CHAPTER 3

COMMUNICATION SKILLS

§ 3-1. INTRODUCTION

Client interviewing and counseling require effective communication. Effective communication happens when lawyers "communicate questions accurately and precisely . . ., maximize the client's ability and willingness to answer . . ., listen actively to determine the significance of statements, [and] probe to increase the validity, clarity, and completeness" of the client's answers.1 Nevertheless, lawyers continue to approach their clients with little thought to their own communication styles or skills much less the understanding that clients differ in their communication processes and that those differences influence both the giving and receiving of information. See chapter 12 for a complete description of these differences. This chapter examines some models and methods to increase accurate communication and sketches their implications for legal interviewing and counseling.

§ 3-2. LISTENING

§ 3-2(a). PAYING ATTENTION

Good listeners pay attention. Paying attention requires that: 1) The listener be mentally engaged to hear and understand what the speaker is saying, and 2) the listener signal this engagement physically to encourage the speaker to continue. Paying attention, especially in a professional context, cannot be successful without both elements.

§ 3-2(a)(1). Paying Attention Physically

The lawyer who refuses to make eye contact, who fiddles with other papers, or who answers the phone during an interview signals to the client that the client's story is not important. Not only does this inhibit the client from fully confiding in the lawyer, it also makes it difficult for the lawyer to hear the important parts of the client's story.

The acronym S-O-L-E-R represents an easy way to remember how to physically signal that you are listening to the client.2

2 This device and the following descriptions are adapted from Gerard Egan, You & Me: The Skills of Communicating and Relating to Others 114-116 (1977).
S: Face the client SQUARELY.
   Turn your body toward the client. By doing this you tell the client that
you are listening and that you value what the client is saying. Arrange
your office so that you can easily face the client during an interview.

O: Adopt an OPEN posture toward the client.
   Crossing your arms or legs signals that you are not receptive to what the
client is saying. These postures indicate to clients that you have already
made up your mind about them or their situation. Physical objects can also
interfere with the communication between you and the client. Interviewing
a client across a desk littered with books, pens, and other objects sends a different
message than an interviewing space that places no objects between lawyers and clients.

L: LEAN toward the client.
   Leaning slightly toward your client signals your involvement in his story,
whereas leaning back in your chair, putting your feet up on the desk, and
placing your arms behind your head all signal a detachment from the
client's story. At the same time, leaning in too close to the client intrudes
into the client's privacy. A distance of between two and three feet seems to
be optimal for most people in the United States. Any closer makes people
uncomfortable and any farther away makes people feel ignored.

E: Make and keep good EYE contact.
   Looking at the client’s eyes shows your readiness and interest in the
client’s story. However, appropriate eye contact is not the same as an
unblinking stare into the client’s eyes. Rather, it requires a moderate
focus on the client’s eyes and includes shifting your gaze to other parts
of the client’s face. When appropriate, the lawyer may look away or look
down at her paper to take notes. But the lawyer should always return to
making eye contact. Once again, moderation is the key. Clients will
become uncomfortable if the lawyer never takes her gaze away from the
client’s eyes. This is the functional equivalent of leaning too closely to the
client. On the other hand, a client will feel neglected if the lawyer seldom
looks up from an intake form or notepad.

R: Be RELAXED during the interview.
   People look relaxed when they are comfortable in their environment and
with the task they are performing. Acting naturally conveys a confidence
in your abilities. It also helps put the client at ease. However, being
relaxed is not the same as being casual. The balance you should seek is
between the formal and the casual. Being unnaturally formal or casual
equally affects the communication from the client. People feel freer to
speak about difficult matters when they are comfortable with the person
to whom they are speaking.

§ 3-2(a)(2). Paying Attention Mentally by Active Listening
   People tend to speak at a rate of 125 words per minute in normal
conversation. We can listen at approximately four times that rate,
however. As we listen our minds typically are attending to a variety of other things. Good communication uses this “excess capacity” to attend to those things that will make our legal interview successful. We call this “Active Listening.”4 In general, active listening requires a constant analysis of the conversation’s contents to decide whether the information is important and accurate. Even if the information is not accurate, it may be a significant indication of the client’s psychological position. . . . [The lawyer should pay attention to] what was said and what was left unsaid, silences, and body language.5

Active listening also requires attention to the emotional content of the client’s story. Thomas Shaffer and James Elkins remind us that “feelings are facts.”

