This fee schedule outlines our typical billing arrangements for civil litigation matters. During our initial consultation, we will discuss which arrangement best suits your specific situation.

Hourly Fee Structure

Our attorneys bill for their time at the following hourly rates:
Senior Partners: $375-450 per hour
Junior Partners: $300-375 per hour
Senior Associates: $250-300 per hour
Junior Associates: $200-250 per hour
Paralegals: $125-175 per hour

Billing Increments

Time is billed in 6-minute (0.1 hour) increments.

Retainer Requirement

Most litigation matters require an initial retainer of $5,000-15,000 depending on the estimated complexity and scope. This retainer is deposited into our client trust account and applied to fees and costs as they accrue.

Contingency Fee Options

For certain cases, we may offer contingency fee arrangements:
33.33% of recovery if resolved before filing a lawsuit.
40% of recovery if resolved after filing a lawsuit.
45% of recovery if resolved after commencement of trial.
Reimbursement of all case expenses is deducted after calculating percentages.

Hybrid Fee Arrangements

For some matters, we offer reduced hourly rates combined with reduced contingency percentages, structured as:
Reduced hourly rate (60-75% of standard rates)
Plus 15-25% contingency fee on any recovery

Case Expenses

In addition to professional fees, you will be responsible for case expenses, which may include:
Court filing fees ($200-500)
Service of process fees ($75-150 per defendant)
Deposition costs ($500-1,500 per deposition)
Expert witness fees ($300-500 per hour)
Document reproduction ($0.15-0.25 per page)
Electronic discovery services (varies by volume)
Investigator fees ($75-150 per hour)
Travel expenses (at cost)
Mediation fees ($300-500 per hour, typically split between parties)

Billing Procedures

Monthly invoices detailing all time entries and expenses
Payment due within 30 days of invoice
Credit cards accepted (3% processing fee applies)
Interest of 1.5% per month on unpaid balances after 60 days

Consultation Fees

Initial 30-minute consultations are offered at a flat rate of $150. This fee will be credited toward your retainer if you retain our firm within 30 days of the consultation.

Fee Estimates

While litigation is unpredictable by nature, we provide the following general estimates:
Pre-litigation settlement: $5,000-15,000
Litigation through discovery: $15,000-40,000
Litigation through dispositive motions: $25,000-60,000
Litigation through trial: $50,000-150,000+

Each case is unique, and actual costs may vary significantly based on complexity, opposing counsel's approach, and court requirements. We will provide updated estimates as your case progresses. We are committed to transparency in our billing practices. Please discuss any questions or concerns about fees during our initial consultation so we can find an arrangement that works for your specific needs.

An interactive H5P element has been excluded from this version of the text. You can view it online here:
https://interviewingandcounseling.lawbooks.cali.org/?p=36#h5p-18

E. How do you explain confidentiality to the prospective client?

The lawyer's duty of confidentiality is one of the defining features of the attorney-client relationship. The purpose? To facilitate a relationship of trust between attorney and client so that the attorney will be able to learn all the facts and counsel the client fully and ethically.

The duty of confidentiality, in most states, extends to any "information relating to the representation."[7] This means that any information relating to the client's matter is confidential—no matter what form (documents, things, observations, conversations), what source (the client, witnesses, even public documents), or even when the information is acquired (so that information in a prospective client interview is confidential even though it precedes a formal attorney-client relationship). To a certain extent, it does not even matter why you have gained the information. If you would not have received information but for the fact of the representation, you should consider it confidential.

The principle underlying this breadth is that the client's information belongs to the client—not to the attorney. Just as you must safekeep a client's money or property,[8] so too you have a duty to protect the client's information and refrain from using it for personal gain or other prohibited purposes.

Exceptions to the duty of confidentiality permit attorneys to disclose information to further the client's interests, and in a limited number of circumstances to protect the attorney or third persons.[9] There are only a very few circumstances in which you might be required to reveal harmful information about a client. The most common of these is when you have presented evidence to a court and then discover that the evidence is false. For example, suppose your client has testified that a particular event occurred or did not occur. If you later come to know that this evidence is false, you must take "reasonable remedial measures" to correct this false testimony.[10] If you cannot convince the client to retract and repair the document or statement, you may be required to reveal the falsehood to the court.

To complicate matters, a second doctrine, the attorney-client privilege, also protects client information. Unlike the duty of confidentiality, which is designed to protect the client from an attorney's misuse of their information, the evidentiary privilege is designed to shield attorney-client communications from third persons who might seek to force disclosures. As a matter of evidence law, the details of the doctrine vary from jurisdiction to jurisdiction. In general, however, the scope of the attorney-client communication privilege is narrower than the attorney's ethical duty of confidentiality. Rather than protecting any information relating to the representation, the privilege shields only private communication between an attorney and client for the purpose of seeking legal advice. Communication that is not private is not protected, which is why you must take care that interviews with a client do not include unnecessary third persons. Neither are communications that are not for the purposes of seeking legal advice protected, so that communications with a client who seeks an attorney's assistance in committing a crime or fraud can often be discovered.

When and how much do you counsel a client about this very complex set of rules? Remember that the purpose of these protections is to help to foster trust and disclosure, so explaining the duty of confidentiality near the beginning of the fact gathering portion of the interview may often be the most effective way to approach this explanation. Saying something like, "Everything you share with me is strictly confidential, so I want you to tell me everything" is often sufficient for most types of representation.

However, given the exceptions to confidentiality, is it entirely accurate? What if anything should you say to your clients about your duty of confidentiality? Consider these two contrasting views on the question and think about your clients.

> [A] study showed that many lawyers rarely fully advise their client of these rules [about exceptions

7. Id. r. 1.6.
8. Id. r. 1-15.
9. Id. r. 1.6(b).
10. Id. r. 3.3.

> to confidentiality] and that many clients significantly misunderstand [them]…. Lawyers owe it to the public to do a better job explaining confidentiality in light of the study's findings of widespread public misunderstanding. The best place to do this is where the lawyer meets the public, i.e., during the initial interview. Because a proper client understanding of fees and confidentiality are important to establishing and maintaining trust and competence, we suggest that lawyers carefully plan how to explain them to their clients. It may be useful to distribute a written explanation of the rules on confidentiality and the lawyer's fee structure before the initial interview. A written explanation of confidentiality allows the lawyer to cover both the ethical rule on confidentiality and the attorney-client privilege rule in that jurisdiction. This allows the lawyer to provide a full explanation to the client in a more efficient manner than a mini-lecture at the beginning of the interview, when the client may not be listening intently.[11]

Compare that statement with this view:

> [S]uch a warning is going to impede, if not wholly frustrate, the already difficult task of establishing a relationship of trust and confidence with the client…. The question in the client's mind is "Can I really trust you?" And the client will not be reassured by a lawyer who invites full disclosure and at the same time cautions the client about the possible betrayal of his confidences…. The lawyer who gives a Miranda warning is not the client's champion against a hostile world; on the contrary, she presents herself at the outset as an agent of that hostile world…. [I]t is important to recognize that the frightened and confused client who is given a lawyer-client Miranda warning may well be innocent. As Professor Stephen A. Saltzburg has observed, "Good persons (or persons with good claims) may shrink from the attorney who gives Miranda warnings as quickly as bad persons (or persons with bad claims)." Note too that the lawyer-client Miranda warning must be given before any serious lawyer-client discussions can begin— that is, before the lawyer can possibly make an informed judgment about the client's guilt or innocence.[12]

Which approach makes more sense to you? Do you think one approach better fits some areas of practice than others? To the extent many of the exceptions to confidentiality are discretionary, does the degree to which you describe these exceptions depend in part on how likely you would be to exercise this discretion to disclose?

If you do feel that you should explain the exceptions to confidentiality, do so in a way that is less likely to place the client in a defensive posture. Professor Marjorie Corman Aaron suggests avoiding direct eye contact that might suggest that you expect that these exceptions would apply to the client. Likewise, she suggests using the third person to describe these exceptions. For example, "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."[13]

Reminding a client of your duty of confidentiality can also be helpful if, during the interview, the client seems reluctant to reveal sensitive information. Likewise, at the end of the interview, additional reminders may be in order. You may wish to remind the client not to share the content of their conversation with others lest the client waive the attorney-client privilege. If you do not go forward with further representation, a reminder that you will nonetheless preserve the client's confidences would be appropriate.

In certain circumstances, you may be required to ask a client to waive confidentiality. Most commonly this would arise when you represent multiple clients in the same matter. If you take on this type of representation, securing waivers of confidentiality among the clients should occur before any one of the clients discloses sensitive information.

In general, there is no right or wrong way or time to discuss confidentiality and privilege with clients but

11. ROBERT COCHRAN, JOHN DEPIPPA & MARTHA PETERS, COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 70–71 (Second ed. 2006).
12. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 155 (2nd ed. 2002).
13. Marjorie Corman Aaron, Client Science: Advice for Lawyers on Initial Client Interviews 343 (2013) available at http://clientsciencecourse.com/wp-content/uploads/2013/11/Advice-for-Lawyers-on-Initial-Client-Interviews.pdf.

informing the client of these protections effectively can facilitate client trust and disclosure. You will want to consider carefully when and what you will say to clients about your duty of confidentiality and the limits of that duty as you approach each initial client interview.[14]

Skills Practice

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F. Why is it important and difficult to avoid arriving at judgments too quickly in the initial interview?

Premature conclusions about a prospective client's matter are one of the greatest barriers to gathering a complete and accurate picture of the potential representation. As we have previously explored,[15] our brains have a number of cognitive biases that make suspending judgment difficult. These biases affect the independent professional judgment that is the core of the lawyer's value to clients.[16] You cannot eliminate the brain's fast-thinking process of operating on cognitive biases (indeed the belief that knowing about bias is enough to eliminate it is itself a bias!). But you can work to counter these biases by using your slow-thinking rational processes.

One of the most powerful cognitive biases is confirmation bias, which is the tendency to look for and favorably evaluate information that confirms our prior beliefs and to ignore or discount that which undermines our conclusions. Confirmation bias will cause us to look for information that reinforces our judgments. Even if contrary information is available to us, confirmation bias will affect our perception so that we may not even notice that information. Certainly, our interpretations of information will be influenced by this confirmation bias. As you can see, an attorney who does not deliberately take affirmative steps necessary to counter this bias will inevitably have a skewed evaluation of the client's case.[17]

Given our fast-thinking mind's rush to judgment and the influence of confirmation bias to blind us to alternative ideas, how can we truly suspend judgment and prevent premature closure of our information gathering process? Being aware of our own thoughts and surfacing our assumptions is an important first step. Many attorneys find mindfulness techniques valuable for this ability to think about how we are thinking. Writing out our thoughts or speaking with others who have a perspective or experience much different than our own can be helpful. Much of our training as critical

14. For a discussion of more views on this subject, see Clark D. Cunningham, How to Explain Confidentiality?, 9 CLINICAL L. REV. 579 (2003).
15. Supra section __.
16. Model Rules of Pro. Conduct r. 2.1 (Am. Bar Ass'n 2023).
17. C. Bryan Cloyd & Brian C. Spilker, Confirmation Bias in Tax Information Search: A Comparison of Law Students and Accounting Students, 22 J. Amer. Tax. Assoc. 60 (2000)(noting that training in research methods can counteract the tendency to overlook precedent that undermines the client's position).

thinkers can come to our rescue here to help us ask questions and to generate alternative positions or interpretations. Understanding what we are thinking and where those ideas come from is essential.

Judgments about the reasons for another's behavior are especially prone to biased thinking. Fundamental attribution error means that we are more likely to attribute the other person's bad behavior to their personality, character, or ability.[18] Egocentric biases lead us to attribute more of our own bad behavior to situational or external factors. Attorneys often recognize this phenomenon in comparing their client's explanations for their behavior with their explanations for the opposing party's behavior. While attorneys might easily see attribution bias at work with clients, they may be less likely to recognize their own tendency to engage in this error.

Embracing an attitude of acceptance can be a challenge in any circumstance. Suppose your speaker is someone who holds a belief or position with which you differ strongly. Likewise, imagine listening to someone whose life experiences are very different from your own. Sometimes, reaching across those barriers of ideology and culture can require an extraordinary mental and emotional effort. For example, consider the client who arrives at an appointment late or has missed an appointment. This behavior can lead us to conclude that our clients are rude or do not value our services. However, we should stop and question this judgment. Time has different meanings in different cultures. A client whose culture is less likely to view time as a commodity may have a very different starting point when it comes to the meaning of being "on time." The lived experience of some clients may lead them to interpret the meaning of appointment times differently. For example, a client living in poverty may "have frequent bureaucratic experiences in which a 9:00 a.m. appointment means being called at 10:30 a.m." and "their lives will often be filled with more stresses and crises than we can imagine in our organized law firm world."[19] Keeping the focus on the client and accepting their starting points may mean an attorney will need to set aside their own feelings about the tardy or missed appointment to take the perspective of the client.

One popular tool to understand how our fast thinking mind shapes our perceptions and judgments is the "ladder of inference." The ladder helps you to separate out the steps in your process of coming to a conclusion about an observation.

Observation. Our mind takes in a vast amount of information, but it cannot consciously process it all, so our fast-thinking brain selects which information to perceive and which to ignore. Going back through your observations or fact gathering and asking "what am I missing?" can give you an opportunity to broaden your observations.

Selecting Data: We consciously filter and select certain information as important or relevant. Here again, our predetermined judgments will influence which information we choose.

Adding Meaning: We ascribe meaning to the information we have selected. Separating out facts from conclusions is a key skill for attorneys. As you consider the explanations you are drawing about the client's situation, ask yourself, "Why do I believe that?" "How else might that be explained?"

Making Assumptions: As we explore the meanings of facts, our fast-thinking brain will be filling in gaps with assumptions. These assumptions will be drawn from our store of patterns and biases based on past experience. Focusing especially on gaps in the facts of your client's situation can help you to identify these assumptions.

Drawing Conclusions: Throughout the interview, we will be translating facts into ultimate conclusions. Delaying that process, or thinking of all conclusions as tentative can help to prevent these conclusions from foreclosing additional investigation or analysis.

Forming Beliefs: Our conclusions will include beliefs about our client and other persons or about the problem or situation the client has presented. For example, we might conclude that our client's actions were intentional and we might believe that the client's intention was driven by a particular value or habit. For both conclusions and beliefs,

18. Matthew I. Fraidin, Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability, 60 CLEV. ST. L. REV. 913, 947 (2013)(arguing that judges in dependency court proceedings are prone to "dispositional bias in attribution," also named the "over-attribution" and the "fundamental attribution error.").
19. Paul R. Tremblay, supra n. 30 at 396.

adopting the perspective of the other people involved in the situation can help to challenge these. You can even ask the client, "What would X say?"

Taking Action: At the top of the ladder, we make a decision about the nature of the client's problem, the potential solutions or outcomes, and whether and how we will represent our client. Using the ladder of interference can help you separate out gathering facts from developing legal theories and ultimate conclusions. Your client too will be making decisions about actions. You can use the ladder of inference to walk your client down the ladder of inference to help them to gain new or different understandings of their situation and their options.

Another important tool for managing the cognitive biases that can lead to misunderstanding is the practice of cultivating intellectual humility. Humility is important for reducing the tendency to rush to judgment or neglect to gather sufficient information. What exactly is intellectual humility? Scholars and researchers have not arrived at a single definition. Some characterize it as "a personality trait, a cognitive disposition, a set of self-regulatory habits, an intellectual virtue, and an absence of intellectual vices."[20] All agree that a core cognitive belief grounds intellectual humility: the belief that you may be wrong. A person with a high degree of intellectual humility will agree strongly with statements such as: "I accept that my beliefs and attitudes may be wrong," "I reconsider my opinions when presented with new evidence," and "I am willing to admit it if I don't know something." Regardless of how characterized, research shows practicing intellectual humility (IH) provides a number of benefits that are especially valuable in the context of interviewing and counseling clients:

> IH can be beneficial in a number of ways—in improving the quality of one's decisions (because people are open to a greater variety of information and perspectives), fostering more positive interactions and relationships (because people are more open to others' views, less defensive, and more likely to admit when they are wrong), and promoting progress in organizations and society (because people high in IH are more inclined to compromise).[21]

For attorneys, strengthening our intellectual humility can be a challenge. While we may be better than most professions at tolerating ambiguity, we are notorious for having an aversion to being wrong. To develop greater intellectual humility, you must first be open to the possibility that you may be wrong. Reflect on times in the past that you have changed your mind about something because you were open to new evidence.

Intellectual humility does not mean that you cannot have confidence in your skills and knowledge. Indeed, intellectual humility is difficult to cultivate if you are afraid of being seen as ineffective or are defensive when your ideas are challenged.[22] Instead, intellectual humility simply means that your confidence in your ideas and conclusions is tempered by your awareness that you may lack complete or accurate information, or that your expertise or skill may be incomplete.

Once you open yourself to this possibility, you must then be able to take a step back from your opinions and conclusions and evaluate your own thought process. This metacognitive skill allows you to uncover gaps in evidence, unwarranted assumptions, and faulty reasoning. When evaluating an idea, practice taking an outside perspective—preferably the perspective of someone unlikely to agree with you—and evaluate your idea through that perspective.[23] Ask for critique and feedback from others, about your intellectual humility in general or your ideas and conclusion in particular.

As you develop greater expertise in practice, intellectual humility can be harder to exercise. After you have represented hundreds of clients in a particular matter, it is difficult not to categorize a new client in terms of your past experience. The greatest antidote to this habit is curiosity. Going into each interview with an attitude that there is

20. Intellectual Humility, John Templeton Foundation, https://www.templeton.org/discoveries/intellectual-humility (visited July 25, 2025).
21. Id. at 14; Mark Leary, What Does Intellectual Humility Look Like?, Greater Good Magazine, November 3, 2021 https://greatergood.berkeley.edu/article/item/what_does_intellectual_humility_look_like.
22. Elizabeth J. Krumrei-Mancuso & Malika Rice Begin, Cultivating Intellectual Humility in Leaders: Potential Benefits, Risks, and Practical Tools, 36(8) Amer. J. Health Promotion 1404, (2022) doi:10.1177/08901171221125326c
23. Id.

something new to learn keeps you open and questioning and can help to constrain the tendency to assume you know more than you do.

Reflective Practice

Jumping to conclusions about a situation or a person is something with which most people have some experience. Think about a situation in which another person has made an incorrect assumption about you, and answer the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=36#h5p-21

Check your Understanding

You will be meeting with your prospective client, Rebecca West. Read the opening dialogue for this interview and then answer the questions that follow.

Interview transcript: Attorney Peterson & Prospective Client West

Attorney: *Hello, Ms. West. Welcome. I'm Pat Peterson. Thanks for coming in today. Please have a seat. Did you have any difficulty finding our office?*

Client: *No, no problems at all.*

Attorney: *Can I get you a cup of coffee, soda, or water?*

Client: *No thanks. I'm fine.*

Attorney: *As I said, I'm Pat Peterson; please call me Pat. How would you like me to call you?*

Client: *Oh, Linda.*

Attorney: *Thank you, Linda. I see from the information you gave to my paralegal that you've had a situation involving your horse.*

Client: *Yeah. It's a real mess. This South guy slugged him and now I think he's stalking me. He's real crazy.*

Attorney: *That sounds frightening. I want to hear all about this situation and see if we can't help you.*

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=36#h5p-22

Assume the attorney has provided an overview of the interview, briefly explaining confidentiality and fees. The attorney continues the interview as follows:

Attorney: *…. So I really won't be able to give you details about how much this case might cost until I learn more about your situation. Would you like to talk about that now?*

Client: *Yes, please.*

Attorney: *So to get started Linda, why don't you tell me a little bit more about yourself. I see from your intake form that you work for a stable in Stillwell. What do you do there?*

Client: *I'm the stable assistant.*

Attorney: *I'm afraid I don't know a lot about horses. Tell me a little about what's involved in working as a stable assistant.*

Client: *Well, basically I take care of the horses: leading, grooming, picking hooves, haltering horses, and putting horse blankets on and off, cleaning the stables, helping with veterinary visits, really whatever the stable supervisor thinks needs doing.*

Attorney: *And you've been doing this for some time now right?*

Client: *Yes. I started out volunteering at the stables in exchange for boarding my horse there and they liked my work, so they hired me. I really like working with the horses. I don't make a lot of money, but I get free boarding for my own horse, which can be pretty expensive otherwise.*

Attorney: *And you live pretty close to the stables I see?*

Client: *Yeah, it's about a 10-minute drive.*

Attorney: *Sounds great. And are you married?*

Client: *No.*

Attorney: *So it sounds like horses are both your work and your main hobby, is that right?*

Client: *Yeah, ever since I was a kid I've wanted to work with horses, so this is really a dream come true. So far it's not paying much, but I can make more if I get good at it, both at the stables and in breeding and showing. But now with what happened to Velvet, I'm really set back.*

Attorney: *So let's talk about that. Why don't you just start at the beginning and tell me what happened.*

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=36#h5p-23

You should recognize that some advantages of asking the client background questions are that it can put a nervous client at ease and permit the attorney to get to know the client as a person. Some clients will be anxious to talk about their issues, however, and will be impatient with background questions. In some circumstances, time is at a premium or you already may have an established relationship with the client, so background questions may not be as essential as getting the details necessary to help the client.

Role Play Practice

Select a client from a case you have read in one of your classes. Imagine that you are the attorney, meeting the client in an initial consultation. Practice how you would open this interview, explain confidentiality and fees, and provide a roadmap for the interview. Video your opening and review your performance.

Chapter Four Endnotes

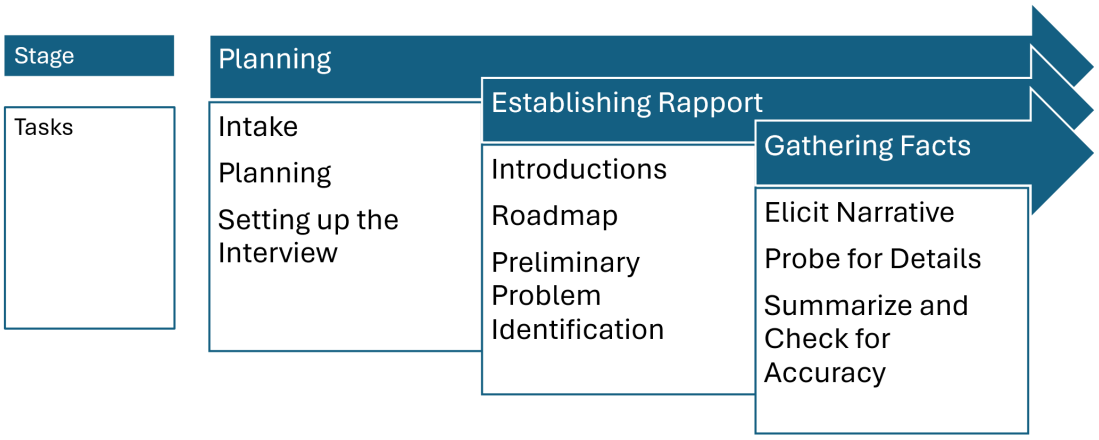
Chapter Five – Preliminary Fact Gathering

Learning Objectives

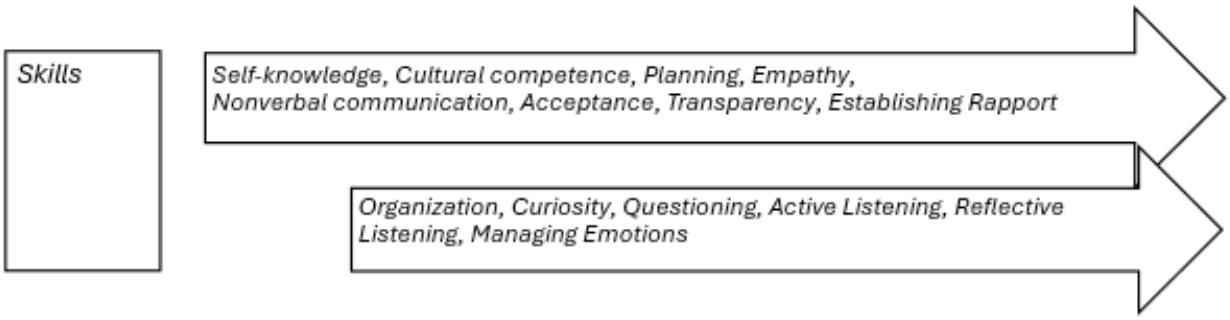
After working through these lessons and practicing the skills presented, you will be able to:

- Use open-ended questions and minimal prompts to elicit client narrative.
- Take notes in a way that accurately captures information without interfering with communication.
- Recognize different ways to frame questions and be aware of the advantages and disadvantages of each.
- Use active- and reflective-listening techniques, including paraphrasing and reflection to encourage disclosure, communicate nonjudgmental acceptance, and check accuracy.
- Recognize, name, and manage the emotional aspects of the problems presented and the force of those emotions on decision-making.

In this chapter, we will focus on the skills needed during the middle part of the interview in which the attorney will be gathering details from the propsective client.



In terms of the skills that are especially important in this part of the interview, we will focus in particular on taking notes, asking questions, and listening and reflecting back both content and emotion.



A. What are the components of the information gathering part of an initial interview?

Once you have set the stage for the interview proper, you can move toward getting the critical information for the client's matter. Remember that your goal in gathering information is to form a picture of the client and their matter that is sufficiently complete to allow you to determine whether this is a representation that will be mutually beneficial and what types of solutions you might be able to offer.

For an efficient interview, you will want to work from general to specific. Start with identifying the primary topic or concern that has brought the client in to see you. Then, using open-ended questions and prompts, you will gather the general information about that matter. Finally, you will go back over the information the client has provided and ask questions about specific details.

If you have information about the client's matter from your intake process, you can begin by simply repeating that information. "I see that you are here today because you would like to make a will." Or "I understand that you are concerned about a competing company stealing trade secrets." Alternately, you can ask the client to identify the topic(s) for the meeting by asking an open-ended question such as, "What brings you in today?" or "How can I help you?" This approach invites the client to select the details about their situation that are most important to them.

Once you have the major topics or concerns identified, you can then request a more complete description of the client's matter. Give your client some guidance on how you want them to provide you with this more detailed information. Be explicit about your need for detailed information without the client editing themselves. "The more details you can give me about your situation/plans/problem, the better I can help you. So don't worry about whether information is relevant or helpful, just tell me as much as you can." At the same time, you should explicitly warn the client not to fabricate information or guess at answers if they simply don't know. You might say, for example, "If you don't know or don't remember, that's okay. Just say so."

For a matter that involves a past event—primarily in disputes—a chronological summary of the dispute can be helpful. "Start at the beginning." "Walk me through what happened…" At the same time, if you are working with the client to recall past events, you can enhance both their recall and their disclosure by reminding them that you want them to describe their situation in any order that comes to mind.[1] In criminal defense practice, a neutral but open-ended question to begin fact gathering would be to ask what the police are saying happened. The client will tell you what they want you to hear about their involvement in the charged crime. This approach avoids your suggestion that the client was indeed involved in the criminal activity.

For transactions or advising on future actions, you are more likely to start with their objective or goal and then

1. RONALD P. FISHER & R. EDWARD GEISELMAN, MEMORY ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING 41 (1992).

ask for a more detailed description of their planned transaction or relationship. While focused on future planning, you will want to gather detailed information about any steps the client has already taken toward their goal, whether that is research, conversations, investments, or other action.

Some clients may provide a fairly complete narrative of their situation in response to an initial question.[2] However, be aware that not all clients will be comfortable providing a narrative response and you will need to use narrower questions and more explicit prompts. "In cultures which discourage self-disclosure, such as some Asian or Latino cultures, an interviewer expecting the client to provide a narrative tale may be disappointed. Once again, there is the accompanying risk that the lawyer will perceive a client who does not participate in the narrative, revealing process as difficult, dishonest, or uncooperative."[3] Remain flexible and vary your questions according to the client and the context.

Keep in mind that this initial narrative is more important for identifying the overall issues and topics you want to explore in more detail than it is for getting the whole story. You will necessarily need to go back over the narrative to confirm facts, fill in gaps, and gather details.

Do not interrupt the client as they begin their narrative. Attorneys are far too quick to assume they know where the client's story is headed and to cut off the client. Interrupting and narrowing inquiry leads to premature closure of the information-gathering stage. In contrast, in most instances, permitting the client to provide an uninterrupted narrative provides more complete and accurate information in the most efficient way possible. Of course, there may be times when you may need to cut short a client's narrative. As a general rule, however, you should encourage a client's open narrative response. This is not only important for making sure you understand the client's entire situation; it also is important for reinforcing a rapport and building a relationship of trust. Creating a questioning dynamic in which the client feels like they are being cross-examined is not likely to build a relationship of trust.

As we mentioned previously, it will be important to be attentive to providing nonverbal encouragement to your clients (head nods, facial expressions showing attention/engagement, etc.) so that they feel heard.

Pay particular attention to the first statements the client makes and any statements or characterizations that are repeated. You will likely have many questions about the details of what the client is saying, but, unless clarification is absolutely necessary to understand the client's narrative, save your curiosity until the client has come to a stopping point.

Early on in problem identification, you will also want information about the client's expectations. Thus, a critical question in any initial interview is simply: "What do you want?" (Or variations on that theme such as "What do you expect to get from this action?" or "What do you hope I can do for you?") As you move into the counseling phase of the relationship, you will revisit this question, but asking this question early in the interview can identify clients with unrealistic expectations—who want something the law cannot provide or who expect results to be obtained in an unrealistic manner, timeframe, or cost. Exploring objectives can also reveal client motivations that you would prefer to avoid (such as the client whose primary goal is angry revenge). Finally, this question can identify those "expert" clients who not only know exactly what they want but believe they know exactly how you should be accomplishing those objectives.

To some extent, starting the initial interview with an open question should not be that difficult. Indeed, many attorneys may develop a set of stock open questions that they use at the beginning of most interviews. Continuing to use open questions as this initial information gathering part of the interview unfolds can be more challenging. You are likely to want to clarify ambiguity, flesh out a situation, fill in gaps, or otherwise gather certain information that you know is likely to relate to the legal issues implicated in a given situation. This may lead you to begin asking direct or closed questions targeting this specific information.

2. On occasion, you may even need to stop the client's narrative if it is going on too long or you are having trouble following. However, attorneys are more likely to err on the side of interrupting too early than letting a client speak too much.
3. Paul R. Tremblay, supra n. 30, at 398–99.

While this can be okay and indeed may be appropriate when a client has left out relevant information or has described something in an ambiguous way, this shift to closed-ended questions has the potential to be a slippery slope that results in falling into a pattern closer to interrogation than conversation. Thus, until you are confident the client has had a chance to tell their whole story, focus on continuing to prefer open questions unless there is a good reason to do otherwise. When you have interjected a direct or closed question to clarify a specific ambiguity or fill a critical gap, return to open questions.

For example, if the client is telling a roughly chronological story about what happened between leaving a bar and getting into an auto accident and fails to describe who was driving the car as she and her friend left the bar, it might be entirely appropriate to interject a direct question: "Who was driving the car when you left the bar?" But then to make sure that you return to the roughly chronological story, it probably makes sense to follow up the response by using an open question: "What happened then?" or "What happened next?" This will likely generate more useful information than a series of closed questions in which you ultimately end up guessing at other information that you hope is relevant and helpful. You will have an opportunity to revisit the details of each part of the client's matter in the middle phase of the interview. Your ability to gather relevant details efficiently and effectively depends on gaining a clear overview of the problem through this initial information gathering.

B. Why and how should you take notes during an interview?

There are two primary reasons to take notes during an interview. One is to accurately capture information from the interview. Few people are able to accurately recall the details from an interview without some form of notetaking. Taking notes reduces memory decay and helps you to recall other content from the interview. The second purpose of notetaking is to help to organize your interview. Many times, while a client is speaking, you may have a question or topic for follow-up. Rather than interrupting or side-tracking the narrative, you can simply note these questions and topics for later follow-up. Notes help you to reflect the speaker's content and identify gaps and inconsistencies that need to be addressed. Some attorneys actually use two different notepads or windows to separate information from questions or reflections.

Before you jump into taking notes, however, think about the impact of notetaking on your client. You may be motivated to start taking notes as soon as the client begins speaking, but it is far better to simply sit and actively listen to the client, undistracted by writing or typing and focusing on establishing rapport and encouraging recollection and disclosure. Once you have an overview from the client, you can turn to recording information. For most clients you should ask for permission to take notes (e.g., "would it be okay now if I took some notes?" or "I'm just going to jot down a few points as we talk if that's alright.") Some clients may be worried about what might happen with notes, so you can assure them that your notes are kept strictly confidential. As you take notes, avoid becoming a stenographer and trying to write down everything that is said. Notetaking can interfere with listening, drawing your attention away from your client to your notes and your own thought processes. Moreover, the physical process of taking notes can distract both speaker and listener alike. Excessive attention to notes implies that your notes are more important than your client.

The stronger your listening skills, the less need for extensive notetaking. Why? Because if you truly understand a message, you will need only a few key words to trigger that understanding. Some details are more important to write down than others. If there are names, make sure you have the full name and have spelled it correctly. Write down the exact words of key conversations and put in quotations. Two details that can determine outcomes are locations (jurisdiction) and time (statutes of limitations). Make sure you ask about these details early on and ascertain how certain the client is that they are correct about these. If a detail is especially important and the client is speaking too fast, don't be afraid to say, "Please give me a second; I want to write that down."

For the majority of the interview, however, you should listen first—summarizing the message in brief notes—and then review and expand on the notes when the speaker has finished speaking. How to achieve the balance between the need to record information and the need to actively listen to the speaker is one of the great balancing skills in active

listening for the professional. Never let notetaking interfere with communication. Better to take a few minutes after the interview ends to go back over the notes to fill in details while your memory is fresh than try to create extensive notes while you are trying to listen to the client.

What about recording a conversation? Wouldn't this be the best method to preserve all the information in your interview? It might, but it is certainly not efficient, because it simply delays the process of extracting relevant information from the interview. A voice recorder does not provide the other benefits of notetaking as a tool for analysis and structure. Attorneys who are recording an interview may be less present and attentive to client cues, relying on the availability of the recording to fill in gaps in attention. Finally, voice recordings are subject to legal regulation and ethical constraints. Even without these, surreptitious recording is not a good first step for building a trusting relationship. Accordingly, you need to ask a client's permission to record your conversation. For many people, knowing that every word is recorded inhibits the free flow of their narrative and raises concerns of security of information. It would be the rare circumstance in which a recording would be a good idea.

Should you take notes on a computer or by hand? For most attorneys, handwritten notes have many advantages. A computer screen can set up a physical barrier between you and your client. The sound of keys tapping can distract. If you are a very fast typist, your ability to "transcribe" the conversation can lead you to take more notes than are necessary and think about what the client is saying less. Flipping back and forth between pages is more time-consuming and difficult on a computer than with paper. If you are a highly visual learner, computers do not easily provide the platform for mind-mapping, drawing charts, or other tools that you might choose to use. Finally, some clients may be concerned about the security of your notes when you are taking them on a computer. It is difficult for someone to "hack" your paper note pad, or for you to inadvertently send your paper notes to someone else. You certainly will want to have a system to either transcribe your notes to electronic form at a later date or otherwise preserve them securely. Overall, for most attorneys, taking notes by hand is the best way to interact with a client. Technology increasingly provides ways to address some of these issues. For example, journalists sometimes use recording pens, which not only provide a voice recording but also transfer the written notes as page scans to a computer. Most AI tools can now convert a scan of handwritten notes into editable text.

As with any new tool you consider, however, you should always weigh the benefits in terms of your goals and the effect that tool might have on the process of interviewing. Many attorneys use checklists to help manage their notetaking, particularly in initial client interviews. The advantages are obvious—a checklist will ensure that you do not overlook key information and provide an organized method for proceeding through the interview and for recording information. There is a significant danger with checklists, however. A checklist assumes that you have correctly identified the client's issue. Moving too quickly to use the checklist can result in missing the bigger picture. In some instances, the legal context of a client's matter is fairly clear from the beginning —a client wants to form a business, get a divorce, plan an estate, or resolve a dispute. A checklist can be very helpful in gathering the required information in these cases.

The biggest danger of relying on checklists, however, is that filling in the checklist can soon become the entire focus of the interview—rather than understanding the client, building rapport, and getting the entire story. Writing down an "answer" to an item on the checklist has a sense of finality ("check, done, next question…") that can interfere with your curiosity or your incentive to follow up on responses, seeking clarification or amplification. Remember that the purpose of the initial interview is to gather enough facts about the client and the matter to determine whether representation is a good idea. You need not gather every detail in the initial client interview in order to make that determination, but you do have to have a clear picture of the client's issues, expectations, and goals.

The best time to use a checklist is before the interview—to review the kinds of questions and information you want to cover and perhaps even to give to the client to complete before the interview begins—and at the end of the interview. Rather than consulting the checklist during the interview, concentrate on the conversation and the relationship. Then at the end, you can consult the checklist to see if there is anything else you have overlooked and even to use as a tool to reflect back to the client the content of the interview.

Whether you use separate pages, capital letters, visual boxes, numbers, or some other method, organize your notes as you take them. As a client's narrative unfolds, certain categories of information will emerge: relationships,

incidents, actions, or motivations for example. For each of these, you will want to probe for more details about that topic. If your notes provide room to expand on topics and clearly label the topics you are working with, you can more easily structure the interview and avoid missing key aspects of the situation. Use flags such as underlining, circling, question marks or stars, to help you to remember topics you want to ask more about or that are especially important to explore.

Sometimes the most useful notes are visual rather than verbal. To understand timing and sequence of events, a timeline of some sort can be especially helpful to clarify when events took place and for identifying gaps in a story. You can even ask a client to draw a timeline during the interview if the sequence of events is especially complex or difficult to understand. To understand relationships among people, organizational or family relationship charts can be used to not only identify all parties and their relationship but to discuss them with the client. Psychologists often use a "genogram" which is a graphic representation of family relationships that can be used to visualize hereditary or behavioral patterns and emotional relationships. Charts, diagrams, and mind-maps are all different ways of taking notes that reflect visually the relationship among ideas. If you are especially visual, you will likely develop your own methods that help you to structure an interview and record information. The key is to develop a method that works well for you—there is no single "best" way to take notes during an interview.

Once an interview has ended, take a few moments to review and complete your notes. Professor Gretchen Viney suggests the following criteria for making sure that your notes are complete and useful. Good notes:

- Are legible and can be easily reviewed,
- Are dated,
- Fill any gaps between the prior client meeting and this client meeting,
- Contain the lawyer's impressions of the current situation, keeping in mind that the client, or subsequent counsel, may read those impressions, and
- Contain a notation about tasks arising from the meeting and deadlines for those tasks.[4]

Generative AI tools can be used as part of a post-interview process of organizing and analyzing your notes and other products of investigation. These tools can categorize client statements into relevant legal categories, identify patterns or gaps, and flag potential legal issues raised during the conversation that might require follow-up questions. The tool might generate timelines or relationship maps to better understand complex factual scenarios.

Despite all of these potential benefits, using generative AI tools for organizing and analyzing interview notes raises additional concerns. Most generative AI tools will require transmitting this data to external servers. This poses questions regarding confidentiality and even the potential loss of attorney-client privilege. Client information could potentially be incorporated into the AI's future training data unless explicit safeguards exist. Unless you are sure that your client's information is protected when using AI, you should inform the clients of the tool, its uses, and its risks, and obtain the client's consent.

Perhaps an even greater threat from using generative AI to organize and analyze interview notes is the threat to the attorney's judgment. AI might misinterpret nuanced legal issues or client statements, but attorneys might defer to the AI analysis rather than exercising independent judgment. The ethical challenge is finding balance—leveraging AI's efficiency benefits while preserving the uniquely human aspects of legal judgment. You must always remain the true analytical engine, using AI as a tool subject to professional scrutiny, rather than becoming an uncritical executor of machine-generated guidance.

4. Gretchen G. Viney, Note-taking: How to Memorialize Client Meetings, 92:7 WISC. LAW. (July 26, 2019).

C. How do you use different types of questions to owHowHow do you effectively gather information?

As you move from the general problem identification to more detailed investigation, you must be able to use questions that will facilitate gathering details. For most circumstances, keeping questions open-ended will be the best approach to gathering the most information. However, as you move toward filling gaps, resolving inconsistencies, or clarifying ambiguities, direct or closed-ended questions may be more effective. Leading questions and compound questions are rarely effective in gaining accurate and complete information.

1. Using open-ended questions

What is an open-ended question? How is it different from a direct or closed question? An open-ended question is a question which does not invite a yes or no response or a specific response of any sort. An open-ended question invites a narrative response. "What happened?" "Why?" "Can you describe…" Often prompts function as well as open-ended questions. "Tell me about that…" "Help me understand…"

Open-ended questions can ask about facts, but also about assumptions ("Why do you suppose…"), feelings ("How did that make you feel?"), or attitudes ("What would you like to see happen?"). Open-ended questions and prompts can facilitate establishing rapport, gathering information, and generating thoughts, while also helping you to refrain from "filling in" gaps with assumptions.

Consider the following questions:

- "Was the light green as you approached the intersection?"
- "What color was the light when you approached the intersection?"
- "Tell me what happened and what you saw as you approached the intersection?"

The first question is an example of a closed question because it defines the range of responses—yes (the light was green) or no (the light was not green). Notably, the question may or may not elicit any additional information. (The client might answer by saying: "No. The light was yellow." But there is some risk that the client will simply answer: "No." To learn more you likely will have to ask more questions.)

The second question is an example of a direct question. It calls for a specific answer—green, red or yellow—but does not artificially confine the answer to a set of possible responses contained explicitly within the question. While it advances knowledge modestly more than the first question (because you should definitely find out whether the light was red or yellow if it was not green), it nonetheless limits the options the client has in answering the question (the client is only directed to describe the color of the light) and tells you nothing else about the intersection and what else was happening as the client approached the intersection.

By contrast, the third question is an example of an open question. It does not elicit a yes or no response at all and does not greatly constrain the scope of the client's potential answer. Rather, it invites the client to describe in narrative fashion what the client recalls about what happened and what the client saw as the client approached the intersection. It is likely to elicit much more information than either of the first two questions.

