

## CHAPTER 4

# BEGINNING THE LEGAL INTERVIEW

### § 4-1. INTRODUCTION

At the end of the initial interview, lawyers should

- Understand the goal(s) the client hopes to achieve.
- Understand how the client believes the lawyer can help achieve those goal(s).
- Understand enough about the matter to make an initial assessment of the client's goals and the possibility of achieving them.
- Have an adequate level of trust with the client.

At the end of the initial interview, clients should:

- Have had the opportunity to state or clarify their goals in the matter.
- Have had the opportunity to tell their story in sufficient detail.
- Understand how this lawyer can help them achieve their goals.
- Trust the lawyer enough to allow the lawyer to proceed with the case.
- Have a general idea of what will happen next and who will be responsible for it.

In the pages that follow, we present a model of interviewing that provides an opportunity for the interviewer to exercise flexibility. Many different styles and approaches can be and are successful. The legal interviewer should employ a range of appropriate techniques depending on the goals and circumstances of the interview.<sup>1</sup>

### § 4-2. EFFECTIVE LEGAL INTERVIEWING: BUILDING RAPPORT AND GATHERING INFORMATION

The goals of effective legal interviewing are to

- Establish rapport with the client, and
- Gather information necessary for the lawyer to represent the client.

<sup>1</sup> Cf. RAYMOND L. GORDEN, INTERVIEWING: STRATEGY, TECHNIQUES, AND TACTICS (1969).

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Rapport building and information gathering never really end. They are not commodities that can be obtained and then preserved without effort. Legal representation is a dynamic process. New developments may require the lawyer to gather additional information from the client. The continuing interaction of the lawyer and the client may undermine the rapport established initially. When the case shifts to decision making (the counseling phase), rapport and fact-gathering interact as the client and the lawyer evaluate potential courses of action.

These goals structure legal interviews. A practical interviewer asks, "What is the best way to establish, build, and maintain rapport with my client and at the same time gather sufficient information to provide competent legal advice." The authoritarian model makes information-gathering predominant by putting the lawyer in control of the content, structure, and sequence of the interview. However, when the lawyer dominates the conversation with the client by asking questions, the lawyer may get information at the expense of rapport. Other lawyers may put rapport first. Yet, when the lawyer attends predominantly to the client's emotional needs, the lawyer may not discover enough facts to represent the client properly.

Maximizing both rapport and information-gathering is important for effective representation. Failure to do one frustrates the other. Clients who do not trust their lawyers may engage in tactics that frustrate the progress of the case. They may withhold important information, they may delay making important decisions, or they may change their minds about decisions already reached.<sup>2</sup> This greatly increases the cost and difficulty of representing the client. Ironically, the lack of rapport can sabotage the information sought in the first interview.

Building rapport makes legal interviewers more efficient by making them less likely to have to backtrack to acquire important information. Lawyers who do not get sufficient information in the initial interview may have to repeatedly contact their clients for the missing information. Moreover, the lack of sufficient information may cause the lawyer to ignore important aspects of the client's case. Either the lawyer must waste time by going back to the client or risk committing malpractice by missing an important claim. Frequently going back to the client for information also may undermine the rapport established in the first interview. The time spent building rapport is a worthwhile investment for the lawyer.

#### § 4-3. THE GENERAL ELEMENTS OF AN EFFECTIVE LEGAL INTERVIEW

Stephen Feldman and Kent Wilson studied lawyer-client interactions to determine the value of interpersonal skills.<sup>3</sup> They wanted to see if a

<sup>2</sup> See generally William L. F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447 (1992).

<sup>3</sup> Stephen Feldman & Kent Wilson, *The Value of Interpersonal Skills in Lawyering*, 5 LAW & HUM. BEHAV. 311 (1981).

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lawyer's interpersonal skills played a role in determining how expert the client perceived the lawyer to be, how satisfied the client was with the lawyer's performance, and whether or not the client would recommend the lawyer in the future. They found that lawyers with high levels of interpersonal skills combined with high levels of legal competence were rated at the top of all of these measures. Moreover, they discovered that the lawyers' relational skills had more of an effect on the clients' perceptions than the attorney's legal competence.