[While] counseling decisions are influenced by what is loosely called “legal thinking,” they are not confined to it. . . . Law office decisions proceed as much from subjective emotional factors as from rules of law. This is also, often, the case with decisions by judges or legislators — but the subjective is more obvious [in counseling], because it is not hidden in procedure and rational explanation. Counseling decisions often clearly proceed from feelings. . . . 6

§ 3-2(b). ACTIVELY LISTENING TO THE CLIENT’S NONVERBAL MESSAGES

Begin listening actively by paying attention to the client’s nonverbal behavior as well as the client’s actual words.7 Nonverbal behavior can deny or affirm what the client is saying.

It is easier to understand nonverbal messages if we first isolate the different ways that people can communicate without speaking. People send nonverbal messages with their bodies, the characteristics of their voices, and the way they use the space they are in.8

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4 Some texts define active listening to include what we call “Reflective Statements.” By distinguishing the two, we want to emphasize that “active listening” involves listening to the client, whereas “reflective statements” involve speaking to the client. They each require different skills.
5 Schoenfield & Schoenfield, supra note 1, at 2.
7 Egan, supra note 2, at 117.
8 This description and the information that follows is adapted from William H. Corbin & L. Sheryl Corbin, Interviewing Strategies for Helpers 66 (3d ed. 1991). Corbin and Corbin use the terms kinesics (body movement), paralinguistics (vocal quality), and proxemics (the use of space). They add two other categories: environment and time. These aspects are covered indirectly in Chapters 4 and 5 and are not included here.
§ 3-2(b)(1). Body Language

People send nonverbal messages primarily in the use of their mouths, faces, head, limbs, and arrangement of their total body. Someone who purses her lips or folds her arms may be signaling discomfort. We use our bodies to express a variety of messages, often very subtly.

§ 3-2(b)(2). Eyes

A person's eyes can be very expressive. He can send a number of messages using his eyes, eyebrows, etc. We must, however, be cautious how we interpret those messages. A lack of eye contact may indicate that the person is uncomfortable or embarrassed. However, in some cultures, lack of eye contact is a sign of respect or an affirmation of a difference in status or gender. It does not necessarily mean that the person is not truthful.\(^9\) People may also avert their eyes when talking, but look up when they want a response to their statements.

Most people move their eyes away from the other person's face periodically. Shifting the gaze may mean the person is thinking about what to say, forming words, or trying to recall some event or information. Quickly shifting the gaze from the person to other objects can indicate agitation.

While lack of eye contact does not correlate with deception, excessive blinking may. Blinking more than normal indicates that the person is anxious.\(^10\) Anxiety may result because a client is not telling the truth. At the same time, it could also be due to the circumstances in which the client finds himself, for example the anxiety of speaking to a lawyer. Remember, blood pressure tends to be higher when measured in the doctor's office than when measured at home.

In general, certain factors seem connected with more or less eye contact.\(^11\) More eye contact results when the parties are farther apart physically, when the discussion concerns less personal subjects, when two people interact naturally, and when one is listening to another speak. There seems to be less eye contact when the two people are closer together physically or when they are discussing difficult, embarrassing, shameful, or personal topics.

§ 3-2(b)(3). Facial Expressions

The total facial expression — eyes, mouth, cheeks, eyebrows, head — accurately conveys our emotional state. However, parts of our faces specialize in certain emotions. The mouth and jaw generally communicate happiness, surprise, and disgust, whereas the eyes are better at communicating anger. Combinations of facial features communicate more complex emotional states.

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9 Id. at 71.
10 Id. Blinking between 6-10 times per minute is considered normal for an adult.
11 Id.
Facial expression tends to support other nonverbal emotional indicators. For example, clients who walk into lawyers’ offices with slumped shoulders, pursed lips, and dull expressions are pretty clearly saying that they are not happy! Visiting a lawyer is a stressful event for many people that has often been prompted by another stressful event. These postures signal that stress.

§ 3-2(b)(4). Using Knowledge of Body Language

Lawyers should not use their knowledge of body language to become amateur psychologists. There may be no reason to confront clients with the fact that their body language indicates that they are uncomfortable. The important thing is to be able to recognize their discomfort. Knowing of a client’s discomfort alerts the lawyer that the client finds a particular topic uncomfortable. Depending on the context, the lawyer may want to avoid the topic or approach it more delicately. Nonverbal signals may also signal that the client is uncomfortable with the attorney. Attorneys should remember that trust is built. They should not assume that clients trust them simply because of their status. It may be necessary to discuss the client’s discomfort openly.