Skills Practice

Suppose you are meeting the owner of a business who has an employee who has been in conflict with fellow employees. Practice turning the following direct and closed questions into open-ended questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-24

Why is it generally important to prefer open questions at the beginning of the fact-gathering stage of the interview, rather than a direct or closed question? There are several reasons for beginning with an open question.

First, the open question gives the client control of the floor or control of the dialogue. This should be somewhat comforting to the client who might be anxious about meeting with an attorney and therefore may help establish a favorable rapport with the client. In addition, the use of open questions implicitly communicates to the client that the client's assessment of the situation is important. The use of open questions, therefore, helps to reinforce the point that the client is a coequal participant in the relationship with you.

Second, the open question gives the client the opportunity to focus on those points that are most important to the client (which should give you a better sense of both the type of dispute or transaction and the emotional or non-legal concerns of the client). Even though the intake form provides some context, the nature of the questions on the form may unduly narrow the client's concerns. By starting with an open question (or a series of open questions), you can be more confident that you understand your client's matter in several respects—the legal problem or proposal, emotional concerns, and practical concerns. In response to a series of open questions at the commencement of the interview, a client likely will talk about those things that have caused the client the most concern—that have weighed on the client over the last several days or weeks. You can then be more confident that you understand both the nature of the legal matter about which the client is concerned and the nature of the client's emotional and/or practical concerns.

Third, the use of open questions may elicit information that is of significance to the client's situation but may not have been a focus of your questioning (if you had engaged in a series of direct or open questions), particularly if you had narrowed your questions based on the description of the matter set forth in the intake form. Open questions, therefore, help minimize the likelihood that you will prematurely constrain the focus of the interview.

Fourth, because open questions invite a narrative response, their use provides you an opportunity to assess how articulate the client is and what the client's understanding of the legal situation happens to be. This can be important information in assessing the way in which a client might be perceived in litigation or negotiations. This also permits you to determine the sophistication with which you can discuss the legal aspects of the client's situation.

In contrast, consider the likely consequences of starting an interview with a series of direct or closed questions. These questions likely will create a dynamic in which the client believes his appropriate role is to be responsive rather than assertive. Again, this is an example of ways in which we communicate implicitly to clients. By asking direct or closed questions, the message we communicate to the client is that we know what is important and will ask them questions about what is important. Their role is simply to respond to the questions they are asked. This may lead them to believe that information they were inclined to share, but about which they were not asked, must not be important. As a result, we may fail to obtain important information because our narrow questions do not elicit the information and because the client is discouraged from sharing information that is not specifically requested. This may be true with respect to both factual information relating to the legal claim as well as practical and emotional concerns that may impact the client's

assessment of the situation. The failure to gather this information can significantly impair the ability to fully understand and correctly analyze a client's situation.

A series of direct or closed questions also may interfere with the effort to establish a favorable rapport. Using these closed questions at the start of an interview can make clients feel defensive, like they are being cross-examined. To some extent this is related to the first point. The attorney-client relationship is one in which it is easy to fall into a power imbalance in which the attorney is the authority figure and the client is subservient. While an authoritarian approach may sometimes be appropriate, you should recognize how readily some clients surrender control to lawyers, especially if you rely too heavily on direct or closed questions in the early portion of the initial interview. For those attorneys who want a collaborative rather than authoritarian relationship, open questions are better when beginning the interview.

This is not to suggest that direct or closed questions have no place in an initial interview. For example, suppose that Attorney Lee is interviewing a prospective client, Mr. Jones, about a potential breach of contract. In response to the attorney's open-ended prompt to describe the situation that has brought Jones in, Mr. Jones has provided the attorney with an overall timeline of the dispute. Mr. Jones described the agreement that he had with a company regarding a supply contract. He explains how the contract was negotiated and some of the key terms of the contract, and then he describes that the services were not delivered as expected.

During this narrative, the attorney may notice gaps or ambiguity in information that makes it difficult to understand the situation being described. For example, when describing the "final agreement," Jones hasn't explicitly stated how this agreement was finalized (e.g., a signed document, email confirmation). Since a writing would be critical to determining whether the agreement is enforceable, the attorney might choose to interrupt in order to fill this gap before continuing:

Attorney: *Mr. Jones, you mentioned a final agreement. Was this agreement in writing?*

Jones: *Yes, we exchanged emails, and they sent over a PDF document which I reviewed.*

Attorney: *Okay. What happened then?*

Notice that the attorney used a closed-ended question to clarify a critical ambiguity and "fill in the gap" but then, to ensure she returns to the chronological flow of the story and continues to gather more details, the attorney returns to an open-ended question.

Suppose Mr. Jones then continues his narrative, explaining when the services were supposed to start and what went wrong. Later in his explanation, he mentions a conversation he had with a specific person at the company. However, he doesn't clearly state the person's role. Again, the attorney might find it especially helpful to identify to whom Jones was speaking, as that could affect the legal significance of the conversation or simply make it easier to follow the narrative. Notice how the attorney moves from a closed question back to an open-ended question to continue the narrative:

Attorney: *Mr. Jones, you said you spoke with someone at the company. Do you recall that person's name or their position within the company?*

Jones: *Gerald White, he's the regional sales manager.*

Attorney: *Tell me more about that conversation with Mr. White. What did you discuss?*

This is an example of cycling between open-ended questions and prompts and more direct questions in obtaining the client's narrative. You might ask, "how often should I interrupt with specific questions?" The answer, of course, is "It depends." How critical is the detail you are asking about to understanding the client's narrative or assessing the significance of the facts? Is the client likely to be deterred from continuing their narrative if you interrupt? How easily will you move back to listening mode if you interrupt with a specific question? Remember that you can always go back and ask about details. Some attorneys star or circle topics in their notes that they want to go back to, rather than interrupt the client. You need to assess whether the cost of interrupting the client's narrative is worth the details or clarity you gain.

The point is that at the beginning of the interview, you generally don't need specific information. Rather you need to have a general understanding of the nature of the matter that prompted the client to contact you. Once you better

understand the client's situation and needs, to "fill in gaps" or "clarify ambiguities," direct or closed questions become much more appropriate tools for gathering information.

2. Using direct or closed-ended questions

Direct or closed-ended questions are more like true-false, or multiple-choice questions. They can be answered briefly or by single word answers. "Was the window open or closed?" "Would you like this item delivered next week or the week after?" Closed-ended questions are efficient methods to confirm or clarify information or elicit more detail. For a client who is reluctant to talk, closed-ended questions can sometimes help to overcome resistance to communication. For example, a very nervous client might appreciate simply being asked to verify information from the intake sheet at the beginning of an interview. Closed-ended questions can also be used to stimulate memory as you ask a client to focus on particular details.

Attorneys will generally start exploring a topic with open-ended questions and then, as they begin to probe for details, may use more closed-ended questions. A common mistake by novice interviewers is to ask an open-ended question and then, without waiting for a response, narrow the possible response with a closed-ended question. "What was the weather like that day … Was it raining or dry?" You can think of open-ended questions like essay questions on an exam and closed-ended questions like multiple choice or true/false questions. Try to avoid turning a perfectly good essay question into a multiple-choice exam!

As you are asking about details, be sure to think about whether there are documents that would be helpful in the representation and let the prospective client know that you will need to see those documents to get a complete picture. For some representations, without being able to review a key document, you will be unlikely to make an informed decision about the representation. For example, if a client is concerned about a landlord's threat to evict the tenant, a copy of the lease is critical. In criminal defense practice, a copy of the police report or charging document is often the place to begin the fact gathering.

3. Problematic question forms: leading and compound questions

Some question forms can lead to a variety of problems in an interview. The two most common forms to be avoided are leading questions and compound questions.

Leading questions are those questions that suggest a response. There are several ways in which a question might suggest an answer. Even an open-ended question might be leading. "What losses resulted from their late delivery?" Notice that this question suggests two facts—that a delivery was late and that losses resulted. If asked before either of these facts has been established, this is a leading question. Closed-ended questions or prompts are far more likely to suggest a response and thus be leading. A statement with a request for confirmation is very leading. "Of course, settling this dispute will be the best option, don't you think?" Asking a question with limited options is often leading. Parents know the power of this technique to limit a child's choice: "Do you want carrots or broccoli?" (when what the child really wants is ice cream). Beware in particular of using yes or no questions. A natural human tendency is to want to please, so asking a series of "is this true" questions may cause a client to answer yes to something that, if asked in a less leading manner, would not give the same response.

Leading questions are used most commonly in cross-examination, when an attorney is trying to put words into a witness's mouth. To put words into the witness's mouth, the leading question generally is structured as a yes/no question. For example: "So it would be fair to say that you were exceeding the speed limit." In response, the witness either has to say "yes" or "no." In the adverse possession context, an example might be: "You did not intend to claim

some property that you did not have a deed for, but were just going to build a fence, is that right?" "Yes, I guess that would be right."

Brief reflection on the purpose and context of the leading question should highlight why leading questions should be avoided in the initial client interview. When you ask a client a leading question—and puts words in the client's mouth—you don't actually find out what the client knows about the situation. Leading questions foster ambiguity rather than clarity and understanding. They may mask the real facts and create a situation in which you are assessing the value of a claim or the strategy for the representation on a flawed premise. In addition, leading questions "muddy" the truth because the client may begin to remember the facts as you have described them in the leading question even though your description may have be inaccurate. Finally, they create anxiety or tension in the client who feels like she is being cross-examined.

Leading questions can sometimes be used to overcome a client's reluctance or to convey acceptance or normalcy of a situation. For example, rather than asking your client, "Have you ever used drugs?" if you already know that drug use has occurred, you can ask the more leading question, "When did you first use drugs?" Generally, however, leading questions should be avoided and only used carefully and intentionally.

Compound questions present a separate but similar problem. A compound question consists of two questions folded into one. The problem with combining questions is that it breeds uncertainty, confusion, and ambiguity. The client doesn't necessarily know which question to answer, may answer in a way that isn't accurate with respect to either question individually, or may simply fail to answer one of the questions. Moreover, the confusion created by the use of compound questions may erode the rapport. Ask one question at a time and let the client answer the question before you ask another question.

The lessons here are simple—avoid leading questions unless you have a very good reason to use them; avoid compound questions in all instances.

Check your Understanding

1. Can you recognize the difference between different forms of questions? Which type of question is each of the following?

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-25

2. Consider the following interview involving a client who is worried about liability for trademark infringement. Evaluate each attorney's question and answer the questions that follow. What type of question form is used? Was this an effective technique? How might you improve the question? Flip each card to compare your analysis.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-26

D. How and why should you develop the skills of active and reflective listening?

When you picture a lawyer communicating, what do you see? For most people, the picture tends to be of a speaker—the incisive questions in cross examination, the compelling speech in closing argument, the careful statement of position in a negotiation, or the sage advice to a client. This picture is perhaps understandable, given the orientation toward speaking in our society. Even the ethics rules on communication tend to focus on the importance of providing the client information needed for decision-making. Yet an even more critical and underdeveloped skill is that of listening. Before you can know what question to ask, what argument to advance, or what advice to give, you must have information about the person to whom you are speaking. You must listen.

All listening requires a set of discrete skills: whether you are listening to clients, colleagues, adversaries, or decision-makers. Like any skill, however, you will learn only through sincere practice. Luckily, the legal community gives you plenty of opportunities to practice—there's always someone talking! Listening goes far beyond mere hearing (even though we say "I hear you" when what we mean is "I am listening to you."). Hearing is a physical process but listening is a process of communication.

In this section, we will address the necessary conditions for listening. We will then discuss two components of effective listening: active listening and reflective listening. You may sometimes see these terms used as synonyms in other client interviewing materials. Here, we are using these two phrases to describe two different but important aspects of communicating with a client. Active listening refers to the way in which we receive information the client is sharing with us. Reflective listening describes the process by which we attempt to confirm with the client what it is that we have heard from the client. We will explore each of these in turn.

1. Necessary conditions for listening

Effective listening requires a combination of physical circumstances (the ability to hear and understand the message, a clear source of communication, and silence) and listening attitudes (empathy, motivation to receive the message, respect, genuineness, and trust).

Be sure your physical environment is conducive to communication. No matter how much you want to listen, that desire can be sapped by poor sound quality, lack of non-verbal content, and myriad distractions. (How often do you play computer games while you are on the phone?) Sit in such a way that both you and your client can see and hear each other. Be aware of barriers such as desks, laptop screens, light, noise, etc. Silence phones. Limit interruptions. Create a zone of privacy.

To truly listen you must focus on the speaker. However, attention wanders, and impatience is all too common when listening. When does that happen? Sometimes focus is challenged by a lack of interest. If you find the subject to be complex, foreign, boring, or irrelevant, you are unlikely to desire full understanding. That's why learning how to motivate your curiosity is so important to learning—without motivation to learn, you will neither read nor listen actively. Without active reading and listening, you will not learn deeply.

For an experienced attorney, one of the most significant barriers to effective listening is stereotyping of clients. It does not take long when practicing in a highly specialized field for your clients to all begin to sound the same. It's far too easy to assume that you know a client's story when you have heard a similar story dozens or even hundreds of times. However, these assumptions about your clients close off questions and inhibit effective listening.

There are a number of circumstances in which the speaker's frame of mind can interfere with your ability to listen. Strong emotions can make listening difficult. If your client is angry, especially if they are directing that anger toward you, the natural defensiveness of most people makes listening in these circumstances very, very difficult. Whether the speaker is a nervous lecturer or a person in a position of authority providing critique, one must push past the barriers of distraction and defensiveness to reach for the underlying message.

Sometimes distraction is a function of multi-tasking. Obviously, it is impossible to listen if others are interrupting or the phone is ringing. But you can distract yourself without any help from others at all! Perhaps the greatest threat to keeping your attention on the speaker is the distraction of your own thoughts. It's easy to let your attention wander from the speaker to yourself: thinking about what you want to say, or what you need to say; or translating the speaker's message into what you want to hear, need to hear, expect to hear, have heard in the past, or have spoken. It is natural for your mind to drift or start formulating responses while the client is still speaking, but effective interviewing demands sustained, focused attention.

You can improve your ability to maintain this focus and minimize distracting thoughts through practice. Mindfulness exercises can be especially helpful to train your mind to minimize or ignore distracting thoughts and maintain focus on the speaker. Practice focusing on something or someone. A common mindfulness exercise is to focus on one's own breathing. A key aspect of these mindfulness exercises is developing awareness so that you can notice when your mind wanders. Instead of resisting or feeling guilty about distraction, gently acknowledge it and consciously redirect your attention back to the subject of your focus.

Physical grounding can also enhance mental focus. The nonverbal communication we use to communicate that we are listening also helps us to maintain our focus. Maintaining comfortable eye contact, periodically nodding, or leaning slightly forward—all of these actions signal your brain to remain engaged. Likewise, notetaking can help anchor your attention to the client's words, but only if it does not become a substitute for listening. Consider a fairly common listening stance for a student while in class. The listener has a laptop open and is busily typing every word the speaker says. However, often the listener is not truly listening. Like a stenographer, the student is simply transcribing what they hear.

Having a structured listening routine can also help you maintain focus and curiosity. Before the interview, remind yourself of your primary goal: to understand your client's experience fully. Setting a clear intention provides mental discipline to guide your focus. As you proceed through the interview, structure your interview to alternate between listening, clarifying, summarizing, and questioning. This structured flow helps maintain your concentration. Most importantly, as we will repeatedly emphasize, withholding judgment while you gather information is critical for many reasons. One of these is that judgment interferes with listening. Delay evaluating the client's statements until you have fully heard and understood their concerns. Premature evaluation triggers distracting internal debates or responses.

Keeping your attention from your own thoughts is a skill that you can develop with practice, but it does require practice. The hundreds of hours you spend in classrooms and conversations in law school can provide ample opportunities for improving your attention. By practicing the habits of focused attention and nonjudgmental listening, you will significantly reduce internal distractions, allowing you to offer your clients genuine, attentive, and empathetic counsel.

2. Staying silent

Here's a riddle for you. What word can you make out of the letters of "LISTEN" that is an essential skill for effective communication? It should probably go without saying, but to listen one must be SILENT. Don't interrupt. Pause for a few seconds before you speak. Learn to relax and be comfortable with silence in another person's company. Don't talk endlessly when you do speak; leave some air space for the other.

The ability to remain silent and simply listen is a key difference between effective and ineffective interviewers.[5] Remaining silent means that you should not interrupt the client's narrative. It also means that you should not jump right in with a question or response whenever a client takes a breath.

5. RONALD P. FISHER & R. EDWARD GEISELMAN, MEMORY ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING 105 (1992).

Silence can be a powerful motivator for clients to provide additional information. Many people are uncomfortable with silence and will tend to say something to fill the "empty air." When we are talking with a client during the initial portion of a client interview, it is generally more important for us to hear from the client than for the client to hear from us. Therefore, we should consider using silence as a tool to facilitate greater disclosure by the client. Silence encourages others to continue to talk. The client may need a moment simply to remember or to think about how to communicate certain information. If you do not provide the silent space for the client to gather their thoughts, you will break the client's concentration and thereby interfere with their memory retrieval or willingness or ability to communicate.[6] If the pace of your questions is rushed, the client may presume that they too should be rushed in providing their answers.[7] Silence within a conversation is uncomfortable for many people, but for others it is a natural, and sometimes very necessary, part of the rhythm of conversation.

Why don't attorneys do a better job of staying silent?

Recall our discussion of assumptions of sameness. If you are the type of person who likes to think out loud, you may presume that others do as well. You may not recognize that other people may prefer to think before they speak. For these people, silence may be necessary to allow them the freedom to gather their thoughts. If you project your own preferences onto others, you may be led to an erroneous conclusion (that silence means the client is done talking) and cut off the introverted client who was simply taking some time before sharing their thoughts. This is problematic on two levels. First, you may not get information you need (because you didn't give the client a chance to share it). Second, you probably have made the client uncomfortable, if not downright frustrated, since you are not giving them a chance to share their thoughts and reflections.

Another reason is simply the press of time. If you have not set aside enough time to conduct a thorough interview, or if the circumstance of the consultation limits the available time, you might interrupt a client to ensure that all critical aspects of the case are discussed within the time available. Even in time-pressured interviews, however, you should try to keep interruptions to a minimum and improve efficiency in other ways, such as by crafting more carefully their questions and prompts.[8]

Some attorneys may interrupt out of a sense that they must "control" the client's narrative. Rarely is this a good reason to interrupt a client's narrative. You might rightfully interrupt a client to prevent them from sharing information in situations where conversations are not protected by attorney-client privilege (for example, if someone else is in the room). In nearly any other circumstance, however, the client should be encouraged to share fully their information.

Sometimes attorneys interrupt their clients because they believe that they have all the information they need to help the client. Often this premature closure means that attorneys will discount the non-legal aspects of their client's situation, believing that any discussion other than the strict legal issues is unproductive. However, if those non-legal considerations are the client's greatest need, the attorney will not be able to productively move the conversation forward without addressing these issues. Sometimes, legal issues can be emotionally charged and an attorney who is not comfortable with the client's emotions may interrupt the client simply to avoid having to address these difficult expressions from the client.[9]

Problem identification and information gathering in the initial interview is always going to be preliminary and temporary. At a minimum, you should be both thinking and asking, "Is there anything else?" Sometimes when an attorney has identified a gap or inconsistency, the attorney may want to ask about it right away for fear that they will forget to follow up at a later point in the interview. The solution to this concern is simply to provide space in notetaking to jot

6. Id. at 104-105.
7. Id. at 78. "Rapid-fire questioning not only limits the current response, but if done repeatedly, it can abbreviate descriptions given later in the interview."
8. For more on the time-pressured interview see How does an initial interview proceed when it is "just in time"? infra Chapter Ten, Section A.
9. For more on emotions, see Why is recognizing and reflecting emotions in the interview is important?, infra Chapter Five, Section F.

down these topics or to mark information with question marks or other symbols to remind you to come back to this topic.[10]

Get comfortable with silence. More than any other listening technique, silence is perhaps the most critical tool for gathering information and building rapport with a client.

Reflective Practice

Reflect on your comfort with silence. First assess your comfort with silence by gathering evidence. Think about an experience in which you have been with another person (such as traveling in a car together or sitting in a room waiting together) and there have been long periods of silence. Answer the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-27

Next, ask for feedback from trusted friends or colleagues on your listening skills. They can provide insights into how well you remain silent and attentive during conversations. Practice with a friend or colleague by having a conversation where you intentionally focus on listening and remaining silent even after they have finished speaking. Count to five before you respond. Answer the following questions.

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3. Active listening

Active listening involves being mentally and physically engaged in listening to your client. Being mentally engaged means focusing with energy on what your client is saying and how she is saying it. It means not simply hearing the words as one of many sets of sounds to reach your ear drum in a given day but listening carefully to the words in a way that allows you to file the words (and accompanying emotions) in your brain for subsequent retrieval. Active listening is contrasted with passive listening precisely because active listening involves a more energetic engagement with the client. The concept of active listening recognizes that listening isn't easy, but in fact, can be tiring, because it requires energy.

You likely already have the skill of active listening. Suppose you have gotten lost in a strange city, are late for an

10. See Why and how should you take notes during an interview?, supra Chapter Five, Section B.

important appointment, your GPS isn't working, and you have stopped at a gas station to ask the attendant for directions to your destination. No matter what the barriers to communication in these circumstances—no matter how poorly the speaker communicates, how distracting the surroundings, how difficult the directions are to understand—your motivation in these circumstances is to understand.

Think of how you will listen in these circumstances. You will certainly be motivated to focus and listen carefully. You will have a strong desire to know not only what this speaker is saying (how to get there) but what his perspective and attitudes are as well. (Does he really know where this place is? Is he likely to be giving me bad directions just to play games?) You will set aside your fear and frustration over getting lost so that you can get the directions you need. You will listen with your body—your body will be turned toward the speaker, your eyes focused on him or on where he is pointing. You may repeat his gestures. You won't be content to simply listen to the directions without checking. You won't interrupt unless necessary. You will encourage him to fill out his directions. You will ask questions if you don't understand and repeat the directions you were given to be sure you have understood. You will use a tone and language that will ensure you are communicating clearly and accurately.

So, you already know how to listen well. Effective listening requires a combination of physical circumstances (the ability to hear and understand the message, a clear source of communication and silence) and listening attitudes (empathy, motivation to receive the message, respect, genuineness, and trust). The key is applying these same skills that you call out in an emergency listening situation to every important listening situation.

Active listening requires giving the speaker your time, attention, and acceptance. In order to listen effectively, you must want to truly know and understand what the speaker is saying; not what you think they should be saying. You must not be listening for your own purposes—to refute, to persuade, or to critique. Rather, your purpose must be to understand the other person—their feelings and ideas from their own unique experience. This means you must set aside your own presuppositions about what the other person might or should be feeling and thinking (or what you would think or feel in the same circumstances).

Active listening also is a form of multi-tasking as it involves not only attention to the words your client uses to describe something, but also to her tone and manner in describing something. In other words, you are listening both to the text and to the subtext, to the facts and to the emotional content with which the client is connected to the facts. For example, if a client comes to you with a complaint about her landlord and becomes louder and more demonstrative as she describes one particularly frustrating experience with the landlord, her manner suggests that the words she is speaking and the event about which she is talking are really important and perhaps deserve more significant attention. Similarly, if a client comes to you with job related complaints and her voice becomes quieter and begins to quaver and she is looking fragile when describing a specific encounter with her supervisor, her manner suggests that she may be very uncomfortable discussing the topic, which might add credence to the fact that she found the environment in which she was working to be stressful. These types of scenarios highlight the importance of listening to the words and the emotions your client is communicating to you.

Active listening represents another circumstance in which you are communicating with your client in implicit and explicit ways. You communicate implicitly with your physical posture and explicitly with your oral responses.

Active listening is a subtle art, but an important part of building rapport with a client. To some extent, listening is an art we have been practicing all of our lives—as we listen to our friends, our spouses, our children, our coworkers, our customers, etc. In these encounters, we have developed a knack for showing interest (or lack of interest) through our body language, our facial features, or our oral responses.

Unfortunately, active listening takes energy—energy we may not have in our day-to-day listening encounters. Our regular habits of listening may not prioritize active listening. Rather, our listening may more often be passive or even distracted (being on the phone with someone while watching television or being on the internet or talking with our spouse or child while reading the paper or the mail). In other words, our listening "habits" may not be consistent with active listening. These are not necessarily models we want to follow in our engagement with a potential client. While we can draw on some of our life experience with respect to aspects of active listening, we really need to be thinking in terms of setting a higher standard for ourselves—a standard that finds us energetically engaged with our clients as we listen with our ears, our eyes, our face, our bodies, and our minds.

Skills Practice

Practice an interview with a client and have a friend video record a portion of the interview. Review the video to evaluate whether and how you are manifesting your focus on the client.

- Are you facing the client and making regular eye contact with the client (showing that you are focused on the client) or is your attention focused somewhere else suggesting to the client that you are distracted (and not focused on the client)?
- Are you leaning back in your chair with your arms crossed (suggesting disinterest and a posture that is "closed" to the client) or are you leaning forward (showing interest in the client) with your arms in your lap or at your sides (showing openness to the client)?
- Are your eyes and face relaxed and engaged—are you smiling or frowning or expressing concern (as appropriate in response to what you are hearing), are you nodding in agreement, or are your facial features "flat" regardless of the content of what you are hearing?
- Are you paying attention to the posture and facial expressions of the client? Are you acknowledging and recognizing when the client is showing enthusiasm, frustration, agitation, sadness, etc.?
- Are you using minimal oral prompts to show your engagement with what the client is saying, e.g., "Okay," "I see," "Yes," "Uh-huh" or are you listening without any sound (suggesting lack of engagement)?

4. Reflective listening

Reflective listening is fairly descriptive because the attorney as a listener provides a feedback loop—reflecting back to the client what she has heard during the most recent portion of the interview. At least two messages are being sent when someone speaks: the factual content and the emotional message. To provide a complete feedback loop, the listener should paraphrase factual content (both legal and nonlegal) and check perceived emotions. We will address reflecting factual content in this section and address emotional content in the next section.

Why are feedback loops so important? First, reflective responses help give structure to the information that the client is sharing. Especially for a client whose narrative continues and wanders without stop, you may find it difficult to cull out the key points of important information and to organize what you are hearing into a coherent set of claims and facts. By "forcing" a pause after a few minutes or several minutes to "reflect" back what you have heard, you should be absorbing a manageable amount of information, which is then organized and stored before proceeding further with the interview and gathering of additional information.

Second, the process of reflective listening diminishes the likelihood of a misunderstanding between the attorney and client. Think about how trying to restate legal principles as you are learning the law helps you to recognize gaps in your understanding. Likewise, in the process of reflecting back the client's information, you will often realize that you didn't truly understand or get a full picture. Moreover, this reflection gives the client an opportunity to correct misstatements or misunderstandings. When the client hears you restate the information incompletely or incorrectly, they will likely correct the information. This is especially so if you have invited that correction.

Third, the reflective listening process allows you to address both legal and non-legal issues with the client. You can reflect both the facts you have heard as well as some of the emotional or practical concerns that are part of the client's narrative about their situation. Indeed, effective reflective listening requires you to reflect not only the legal concerns (about which the attorney might be most concerned), but also some of the emotional or practical concerns (about which the client might be most concerned). The importance of being willing to engage the nonlegal content of a client's situation cannot be overstated from the standpoint of building rapport with a client and understanding information that might be essential to helping the client develop alternatives solutions to a problem.

Fourth, reflective listening—when done well—implicitly communicates to the client not only that you are listening but that you care. Listening actively and reflecting the client's experiences signals genuine empathy. By choosing to prioritize the client's words and perspective rather than your own immediate interpretations or judgments, you communicate emotional engagement and genuine concern. This deepens trust and rapport. A client who feels genuinely heard and understood is far more likely to share important, even sensitive details—information crucial to effective legal representation. In short, practicing reflective active listening communicates implicitly but powerfully: "*Your voice matters, your concerns are valid, and you are not alone—I am here to help.*"

Please note that reflective listening is not easy. Indeed, it is much easier to do a poor job of reflective listening rather than a good job of reflective listening. In this regard, the concept of reflective listening can be a little misleading. You are not a mirror—reflecting back exactly what is presented. This would sound robotic and would be more likely to impair rapport with the client rather than build rapport with the client. Rather, you need to capture the essential points being communicated without simply parroting back exactly what the client said.

To check your understanding of the ideas, information, or suggestions of others, state the speaker's idea in your own words or give an example that shows what you think the speaker is talking about. You need not agree with a client's view or perception, but you do need to let the client know that you understand what he or she is saying. Again, paraphrasing is not simply repeating what the client has said. Rather it is a process of choosing and capturing the most important details. Paraphrases can be just a few words or one or two brief sentences. When you have accurately captured the client's message, often the client will say, "right" or otherwise confirm that you have heard them correctly. A paraphrase improves communication by showing what your present understanding is and thus enables the speaker to clarify precisely how you have misunderstood.

Not all responses are truly "reflective" but are instead "reactive." These responses are especially prone to distort or cut off the client's information prematurely instead of encouraging further disclosure and trust. Reactions that can close down information gathering include providing solutions (ordering, threatening, moralizing, advising, even questioning if suggestive of solutions); making evaluations (judging, praising, diagnosing, labeling); and avoiding certain topics (diverting, ignoring, or even sometimes reassuring).

Check your Understanding

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-50

Consider this situation: You are telling your study group about a frustrating and emotional encounter with your law professor the day before, in which you approached the professor for help understanding a concept and the conversation confuses you even more. Consider the following common responses from your friends. Consider whether the response is likely to encourage you to talk more about this episode. Click each option to compare your evaluation with the one provided.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-51

Role Play Practice

Reflecting content and emotions does not come naturally to most people. Improvement requires practice. Consider one or more of the following exercises:

- Paraphrasing Exercise: Pair up with a friend or colleague. One person shares a story or situation for a few minutes. The listener then paraphrases what was said, focusing on both the content and the emotions expressed.
- Mirroring Exercise: In a conversation, practice mirroring the speaker's emotions and tone of voice. If they are excited, reflect excitement in your response. If they are sad, respond with a more subdued tone.
- Active Listening Role-Play: Engage in role-playing scenarios where one person plays the speaker and the other the listener. After the speaker shares, the listener reflects back both the content and the emotions. Switch roles after a few rounds.

Ask your partner in these exercises to provide constructive feedback on your performance.

E. Who are some clients for whom active listening can be challenging?

For most clients, using open-ended questions, reflective listening, and silence will encourage a productive narrative. You may need to work harder with some clients to encourage them to provide information at a pace and in a format that provides helpful information such as clients whose responsiveness falls at the ends of the spectrum from verbose to taciturn. An obvious challenge to listening arises when the client speaks a different language than you. Finally, some clients may speak your language but they speak in generalities and conclusions rather than providing concrete facts you need to assess their issues and provide assistance. How can you tailor your listening to have the most productive interview with these clients?

1. The garrulous client

What do you do about the prospective client who never stops talking? Recognize that the client's excessive talking may be a sign of nervousness, habit, cultural patterns, or even a mental health disorder (when speech is not only voluble but pressured, hyperverbal, and disorganized). With a talkative client, you may need to exert a bit more control to slow down their narrative or keep them on topic. Be sure that this control is necessary. If you are following the client's narrative and getting important information in a coherent fashion, there is little need to do anything to stop the client other than to manage the available time. Ask yourself why you feel like you need to interrupt. If the answer is because of your comfort rather than the client's, reconsider.

Nonetheless, you may need to cabin the conversation with some long-winded individuals. How can you assert control over the interview with these individuals, without risking offensive behavior that impairs rapport? Obviously, the

ideal non-intrusive approach is to wait for a natural lull in the client's presentation and then jump in with a reflective response that allows you to summarize what you have heard before hearing too much more. In other circumstances you may simply need to interrupt. To soften the "intrusive" nature, you might want to be honest about what you are doing. For example, you might say something like: "I need to stop you for a minute, as you have shared a number of important things, and I want to make sure I understand them correctly before we get too far into the situation." As you segue from a reflective response back into questions for the client, you might want to foreshadow that you will be interrupting again just to make sure the client appreciates that the interruption is just part of the process.

It may even be necessary to explicitly discuss with the client the problem you are having following their narrative and the need to try to stay on topic. It is possible (although not necessarily easy) to do this without impairing rapport with the prospective client. For example, at some point, you can say to the client—"I would like to help you better understand some of the options you may have in your situation, but I can't help you with options unless I understand your situation better. So, I really need you to slow down and try to focus on limiting your answers to the questions I am asking you."

Another way to try to "slow down" the narrative is through use of more closed questions which call for more focused responses. Beware of shifting to an interrogation, however. Closed-ended questions invariably require you to make some assumptions about the facts. Moving toward these questions too early or relying on them too much simply because you are uncomfortable with your client's volubility will ultimately limit the amount and accuracy of information.

One of the risks with a talkative client is that you may presume that you are getting all the pertinent information simply because of the volume of information the client is sharing. However, a client's expansive narrative may be a defensive mechanism to control the conversation and steer away from uncomfortable topics. The client's assumptions about what information is important and relevant may cause them to skip over important and relevant topics. Be sure to listen for relevant topics that the client is not talking about and explore these as well.

2. The unresponsive client

At the other end of the spectrum from the talkative client is the client who is unresponsive. You may find that, despite inviting open-ended questions and prompts, your client continually answers with only minimal responses. Open ended questions are met with responses such as "I'm not sure" or "I don't remember." You may feel like you are having to pull every bit of information from the client. Or the client may provide some information about events or transactions freely but they may be unable or unwilling to share motivations or attitudes about those events.

There are many reasons that a client may be unresponsive. The reasons for this can vary, including a shy or introverted personality, a cultural bias against volubility, fear, trauma, or language barriers to name a few.

Some people are simply reticent. Introverts prefer to process information internally before sharing. They may curate or censor their responses more carefully. Silence—and your comfort with that silence—is critical for these clients. Express gratitude for their sharing, particularly when it appears difficult. Reflective statements will help the client to process and expand on their responses. Particularly if you do not share this personality trait, consider that the problem may not be that the client is being unresponsive but that you are being impatient. Rather than trying to change how the client responds, you may find it more effective to use your skills of perspective taking and empathy to become more comfortable with the client's pace of disclosures.

For some clients, cultural norms may make it uncomfortable for them to discuss certain topics or display emotions. Especially if you do not share an important part of your client's identity, you may find them reluctant to discuss some topics with you. For example, a client who is a woman might be uncomfortable discussing sexual topics with an attorney who is a man (or vice versa). Certain cultures have such strong deference norms that clients may be reluctant to correct or disagree with you. The variations on these cross-cultural inhibitors are endless. You might

be able to break down these barriers by acknowledging the client's discomfort and explaining why the information is important to your representation. Continuing to develop your cross-culture skills[11] is critical to effective interviewing.

Emotions can interfere with a client's ability and willingness to discuss certain topics. Trauma can interfere with memory and communication. We explore this particular challenge more fully in Chapter Ten. However, even short of trauma, emotions such as guilt, embarrassment, or fear can make clients reluctant to discuss certain topics. One method to encourage disclosure can be to acknowledge the client's difficulty. You might say, for example, "It seems like this is hard for you. Could you tell me a little bit about how you are feeling and why it might be challenging to discuss this situation?" Again, patience is important. Some topics may simply be too sensitive to be able to explore fully in an initial interview. In that case, you can let the client know that you are going to save certain topics for a later date. This will give you time to build stronger rapport and trust and the client more space to prepare to discuss difficult topics.

For all these clients, a common temptation is to simply shift to closed questions to make it easier for these clients to respond. However, this will likely only exacerbate the situation, as the closed or direct questions implicitly invite a more focused or cryptic response. Once you move from interview to interrogation, you establish a pattern that can be very difficult to break. You will find yourself on a fruitless fishing expedition that will neither increase your client's comfort with disclosure nor generate more information.

Instead, consider the order and scope of topics you explore. Go where the client is comfortable first. Break down large narrative requests into more discrete topics. Rather than "tell me what happened" you could ask "tell me about how this began." Invite open dialogue by encouraging the client to enlarge their comments or expand their story. "Tell me more" (or variations on that theme) becomes a mantra of sorts with these clients.

With some clients, you might consider changing the communication channel. Asking the client to provide written responses to questions outside the interview may make them more comfortable addressing certain topics. With some clients, where cultural or identity differences present stubborn barriers to communication, you may find that having someone else who shares the client's identity ask about certain topics may be necessary to obtain complete information. Visual aid tools (e.g. diagrams, maps, charts, or drawings) may help some clients to remember or describe their experiences or provide an external focus for difficult conversations.

Unresponsive clients can be encouraged to more fully disclose information by using all of the tools of effective interviewing generally, from educating the client about why information is important and empathizing with their discomfort, to using silence and reflective listening to encourage disclosure.

3. Clients whose first language is not yours

In an increasingly global society, you may find yourself being asked to represent a client who does not speak the same language or dialect as you. You should first consider whether you have the resources and skill to bridge these language differences to effectively represent the client. Using translators or interpreters addresses only part of the challenge of these cross-linguistic representations. Language is a central component of culture. Even if you can have words translated, meanings generally require deeper understandings of the underlying assumptions and the nonverbal content of the communication. As a recent ABA ethics opinion notes: "Communication is a two-way street. To convey information about the representation in a meaningful way, it is essential that the lawyer understands the client and the client understands the lawyer. Client-lawyer communication is not merely a translation of words but a determination by the lawyer that the client understands the relevant law and legal, institutional, and social contexts of

11. Loise J. Rasmussen & Winston R. Sieck, Culture-General Competence: Evidence from a Cognitive Field Study of Professionals Who Work in Many Cultures, INT'L J. INTERCULTURAL RELATIONS (2015). http://dx.doi.org/10.1016/j.ijintrel.2015.03.014.

the communication."[12] While you need not be fluent in a second language to effectively represent clients from different linguistic backgrounds, you must commit to learning about the client's culture.

Translators or interpreters[13] must not only be skilled in their ability to understand and convey the client's information to the attorney but must also have the ability to accurately convey legal concepts to the client. In effect, an interpreter or translator must be fluent in three languages: the native language of the attorney and the client and the language of law. Using a certified professional ensures this competence.

If you use a translator or interpreter, you have a duty to assure that they understand their duty of neutrality. As the ABA opinion notes, "particular care must be taken when using a client's relatives or friends because of the substantial risk that an individual in a close relationship with the client may be biased by a personal interest in the outcome of the representation."[14] Where a translator is necessary to facilitate communication, their presence does not ordinarily waive attorney-client privilege; however, you are responsible for assuring that the translator understands their duty to preserve the client's confidential information.[15]

You may be highly motivated to represent clients whose language is not your own—whether to ensure broader access to justice or to enhance your own book of business. However, you must recognize that these representations require a substantial investment of time, energy, and resources, not only in engaging professional assistance but in expanding your own knowledge and skills to meet the challenges of extending your practice in this way.

4. Conclusions versus facts

The examples we have explored thus far are ones in which a client's communication style or language obviously interferes with your ability to gather information. However, a more subtle difference in communication can present just as significant a challenge. Some clients will answer questions with conclusive statements that mask the underlying facts upon which the client bases the conclusion. Many times, clients will describe a situation using conclusive language—essentially describing the client's filtered perception and understanding of what happened rather than simply stating what it was the client saw or heard. For example, in discussing an employment related issue, a client might state that his boss "spoke angrily" to him. The use of the adverb "angrily" is descriptive of how the client perceived the manner in which his boss spoke with him. But would a jury necessarily perceive the manner of speech as angry?

You cannot assess whether a jury would conclude that the boss "spoke angrily" without getting at the underlying facts. Indeed, these types of conclusive statements are problematic precisely because they are inherently ambiguous. You may know what the client thought about what happened, but you don't know what actually happened.

Indeed, if you are not listening actively—attentive for these types of "conclusive" statements—you may be inclined to surmise or presume underlying facts that are inconsistent with what actually happened. When you are not listening actively, you are likely to fill the void of facts underlying a conclusive statement by "projecting" into the void your own experience. For example:

The client states: "My boss spoke angrily to me."

12. Am. Bar. Ass'n, Standing Comm. on Ethics & Prof'l Resp., Formal Opinion 500 (Oct. 2021).
13. A translator is someone one who works with the written word while an interpreter "converts speech from a source language into a target language." Id.
14. Id.
15. "With respect to a nonlawyer employed or retained by or associated with a lawyer: . . . a lawyer having direct supervisory authority over the nonlawyer, whether or not an employee of the same law firm, shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Model Rules of Pro. Conduct r. 5.3 (Am. Bar Ass'n 2025).

The attorney thinks: "I recall when my boss 'spoke angrily' to me. My boss was loud and imposing and swore at me as he walked away. My client's boss must have acted similarly to my boss."

This might be an entirely flawed conclusion. When saying that his boss "spoke angrily," the attorney is assuming that the client meant that his boss was loud and imposing and swore at him as he walked away. However, the objective facts of the exchange might be much less dramatic than this and open to different interpretations. Obviously then, inattention to conclusive statements can create some significant problems in assessing the legal merit of a proposed action or claim, its value, and the best strategy going forward.

In this context, both active and reflective listening are required to guard against the ambiguity inherent in these types of conclusive statements. You will need to listen actively, with energy, not lazily or passively, in order to recognize when the client's statements are subjective conclusions rather than more objective descriptions of the facts that led to those conclusions. Reflective listening is then required to identify incomplete or inaccurate assumptions and invite corrections. Summarizing your client's statements will often help you to recognize ambiguity, which may help trigger additional questions to clarify the underlying facts. But reflective listening will help the attorney only if you are first listening actively, attentive to these types of conclusive statements.

What should you do when you hear a client describe a situation with conclusive language? Frequently, you can get past the conclusive statement to the underlying facts by asking for more. For example, an attorney might say, "Tell me more about your conversation with your boss." This might facilitate a response by the client in which the client explains exactly what his boss said and how he said it. Alternatively, the client may simply continue to describe the boss's response in conclusive terms.

When this happens, switching to a more direct form of question probably makes more sense than continuing to hope that open questions will elicit concrete details. For example, you might ask—"When your boss 'spoke angrily' to you, what did he say and how did he say it?" This should get the client to move beyond the conclusion to the underlying facts—and move you from ambiguity to greater clarity. This will enable you to better assess the client's situation. (It also will help you avoid the unfortunate situation in which several months after taking a case based on your "presumed/projected" facts drawn from the client's conclusive statements, you discover in a deposition that the facts, in reality, only minimally support your client's conclusion that the boss "spoke angrily.")