The clients in the study consistently ranked attorneys with good interpersonal skills more expert, more capable of satisfying their goals for the case, and more likely to do as well for other people than equally competent but "relationally impaired" attorneys. Some clients may not have the knowledge or sophistication to determine whether or not the lawyer knows the law, but they can tell whether or not the lawyer is "paying attention" to them.

It is also important that lawyers learn how to gather sufficient data and analyze it properly. They cannot count on clients to police their information-gathering skills, however. The Feldman and Wilson study found that lawyers with high relational skills and low competence were rated higher than lawyers with low skills. Thus, it becomes necessary for the lawyer to police her competence. In the context of the initial interview, this means gathering sufficient information to allow the lawyer to make competent judgments about the law. In short, the lawyer must be relationally competent because that is how clients measure competence and satisfaction. The lawyer must also be legally competent because that is the *sine qua non* of legal representation.

Saying that lawyers must be relationally competent and legally competent begs the question: what does it mean to be competent in these areas? What specific behaviors must a lawyer engage in to display either or both of these skills? Here is the second area where Feldman and Wilson's study helps us. After studying the social science literature, they established a list of characteristics of those who exhibited high relational competence and high legal competence.

*High relational skills consisted of*

- Introducing the lawyer by using the lawyer's first name;
- Shaking hands;
- Making small talk;
- Letting the client talk without undue interruption;
- Leaning forward;
- Looking at the client;
- Reflecting the client's content and feelings; and
- Appearing warm, reactive, and animated.

*High legal competence skills consisted of*

- Obtaining sufficient factual data to determine the client's specific legal issue;
- Explaining court jurisdiction and procedure;
- Giving practical advice;
- Providing appropriate forms for gathering further information from the client; and
- Explaining relevant law.

Effective interviewers structure the interview to allow them to do the things that Feldman and Wilson describe as high relational and high competence behaviors. For example, introducing yourself to a new client is important but subsequent meetings shouldn't require repeated introductions. Similarly, gathering sufficient facts is crucial in the initial interview but may fade in importance as the case progresses. Giving practical advice may not be possible until the lawyer has gathered sufficient information about the matter. This may not be possible before the lawyer hears the client's story.

What follows is a suggested structure for an initial client interview. This structure allows the lawyer to use her own style to accomplish the twin goals of legal interviewing. This suggested structure should be used as a model. You should not think that you must follow this as you might a recipe in a cook book — from the beginning, with precise attention to the details, and only once. Rather, an effective interviewer may need to rearrange the sequence of the stages, start at a point in the middle, or repeat the entire sequence a number of times in the course of an interview.

Our structure breaks the interview down into several parts with each part linked by a framing question. The parts are described functionally; i.e., they try to describe the process in terms of what should happen in each section rather than what skills the lawyer must use.

## § 4-4. THE STRUCTURE OF AN EFFECTIVE LEGAL INTERVIEW

### § 4-4(a). OVERALL GOALS

The goals of an initial interview are as follows:

1. *Establish rapport with the client.* This involves

- Establishing a level of trust between the client and the attorney;
- Making the client feel comfortable confiding in the attorney; and
- Establishing appropriate roles for attorney and client.

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2. *Acquire facts necessary to understand the client's legal situation.* This requires

- Establishing the goals of the representation; and
- Exploring the client's story in sufficient depth to ascertain its legal contours.

#### § 4-4(b). STRUCTURE

In order to achieve those goals, we suggest the following structure:

##### 1. *Greeting and meeting the client (Chapter 4)*

- Introductions
- Ice Breaking
- Explanations of time constraints, purpose of the interview, and confidentiality and fees
- Framing question: open question designed to elicit client narrative

##### 2. *Hearing the client's story (Chapter 5).*

- Getting the client's story or narrative
- Initial clarification of general points
- Summary
- Framing question: summary of client story followed by request for specific details

##### 3. *Exploration and clarification of crucial elements of client's story (Chapter 6)*

- Clarify descriptions or conclusions
- Explore major points
- Exploration of importance
- Framing question: statement of understanding

##### 4. *Ending the interview (Chapter 6)*

- Define the role of the attorney
- Repeat highlights of the story
- Provide tentative diagnosis, if appropriate

##### 5. *Planning what to do next (Chapter 6)*

- Explain next steps
- Finalize fee discussion

## § 4-5. THE OPENING STAGE OF THE CLIENT INTERVIEW

The opening stage of the initial interview is the lawyer's opportunity to lay a sound foundation for the rest of the lawyer-client relationship. This opening stage includes a number of different components. Each has its own purposes. Before we explore the individual components, we will discuss some general guidelines.