In addition, knowing how to read body language enhances the accuracy of communication between the lawyer and the client and also leads to better decisions. For example, suppose the lawyer and client are discussing whether or not to accept a particular settlement offer. Consider the phrase “Sure, I can accept their offer.” If the client says these words without pausing and while looking directly into the lawyer’s eyes, the lawyer can be confident that the client wants to accept the offer. In contrast, suppose the client says the same words while shifting her gaze around the room and blinking rapidly: “Sure [pause] I . . . I . . . can [pause] accept their [pause] offer.” Here, the lawyer should recognize the client’s hesitation and explore the client’s misgivings before moving forward with the settlement offer.

§ 3-2 (c). USING KNOWLEDGE OF PSYCHOLOGICAL TYPE

Some of the nonverbal and body language differences we see across clients may be related to psychological type differences. Chapter 12 gives an in-depth explanation of this theory, but we want to alert you to some common differences you may observe. There are two ways of directing one’s energy and processing information, externally by talking and internally by thinking and reflecting. We all use both processes even within one interview or counseling session, but we prefer to use one more often and have more energy when using one of these processes than when using the other. This preference influences clients’ communication to lawyers and the ways clients receive information from their lawyers. Clients who prefer extravert may be quite anxious to tell their story and jump right into an interview. These clients may use a lot of nonverbal communication, particularly through using their hands to accompany their speech. They are likely to have told this story many times before telling their lawyer
and may benefit from questions that take them to the context of the conflict and to parts of a sequence they may not realize they have skipped. These clients may seem to tell you more than you want to know, but watch for parts of their stories that they may skip over as unimportant or that put them in an embarrassing position.

Clients who prefer to introvert may pause to reflect as they tell their story. Be patient and use encouraging statements like ‘tell me more about...’ to prompt their telling of the events. Be aware that they may tell you less than you want to know because they are more likely to censor what they say. They may be telling you parts of their story for the first time and the less you anticipate what they may say and the more you reflect their content and feelings, the more rapport you will build and the more accurate and complete your interview will be.

There are other influences of psychological type on interviewing and counseling. A very detailed, sequential accounting may indicate a sensing preference that signals a lawyer to ask practical and pragmatic questions. Focusing on direct experiences gains the most information. Clients with intuitive preferences may tell their stories differently, giving a general overview and then skipping from one topic to another as they build the components of the story, its context, and their future concerns. As they talk, one event or detail may remind them of another part of the story. As they jump from one part to another, it may be difficult for a lawyer to follow. However, if they can tell their story in their own way once, a lawyer may find it helpful to impose a time line to get a better idea of the sequencing of the events and this time line may actually spark more important memories of events. These clients appreciate a summary of what the lawyer has heard and any preliminary ideas the lawyer has of a theory of their case.

Psychological type theory gives insight not only into client tendencies, but also into ways that lawyers communicate to clients and others. Awareness of these tendencies can help lawyers increase the effectiveness of their communication with clients and clients’ communication to them.

Good communicators do not focus excessively on one aspect of the client’s message. Rather, they integrate all aspects of the communication while they listen. They pay attention to body language and the content of the communication. They pay attention to the client’s emotional language and the quality of the information the client conveys. They neither read too much nor too little into the client’s words and actions. They consider the context of the client’s communication and the person of the client, that is, they understand both the immediate and long term context of the conversation. Suppose a client avoids eye contact with the attorney and discloses little information without prompting. These behaviors may mean something different when the client is a teenager who has never been to a lawyer before as compared to an adult businessman who is an experienced user of the legal system.
§ 3-3. BUILDING RAPPORT

Active listening helps build rapport with the client. Good rapport helps build a relationship of mutual trust typified by cooperation, understanding, and responsiveness. Good rapport arises when the lawyer and the client genuinely respect and trust one another. The client trusts the lawyer's professional competence and sensitivity, and the lawyer trusts and respects the client's judgment and input. Good rapport is necessary to enable the client to fully confide in the lawyer and for the lawyer to more fully appreciate the client's story.