F. Why is recognizing and reflecting emotions in an interview important?

Studies of attorney effectiveness factors indicate that understanding emotions is critical to a range of lawyering skills, including not only interviewing and counseling, but negotiation, managing others, and networking.[16] Emotions can inform information gathering; failing to address emotions can be a barrier to disclosure. Thus, you must be able to recognize, name, and reflect client emotions. At the same time, you must be aware of how you may be impacted by your client's emotions and develop professional boundaries and self-care practices to minimize vicarious trauma.

1. Feelings are facts

Emotions can make communication difficult. In many practice areas, clients come to attorneys in crisis, dealing with difficult emotions and under significant stress. Many attorneys may consider these emotions irrelevant to the "legal issues" and discourage the client from expressing emotion or ignore those emotions when expressed. In their landmark

16. Marjorie M. Shultz & Sheldon Zedeck, LSAC Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering 56-57(2008), available at http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf.

research into client counseling in family law offices, Professors Austin Sarat and William Felstiner offer the following description of typical attorney reactions to client emotions:

Because they regard the client's emotional agenda as volatile and dangerous, lawyers often avoid responding to clients' characterizations of their spouse or of some event during the marriage; they try to discourage the expression of emotion in or through the divorce and make a professional practice of being emotionally unresponsive to what are for many of their clients the central issues in the divorce. In this sense, "clients largely talk past their lawyers.' Lawyers seek to define or redefine the divorce dispute by focusing on the financial rather than emotional aspects of the dispute and by trying to get their clients to think about the future rather than the past.

Consider, for instance, the following excerpt from a conference in Massachusetts between a woman and her male lawyer. The lawyer and client were talking about her future educational needs. The client responded by focusing not on the future but on the past, on her sense that her husband had discouraged her from pursuing her education and had emphasized her duties as a wife.

> CLIENT: There was harassment and verbal degradation. No interest at all in furthering my education. None whatsoever . . . If there was ever any time when I did not need or want sex, I was subject to, you know, these long verbal whiplashings. Then the Bible would be put on the counter with passages underlined as to what a poor wife I was . . .
>
> LAWYER: Mmm uh.
>
> CLIENT: There was . . . what I was remembering the other day, and I had forgotten. When he undertook to lecturing me and I'd say, "I don't want to hear this. I don't have time right now." I could lock myself in the bathroom and he would break in. And I was just to listen, whether I wanted to or not. And he would lecture me for hours . . . There was no escaping him, short of getting in the car and driving away. But then he would stand outside in the driveway and yell, anyhow. The man was not well.
>
> LAWYER: Okay. Now how about any courses you took.

The lawyer simply ignores the client's characterization of her husband. Although his "okay" may seem out of place in response to what he has just been told, it is part of his determined effort to get the conversation back on track. His response is typical of the way lawyers respond to clients' efforts to talk about the reasons for the divorce or at least to enlist a sympathetic response from their lawyers.[17]

What's the problem here? Aren't attorneys doing exactly what they are supposed to do if they help their client focus on the legally relevant information? Isn't that what is "reasonably necessary to permit the client to make informed decisions regarding the representation"? No, it is not. Feelings are facts that are relevant to the client's informed decision-making.[18] Indeed, studies of the brain reveal that, without emotions, one cannot make decisions.[19] To ignore fear, anger, anxiety, sadness, denial, or any other psychological state is to leave the client in a state that makes rational, informed decision-making difficult if not impossible. Extreme stress interferes with the client's ability to receive information. Simply put, if you are so distracted by the fear ringing in your ears, you literally cannot hear much of what someone is saying to you and are unlikely to remember accurately what you did hear. Similarly, stress and fear can interfere with the client's ability to make decisions.

Students anticipating a transactional practice might presume that emotions will play no role in their work with clients. However, emotions are drivers of decisions even in a transaction that on its surface does not appear to engage strong feelings. Consider the attorney who, in providing estate planning representation, raises the issue of the need for an advanced health care directive. Anticipating death is difficult emotionally for most clients, but for many it is even more difficult to anticipate incapacity. "The client can dismiss the suggestion of any need to discuss the area in question as being unnecessary, premature, or not applicable, at least not at the time. By touching such deep anxiety, the attorney's

17. Austin Sarat, Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education, 41 J. LEGAL EDUC. 43, 47 (1991).
18. THOMAS L. SHAFFER & JAMES R. ELKINS, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL 9 (2d ed. 1987).
19. JONAH LEHRER, HOW WE DECIDE 13-16 (2010).

mere suggestion could provoke resistance, hostility, anger, and quick rejection."[20] You could try to ignore the underlying emotional and psychological state and simply leave a client's clear legal need unmet or you could simply bully through the issue without addressing the client's anxiety directly. In either case, the client has not been helped in making an informed decision.

Not all emotions are negative, but all are relevant. The client anticipating starting a new business might be excited and hopeful. Recognizing this emotion can help attorneys to understand why these same clients will be resistant to planning for failure or conflict.

Underlying the client's feelings are concerns and values that you must address if you are to assist your client in making rational decisions. Emotions are the cues that can help you to uncover your client's underlying concerns. "Rather than getting caught up in every emotion you and others are feeling, turn your attention to what generates these emotions." [21] If a client is feeling devalued, powerless, marginalized, or mistreated, they will react by taking steps to increase their feelings of self-worth and autonomy, even if those steps are contrary to their ultimate goals in the matter. If a client is operating with positive feelings about their value, autonomy, status, and role, they can approach their matter with greater openness and creativity.[22]

How can you uncover these client emotions and concerns? Just like any other facts, the best approach is to simply ask, using open-ended questions. In his book, "Ask More: The Power of Questions to Open Doors, Uncover Solutions, and Spark Change," Frank Sesno suggests the following questions to convey empathy and understand what is behind emotions.

- Personal Context: "How did that make you feel?" "What are you most worried about right now?"
- Professional Context: "How is this change affecting your work?" "What support do you need to handle this situation better?"
- Conflict Resolution: "What do you need from me to feel heard and understood?" "How can we work together to resolve this issue?"

2. Responding to emotional content

Notably, the window of opportunity for engaging a client's emotions may be limited. If a client shares emotion, and you fail to respond in any way to the emotional content shared by the client, the client likely will understand that it is inappropriate to share emotional content and will not share it again. To the extent that an attorney is uncomfortable dealing with emotions, this might seem to be a positive outcome, but is unlikely to help the attorney identify the concerns that lie at the heart of the client's problem.

An example may help emphasize the significance of emotional content in problem-solving for a client. Consider a case in which a man was fired from his position by his employer in a circumstance in which the man thought the employer may have engaged in age discrimination. Losing a job was problematic enough for the man and his wife but became more problematic several months later when their college-aged daughter, who was experiencing financial struggles, committed suicide, leaving a note indicating that she didn't think she could turn to them for help given her dad's employment situation.

The case proceeded through discovery for several more months. Several weeks prior to trial, the case was

20. Bruce J. Winick, Legal Counseling About Advance Directive Instruments: Client Denial and Resistance in the Advance Directive Context: Reflections on How Attorneys Can Identify and Deal with a Psycholegal Soft Spot, 4 PSYCH. PUB. POL. AND L. 901, 903 (Sept. 1998).
21. ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 8-11 (2005).
22. FISHER & SHAPIRO, supra note at 15-21 (2005).

slated for mediation. The client and his wife attended the mediation, but little progress was made initially. During the mediation, however, the wife had the opportunity, in a rather emotional outburst, to express her view that the company was to blame for their daughter's suicide. It is clear from the context that these were views she had been harboring for some time but had not been given the opportunity to express. While the company did not acknowledge culpability, in the context of the mediation, the company representatives were able to appreciate how painful the experience had been for this couple and why settlement discussions had not proceeded further. Moreover, as a result of venting her emotions regarding the scenario, the client and his wife, who initially were resistant to settling, were able to listen more openly to the prospect of bringing closure to this set of painful events through some sort of settlement.

Had the wife not had an opportunity to express her emotions, neither she nor her husband may have considered settlement. Had the wife been able to express these emotions sooner, they may have been willing to consider settlement much sooner. The attorney representing the man, however, probably felt very inadequate in discussing emotions. As a result, the attorney tried to control discussions with the client in a way that avoided having to engage emotional content, particularly the emotional issues the man's wife felt a need to express.

Accordingly, be sure that early on you specifically ask about and address your client's key concerns—even if those concerns aren't "legally relevant." You must learn how clients view their situation, how they feel about it, and what their values and goals are in going forward. The process of listening to the client's story, providing attention to and acceptance of the client's emotions, and helping the client sort out goals is a powerful service. Sometimes this is all the client needs to empower them to address a situation. Often, it is the service that clients most desire. Moreover, sound counseling skills are not extras. They are fundamental skills that keep an attorney from becoming a discipline/malpractice statistic.

You may object, "I'm not qualified to be a counselor. I might do more harm than good!" Indeed, you should know your limits and not attempt psychological therapy. A mental health professional helps clients to explore their emotions deeply, uncover underlying psychological issues driving those emotions, and develop coping strategies for better mental health. If emotional issues require this kind of management, both you and the client would be better served if you refer those tasks to a mental health professional. Referral to or collaboration with a mental health professional may be especially important in some areas of practice. For example, in *Boyd v. Garvert*, 9 P.3d 1161 (Colo. Ct. App. 2000), the Colorado Court of Appeals affirmed a verdict for professional negligence against an attorney who had represented a couple in relinquishing their child for adoption to a couple in Kansas. The couple claimed emotional distress damages based on the attorney's failure to advise them of counseling. The court noted that the attorney's duty arose both from the Colorado statutes that required relinquishment counseling and from common law duty established by expert testimony that the reasonable and prudent attorney would advise psychological counseling regardless of the statutory requirement.

While referral or collaboration may be necessary or useful, it does not relieve you of the independent obligation to communicate effectively, including the responsibility to address the client's issues from the client's perspective. Note this comment to Model Rule 2.1, the only rule of professional conduct on the role of attorney as counselor:

> Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.[23]

Engaging emotional content, then, is important. But you should take care not to get caught up in the emotional content. If you get swallowed up in the client's emotions, you are unlikely to be able to develop the information you need about the client's legal concerns and nonlegal concerns during the initial interview because so much time will be

23. Model Rules of Pro. Conduct r. 2.1, cmt. 4 (Am. Bar Ass'n 2025).

spent on the emotional issues. Moreover, if you identify too closely with the emotions of the client, you are likely to lose objectivity.

So how do you acknowledge a client's emotion while maintaining appropriate psychological boundaries? The simplest way is to be as brief and honest as possible. Acknowledge the emotion that your client is manifesting—e.g., "I can tell this is difficult for you," or "You are angry and frustrated over their response." At the same time, give the client a chance to emote and then become more composed. Offer the client some tissue and some quiet time until the client seems ready to continue to move back into the interview. Make sure that your focus is on what the client feels or believes, not what you would feel or how you think the client should react. Reflect emotion in a manner that conveys nonjudgmental acceptance of that emotion.

In addition to providing nonjudgmental acceptance, you must be able to recognize the speaker's emotion, but also accurately reflect that emotion. If the speaker is *uncomfortable* that is a different feeling than *nervous*; an event may have *troubled* one person, but *shocked* another (a similar feeling, but different intensity). Learn to develop a vocabulary of emotions to draw upon in reflecting a client's feelings. Gauging the intensity of those emotions requires listening to what is said and also considering clients' nonverbal messages (vocal tone, facial expression, body posture, etc.).

You can engage the emotional content clients bring to a situation through active and reflective listening. By listening energetically for text and subtext—for legally relevant facts and emotional concerns—you will give yourself the ability to reflect back both a factual summary as well as some empathy for the emotion you are hearing from the client. This will enhance your relationship with your client while also enhancing your ability to understand the concerns and interests that are influencing your clients' choices. Only then can you develop options that respond to the client's complete situation—legal, nonlegal, and emotional.

Check your Understanding

1. Consider your client, who has just told you about having been the victim of a false arrest for shoplifting in a store: "I was leaving the store, when all of a sudden the alarm went off. I just kept on walking, thinking it had to be the person behind me. Then this big security guard comes and grabs my arm and tells me to step into the manager's office. I didn't know what was going on! Everyone in the store had stopped and was looking at me. I couldn't believe it!" Evaluate each of the following responses. Which would be most effective in checking your perception of the client's feelings about this incident? Click each option to check your analysis with the one provided.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-52

2. Assume your client is talking about an auto accident and has related the following in response to your open question—"What happened next?":

> *At first, I wasn't sure what to do. I had never been in an accident before, and I didn't know whether we were supposed to call the police or not. I sat there just kind of dumbfounded for a minute or two. I wasn't really hurt (or I didn't think so at the time), and when I asked my friend, Karen, who was riding with me, how she was, she said she seemed to be okay, so I didn't think we needed to worry about an ambulance or going to the hospital or anything. Then, as I was getting out of the car to see how much damage there was, the driver of the other car came over and started yelling at me. He was screaming: "What were you doing turning left there? Why weren't you using your*

directionals?" But I am pretty sure I had turned my signal on a few seconds before I started to turn. Anyway, before I could even figure out how to answer this guy, a police car showed up and two police officers got out and one started asking me questions while the other one started asking the other guy questions.

There are any number of possible "reflective listening" responses one could use after hearing this narrative.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=40#h5p-53

3. Revisit your client's statement, paying attention to the emotional content:

At first, I wasn't sure what to do. I had never been in an accident before, and I didn't know whether we were supposed to call the police or not. I sat there just kind of dumbfounded for a minute or two. I wasn't really hurt (or I didn't think so at the time), and when I asked my friend, Karen, who was riding with me, how she was, she said she seemed to be okay, so I didn't think we needed to worry about an ambulance or going to the hospital or anything. Then, as I was getting out of the car to see how much damage there was, the driver of the other car came over and started yelling at me. He was screaming: "What were you doing turning left there? Why weren't you using your directionals?" But I am pretty sure I had turned my signal on a few seconds before I started to turn. Anyway, before I could even figure out how to answer this guy, a police car showed up and two police officers got out and one started asking me questions while the other one started asking the other guy questions.

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Reflective Practice

Research reveals that writing about emotions helps individuals to gain insights in ways that simply thinking about or speaking about those emotions does not. Assess your current emotional vocabulary with the following exercise.[24] Set a timer for 10 minutes. Identify an emotional event or interaction in the recent past, the more recent in time the better. The event could be positive or negative, but it should have significant emotional content. Write about that event. Don't worry about grammar or organization—simply write. Try to write continuously for the entire ten minutes, describing what happened but more particularly describing how you felt.

When you are done with this free write, observe what you have written and prepare a short reflection on your emotional vocabulary. Focus especially on your ability to name both the emotion and the intensity of the emotion. Did you use only a narrow range of words? Did you have trouble finding ways to talk about your emotions? Did the process

24. Based on Susan David, Three Ways to Better Understand Your Emotions, HARV. BUS. REV. (Nov. 10, 2016).

of writing about your emotions raise new emotions? How well developed is your emotional vocabulary? What steps can you take to better understand your own and other's emotions? Your reader does not need to know the subject you used for this exercise or even the emotions that it raised. Rather, the reflection should focus on the exercise as a tool for understanding and expanding your emotional vocabulary, managing the emotional aspects of law practice, or any other insights you gained from the exercise. (Note that you can use this same exercise to write about another person's emotions. By doing so, you may be able to more precisely and accurately identify the emotions involved in a situation and respond appropriately.)

Evaluating an Interview

Review this first part of an interview with Ms. Brown. Evaluate the attorney's approach to establishing rapport with the client, previewing the interview, explaining the attorney-client relationship, and active listening.

TRANSCRIPT OF INTERVIEW – BARBARA BROWN

A. Hello, Ms. Brown. Welcome. I'm Pat Peterson. Thanks for coming in today. Please have a seat. Did you have any difficulty finding our office?

C. No, no problems at all.

A. Can I get you a cup of coffee, soda, or water?

C. No thanks. I'm fine.

A. As I said, I'm Pat Peterson; please call me Pat. How would you like me to call you?

C. Oh, Barbara is fine.

A. Thank you, Barbara. I see from the information you gave to my paralegal that you've had trouble at the local Walgreens pharmacy. It sounds like it was a horrible ordeal.

C. Yes, well, I can tell you, they are in big trouble! They had no right to treat me the way they did. I've been shopping there for years, and they just treated me like I was some kind of criminal!

A. *That sounds horrible. I'm so sorry you had that experience. I want to hear all about this situation and see if we can't help you. First, let me tell you a little bit about how today's meeting will work. The purpose of our meeting today is to decide whether we are a good match as a firm for what you need in terms of addressing this case. We have about 30 minutes and we'll spend most of that time with you talking and with me listening, so I can get the whole picture. Everything you tell me is confidential. No one in our firm will be sharing your information with anyone outside our law firm, even if you decide we aren't the firm you'd like to represent you, so I encourage you to tell me everything about this situation, even if you think it's probably not important, or relevant, or that it might hurt your case. I can only help you if I have the whole story. Do you have any questions about that?*

C. *No. I understand.*

A. *Ok, and today's consultation is free, but if we do decide that we will be working together in this matter, there are a couple of different options we have for how you might pay for our services. We can talk about those now, but I can give you a much better idea of what those options might look like after I know more about your situation. Would you prefer that we discuss fees now or at the end of our meeting?*

C. *I'm happy to wait. Well, except, do you do that thing where you don't get paid unless you win?*

A. *Sometimes.*

C. *How does that work?*

A. *Well, it's really too early for us to discuss the details of how that works.*

C. *Ok, well I'm not sure I can do anything if I can't get that kind of arrangement made. I want to sue the pharmacist and the security guard too. They're the ones who roughly handled me.*

A. *I understand. Why don't I learn more about what happened?*

C. *Yeah, well, first let me explain that I have been a customer at Walgreens for years now. I've got several health problems unfortunately—diabetes, high-blood pressure, gout, and sleep apnea. Bad genes.*

Anyway, I need a lot of prescriptions and I've always gotten them filled at Walgreens pharmacy for the past 20 years. I have health insurance through UCare, a nonprofit health plan. With that plan, I have a $20 copayment each month for my medications (it's gone up a lot in the past five years); after that, I get all the rest of my medicine without a copay for the month. I'm on a fixed income—social security—and sometimes I can't afford the copay. In the past, the pharmacy has always waived the copayment. In the past five years though, ever since that new pharmacist Paul Farmist, took over, I've had the pharmacy say they wouldn't fill my prescription without a copay. I've learned Paul's schedule, so I just started going there when he wasn't on duty.

Well a couple of weeks ago, I showed up to get my prescriptions filled and the little gal at the register told me that they would not waive the copay. I asked to speak to the pharmacist. At the time, I didn't think it would be Paul, but out he comes from the "cage" where he counts pills. I had already taken the bag with the prescriptions and had it in my hand. I explained to Paul that I really needed the medication and if they could waive the co-pay this time, I'd be able to pay for sure the next time. Well, he gets all huffy and starts calling me names. That gets me pretty upset, and I turned to go back into the main part of the store before I lost my temper, but he comes around the counter and grabs my purse, where I had put the bag of prescriptions. He says "Oh no you don't. No more freeloading here lady." Well that really did make me mad so I pulled back my purse and started yelling a little bit. That's when the security guy shows up. He put me in handcuffs and made me sit down at the pharmacy waiting area. All the other customers were staring at me. I just started to cry and explain that I just needed my medications.

Paul told the security guard that he did not want me arrested, he just wanted the prescriptions back and for me to leave the store. So what could I do? I told them I would leave and gave them the prescriptions and I left and got an Uber home.

Chapter Five Endnotes

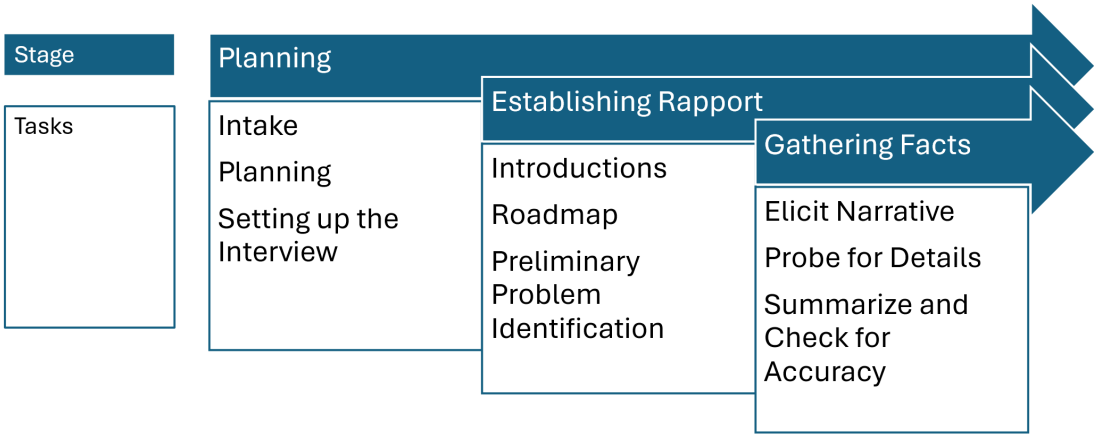
Chapter Six – Probing for Details and Confirming Information in The Middle of the Interview

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Structure fact-gathering to efficiently gather a complete picture of the client's matter and keep the client on track.
- Use a variety of question-types to probe for details.
- Recognize conditions that inhibit a client's willingness and ability to share information fully and accurately and be able to implement a variety of tactics to facilitate memory and disclosure.

In this chapter, we explore further the middle of the interview, particularly the ways in which one structures this portion of the interview and the iterative nature of detailed fact gathering.



A. How do you use transitions to structure the interview?

Clear organization and transparency are important to trust and to effective communication. Throughout the interview, you should signal transitions to help the client understand the purpose of questions or dialogue and to forecast where you are in the overall interview process. While you will have provided an overall preview of the interview at the very beginning, you will need to continue to use these signposts as you move through the interview.

The transition from preliminary problem identification to detailed fact gathering is one such point at which a signal can be helpful. With the information provided in the intake form and the client's initial description of their matter, you will have a general understanding of what has brought the client to you. Indeed, in some circumstances, when the prospective client presents a very narrow and specific problem, the intake form and the first "how can I help you?" question may be all you need to begin to analyze the matter and focus the interview. For most clients, however, you will need to probe for more details to truly understand the nature of the client's matter.

Recall that by the end of the initial interview, both you and the prospective client need to have a good enough understanding of the client's problem(s) and situation to make informed investment decisions about whether you want to represent the client, whether the client should hire an attorney, and if so, whether the client wants to hire you. Thus, you and the client need to have some idea of the cost-benefit factors in making these choices: the value of the matter, time demands, other costs, the client's ability to pay something resembling your normal fee, whether you like each other enough to engage in an attorney-client relationship, and whether life circumstances for both of you are such that you have the energy, time, and resources needed to assist each other in trying to help the prospective client achieve their goals.

With this in mind, the heart of the interview involves sharing the information that both the attorney and client will need to make an informed investment decision. After summarizing the general nature of the client's matter, you can bridge to the middle of the interview by describing the more detailed dialogue about their situation that is to follow. What might that sound like? In a family law matter: "So we need to discuss divorce, division of property and debts, custody, and child support. Does that sound right to you? (Pause for confirmation or explanation.) Ok, then I'll need to get more details about each of these topics." In a business transaction matter: "I understand you would like help in choosing the right business form and tax classification to begin your business today. Are there any other issues you'd like to discuss? (Pause for answer.) Well then, let's get some more information to see which options will work best for you."

As you proceed through the middle of the interview, continue to use "bridge phrases" and other signals to help your client transition from one stage to another or from one topic to another. Phrases such as "Next I'd like to address…" "Let's revisit…" or "Are you ready to discuss…" help the client to orient themselves to the purpose of questions and respond more accurately and completely. Accordingly, don't be reluctant to step out of the interview from time to time to not only reflect and summarize, but also to provide these signals.

Check your Understanding

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=44#h5p-29

B. How can you most effectively structure detailed fact gathering?

As you move from the client's preliminary description of their problem to more detailed fact gathering, you will need to evaluate the topics you wish to explore and guide the client through each of these topics in a structured manner. The middle of the interview is the time to gain the details of the client's situation, to explore gaps and inconsistencies, and to understand motivations and emotional context. To do so effectively, you must have a structure for this exploration.

If you think of an interview as building a house, the first information gathering part of the interview is when the structure of the house is built and the detailed fact gathering is when you furnish each room. Each room can be thought of as a discrete topic to explore in the client's narrative. You will need a structure for how to proceed to "furnish the rooms" in gathering details.

If the client's situation lends itself to a chronology, using the timeline to gather details can be effective. Chronological discussions provide a logical organization which allows a client to focus on discreet events. The timeline provides a useful tool for understanding the relationship between events and for storing information about a set of events. Many clients find it relatively easy to retrieve memories by using a chronology.

Alternately, the client's matter might better lend itself to a thematic or topical content to organize the discussion. This will be especially true when working with clients planning transactions. Even for event-driven matters, however, for some clients this thematic orientation may present an easier means of recalling events than a chronology, as their brains may be less comfortable with the linear nature of chronology and more comfortable recalling things in relation to a given topic. A thematic organization can also help you to ensure that you gather details about each legally relevant category necessary to address the client's issues. Note that in some circumstances, an attorney may find herself combining these structures—talking about a set of topics or themes but discussing each in a chronological fashion—at least with those clients comfortable with discussing things chronologically.

The point is not to adopt one or another approach but to have a transparent structure that best fits the client's matter and the client's comfort in relating their information. Gather details you need by signposting the topics as you move from one to the next. ("Next I'd like to explore…" "Let's turn to the topic of…") As you move through each topic, you can continue to use open-ended questions and prompts such as "You mentioned that X. Tell me more about that." or "I'd like to hear more about X." Other details may require more closed-ended questions, particularly regarding topics that a client is having difficulty in conveying. You can then move back to more open-ended questions to get the client back onto the chronological timeline.

Proceed one topic at a time and gather the necessary details before moving to the next topic. How do you know what topics are important for gathering more details? The content of the interview will depend in part on the legal theories you begin to develop as you learn more about the client's issues. As you listen to the client's information, you will need to begin to develop a theory about how the law frames those facts. In a litigation matter, you will begin to identify potential claims or defenses and then begin to look for facts that relate to legal elements. You will begin thinking about how you can translate facts into evidence. Likewise, in transactional matters, you will begin to develop options for structures or transactions that can accomplish the client's goals. Those structures will then signal the need for additional information.

Do not let these legal theories constrain your detailed fact finding, however. Having the elements of a cause of action or the terms of a business transaction in mind should provide you with additional topics to explore more fully, but you should nonetheless explore topics simply to gain a full understanding of the client's situation. In this process, you may find that additional legal issues emerge that you would not have recognized if you had prematurely narrowed your lens.

In addition to exploring details that address elements of potentially relevant legal issues, you should strive for a complete picture of the client's situation. The law is very focused on "transactions and occurrences" but in the interview, you should expand the frame to include facts about before and after these legally significant incidents. Don't overlook background facts. Ask about similar situations in the past. Ask about how a situation differs from how it would have been in the past. Ask about expectations for future steps. Don't be afraid to ask about downsides. What if a business fails? What if the client does not prevail in a claim?

The journalist's WWWWWH questions remains one of the best structures for gathering details. While you may not structure your interview based on these questions, you should always be sure that you have addressed all of these topics.

- Who: Ask for complete names and details of relationships to the client and to the matter.
- What: Fill out the details of events. Asking clients to recall details using sensory language ("What did that sound

like?" or "What would that look like?") can help some clients better generate the detail needed. Think not only in terms of facts but consider how those facts might be communicated to others—as evidence in litigation matters or as negotiation points in transactional matters. Ask for any documents, texts, emails, social media posts, or other corroborating materials.

- When: Try to gather details of dates and be clear on sequence of events. ("When did this start/change/worsen?") If clients have difficulty remembering dates, often asking in relationship to other aspects of their lives can help jog memories. (For example, "Where we you working/living at that time? How old were your children? What season of the year? Etc.)
- Where: Jurisdictional facts are critical. Be sure you understand where events took place or are planned.
- Why: Do not neglect to ask about the client's thoughts, emotions, or intentions. The "Why" questions can often uncover important additional facts. Asking "how did that make you feel?" can provide critical insights into the client's perception of an event as it was happening.
- How: Consider explanations of cause, processes, and potential solutions. Invite your client to challenge their assumptions about cause or intent. "Could there be another explanation for this issue?" "What if our current understanding is incorrect?" "Have you considered a different approach to this plan?"

You will never gain perfect information even after the most effective of interviews. Gaps and ambiguities are inherent in any fact situation. However, you want to try to identify and fill or clarify as many of these as possible in the time available. When there is confusion or when gaps appear, it frequently becomes necessary to ask direct or closed questions in an effort to clarify some ambiguity, better understand details, or fill in gaps.

Filling the gaps is often not as difficult as recognizing the gaps in the first place. The psychological phenomenon of "filling" and "framing" causes us to assume facts instead of probe to fill gaps. The reluctance to be "nosy" limits our willingness to ask for more details. Effective interviewing requires a relentless curiosity driven by the need to understand the client and their situation fully. If you are wondering, ask! If you can't picture the situation clearly, get more details. Be respectful but persistent. If a client is reluctant to provide details, explain why the details are important.

As previously noted, you should be especially aware of the difference between conclusions a client has arrived at and the underlying facts driving that conclusion. This is especially important for facts that relate to the mental state of an individual. If a client reports that another person intended or desired a particular result, ask why they have drawn that conclusion. Likewise for other conclusions such as causes for events, predictions for future reactions, etc.

The middle of the interview challenges your ability to both listen fully and analyze what you are hearing at the same time. As you are taking in information, you are beginning to identify some possible legal doctrines that might apply to your client's matter. These preliminary theories will in turn influence your further fact gathering. The delicate balance to be achieved is to be able to conduct this legal analysis without coming to premature conclusions that will close off important additional fact finding.

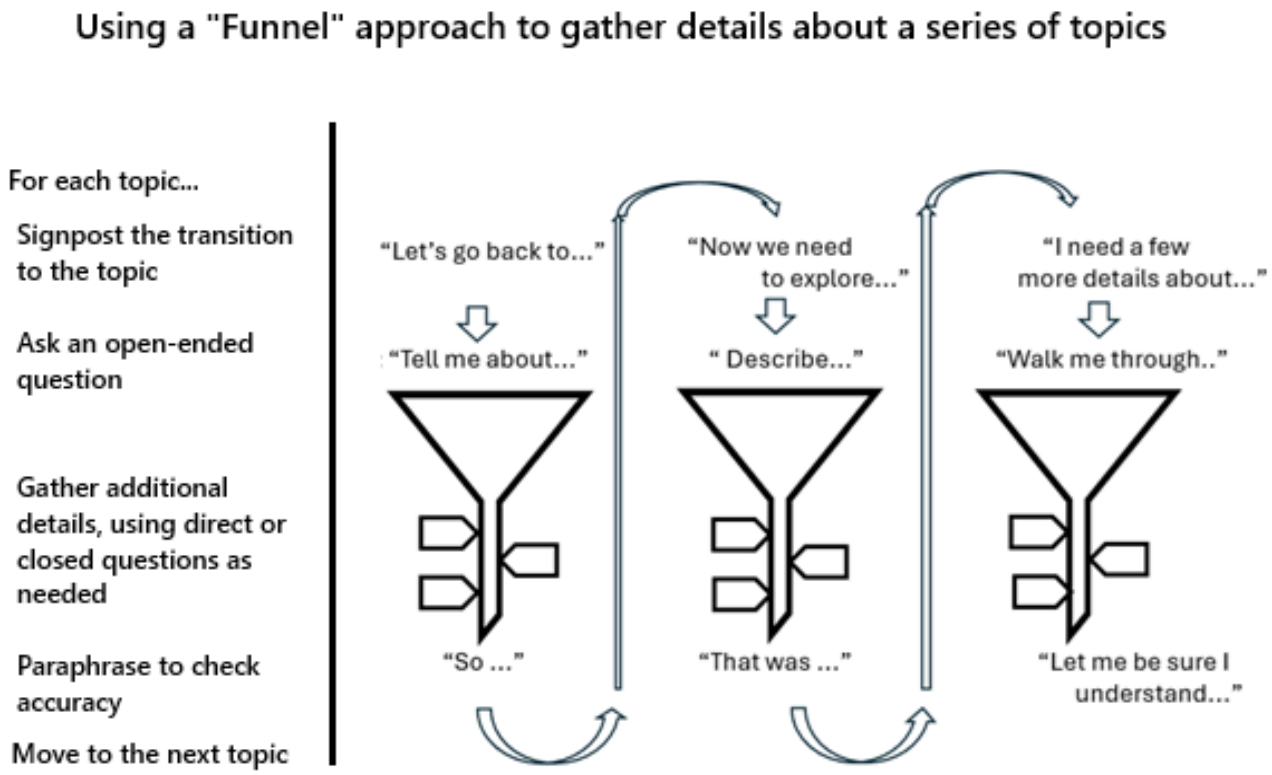
C. How do you use questions and listening in the middle of the interview?

The questioning and listening techniques discussed earlier apply throughout the interview. However, to be efficient and organized, the attorney must be able to exercise these techniques with more flexibility as the interview moves toward more detailed information gathering.

Some commentators describe the middle of the interview as a "funneling" because the interview has begun with broad, open questions and then narrows—like a funnel—during a series of direct or closed questions that become more and more specific and precise in an effort to get a full and complete picture of a specific event or series of events along the chronology. While the image of a "funnel" can be helpful, we think the concept can be misleading in that one can assume that the purpose of the middle of the interview is to narrow the information down or that there is only one "funnel" of information one is pursuing. We prefer the concept of a cycle, in which one moves between open and

closed or direct questions as one explores individual topic areas. This cycle concept reminds attorneys to return to open questions after exploring a topic with direct or closed questions.

The following graphic demonstrates how one might use this technique to gather details after having gained a client's timeline or narrative.



You should continue using active and reflective listening throughout the middle portion of the interview. Active listening assures that you remain attentive to ambiguities or gaps in the client's presentation. Indeed, to succeed in the "cycling" or "funneling" process that comprises the middle of the interview, you need to be listening actively enough to catch the ambiguities in the client's presentation, to identify the gaps in the client's presentation, and to flesh out specific events that merit more detailed attention. You also need to listen for the client's nonlegal and emotional concerns.

Reflective listening remains important also both as an organizational tool and a relational tool. During the middle of the interview, the attorney needs to gather a fair amount of information about the client's situation and will need to organize this information. Reflective listening serves an important role in helping the attorney to summarize manageable chunks of information, verify understanding with the client, create transitions between specific event discussions and broader chronology, build rapport by acknowledging non-legal concerns, and demonstrate empathy by acknowledging emotional content.

In the middle of the interview, then, you will use active and reflective listening and the organizational device of cycling through topic "funnels" with a variety of question forms. For example, recall the interview involving the client Mr. Jones and his breach of contract dispute involving a failed delivery. Assume that the attorney obtained a complete timeline of Mr. Jones's business dispute. One of the key concerns Mr. Jones has identified is that the services due under the contract were not provided as agreed. Consider how the attorney uses a series of specific questions to gain more detail about this aspect of the client's situation.

Attorney: *Mr. Jones, you mentioned the services weren't as agreed upon. Could you give me an example of a time when you believe the service fell short of the agreement?*

Jones: *Sure, a good example is this summer when we were expecting a shipment of computer chips, and they were delayed six weeks. During that whole time, the company kept promising that the shipment was "on its way."*

Attorney: *When were the chips originally due?*

Jones: *May 1.*

Attorney: *Ok, and when did you actually receive them?*

Jones: *The middle of July. I don't remember the date exactly, but I can look it up for you.*

Attorney: *Great. That will be a helpful detail later. For now, tell me about how this particular delay impacted your business.*

Jones: *Well it threw our whole production schedule out of whack.*

Attorney: *Did you incur any specific financial losses as a direct result of this delay?*

Jones: *I wouldn't say that. We always build some 'give' into our schedule and we always keep some reserve inventory so that we are able to meet all of our contracts. But, well, I guess there was the cost of the overtime once we got the shipment in order to build our reserves back up.*

Attorney: *We'll want to get some details about those costs as we go forward. Any other costs?*

Jones: *Not financial, but boy it sure did make me question whether we should be looking for a different supplier.*

Attorney: *You lost trust in the supplier.*

Jones: *Yes, if they had just told us there was going to be a delay instead of saying "the check's in the mail" so to speak, well, it would have saved a lot of headaches.*

Attorney: *Let me ask more about your communications with the company about the delay…*

Notice how the attorney signposts the topic they are going to explore as they move from one "funnel" to the next (first, a specific example of a delay, then communications). Notice as well that the process of asking these specific questions causes the client to recall more details they may have omitted from the initial narrative (the overtime costs that resulted). Finally, notice that the attorney uses reflective responses to verify the client's meaning ("You lost trust…") Regardless of the type of question the attorney uses to gather details, the attorney continually uses active and reflective listening.

Skills Practice

Consider an initial client interview in an estate planning practice. Assume the preliminary part of the interview has taken place (introductions, explanations of interview, etc.). We pick up the interview at the point at which the attorney is getting the client's description of their legal issue. Answer the question that follows.

Attorney: *How can I help you today?*

Client: *Well, I want to make sure that my stepson, Daniel, gets my house when I pass away. I'm not sure how to go about it, and I want to make sure it's done properly.*

Attorney: *That's a thoughtful decision. I'd like to understand more about your situation so we can explore the best way to accomplish your goal. To start, could you tell me a little about your family and any other heirs or beneficiaries who might have a legal interest in your estate?*

Client: *Sure. My husband passed away five years ago. Daniel is his son from a previous marriage, but I've always thought of him as my own. I don't have any biological children myself, and I don't have any other relatives that I am close to.*

Attorney: *I see. And do you currently have a will or any estate planning documents in place?*

Client: *No, I've never done any formal estate planning.*

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=44#h5p-30

Notice that you need not necessarily know a great deal about estate planning to generate a list of relevant questions. What you do need is curiosity and imagination.

D. What conditions might inhibit or facilitate gaining details?

No matter how deftly an attorney questions, listens, and reflects, a client may be inhibited from sharing information freely during an attorney-client interview. For example, as we have already seen, differences in personality, culture, or language can make it challenging for clients to communicate effectively. The client may believe it would be inappropriate to raise a subject or convey particular ideas or information to the attorney. Revisit the discussions of communication differences[1] and clients who pose particular challenges in gathering information[2] and consider how you might build bridges across these divides with your client.

Many of these inhibitors may even operate at a subconscious level as a consequence of the cognitive biases that pervade our fast-thinking processes. Being aware of these inhibitors and developing techniques to overcome them can improve the quality and quantity of information you can obtain in an interview. For example, recall the discussion in Chapter Four regarding the ways in which confirmation bias might cause an attorney to prematurely conclude information gathering or ignore certain information that contradicts preexisting judgments. This same cognitive bias can inhibit a client's information sharing. Confirmation bias can operate to limit what a client may remember or how readily they will share information that contradicts their preconceived judgments about the matter they bring to the attorney. Selective memory or perception may lead clients to unintentionally omit or distort details. This selective perception will make it particularly difficult to obtain information that the client believes threatens their case or makes it harder to achieve their goal.

Another common cognitive bias is social desirability bias; that is, the tendency for individuals to present themselves in a way that will be viewed favorably by others. This bias stems from the desire to conform to societal norms and gain approval or avoid disapproval from others, especially those in positions of authority or perceived power such as attorneys. Consequently, clients may consciously or unconsciously omit or downplay negative information or they may exaggerate or embellish details that make them appear more responsible or virtuous. Social desirability bias can especially inhibit clients from disclosing highly stigmatized matters, such as mental health, substance use, or relationship problems. Especially if the attorney hasn't established a strong rapport and created a safe, non-judgmental space, the client will not easily share sensitive information.

How can you facilitate information sharing when faced with these inhibitors? All of the basics of interviewing skills are critical for open and honest communication: building rapport and trust, explaining confidentiality, employing active and reflective listening skills, maintaining cultural sensitivity, and providing nonjudgmental responses. Additionally, you can employ a number of more specific facilitators to address a client's reluctance to disclose negative information. Patience is a key facilitator. Trust takes time to develop, especially when there are barriers of culture,

1. What are some important differences among people that can lead to misunderstanding? Supra Chapter Three, Section C.
2. Who are some clients for whom active listening can be challenging? supra Chapter Five, Section E.

trauma, or perceived threat. Educating the client about the reasons that you need full information can create expectations that a client will want to fulfill. Consider this explanation:

> I view our relationship as a partnership. I'm an expert in the law but you are the expert in your situation. The biggest help you can give me is to provide me with a complete picture of your matter. So, I'm going to ask you not to hold back—even if you think something is irrelevant or unimportant, even if you think it might hurt your case—it's more important for me to fully understand your situation to help you find a solution to your situation.

Sometimes the best way to overcome a client's reluctance to share negative information is not to ask the client directly but to ask what a third person might say. Bringing these virtual third persons into the room can reduce a client's defensiveness and provide a face-saving way for them to disclose negative facts. Ask the client to place themselves in the shoes of another person who witnessed the event or who is viewing the transaction. Then ask the client to explain what they think that person would say. This can also be an effective technique for improving a client's recall of past events.[3] You can then open up a discussion about that negative information by asking the client why they believe others might say something or how the client might want to respond to that information. When a client does disclose sensitive information, you can facilitate even more disclosure by recognizing the client's contribution (e.g., "Thank you for sharing that.. That couldn't have been easy to tell me…").