### § 4-5(a). PHYSICAL SURROUNDINGS

First impressions play a significant role in our perceptions. If lawyers want to successfully build rapport and convey competence, they must be particularly careful about their first impressions on clients.

How clients are greeted — whether they are greeted by a receptionist or the lawyer or whether the reception area or waiting room is comfortable — affect their perception of their lawyers. For example, one of us worked in a legal services office that bought an old house and adapted it to create large and comfortable offices for the lawyers and paralegals. The clients entered the building through the back door by climbing narrow metal steps. The door opened into a narrow, rectangular room in what used to be the back porch of the house. Chairs lined the long sides of the rectangle. When people sat on chairs opposite each other, their knees almost touched. Two people could not pass down the remaining space at the same time.

Imagine clients confronted with these surroundings. They may not have felt valued because they had to enter the back door. They may not have felt important because they were made to wait in uncomfortable surroundings. They might have felt powerless because the lawyer's space was so much more comfortable. Imagine the effect this might have had on rapport and information gathering. Clients who feel disempowered will engage in their own assertions of power with what they do control: access to information and their own availability. An office so designed might have a lot of clients who scheduled appointments but fail to show, a lot of "difficult" clients, and a lot of indecisive clients. In fact, this office was afflicted with all of these things.

#### § 4-5(a)(1). The Office Building

Whatever the level of practice and the kind of clientele, the lawyer should make every effort to organize his physical surroundings so that they are comfortable and inviting yet "professional." At the very least, the lawyer should carefully arrange the first place the client sees when entering the office. If it does not help to establish rapport, it should be changed. Even something as simple as a fresh coat of paint can improve the quality of the surroundings.

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### § 4-5(a)(2). The Lawyer's Office<sup>4</sup>

A pleasant physical setting helps build rapport. An office that includes cushioned chairs, soft lighting, rugs, and pictures on the wall helps place a client at ease. Offices with wooden furniture, fluorescent lighting, and bare floors and walls convey a colder image.<sup>5</sup> Cultural sensitivity also is important. Images or items that might offend clients should be avoided, and items that might make clients feel welcome should be included. At bottom, however, the furnishings should be genuine. Decorating an office with the "correct" items cannot substitute for a caring, competent lawyer.

The positioning of the lawyer and client is important. The lawyer should try to create an arrangement that puts a moderate distance between the lawyer and the client and allows them to at least partially face each other without obstructions. The lawyer should be neither too close to the client nor too far away. The farther a counselor sits from a client, the less effectively the counselor establishes rapport.<sup>6</sup> A distance of around 2-3 feet seems to work best in contemporary western culture. There are significant variations among subcultures, however. Lawyers should be careful to understand and respect these variations. We discuss some of these variations in Chapter 11.

### § 4-5(b). OPENING THE INTERVIEW

#### § 4-5(b)(1). General Guidelines

In addition to the physical setting and the placement of the lawyer and the client, other general factors that contribute to an effective interview include:

- Leaning forward toward the client
- Making and keeping eye contact throughout the interview
- Smiling
- Nodding your head up and down
- Keeping your arms unfolded
- Using your hands for gesturing during conversation
- Speaking in a clear, audible voice without undue hesitations

All of these things help create an environment in which the client will feel comfortable and therefore more likely to give the lawyer more complete information. Of course, if the lawyer does not genuinely care about the client or the client's case, no external features will make the client feel

<sup>4</sup> The material in this section is drawn from IRVING L. JANIS, *SHORT-TERM COUNSELING* (1983).

<sup>5</sup> *Id.* at 90-91.

<sup>6</sup> *Id.* at 90.

comfortable. Being genuine "means being oneself without being phony or playing a role."<sup>7</sup> The lawyer's actions and environment must match the lawyer's feelings. This is not always easy to do. Effective counselors may be able to do this because they are able to identify with their clients without losing their own identities, they will wait for the resolution of the client's problem without prematurely imposing their own solution, and they are not likely to be provoked by the client.