§ 3-3(a). MIRRORING

§ 3-3(a)(1). Mirroring the Client

People can learn how to build rapport. One simple technique is to mirror, to an appropriate degree, the client's posture, movement, and emotion. This does not mean the lawyer should imitate everything the client does. Lawyers should not mimic a nervous client. The key here is for the lawyer's posture, voice, etc., to remain congruent, not identical, with the client's. The more congruent the lawyer and the client are, the easier it becomes for the client and the lawyer to communicate effectively. The lawyer should not adopt a casual posture with a nervous client who sits rigidly in his chair. Similarly, the lawyer should avoid speaking in a booming voice to a soft-spoken client.

§ 3-3(a)(2). Mirroring the Client's Language

Mirroring the client's language when discussing the client's case also builds rapport. Accurately restating the important parts of the client's story in the client's own words tells the client that the lawyer is listening and that what the client says is important. A good listener will fill in the listening-speaking gap by mirroring client movements and by planning how to mirror the client's language later in the conversation.

However, mirroring means more than adopting the client's way of speaking. Successful mirroring involves using language that fits with the way the client understands the world. People have a characteristic way of perceiving the world. They may primarily understand the world visually, aurally, physically, emotionally, or cognitively. They convey this understanding in the words they use to describe themselves or events or by emphasizing certain aspects of their stories.

For example, the visually oriented client may relate everything he saw and use visual language to do so. This client focuses on what the participants looked like or what they were doing. He may leave out the actual

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words of the participants. On the other hand, the aurally oriented client may relate everything the participants said and use sound-related words to describe events. This client may leave out visual details.

The physically oriented client may explain what things looked, smelled, or felt like, but he will exclude aural and visual details. He may remember whether or not the room was cold, but not what people said or did. The emotionally oriented client may relate the emotional content of the event (whether or not it was tense, happy, etc.) or describe the relationships among the participants. This client may exclude the physical details of the setting. Last, the cognitively oriented person may process everything in objective, impersonal terms. He may remember the rules that were followed or broken and the principles at stake, but he may be unaware of the emotional context in which these activities happened.

People respond better when others communicate with them using their primary process. Thus, a client who primarily uses visual images to explain his story will respond better to the attorney who says, “Do you see what I mean?”, rather than to the attorney who says, “Do you understand what I said?” The first example uses a visual metaphor to ask the question while the second uses an aural metaphor.

This can be particularly useful regardless of whether the lawyer is responding to the client or asking for information. For example, the lawyer might respond to the visually oriented client by saying, “I can see why that conversation with your boss upset you.” When the time comes to explore the client’s story further, the lawyer can say, “Let’s go back to when you saw your boss on the elevator. Paint me a picture of exactly what happened during that elevator ride.” The aurally oriented client may respond better if the lawyer says, “You were upset when your boss said those things to you. Later, the lawyer can say, “Let’s go back to when you talked to your boss in the elevator. Tell me everything you remember he said to you during that elevator ride.” Similarly, the emotionally oriented client may prefer the following approach: “You felt unfairly singled out when your boss said those things to you.” And later, the lawyer could say, “Let’s go back to when you and your boss met in the elevator. Tell me how he acted toward you during that elevator ride.” The lawyer is more likely to get accurate and detailed information by using statements and asking questions that mirror the client’s primary cognitive mode.

The following chart summarizes the above discussion. The chart contains the emphases of each process, words and phrases related to the different ways of perceiving the world, omissions, and ways that the lawyer can mirror the client’s process.
<table>
<thead>
<tr>
<th>Process</th>
<th>Emphasis</th>
<th>Key words and phrases</th>
<th>Omission</th>
<th>Response</th>
</tr>
</thead>
<tbody>
<tr>
<td>Visual</td>
<td>Visual details: what the client saw.</td>
<td>It seems to me a . . . ; That was a clear breach of contract; Look at how they treated me: Do you see what my children mean to me?</td>
<td>What people said.</td>
<td>“Paint me a picture . . .”</td>
</tr>
<tr>
<td>Aural</td>
<td>Aural details: what people said and what the client heard.</td>
<td>It sounded like they wanted to fire me; Listen to what they said to me; Let me tell you what I heard.</td>
<td>What people looked like; what they did.</td>
<td>“Tell me what he said to you.”</td>
</tr>
<tr>
<td>Physical</td>
<td>Sensory details: descriptions using one or more of the five senses.</td>
<td>I sensed they wanted to fire me; I felt that was breach of contract.</td>
<td>Verbal details; emotional content.</td>
<td>“Describe what it was like at the meeting.”</td>
</tr>
<tr>
<td>Emotional</td>
<td>Relationship details or a focus on values: emotions the client or others felt.</td>
<td>I was hurt when they fired me; I was not treated fairly.</td>
<td>Other details, especially physical and cognitive ones.</td>
<td>“How did he act toward you?”</td>
</tr>
<tr>
<td>Cognitive</td>
<td>Focus on rules or principles involved: neutral, objective descriptions of events.</td>
<td>They broke the rules; This is what happened.</td>
<td>Emotional context, possibly physical details.</td>
<td>“What happened during the meeting?”</td>
</tr>
</tbody>
</table>