If a client is having trouble remembering details, try getting at the information in a different way. A technique known as "cognitive interviewing" developed for forensic interviews suggests additional approaches to helping witnesses recall details accurately.[4] These techniques can be used in the initial client interview as well. One technique is to ask the client to place themselves in the scene of the event they are trying to recall, using all their senses to recall the context in which the event took place.[5] What was the weather like? How were they feeling? A second technique suggests asking about events in a different order, starting with the most important part of the events, or working from recent to past rather than chronologically.[6]

Sometimes the most powerful inhibitions are not those of the client but of the attorney. Asking about sensitive facts can be especially difficult. Some new attorneys are reluctant to probe for details as fully as is necessary to get all the facts needed to guide their own and the client's decisions about the possible representation. For instance, a new attorney might hesitate when needing to ask a client detailed questions about their financial circumstances, such as sources of income or outstanding debts, fearing it may seem overly intrusive or judgmental. Similarly, some attorneys may become uncomfortable discussing emotionally charged or intimate personal matters, such as allegations of domestic violence, divorce details, or health-related issues. In criminal cases, attorneys may feel apprehensive about probing deeply into sensitive topics like substance use, prior criminal records, or difficult family relationships, worrying that these questions might embarrass or alienate their clients. These attorneys might feel protective or sympathetic toward their clients, making it difficult to fully explore potentially uncomfortable yet crucial facts. A good interviewer must overcome this reluctance and exercise vigorous curiosity, recognizing that the willingness to sensitively and professionally explore difficult topics is essential to fully representing the client's interests and making well-informed legal decisions.

Monitor both your client's and your own comfort level throughout the interview. Just as ego threat can limit a client's answers, so too your own awkwardness, discomfort with topics, or concern that you will be perceived in a negative light can inhibit your questions. If the reason you choose not to ask a question is because of how it makes you feel, reconsider. You've likely identified a topic about which details may be especially important. On the other hand, if you are reluctant to follow a line of questioning because the client is showing signs of deep distrust or distress, it makes more sense to save that topic for a later time. In certain types of representation, where clients have experienced trauma

3. Julian Boon & Elizabeth Noon, Changing Perspectives in Cognitive Interviewing, 1 PSYCH., CRIME & L. 59 (Jan. 4, 2008) https://doi.org/10.1080/10683169408411936.
4. Fisher & Geiselman, supra n. 1.
5. Id. at 99-102.
6. Id. at 110-12.

or they must disclose deeply personal information, you are unlikely to gain all relevant facts in the initial client interview. You must balance your persistence with patience and plan for follow-up interviews.

Check your Understanding

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=44#h5p-33

Skills Practice

You are interviewing a new client, Ms. Davies, regarding a potential employment discrimination case. Ms. Davies alleges that she was unfairly passed over for a promotion. During the initial part of the interview, Ms. Davies focuses heavily on her qualifications. However, she is less willing to provide details about her employer's justification for not promoting her. Given some of the ways Ms. Davies has characterized the situation—"I trusted him," "I thought we had a professional working relationship"—and her reluctance to describe the details of the conversation that led to her dismissal, you suspect that there is much more to the story.

Consider each of the following tactics that you might use to increase the client's willingness to discuss that conversation and the details of the reasons for the supervisor's decision. Think about how you would approach each circumstance and answer the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=44#h5p-32

Evaluating an Interview

The following transcript follows up on the West case interview, recording the attorney's detailed fact gathering. Read the transcript and evaluate the use of structure and signals, prompts and questions, and reflective listening. Answer the questions that follow.

TRANSCRIPT OF INTERVIEW – LINDA WEST

A. Why don't you just start at the beginning and tell me what happened.

C. Well, like I mentioned, I work at the stables and that's where I keep my own horses that I train and show. Last March, Tammy and I were out riding our horses. She was riding a little bit in front of me. She rides a saddle bred horse, so she usually walked a little faster than my mare. So we are riding our horses along the side of the road, and I hear somebody yelling "Get out of my yard!" I stopped my horse and I looked and there was a man standing there on the south side of the house with his hands on his hip. And I looked at him and I said, "Sir, we're on public right of way." And he said, "I don't care what it is, it's my grass and I take care of it and you need to just get off." He started coming across the yard towards us yelling. Tammy moved her horse to the side and more into the road. I don't remember exactly what I said, but it was something about us having a right to be there and why was he so upset. He just keeps on coming at us and screaming about his property and my horse being a menace. All that yelling… yelling, loud voices excite animals. So Velvet was getting very fidgety. I'm trying to keep control of her and asking the man to please calm down. He just keeps coming at us and yells "I'II show you what I think of your horses!" He doubled up his fist and hit Velvet in the head. Well, Velvet just went crazy. She ran into the man's yard and when I finally got her out of the yard and back to the stable, well, she was just too skittish to keep showing. I've done all kinds of work to help her to recover but she won't ever be the same. I've lost a lot of money because of this, not to mention my reputation in training horses, and I am wondering if there's anything that I can do to recover something from this guy because of this.

A. Wow! That sounds really frightening.

C. It was! An out-of-control horse is a really dangerous situation, especially if she'd thrown me on the road, it could have been deadly. We were close—the pavement's right there. Horseshoes are very slick on asphalt. Horses can slip and fall. There's cars going by. You can fall off, break your back, break your neck. It's dangerous!

A. Let me get a few more details about this situation. Do you know the name of the man who hit your horse?

C. Yeah. Roland South. His name's on his mailbox.

A. Okay, thanks. You mentioned that Velvet went crazy when Roland hit her. Tell me more about that.

C. She was out of control—I think any animal would be. When something like that happens, they jump around, they—they rear, they buck. So Velvet came off the front end a little bit, which we call rearing, somewhat coming off the ground. She was fidgety. She was bucking a little bit, twisting, turning. She immediately threw her head to the side and just went out of control.

A. Now, where's Tammy while this is going on?

C. I presume she was still watching us. I – I was—had my hands full.

A. I guess so! What happened next?

C. Well, South is still yelling. He ran back into his yard and he started backing up and he yells that if we don't get off of his property, he's going to go in the house and get his gun and come back out and blow our goddamn heads off. Those were his exact words.

A. Where were you at that time?

C. Like I said, the yelling kept the horse excited. I had lost control of her and she did run into his yard. But I couldn't help it. I got her to turn back and I was trying to get her back to the side of the road. There was a gravel driveway right there to our left. And as I recall, I think we got in the driveway and got back alongside the road that way.

A. Okay. Did South back off then?

C. No, we were leaving, he was running after us, after my horse, and he got to the driveway and picked up some rocks and threw them at us.

A. Did they hit you or the horse?

C. Both I guess. We were moving pretty fast getting out of there.

A. What happened next?

C. Well, we headed back down View High Drive to the barn. We were headed to the barn. We raced down the street to one of the neighbor's houses. Her name is Norma McMillen. She was outside her house and we just stopped for a minute to get the horses to calm down. I'm not sure if she saw anything. She came out and asked us if everything was okay and I told her that the crazy neighbor down the street threw rocks at us. She asked if there was anything she could do to help. We told her we just needed to stop for a minute and then we went on back to the barn.

A. Okay. Tell me about how things went when you got back to the barn.

C. Well Velvet was real tight. She—I tried to take her bridle off and put the halter on so you can cool them down and put them back in their stall. And she was—her head was just, you know, she kept flinging her head. It's called being head shy.

A. So was she physically okay? Nothing broken or anything?

C. No she didn't break anything, but she was a mess.

A. How about you? Were you hurt?

C. No. We were just both really shook up.

A. It sounds like it was a traumatic event for sure. This happened in March, right? How have things gone since then?

C. Not so well. I'd been showing Velvet and she was doing really well, but after this she became so head shy that I really couldn't win any shows anymore. There was a kickoff show second or third week of April. I can't exactly recall the exact date right now. I had been in a class and—I believe it was a horsemanship class, as I recall it was a horsemanship class. And after the class, a lot of times a judge will come up and he will touch part of your tack, your bridle, your saddle, your horse, and ask you what it is. Sometimes he'll even see if you've kept your saddle clean. After we had performed our wall trot and canter, the judge started walking towards us. He raised his hand and she ran from him sideways. Well, that doesn't look very good and you don't—that's part of it. That disqualifies you. So that was the end of that show for us.

A. Is there a way to cure a horse of being head shy?

C. Well, I tried. I tried to expose her to a lot of different people, you know, strangers. That's what she was the most afraid of. It wasn't so much me. She was still even leery of me, but, the worst thing she was, she had to be exposed to different individuals. There were some people that even would come up and wave their arms around her, but wouldn't touch her, to let her know they weren't going to hurt her, they weren't going to hit her. There's several times we've done that, different people, just get her used to motions. But she's—I still can't move real fast around her, especially someone she doesn't know.

A. Did that work?

C. No. I wasn't doing a very good job of getting her over being head shy. I didn't know what to do exactly. I knew of a trainer that was very good, had a good reputation. His name is John Fox. He had seen her at a show and she was acting silly. And I approached him to see if there was some way he might help me. I asked him if there was a way I could work for him, if he would work with my horse and I would do what needed to be done at his place for help. I really couldn't afford his help any other way. He charged $500 a month. Well he was really nice and agreed. So I moved her to his stables and began working for him in addition to the work I did at Deerhorn stables.

A. When was that?

C. Starting in about May.

A. And how did that go?

C. Well I started working for him in the middle of May and I left in the second week of August. I worked about 20 hours a week for him, a lot on the weekends. I helped feed the horses, hand-picked the stalls, put horses on the walker, groomed them—that sort of thing. Oh, I even helped mow the pasture with a tractor. Whatever needed to be done.

A. And Velvet?

C. Well I began training with Mr. Fox a few hours every week. And I took Velvet to shows. We went to maybe 18 or 20 shows and I would show Velvet in one or two classes. She did seem to get better for a while. She still—she wouldn't keep her head in the right head set, she wouldn't—in a pleasure class, you have to stay on the rail. A lot of times at the shows, people will hang on the fence and it was very embarrassing at first because she would come around the ring and someone would be on the fence and she would run away from the fence. But she got better over the summer. She even won a few in August.

A. Can you give me a little bit more background on Velvet. What kind of horse is she? How big? How old? That kind of detail.

C. Well, she's seven years old now. I bought her in August 2018. She is a registered Black Leopard Appaloosa and her birthday is April 3, 2016. At the withers she stands about 15 hands and weighs about 1000 pounds, though she's in foal right now so she weighs more. I had her bred to a Bay Appaloosa stallion for a May 2023 foal.

A. Ok, help me out here a little more. When you say she's 15 hands at the withers, what does that mean?

C. A hand is how you measure a horse. It's about four inches. She's 15 hands from ground to withers.

A. Withers?

C. That's the highest part of a horse's back, just above the shoulders.

A. When you say she's in foal, what does that mean?

C. She's pregnant.

A. Oh, okay, well we'll talk more about that in a minute. Let's talk about when you first got her back in summer 2018. Did you start showing her as soon as you got her?

C. Oh heavens no. She'd never had a saddle on her. I had to break her, and that takes time. I worked her on the ground for several months, put a saddle on her back and off. I didn't actually start riding her until Spring 2020.

A. Is that when you started showing her too?

C. Not really. COVID really shut down opportunities for a while. I really just started showing her in 2021.

A. And how often would you show her?

C. Well I'd take her to 15-20 shows a year and she'd be in one or two classes each show.

A. How did she do?

C. Oh she was great. She brought home a lot of ribbons. She's been really easy to train and she has the right build and gait, so she's kind of a natural. Well she was anyway. After she got head shy, not so much.

A. Did she ever get over being head shy?

C. Well, with me she did. She's real good with me now. The lady I rent from, her boyfriend, Mark, we all take—he has a horse there too and we all take turns taking care of them. He cannot catch her, he cannot walk up to her, and she just—if she's even in a stall, she'll throw her head away from him. She just—he can't do it. He can't—he can't do anything with her.

A. Did you ever have a veterinarian look at her?

C. Well, yes, of course. When a horse is with foal, they need regular care from a vet.

A. I meant about the head shyness.

C. No, that's really more a trainer issue.

A. So do you think she'll ever be able to be shown as successfully as she was?

C. No. That's why I decided she's better off as a broodmare.

A. A broodmare—that means you breed her?

C. Yeah.

A. So how much is a horse like Velvet worth?

C. Do you mean before or after she got hit? Because it's a big difference I think.

A. Before and after.

C. Well, before she got head shy, she was winning a lot and I think she would probably would have brought $15000 then. Now, I'm not sure that I could get even $3000 for her.

A. What about her foal? Is she valuable as a broodmare?

C. Well, maybe, we'll see, but I really don't want to get into horse breeding. It's really expensive. Whatever I might get for her foal will really only cover the costs of breeding her. But if she breeds well, I want to see if I can keep one of her foals. It's the showing I really like.

A. Do you make any money from showing horses?

C. If they win. Not a lot though.

A. About how much did you make showing Velvet?

C. I really don't know. I never kept any records. I keep the ribbons and trophies and such, but not any record of any prize money. The winnings were just a way to be able to afford to keep her.

A. OK, well we might need to dig into that a little bit more later, but for now, let's talk about you. How has all this affected you?

C. Well, it's hard to talk about.

A. Of course. Just take your time. It's important that I understand how this entire matter affected you though.

C. Well, at first I really couldn't sleep and I cried a lot. Especially seeing that Velvet didn't trust me…. well that was just awful. I had a lot of nightmares. I would get up in the night a lot. I was very afraid for Velvet. A lot of times that first month or so, I would drive to the stable in the middle of the night just to make sure she was okay. I was nervous, upset. I am a very nervous person about eating, what I call a nervous eater. I gained a lot of weight and a lot of times I was nauseous.

A. How much work did you miss during this time?

C. I never miss work.

A. Never?

C. Yeah. I—I usually end up with strep throat at least once a year and I never miss work. I just get antibiotics and keep going. I'm—I just go.

A. So, you worked through all that sleeplessness, nausea, and stress. How are you doing these days?

C. I still have nightmares. Not quite as much as I did, but still pretty regularly. I didn't sleep much at all last night thinking about coming in today to talk to you about this.

A. I'm so sorry to hear that. Unfortunately, it's not uncommon in situations like this to experience significant distress. I always encourage clients to get some professional advice and assistance to deal with that distress. I'll provide you a list of some fine, affordable counseling options my clients have found helpful in the past and, if you don't have someone already, you might consider working with one of them.

C. Well okay yeah I guess.

A. So have you seen a doctor at all to address your trouble with sleeping and nausea?

C. No, I really don't see doctors much.

A. Okay, is there any other aspect of this situation that has you concerned?

C. Yeah, this South guy, I just don't understand what his problem is. I've seen him driving a few times since that day in March and, whenever I do, he honks his horn and gives me the finger. One time at 79th and Raytown Road, he cut me off. He was coming from the opposite direction on 79th and he turned right in front of me. No blinker. It was like he saw me and just decided to cut me off.

A. Was it your impression he did that deliberately?

C. Oh yeah, he was laughing and flipped me off.

A. So how does that make you feel?

C. Scared really. He seems not right to me. I sure don't go by his house ever. But it makes me wonder what he might do if he ever saw me on a horse again.

A. Well that's certainly concerning.

So let me just make sure I have the whole picture here. You were riding along the road in front of Roland South's house when he aggressively confronted you and hit your horse, Velvet. This caused you to lose control of the horse and she ran into Roland's yard. He chased you off and threw rocks at you. Since then, Velvet has become head-shy, which has resulted

in significant financial losses for you, not to mention the emotional toll. Despite your efforts to rehabilitate Velvet with a reputable trainer, the horse's value and showing potential significantly declined. You have continued to experience anxiety and fear due to subsequent hostile encounters with South, impacting your daily life and sense of safety.
Is there anything else that you'd like to share about this matter? Am I missing anything?
C. No that's about it.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=44#h5p-34

Chapter Six Endnotes

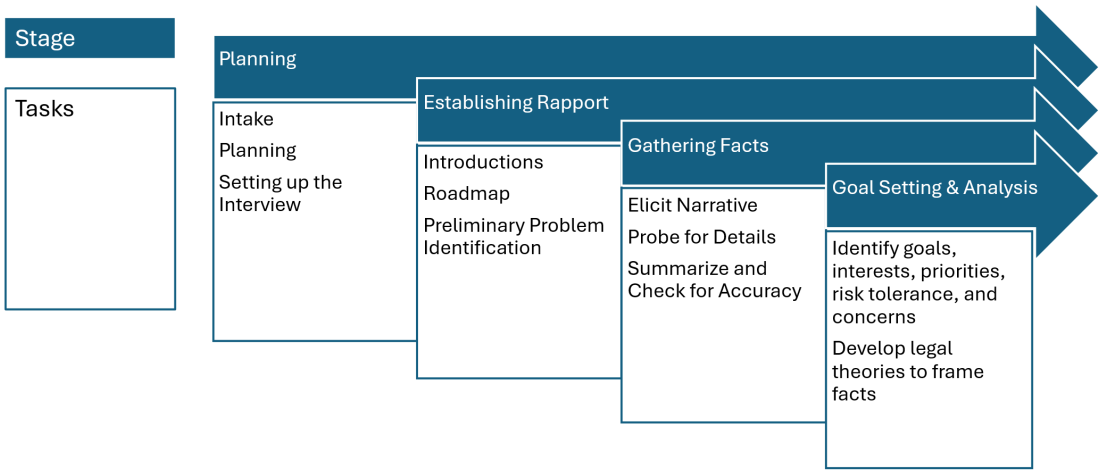
Chapter Seven – Goal Setting and Legal Analysis

Learning Objectives

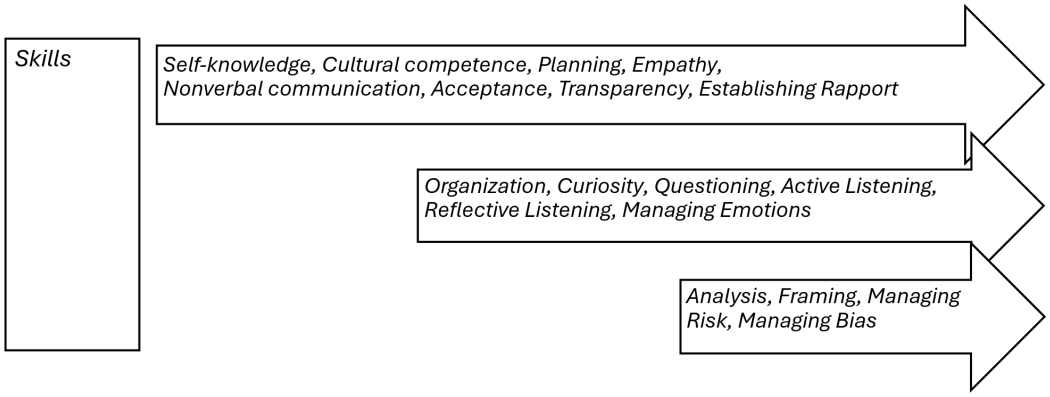
After working through these lessons and practicing the skills presented, you will be able to:

- Close the information gathering portion of the interview and transition effectively to the counseling portion of the interview.
- Clarify the client's objectives, interests, concerns, and expectations.
- Translate the client's facts into legal categories.
- Identify some categories of value orientations and be able to speak about an issue from the perspective of these different orientations.

In this chapter, we examine the end of the fact gathering phase of the interview and the transition to counseling. This phase involves analyzing the facts gathered and setting goals for addressing the issues identified.



Some of the skills needed at this stage are familiar for law students—identifying legal theories and matching those theories to facts to spot issues. This stage also requires a second set of relational skills—helping the client to identify and clarify their goals. Just as fact gathering requires first a preliminary identification of the problem or transaction followed by probing for more details, the process of identifying and clarifying goals also involves multiple layers: not only what the client wants but why, not only what the client hopes but fears, and the priorities and risk tolerances for each of the multiple goals a client may have. These skills build on the skills we have already been exploring in the previous stages of the interview.



A. How do you know when to transition from fact gathering to deciding whether to move forward with representation?

How do you know when you have gathered sufficient facts to be able to begin making decisions about the representation? You will generally know to close out fact gathering in the initial interview when additional questions fail to uncover additional information. The best way to know that you have reached that point is to return to open-ended "wrap up" questions that allow the client to address any remaining topics they wish to discuss. These questions should make it evident that the client has fully expressed their concerns and has nothing further to add. It may be that the first time, or the first couple of times, that you try to wrap things up with an "anything else?" type of question, the client may indeed have additional topics or information to add. You can continue to probe for these additional details as time permits. Sometimes the client will return to topics already discussed, signaling the importance of this aspect of their matter. Use reflective listening to acknowledge that you have heard and understand the importance of these matters. Of course, sometimes as a practical matter, fact gathering ends when there is no more time available.

When you have exhausted topics or time, you will move to the counseling portion of the interview. An effective way to make that transition is to provide an overall summary of the situation, emphasizing the key facts and perspectives in the matter. You might signal to the client that this is what you are doing and invite their attention and correction: "Okay, let me make sure I understand this situation" or "Correct me if I'm wrong but here's what I see." When you finish your summary, invite the client's response by asking "Do I have that right?" "Did I miss anything important?" or simply, again, "Is there anything else?" After this summary, provide a roadmap for the remainder of the interview.

B. How do you assist a client in clarifying goals and objectives?

Analyzing the client's matter requires understanding the client's objectives and how to achieve them. Helping the client clarify their goals and select potential solutions is the heart of the counseling function. This requires exploring the client's underlying interests and motives beyond their stated positions and using values to clarify goals.

1. Understanding positions and interests

One set of critical questions needs to be addressed as you transition to counseling: the client's goals and expectations. In much of the middle part of the interview, you will be focusing on the "what happened" part of the client's matter, including the emotions involved in that matter. As you conclude this portion of the interview, you will turn to the "why" of the client's story. There rarely is a simple answer to this question.

How do you determine the client's objectives and interests? Like any other part of the interview, you can simply begin with open-ended questions to identify the client's objectives. Ask directly: "What outcome are you hoping to achieve?" Unpack the client's conclusory descriptions of their goals by asking for specifics. For example, you might ask "What does 'justice' look like to you?" or "What would you consider a 'successful negotiation' to be?" As with fact gathering, use reflective statements to check your understanding.

Frequently, clients will focus on short-term goals. Part of the value you can provide to a client in goal setting is to help them consider longer-term goals as well. Attorneys can help clients broaden their perspective beyond immediate concerns to consider long-term implications through several strategic approaches. One method is simply to ask future-oriented questions. For example, a client in a custody dispute may be focusing on the needs of their children at present. Asking how those needs might change when the children are older can help to inform the client's immediate goals. Likewise, focusing on securing a business advantage or closing a transaction may blind a client to considering their longer-term goals for that business or relationship. Here is where gathering more context for the client's goals can help to broaden the scope of goal setting. Exploring a client's overall goals for their career, family, finances, or business may provide an important lens for examining short-term goals. The goals a client selects in an initial interview need not be set in stone. Assuming you enter into an attorney-client relationship, you should invite the client to revisit their goals after they've had some time to consider the broader implications or have more information on which to assess their situation.

Whether focused in the present or future, you need to go beyond asking for desired outcomes. Questions about goals uncover only the client's *position* (what they want). To engage effective problem-solving you must understand the *interests* driving those objectives (why they want something). Positions are the specific demands or proposals your client expresses, while interests are the underlying needs, desires, concerns, and motivations behind those positions. Accordingly, you must listen for both the explicit positions and the implicit interests driving those positions.

Don't expect simple answers to your questions about goals. Clients bring complex motivations to a legal matter. Personal, emotional, relational, and business considerations often drive client decisions alongside strictly legal concerns. Many clients approach attorneys without clearly defined goals. As Professor Rubinson notes, "client perspectives—like the perspectives of everyone else—are rife with competing concerns, ambiguities, and ambivalences, and thus are not unitary. These dissonances and instabilities are not merely risks of interviewing and counseling but in many ways define these very processes."[1] Some clients simply feel overwhelmed and want the attorney to suggest a path forward. They may have conflicting goals, like wanting a peaceful divorce while also desiring significant custody rights

1. Robert Rubinson, Constructions of Client Competence and Theories of Practice, 31 ARIZ ST. L.J. 121, 153 (1999).

that might provoke conflict. Clients may be reluctant to fully disclose certain motivations due to embarrassment, fear of judgment, or uncertainty about relevance.

Consider, for example, a criminal defense client who expresses a desire to accept a plea deal. The attorney may consider the legal or strategic reasons that might drive this decision. A plea agreement might avoid exposure to more serious charges that prosecutors might pursue at trial, prevent evidence of other misconduct from becoming public, or secure specific outcomes like particular facility placement or program participation. However, for the client, a much wider range of implicit goals or motivations may be driving this objective. For example, the client may be motivated by assumptions about how a plea deal will affect their own well-being and safety. The uncertainty and anxiety about an unpredictable trial outcome may outweigh the impact of a sentence. They may be focused on the immediate threats of escaping pretrial detention conditions that may be harsh or dangerous. They may be weighing the impact of an immediate resolution on their broader life circumstances. Perhaps they believe that resolving the case quickly will permit them to retain a job or house that might be lost during a lengthy trial process. If they are not a citizen, their primary consideration may be preserving their immigration status if certain convictions would have deportation consequences. Accessing treatment programs that might be available through certain plea arrangements may be a priority consideration. Finally, the client may be motivated by social or identity factors, such as maintaining privacy about personal matters or preserving their dignity through avoiding public exposure of embarrassing facts. They may view a plea agreement as the best way to accept responsibility for their actions in a way that aligns with their personal values or religious beliefs.

Additionally, the client may be focusing on the impact of their case on others rather than themselves. Their underlying goal may be to protect co-defendants or loved ones who might be implicated during a trial. They may believe that a plea deal will protect their family from trial publicity or from having to testify; reduce the financial burden on family members who may be supporting them; or allow them to return more quickly to caregiving responsibilities for children or dependent family members.

Beware of the tendency to assume that instrumental outcomes are the client's most important goals. A client's objectives may have less to do with instrumental outcomes such as money damages or court orders, and more to do with procedural values or psychological needs for validation of self-worth, competence, and identity. Many clients have a primary goal of simply "wanting their day in court." The procedural value of having a formal authority to hear their story may be at the center of their decision-making. For some clients, vindication of their experience may outweigh the risk of even harsh outcomes. Sometimes the attorney's nonjudgmental acceptance of the client's perspective is all that is necessary to address this need for validation and process, but if it is not addressed in some way, it will distort all other decisions.

Check your Understanding

In each of the following examples, consider the possible implicit goals that might underly the client's stated goal. Click each one to compare your answer.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=49#h5p-35

By identifying both explicit and implicit goals, attorneys can develop legal strategies that address the client's full range of needs and priorities, leading to more satisfying outcomes and stronger attorney-client relationships.

Uncovering interests and motivations

How do you help a client discover and clarify their underlying interests and motivations? In the book "Difficult Conversations," authors Douglas Stone, Bruce Patton, and Sheila Heen from the Harvard Negotiation Project offer valuable insights into identifying underlying interests and motivations in the context of negotiations. They use a "three conversations" framework, that describes three simultaneous conversations happening beneath the surface of a difficult conversation. This framework can be helpful in exploring a client's positions and interests.

The first conversation ("What Happened?") focuses on truth, intentions, and blame. In the context of client goals, this is often the surface level conversation about what the client wants and is often where the conversation about goals begins. Just as we have emphasized in gathering facts, the authors emphasize the importance of approaching client goals with genuine curiosity rather than assumptions and employing active and reflective listening to detect unstated concerns.

The authors describe two other conversations that can help uncover the interests driving a client's goals. The second conversation ("Feelings") addresses emotions triggered by the situation. As we have explored previously, exploring the client's emotions can uncover drivers of the client's goals and decisions. Careful listening and observation are key to understanding this interplay between emotions and goals. Notice your client's emotional reactions, body language, or tone shifts when discussing certain topics. Ask about how the client would feel about a particular outcome. Creating space for emotions to be articulated safely and acknowledging these emotions without judgment can help a client to explore how their emotions are affecting their decision-making.

The third conversation ("Identity") concerns how the situation affects and is affected by self-image. Understanding how legal issues touch on the client's sense of self-worth, values, or reputation can provide important insights into the client's priorities and risks tolerances. To listen for these identity interests, pay attention to repeated themes or concerns. Particularly when clients take seemingly irrational positions, consider how the situation may present a threat to the client's self-image. Here again, maintaining a nonjudgmental stance is critical. Be sure you have gained information about the broader context of the client's matter (relationships and finances for example). All these will give clues to how the client views themselves in relationship to the matter that has them seeking your assistance.

All of these techniques might seem inefficient and indirect. One might assume that the most efficient and effective way to discover motivations or interests is to ask the client why they want a particular outcome. Indeed, in some instances prompting the client to tell you more about why a particular outcome is important to them can be an effective method to elicit more detailed explanations of the interests underlying a goal. However, in many cases using "What" and "How" questions can be even more effective. Asking a client why they want a particular outcome (or especially why they don't want a different outcome) can feel accusatory or judgmental. The attorney who asks a victim of domestic violence, "Why don't you just leave?" will have diminished the significant barriers and risks the client faces in their relationship and seemingly blamed the victim for the violence they are enduring. Even if a "Why" question does not make a client defensive, these questions often invite rationalizations rather than exploration. "Why do you want to pursue this claim?" might make clients feel they need to construct a logical justification for their goals. These post-hoc explanations may not reflect their actual motivations and the answers are often too abstract to be helpful.

In comparison, "What" and "How" questions often feel more neutral and non-judgmental. Asking, "What aspects of this situation concern you most?" invites information without implying criticism. This creates psychological safety for a client's honest disclosure and more often will elicit concrete details. "How would an ideal resolution look to you?" generates specific, actionable information and helps the attorney understand practical priorities. Moreover, both questions look toward future solutions rather than past motivations.

Compare the effect of these "Why" questions versus "What" or "How" questions:

"Why do you want to sue your employer?"	"What outcome are you hoping to achieve through litigation?"
"Why is having sole custody important to you?"	"How would shared custody impact your relationship with your children?"
"Why didn't you disclose this information earlier?"	"What considerations influenced your timing in sharing this information?"
"Why do you think we should reject this settlement offer?"	"What aspects of the settlement offer don't meet your needs?"

These alternative question formats help clients articulate their true interests without feeling defensive, ultimately leading to more productive attorney-client communication and more effective representation.

Evaluating an Interview

Recall your prospective client from Chapter Three, in which Karen Davis, a financial advisor, has developed software for client profiling that she has questions about. The attorney has learned more about Karen's product, which essentially creates comprehensive client profiles based on publicly available data. Consider this portion of the interview in which the attorney transitions to goal setting. Answer the questions that follow.

TRANSCRIPT OF INTERVIEW – KAREN DAVIS

Attorney: *I can see that you are very excited about this program Karen. Let me make sure I understand how it works. You use online web search tools to gather information on prospective clients from any information that's publicly accessible on the web: social media profiles, property records, court filings, business registrations, news mentions. This isn't your web search tool. You use the commercial search service called FastFinder.*

Karen: *Right. I pay $200 a year.*

Attorney: *But the tool you have developed takes all that information, compiles it into a profile, and uses an algorithm that you have developed to assess the prospect's risk tolerance and to suggest investment vehicles. You mentioned that it can even predict major life events that might affect financial planning. You've been testing the program with potential clients for about three months now, and it has cut your client onboarding time in half.*

Karen: *Yes, it saves me hours of client interviews and questionnaires, giving me a competitive advantage.*

Attorney: *Have I missed anything?*

Karen: *No, that's it. But you can see why it's important I protect the work I've put into this product.*

Attorney: *Let's talk more about that. When you say you want to protect your work, what does that look like?*

Karen: *I'm not sure. I really don't know what my options are.*

Attorney: *That depends on what you want to do with the program. Are you primarily looking to use it exclusively in your practice, or are you considering commercializing it more broadly?*

Karen: *Right now, it's giving me a major edge over other advisors. Ideally, I'd like to keep exclusive use for a while, but I can see how other financial advisors would pay good money for it. If I could license it while maintaining some control, that could be a nice additional revenue stream.*

Attorney: *That's helpful to understand. If you were to license it, would you want to remain involved in its further development, or would you be comfortable having others take that on?*
Karen: *Oh no! I'd definitely want some say in how it develops. This is my brainchild, and I understand the financial advising business in a way that tech people might not. I wouldn't want it turning into something that doesn't serve advisors or their clients well. I'm concerned it could be misused.*
Attorney: *Tell me more about those concerns. What specific types of misuse are you worried about?*
Karen: *Well, imagine someone using all this personal data to specifically target people going through divorces or who've recently inherited money, and then pushing high-commission products that aren't in their best interest. Or worse, using the psychological profile elements to exploit emotional vulnerabilities to sell unsuitable investments.*
Attorney: *Those are substantial concerns. How does that factor into your thinking about licensing versus keeping exclusive use?*
Karen: *It makes me hesitant about widespread licensing. If I do license it, I'd want strict controls in place—maybe even ongoing monitoring of how it's being used. I'd want the ability to revoke access if I discovered someone was using it unethically. I realize that might limit the commercial potential, but I didn't create this to help predatory advisors take advantage of people.*
Attorney: *So maintaining ethical use of the technology is actually a significant goal for you, potentially even more important than maximizing revenue from licensing?*
Karen: *Absolutely. My reputation in this industry is everything. I wouldn't want my name associated with something that became known for enabling unethical practices. I want this to elevate the profession, not give tools to the wrong people. That's partly why I came to you—to figure out if and how I can maintain that kind of control.*
Attorney: *What's your timeline for pursuing protection and potentially commercializing this? Is there any urgency driving your decisions?*
Karen: *I'd like to move fairly quickly. Word travels in our industry, and once people hear what I'm doing, someone with more technical resources might try to create something similar. I've invested about eight months developing this already.*
Attorney: *Those are important considerations. What would success look like for you in a year or two with this software?*
Karen: *In an ideal world, I'd have it protected legally, be using it to grow my client base significantly, and maybe starting to license it to select colleagues for additional income.*
Attorney: *One more question about your goals—how important is confidentiality regarding this software? Are you concerned about keeping the methodology proprietary versus having to disclose details through the patent process?*
Karen: *I hadn't thought about that. What do you mean exactly?*
Attorney: *When you file for a patent, you disclose how your invention works, and that information becomes public. The trade-off is that you get exclusive rights for a limited time period. An alternative is keeping it as a trade secret, which means protecting it through confidentiality but not having the legal monopoly a patent provides.*
Karen: *I see. The algorithms are really what make it special. I wouldn't want competitors to see exactly how I'm analyzing the data, even if they can't legally use the same method.*
Attorney: *Thank you for that clarification. Let me summarize what I'm hearing about your goals to ensure I understand correctly. You want to protect your software from competitors in the financial advising industry. This is giving you a competitive edge right now and that business advantage is important so you would like to move relatively quickly to secure protection. You have some concerns about disclosing the system, primarily because you are concerned about the potential for exploitation. So while you are interested in potentially licensing the software to others as a significant source of income, you would want to do so in a way that would allow you to have some kind of mechanisms that might allow monitoring and enforcement of proper use. Is that an accurate representation of your priorities?*
Karen: *Yes you've got it exactly right.*
Attorney: *Thanks. I want to raise one other aspect that we haven't discussed. You mentioned that you have been using the software for several months now and that you haven't explicitly told your clients about this tool and how you use it. I know that you said that you had discussed the program with my partner Jeri when you were first developing the program about how your use is affected by privacy laws and financial regulations. Is that a continuing concern we need to address as well?*
Karen: *No I'm pretty confident about that. Jeri and I went over that pretty thoroughly and I got the green light before*

I started using the software. In fact it was that discussion that really got me thinking about how others might misuse the software. Jeri recommended me to you, since she said she's not an expert on protecting property rights in software programs.

Attorney: *Excellent. Based on what you've shared, I think we need to explore several avenues. let's discuss the different intellectual property protection strategies and their trade-offs….*

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=49#h5p-36

3. Using values to clarify goals

Understanding the values that underly a client's objectives can be as important as understanding the objectives themselves. Our moral frameworks shape our own and our client's choices. Modern moral psychology provides insights into the cognitive, emotional, and motivational factors that shape our moral frameworks. Drawing insights from various disciplines, including neuroscience, evolutionary psychology, and cultural psychology, Dr. Jonathan Haidt and his colleagues have developed important theories based on their research on how individuals arrive at moral judgments.

Moral Foundations Theory[2] proposes that morality is based on a set of innate psychological foundations that shape moral intuitions and judgments across cultures. Their research, which continues to evolve, currently identifies a set of basic values that all humans have as templates from birth. Our experience, education, and upbringing then shape those templates, giving greater or lesser emphasis to one or more of these values. Each of these values can be identified by the language used to describe a situation as well as by the emotions a client might exhibit in reaction to a situation in which the value is honored or disrespected.

The following chart summarizes these values, along with the emotions associated with situations in which one perceives the value being upheld and being violated.

2. JOHNATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2012).

Value/Violation	Emotions when expressing the value	Emotions when experiencing violation
Care/Harm Concerned with caring for others (especially vulnerable individuals) and protecting them from harm	Empathy and compassion	Concern or distress
Fairness/Cheating Concerned with fairness, justice, and reciprocity.	Gratitude or satisfaction	Anger or indignation
Loyalty/Betrayal Concerned with loyalty to one's group, family, or community	Pride, patriotism, belongingness	Anger, betrayal, moral disgust
Authority/Subversion Concerned with respect for authority, traditions, and hierarchies	Respect, obedience, awe, security	Resentment, defiance, contempt
Purity/Degradation Concerned with maintaining physical and spiritual virtuousness and minimizing the degradation and deviance that could threaten social order	Sanctity or elevation	Disgust or revulsion

Other values have been suggested as part of the innate frameworks. These include Liberty or Autonomy, with the violation of this value being expressed as oppression. Emotional reactions may include feelings of indignation or outrage when freedom is restricted, and feelings of liberation or empowerment when freedom is protected or achieved. Two other frequently suggested values closely related to equality are proportionality and equity.[3]

Of course, the relationship among these values is not so neatly categorized in individuals. Moral judgments and behaviors often involve a complex interplay of multiple moral values and emotional reactions. Moreover, researchers debate the validity of these categories or their ability to predict behavior or decisions.[4] However, we need not resolve these debates to find the framework useful as a tool for understanding and communicating with others. It can be helpful in interviewing a client to take some time to explore how a client might be engaging one or more of these values—consciously or subconsciously—in making judgments and choices.

A single problem can be framed through many different value lenses. Understanding your client's moral framework can aid communication and can be important in identifying the client's interests. Understanding your own moral frameworks is equally important, especially when your moral framework differs from that of your client. Moral psychology researchers have developed tools to help you to better discern your value orientations.[5] Whether through these tools or simply through self-reflection and dialogue, understanding value orientations can help you to better understand and frame a client's concerns or goals and can be a valuable tool for generating and communicating options for solutions.

3. Chris Skurka, et. al, All Things Being Equal: Distinguishing Proportionality and Equity in Moral Reasoning, 11:3 SOC. PSYCH. & PERSONALITY SCI. 374 (2020). https://doi.org/10.1177/1948550619862261
4. For example, the category of "purity" in particular has been criticized as a specific moral domain because it is too loosely defined and separate from other values in that it does not include interpersonal harm. Kurt Gray, et. al, The Problem of Purity in Moral Psychology. 27:3 PERS SOC PSYCHOL REV. 272 (Aug. 2023) doi: 10.1177/10888683221124741. These same authors have argued that the relationships between values and emotions are better characterized as overlapping circles rather than directly linked associations. Kury Gray, Chelsea Schein, & C Daryll Cameron, How to think about emotion and morality: circles, not arrows, 17 CURR OPIN PSYCHOL. 41 (Oct. 2017) doi: 10.1016/j.copsyc.2017.06.011.
5. https://yourmorals.org.

Check your Understanding

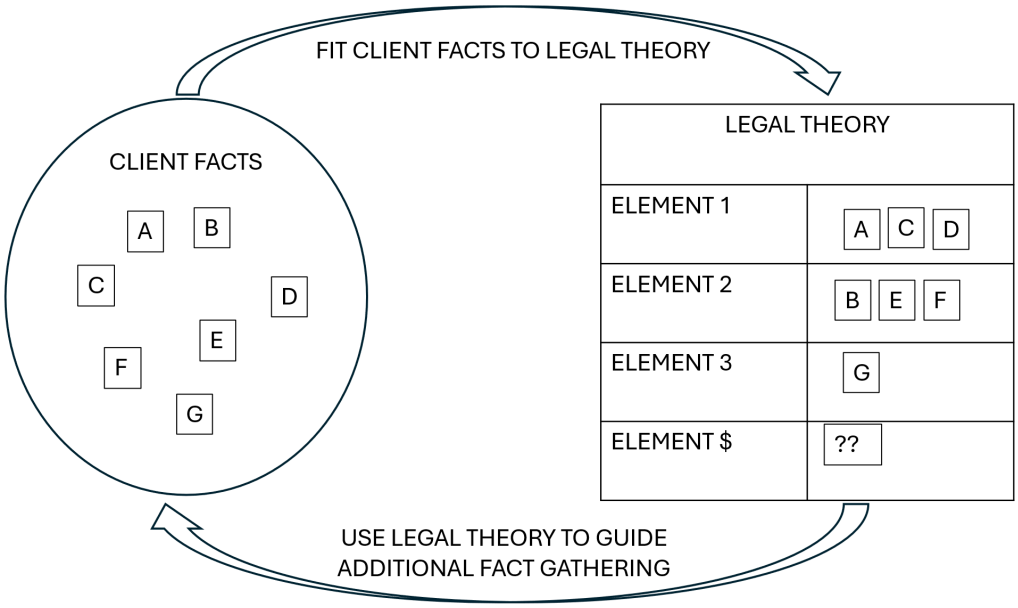
Your client has a dispute with a contractor over the installation of an air conditioning system in the client's home. While the attorney may view this as a breach of warranty or negligence, the client might express their concern in value-laden terms. See if you can identify the value the client likely feels has been violated.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=49#h5p-37

As you listen to a client's description of their situation, be aware of your own value lens so that you can avoid making assumptions about shared values that will interfere with your complete understanding of the client's goals.

C. How do you translate the client's facts into a legal framework?

At the same time that you are gathering a basic set of facts regarding the prospective client's situation, you will have begun to build a preliminary legal theory regarding those facts. The relationship between information gathering and legal analysis is not linear but cyclical. The questions you ask will be guided in part by your preliminary ideas about the possible legal issues; the possible legal issues you identify will then lead you to ask additional questions. This iterative process will continue throughout the representation as you translate facts into legal categories and that translation then leads you to search for new facts, which in turn may cause you to revisit your initial legal theory.