#### § 4-5(b)(2). Building Rapport: Conveying Acceptance<sup>8</sup>

The twin goals of establishing rapport and acquiring facts are interdependent to a considerable degree and mutually reinforce each other. Clients may disclose facts that make them feel uncomfortable when they have developed a strong relationship with their lawyer. If these initial disclosures are met with acceptance by the counselor and not criticism or blame, the client is likely to trust the counselor. That is not to suggest that there will not be a time in the representation for the lawyer to raise moral issues with a client and express judgment as to matters relevant to the case, but it is best to raise such matters after the lawyer and client have developed a relationship. We discuss the matter of moral counsel in Chapter 9.

When a counselor listens without quickly judging what the client says, it sends a powerful message of acceptance to the client. The client is motivated to provide the lawyer with even more information. When the lawyer prematurely criticizes the client, the bond of trust is not developed and the client lacks motivation for further disclosures. For example, suppose a person seeking a divorce must disclose painful and embarrassing facts about himself. If the lawyer brushes off the client's embarrassment and comments negatively about the situation, the client may not be willing to make further disclosures. At the same time, if the lawyer remains affable and considerate, gives approval when otherwise appropriate, and does not reject the client as a person, the client and the lawyer may build an effective relationship.

The experience of representing a wide variety of people helps to prepare a lawyer for the variety of ways clients communicate their stories and evaluate their choices reflecting differences in psychological type, cultural values, and stress levels. Understanding these variations and anticipating individual differences helps the lawyer build a relationship with a client and at the same time retain the detachment that enables him to engage in wise deliberation with the client. As Mary Ann Glendon has said,

Representing other people, in both friendly and adversarial situations, promotes in lawyers an ability to enter empathically into another person's way of seeing things while retaining a certain

<sup>7</sup> *Id.* at 91.

<sup>8</sup> The material in this section is drawn from IRVING L. JANIS, *SHORT-TERM COUNSELING* (1983).



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These techniques are designed to build trust in the client and understanding in the lawyer to overcome the natural protective barriers people erect when they must make decisions under pressure or in crisis. These barriers may harm instead of protecting clients by interfering with their ability to process information and evaluate alternatives.<sup>10</sup> They may also inhibit clients from making full disclosures to their counselors who especially need to know embarrassing information in order to anticipate problems and better protect clients' interests. Learning these techniques allows lawyers to better represent their clients. There is nothing about these relationship-building techniques that are inherently manipulative unless the lawyer is insincere. If the lawyer is not genuine, the client is likely to see through the lawyer's insincerity and deprive her of the referent power a more sincere and genuine lawyer would acquire.

**§ 4-5(c). OPENING THE INTERVIEW: MEETING AND GREETING THE CLIENT**

**§ 4-5(c)(1). Introductions**

Effective lawyers introduce themselves to their clients using their first names. While this seems a matter of common courtesy, it is also an important factor in establishing rapport with the client. The introduction need not be elaborate. The simple statement, "Hello, my name is Karen Smith" suffices. The introduction should also extend to anyone else who is going to participate in the interview.<sup>11</sup>

If the client continues to refer to the lawyer in formal terms (e.g., Mr. or Ms.) we believe that generally the lawyer should refer to the client in the same manner. This conveys the equality that we think is important in the client-lawyer relationship.

**§ 4-5(c)(2). Ice Breaking**

Ice breaking measures are a part of the "small talk" that Feldman and Wilson found to be important for the attorney establishing a good relationship with a client. Small talk such as asking the client "How are you?" or "Did you have any trouble finding us?" help relax both lawyer and client. They seem to provide a kind of psychic breathing space in which the

<sup>9</sup> MARY ANN GLENDON, A NATION UNDER LAWYERS 106 (1994).

<sup>10</sup> See IRVING L. JANIS, DECISION MAKING (1977).

<sup>11</sup> These may include associates who will be working on the case, secretaries, or paralegals. The presence of unnecessary third parties compromises the attorney-client privilege. This has been a major obstacle to the study of lawyer-client interactions. See Brenda Danet et al., *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 LAW & SOC'Y REV. 905 (1980).

client makes the transition from the outside world with its rules and mores to the legal interviewer's world with its potentially different rules.

If used authentically, these ice breakers help establish rapport. They also allow the lawyer to identify areas where the lawyer and the client may share attitudes, activities, beliefs, or values. Clients can perceive if lawyers are simply following a script or if they are genuinely concerned with their welfare. Thus, when a client replies to the how are you question with, "I'm terrible. My car was stolen last night, my kids are in jail, and I was mugged on the way to this appointment," the lawyer had better say something other than, "That's nice. Do you want some coffee?"