There may be some value to phrasing questions in modes that the client does not prefer. This may be helpful when the lawyer needs information that has not been disclosed through the client’s primary process. For example, many cases require specific details concerning events that a client may not readily remember. The lawyer may jog the client’s memory by phrasing a question in a way that taps a different process. We will discuss this and other issues in more detail in Chapters 5 and 6.
§ 3-4. WHAT TO AVOID

§ 3-4(a). PROFESSIONAL BLINDNESS

A lawyer may be sensitive to the client and capable of framing questions and statements, but the lawyer’s overall orientation to the client and the client’s case may render all of these skills ineffective.

As the authors of a classic legal interviewing text put it:

The chief danger that confronts a professional, in law or in any other field, is that he will tend to fill the gap with related informational material from other similar situations in his experience. Or, he may leap ahead and begin to anticipate information that may or may not actually be involved in the situation that now confronts him.

In short, the situation becomes clouded by what the attorney brings to it that the client has not imparted to it. Unless the attorney is extremely careful, in a very short time he will have reduced a unique set of facts to a standard pattern. This pattern inevitably will be at least somewhat different from the situation that the client is trying to convey. The more experienced and intelligent the attorney, the greater the danger that the gap (between what is being said and what actually registers in the attorney’s mind) will be a large and unbridgeable one.\textsuperscript{13}

This tendency to reduce “a unique set of facts to a standard pattern” shows itself in what we call “Hardening of the Categories.”

§ 3-4(b). HARDENING OF THE CATEGORIES

Hardening of the categories happens when the lawyer prematurely forces the client’s case into a legal category. Professor Carrie Menkel-Meadow captures the essence of this process in the following description:

[The grievant tells a story of felt or perceived wrong to a third party (a lawyer) and the lawyer transforms the dispute by imposing “categories” on “events and relationships” which redefine the subject matter of dispute in ways “which make it amenable to conventional management procedures.” This process of “narrowing” disputes occurs at various stages in lawyer-client interactions. . . . First, the lawyer may begin to narrow the dispute in the initial client interview. By asking questions which derive from the lawyer’s repertoire of what is likely to be legally relevant, the lawyer defines the situation from the very beginning. Rather than permitting the client to tell a story freely to define what the dispute consists of, the lawyer begins to categorize the case as a “tort,” “contract,” or “property” dispute so that questions may be asked for legal saliency.]\textsuperscript{14}

\textsuperscript{13} Melvin S. Heller, Estelle Polen & Samuel Polsky, An Introduction to Legal Interviewing and Counseling 11 (1960).

Often, the lawyer has some advance knowledge about the reason for the client’s visit. The lawyer may reach a “tentative” conclusion about possible remedies based on this preliminary information. This tentative conclusion may then color what the lawyer pays attention to during the client interview. The lawyer will hear those elements of the client’s story that confirm his tentative conclusion and ignore any elements of the client’s story that do not.\(^{15}\)

Clients can also influence the lawyer toward hardening of the categories. Clients may express what they want in conclusory terms. When asked why the client wants to see the lawyer, the prospective client may respond in terms he or she believes the lawyer wants to hear. Instead of giving a functional description of his goals, the client will give a legal conclusion. For example, the client may respond that he wants to file bankruptcy instead of saying that he is having a problem paying his bills. The danger is that when the lawyer hears the word “bankruptcy,” the lawyer will place the client’s case into the bankruptcy category. Once this happens, the lawyer may be unable to “hear” the client talk anything except bankruptcy talk.

\section*{§ 3-5. VERBALLY RESPONDING TO THE CLIENT}

Effective interviewers have a purpose for everything they say and do. Responding to the client with statements or questions is not a random activity. Rather, effective interviewers know what they want to accomplish and they use statements and questions to accomplish their goals. The following sections will explore different ways to respond to clients and will explain the strengths and weaknesses of these different responses. Chapters 4, 5, and 6 will show how to use these different responses in the course of a legal interview.