1. Issue spotting in the initial interview

In some ways, the initial client interview is like a traditional final exam. In both settings "issue spotting" is a core function of the attorney. Unlike law school exams, in an initial client interview you will not necessarily know in advance the area of law that the client matter will require, nor will you be given all legally significant facts in a neat package. Two of the most important transition-to-practice skills you must develop are the ability to identify relevant issues through the lens of many different areas of law and the ability to apply those legal principles to uncertain and undeveloped facts. Indeed, the NextGen bar exam emphasizes this skill by introducing "integrated question sets" that ask you to apply different areas of law and skills to a single problem and includes questions about fact investigation and research necessary to address that problem.

As you specialize your practice, most of your clients will bring you familiar legal problems. A domestic relations attorney will likely be focusing on the application of divorce or custody statutes. An estate planning attorney will give particular attention to the law of trusts and estates. A state public defender will be focusing on criminal law. However, even in specialized areas of practice, attorneys cannot assume that they know a prospective client's legal issues before having thoroughly gathered the facts. The domestic relations client who seeks a divorce may also have tax, immigration, debtor-creditor, criminal law, or tort issues. The concerns of the owner or director of a company regarding their entity may include personal concerns for themselves as an owner. You must be able to spot the issues that are within the scope of your representation but also be able to identify those legal issues that may be present but that you will not address. The United States Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010) held that that a criminal defense attorney has violated that client's Sixth Amendment guarantee of effective counsel if the attorney does not advise their noncitizen clients that there may be potential immigration consequences of accepting a guilty plea. This is but one example of the many times that you must know enough about the law in general to recognize potential additional legal issues that may be outside the scope of your representation.

To translate your client's facts into a legal framework in litigation, you will need to determine whether and how those facts can serve as evidence to prove each required element in a legal proceeding. Similarly, in a transactional matter you will need to consider how these facts can be incorporated into agreements and policies to achieve a specific transactional goal. Preliminary legal analysis is a necessary step not only for gathering relevant information, but for determining whether you can help your clients achieve their goals in a manner and at a cost acceptable to them. In litigation, you must help the client determine whether there is a substantive claim or defense. In a transactional matter, you must determine what agreements or structures can best meet your client's objectives.

In conducting this legal analysis, you should ask three basic questions:

What laws apply? In the first year of law school, we learn that the law is divided largely into civil (torts, contract, property) and criminal law and we learn to read cases to identify the legal principles in these areas of law. However, much of the law that attorneys apply in their day-to-day practice is far more often statutory or administrative. Procedural law issues, such as filing or registration procedures, or statutory deadlines or limitations, can be the most critical aspects of a matter. You may not be able to gather all the necessary facts in the initial client interview to be able to complete your legal analysis; yet you will need to decide whether to represent a client in the face of this uncertainty. For this reason, you must be sure that you understand the client's core problem, interests, and goals. You must be able to develop a sense for whether you are likely to be able to help the client, even though you will be uncertain about how the case or transaction will develop.

What jurisdiction? International, federal, state, and local laws can all apply to a client's matter. Overlooking the jurisdictional aspects of a client's matter is an easy step on the road to malpractice.

What solutions? Most clients do not usually care about the finer details of the doctrines that apply to their matter. They do care deeply about the outcome, however. Some outcomes the legal system can provide more readily than others. Accordingly, you need to understand well the opportunities and limitations of the law in solving problems and be able to help your prospective clients to understand these as well.

If a client is involved in litigation, the available remedies will as often as not determine whether to pursue a

lawsuit or a settlement. Legal remedies, whether in civil suits or criminal cases, amount to two types of solutions. One solution is to require a wrongdoer to pay money, whether damages judgments in civil cases or fines in criminal cases. Money is nearly always merely a substitute for the actual harm an individual or society has felt. (The exception is when the harm is a loss of money—such as a theft—and the remedy is a return of that money.) Money cannot reverse the harm itself.

The other solution a legal system can provide is compulsion. In civil suits, courts can order parties to do or refrain from doing something through equitable remedies such as injunctions. In criminal matters, a court can order that an individual be paroled (perhaps with service or treatment obligations), incarcerated, or executed. These are powerful remedies, but they are not easily obtained. On the civil side, courts will not grant equitable remedies unless an order is necessary to remedy an irreparable harm that a damages judgment simply cannot begin to repair. Securing criminal penalties of incarceration or death requires overcoming substantial constitutionally guaranteed protections.

The bottom line is that the law is a blunt instrument to solve the myriad matters clients bring to their attorney's offices. A wider variety of solutions may be crafted through negotiation or other alternative dispute resolution processes. Some clients can use self-help to address disputes; others should never turn to do-it-yourself solutions. Sometimes the greatest assistance you can provide a client is to give them hard truths about their options.

On the transactional side of practice, business clients want to accomplish their goals and are less concerned about the details of how the law will get them there. Transactions offer complex relationship questions. The law provides default rules for many of these questions and attorneys in these areas need to help their clients make the decisions about how much certainty they desire, how much customization they need, and how many transaction costs they can afford to get to that certainty and customization. Likewise, attorneys assisting clients with compliance issues face similar questions of scope and cost in selecting services.

Much of the legal analysis you will conduct during a client interview and counseling session is not something that you will share with the client explicitly. However, this ongoing legal analysis is essential to complete fact gathering and effective counseling.

2. Naming, blaming, and claiming

An attorney thinking about how the client's facts translate into specific legal rights and obligations will necessarily also be thinking about the scope of their possible representation regarding those rights and obligations. This is especially so when a client brings a dispute to the attorney's office. The attorney can play a powerful role in shaping the nature of the legal matter that the client is facing. Over forty years ago, Professors Bill Felstiner, Rick Abel, and Austin Sarat published a highly influential framework for understanding how disputes emerge and transform.[6] They described this process as a process of "Naming, Blaming, and Claiming." *Naming* occurs when someone realizes that they have been hurt. They then may turn to *Blaming* another party or cause for that injury. Finally, *Claiming* occurs when the person asks that third party for remedy. If the remedy is refused, a dispute emerges. The framework views each stage as subjective, unstable, and incomplete. When a client comes to an attorney with a dispute, the attorney must revisit this process with the client through the lens of the law.

First the attorney must assist the client in naming the problem or grievance. The client must name the loss they fear or the gain they hope to achieve through the representation. The attorney then reframes the client's concerns in legal terms or as a potential legal issue. The attorney may broaden or narrow how the client names their injuries. The attorney will assign legal categories to the client's problem or injury. This process may broaden or narrow the client's

6. W.L.F. Felstiner, et. al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming…" (1980-81) 15 L. & SOC'Y REV. 631.

matter. If the law provides multiple ways of characterizing a right or wrong, the attorney and client must determine which of these theories best meets the client's goals.

The law also may lead the client to reframe the nature and extent of their injury or consider the extent to which others share the same injury. For example, a client may be focused solely on their immediate injury and not recognize longer-term losses. A client may be focused on solely emotional harms without considering financial implications or vice versa. What losses has the client incurred or allegedly caused? What wrongful gains might have resulted from the wrong? Who else might have been injured who might support or compete with the client's claim?

For example, suppose your client is a farmer who believes that their neighbor has intentionally discharged environmental waste onto the client's land. The law may classify the chemical that was dumped as toxic waste or perhaps the injury would be better characterized as simply a nuisance or trespass. The legal characterization will require framing the client's losses. The farmer may be focused on the costs of his own single crop failure. However, the attorney may ask the client about the costs and risks of an on-going threat of environmental damage, the psychological and aesthetic losses of damaged land, or the profits the tortfeasor made by not having to dispose of their chemicals properly. The attorney might consider whether the client's injury is part of a collective injury to all the farmers downstream from the spill. The client's injury alone may not be financially significant enough to justify legal action. That calculus may change if the client's losses are aggregated with others who have suffered the same or similar injuries. As you can see, then, by naming who has been injured and how they have been injured, the attorney can substantially narrow or broaden a client's matter.

Second, through the blaming process, the attorney and client will consider who or what is responsible for the client's current or future injuries. From a legal perspective, this means considering the possible targets for claims for remedies. Here, too, the attorney may cause clients to revisit their initial targets for responsibility for injuries. Sometimes the client may not know whom to blame. Sometimes the client has a target, but that target isn't necessarily the only or best target for getting a remedy. In this process of assigning blame, the attorney may lead the client to narrow, broaden, or change the target to be blamed.

For example, a litigation client may want to bring an action against someone who is unlikely to be able to satisfy a judgment, not recognizing that others may bear equal or greater responsibility for the injury and also may be in a better position to provide a feasible remedy. Reframing the dispute to target individuals or entities with significant wealth or insurance coverage can be a legitimate counseling strategy, assuming, of course, there is a reasonable basis to believe that the targeted party bears some legal responsibility for the harm. If a party is included in a lawsuit solely because of their financial resources, without a legitimate legal claim, this can lead to sanctions or penalties against the attorney and the attorney's client. In our environmental tort example, the farmer might blame the company that dumped the chemical. Yet it may be that the chemical producer is a better target in terms of financial recovery, or the EPA is a better target in terms of getting some clean-up assistance.

Just as an attorney may broaden the range of individuals in this blaming process, so too, an attorney may narrow the client's targets. It is not uncommon for clients to have blamed individuals or entities for which there is no legal recourse available. Attorneys in these circumstances must dampen their clients' unrealistic hopes.

Third, the attorney and client will together consider how they might make a claim against those blamed for the injuries named. Even if there are feasible legal claims against multiple targets for a range of different injuries, an attorney may focus their client's attention on the most critical issues or strongest claims, thereby narrowing the dispute. Attorneys might encourage clients to settle disputes out of court or use ADR methods like mediation or arbitration, which can limit the scope and intensity of the conflict.

While the Naming, Blaming, and Claiming model focuses on disputes that could result in litigation, the same framing of goals, parties, and strategies can apply to transactional matters. When assisting a client with future planning or negotiations the client must still name their outcome or goal that they hope to achieve. This might be a financial target or a relational or reputational gain or repair, or even simply a clarity of position. In counseling the transactional or compliance client, this process of "naming" focuses more on potential future gains and losses rather than the past. The tax clients may want to know how to structure their business or personal finances to avoid or minimize future tax liability. The estate planning client may have similar tax interests but may have even greater interests in avoiding

probate, ensuring that their final wishes will be respected, or reducing conflict after their death. The business client may be seeking ways to secure gains and stability as they structure their business, protect their trade secrets, manage their employees, and more. The attorney will need to clearly identify the client's goals to know whether the attorney can realistically assist the client.

Likewise, in a transaction, the client may have a preliminary idea of where, how, or who should be involved in their plan, but may have overlooked other individuals or avenues to achieve their goals. Counseling the client means helping the client to recognize and think through this planning process. The process of translating the client's facts into legal frames can broaden or narrow the planning process, just as it can broaden or narrow a dispute. Especially in transactional matters, narrowing a client's matter generally simplifies and speeds up the transaction, focusing on specific goals, whereas broadening can protect clients' broader interests and provide more comprehensive strategic benefits. Attorneys must carefully balance simplicity and expediency against thoroughness and risk management based on each client's unique circumstances.

The power of an attorney to influence how a client frames their legal matters is one that is rife with the opportunity for self-dealing. Unethical attorneys can aggravate rather than resolve disputes in the interests of generating fees. Likewise, attorneys might unduly narrow a matter in order to make their representation possible rather than needing to refer the client elsewhere or bring in co-counsel. These personal influences may not even be conscious choices but simply the blinders of self-interest that we all carry with us if we do not stop to consider an outside perspective. Accordingly, in translating a client's matter through a legal lens, you must always thoughtfully consider how your own interests intersect with the client's interests and ensure that you are maintaining the proper balance of authority and decision-making.

When reframing a client's matter, attorneys must thoughtfully choose whether narrowing or broadening better aligns with the client's emotional, financial, and practical short-term and long-term goals. Narrowing a dispute may expedite resolution and minimize client stress, while broadening could maximize compensation, accountability, or broader systemic change. Similarly, narrowing a transaction may permit a client to capitalize on near-term opportunities and efficiencies while broadening the transaction may minimize long-term risks and avoid opportunity costs.

Consider a client who characterizes their matter as "*My husband died in a car accident when a drunk driver crossed the median and crashed into him.*" How might an attorney narrow the injury (naming), the parties (blaming), and the method of relief (claiming)? Consider these examples:

- **Narrowing the injury:**
  "We might narrow the claim to focus specifically on the wrongful death claim, clearly defining damages directly linked to your husband's death, such as funeral expenses, loss of income, and emotional distress directly resulting from the loss."
- **Broadening the injury:**
  "In addition to the wrongful death claim, we might include a claim for punitive damages due to the driver's reckless conduct, potentially increasing the compensation you might receive."
- **Narrowing the parties:**
  "We could focus solely on suing the drunk driver who directly caused the accident, particularly if the driver's fault is clear and liability insurance coverage is adequate."
- **Broadening the parties:**
  "We could examine whether other parties contributed to the accident—for instance, the bar or restaurant that served the driver alcohol (dram shop liability), the city or state if road safety measures were inadequate, or the vehicle manufacturer if vehicle safety features failed."
- **Narrowing the method of relief:**
  "We might seek relief strictly through settlement negotiations or mediation to achieve a faster resolution and minimize emotional distress for your family."
- **Broadening the method of relief:**

"We might pursue both civil litigation and advocacy through public forums or legislative channels to push for tougher DUI laws or improved roadway safety to prevent similar tragedies."

Skills Practice

Complete this same exercise for the following clients:

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=49#h5p-38

Self Evaluation

Review this chart on the components of effective interviewing behaviors. Download a PDF of the chart. Rate yourself on a scale of 1-3 for each:

Ineffective	Effective	Rating
NON-VERBAL BEHAVIOR		
Listener looks bored, uninterested, or judgmental; avoids eye contact; displays distracting mannerisms (doodles, etc.).	Listener maintains positive posture; avoids distracting mannerisms; keeps attention focused on speaker; maintains eye contact; nods and smiles appropriately.	
FOCUS OF ATTENTION		
Listener shifts focus of attention to self: "When something like that happened to me, I…." (Attention focused internally, thinking how you would feel, respond, etc.)	Listener keeps focus on speaker: "When that happened, what did you do?"	
ACCEPTANCE		
Listener fails to accept speaker's ideas and feelings: "I think it would have been better to…"	Listener accepts ideas and feelings: "That's an interesting idea, can you say more about it?"	
EMPATHY		
Listener fails to empathize: Ignores emotions or concerns; assumes rather than exploring; expresses judgment ("I don't see why you felt that…")	Listener empathizes: "So when that happened, you felt angry."	
QUESTIONING TECHNIQUE		
Attorney interrogates clients or uses question forms in haphazard fashion. Attorney closes information gathering prematurely and uses primarily closed-ended and leading questions.	Attorney uses questions most appropriate for purpose and client, asking about one topic at a time. Attorney prefers open-ended questions to gather information and direct or closed questions to facilitate disclosures, explore gaps or inconsistencies, or check understanding.	
PROBING		
Listener fails to look for gaps or inconsistencies, fills in with assumptions, or fails to follow up and probe for details.	Listener probes in a helpful way (without cross examining client): "Could you tell me more about that? Why did you feel that way?" "A few minutes ago you said…"	
PARAPHRASING		
Listener fails to check the accuracy of communication by restating in his own words important statements.	Listener paraphrases at the appropriate time.	
SUMMARIZING		
Listener fails to summarize.	Listener summarizes the progress of the conversation at key transitions and asks for confirmation.	
STRUCTURE AND SIGNPOSTING		
Attorney fails to structure questions in a logical fashion or communicate that structure to the client.	Attorney organizes fact gathering in a way that effectively gathers critical details and communicates to the client when moving from one topic to another.	

Rate yourself on each of the components. Ask your classmates to observe an interview and provide a rating. Develop a plan for improvement.

Chapter Seven Endnotes

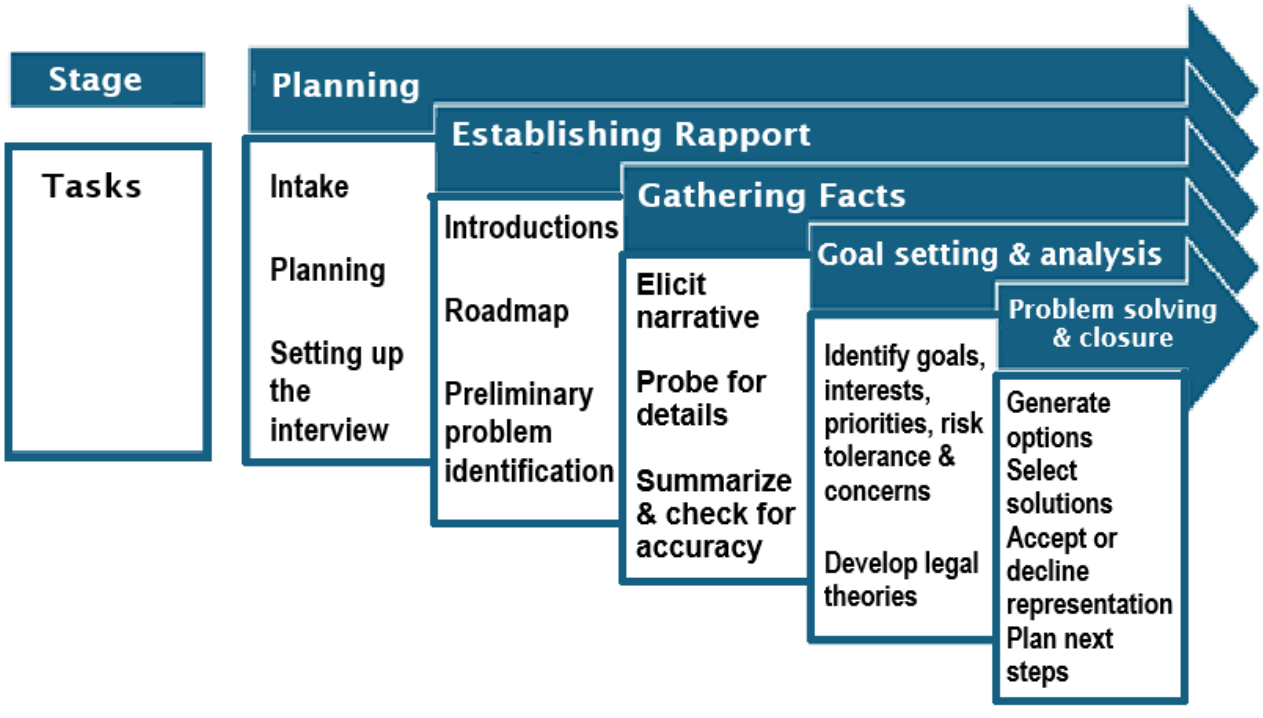
Chapter Eight – Client Counseling

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Educate a client about legal rights and responsibilities as appropriate to the circumstances.
- Based on the facts of a client's matter, identify options about how to proceed that consider the legal, financial, and social consequences for the client, including giving bad news to the client.
- Identify and manage cognitive biases that affect decision-making.
- Assist the client to develop a preliminary approach to addressing the matter, including managing uncertainty and risk.

This chapter turns fully to the counseling function. While counseling is often a minimal part of the initial client interview and nearly always is elaborated upon as a representation proceeds, attorneys typically provide some preliminary counseling even when they decide not to represent the client. This chapter explores a perspective and framework for that counseling along with the skills necessary to assist clients in generating and selecting solutions.



Pre-reading Reflection

Just as you already have experience with interviewing, whether in job interviews or asking for directions, you also likely have engaged in counseling (or being counseled). Perhaps you are the friend others seek out for advice. You

likely have an adult family member or trusted friend to whom you turn for guidance. If you are a parent, coach, or youth leader, you regularly provide advice and direction, just as your own parents, teachers, and employers do for you. Each one of these relationships encompasses one aspect of counseling or one perspective on how one could perceive and understand the counseling relationship. Think about a time when you have counseled someone or someone counseled you in addressing a problem. What was especially helpful in that process? What was frustrating or counterproductive?

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-40

A. Counseling as facilitated problem-solving

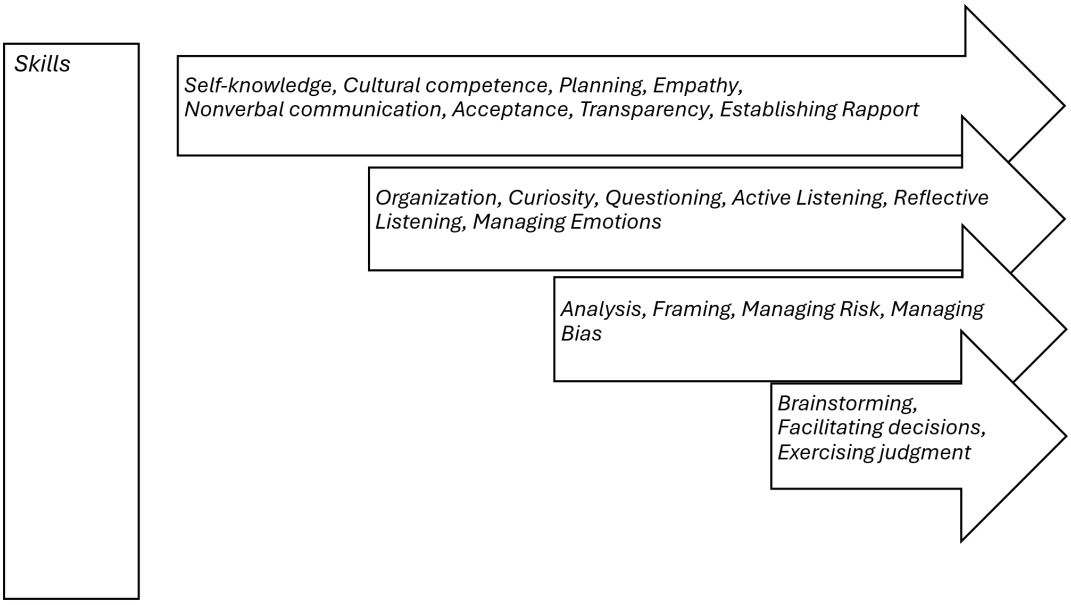
Earlier, you considered the range of models of the attorney-client relationship—from directive to deferential. These are especially important models to consider when thinking about the counseling function. How much do you consider yourself morally responsible for your clients' choices? How much will you engage them in choosing the means to achieve their objectives? Depending on the community of practice you ultimately select for your career, you will develop and refine your own philosophy and approach to counseling. For purposes of learning the skills required for any approach, we treat counseling as a form of facilitated problem-solving, and we believe that a collaborative approach is the most useful and appropriate way to begin your journey toward becoming a counselor at law. The philosophy we adopt regarding the counseling process is one that places a priority on respect for the autonomy of the client. Clients are the ones who will have to live with the consequences of their decisions. They are the people who must subjectively define the constellation of interests that they hope to satisfy by their decision. Accordingly, we suggest that you should be circumspect about engaging in an authoritarian approach to facilitating problem-solving by a prospective client or client.

At the conclusion of the initial interview, you will often already have begun to counsel the prospective client—to facilitate their effort to decide whether and how to try to solve a problem. In some instances, you will provide very little counseling. Perhaps you have concluded that the prospective client is someone you cannot or do not wish to assist. In those instances, your "counseling" is similar to that you would give to any unrepresented person—that you do not represent them and that they should not delay seeking out other assistance. At the other end of the spectrum are those situations in which it is clear that you and the prospective client will continue to work together. This may be because you have been appointed to represent the client or the client's legal needs are clear and are within your area of expertise. In these circumstances, your counseling may be limited to the process of engaging the prospective client and agreeing upon the scope of the representation, reserving more focused problem-solving for a separate counseling session.

Many initial interviews fall in between these extremes. For example, the prospective client may need to have a better idea about the possible solutions for their problems before they can decide whether to engage your services. Alternatively, you may wish to assist the client in evaluating options even though both of you recognize that the prospective client is not ready or able to engage your services for broader representation. Whether in the initial interview itself, or in a subsequent meeting, you will move out of the interviewing process and into the heart of the counseling process.

The counseling process includes several types of assistance. As we discussed in the prior chapter, the attorney first assists the client in clarifying interests and goals and places the client's problem in a legal context. This chapter focuses on the remaining steps in the counseling process. First, the attorney must educate the client regarding the relevant law. Next, the attorney must work with the client to generate potential approaches to achieving their goals,

generally with the perspective that a wide variety of potential "solutions" should be put on the table (rather than a narrow set of potential "solutions"). The attorney then assists the client in evaluating the various approaches to achieving the goals. Finally, the client chooses among these alternatives—generally choosing the solution that they perceive to be most likely to satisfy the widest range of their various interests. The skills we have been developing thus far (building trust, effective questioning, active and reflective listening) are all critical in the counseling process. However, you will need to use some additional skills in this process as well. These include framing the matter, managing risks and biases in decision-making, brainstorming solutions, facilitating a decision-making process, and exercising independent professional judgment in advising the client.



This text focuses on the initial client interview. Of course, neither you nor your client will fully understand the more nuanced nature of the client's matter as a result of the initial interview alone. The counseling process is one that is a continual process of conversations throughout the representation. You will need to think creatively through ways in which to gather necessary additional information as economically as possible. This process of applying the law to the known facts and identifying the key unknown facts that need to be gathered is one important way that you will add value to the client's efforts to achieve their goals.

As you gain a richer set of facts, your counseling may change over time. Your client may have neglected to share with you or may have forgotten to describe some aspect of his situation that suggests the matter is more or less complicated than it first seemed. Indeed, there may be specific information you have asked the client to bring forward—a contract, some correspondence, a written chronology of events—that reveals new information that places the client's issues in a different light. During litigation, you may discover that the opposing party disputes the facts or has filed a counterclaim. You must then help your client both prove their claims and defend against the opponent's claims. Your business client may be operating in a fluid environment where market or financing changes may affect the client's options or objectives.

Thus, one key component of the facilitated problem-solving process involves ongoing investigation, analysis, and communication. Ongoing investigation can take many forms. You may recognize that the client has documents, photographs, or other potential evidence that could shed some light on the matter. You may realize that it would help if the client or you could contact the client's friends, acquaintances, or coworkers to gather additional information. You may understand that there is legal research that needs to be done on nuances of the law as it relates to the client's situation. This ongoing fact gathering will in turn require additional legal analysis and research.

You can see that this is a recursive process. As you gather additional information, it will impact your understanding of the nature of the client's problems—what seemed to be the presenting problem may become less significant in light of a different problem that has arisen. This new information (or sometimes just the passage of time) also may affect the goals and interests the client hopes to achieve. This is one of many reasons why it is important to remain in frequent dialogue with the client—to make sure that you and your client continue to agree on objectives and means of achieving those objectives.

Although counseling in initial interviews is minimal and tentative, it remains essential. Both you and the client must understand the client's goals and the scope of potential solutions before deciding whether to work together.

B. How do you best educate clients about the law?

Once you understand the nature of the client's facts, goals, and interests, you can begin to discuss possible means to achieve the client's goals. Often, the first step in counseling a prospective client about possible representation is to educate the client about the legal aspects of their matter. As we have seen, for a client to make an informed decision about whether to engage your services, you must translate your legal analysis into information about legal rights, obligations, and options. However, attorneys often do a poor job in providing this information. According to a 2018 CLIO legal trends report, 40% of clients report feeling frustrated during meetings with their attorneys, whereas only 8% of attorneys estimate that their clients are frustrated.[1] One significant contribution to that frustration is that attorneys do not effectively educate their clients.

It is easy to underestimate how little your client knows or understands about the law. This is one of the many reasons why one of the early questions in an interview is "Have you ever worked with an attorney before?" The client's answer will help you assess their understanding and misconceptions about the law.

Even very sophisticated corporate clients need and want legal expertise and explanations. Often corporate law firms approach prospective clients rather than clients seeking out their services. In these communications, firms distinguish themselves not only based on their experience with similar matters, but by presenting legal information regarding possible strategies, costs, and timelines.

> In the past, clients learned to select legal teams based on recommendations from colleagues and associates. Things are different now. "What is changing more rapidly is how cases are being assessed and how outside counsel are being selected," explains Oscar Romero, general counsel at Veristor Systems. "It is no longer relationship-driven, but who can most successfully handle this matter in this courthouse in front of this judge.[2]

Tailor your explanation to your audience. Attorneys often overestimate their client's ability to understand legal explanations. No matter who the client is, strive to use plain language to explain legal concepts. Try to remember what you didn't know before you went to law school. It's astonishing how quickly law students become fluent in law, but it is perhaps even more astonishing how knowing legal language displaces the everyday understanding that preceded that education. Avoid abbreviations or legal terms. Don't assume a client understands that a "plaintiff" is "someone who sues someone" or that "the court" means "the judge." Even less should you expect that a client will understand that negligence is "per se" or that a contract contains a "force majeure" clause.

Be especially careful to recognize that your client might not understand words that have a different meaning in law than in life. A criminal defense client may interpret advice that they shouldn't "make a statement" to mean that they

1. CLIO, 2018 Legal Trends Report. https://www.clio.com/resources/legal-trends/2018-report/
2. Nicole A. Clark, How Attorneys Are Shoring Up Client Research for the Perfect Pitch, L. TECH. TODAY, July 18, 2024. https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2024/how-attorneys-are-shoring-up-client-research-for-the-perfect-pitch

shouldn't sign a written document. They may not understand that the advice means "don't say anything to anyone." The state statutes might call your client's legal process a "dissolution of marriage" but to most people that is a "divorce." "Motion" means "movement" to someone without the legal training to translate that word into "a request to the judge to make some kind of ruling or order in a case." Telling your client that they don't have good "title" to a piece of property will leave them wondering how that can be if they have a copy of a deed in their name. Remember how hard you labored in your first year to learn the legal meanings of everyday words like owner, intent, reasonable, etc.

Proceed slowly, checking often for understanding. Remind your client that law is complex and that you want them to stop you and ask for clarification if they don't understand. Try to avoid asking closed questions to assess client understanding. If you ask a client, "Does that make sense?" or "Do you understand?" your yes/no question may result in the client telling you "Yes" even though the more accurate answer is "No." The client may not want to be perceived as ignorant or may simply not want to slow down the proceedings, thinking that the question suggests they should understand. To avoid this type of "false positive," in which the client tells you they understand when in fact they are still confused, you can ask the client to explain how they understand the law you have just described to them. This is a form of "reverse reflective listening" that allows you to assess whether the client actually has an accurate understanding of the law as you have described it. Follow up with "What questions do you have about this?"

Keep in mind that the client does not need to know everything that you know about the law in order to make an informed choice about hiring you. You need to provide enough information to build the client's trust and confidence without overwhelming them. Most doctors today provide patients with "after-visit" notes and instructions. Attorneys too can use written materials during and after the meeting to help reinforce or amplify explanations. In today's legal environment, many clients will have already consulted internet sources to read about their legal issues. They may have talked to friends or family about their matter. Part of the education function then may first consist of "unlearning" some of the misinformation or gross generalizations they bring to the counseling session.

You must not only educate the client about their rights and obligations but about the legal processes required to secure those. Explain the steps in the legal processes that might be engaged to meet the client's goals. Use visual aids. Assess your client's interest in details of process to guide how much explanation you provide. In every case, be sure to explain that as time passes and new information emerges, the client will be given an opportunity to revisit their assessment of the matter and that the possible solutions or approaches may change. This counseling is particularly important in managing the client's expectations.

At this stage in the interview, you will need to revisit issues of costs, timing, and outcome. You will rarely be able to provide definitive information about any of these. However, you can help the client understand what factors will affect these aspects of the representation. You should explain that each of these variables can change if facts change.

Skills Practice

Suppose that a client has come to an attorney wanting to open a restaurant. Client asks the attorney, "Is there a way I can make sure I won't lose my house if something goes wrong?"

Consider the attorney's initial response:

Attorney: *Protecting your house is only one of several operational, tax, and liability implications of entity selection. Your choices are basically a sole proprietorship, an LLC, an S-corp, or a C-corp. Now, mitigating personal liability, which is what I understand is your primary concern, necessitates an entity structure that creates a legal separation between your personal assets and the business. A sole proprietorship—default treatment absent formal entity formation—would provide no such insulation, rendering you personally liable for all debts and liabilities under the doctrine of unlimited personal liability. In contrast, if you opt for an LLC, governed by the Revised Uniform Limited Liability Company Act* (RULLCA), *or a corporation formed under the Model Business Corporation Act* (MBCA), *you can avail yourself of limited liability protections.*

Client: *…Can you say that again in English?*

Try to improve on this attorney's obtuse obfuscation by preparing a plain English version of this explanation before comparing your answer to the one on the second page of the exercise. Note: this is where generative AI can be a helpful tool in writing to clients. You could cut and paste this paragraph into an AI agent and ask it to rewrite the paragraph in plain English. You could then check the rewritten content for accuracy and completeness. However, in an in-person conversation with a client, you do not have the leisure of editing (with an AI tool or otherwise) but must have the skill of "translating" legal terms in a way that your client can understand. Explaining complex legal concepts to lay people is not easy. Try to translate the attorney's explanation yourself and then compare to this more plain-spoken attorney's attempt to explain the business entity choices to this client.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-41

Helping a client understand legal categories requires more than just plain language. Even when explained clearly, some clients may be reluctant to accept the explanation given. Consider a divorce client who is told that any property he currently owns is considered "marital property" and must be listed as such in a divorce petition. The client may object, "But my name is on the title!" or "But I bought it!" or "But we already divided our property and she agreed that this was mine!" It will take patience to help the client to understand that the way the law characterizes their property may not align with their expectation about how that property should be characterized. The attorney will need to not only explain the meaning of "marital property" but the significance of that characterization for the client's ultimate goals in the divorce.

How you frame legal issues can be critical to the client's willingness to explore these topics. For example, business clients often view attorneys as "deal killers" because of the tendency to focus on potential problems in a transaction. As James Freund, a professor and retired partner at Skadden Arps in New York, points out, "In a transactional practice, nothing comes easy. There are invariably two opposing points of view on significant issues, and the parties will even clash… over a circumstance that may never come to pass. Every disputed issue has to be resolved in order for the deal to take place. And the business lawyers bear the primary responsibility for getting it done. Viewed in its broader context, this activity falls under the rubric of problem-solving. Unless you're a problem solver, you're unlikely to be an effective business lawyer. And the problems that stand in your way aren't limited to transactional matters… they can involve dealings with regulatory agencies, tax planning, strategizing about how to protect intellectual property, and on and on."[3] Entrepreneurs may quickly become frustrated with the attorney whose approach to explaining the law is a litany of barriers and obstacles rather than a more positive frame. Regardless of the reason for a client's frustration, you must have patience and empathy if you are going to help them to understand their rights, obligations, and options.

The stress of meeting with an attorney can make it difficult for a client to listen and remember an attorney's explanations. Many attorneys use written or electronic resources to help their clients understand the legal aspects of their matter. This might be in the form of a follow-up letter repeating some of the information provided. Depending on the matter and the client, you may want to provide written or electronic informational resources for the client to read more about the substantive or procedural aspects of their matter. Even for the client who does not hire you, providing these generalized resources gives the prospective client value for their investment in the initial interview and creates goodwill in your practice.

3. Scott Edward Walker, Top 10 Reasons Why Entrepreneurs Hate Lawyers, VENTURE HACKS, Jan. 14, 2010. https://venturehacks.com/hate-lawyers.

C. How do you assist a client in generating and selecting potential solutions?

1. The choice to provide counseling

Once you have provided your client with some information about the legal aspects of their matter, you can begin generating options for achieving those goals.

For most clients, the option that is most salient in the initial interview is the choice to engage your services. This important decision is one that requires a client's informed consent. Informed consent is not a paper the client signs or a decision they make, it is a process and a conversation. The Rules of Professional Conduct define "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." In other words, for a client to make an informed choice, they must have options and enough information to weigh those options. Informed consent isn't based on whether the client's decision is a good one. A client has a right to be "pigheaded" and "to tilt at windmills." *McKnight v. Dean*, 270 F.3d 513, 519 (7th Cir. 2001). Informed consent does, however, have everything to do with communication.

What if it seems likely that the client will not be able to afford your representation or seems reluctant to engage an attorney? Should you still engage in the process of generating options? Unless the client is someone whom you simply do not want to help (for whatever reason), there are several reasons to engage a prospective client in some initial counseling even if this will be the only meeting you will have. First, as a matter of professionalism, the prospective client has entrusted you with their matter for the purpose of exploring whether you can help them. They have invested their time and privacy (and funds if you charge for an initial consultation) in sharing their information. Basic principles of reciprocity dictate that you provide them with some value in return. Second, all clients, including those prospective clients who do not ultimately engage your services, are sources of referrals and reviews. A client who leaves your office with greater clarity on their legal and practical options will be more satisfied than a client who was given little other than a sales pitch for your services. Third, sometimes the process of this preliminary counseling uncovers ways that you could help the prospective client that they would be willing or able to engage.

Some clients have very limited options. The law may not align with their goals or provide realistic remedies. In these instances, your counseling consists largely of educating the client about their situation and assisting them in planning how they might give up or give in. Other clients may not be able to afford options that require the assistance of a private attorney. Helping these prospective clients by providing brief advice, referral to pro bono help (if it is available), and resources for self-representation can go a long way to fulfilling your responsibility "to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."[4]

2. Generating options

For clients for whom you will be generating more complete options in order to make a choice about how to proceed and whether to engage your services, you will begin by revisiting the client's goals and interests. The attorney should explore not only the client's positions and interests as to outcomes but their expectations about how those outcomes might be achieved. Asking the client about potential obstacles or challenges they anticipate in pursuing their

4. Model Rules of Pro. Conduct Preamble ¶ 8 (Am. Bar Ass'n 2023).

matter can help to uncover these expectations. Likewise, you can ask if the client has any specific preferences or concerns about the legal strategy or approach you might take.

Especially today, with the surfeit of information available on the internet, some individuals will come to you having thoroughly researched their issue. These prospective clients may believe that they already know the best way to address their legal issue and simply want you to carry out their plan. This may be a client who is very interested in being engaged in the decisions about their case or it may be a client who is so sure of their own "expertise" that they will not listen to your advice.

You can best respond by first acknowledging their active interest in understanding their case. Ask more about the research they have done. If they have brought materials, ask to review them. If they mention websites, get the URL. Assess their openness to your advice by explaining the complexity and uniqueness of legal matters and the fact that small differences in facts can impact legal strategies and outcomes. Ask if they would be open to different approaches. If the client is trying to decide between hiring you and representing themselves, give them independent professional judgment on the advantages and disadvantages of each of these options. With an approach that respects the client's initiative but assesses their expectations and communicates the value of professional legal expertise, you will be able to determine whether this is an individual you wish to represent. If so, your approach will have established trust and set the foundation for a collaborative attorney-client relationship.

Preview the process of generating options for your client. It can be helpful to frame that process as a partnership. The client is an expert in their situation—the resources and people involved—while you are the expert in the legal system processes. Explain that you will first work together to brainstorm some ideas for solutions and then you will evaluate those options. Emphasize that to effectively brainstorm, you will need to separate generating ideas from evaluating ideas, so the client should feel free to offer any ideas for solutions they may have. Brainstorming requires generating a wide variety of ideas rather than searching for the single answer or assuming that solutions are fixed or zero-sum. Encourage your clients to think beyond current limitations and explore "what if" scenarios. Pose questions like, "What would you do if we had unlimited resources? What if I could snap my fingers and magically make something happen? Encourage clients to consider long-term goals by asking them to specifically envision the situation five or ten years into the future. Ask "What would you like this situation to look like at that point in time?"

To generate options, begin with the client. Ask the client for their ideas for solutions or avenues to achieve their goals. ("What have you tried? What have you thought about?") Some prospective clients will resist offering solutions, wanting to defer to you to decide how to proceed.

Some clients' ideas for self-help should be discouraged as they may be prohibited or dangerous. Consider for example a landlord who comes to you seeking assistance with a tenant who has damaged the property in some way. The landlord may not know that changing the locks to evict the tenant is unlawful. They may not fully recognize the safety risks involved in trying to remove the tenant without legal process. To avoid suggesting that your client consider these kinds of tactics, use the third person when discussing the reasons to avoid these options. ("Sometimes people think that a good solution might be…")

Next turn to considering who else might be able to help the client solve the problem or achieve their goals. For some issues, enlisting the assistance of family members, business partners, friends, or members of the community might be productive. Sometimes non-profit agencies can be especially helpful to prospective clients (e.g. better business bureau, professional organizations, etc.). Governmental agencies may have resources to assist in the client's matter (e.g., police, regulatory agencies). For some kinds of matters, local media can be a valuable ally. In our landlord example, the landlord might explore whether police intervention would address their concerns. For many disputes, the client's insurance company is an important resource.

Rarely is a prospective client's matter solely a legal issue. Sometimes a client simply needs a different type of professional in addition to or even instead of an attorney. The entrepreneur seeking to start a small business may need business planning assistance. The individual seeking estate planning services may need a financial advisor. The parent involved in a divorce may need mental health support. These allied professionals may be as important to achieving the client's goals as your own services.

What about your services? Again, one of the most common problems in brainstorming solutions is to consider

only a single solution. In nearly all circumstances, there are a range of options for engaging your representation. Rule 1.2(c) of the Model Rules provides that an attorney can limit the scope of representation so long as that limitation is reasonable, and the client gives their informed consent to the limitation. As previously mentioned, it may be that providing the client with information is all they need or want. For example, you might agree to provide some brief research and a second counseling meeting for the client. You might facilitate communications (act as a spokesperson, write a letter or make a phone call on behalf of the client, accompany the client in meetings, coach the client in their communications). You might go a bit further and help the client with a limited part of their matter—drafting a particular clause in a contract but not negotiating the entire contract or helping draft a complaint but not representing the client in a trial. You might agree to represent a client in one phase of their matter, leaving it up to them as to whether to employ you for additional representation. Representing an individual who wants to start a business, for example, you might draft the documents necessary to register as a state business entity but not negotiate for business licenses or other matters necessary for the business to open its doors. In a dispute, the scope of your representation might be limited to writing a demand letter or attempting to negotiate a settlement, or you might agree to represent the client through a trial but not if an appeal is necessary.