Making small talk is important the first time you meet a client, but it is also important at subsequent meetings. In fact, it may even become more important because it is one of the few ways to reestablish rapport once introductions are out of the way. Similarly, it may be important to reestablish rapport with a former client who comes to you with a new case. Making small talk about the client's life enables the lawyer to reestablish a personal connection. It may be especially helpful for reestablishing rapport if the lawyer asks about aspects of the client's life that he learned about during the prior representation.

The ice breaking stage is not emotionally neutral. Being the first moment in which the lawyer and the client interact, it will have a powerful impact on the perceptions formed by the client about the lawyer. Warmth and personal interest in the client are highly valued by clients.

The ice breaking stage is not substantively neutral either. Clients are satisfied by lawyers who are both interpersonally effective *and* legally competent. Every communication from a client gives the lawyer the chance to display both. Moreover, the first words by clients, even those spoken during ice breaking, may contain "embedded messages" that are clues to both the emotional world of the client and the substantive nature of the legal claim.<sup>12</sup> Listen to how the client in this excerpt indicates his discomfort at having to seek disability payments.

**Gay Gellhorn, *Law and Language: An Empirically Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 331-332 (1998)<sup>13</sup>**

Mr. L. was a voluble, fifty-nine year old, illiterate African-American man who, in less than half an hour, spoke with grace and eloquence about his moral values. Mr. L. had worked for thirty-two years bussing dishes and mopping up at a restaurant, working twelve-hour days, starting at 75 cents an hour, and missing only one day. He had not had much formal education. As he explained, "I had eight sisters and all of them little bitty

<sup>12</sup> Gay Gellhorn, *Law and Language: An Empirically Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321 (1998).

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and I had to drop out and, uh, you know, uh, work and feed, keep them in the house." A combination of health problems made it impossible for him to continue working, but he had been denied Social Security disability. He sought legal assistance to appeal that denial. Mr. L.'s first words invited the young white women interviewers to hear and understand the context of his reality as an active, hard-working, self-sufficient man.

L1: This is P. [introducing student] [This is Mr. L.] [introducing client]

L2: [Nice to meet you.]

C: How're you doing?

L1: P's gonna listen in today.

C: Alright.

L1: Have any trouble finding us?

C: No, no, uh-uhn, cause . . . mmm. . I usually, I used to work right across the street there.

L1: [Oh, I think I know where that is.]

C: [in that school building.]

L1: Oh, okay.

Mr. L.'s reference to working was critical information which the legal interviewer should not have ignored, even though it was communicated during initial ice-breaking moments ("How're you doing?" "Have any trouble finding us?") which legal interviewing texts seem to consider as content-free. As the interview and subsequent contacts with Mr. L. made clear, he was now struggling with the role of being cared for, a role thrust upon him by his disability and total lack of income, so that he could not so much as buy a soda or go to a medical appointment without reliance on others. For example, of his eleven siblings, "all of us livin'," he speaks over and over of his sister ("that's my heart") who has to pay his rent now and take him where he needs to go. His request for "the income, that's all I need," repeated eleven times in the twenty-eight minute interview, has meaning within this context of his difficulty in shifting roles from the helper to the helped, and in coming to terms with the fact that the only way to have some financial independence would be to be labeled "disabled." Mr. L. is similar to many other clients who express their sense of self as soon as they are given a chance to speak.

In the above excerpt, the client expresses his pride in his work life by incorporating it into his answer to the seemingly neutral question about finding the office. Recognizing his pride and acknowledging it would give the client a chance to express his identity to the lawyer in his own words. If received warmly and incorporated into the handling of the case, it would

help establish rapport and guide the lawyer and the client in the difficult decisions they have to make.

Gellhorn gives other examples of what happens when the client is first given the opportunity to speak. These examples illustrate how ignoring the concerns embedded in the client's statements may lead the lawyer to ignore the emotional reality of the client. In turn, this may lead the client to assert control over the representation by evading questions, withholding information, delaying decisions, and changing his or her mind. Lawyers might interpret these as the behaviors of a "problem or uncooperative client." How ironic that the lawyer may be the cause of these behaviors.