The following chart summarizes some of these options:

Who	Can do what
The Client	• Do nothing – wait and see • Learn more • Talk to someone • Take action to change their circumstances (practical self-help) • Engage legal processes without assistance (legal self-help)
Other private parties or organizations • Friends, family, neighbors, colleagues, • Libraries • Bar associations • Insurance • Special interest organizations (homeowners associations, trade associations, consumer associations, etc.) • Businesses and other professionals (accountant, therapist, engineer, etc.) • Self-help resources (online document preparers, etc.) • News or social media	• Information • Factual or legal investigation • Funding or other resources • Referral • Advocacy • Mediation or other dispute resolution • Publicity
Public entities (local, state, federal, international) • Courts • Legal Aid & Public Defender organizations • Attorney general • Agencies • Elected representatives	• Information • Factual or legal investigation • Advice and counsel • Referral • Funding or other resources • Self-help assistance • Mediation or other dispute resolution • Advocacy or legal representation (e.g., public defender) • Enforcement
A private lawyer	• Information • Factual or legal investigation • Advice and counsel • Referral • Informal Advocacy (e.g. demand letter) • Informal dispute resolution (e.g. negotiation) • Limited scope (e.g. drafting only) • Representation in formal legal process

Discuss with the client the iterative nature of the process of generating options. At any given point in the process, the "options" for solving the client's problem(s) may be, of necessity, described in only general terms because neither of you has sufficient information to make an informed decision about which options seem preferable at that moment. In this context, the options available to the client generally involve deciding whether to try to solve the problem(s) with insufficient information (and likely a wide margin of error associated with the consequences of the decision) or to invest time and money in gathering more information to provide a better context for decision-making.

Thus, the discussion of options for solving the client's problem(s) likely will have a range of options that will change over time. Some options are preliminary or incremental steps that advance the client's understanding of her problem(s) or investigate the ultimate options available for meeting the client's goals. For example, in a dispute, the attorney and client might identify some important incremental options such as research or fact investigation or informal attempts to resolve the dispute without engaging legal assistance. These incremental options will then determine whether and what more final options are best. In a dispute, these might include the attorney writing a letter to

the opposing party asking for relief. This option might meet the client's goal if it results in a change in behavior or compensation for injuries or both. If that is ineffective, the attorney might agree to pursue settlement discussions (which may result in a settlement) or mediation (which also may result in settlement). If an agreement cannot be reached, the attorney could then offer to undertake litigation (which may lead to a court decision or to settlement). Similarly, in a transactional matter, incremental options could influence final options. A business opportunity may require first some preliminary research to discover any financing options, market analysis, or legal restrictions. Final options could include forming a business entity, obtaining tax status, or complying with securities requirements for investor funding.

In this iterative process of counseling, you help clients understand their immediate options and the steps they can take to gather information for better decision-making while forecasting possible future options. What is significant about this iterative approach? It is a process in which clients can maintain significant control of their destiny. The client doesn't have to commit to a final option from the beginning but can discuss the range of final options and choose an incremental option that moves the client toward being better positioned to make an informed choice among the final options. Thus, the client doesn't need to decide at the outset to invest $30,000 or $50,000 or $100,000 in litigation that will take the next four years and involve a significant loss of autonomy (as the attorneys and the civil procedure and evidence rules and a judge become the controlling players in solving the dispute). Rather, the client can choose to invest $2,000 over the next two months on an incremental option—information gathering efforts that bring the client to a point in which they can better assess the final options. Then the client can choose to stop, or to invest another $2,000 or $5,000 in another incremental option that may take a few months. At the conclusion of each incremental step in the process the client has a "decision point"—a point at which you and the client can revisit the final options (in light of the new information) and a new array of incremental options.

3. Evaluating and selecting options

After identifying the immediate and future options that are available to a client, the attorney will help the client to evaluate the benefits and costs associated with each of the options. When discussing benefits and costs, use the client's goals and interests as reference points to evaluate how well each option meets those objectives.

To be most fruitful for the client, the evaluation of options should proceed in a structured and orderly manner in which the costs and benefits of each option in relation to the client's goals and interests are explored in comparison with other options. However, this purely analytical spreadsheet approach may not be helpful to all clients. Sometimes conveying options in the form of a story or example can help the client to better assess options. Of course, you need to take care that your stories are not drawn from particular representations of other clients, lest you violate your duty of confidentiality. However, you can help the client to get a clearer understanding of a particular option with a conversation that begins with "what might that option look like?" or "let's assume this is how we proceed" and then draw out a concrete picture of how a particular choice might play out.

Some prospective clients may want to simply defer the decision to you. These individuals may ask you to "take care of the problem" and make all the decisions. They may indicate that they "trust your judgment" to "get the best results you can." It is fairly common to have a prospective client ask: "What do you think I should do?" or "What would you do in my situation?" These are enticing and sometimes intoxicating questions. These are questions that place you in the problem-solving mode (where many attorneys like to be) or in the context of "expert" to whom the prospective client is looking for advice. These are questions that invite you to be authoritarian and outline what you would do.

Most commentators generally agree that the one thing you should avoid in this situation is answering the question as asked. One possible response to this type of question is the "redirection" response—something that suggests "What I would do doesn't matter because I am not in your situation. You must make this decision because you have to live with the consequences. I don't." Then the conversation can return to the collaborative work of generating and evaluating options. Alternately, you might provide a reflective response in which you first describe your understanding of the prospective client's perspective on the situation (seeking confirmation from the prospective client that you

have accurately described the prospective client's perspective) and then describe what you would do if you were the prospective client standing in the prospective client's shoes. "Well I can't tell you what I would do in your situation, because I am not in your situation, but if I were you in your situation, given what you have told me about your desire to avoid risk (for example) or avoid unnecessary costs (for example) or your desire to avoid taking action that would deteriorate your relationship with your neighbor/coworker/friends (for example), I think the options that merit the most exploration would be these three options." At this point, you return to an analysis of the options, and the pros and cons, with the goal of having the prospective client talk through why each option might be more or less preferable than another option. Many commentators argue that attorneys should avoid giving direction during initial interviews because, no matter how client-focused they try to be, they risk imposing their own perspectives and values in selecting options.

In trying to decide whether and how to deal with these situations, one important consideration should be how to deal with ultimate disappointment. If the prospective client is making the decision based on their own assessment of the relative merit of various options, and things don't work out, the prospective client is less likely to blame you. If the prospective client decides to do something because you told her that's what you would do, and it doesn't work out, you are far more likely to have a client who is reluctant to pay your fees, to recommend you to others, or to return to you for legal services in the future. Thus, there are both practical and philosophical reasons for being reticent about the extent to which you provide specific direction to a client who asks you to suggest a particular solution.

Sometimes you cannot make final decisions in the initial meeting because you or the client need to gather more information. New information may require reassessing the legal position and cause clients to reevaluate their goals. In follow-up meetings, revisit your understanding of the client's problem and objectives. Start by restating the client's previously identified concerns and goals, then ask what has changed and whether the client has additional information to share.

After evaluating each of the final and incremental options that seem most relevant to the client's situation, it is time for the client to decide—to choose among the final options and incremental options. Keep in mind that the client can be pursuing multiple options at one time. For example, a client may be interested in pursuing an incremental option—gathering more information through witness interviews, interrogatories, or depositions—while also pursuing a final option such as settlement negotiations. Or clients may have to begin to pursue a final option, such as filing a lawsuit, so that they have access to certain incremental options, such as discovery under the rules of civil procedure, while also engaging in settlement discussions. Thus, the decision process of the client should not be narrowly confined to choosing one option. Rather, the decision process should reflect the options that may best serve the client's goals and interests, recognizing that some options may be pursued only partially or may prove to be unsuccessful.

Again, because the client's understanding of their goals and interests is a subjective assessment that you may try to understand, but cannot truly grasp, and because the client is the person who has to live with the consequences of her decision among options, you should be placing responsibility for choosing among options in the hands of the client. You can assess benefits and costs and identify other options that the client may not have considered, but in choosing among options, you should be sure that the decision is the client's, not yours. As noted above, while the model of counseling we are recommending is that of facilitated problem-solving, the reality is that each person likely will do this in a different way, tailored to his or her personality and style. And regardless of each person's style, the process likely will include components of an authoritarian model and components of a more client-centered model. For example, when talking about the law and how it applies to the facts, it is understandable that the attorney will be engaging the client in a more authoritarian manner. The law, after all, is the area of the attorney's expertise. But in evaluating options in light of the client's goals and interests, for example, the client is the expert, and the attorney should be more focused on a client-centered model of counseling.

Skills Practice

Maria, a mid-level marketing manager at a large corporation, has recently noticed discriminatory behavior from her direct supervisor, Mr. Thomas. Maria, who is a Latina, has overheard Mr. Thomas making dismissive comments about diversity initiatives, and she has observed that he consistently overlooks her for high-profile projects in favor of her white male colleagues. When she inquired about promotion opportunities, he suggested that she should "focus on being a team player" rather than "being too ambitious."

Recently, Maria discovered that a less experienced white male colleague was given a promotion she had also applied for, even though she had superior qualifications and experience. Additionally, during meetings, Mr. Thomas frequently interrupts her or dismisses her suggestions, while giving full attention and consideration to similar ideas when presented by white male colleagues.

Maria is feeling increasingly marginalized and frustrated, but she is unsure about how to proceed. She is worried that filing a formal complaint could lead to retaliation, harm her career, or create a hostile work environment, yet she is concerned that, without doing something, her career will continue to suffer. Help Maria generate options to address her goals. Complete the exercise below, then compare your ideas with the ones provided.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-42

4. Understanding biases in decision-making

Among the many shortcuts our brain uses to make decisions, several cause us to weigh certain information more heavily than other information. Understanding these biases can help you identify how to help clients improve their decision-making.

One example of a bias in our decision-making is that which causes us to prefer information that is easier to access. This availability heuristic[5] leads us to give the greatest weight to information that is most readily available in decision-making. Several types of information might be readily accessible. One type is that information we have most recently received. We hold recent information in short-term memory and can most easily access it, impacting our decision-making. A second type of information is that which we first received about a subject. The maxim that "first impressions count" captures some of our understanding of this primacy bias. Primacy operates not only to give outsized weight to the initial information we receive but to influence how we view subsequent information.

The "halo effect" describes one way in which primacy of information influences how one takes in subsequent information.[6] The impact can be positive or negative.[7] A particularly memorable application of this effect is a study in which subjects were presented with two different descriptions of a person. The first person was described as "smart,

5. Availability Heuristic, APA DICTIONARY OF PSYCH., Nov 15, 2023 https://dictionary.apa.org/availability-heuristic.
6. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 82-84, 121-127 (2011).
7. Theodore Eisenberg & Valerie P. Hans, Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes, 94 CORNELL L. REV. 1353, 1379-87 (2009)(revealing defendant's past criminal record creates negative halo effect).

diligent, critical, impulsive, and jealous" and the second as "jealous, impulsive, critical, diligent, and smart." Even though the two descriptions contained the same information, subjects judged the first person more favorably than the second.[8] Watch for this heuristic and provide clients options in more than one order.

The initial interview requires financial or numerical assessment of value (if for no other reason because of the assessment of attorney's fees). In this regard, yet another impact of the primacy effect can be seen in the concept of anchoring.[9] Anchoring explains how a decision can be primed by setting a numerical benchmark. Anchoring research suggests that the first side to make an offer can frame the other side's valuation, pushing the results closer to that initial offer.[10] Even numbers that have nothing to do with the valuation can "anchor" subsequent decisions. In one study of sentencing, judges were asked to sentence a woman convicted of shoplifting by first rolling a dice (which was rigged to either turn to a three or a nine) and then setting their sentence. Judges who rolled a nine produced a sentence of eight months compared to the five-month sentence that resulted when judges rolled a three.[11] Another example of this effect is the difference between being given a refund and a bill. If an attorney requests an advance payment of fees for a representation and then does not charge against the entirety of that advance, the last financial transaction a client will have with the attorney will be a refund. Given the higher "anchor" of the initial advance against fees, the client may go away feeling that they have gotten a great deal compared to the client who is charged the exact same amount but whose last financial transaction with the attorney is paying the fees.

These are just a few examples of how the order in which information is presented can affect decision-making. How one asks the question can affect decisions in other ways as well. Law students learn early on the importance of "framing the issue." Behavioral psychologists explain how that framing impacts decision-making. Framing is especially important when assessing risk. Most people are loss averse, meaning we will take more risks to avoid a loss than achieve a gain.[12] Combined with loss aversion, framing can readily shape legal decisions. For example, in one study of custody decision-making, two parents were presented to decision-makers. The first had average parenting characteristics, the second a combination of positive and negative characteristics. When the question of custody was framed positively—as "who should be granted custody" —the second parent was favored as decision-makers focused on the positive characteristics that parent displayed. When the question was framed as denying custody, the decision makers focused on the second parent's negatives and chose the first parent.[13]

Every representation involves a degree of risk. You should explain the uncertainties and risks associated with pursuing the client's objectives and assess their client's risk preferences. You can do so by asking the client directly about their tolerance for uncertainty, and their willingness to take on these risks. Careful listening and observation will help you to assess the client's comfort level. Some clients may use cautious language or express concerns about potential negative consequences, indicating a lower risk tolerance, while others may be more optimistic or open to taking calculated risks. You can pose different scenarios, options, or potential outcomes and observe how the client reacts. The client's responses and body language can provide valuable cues about their comfort level with risk.

How you frame risk can have a powerful effect on the client's decision-making. Nearly every outcome can be framed as either loss or gain. Take a criminal defendant's choice to accept a plea bargain. Framing that decision as a potential loss might sound like this: "Accepting the plea bargain means you will have a conviction on your record, which could impact your future employment opportunities, your reputation, and your personal life. You will also have to comply with the terms of the plea deal, which might include community service, fines, or even some jail time." The

8. Id. at 82.
9. KAHNEMAN, supra n. 1 at 119.
10. Ralph A. Weber, Understanding Anchoring, 95 WIS. LAW. 16, 18 (May 2022).
11. KAHNEMAN, supra n. 1 as 125-126.
12. *Id.* at 368-69.
13. Roller, *How Anchoring, Ordering, Framing, and Loss Aversion Affect Decision Making*, UX Matters (March 7, 2011) http://www.uxmatters.com/mt/archives/2011/03/how-anchoring-ordering-framing-and-loss-aversion-affect-decision-making.php.

same choice could be framed to emphasize the potential gains: "By accepting the plea bargain, you avoid the risk of a much harsher sentence that could result from a trial. You can benefit from a more predictable and typically lighter sentence, allowing you to resolve the matter quickly and start rebuilding your life without the uncertainty and stress of a prolonged legal battle." Since we know that framing influences decision-making, how do you help clients to frame options in a way that permits them to weigh their options on equal terms?

Attorneys must take care to monitor for the impact of when and how questions are asked, or information is presented. These biases can be exceedingly difficult to counteract. As with other cognitive biases, one cannot easily eliminate these biases by simply educating clients or asking them to ignore or discount certain evidence.[14] Since cognitive biases are a result of our fast-thinking unconscious processes, the best way to counter these is to be aware of the circumstances in which they may be affecting decision-making[15] and turn to slow thinking regarding these decisions. Slow thinking might mean simply slowing down and lowering tensions. When we are "forced to make quick decisions using subjective criteria, the potential for bias is great."[16] We can help our clients make more rational choices by looking for more objective measures[17] or deliberately searching for evidence to re-evaluate the framing or anchoring.[18]

Finally, revisit the materials on culture and communication in Chapter Three. These same differences affect decision-making. Recall that a client's culture may differ in the emphasis it places on the individual versus the collective. Some clients may focus especially on the present while others may be more future-oriented. The client's values will influence their evaluation of options.

These unconscious influences on decision-making can affect not only the client's assessment of their options but your assessment as well. Your legal training in viewing situations from multiple perspectives and maintaining a critical focus on evidence and logic can help you to recognize when these biases are affecting your client or your own evaluation.

Reflective Practice

Attorneys have a dual responsibility to guide clients toward sound decisions while respecting their autonomy. Reflect on how these cognitive biases could challenge this balance. Answer the following questions.

14. See, e.g., Barrett J. Anderson, Note, Recognizing Character: A New Perspective on Character Evidence, 121 Yale L.J. 1912, 1935 (2012) ("[S]tudies have demonstrated that jury instructions do not provide a satisfactory remedy when improper character evidence is presented to the jury. That fact strongly suggests that the halo effect cannot be cured by informing people that they are likely to use character proof wrongly.")
15. Tigran W. Eldred, Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility, 2016 MICH. ST. L. REV. 757, 799 (2016).
16. JENNIFER EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO 285 (2019).
17. WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 183 (1993)(suggesting that negotiators "go to the balcony"- that is, take the stance of a neutral observer to the conflict).
18. KAHNEMAN, supra n. 1, at 126.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-43

Check your Understanding

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-44

These questions encourage you to think about how subtle differences in the order and presentation of information can impact client decisions. Consider how awareness of these biases might lead you to adjust your counseling approach—such as presenting options in varying orders or deliberately slowing down the decision process to engage more reflective (slow) thinking.

How do you address common counseling challenges?

There is no such thing as an ideal prospective client. The prospective client who comes into your office and clearly and concisely explains all of the important facts of her situation in precise chronological order with short asides in which she can communicate the practical problems associated with her situation or the emotional challenges presented by her situation doesn't exist. The prospective client who has all of the related documents copied in a color-coded three-ring binder, again arranged in chronological order doesn't exist. Prospective clients come to lawyers because there is something in their lives that is causing turmoil, or there are goals they want to meet but need help sorting through.

But within this vast sea of prospective clients, there are several prospective clients who present particular difficulties for many attorneys. In this chapter, we will introduce you to some of the most common ways in which prospective clients present difficulties for counseling and try to describe some ways you can work through these difficulties to help understand the prospective client's situation and get to a point in which you and the prospective client can make an informed decision about whether to proceed with representation.

1. The prospective client with unrealistic expectations

At some point in your career, you will have a client or two who comes into one of your follow-up counseling sessions and commences the session with one of the following pronouncements: "You know, I was surfing the internet regarding my situation, and I found a bunch of articles written by other attorneys describing cases just like mine that seem to be generating verdicts worth millions of dollars. I think we have been undervaluing my case." Or "I saw that another business like mine opened in town and was able to obtain a zoning variance to operate in the same area I

am interested in." As you try to talk through the situation, your client seems inclined to hold firm to their unrealistic expectations and "pushes back" when you try to explain why his case may not be worth as much as the cases about which they were reading. Similarly, a transactional client may have unrealistic expectations of what it will take to be successful in a transaction or venture. The mismatched assessment of the value of a case or the probable success of a venture can be a particular problem for many attorneys and clients. The challenge is complicated by the fact that generally, the discussion of valuation is one in which the attorney is the voice of experience educating the client. When the client develops a firm (if misguided opinion) about the value, the dynamic of the discussion changes significantly.

Sometimes these inflated expectations are a product of the attorney's own communication. Attorneys who advertise their successes can create client expectations, despite the frequent professional responsibility rules that require that these statements have disclaimers accompanying them. Similarly, assuring a client at the beginning of a representation that you can help them achieve their goals, that you can work things out, or other promises of success, while often offered to reassure an anxious client or even to convince a client to engage your services, are a surefire way to end up with a disappointed client. Instead, provide realistic assessments of costs, timing, and probabilities of success. Identify ethical barriers and explain clearly limits of your representation. Explain the contingencies that can affect outcomes. Keep the client regularly informed about the progress of their case. Regular updates can help manage expectations and reduce anxiety.

Sometimes the problem is that clients are relying on information from other sources (the internet, friends, or family). To moderate these expectations, first begin with empathy. Thank them for bringing this information to you. Value their enthusiasm or optimism. Ask questions that help uncover the basis of their expectations. For instance, "What information or sources have you relied on to form your expectations about this case?" With some clients, tactful confrontational questions may be helpful to hold the client accountable to their expectations. For instance, "What evidence do you have that supports such a high expectation?" Explain why the sources they are relying on are not predictive in their situation. Share case studies and statistical outcomes that do provide realistic outcomes. Create scenarios with different outcomes to help the client visualize potential results. This can be particularly useful in showing the range of possible settlements or verdicts. Encourage the client to consider "in case you're wrong" scenarios. For example, "What would you do if the court's decision doesn't go in our favor?" or "What if the settlement offer is lower than expected?"

It may take time to reset a client's unrealistic expectations. Set realistic, incremental goals that can lead to the overall objective. This helps in managing expectations over time and keeps the client motivated. Establish clear benchmarks for success at different stages of the case or transaction. This helps in setting a realistic pathway and aligning expectations. If necessary, refer clients to counseling or support services, especially if their unrealistic expectations are rooted in emotional or psychological needs.

2. The fee-conscious prospective client

Fee-conscious prospective clients can appear in two different guises. The first is a prospective client who has a real problem that merits real attention but their concern over fees overwhelms their ability to make reasoned choices about the representation. This may appear at the very beginning of the interview, when anxiety over fees makes it difficult for the client to even begin to discuss their issue. Sometimes these clients will be uncomfortable even raising the issue of fees but their concern over costs will be in the background, interfering with their ability to fully engage in the interview. For these prospective clients, raising the issue of fees at the top of the interview is especially essential.

Clients who are especially concerned about fees may feel relieved to know that there are ways that they can reduce costs by helping in the matter. You might suggest ways that clients may be able to develop additional facts or gather documents to assist in the representation. Counsel the client about available and prohibited self-help options. A client armed with sufficient information may be willing and able to negotiate a deal or a resolution of a dispute on their own. Help the client to carefully weigh the risks of self-help approaches.

Some clients' anxiety over fees goes beyond concerns over their anxiety over the uncertainty of costs or their ability to manage those costs. These clients may resent having to pay any money to someone to help them solve their problems. This "misguided miser" prospective client hears that the costs might be $10,000 and becomes overwhelmed by a number that is larger than anything he has ever spent in his life. For these types of prospective clients, modest efforts to help the prospective client reassess the situation along the lines of an investment decision can be fruitful. Reminding the prospective client of the "goals" the prospective client had described previously, and encouraging them to think in terms of placing values on those goals (so that there can be a comparison with the costs) may be fruitful. But sometimes nothing is fruitful, and there is not much you can do other than recognize that the prospective client may be destined to miss out on the value of legal services because of their inability to adjust their perspective on the fees and costs.

A second type of fee-conscious client is one who appears to have a good claim or transactional plan but literally can't afford to pay for legal services to assist. For a transactional client, the inability to afford legal services to pursue their plan may be a sign of an even larger problem of business planning. Helping this client to more realistically assess the overall costs of their plan, including legal fees, can be some of the most useful counsel you can provide. For a litigation client, if the claim has sufficient value, a contingent fee arrangement or the applicability of fee-shifting to a claim may provide a solution. Nonetheless, there remain many very deserving prospective clients for whom a just result requires some type of legal assistance, but who simply cannot afford that assistance.

Attorneys have an obligation to make legal services available. For these prospective clients who cannot afford legal assistance, at a minimum, you might fulfill your obligation by providing referrals to nonprofit legal services organizations or to other resources. You might choose to provide some limited-scope assistance to make self-representation possible. You might choose to represent the client pro bono. Your duty of diligence requires that you manage your caseload. Making decisions in these situations can be very challenging, as the prospective client clearly needs help and you may want to respond to that need. For some attorneys, the inability to say no to a deserving but limited-income prospective client threatens their ability to sustain their practice. Before committing to assist in representing a prospective client pro bono, you need to have a really good sense of how your client load is distributed between paying clients and non-paying clients so that your portfolio of clients doesn't get too out of balance.

3. The prospective client and their third-party decision-makers

When you are dealing with a young adult client (who still may be subject to significant parental influence) or someone in a dependency relationship, a problem can sometimes arise in which your client appears to lack independent decision-making ability or appears to be significantly influenced by someone else.

For example, suppose that after talking with a client about her case during the initial interview, you sense that she seems less than thrilled to be talking with you and has reservations about bringing suit. She relayed her story in a coherent manner and appeared to answer your questions sincerely and honestly but always seemed reserved. While she indicated that she wanted you to represent her in this matter, there was some hesitancy in her responses. When you inquired further, however, she insisted that she wanted to go forward with you as her attorney. At your follow-up meeting, her hesitancy about going forward resurfaces. You gently confront her, and she confides in you that her husband is "pushing her into this" because he sees the case as a "sure winner" and is looking to make a lot of money. Your client says her husband always needs money, but they never seem to have any. She doesn't know what he does with it.

The "hidden" influence problem is very challenging because it creates two different levels of problem-solving activity in which the attorney needs to be engaging the client. One level concerns the matter that brought the client to you. The other level concerns the client's relationship with her husband.

Some attorneys might be inclined to ignore the issue of the husband's influence, considering this to be tangential to the representation. However, this route poses threats to the attorney's ethical responsibilities to the client. The

attorney's duty of loyalty is to the client, not to her husband. The attorney must ensure that the client's decision to bring suit is genuinely her own, not the product of coercion or undue influence. If the client feels pressured, her consent to litigation may not be fully voluntary, which could undermine the attorney-client relationship and the integrity of the case. Rules of professional conduct dictate that the lawyer must abide by the client's decisions regarding the objectives of the representation.[19] If the decision is effectively being made by her husband, the attorney cannot be confident they are following the client's wishes. Practically, a client ambivalent about pursuing litigation is less likely to remain committed through discovery, settlement negotiations, trial, or appeals. If the case is largely the husband's project, it risks collapse later, possibly harming the client financially or emotionally.

At a minimum, then, you will want to ensure that the decisions about the representation are truly the client's. Meet with the client without the husband present and ask open-ended questions about what *she* wants to achieve, why she's hesitant, and whether she feels free to decide. Help the client understand the costs, risks, and emotional burdens of litigation. This may help her make a decision that's truly her own, not one based on her husband's optimism about a "sure winner." How might this discussion proceed? Consider this approach:

> I want to make sure we're moving forward based on what **you** want, not what anyone else wants, because you're my client and the decisions about your case are yours alone. You mentioned your husband is encouraging this lawsuit, and I understand he sees it as a good opportunity. But I need to ask—how do you feel about pursuing this case? Is this something you want to do for yourself?
>
> If you're feeling pressure, or if you have doubts about going forward, we can talk about your options, including ways to pause or explore alternatives like settlement, mediation, or even not filing suit. My role is to help you make an informed decision and support whatever you choose, even if others might not agree.

This keeps the focus on your client's autonomy, avoids judging the husband, and opens the door for her to express hesitations freely.

If there is any concern that the husband is exploiting the client financially (or worse), the client may be facing threats to her safety that are far more serious than the matter that has brought the client to the office. Effective representation means identifying issues that are not strictly within the scope of the representation but that pose significant collateral consequences for the client. For this reason, attorneys should routinely screen for the presence of domestic violence when third parties appear to be influencing a representation. Securing a favorable damages judgment for a client but ignoring the enormous collateral consequences of physical and psychological safety for that client is neither competent nor ethical.

Simple question like "Do you feel safe?" or "Are you afraid?" can uncover deeper concerns of abuse. If the client does indicate that her husband's behavior is controlling or abusive, you might provide information about counseling, domestic abuse hotlines, or financial and legal advice resources. Of course, not all clients will feel comfortable sharing this information:

> While it is an attorney's duty to screen for domestic violence, the attorney also must respect the client's decision to not disclose information about the abuse. The client may determine that sharing the information with her or his attorney poses a safety risk. Or, the trauma may be too difficult for the client to discuss, despite the benefit to her or his legal case. Attorneys and advocates need to respect that choice. Attorneys should ask direct questions about domestic violence; however, if the client does not want to discuss the issue, the attorney should clearly communicate that the door is always open for further discussion and assistance, on that or any other topic.[20]

Whether a third party is a threat or merely an influence, your duty of loyalty to your client requires that you ensure that your client is directing your representation freely and making fully informed decisions.

19. Model Rules of Pro. Conduct r. 1.2(a) (Am. Bar Ass'n 2023).
20. Erika Sussman & Carolyn Carter, Domestic Violence Screening Tool for Consumer Lawyers, Apr. 2012. https://crdvsi.wordpress.com/wp-content/uploads/2012/04/crdvsi-screening-tool.pdf.

4. The prospective client acting on a matter of principle or honor

In many circumstances, your client will be driven by a matter of principle or a matter of honor in her understanding of a problem and in her approach to thinking about solving a problem.

For example, your client was the Postmaster in a small town for many years. He was fired from his job for sexual contact with an intellectually disabled employee. He tells you he didn't do it and wants to fight his discharge, and you have agreed to represent him. Subsequently, you have a chance to review the postal investigator's records. Based on your review of the records, it looks like the evidence will support the discharge. When you meet with your client to talk about how the case looks following your review of the records, he breaks down crying and says, "I need you to defend me to protect my honor with my wife. If I let this go and don't fight she will see it as my admitting I did it and probably divorce me. I gotta defend myself."

This, in some respects, presents a variation on the "third-party decision-maker" problem, except that in this circumstance, the "third-party" has an implicit involvement rather than an explicit involvement. In the "third-party decision-maker" example discussed above, the premise is that the third-party is explicitly directing the client to proceed with litigation the client may not have an interest in pursuing if she were an independent decision-maker. In this situation, however, the third-party is not explicitly directing the client; rather, the client is independently guiding his actions because he is concerned about what those actions will communicate to a third-party and how that third-party will respond to those actions. The third party might be his wife (as in the example), or it might be other members of an association or community of which he is a part whose opinions of him matter greatly.

When a client is motivated primarily by honor or principle—especially when their decision-making is tied to how they believe a third party (like a spouse or community) will judge them—the attorney's role is to help the client examine the problem from a broader perspective. The goal is not to disregard their concerns about reputation or dignity but to reframe those concerns as one factor among many so the client can make a balanced, informed decision.

How might one ask questions that would help the client look at the problem in a circumspect manner, so that all options can be considered, rather than focusing on only one option that seems driven by the matter of "honor/principle"? First, you must acknowledge the client's values and concerns. Ignoring or minimizing the client's stated motivation will likely make them defensive. You can use open-ended, neutral questions to broaden the client's frame of reference. Ask about other outcomes that are important alongside the concern about the wife's reaction. Help the client to evaluate their fear. You might ask, for example, "How do you think your wife would respond if we pursued the case and lost, versus if we explored other ways to clear your name or present your side?" Elicit or offer alternative strategies that could address the client's immediate concern regarding the wife's reaction but also address the other concerns the client has identified. Once the client starts to recognize multiple interests, you can present options such as negotiating a resignation in lieu of discharge with language that does not admit wrongdoing; seeking a confidential settlement to avoid public escalation; or crafting a carefully worded statement the client can share with his wife or community to explain his decision without conceding guilt ("I am stepping away because of the toll this case would take on us, not because I did anything wrong"). Ultimately, you will need to center the decision on the client, emphasizing their agency and the importance of weighing all factors. If the client insists on their initial path forward as the only way to preserve their honor, you will need to decide whether you are willing to represent the client to aim toward this goal.

5. The prospective client with a bad idea

You will recall from our discussion of the models of the attorney-client relationship that attorneys differ on whether they believe themselves to be morally responsible for the choices their clients make. Attorneys also vary in the degree to which they are comfortable engaging their clients in an assessment of the wisdom (as opposed to the legality) of their objectives.

Certainly, when it comes to advising a client about the law, attorneys have a duty to question their client's objectives and the means to achieve these. The attorney's duty of "independent professional judgment" requires "candid advice."[21] Sometimes, however, an attorney's hesitancy in counseling a client is not grounded in the law but in a larger analysis of the practical, moral, relational, or other aspects of the client's objectives. In most states, rules of professional conduct make it clear that an attorney has the right to refuse to lend services to a client who "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[22]

What do you do with a prospective client who has a bad idea, that is, an idea you disagree with as a moral or practical matter? Do you have a duty to say or do something? If the bad idea is part of the matter on which you are representing them, you likely should engage them in a discussion of their plan, even if the plan is legal and simply impractical or imprudent. In general, your discussion should involve three steps.

First, inquire—ask more about the client's proposal. Often this process of inquiry will itself be sufficient for the client to recognize the flaws in their plan. Ask for details of the client's plan. Once the client has clarified their plan, you can ask questions to help the client evaluate the plan. "What do you think might happen if you do that?" "Do you see any risks or downsides to this plan?" These questions avoid making judgments and so are less likely to make the client defensive and are more willing to generate a dialogue. A second line of inquiry is to explore the interest that is motivating the bad idea. Questions grounded in the "why" of the client's plan will permit you to suggest alternative options that would be more effective, ethical, or prudent.

Second, advise—you can simply tell them why you think their idea is not a good one and why.

Third, avoid—if you don't think they understand and agree, don't represent them or withdraw/seek to withdraw.

What about the worst ideas—if your client says they are going to violate the law? Your options may differ depending on your state's rules of professional conduct. In all states, you CANNOT advise or help the prospective client to violate the law, but you can explain the legal consequences of their choices. In all states, you MAY withdraw if the client insists on pursuing illegal conduct. States vary in the circumstances under which the rules say that you MUST withdraw from the representation. Likewise, states vary on the circumstances under which you may or must reveal confidential information to prevent or rectify the client's illegal conduct. You must always carefully research and analyze your state's rules of conduct to determine your options when faced with these clients.

Skills Practice

Suppose you are representing a client in a wrongful discharge lawsuit against his former employer. Consider this exchange in which the client discusses a strategy for proving the employer's wrongdoing: https://umkc.box.com/s/qu8wwmm24vvv0lc1ewtwrrtawom69lv0. Complete the exercise below.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-45

21. Model Rules of Pro. Conduct r. 2.1 (Am. Bar Ass'n 2023).
22. Id. r. 1.16(b)(4).

E. How do you deliver bad news to a client?

Sometimes, your analysis will lead you to conclude that the law cannot assist the client in achieving their objectives. Sometimes clients want that which the legal system cannot or will not provide (e.g., forgiveness, revenge, respect, or compensation for wrongs the system does not recognize). Sometimes the client wants a remedy from someone the legal system cannot or will not hold responsible (businesses that have dissolved or people who have died; individuals who lack capacity; individuals or entities with immunity). Sometimes the client cannot afford the outcome they desire (financially, psychologically, socially, relationally).

Delivering bad news to clients requires clear and compassionate communication. At a minimum, the prospective client should clearly understand the reason that you are unable to assist them. If you are confident that the client is expecting assistance in something that is illegal, explain that clearly, including the consequences of the client going forward. If you simply suspect this, you need not investigate further to confirm your suspicions so long as you are planning on simply declining the representation. If you are considering moving forward, however, the rules of professional conduct in your state may require that you "inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation." [23] In either case, document the meeting carefully.

If you are quite confident that the law simply does not provide a right or a remedy, explain that. If you believe that the matter is simply not one that is worth your time or effort, decline on that basis (or simply decline without an explanation). "You have no case" or "The law doesn't permit that course of action" are quite different messages from "We aren't able to help you at this time." Be sure you know which of these messages you want to send. The former is a legal evaluation of the client's matter. The second is simply a denial of representation.

Beyond these conversations, the best you can do is provide a sympathetic ear to help the client process the hard reality check. Sometimes you may be able to help the client reframe the problem or find ways to help the client respond to the bad news you are delivering. For some kinds of problems, you might consider referring the client to other professionals (counselors, financial advisors, business coaches, etc.) to help them consider how they might change their own behavior or perspective to come closer to some of their goals.

Remember the limited nature of the information you have in an initial interview; it is a good idea to temper "bad news" with the message that it is possible that other attorneys may see the matter differently. If the client wants to get a second opinion, encourage them to seek out that option quickly as time limitations may apply.

Skills Practice

Consider an interview with a client who wishes to purchase property for a business. The property is currently zoned for residential uses only; however, the municipal zoning ordinance has a process by which one can request variances. Review this interview transcript of the initial information gathering, then answer the questions that follow.

Attorney: *Good afternoon! I understand you're looking to purchase a property for your business and have a question about zoning. Can you tell me more about your business and your goals for this property?*

Client: *Sure, I run a small bakery, mostly pastries and cakes. I'd like to relocate to this property because it's centrally located, offers enough space for my kitchen and retail area, and has better foot traffic. Right now, I'm renting a space, but I want something more permanent.*

Attorney: *Great. First, let's talk about your specific business operations. Could you describe exactly what activities your*

23. Id. r. 1.16(a).

business involves? For instance, hours of operation, noise level, traffic volume, parking needs, and any special equipment you plan to use.

Client: *We usually open around 7:00 a.m. and close around 4:00 p.m. Traffic would mostly be walk-in customers, but some might park briefly to pick up orders. Noise would be minimal, maybe some kitchen equipment noise, but nothing excessive. Equipment would include ovens, refrigerators, mixers, and baking stations—standard bakery items.*

Attorney: *Good, that's helpful. Now, let's discuss the property itself. You've shared the address of the property, so I've been able to see that you are looking at a charming older house on a moderately sized lot. Are you planning any physical alterations?*

Client: *Yes, I'd probably need to remodel part of the interior and perhaps add parking spaces in the back yard.*

Attorney: *I see that the house is surrounded by other residential homes. Have you spoken with the neighborhood association about your plans?*

Client: *No, but the house is very close to a busy commercial area, which makes it ideal. I suppose talking with the HOA would be a good idea.*

Attorney: *Probably. Homeowners associations are often influential when it comes to zoning requests. Next, let's talk about your timeline and budget. What is your timeframe for opening the business in this location, and have you budgeted for the remodeling, the zoning variance process, and other costs?*

Client: *Ideally, I'd like to open within about six months. I've budgeted for remodeling and renovations, but I hadn't considered costs associated with zoning variance requests or delays.*

Attorney: *That brings me to the zoning issues you've asked about. The property is currently zoned residential, but there are options to have a bakery be allowed in that location. You could request a rezoning or there is a process for requesting a variance. The variance would likely be the route you would want to pursue. Usually, to qualify, you'll have to demonstrate special circumstances. One way to do that is to show that the surrounding area is already shifting from residential to commercial uses. Do you know of other businesses in the immediate area?*

Client: *Yes! It's not obvious when you drive through the neighborhood, but Google Maps shows three different residences that operate businesses: a dog day care, a hair salon, and a music teacher.*

Attorney: *Ok, great. Would you operate like these businesses—that is, without a "storefront" presence?*

Client: *No. Ideally I want to have a small café. Even as a bakery though I want people to be able to come pick up items—I'm not interested in working wholesale. Plus, I think a storefront, especially with a little coffee shop, would really benefit the neighborhood. You know, when my mom was little she said that there was always a little store or coffee shop every few blocks. I think it would be a great community gathering place.*

Attorney: *Have you looked at other alternative locations that don't have zoning restrictions?*

Client: *Yes, other available commercial properties nearby are either too expensive, not the right size, or less accessible to customers. This property's unique location really fits my budget, provides customer access, and offers potential growth.*

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-46

Skills Practice

In this problem, the attorney represents Nick in his divorce from Christine. You will watch and listen to a series of segments from the attorney's interview with Nick. Watch and listen to each segment and then respond to the question before watching the next segment.

We begin the interview at the point in which the attorney is turning the discussion to Nick's relationship with his stepdaughter Holly. Nick and Christine have been married a little less than five years. Christine has sole legal and physical custody of her 13-year-old daughter Holly from a previous marriage. Nick has not adopted or otherwise made any parental claims regarding Holly. Holly's father pays child support but has little interaction with her otherwise. Holly has lived with Nick and Christine since they married.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-47

Reflective Practice

In the Child Custody problem above, the attorney had to give the client some very bad news—that he had no legal rights as a stepfather. Reflect on the attorney's approach. Think about times in which you had to deliver bad news. Answer the following question.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=52#h5p-48

F. Why is self care an important part of client counseling?

The process of interviewing and counseling requires a tremendous investment of self—establishing trusting relationships, conveying empathy, understanding perspectives, exercising creativity, and balancing roles. All these investments in your client can take a toll on your own emotional and mental health if you do not pay close attention to professional boundary-setting. Especially in a practice that involves a great deal of trauma, but even in transactional practices, it is far too easy to make the client's issue your own.

The duty to maintain your own emotional health is an implicit part of the basic notion of fitness to practice law. Indeed, most state's rules of professional conduct provide that if a lawyer's "physical or mental condition materially impairs the lawyer's ability to represent the client" the attorney must withdraw from representation.[24]

Burnout and compassion fatigue are very real risks for attorneys in practice areas that expose them to client trauma. What can you do to protect yourself in these areas of practice? A critical protection for attorneys is setting appropriate boundaries; that is, maintaining appropriate professional relationships and keeping one's own personal interest separate from the client's interest. Ethical guidance on this point is sparse. Conflicts of interest rules refer generally to situations in which an attorney's own personal interests may materially limit his or her ability to

24. Id. r. 1.16(a)(3).

competently and diligently represent the client[25] and insist that an attorney maintain independent professional judgment.[26]

There are few explicit rules of professional conduct that address boundary failures. Extremes addressed by rules such as prohibitions on initiating a sexual relationship with a client[27] or lending money to a litigation client[28] address clear examples of becoming too personally involved in a client's life. But since the rules of professional conduct are for the purposes of regulating only that ethical misbehavior that threatens clients, the courts, or the public, there is little consideration given to crafting guidelines for attorneys to help protect their own psychological and emotional health.

While every attorney must establish clear boundaries with their clients, where the lines are may differ from attorney to attorney. These include structural boundaries of space and time (for example, not giving out home phone numbers or limiting locations where one will meet clients). Some of these boundary rules can be established in the initial meeting with the client. As a long-term family law attorney tells her clients in her initial consultations, "This is a strange relationship. I will learn the most intimate details about you and your family, and you will learn nothing about mine."[29]

Even more important and more difficult to establish are the permeable boundaries of the balance of emotional distance and connection. Even the clearest emotional boundaries may not protect you from emotional overload. The best practice to protect yourself emotionally is knowing yourself and having opportunities to reflect on how your practice is affecting you.

Finally, attorneys must learn to take care of themselves. Certainly, this is much easier said than done, and in the end is a very individualized process. Nonetheless, general parameters of self-care include finding a balance between work and life, finding creative outlets or spiritual practices that replenish the helping professional, and systematically monitoring one's own emotional and mental health. Attorneys have an increasing number of resources available to help address self-care issues. State lawyers' assistance programs, once accessed primarily by attorneys with alcohol and other substance use issues, are increasingly being asked to present programs and provide resources for all attorneys to maintain their fitness to practice. Within law schools, courses and programs to teach students how to maintain balance in the practice are gaining momentum. Clearly, the profession generally is recognizing that self-care is an important component of competent lawyering.