Sometimes the failure to pick up on these embedded concerns leads to substantive problems as well. Gellhorn compares the performance of two different sets of interviewers in a legal clinic. The first interviewer failed to identify his client's concern for her mental condition in the opening sequences of the initial interview. He repeatedly failed to understand that the client was telling him that she was seriously depressed when she kept "recycling" it in their follow-up conversations. This resulted in a denial of her disability claim because there was an insufficient record to support any claim of mental disability. The second group of interviewers, by seeing and acknowledging this concern, developed more complete medical evidence in support of her claim.<sup>14</sup>

In the following excerpt, Professor Gellhorn emphasizes the importance of attending to the client's first words during an interview. She extrapolates from the literature on medical interviewing to suggest some techniques that will better enable legal interviewers to effectively listen and respond to a client's embedded concerns when expressed early in the interview. Specifically, she suggests that lawyers:

- take almost verbatim notes of the client's first words,
- use responses and questions that encourage the client to continue talking, and
- avoid even moderately limiting responses and questions.

**Gay Gellhorn, *Law and Language: An Empirically Based Model for the Opening Moments of Client Interviews*, 4 CLINICAL L. REV. 321, 345, 346, 347-348, 349-350 (1998)<sup>15</sup>**

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[L]egal interviewers must be attentive at times and in ways they may not now be trained to be. My experience as an interviewer and as a supervisor

<sup>14</sup> We provide an extended discussion of this case study in Chapter 6.

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is that minds wander, particularly during the "ice-breaking" stage, and new questions are formulated mentally without listening carefully to the clients' responses. "Attending" to clients is a paper in itself. David Berger, a psychotherapist, notes that "the basis of the empathic process is an evenly focused attention to the patient from within and from without (that is, as participant and observer)." The model emphasizes that legal interviewers must expect that the client's first words hold meaning and deserve exploration and encouragement. The words are so critical that they should be written down, as close to verbatim as possible. Even if the interview is taped and a transcription can be made at a later time, the discipline of capturing the clients' first words in writing will focus the interviewer's attention and ingrain a habit of listening well and with subtlety. . . .

The medical interviewing literature convincingly demonstrates the importance of not interrupting patients' statements of their concerns, although in practice physicians actually do interrupt most of their patients on average within eighteen seconds. Based on my anecdotal experience, it is unlikely that attorneys would make a better showing. . . .

Attentiveness to clients' first words does not preclude parallel attentiveness to nonverbal behaviors and cues. Nonverbal behaviors — posture, face, movement, tone, autonomic physiological responses (e.g. blushing, quickened breathing), physical characteristics, appearance — "leak" messages and "punctuate" what one is saying. Emotional expression — the eyes filling with tears, the hands sheltering a head hung low — are vital clues to a person's data base. These are part of the client's first words. . . .

In summary, legal interviewers should expect that clients' first words hold critical information or clues. Those words should be captured verbatim. Although the self-revelation will occur regardless of the interviewer's style, the better practice is to elicit a complete and uninterrupted statement of concerns at the outset of the interview. Interviewers can encourage completeness by limiting their linguistic techniques during the opening moments of the interview to continuers, non-judgemental straightforward statements, nonverbal facilitators/encouragers, and additional open-ended questions. Interviewers should avoid probes, elaborators, recompleters and closed-ended questions during the solicitation of the client's concerns or story telling. Use of this model will have a positive effect on the legal interviewer's ability to form a relationship with a client, to comprehend the full range of information the client needs to share, and to collaborate with the client to tell a story in legally and emotionally effective language.

Gellhorn's work shows that the legal interview cannot be contained within rigid structural or theoretical boundaries. For example, the conventional view holds that during "ice breaking," the client will not reveal important information. After ice breaking, the client will tell her initial story and then the lawyer asks follow-up questions. Gellhorn shows us that

effective legal interviewers must pay attention to what the client is actually saying and doing. If the client reveals embedded concerns early on, the lawyer should allow the client to continue even if the lawyer has not had the chance to finish the "Ice Breaking Followed by Opening Statement" script. As Gellhorn points out, client self-revelation will occur no matter what style the interviewers adopts. The question is whether or not the client will continue to reveal more information. Other research shows that clients whose initial self-revelations are ignored, ridiculed, or downplayed are less likely to continue to provide critical self-information.<sup>16</sup>

More broadly, this initial stage will color clients' perceptions of lawyers. The initial stage may determine whether or not lawyers will be perceived favorably and whether or not they will understand their client's case.