Chapter Eight Endnotes

25. Id. r. 1.7.
26. Id. r. 2.1.
27. Id. r. 1.8(j).
28. Id. r. 1.8(e).
29. I do not recall which long-term family law attorney who told me this was a common explanation of the explanation she gave in prospective client relationships.

Chapter Nine – Closing the Interview

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Decide whether to represent a prospective client.
- Help a prospective client decide whether your legal representation is a good investment for them.
- Make clear to the prospective client the status of the relationship at the close of the interview.
- Provide appropriate follow-up.

As we learned at the beginning of this book, the decision to represent a client is easily one of the most important ethical choices an attorney makes. Apart from instances in which you are appointed to representation, you are generally free to reject potential clients for any reason at all. Likewise for the prospective client, the decision to engage an attorney is a significant investment of time, resources, and privacy. As an initial interview comes to a close, you and the prospective client must each determine whether you will continue to work together.

There are multiple possible outcomes from the initial consultation. You may decide not to offer to represent the client. Either you may have decided that you don't want to represent the client at all or you may be undecided and need to defer the offer to represent the client until you have more information. Similarly, while you may be willing to represent the prospective client, they may not be interested or may need more time or information before agreeing. Finally, both the client and you may agree to further representation. No attorney should ever close an initial interview without making it very clear whether an attorney-client relationship has been formed and what that decision means for next steps for both attorney and client.

A. How do you decide on representation?

When you have reached the point at which the prospective client has no further pertinent information or questions, you are ready for the conclusion of the interview. By this point, you need to not only have gathered the information relevant to the prospective client's situation, but also to have processed and analyzed the information. You will need to place the client's matter in the context of the preexisting demands of your professional and personal life.

The following decision-matrix fleshes out one way of thinking through the decision about whether it makes sense for both attorney and client to proceed to an attorney-client relationship:

Decision-Matrix for Conclusion of Initial Meeting for Dispute Resolution	Decision-Matrix for Conclusion of Initial Meeting for Transactional Assistance
The Case • Do the facts give rise to cause of action? **OR** Can you advance a "good faith change in existing law?" • Do the damages or does the harm warrant the involvement of a lawyer to assist in problem-solving? • Are there venue or forum issues that alter the assessment of the claim? • Does the nature of the problem suggest: • Litigation • Alternative dispute resolution • Attorney involvement in stages	The Matter • At what stage is the client in the transaction? • Does the client need legal assistance at this stage or is the client better served by a different professional? • Are there legal or ethical barriers to achieving the client's goal? • What type of assistance does the client need or desire? • Planning • Negotiation • Regulatory compliance
The Client • Can the client afford to sue: • Financially • Emotionally • Time/Process-wise • The "Should Dialogue": Should the client go forward with legal action?	The Client • Can the client afford to proceed with the transaction? • Financially • Emotionally • Time/Process-wise • The "Should Dialogue": Should the client go forward with the transaction?
The Lawyer Can you afford to take the case: • Do you have sufficient expertise for this case? If not, can you afford the time and expense of self-study or consultation with another attorney? • Financially • Do you have money to front costs if the client does not? • Will this case provide steady income or a prospect of substantial recovery in the future? • If not, does the balance of your case load allow you to take this on a pro bono or discounted fee basis? • Does the case present a conflict of interest? Can that conflict be waived? • Effects on future representation • Will this case affect your reputation and skills? • Will the representation cause conflicts that preclude substantial employment possibilities in the future?	The Lawyer • Do you have sufficient expertise for this case? If not, can you afford the time and expense of self-study or consultation with another attorney? • Can the client afford your representation? If not, does the balance of your workload allow you to take this on a pro bono or discounted fee basis? • Does the case present a conflict of interest? Can that conflict be waived? • Effect on future representation: • Will this case affect your reputation and skills? • Will the representation cause conflicts that preclude substantial employment possibilities in the future? • Will the representation lead to ongoing representation for this client?
Emotionally • Do you like the prospective client? • Can you sublimate your feelings about the client, so the feelings do not compromise your ability to provide legal service? • Do you feel good about the case and representing this client? • Can you set aside any of your own personal issues that would affect your representation? • X-factor: Do you want to take the case?	Emotionally • Do you like the prospective client? • Can you sublimate your feelings about the client, so the feelings do not compromise your ability to provide legal service? • Do you feel good about the matter and representing this client? • Can you set aside any of your own personal issues that would affect your representation? • X-factor: Do you want to take the matter?

Time • Do you have time to handle the case given the demands of your practice and your personal life? • Are their legal deadlines and will you be able to meet those? • Does the client have urgent deadlines, and will you be able to meet those?	Time • Do you have time to handle the matter given the demands of your practice and your personal life? • Are their legal deadlines and will you be able to meet those? • Does the client have urgent deadlines, and will you be able to meet those?
You are the door keeper to the legal system but not the only door keeper. Do you want to open the door to the legal system to this claim or this person yourself or do you want to let someone else do it?	You are the door keeper to the legal system but not the only door keeper. Do you want to open the door to the legal system to this transaction or plan, or to this person yourself or do you want to let someone else do it?
You are now at the point where you make the decision. "Yes" or "No" or "Need More Time to Decide." Only if the answers to all of the above questions are "Yes" should you make the decision to represent the client. If you don't know the answer to one of the above questions you should make the "Need More Time" decision.	

Notably, the top half of the Decision-Matrix Chart focuses on information gathered during the initial interview and on the client's decision to engage your services. In all likelihood, helping the client through this decision will require a discussion about the "costs" or "risks" associated with the representation. These include the direct costs associated with the attorney's time or fee arrangement, as well as the "costs" or "expenses" for which the client will be responsible. There are also indirect "costs"—the time involved in continuing to pursue the claim or transaction, the anxiety involved in monitoring the progress of the matter and dealing with depositions or requests for information (or learning about other information that alters the "calculus"), the emotional energy involved in dealing with the lack of "closure" regarding an event, etc.

In these latter scenarios, you should initiate a discussion with the prospective client about these direct and indirect costs. The discussion should encompass a dialogue about your preferred fee arrangement (and alternatives if necessary) as well as some of the indirect or intangible costs: How long might it take to bring the case to resolution? How much of the prospective client's time might need to be invested in bringing the case to fruition? How might the process unfold in a way that has an emotional or psychological toll on the prospective client over time? During the course of the discussion, you and the prospective client are essentially exploring whether there is a mutually beneficial investment opportunity—an opportunity in which each of you sees value in a decision to invest your resources (time, energy, finances) in pursuing an attorney-client relationship.

If you know that the representation will be unlikely to return value, you must then take steps to make it clear that you will not represent the client. If you are open to offering to represent the client but need more time or information, you have the responsibility to be sure that the client understands how and when that "Maybe" can or will become a "Yes" or "No." Likewise if a client has decided against representation, you still have an obligation to make it clear what that means in terms of any future representation. If the client needs more time for the decision, again, you must make it clear that no relationship exists unless and until the client takes the necessary steps to accept your offer of assistance. If an investment in the representation makes sense for both you and the prospective client, you can proceed to discuss the scope and details of that relationship.

The bottom half of the Decision-Matrix Chart focuses on information you should bring to the interview. Once again, this highlights the importance of your reflection on a variety of aspects of your life and practice. You need to be aware of your professional commitments to other clients and the time and financial commitment and emotional energy involved in your existing obligations. You also need to be aware of your personal life and the demands of family, friends, civic or public service commitments, etc., that also require a commitment of time and emotional energy by you. If you are not cognizant of the extent to which your professional and personal life already are fully committed, or overcommitted, you likely will pay a significant price for making decisions that only make life worse.

As the ability to gather and analyze data increases with artificial intelligence, you will be able to refine this

decision matrix by using both client data and public data from similar cases to inform your decisions about whom you will represent. For example, AI can perform more comprehensive conflict checks across vast databases of past and current clients, transactions, and related parties than manual methods. For litigation matters, particularly in contingent fee representation, AI systems can analyze similar past cases to predict the likelihood of success based on case facts, jurisdiction, judge history, and precedents, helping you make more informed decisions about case viability. On the resources side of the equation, AI can estimate the time, staffing, and costs required for different case types by analyzing historical firm data, allowing you to better evaluate if you have adequate resources for proper representation. This same analysis can permit fee arrangement optimization, suggesting optimal fee structures based on case complexity, projected duration, and likelihood of outcomes. While AI is already routinely used for document review in ongoing representation, in some instances this type of documentation analysis might be relevant to screen for issues that might impact representation decisions.

More controversial uses of AI would be those that would perform more personal analyses of clients. AI tools could perform far more extensive investigation into prospective clients, screening these potential clients against databases to identify litigation history, credit issues, or other risk factors that might affect payment or representation challenges. AI could even analyze initial client communications for indicators of potential client behaviors or expectations that might create challenges during representation. One of the ongoing concerns about AI is the embedded stereotypes and biases that exist in any tool drawing from the internet as a whole. Attorneys must always take care that their use of any tool—whether a decision matrix or an AI program—does not undermine or cloud the attorney's ethical responsibilities to their clients, the public, and the system of justice.

B. What should happen if you decline further representation?

Throughout the text, we've emphasized nonjudgmental acceptance when understanding client situations. When we turn to counseling, however, that acceptance of the dignity and autonomy of the client as an individual must be balanced with the duty to provide independent professional judgment. Nowhere is this more important than when you find a prospective client's objectives repugnant or when they seek assistance in furthering a crime or fraud. In these cases, you have the right to refuse the matter and the duty to avoid assisting in wrongdoing. If a prospective client seeks an illegal or unethical outcome or proposes an improper approach, your counseling may simply consist of declining the representation clearly and firmly.

How do you do so? Consider the attorneys in an investigation by the organization Global Witness.[1] An investigator, posing as an adviser to a foreign government official, met with thirteen law firms. The investigator asked the lawyers how to anonymously move large sums of money that should have raised suspicions of corruption. None of the law firms agreed to represent the investigator as a client but all but one provided some preliminary information and advice. One attorney, Jeffrey M. Herrmann, after listening to the investigator's request for assistance, declined the client in the initial interview. Here's how he responded:

JMH: *This ain't for me. My standards are higher.*
Investigator: *Well that's fair enough. That's good.*
JMH: *Pardon?*
Investigator: *Therefore I said we have to be very frank.*
JMH: *Yeah, right. I'm not interested.*

1. Global Witness, Undercover investigation of American lawyers reveals role of Overseas Territories in moving suspect money into the United States, February 12, 2016, https://globalwitness.org/en/press-releases/undercover-investigation-of-american-lawyers-reveals-role-of-overseas-territories-in-moving-suspect-money-into-the-united-states/

Investigator: *Do you know anyone who would be able to do so?*
JMH: *I don't think so and I would not recommend it either. Because those persons would be insulted.*[2]

Reflective Practice

What do you think of Mr. Herrmann's response? Would you be comfortable being this blunt?

Of course, you may decide not to represent someone even when the representation is otherwise permissible. You may have concluded that the client doesn't have a strong claim or that you don't have the time or expertise to competently represent the client. You may simply not want to work with this particular client or pursue this particular matter. Attorneys are never required to accept a representation, so you need not have a particularly clear reason for declining a client.

When declining an individual who has sought your advice or representation, make the fact of your non-engagement crystal clear. Tell the client in clear and explicit language that you will not be representing them going forward. You need not give a reason, but if you do, take care that the reason for declining the case is not in itself legal advice. For example, it might be perfectly appropriate to say, "given our current caseload and resources, we do not believe we will be able to give your case the time and attention it deserves" but it would be unwise to say "I really think you don't have a winning case here; I'm sorry but I will be unable to represent you." Avoid evaluating the individual's case on its merits, value, or appropriateness for legal resolution.

A client may ask for a referral. You can provide one if you feel comfortable recommending the client to a particular attorney (or, better yet, more than one attorney). Include a caution that the client should determine their own compatibility with the attorney. Consider directing clients to state or local bar association referral services. If you have any concerns about making a referral, do not feel pressured to do so.

Whether you make a referral or not, be sure to remind clients who are considering other representation to act promptly, as delays may foreclose legal rights and opportunities. Advise the client that statutes of limitation do or may apply, but do not give any specifics as to what those time limitations are (for that, again, would be providing legal advice). Rather, simply emphasize the need to contact another lawyer immediately.

Finally, send a non-engagement letter. Examples of these letters are readily available from bar associations or malpractice insurers, but all have the same basic elements. Repeat the clear and explicit message that you are declining the representation. For purposes of avoiding any claims of conflict of interest at a later time, you may wish to summarize the steps you took to review the case, especially emphasizing the degree to which you reviewed (or avoided receiving) certain confidential documents or discussed private information. In this summary, be sure to again make clear that the individual should not expect that you will be providing any further information or assistance to them. Finally, reiterate your suggestion that the client should not delay if they are interested in finding another attorney. In some circumstances, you may want to consider sending the non-engagement letter by certified mail, return receipt requested. In any case, be sure to keep a copy of the letter and the date sent.

Sometimes, you don't want to decline the client but you need additional time or information before you can engage them. If the client wants to engage you, but you need to defer that agreement pending other decisions, you should recognize that you have agreed to a very limited duty going forward. There may be times, particularly early in the career of an attorney, when you may not have a sufficient grasp of the nuances of a given area of law to make an informed assessment of the existence or value of a claim. Alternatively, there may be key facts that you need to consider before you can commit to the client.

For example, you might say to a client, "I think there is a possible claim here, but I would like to do some more research to make sure I am assessing the possibility in light of the most current state of the law" or "I would be interested

2. https://youtu.be/kC2DDNLvFg8?si=3FBFIJC_imLoEXIB at 4:19.

in helping you with this deal but I need to have some more details about the financing to determine if we are really the best fit for you." This is a little like taking a time out—putting further discussion about the possible attorney-client relationship on hold until the attorney has done more research.

Recognize that in these circumstances, you have agreed to a limited duty to the prospective client: that is, you have agreed to review those documents, do that research, and communicate your decision to the client. Make it clear to your client the limit of this duty—that you will take no other steps to advance the client's interest beyond this limited review. Let the client know if you will charge them for this assessment. You should set a clear deadline by which you will make this decision and communicate it to the client. Especially if the matter is one for which time limitations apply, emphasize that the client should feel free to explore engaging other attorneys while you conduct this review.

When you can't assess the viability of a matter because of insufficient information from the prospective client, then the interview should conclude with a clear set of understandings. Identify specifically what information you need from the client and why. Be sure the client knows when and how to provide that information to you. Perhaps most importantly, make it very clear who will communicate with whom next and what you will or will not do in the meantime. Emphasize that you have no duties to the client unless and until they provide the information. Let them know that, even if they provide the necessary information, this will only permit you to continue the discussion about whether your representation is the best choice for them. This structured conclusion establishes clear expectations, maintains professional boundaries, and creates accountability for both parties while preserving the possibility of representation once sufficient information is available.

Finally, document these messages with a follow-up letter and a calendar deadline. If your additional research indicates that you should decline the client, proceed to do so clearly and explicitly. If you have determined that you do wish to engage the client, extend your offer of representation and determine whether they wish to accept that offer. Do not let these "maybe" client situations linger in ambiguity.

Skills and Reflective Practice

With a partner, practice declining a client in an initial client interview. Take turns acting as a client presenting representations that an attorney should decline (e.g., a case too complex, too rushed, or too frivolous; a client too impecunious, too rude, or too devious). After you have each had a turn at declining a representation, write a short reflection on your experience in both roles by answering the following questions.

An interactive H5P element has been excluded from this version of the text. You can view it online here: https://interviewingandcounseling.lawbooks.cali.org/?p=53#h5p-49

C. What should happen if the client declines to engage you?

Sometimes you offer to represent a prospective client but they are not interested in engaging you. Once a client communicates this choice, you should make it clear that you respect their right to make that decision, even if you think it unwise or unfair. Your professional reputation is built on these interactions just as much as the work you do on behalf of clients you do represent. Don't argue or try to change the prospective client's mind; rather, thank them for considering your services and maintain a courteous demeanor.

A prospective client may not be able to afford your representation and they may want to "shop around" for a lower-cost option. You can help them with this decision by providing referrals for lower-cost or pro bono legal services if you know of viable options. If you provide unbundled legal services, you can offer these options as well if the situation is appropriate for limited scope representation.

Other prospective clients may have decided that the matter is one they can handle themselves. If you agree with that assessment, you can point them to self-help resources. Here, too, you can offer limited-scope assistance if appropriate to the matter. Clients who attempt to represent themselves may return to ask for help at a later stage in their matter. Stepping in to take on (and perhaps clean up) a self-represented individual's planning, negotiation, or litigation can often be more complicated and costly than if the client had simply hired you in the first place. If you are concerned that the client may perceive you as "on call" make it clear that you can make no promises now that you will be available to them at a later stage in their legal matter. Conversely, if you wish to encourage the client to return to you for additional assistance with the matter, let the client know whether and how they can revisit the question of securing your representation.

Sometimes the client has not expressly declined your offer to represent them but simply needs time to decide whether to engage you. This results in a "maybe" conclusion which recognizes that the client has just learned a great deal of new information and needs time to process. In this situation, the actual conclusion of the interview probably involves the prospective client saying, "I need some time to think about this. I will get back to you in a few days (or in a week)." There is nothing inherently wrong with a "maybe" conclusion to an interview.

Sometimes the "maybe" is simply a matter of giving the client time to review the representation agreement. Remember that an attorney-client relationship can be formed even if there is not a signed representation agreement. If you do not want to take on a representation without an express written agreement, make that clear to the client. In that case, tell the client "Please take this with you. Read it over and think about it. If you decide that you do want us to represent you, sign it and return it to me."

These situations of uncertainty as to future representations are fertile grounds for malpractice, so you must be especially clear and explicit with the prospective client. If you are willing to engage the client but the client wants time to make their decision, make it very clear what steps the client needs to take to engage your representation. Emphasize that you have no duty to the client unless and until they take those steps, whether that is a second meeting, a signed engagement contract, a fee deposit, or other steps. Provide some outside limits for your offer to represent. You certainly don't want to have a client send a signed representation agreement to you months after an initial meeting and thereby create your duties when you have perhaps already determined that you will distribute your workload in a way that makes no room for the client's representation.

Whether the prospective client has expressly declined to hire you or has left with the possibility of returning, documenting your nonengagement is critical. Create a reminder for yourself to send out a letter to the prospective client sometime in the next two to three weeks memorializing the fact that there is not an attorney-client relationship. Many of the same points that apply when the attorney declines a client apply to these nonengagement letters. You must emphasize the importance of timely action and should avoid giving specific legal advice about the client's situation.

If the prospective client has decided not to proceed with representation, this letter simply confirms this. If the prospective client was thinking that he did want the attorney to represent him, this correspondence should trigger a response from them so that the client and attorney can "close the loop" on the question of representation.

D. How do you properly engage a client for further representation?

How do you go about establishing an attorney-client relationship with those clients whom you do want to represent and who want you to represent them? The answer is quite simple: you expressly agree to do so, or you simply begin to represent the client.

Some attorneys mistakenly believe that, unless a client has signed a representation agreement and paid an

advance on fees, the attorney has no duty to that individual. The rules of professional conduct in most states do encourage and, in some instances require, that the attorney have a written agreement.[3] However, just because the client has not signed an agreement does not mean that there is no attorney-client relationship. Likewise, an attorney-client relationship does not depend on the client having agreed to pay or having provided an advanced payment of fees.

So, while it is very useful and important to use written representation agreements, be sure that your communication with potential clients is consistent. If you will not represent clients until they have signed a representation agreement (and perhaps paid an advance on your fees), be sure you clearly communicate that to them, lest they leave your office believing that you are representing them.

As with any other critical decision your client makes, you do not want to rely on paper alone to communicate this agreement. Discuss with your client the essentials of the representation agreement and invite questions. Give the client time to read and understand the agreement.

One essential is the financial aspect of the representation—the fee arrangement, the direct costs and expenses, and the indirect costs. Clients should understand how you will be communicating your bill and how they will pay.

A second essential discussion the attorney and the prospective client need to engage in is the scope of representation. The prospective client's situation may involve one common set of facts with multiple claims in which the attorney is prepared to represent the client with respect to all these claims. The situation, however, may involve multiple possible claims against multiple parties. Perhaps the prospective client has a workers' comp claim, with respect to which the attorney is prepared to represent the prospective client, but the attorney is not interested in (and is not intending to agree to) representing him with respect to related common law claims. Perhaps the prospective client has a criminal charge brought against her with respect to which the attorney is prepared to provide a criminal defense representation, but there are related civil claims with respect to which the attorney will not provide representation. Perhaps the attorney and client have discussed a limited duration for the representation in which the attorney will represent the client in settlement discussions but is not committing to represent the client with respect to litigation if the settlement discussions do not lead to a resolution of the dispute. These are examples of issues that need to be discussed as the attorney and prospective client each assess whether to make an investment in an attorney-client relationship and how much to invest in the attorney-client relationship.

The client needs to understand exactly what you will and will not be doing for them. Clear definitions of the scope of representation are important for several reasons. First, a clear scope of representation will set a client's expectations. "One of the major sources of disagreements between lawyers and clients is the issue of scope creep. Be extremely clear about the scope of work to be performed for the client and the fees for that work. Incorporate the scope of work and any variables that might change the scope of work into your engagement agreement."[4] If a client sues you, your duties will be defined by your agreement with the client. If you have not made clear when your representation has ended, you may have unintentionally created an ongoing duty to a client. If you have not clearly defined what the client can expect and, perhaps more importantly, what they *cannot* expect, the scope of your duty will depend on your client's word against yours.

A clear scope of representation will be critical for future representation of other clients as well. In a conflict-of-interest analysis, you will need to determine whether your former client's matter is the "same or substantially related"

3. Model Rules of Pro. Conduct r. 1.5(b)(Am. Bar Ass'n 2023)("The scope of the 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.")
4. Allison C. Shields, Managing Clients' Expectations (August, 2013) at https://www.legaleaseconsulting.com/legal_ease_blog/2013/08/

to a new prospective client's matter.[5] The scope of representation outlined in your agreement with that former client will be the best and clearest evidence of what that former "matter" entailed.

There is rarely a representation in which you will not want to set some outer boundaries of the scope of your representation. For example, it is not uncommon for an attorney to agree to represent a client at trial but not on appeal, or to form a business but not pursue litigation arising out of that business formation. In some practices, attorneys will provide even more limited scope representation—agreeing to draft a petition but not represent the client in the subsequent litigation, for example, or provide a preliminary review of intellectual property rights in a business agreement but not conduct a complete patent search.

Especially for clients with limited means, this limited scope representation, also known as "unbundled legal services," can provide critical assistance that allows pro se litigants to access the justice system. These limited scope agreements also can encourage attorneys to provide pro bono or low-bono assistance to these clients. A 2009 ABA study found "giving the attorney the ability to define the scope of the engagement (was one of) … the most powerful incentives to encourage greater pro bono activity."[6] To so limit a representation requires the informed consent of the client. In no case can a client give up the right to discharge the attorney, the right to competent representation, the right to reasonable diligence and promptness, or the ultimate right to settle or terminate the representation or the litigation.

In addition to defining the scope of the representation, be sure that your client understands the roles and responsibilities each of you have in the relationship. With respect to what decisions will you definitely be consulting the client? With respect to what other decisions does the client want to have a voice? Clients need to understand their own responsibilities—what information will you require? What behaviors should they avoid (discussing your advice with others, taking certain actions without consulting with you beforehand, etc.)?

Establishing protocols for the communication patterns of the relationship right from the beginning is essential. Make sure the client knows the who, when, how, and how often of future communication. Whatever protocols you establish, be sure you follow through. If you cannot be sure to return all calls within 24 hours, don't promise that you will do so. Be sure you both know what kinds of communication the client does not want you to use (leaving voice mail, using email, etc.).

While rules of professional conduct do provide broad rules regarding allocation of authority, relying on these default rules is not as effective as discussing and agreeing upon these issues from the start of the representation. So, for example, you may wish to have the client agree that you have the authority to determine scheduling, lest an angry client view your agreement to a continuance as an act of disloyalty.[7] Similarly, you may wish to explain your standards for interaction with opposing parties or counsel, or your personal limits on using particular tactics. In representing parents in divorce, for example, attorneys will often discuss their refusal to assist their clients to use children as a bargaining chip for financial advantage.

If the attorney and client have agreed that the investment in an attorney-client relationship makes sense for each of them, this understanding should be memorialized in a "representation agreement." This is generally a one- or two-page document that represents the "contractual understanding" of the parties as they enter into the attorney-client relationship, and includes the specific scope of representation, fee structure, and cost reimbursement structure on which they have agreed.

Ideally, this is a document that the attorney takes the client through on a line-by-line basis, reading the language of the agreement and answering any questions the client may have regarding specific language in the agreement. For those interested in avoiding any concern about duress, or the perception that a client was pressured into signing an agreement, it may make sense to read through the representation agreement with the client and then ask the client to leave the office and think about it on her own, sign it on her own (if she is still so inclined) and then return it to the

5. Model Rules of Pro. Conduct r. 1.9 (Am. Bar Ass'n 2023).
6. ABA Standing Committee on Pro Bono and Public Service, Supporting Justice II, A Report on the Pro Bono Work of America's Lawyers, (Feb. 2009) https://www.courts.mo.gov/file.jsp?id=3552
7. Purtle v. Comm. on Professional Conduct, 878 S.W.2d 714 (Ark. 1994).

attorney. When this is done, however, the attorney also should make it clear that unless and until the representation agreement is signed and returned to the attorney, the attorney and client do not have an attorney-client relationship. (In this regard, see the discussion below regarding what happens with a "maybe" scenario.)

In sum, the conversation in closing an interview that will result in ongoing representation involves multiple decision points. You need to make room for this conversation, document the key aspects of these agreements, and then carefully conform your practice to the agreement. Make the next steps clear for your client. Provide timelines, make appointments, and allocate responsibilities so that the client knows exactly what to expect next in the representation.

E. How should you follow up after an interview?

After an initial interview, an attorney has several follow-up responsibilities. These include documentation, calendaring, and reflection.

As you have seen, documentation of the interview is a critical step to follow up on all interviews. One key document that you should always produce after an initial interview is a memo to the file, documenting the key information from the interview. In some cases, your interview notes on the initial intake form may be sufficient for these purposes. In other instances, especially if you have agreed to represent the prospective client, you may need to document more extensively the information you have received. In most instances, a letter to the prospective client is also wise, such as either a non-engagement letter (with or without an invitation to future representation) or an engagement letter.

Along with this documentation, if the attorney has undertaken a representation, the attorney must take other steps to open the client file and begin the case management process. One of the most critical steps in that process is identifying deadlines and entering those deadlines into a tickler system.

A less common follow-up task that new attorneys in particular should consider is engaging in reflection. Skills like client interviewing do not improve simply because you have a lot of practice. Only practice coupled with reflection and correction improves skills. I can swing a bat at a baseball all day long and still keep striking out if I do not take the time to think about (or be coached on) my skills at stance, attention, follow-through, and the like. Indeed, if I practice continually without reflection and correction, I will simply hard-wire bad habits that will make it even more difficult to improve in the future.

Often the most useful way to incorporate regular reflection into your professional development is through reflective writing. Because writing engages your thoughts in a different (and sometimes deeper) manner than just thinking about a topic, a journal or log can be an important tool to improving your professionalism. However, reflection can be simply taking some time to think about an interview or talking with others (while respecting confidentiality). Through reflection, you can observe your behaviors and then consider the reasons driving those behaviors. You can consider whether your behavior aligns with your values and philosophy. You can reflect on your client or their matter.

One of the cautions in any documentation, but especially in converting notes or reflections into a file, is the requirement that the client owns their entire file. The definition of what constitutes the "file" is not entirely clear in all jurisdictions. The Restatement characterizes the majority approach as requiring that the attorney turn over to a client or former client "such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs."[8]

The Restatement notes that most courts do recognize limited exceptions to the rule that the entire file belongs to the client. For example, in a frequently cited opinion, the New York court recognized the need for some privacy for an attorney's reflection:

The need for lawyers to be able to set down their thoughts privately in order to assure effective and

8. Restatement (Third) of the Law Governing Lawyers § 46 (2000).

> appropriate representation warrants keeping such documents secret from the client involved. This might include, for example, documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation. Such documents presumably are unlikely to be of any significant usefulness to the client or to a successor attorney.[9]

Nonetheless, attorneys should exercise judgment about how to engage in reflection. While some reflections may be better in silent contemplation rather than in writing, cultivating a deliberate practice of evaluating your own decisions and actions is the key to your growth as an attorney.

Chapter Nine Endnotes

9. Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P., 91 N.Y.2d 30, 37-38, 689 N.E.2d 879, 666 N.Y.S.2d 985 (N.Y. 1997).

Chapter Ten – Special Challenges in The Initial Interview

Learning Objectives

After working through these lessons and practicing the skills presented, you will be able to:

- Be able to identify contextual factors that influence the interviewing and counseling process in diverse areas of practice.

The essential elements of an initial client interview are the same regardless of the area of practice: building trust, gathering information, clarifying goals, deciding on representation, and problem-solving. However, these general considerations may look slightly different in different areas of practice or in different settings. This chapter explores some of the interviewing challenges that are especially common in certain areas of practice.

A. How does an initial interview proceed when it is "just in time"?

In some settings, an attorney provides last-minute or emergency representation.[1] Clients sometimes seek out an attorney to address an imminent threat to the client's personal or business interests. Sometimes that crisis may be a result of the circumstances; in other circumstances, a situation may have developed into a crisis because the client was unable or unwilling to address the issue earlier.

These urgent requests for assistance may require a rushed and constrained initial meeting. They may provide very limited assistance, as sometimes the attorney responding in these emergencies is acting outside the core of their area of practice. The Rules of Professional Conduct in most states provide that an attorney is not violating the duty of competence in these circumstances but cautions attorneys to limit their representation to only that which is critical to meet the client's immediate need:.

> In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.[2]

The paradigmatic case for "emergency advice" is the attorney receiving a call in the middle of the night from a client, friend, or acquaintance who has been arrested.[3] However, emergency representation is not limited to criminal defense. The challenge for attorneys in these instances is that they will not have time to research the law and must

1. See generally, Barbara A. Glesner, The Ethics of Emergency Lawyering, 5 GEO. J. LEGAL ETHICS 317 (1991).
2. Amer. Bar Ass'n, Model R. Prof. Conduct, r. 1.1, cmt. 3 (2025).
3. See, e.g., RANDY HERTZ, MARTIN GUGGENHEIM, & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR JUVENILE DEFENSE ATTORNEYS § 3.22 (2024) at https://www.defendyouthrights.org/resources/trial-manual/. This section provides a detailed description of the steps an attorney should take in an initial contact with an individual who has been arrested.

know enough to at least be able to determine what facts are essential to address the client's immediate needs without jeopardizing their long-term interests. Accordingly, while Rule 1.1 permits emergency advice and counseling, attorneys are often far more useful to the client in an emergency if they can simply preserve the status quo, secure some kind of delay in decisions, and help secure the assistance of an attorney experienced in the field.

In nearly any field of practice, however, attorneys can anticipate certain "emergency" cases that their clients might face. Attorneys in almost any field of practice might receive a call from an individual who is in circumstances in which they need to decide immediately whether a particular step will breach a contract or violate a law.

In other circumstances, an attorney may be called to provide emergency advocacy during or just before the client is to appear in court. This is most common when courts ask or appoint attorneys to step in at the last moment to represent a client. For example,

- An attorney may be part of a panel of attorneys who are appointed to represent parents in protective custody hearings (hearings that are held quickly after a child has been removed from their parents' care because of allegations of abuse and neglect).
- A public defender may be appointed to represent a criminal defendant at a detention hearing and probable-cause hearing with little advance notice.
- An attorney may provide courthouse advocacy, assisting clients who have arrived at the courthouse unrepresented and whose matters involve a variety of civil or criminal matters.

These requests for help or appointments to represent clients may come with less than an hour to establish the attorney-client relationship, learn the critical facts necessary for the imminent hearing, and understand the client's highest priority in that hearing.

An attorney in these circumstances must not neglect establishing rapport with the client but does so primarily by responding to the client's immediate needs. The attorney must be warm but efficient. The content of these emergency representations will depend on the type of case and the client's immediate needs, but this interview will nonetheless contain the essential elements of an initial interview.

In many of these emergency representations, the client is meeting the attorney for the first time at the same time that they are facing the imminent need for legal assistance. The attorney should introduce themselves to the client and provide a business card (physical or electronic). The attorney should learn the client's name and use it when speaking with the client.

Often the physical circumstances in which an attorney is meeting a client in these emergencies is not ideal. The attorney may be speaking to the client over the phone rather than in person, or they may be meeting the client in a courtroom hallway or even a jail cell. While the attorney may not be able to make the client more comfortable in these circumstances, they must ensure that there is sufficient privacy, such as by asking if others can overhear a phone call or looking for a private office or alcove for the consultation.

Similarly, there is little time for the small talk to ease into the interview and permit the attorney and client to get to know each other as persons before diving into the legal problem. However, the attorney should, at least, sincerely ask the client how they are feeling and try to address briefly but directly their most immediate concern.

If the attorney is being asked to represent the client, the attorney should secure the client's express consent to the representation. The attorney should provide a brief but clear explanation of the scope of that offered representation (e.g., for purposes of this hearing only) and fees (if any). While written fee agreements are not required unless they involve contingent fees, most states require a written agreement if the scope of the representation is limited. Many states provide forms for limited scope representation, in which the attorney can simply check the boxes of what services will and will not be provided.[4]

4. See, e.g., Mo. R. Pro'l Conduct, Rule 4-1.2 Comment 2, Notice and Consent to Limited Representation (2025), https://www.courts.mo.gov/file.jsp?id=200693.

Even if an attorney is appointed, they should nonetheless secure the client's express agreement to representation. The court's order of appointment will generally outline the scope of the representation, so a separate written agreement is unnecessary, but the attorney should still explain the scope of the appointment. The attorney should reassure the client that they are there to represent the client, not for any other interest. This is often best communicated in the context of an explanation of confidentiality or the attorney-client privilege.[5] It is not uncommon for clients of appointed attorneys to believe that the attorney is a representative of the court or the state. This is especially so in circumstances in which there are multiple attorneys and other legal representatives in the matter, as for example, in child in need cases where the child may have a guardian ad litem, the state agency may have an attorney, there may be a juvenile officer prosecuting the case, and other caregivers may have attorneys.

The goals of a "just in time" interview is not to gather comprehensive facts, identify the client's long-term goals, or advise on the overall case itself, but to meet the more immediate legal needs of the client. For example, a criminal defense attorney's meeting with a client who has just been arrested is not for the purpose of laying out a defense strategy or gather comprehensive facts for the defense. Rather, the attorney's goal is to secure the client's immediate safety and release and to prevent the client from doing or saying something that could further incriminate them. The attorney must identify the facts that are necessary immediately, and those that can be deferred to a later stage or for another attorney.

Even under significant time pressure, the attorney should remain calm. A client in an emergency will already be feeling pressure—the attorney need not add to that by becoming frantic. Transparency and clear organization are even more essential in these emergency interviews than in an interview for a full representation. The attorney should outline clearly not only how they will be conducting the truncated interview but why they must be direct and succinct in their questions. Reminding the client of the attorney's duty of confidentiality, the attorney can instruct the client to answer as directly as possible, without worrying about whether information is helpful or hurtful, important or irrelevant.

The counseling an attorney provides in emergency interviews is necessarily limited. The attorney must often focus only on preserving the status quo and preventing further harm to the client, rather than advancing their overall or long-term rights.

Interview Transcript for Evaluation

Because of the increasing prevalence of pro se litigants in civil matters, courts are increasingly providing courthouse resources for these individuals, including clinics to provide just-in-time legal assistance for certain types of cases. Consider what a rapid interview might look like in these circumstances:

Client: *Can you help me? I have a hearing this morning and I don't know what to do.*

Attorney: *Let's see if I can help. I'm Ashleigh Taylor. What's your name?*

Client: *I'm Monday Johnson.*

Attorney: *It's nice to meet you Monday. I'm an attorney here at the Tenant Defense Clinic. We don't work for the court. Our clinic is here to help tenants who are here for eviction hearings. The city pays us to defend tenants so there is no charge for our help. Is your hearing about an eviction?*

Client: *Yeah. I got behind on my rent.*

Attorney: *Okay, you're exactly the kind of folks we try to help here. When is your hearing?*

Client: *I got a notice to be here at 9:00.*

Attorney: *Do you have a copy of that notice?*

Client: *Yeah. Here (handing attorney summons).*

Attorney: *Okay, well it looks like you are in Division 31. That judge starts right on time. It's a busy docket*

5. RANDY HERTZ, MARTIN GUGGENHEIM, & ANTHONY G. AMSTERDAM, supra n. 3 at §5.04(d).

so it's hard to say exactly when your case will be called, but you need to be in the courtroom when it is. It's 8:30 now, so we don't have much time before you need to go in. I'll need to ask you some direct questions to determine how best to help you. Everything you tell me is confidential. Is that okay?
Client: Yes, that's fine. I'm really worried about this.
Attorney: Let's see what we can do to help. So this paperwork you gave me says that you are at the Brookview Apartments, Unit 38A, is that right?
Client: Yeah, it's a real dump but it's the best I can afford.
Attorney: Do you have a subsidy to help pay?
Client: No, I applied but I haven't heard back yet.
Attorney: Okay, and it looks like your landlord is evicting you for non-payment of rent—$1,200 for last month. Is that right?
Client: Yes, I lost my job two months ago and couldn't pay the full rent.
Attorney: I'm sorry to hear that. Has the landlord said anything to you about being behind?
Client: Yeah, I got a note under my door telling me I had to pay or I'd be evicted.
Attorney: Have you been able to pay anything?
Client: No. I just got a new job so I can pay this next month's rent and I can catch up on the rest if the landlord will just give me a little time.
Attorney: Have you talked to the landlord about this?
Client: I tried. But he's impossible to get ahold of. I've been complaining about my ceiling for months, so he avoids me.
Attorney: Okay. Can you quickly tell me what the problem is with your ceiling?
Client: There's been a leak in the bathroom ceiling for months. It's caused mold, and my daughter's asthma has gotten worse. I've complained multiple times.
Attorney: That sounds awful. When did you first complain?
Client: About three months ago, I called the manager and left a voice mail. Then I texted him photos.
Attorney: Do you still have the texts and photos?
Client: Yes, they're on my phone.
Attorney: Have you contacted anybody other than the manager about this?
Client: Just my neighbors. I'm not the only one with a mess they won't take care of.
Attorney: Okay, well, let me explain your situation and options. Your landlord has sued you in what is called a "rent and possession" case. That means he wants his rent or he wants you evicted. All he has to prove is that you had rent due, that he told you to pay it, and that you didn't.
Client: So I'm screwed.
Attorney: Not necessarily. We basically have two options. One is to work out something with the landlord and the other is to try to defend you against the eviction. Ordinarily I'd suggest that we try to get the hearing delayed (that's called a continuance) but this judge rarely grants continuances. Even if we could get one, you'd still be facing eviction, you'd just have more time before you were out.
So the first option we can try is to work out something with the landlord. We could try to negotiate a payment plan with your landlord that would allow you to stay or would give you more time to move. Given the way he's responded to you, he might not go for that and it doesn't really solve your ceiling issue, but it's an option we can try. I would simply talk to his attorney about this before your case is called and if we work something out, we would just tell the judge that the case is dropped. Then it's just a matter of your getting your back rent paid or finding another place to live. What's most important to you right now—trying to stay in the apartment or having more time to move?
Client: Well crap. I would have moved months ago if I could have. I can't afford to move right now, and my daughter's school is nearby.
Attorney: Okay well then it sounds like we should see if the landlord would be open to a payment plan that would let you stay. If he doesn't we can still try to fight the eviction.

The law says that if the conditions of your apartment are so bad that they are a danger to your health and safety, that can be a defense to nonpayment of rent. This is called a warranty of habitability defense. Because you notified the landlord about your ceiling before falling behind on rent and because he hasn't done anything about it in a reasonable amount of time, you can raise this defense in your hearing. If we fight the eviction based on the problem with the ceiling, you might not only get additional time to get caught up on your rent, but it might even reduce what you legally owe, but there's still risk that won't work and the court might require that you pay the rent into a special fund called an escrow account until the repairs are done.

Client: *That sounds good.*

Attorney: *Let me ask, besides being late on your rent, is there anything else that the landlord's attorney might bring up as a reason for you to be evicted?*

Client: *I don't think so. I complain a lot, but I'm respectful when I do—a lot more respectful than the manager is.*

Attorney: *Good. So let's make sure we agree: I'll try to negotiate a payment plan for you and if that doesn't work, we'll argue the warranty of habitability defense and ask that your rent be reduced until the ceiling is fixed. We'll use your texts and photos as evidence. How much do you think you could pay extra to get caught up on your late rent?*

Client: *I just started a new job last week. I could probably pay $300 per week until it's caught up.*

Attorney: *That's very helpful information. When we go into the courtroom, you sit down and wait for your case to be called. I'll talk to the landlord's attorney. When the judge calls your case, let me do most of the talking initially. If the judge asks you questions, be honest but brief. Try to stay calm and focus on these key points: you are ready to pay to get caught up, you repeatedly notified the landlord about serious repair issues, and these issues affected your daughter's health.*

Do you have your phone ready with those texts and photos? We'll need to show those to the judge and opposing counsel.