### § 4-5(c)(3). Time Constraints and Purposes of the Interview

The lawyer should tell the client about any time constraints on the interview. This helps establish the boundaries of the interview and it enhances rapport. It is a matter of common courtesy as well as a way of framing the interview.

Similarly, the lawyer should advise the client of the purpose of the interview. Clients should be advised if the interview is exploratory, diagnostic, etc. A client may assume that the lawyer will "take his case" and be surprised when, at the end of the interview, the lawyer advises him that she will not handle the matter.

An initial statement might sound like:

This interview is so that I can learn about your case and you can learn more about me. I need to know more about your situation before I know if you have a case I can handle. This interview will also give you the chance to learn more about me so you can decide if you want me to represent you. We have 45 minutes for this interview today. If we need more time, we can schedule another meeting.

## § 4-6. EXPLANATIONS

### § 4-6(a). CONFIDENTIALITY

It is important that the client understand the confidential nature of the conversations, their costs, if any, and what to expect during the interview. Many lawyers may be tempted to give the client a simple statement telling the client that everything they talk about will be "confidential." But consider the problems with this simple statement.

First, it is not literally true that everything is confidential. There are exceptions to the ethical rules that may prompt or even require the attorney to disclose parts of this conversation. In addition, the evidentiary

<sup>16</sup> See JANIS, *supra* note 4.

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attorney-client privilege may also be waived under certain conditions, such as when the attorney and the client discuss a future crime. And, what does "confidential" mean? It may have a specific meaning to professionals but mean considerably less to nonprofessionals.

**§ 4-6(a)(1). Discussing Confidentiality**

Both the rules of professional conduct and the rules of evidence impose a duty of confidentiality on attorneys. These duties are frequently defended on the grounds that they encourage clients to be forthcoming with their attorneys and that they respect clients' dignity. Client decision making is enhanced because the lawyer is better able to assess the client's case and the client is able to make an informed, autonomous decision.

As a general proposition then, it would seem that most lawyers would want to give their clients a thorough explanation of the scope and nature of confidentiality. But a study showed that many lawyers rarely fully advise their clients of these rules and that many clients significantly misunderstand the confidentiality rules.<sup>17</sup> 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.

**§ 4-6(a)(2). Talking About Confidentiality at the Initial Interview**

The following are some guidelines for talking about client confidentiality.

*1. Explain confidentiality early in the first interview:*

We justify the rules about confidentiality by saying that clients will be more forthcoming. If clients do not know about these rules, however, there is no basis for them. Most clients do not know about either the ethical rule on confidentiality (Rule 1.6) or the attorney-client privilege.

*2. Presume that all information is confidential:*

The duty of confidentiality extends to preliminary conversations, even in cases where the lawyer eventually decides not to take the matter. The

<sup>17</sup> Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989).

name of the person, the purpose for which the person sought advice (or even whether the person sought advice) should be considered confidential, regardless of whether you go on to represent this person in a matter.

*3. Understand the difference between the privilege and the ethical rule:*

Remember the ethical rule of confidentiality is broader than the evidentiary attorney-client privilege. The ethical rule applies at all times and protects all information "relating to the representation," even if it comes from a third party. The attorney-client privilege applies only when the lawyer is before a tribunal and protects only information given to you by the client and only when given under certain circumstances.

*4. Train your staff to keep client information strictly confidential:*

The rules require that lawyers ensure that everyone in the firm complies with the lawyer's ethical obligations. Partners must make reasonable efforts to put measures in place to ensure reasonable compliance. Direct lawyer-supervisors must make reasonable efforts to ensure compliance. Even if the lawyer could not be disciplined for breakdowns, the lawyer and the law firm may be liable in a malpractice action.

*5. Prevent clients from seeing other clients' information:*

Don't leave confidential information exposed on your desk so that other clients may see it. Keep a clean desk or find another place away from your desk to conduct interviews.