Client: *Yes, I have them here.*

Attorney: *Excellent. One last thing—if we're successful in reaching an agreement today, it's crucial that you strictly follow whatever payment schedule we work out. Missing payments would likely result in immediate eviction. Do you understand?*

Client: *Yes, I understand. I'll make the payments.*

Attorney: *Do you have any questions before we go in?*

Client: *What are my chances of staying in the apartment?*

Attorney: *I can't promise anything. We've got a basis to negotiate. We'll know more once I talk with the landlord's attorney and see the judge's reaction to our evidence. Are you ready?*

Client: *Yeah, I guess. Thank you.*

Attorney: *You're welcome. Go ahead and head into the courtroom and have a seat. Don't be nervous if you don't see me right away—they call the docket out here in the hall, so I'll know when your case is called and I'll be right in.*

B. How do you properly conduct an interview when the client has diminished capacity?

In some areas of practice, attorneys may regularly find themselves representing clients whose decision-making ability is diminished, whether by age, disability, mental health issues, substance use, or the emotional turmoil of family conflict. How should that fact impact your approach to an initial client interview? You should always proceed first with an assumption of competency. However, rather than beginning with the presumption that our clients are capable of participating fully in the interview and exploring how we can further assist our clients to recall and relate information or

generate and select solutions, we may react with automatic assumptions of incapacity.[6] We may presume, for example, that an individual has limited capacity simply because of their age, circumstances, or health status. However, our ethical standards counsel against this presumption. Rule 1.14(a) of the Model Rules of Professional Conduct, which has been adopted in all states except California, states that "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[7]

How are we likely to violate that ethical responsibility in the initial interview? First, we may be less inclined to accept that our client's understanding of their situation is accurate. We may presume that these clients cannot understand complex situations or legal concepts, rather than working to make those situations and concepts accessible to the client as we would any other. With elderly clients, we may assume that memory lapses indicate global cognitive decline rather than normal aging. We may confuse communication difficulties with cognitive impairment. For example, a client whose brain injury has impaired their ability to speak may not have any less capacity for decision-making. With young clients, we may view inconsistent narratives or metaphorical descriptions as indicia of dishonesty or confusion rather than appropriate developmental communication. If we lack the understanding of a mental illness and how it presents in a particular client we might discount their narratives as irrational, especially when the client presents strong emotions in relating their experience.

Especially when it comes to respecting our client's right to direct the objectives of the representation, we may be inclined to be more directive with these clients. Yet our standards of professional ethics dictate that we consider and respect the client's autonomy, dignity, and privacy just as we would any other client. Yet we may mistake "eccentricities, aberrant character traits, or risk-taking decisions" with a lack of capacity.[8] ABA Opinion 96-604 emphasizes that, just because an attorney thinks a client's choice is a poor one, doesn't mean the attorney should intervene and control the decision-making process.

Clients who regularly experience these types of bias may expect this conduct from their attorneys as well, and so may be less willing to trust and share fully their situation. That is why it is important to consciously monitor your reactions and question your assumptions when interviewing every client, but especially those clients about whom you may have concerns regarding capacity.

Just as in any representation, there is no substitute for getting to know your client well: their history, interests, and values. Assessing capacity may require the assistance of a health professional, but you need to make an initial determination of capacity even to make this choice to bring in the professional. Accordingly, if you have concerns about your client's capacity to make decisions, you must have some understanding of what diminished capacity looks like, what causes it, and how it affects decision-making. If you are working with young children, you need to understand child development. If you represent individuals who have experienced trauma, you must become competent in the special demands of working with these individuals. Likewise special competency is required to represent individuals with mental illness, intellectual disabilities, or other health factors that could impact capacity. Model Rule 1.14 provides additional guidance for assessing competency:

> In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reason leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.[9]

6. To learn more about these implicit reactions, visit Harvard's Project Implicit Health page at https://implicit.harvard.edu/implicit/user/pih/pih/index.jsp.
7. Amer. Bar Ass'n, Model R. Prof. Conduct, r. 1.14(a) (2025).
8. Charles P. Sabatino, Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It? 16 J. AM. ACAD. MATRIMONIAL LAW. 481, 488 (2000).
9. Amer. Bar Ass'n, Model R. Prof. Conduct, r. 1.14 cmt. 6 (2025).

Fundamentally, you should understand that capacity is not an all-or-nothing proposition. Capacity can vary according to time and circumstances. Impairments may be temporary or permanent or shifting. Similarly, decision-making capacity is not zero-sum. A client may have capacity to make certain decisions, need assistance in making other decisions, and lack the capacity to make still others. Distinguish between decision-making and execution of distinctions: clients may need support implementing decisions they are fully capable of making

With any client, you will want to work to facilitate the client's ability to recall and communicate. Again, there is little substitute for getting to know the client to advance this goal. For example, suppose you know that a client's memory may be stronger and more reliable in the morning, or in a familiar location. You therefore schedule interviews earlier or at the client's home rather than your office. You already know that how you ask questions can affect the capacity of the client to recall and relate information. The stronger and more flexible your repertoire of questioning techniques, the better the information you will gather. For example, knowing that children may have difficulty relating events in a relationship to dates and times, you will develop alternatives to the more conventional "timeline" sequence of questions. Rather, when asking about calendar dates, you will link questions to significant events in the child's life ("Was this before or after your birthday?"). Instead of asking "What time did this happen?" you will ask, "Was it morning when you eat breakfast, afternoon when you play, or nighttime when it's dark?"

Just as we may assume that some clients' capacity may be affected by their age or health, there are other situations when we may assume full capacity of our client, despite the presence of circumstances that interfere with their memory, communication, or decisions. In recent years, we have come to understand more fully that trauma, whether emotional or physical, presents distinct challenges that can impact the attorney-client relationship. Trauma-informed interviewing demands sensitivity, awareness, and specialized communication skills. Trauma can impair memory and exacerbate emotional reactions (either by causing withdrawal or heightened anxiety, mistrust, or fear). These reactions can interfere with the client's ability to communicate, understand, or make decisions. Attorneys can make it worse with insensitive questioning or inadvertent pressure. Conducting trauma-informed interviews requires attorneys to establish the client's safety and trust. Moreso than other interviews, the attorney must take the time to clearly explain the purpose of the interview and how information will be used. Likewise, a physically and emotionally safe environment is essential. As much as possible, the attorney should give clients choices about when, where, and how to communicate.

Key to the client's safety and trust is client control. The attorney should recognize that the client may not be comfortable with the pace and depth of disclosures that the attorney may desire. The attorney must plan for the additional time needed for sensitive fact gathering. Rarely does the initial interview give an attorney the entire story, but this is especially so when those facts require revisiting traumatic experiences. Attorneys must be patient and empathetic listeners, recognizing nonverbal cues that indicate distress or dissociation, and responding by gently redirecting or pausing or even ending the interview as needed.

You will need to meet with a client more than once to acquire a truer sense of the client's decision-making capacity. As the client gets to know you and gains confidence and trust in your representation, the client's ability to function optimally will increase. To both increase efficiency and the client's ability to function well, schedule more, but shorter, sessions. Additionally, attorneys should educate themselves on the potential effects of trauma on memory and cognition, recognizing that trauma survivors may recall events non-linearly or inconsistently without compromising credibility. Collaborating with mental health professionals can also enhance an attorney's ability to tailor their approach effectively. Developing cultural humility, awareness of personal biases, and avoiding judgmental or confrontational attitudes are fundamental practices. By integrating these trauma-informed strategies into client interviews, attorneys can significantly improve the reliability of information gathered, reduce client distress, and uphold ethical responsibilities toward vulnerable populations.

One of the most significant challenges in the initial interview with an individual who may lack some capacity is that third persons will want to assist in the representation. There are distinct risks to allowing third parties to interfere with your client's decision-making. Those third parties may not be operating to protect the client's interest. Even where they are, unless third persons are necessary to facilitate communication, allowing these persons to be privy to your conversations with a client can waive the attorney-client privilege and may violate the attorney's duty of confidentiality.

Whenever you are concerned about the capacity of a client, you should insist on meeting privately with the client in person. A separate private meeting will allow you to assess the seriousness of a competency issue and to educate the client regarding her role and her family member or friend's role in the representation. If you conclude that your client is able to direct the representation, you can then proceed as you would any other representation, taking direction solely from the client and limiting third person involvement to that which is prudent and helpful to the client.

Skills Practice

Arranging for these separate meetings can be a challenge when a third person believes they are necessary for the representation to be effective. For example, suppose that an attorney has been contacted about a bullying incident at a local middle school. The prospective client and target of the bullying incidents is 13-year-old Jason. The preliminary intake indicates that Jason was beaten badly in the bathroom at the school and suffered a concussion. He has come to the initial interview with his stepfather Robert and they have just been shown into the conference room. Consider how this interview begins:

> Attorney: *Good morning, Jason and Mr. Wilson. I'm Jennifer Liu. Thank you for coming in today.* (extends hand to Jason first, then Robert).
>
> Robert: (jumps in before Jason can speak) *We're here about the bullying situation at Westlake Junior High. It's been going on for months and the school isn't doing anything about it.*
>
> Jason: (looks down, shifts uncomfortably in his chair)
>
> Attorney: *I appreciate that background, Mr. Wilson. Before we get started, I'd like to explain a few things about how these consultations work. First, I'd like to chat with Jason for about 15-20 minutes alone, and then I'd be happy to bring you back in to discuss how we might move forward together.*
>
> Robert: *That doesn't make sense. I know more about the situation than he does. Jason doesn't always explain things clearly, and I need to make sure you get the full story. I've been dealing with the school administrators all along. I have all the emails right here. (pulls out folder) Besides, I'm the one paying for this consultation.*
>
> Jason: (looks increasingly uncomfortable, glances between attorney and stepfather)

Pick up the interview at this point. How would you proceed to secure a private meeting for Jason and build rapport with him separate from his stepfather's influence but also preserve the stepfather's confidence in your representation.

What if, when meeting privately with Jason, he insisted that he needed his stepfather present for the interview? You have two decisions to make at this point. First, is Jason's capacity to act in his or her own best interest so diminished that he needs a third party to assist him? Again, remembering that capacity is not an absolute attribute, you may conclude that Jason may need some assistance early on in getting comfortable with the representation but not at a later stage after you have had an opportunity to build rapport. Second, you need to decide whether his step-father Robert is the adult who is best able to assist in his decision-making. This will depend not only on Robert's legal relationship with Jason, but whether his influence over Jason is supportive or directive.

Here is where a little education about the attorney-client privilege might permit you to convince the stepfather of the need for at least some separate consultation. While Comment 3 to Rule 1.14 provides "When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client privilege,"[10] there is no caselaw to back up that comment and the exception it provides relies heavily on the determination of whether the third person is necessary. Document this determination and limit third party input to only that which is indeed necessary.

In summary, the work you put into improving your ability to communicate with and counsel clients whose

10. Id. r. 1.14 cmt. 3.

capacity may be diminished will benefit all clients. Curb cuts and ramps are designed to make streets and entrances accessible for those with limited mobility, but they benefit all of us in making our day-to-day mobility easier. Likewise, all of your clients will benefit from you adjusting your communications to improve your ability to build trust, to gather information rather than making assumptions, and to respect client decision-making autonomy. As one elder law attorney comments, "Remember that sometimes our client's diminished capacity might be more of a reflection of our incompetency in adjusting to the emotional, physical, and physiological needs of the client."[11]

C. How do you conduct an interview with a client who is incarcerated?

Criminal defense practice presents several unique challenges for interviewing. In this section, we will focus on one particular challenge: conducting the initial client interview with a client who is incarcerated.

This setting makes all aspects of the interview more challenging. Consider the physical environment in which the interview will take place. Jails and prisons are the antithesis of a warm and inviting environment. Interview rooms are small (though perhaps larger than the 9×6 cell the client is confined to), minimalist spaces with blank walls of institutional colors and fixed furniture (bolted metal table and chairs). Surfaces are often scratched with graffiti; walls may show institutional wear. The room will either have no windows or small, narrow, reinforced windows. Harsh fluorescent overhead lighting can't be adjusted. Background noise of PA systems, door buzzers, radio chatter, and other inmates echoes from concrete walls. The noise is constant. Rooms have poor ventilation.

You will have had to go through multiple security checkpoints before reaching the interview area. Correctional officers will be stationed nearby, occasionally performing visual checks. Time will be strictly limited. There will be clear restrictions on what you can bring. Many facilities prohibit staples, paperclips, and spiral notebooks and nearly all have strict limits on laptops, phones, or recording devices. Even if electronics are permitted, internet access will not be available.

Your client will likely arrive in prison wear, perhaps shackled. Interview rooms may have glass partitions, surveillance cameras, or guards within earshot. Attorneys may be restricted to communicating with the client through plexiglass or over phones. There will be limited desk space for spreading out documents and specific protocols for passing papers (often with officer inspection). The institution will have strict visiting hours and limited duration for visits.

These environmental factors will be stressful for you, but you can only imagine how stressful this experience is for the client, who is confined to a 6×9 foot cell with limited time outside for exercise and with no clear idea of when or if they will be released. Clients may be experiencing shock or sleep deprivation. Clients may be going through withdrawal from addictions or due to a lack of required medications. They may have been victims of violence or threats of violence within the prison.

How can an attorney build trust in such an environment?

First, the attorney should do what they can to ensure privacy of the consultation. Ensuring that conversations aren't recorded or monitored, setting up procedures for sharing case materials while maintaining privilege, and managing the presence of correctional officers while preserving confidentiality are all challenges in an institutional setting. Where there are significant risks of a loss of privacy, the attorney should be judicious in the scope of their conversation.

Second, the attorney should begin with introductions just as in any client interview. The attorney must ensure that they are interviewing the correct client. Where the attorney has been appointed or a family member has engaged them, they should be sure the client understands who they are and why they are visiting with the client.

11. Roberta K. Flowers, Maintaining a "Normal Relationship" with Clients with Diminished Capacity, 27:2 NAELA NEWS 19 (Apr-Jun 2015).

Third, the attorney may need to "flip the script" of the usual initial interview and focus on identifying the client's needs and goals before gathering case information. When meeting an attorney for the first time while incarcerated, clients often have priorities shaped directly by the immediate stress and trauma of confinement. Experienced defense attorneys recognize that addressing these immediate concerns builds trust and creates space for the client to engage with more complex legal considerations as the relationship develops.

Accordingly, the first matters an attorney should ask about are basic needs. How is the client coping? Do they have any medical needs? What are their immediate concerns? Clients may prioritize discussing these immediate concerns over case details. Addressing safety threats or urgent health needs (medication access, treatment for injuries) may supersede legal strategy discussions. Similarly, some clients will not want to talk about the case until they have been assured that their loved ones know where they are and will be able to communicate with them.

In most counseling situations, attorneys seek to focus their clients on long-term as well as short-term goals. When meeting a client for the first time in a jail, prison, or other confinement, a crisis mentality restricts their ability to consider long-term consequences. Instead, you may need to focus on small, immediately actionable items to help the client regain a sense of agency. Often questions focused on the long-term goals of defense and sentence mitigation will sometimes be swamped by the client's overwhelming focus on getting out immediately, sometimes at the expense of long-term case strategy. Some clients may initially express willingness to "admit to anything" just to secure release. Nonetheless, these clients may be skeptical of a defense attorney's offer to assist with a plea deal, presuming that the attorney is providing this assistance in order to be rid of the representation as soon as possible.

Initial interactions may serve as tests of the attorney's responsiveness and reliability. While attorneys in other areas of practice may place a priority on moderating their clients' unrealistic expectations, the challenge in this setting is building an expectation that you can and will help.

Public defenders have special challenges in building client trust. Many criminal defendants may not view public defenders as "real attorneys" or may be suspicious of their loyalty. They may believe that, because their attorney is paid by the state, they are not truly on the client's side. They may be concerned that the attorney's view of their role is to facilitate the client's plea bargain rather than defending them. Clients may not trust the competence of a public defender. In part this can be a "you get what you pay for" attitude. Other times, these clients may have heard of or had bad experiences in the past with public defenders, or they may know of the high caseloads most public defenders must balance. For whatever the reason, attorneys practicing as public defenders must be especially attentive to building a trusting relationship.[12]

Some clients will "trust test" their attorneys to evaluate whether the attorney is genuinely committed to their defense. These behaviors stem from vulnerability, past experiences with institutional systems, and the power imbalance inherent in the attorney-client relationship. This testing might consist of testing the attorney's ability to investigate the case. A client might intentionally change minor details in their story to see if the attorney notices and follows up or share verifiable information to check if the attorney investigates it. Similarly, the client may test the attorney's responsiveness by making minor requests (e.g., "Can you check on my property in police custody?") to assess follow-through or asking the attorney to convey information to family members, then confirming it was done.

Criminal defendants may be individuals whom society has already dismissed as broken, dangerous, or less worthy. These defendants will test for the attorney's attitudes, observing if the attorney shows discomfort, judgment, or disgust when discussing the alleged offense and watching for subtle signs of dismissiveness, condescension, or impatience. If the client perceives the attorney as inexperienced, they may push the attorney to demonstrate their knowledge of the system and how to navigate it.

At the same time that an attorney must engender their client's trust in their competence, they must maintain a strong sense of humility. Remember that your client is the expert in their situation, one you are unlikely to be familiar with. Adopt a learner mindset. Clients who have prior experience with the criminal justice system have hard-knocks

12. See https://www.nacdl.org/Content/PDTrainingsClientRelations

lessons about how that system works. Do not be too quick to dismiss or correct their understandings. Don't be afraid to admit that you don't know but do assure the client that you will research or learn whatever is needed.

Understanding these trust-testing behaviors helps attorneys recognize them as rational responses to an inherently disempowering situation rather than mere resistance or difficult behavior. Attorneys who successfully navigate these tests—by demonstrating consistency, follow-through, honesty, and respect—can establish the foundation of trust necessary for effective representation.

When it comes to fact gathering in this setting, the limited time available for consultations in these settings brings into play all of the considerations of any "just in time" interviews discussed in section B of this chapter. The attorney will need to focus primarily on time-sensitive issues like bail, immediate defense needs, and imminent court dates. In gathering information to advocate for the client and begin the process of investigation and defense, the attorney will need to continue to keep trust building and client empowerment as core considerations. Criminal defense attorneys will debate whether and how to ask the client about their own culpability. In the end, however, you have little control over what your client decides to share. "They will tell you what they want you to know, regardless of what you ask."[13] All of the information we have discussed in section B of this chapter, relating to interviewing clients who have experienced trauma, will apply in this setting.

In an initial criminal defense interview, the attorney's most important objective is to counsel the client in the strongest terms possible to do or say nothing that would incriminate them. This means warning the client not to talk to police, cellmates, or others. Some attorneys advise the client against "making a statement" but many clients will not understand that a statement can be as simple as orally answering a yes or no question. Other attorneys will advise their clients to simply remain silent,[14] but silence is hard to maintain. Seasoned criminal defense attorneys may even use the phrase "Shut the f**k up" as the impact of such strong language is likely to make this advice both emphatic and memorable.[15] Other attorneys, recognizing how difficult silence can be to maintain in the face of pressure to speak, advise the client to say "My lawyer told me not to say anything."[16] Along with this advice, the attorney must warn the client not to agree to searches, lineups, or other police investigative procedures.[17]

The National Legal Aid and Defender Association, Performance Guidelines for Criminal Defense provide guidelines on the kind of information an attorney should prioritize in the first meeting:

> (b) The Interview:
>
> > (1) The purpose of the initial interview is both to acquire information from the client concerning pretrial release and also to provide the client with information concerning the case. Counsel should ensure at this and all successive interviews and proceedings that barriers to communication, such as differences in language or literacy, be overcome.
> >
> > (2) Information that should be acquired includes, but is not limited to:

13. Interview with Professor Sean O'Brien, UMKC School of Law, February 23, 2025.
14. In his YouTube recording of a class lecture, which has over 20 million views, Regent Law School Professor James Duane notes this advice has been given by attorneys for decades, citing the exampleof Justice Jackson's statement that "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949)(Justice Robert Jackson, concurring in part and dissenting in part). James Duane, Don't Talk to the Police" YouTube (Mar 20, 2012), https://www.youtube.com/watch?v=d-7o9xYp7eE.
15. The phrase became a viral meme in a video posted by "The Pot Brothers at Law", which has gained over 4.8 million views on YouTube. Troy Farah, The Pot Brothers at Law Want You to 'Shut the Fuck Up' Around Cops, Vice (May 28, 2021), https://www.vice.com/en/article/the-pot-brothers-at-law-want-you-to-shut-the-fuck-up-around-cops/.
16. Randy Hertz, Martin Guggenheim, & Anthony G. Amsterdam, Trial Manual for Juvenile Defense Attorneys. §3.19(b)(2024) at https://www.defendyouthrights.org/resources/trial-manual/. The authors note that this approach also "avoids the risk that the client's total silence may later be used against him or her as a "tacit admission."
17. ID. at § 3.19(b)-(d).

(A) the client's ties to the community, including the length of time he or she has lived at the current and former addresses, family relationships, immigration status (if applicable), employment record and history;

(B) the client's physical and mental health, educational and armed services records;

(C) the client's immediate medical needs;

(D) the client's past criminal record, if any, including arrests and convictions for adult and juvenile offenses and prior record of court appearances or failure to appear in court; counsel should also determine whether the client has any pending charges and also whether he or she is on probation or parole and the client's past or present performance under supervision;

(E) the ability of the client to meet any financial conditions of release;

(F) the names of individuals or other sources that counsel can contact to verify the information provided by the client; counsel should obtain the permission of the client before contacting these individuals.

(3) Information to be provided the client includes, but is not limited to:

(A) an explanation of the procedures that will be followed in setting the conditions of pretrial release;

(B) an explanation of the type of information that will be requested in any interview that may be conducted by a pretrial release agency and also an explanation that the client should not make statements concerning the offense;

(C) an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;

(D) the charges and the potential penalties;

(E) a general procedural overview of the progression of the case, where possible;

(c) Supplemental Information:

Whenever possible, counsel should use the initial interview to gather additional information relevant to preparation of the defense. Such information may include, but is not limited to:

(1) the facts surrounding the charges against the client;

(2) any evidence of improper police investigative practices or prosecutorial conduct which affects the client's rights;

(3) any possible witnesses who should be located;

(4) any evidence that should be preserved;

(5) where appropriate, evidence of the client's competence to stand trial and/or mental state at the time of the offense.

Remember that effective advocacy is not simply about guilt or innocence. Most criminal defense is about sentencing.[18] The very person-first approach necessary for building rapport and trust is also the most effective sentencing advocacy. The attorney should focus on the client's talents and needs and connecting the client to a support network so that, if released, the court will be assured that the sentencing plan protects the safety of the community.

Obviously, the initial interview of an incarcerated client will rarely provide the defense attorney all of the critical facts necessary to craft a plan for investigation and a strategy for defense and sentencing advocacy. The attorney must at least use this first meeting to protect the client from further threats and build a foundation of trust.

18. Interview with Professor Sean O'Brien.

D. How do you conduct an initial interview with in-house counsel retaining the attorney for an internal investigation?

When a larger company or organization hires an attorney, the initial interview may be with an in-house attorney who represents that company. This may be an attorney for a governmental unit (for example, a city or county attorney) or it might be in-house counsel for a corporation or non-profit organization. When the client in these instances is seeking representation in litigation or assistance with a specific transaction, the initial interview looks little different than an interview with any client. The attorney will proceed through the same steps as in any initial interview: building rapport, gathering facts, clarifying goals, developing theories and solutions, and selecting among these to determine whether and what type of representation results. In a wide variety of industries, an attorney is engaged for a third type of representation: to conduct an internal investigation regarding compliance with particular regulations. In many instances, this interview is not to determine whether an attorney-client relationship will be established: both the client and the attorney proceed from the assumption that the attorney will represent the client.

The challenge in these settings is remembering that the client is not the people with whom the attorney is speaking, but is the entity:[19] the governmental unit, business, or nonprofit organization. Accordingly, the attorney must always pay attention to whether that in-house attorney has the authority to engage outside counsel and who will be directing the actual representation.

Just as in any other representation, there is little substitute for truly getting to know the client. Getting to know the client means understanding that entity's history, mission, and culture. It also means learning about the people within the entity who have important leadership roles. The attorney should have clear information about reporting structures. The conversation should explore potential conflicts within the organization and identify stakeholders who may resist the investigation.

However, much of this work of learning about the organization will take place before or after the initial interview; the primary purpose of these initial interviews is to determine the scope of the representation and to develop a plan for conducting the investigation. Since the purpose of the representation will itself be fact gathering, the primary questions to be asked in this interview are designed to determine what questions or concerns the investigation should address. Just as in fact gathering in any other representation, the journalist's questions will provide an effective framework in scoping the investigation:

- What? The nature of the compliance concerns should be outlined specifically: is a matter to be investigated solely from the perspective of compliance with internal policies or are their specific areas of law or external regulations of concern? If so, what is the nature of that law: regulatory, civil liability, or criminal liability? What potential areas of compliance are excluded from the investigation?
- Who? Who raised the concerns initially? Who has authority to direct the investigation? Will officers or directors of the entity be involved? Who are the employees and agents with whom the attorney should be meeting? Has a governmental body been involved thus far and, if so, how? Have lawsuits been filed or are they expected?
- When? What period of time does the investigation cover? Are there deadlines to be met in producing the results of the investigation?
- Where? Which division or department of the entity is involved? What is the geographic scope of the investigation? Which governing law will likely apply (local, state(s), federal, international?)
- Before? What communications and actions have already occurred?
- After? Will people get fired? Will results of the investigation be used in litigation? In what form will the final report be expected: oral findings, written report, presentation, recommendations for changes in policies or procedures?

19. "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Model Rules of Pro. Conduct r. 1.13(a) (Am. Bar Ass'n 2025).

To whom will reports be directed or presented?

The bulk of the interview should be devoted to a determination of goals and methods (the "why" and the "how" of the engagement). Clarifying the client's goals regarding the investigation is a primary part of the initial interview in compliance matters. Just as in any representation, a client may have multiple goals. The concerns may be to limit harm such as by protecting shareholder value, limit reputational harm, or limit the likelihood or success of lawsuits, regulatory proceedings, or criminal actions. Where the investigation uncovers wrongdoing, the goals may be to identify ways to remediate those wrongs or prevent recurrence in the future. Internal concerns will also appear, such as ensuring trust and fairness in the investigation or retaining key employees.

Just as you want to screen clients for those representations that you will later regret, part of the function of these interviews is to determine the client's expectations and whether those expectations conform to your preferred approach to representing clients. The question of your relationship with your client is no mere philosophical matter in these circumstances. You must make it clear whether you are acting as an advocate (investigating matters as part of preparing to advocate on behalf of the client in litigation) or as a counselor (acting as an objective source of independent fact-finding and recommendations). This distinction is important, not only for determining the scope and approach you will take to the investigation, but also for determining whether and to what extent communications are protected by the attorney-client privilege.

If the client presumes that the attorney will pursue an investigation as an advocate, they will expect the attorney to focus on discovering those facts that support the company's legal claims and defenses and minimizing or discrediting unfavorable facts. The attorney's report or analysis will be structured so as to maximize attorney-client privilege and work-product protections. The client who has engaged an attorney to assist in compliance, however, will expect an objective, independent investigation, pursuing and presenting facts regardless of whether they help or harm the client. The attorney's report or analysis will provide remediation recommendations and may ultimately produce findings that could be disclosed to third parties.

For example, suppose an attorney has been contacted by a pharmaceutical company that has discovered potential off-label promotion by its sales force. If the attorney has been retained to represent the client in defending the company in a regulatory action, the attorney will search for evidence that the company provided proper compliance guidance and will not search for broader causes or instances of regulatory misconduct. Contrast that with the expectations a client may have if they engage the attorney to assist in bringing the company into compliance. In this instance, the client will be more likely to expect that the attorney will thoroughly investigate all sales practices regardless of implications. They will expect the attorney to discover underlying root causes of the problems, such as cultural factors or deficits in the training or incentive structure. The attorney will provide recommendations for comprehensive remediation.

The role definition substantially impacts whether communications or findings will be shielded from discovery in litigation. If the attorney is engaged as an advocate in anticipation of litigation, communications will more clearly fall within traditional attorney-client privilege[20] and work product protections will apply more readily. If the attorney is acting as a counselor in the investigation, however, the attorney's communications may be challenged as business advice rather than legal advice, outside the scope of the attorney-client privilege.[21] Findings and recommendations may

20. Courts generally recognize that the attorney-client privilege applies to internal investigations conducted for the purpose of obtaining legal advice. In Upjohn Co. v. United States, the Supreme Court held that communications between corporate employees and attorneys during an internal investigation were privileged if the investigation was conducted to provide legal advice, the communications were made confidentially, and the employees were informed of the purpose of the investigation. Upjohn Co. v. United States, 449 U.S. 383 (1981). Importantly, it is the entity that owns that privilege rather than the person who is speaking with the attorney. That means it is the entity that can choose to assert or waive the privilege.
21. If an investigation is conducted for business purposes or regulatory compliance rather than for obtaining legal advice, the attorney-client privilege may not apply. For example, in National Farmers Union Property & Casualty Co. v. District

be designed with the expectation that the client will wish to use these reports as evidence of their robust compliance efforts.[22]

Accordingly, during the initial interview, the attorney must take care to probe the client's expectations regarding the attorney's role and the purpose of the investigation. This means clarifying the attorney's independence boundaries and possible future role if the outcome of the investigation reveals misconduct or leads to legal proceedings. The attorney might ask, "If I find evidence of serious misconduct by senior executives, what process should I follow? Are there any reporting limitations you're envisioning?" "Under what circumstances would you consider disclosing investigation findings to regulators? How might that affect our approach?"

Not only must the initial interview with an entity client seeking an investigation carefully delineate objectives, the attorney in these interviews must explore the means of accomplishing those objectives much more than with clients in other settings. While attorneys representing a client in litigation may discuss broadly their approach to legal theories and defenses, they are less likely to need to detail discovery and litigation strategy as part of the scope of the representation. However, this detail is far more critical in an initial interview determining the scope of a compliance investigation.

The attorney and client must create a concrete and precise description of the parameters of the investigation. Misunderstandings of the attorney's responsibility are almost inevitable if the agreed-upon scope is simply a "complete investigation." Rather the attorney and client must specify the specific allegations, time periods, and departments to be investigated and the relevant compliance standards against which the facts will be measured. "Scope creep" is one of the most challenging aspects of managing internal investigations. Without proper boundaries established during the initial client interview, investigations can expand uncontrollably, creating numerous complications. Scope creep occurs when an investigation gradually extends beyond its original parameters, consuming additional resources and time and expanding into unrelated areas. This phenomenon is particularly problematic in internal investigations because an investigation will often naturally uncover connected issues, resulting in pressures to broaden the inquiry as these findings emerge.

While you might be delighted to have this additional work, you may not be ready or able to take on these tasks. Without a clear scope of how you will conduct the investigation and what the expected products will be, either you or your client or both will be unhappy: costs can escalate unpredictably, completion dates become unreliable, and resources may be limited to be able to meet the expanded responsibilities. In sum, you need to not only clearly define what you will do for the client but what you will not do. You need to discuss how you will manage requests for changes in that agreement.

Because the attorney will be speaking with many different persons in the entity in an investigation, the attorney must establish clear communication protocols between outside counsel, in-house counsel, and other organizational stakeholders. The attorney and client must designate a single point of contact within the in-house legal team (typically the General Counsel or a designated attorney). The attorney and client should agree that all substantive communications about findings, scope changes, or significant developments flow through this channel first and create a regular update cadence. This communication protocol may require a classification system for investigation information: from highly sensitive findings (e.g., potential criminal conduct, executive misconduct), to significant policy violations or regulatory

Court for Denver, 718 P.2d 1044 (Colo. 1986), the court found that the privilege did not apply because the investigation was conducted primarily to gather factual information rather than to provide legal advice, and the employees were not informed that the communications were confidential or for legal purposes.

22. This disclosure may be part of a strategy to rely on an internal investigation to support a defense. When the client raises an investigation as a defense, courts have held that the client has waived the privilege over the investigation and related documents. Fenceroy v. Gelita USA, Inc., 908 N.W.2d 235 (Iowa 2018)(holding that employer had waived attorney-client privilege and non-opinion work-product protection over testimony and documents related to an internal investigation when, in a race discrimination case, it relied upon that internal investigation to support an affirmative defense that it exercised reasonable care to prevent and correct harassing behavior.)

concerns, to less sensitive process improvements or minor policy violations. Written communications should have clear templates to designate their purpose in order to protect their status as privileged or work-product.

Communication protocols should also describe who and how employees will be contacted and interviewed. When meeting with employees and officers, the attorney must make it clear that they represent the entity and that their duty of confidentiality is to the entity not the person being interviewed.[23] In the initial interview with in-house counsel, the attorney should discuss how the entity will reinforce that message. For example, in many organizations, the entity itself will provide the initial "Upjohn warnings" regarding the privileged nature of communications with investigating attorneys.

Counsel should explore in particular how potential whistleblowers will be managed, including establishing procedures for whistleblowers that protect confidentiality and prevent retaliation. Likewise, if a regulatory agency is already involved in the matter, the attorney and client should specify who communicates with these regulators and what information can be shared at different investigation stages. Finally, the attorney and client must discuss technological aspects of the investigation. Communication channels, whether for communication or for sharing documents, must be secure. By creating these structured communication protocols at the outset, outside counsel can maintain appropriate control over information flow while ensuring in-house counsel remains appropriately informed to fulfill their organizational duties.

Finally, an investigation requires working with often voluminous documents and communications. The initial interview should discuss immediate document preservation needs and legal holds and identify key custodians and data sources. The attorney should explore whether there are risks for potential destruction of evidence, and how those risks might be mitigated. Whether, who, and how electronic evidence will be gathered and analyzed must be part of any investigation plan.

As you can see, the initial interview in these compliance situations will challenge the attorney to clarify client goals and collaborate on problem-solving at an early stage far more than in other types of representation. When an attorney conducts these interviews well, they create the framework for a successful partnership with the client and effective representation.

Skills Practice

Suppose you have been retained by in-house counsel for a university regarding allegations of sexual misconduct by a coach in the school's gymnastics program. You have asked the client what their expectations are regarding your role. The client answers, "We'll want a thorough investigation. We want to know what happened. We need to protect the university's interests."

Practice with a partner how you might further clarify expectations with the client, depending on whether the client anticipates litigation and is engaging the attorney to prepare or whether the client is seeking an independent internal investigation in order to address any misconduct that might be discovered.

Evaluate your resulting agreement. Suppose after initial interviews, you note that several witnesses mentioned similar harassment by other coaches or in other programs. When you include this information in a preliminary report, in-house counsel responds that you should "review all harassment complaints from the past five years to identify patterns." Did your scope address this eventuality? What if, after you complete your investigation and report, the client asks you to "draft new harassment policies based on your findings" or "design and conduct company-wide training."

23. Model Rules of Pro. Conduct r. 1.13(f) (Am. Bar Ass'n 2025)("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.")

Chapter Ten Endnotes

Conclusion

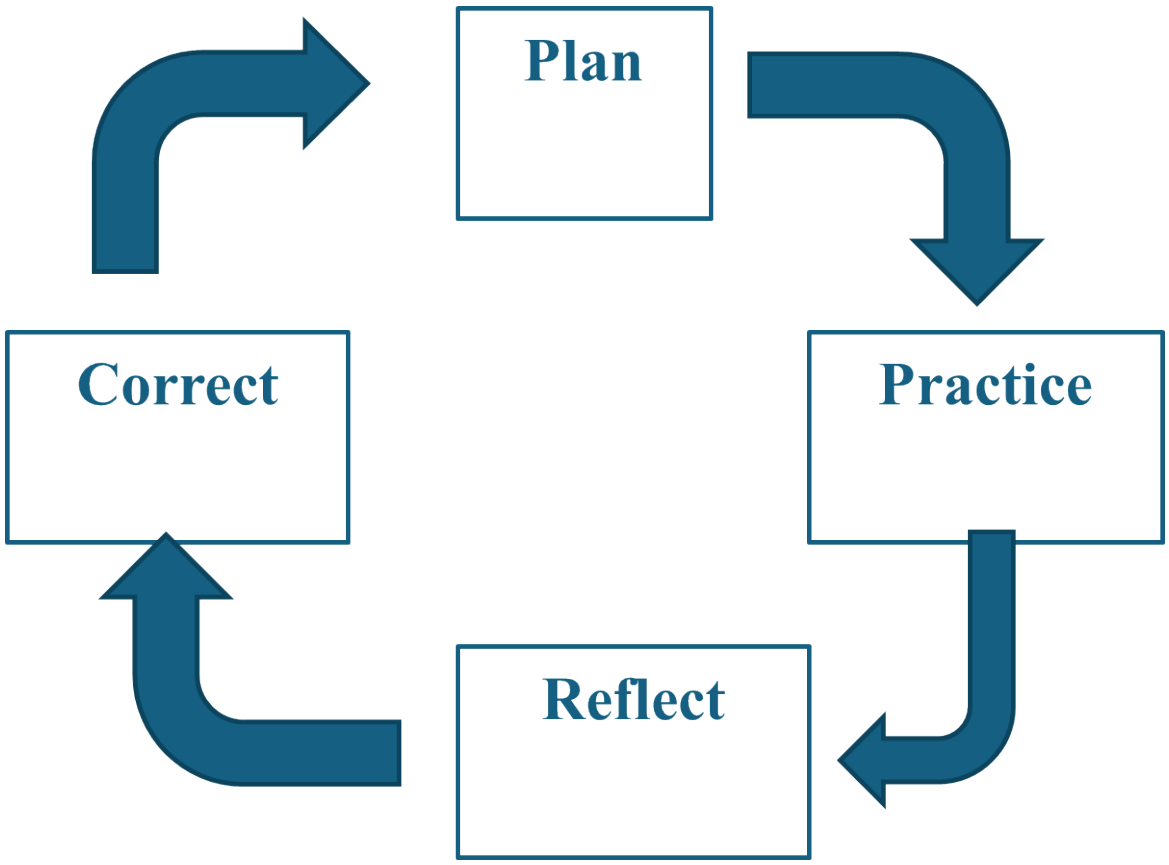
This text provides a good deal of knowledge about client interviewing and counseling; however, being able to conduct an interview and counsel a client requires more than knowledge. It requires the adoption of a set of values and the development of a set of skills.

To be effective at interviewing and counseling clients you must make a commitment to core values of the legal profession: service, autonomy, and responsibility. You must have a deep appreciation of the various roles you play in representing a client.[1] Initial interviews engage an attorney in their role as counselor, which involves not only informing clients of their rights and obligations but helping clients to clarify their goals and craft solutions—both legal and practical—to achieve those goals. Acting as a counselor is a distinct role from acting as advocate: a counselor owes a client independent professional judgment,[2] including identifying weaknesses in a client's position or foolishness in their goals. It is in the initial interview that you will demonstrate respect for your client's autonomy while also fulfilling your responsibility to the rule of law and system of justice.[3]

You must also make a commitment to the value of continual improvement.[4] You may be familiar with Carol Dweck's book "Mindset"[5] in which she distinguishes between a fixed mindset and a growth mindset. Individuals with a growth mindset believe that intelligence and ability are changeable and can be developed over time through effort and persistence. As a result, they are constantly looking for new challenges, which they perceive as opportunities to grow and improve. By contrast, people who have a fixed mindset believe individuals are born with certain amounts of intelligence and ability, which are stable and unchangeable over time. As a result, they try to avoid looking dumb at all costs because they believe this would reveal an inherent deficiency in their intelligence. When it comes to bias, a fixed mindset can cripple our ability to recognize and change negative stereotypes and harmful behaviors. This may cause us to isolate ourselves in a narrow world of sameness lest we make a mistake in interacting with others who are different than ourselves or exposing ourselves to experiences that challenge our skills. A growth mindset, on the other hand, encourages us to seek out knowledge and experience, knowing that we have much to learn and that mistakes are often the most powerful teachers.[6]

How practically can you improve your skills in interviewing and counseling? As a general matter, improving any skill requires a recursive practice in which you plan, practice, reflect, and correct.

1. Model Rules of Pro. Conduct Preamble ¶ 2 (Am. Bar Ass'n 2023).
2. Id. r. 2.1.
3. Id. Preamble ¶¶ 5-6.
4. Id. r. 1.1, comment 8 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.").
5. CAROL DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2006).
6. https://hbr.org/2019/11/how-the-best-bosses-interrupt-bias-on-their-teams.



Planning improvement begins with goal setting. Identify a specific skill that you want to improve in the context of interviewing and counseling. In this text, we have explored a number of specific skills:

- Understanding your own preferences, philosophies, biases, strengths, and weaknesses
- Developing your cultural competencies
- Planning for interviews
- Improving empathy
- Managing nonverbal communication
- Conveying nonjudgmental acceptance
- Communicating with transparency
- Establishing rapport
- Organizing an interview
- Exercising curiosity and avoiding premature judgments
- Questioning effectively
- Actively listening
- Paraphrasing and summarizing
- Identifying and reflecting
- Helping clients to clarify goals, interests, disputes, and risk preferences
- Analyzing facts
- Framing situations
- Managing biases
- Brainstorming solutions

- Facilitating decisions
- Exercising judgment
- Clarifying relationships
- Documenting

Identify a particular skill you would like to improve and state your goal in concrete, measurable terms.

Practice the skill you have identified. Entire institutes are devoted to improving skills of trial practice, but there are few formal opportunities to practice interviewing and counseling in formal programs. Accordingly, you must develop your own plan and resources for practicing skills. Many of the practice exercises in this text are ones you can continue to use throughout your career. Obviously, you will have opportunities to practice your skills in general as you meet with clients, but you can practice many skills outside this specific context. For example, you can develop relationship skills in any setting in which you are interacting with others and you can develop empathy by reading literature.

Reflect. Throughout the text you have been asked to develop the skill of reflection—describing what you have done or observed, questioning why and how, identifying ways to improve or extend your learning, and then planning opportunities for future improvement. Reflection need not be in writing, though there are particular benefits to written reflection. Many attorneys engage in reflection through dialogue with others. With some skills, recording yourself in audio or video and observing and critiquing your performance can be very effective, though as we have discussed, you would not generally want to record interactions with actual clients. Finally, seeking feedback on your skills, particularly from those who have keen observation skills and a willingness to provide candid evaluation, is a powerful source for improvement.

Correct. Practice and reflection are of little value if you do not take advantage of the insights provided from this process to repeat the cycle of planning, practicing, and reflecting to continually improve.

Through this iterative process of continual improvement, anyone can become highly effective in carrying out one of the most common and important roles of an attorney: acting as the agent of our system of justice by building a relationship with a client and helping them to protect their legal rights and fulfill their legal responsibilities.

Conclusion Endnotes