## § 4-6(b). FEES

### § 4-6(b)(1). Talking About Fees

Model Rule of Professional Conduct 1.5(b) states that "[w]hen a lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, *preferably in writing, before or within a reasonable time after commencing the representation.*"<sup>18</sup> Handing out a fee schedule or an explanation of typical fees completely satisfies the rule. The client can review the fee information and make an informed choice about whether or not to continue the representation. In addition, clients can take the written statement home and review it at their leisure. The written statement can be used later in the representation when the client may have some questions. It may even head off fee disputes.<sup>19</sup>

<sup>18</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1994).

<sup>19</sup> Fee disputes are among the most common form of complaints to disciplinary bodies. Most of these cases do not result in disciplinary action either because they fall outside of the jurisdiction of the agency or they are not founded. Frequently, they result from a misunderstanding between the attorney and the client about the amount or the nature of the fee. It stands to reason then that if the opportunities for misunderstanding can be decreased, the number of complaints can also be decreased. That is why we suggest that you give your client a written explanation of your fee structure early in the representation, i.e., in the waiting room, and that you go over it with the client near the end of the initial interview.



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§ 4-6(b)(2). Talking About Fees at the Initial Interview

Here are some guidelines that summarize how to approach discussing fees with clients.

1. Tell a new client the basis or the rate of the fee:

This could be merely a reference to a copy of your fee schedule if that information is sufficient to let the client know how you will bill.

2. Tell the client about fees as early as possible:

Handing out your fee schedule when new clients come in but before they speak to you is a good idea. Because you begin to represent them as soon as you begin talking to them (at least for the purpose of deciding if you will take their case further) you should have a fee discussion as early as possible. Do not put it off. Clients generally appreciate candor about fees.

3. The basis or rate of the fee should be in writing:

Most fee agreements do not have to be in writing. If you charge by the hour or at a fixed fee, you need only communicate the fee orally. But contingent fees must be in writing and must include the information specified in the Model Rules.<sup>20</sup> Prudence dictates that all fees be in writing. A written fee agreement minimizes the possibility of misunderstandings. Remember, fee disputes are the most common source of complaints about lawyers to disciplinary authorities. Don't take chances. Talk about your fee early and put the agreement in writing.

4. Advise the client if you will be splitting the fee with another lawyer:

This applies to splitting fees with lawyers outside of your firm. Model Rule 1.5(e) requires a written agreement with the client if the lawyers will not split the fee in proportion to the work each lawyer performs.<sup>21</sup> In any event, the client must be "advised" of each lawyer's participation and must not "object" to his or her participation.

§ 4-7. SAMPLE DIALOGUE TO OPEN A CLIENT INTERVIEW

We have included a lot of guidelines and suggestions in this chapter. Here is a sample dialogue that integrates these guidelines that you can use to open an interview with a client:

Before we get started, let me talk about those papers you received in the waiting room. One paper describes what lawyers call the rules on confidentiality. That generally means that I cannot tell anyone what we talk about unless you give me permission, but that paper explains some of the exceptions to the rule. The other paper explains what I charge in most cases. Now, I will not charge you for the time we spend today. If you decide that you

<sup>20</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(c) (1994).

<sup>21</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1994).

want me to represent you, I will explain my fees at that time. Do you have any questions about confidentiality or fees?

Ok, I've set aside 45 minutes for this conference. If we need more time we can schedule another appointment at your convenience.

As always, the lawyer must adapt this sample to conform to her own personality and circumstances. What is most important is that the basic elements of this dialogue are covered.

#### § 4-8. CONCLUSION

The beginning of an interview is very important. That is why we have devoted so much material to it. What happens at the beginning of the interview often determines how successful the lawyer-client relationship will be. Lawyers should approach their clients with dignity, cultural sensitivity, and respect. They should give the client as much control over the representation as the client wants.

Especially in the early stages of the representation, lawyers should focus on building rapport with their clients.

- Building rapport at this stage pays dividends later.
- Clients who trust their lawyers are more likely to disclose important information than clients who do not trust their lawyers.
- Attending to the client's emotional and legal needs shows respect for the client.

Lawyers should put their clients at ease by:

- Having comfortable and inviting offices;
- Greeting clients warmly and personally; and
- Engaging in appropriate ice-breaking talk before the interview.

Lawyers must be aware that clients will reveal important emotional and legal information even in the earliest stages of the relationship. Lawyers should not be constrained to interview "by the book." Rather, they should pay attention to the client and respond flexibly.

In the next chapter, we discuss how lawyers go beyond these initial stages to listen to the client's story.