Gerard Egan says, “The ultimate proof of good listening is good responding.”\(^{16}\) Egan contrasts the good listener who is capable of responding intelligently with the “hollow listener:”

Often when people say “I am a good listener,” what their statement means is that:

- they don’t respond by evaluating or judging what others have to say;
- they pay attention to the person speaking and they look involved;
- they indicate their involvement by nodding their heads, by good physical attending, by saying such things as “uh-huh” or “yeah”;
- they sometimes respond with such cliches as “I understand” or “I think I understand.”\(^{17}\)


\(^{16}\) \textit{Egan}, supra note 2, at 137.

\(^{17}\) \textit{Id}. 
Communicating well entails more than the kind of hollow listening described above. When a lawyer responds to a client with intelligence, understanding, and sensitivity it helps to create a climate of trust.\textsuperscript{18} Effective communication requires the lawyer to listen carefully to the client’s entire message, to identify precisely the content (cognitive and affective) of that message, and to respond in a way that shows understanding.\textsuperscript{19}

This section outlines basic communication tools that make it easier to communicate effectively with the client. The tools are divided into two types: responsive statements and questions. Both types of responses focus a lawyer on a client’s story because the lawyer must respond with a summary or a reflection. These responses keep the lawyer focused on the client instead of on the next thing the lawyer wants to say.

Responsive statements use the client’s statements as the basis for the lawyer’s reply. They build on something the client has said or implied. They either clarify something the client has said, reflect feeling or content back to the client, or paraphrase something the client has said.

Questions ask for more information about a topic the client already discussed or for information about a subject the client has not discussed yet. They also explore what the client said by searching for more detail.

\section*{§ 3-5(a). RESPONSIVE STATEMENTS}

\subsection*{§ 3-5(a)(1). Clarification Responses}

The clarification response is straightforward. The lawyer simply asks the client to clarify or explain something the client said. Ideally, it takes the form of a short question by the lawyer followed by a repetition of what the client said. Here are some examples:

- Tell me more about the day you were fired.
- Do you mean that you were fired when you returned from pregnancy leave?
- What did your supervisor say to you on the elevator?

Using clarification responses benefits the lawyer in two ways. First, it promotes good listening. Framing effective clarification statements requires the lawyer to listen carefully to what the client said and focus the clarification request on a specific ambiguity in the client’s statement. Notice how the above examples focus on specific events surrounding the client’s job termination.

Second, clarification responses increase the lawyer’s knowledge and understanding of the client’s story. Effective clarification responses verify

\textsuperscript{18} \textit{Id.} at 125.

\textsuperscript{19} \textit{Id.} at 137.
the accuracy of the lawyer's understanding, ascertain the existence of certain facts, or make explicit something that the client implied. The lawyer should verify his understanding before moving on to other aspects of the interview. Not only is it more efficient to do so, it also builds better rapport with the client because the lawyer is letting the client know that the lawyer has been paying attention.

§ 3-5(a)(2). Reflective Statements

While some authors refer to reflective statements as active listening, this book uses the term "reflective statements" narrowly. "Reflective statements" are comments a lawyer makes that reflect back to the client something the client said or felt. It also refers to lawyer summaries of the client's story.

This is an important communication skill for several reasons. First, it shows the client that the lawyer is really listening. When a lawyer accurately restates something the client said, it shows respect for the client, helps establish rapport, and encourages the client to speak freely and fully in the future. Second, it helps clarify factual information. Restating what the lawyer heard allows the lawyer to check the accuracy of the client's statements, and it allows the client to correct any misunderstandings. Third, reflecting the emotional content of the client's story helps the lawyer understand how important certain aspects of the case are to the client. This helps the lawyer mirror the client's language and values, thus enhancing rapport. In addition, it helps the lawyer frame alternatives and discuss their consequences in a way that will be meaningful to the client.

Reflective statements should be used to

- Clarify what the client said.
- Encourage the client to continue speaking.
- Comfort the client under stress.
- Help the client focus on key issues or events.
- Signal a shift to a different stage of the interview.

§ 3-5(b). KINDS OF REFLECTIVE STATEMENTS

§ 3-5(b)(1). Paraphrasing

An effective and accurate paraphrase is an essential component of most reflective statements. This is because most reflective statements paraphrase the client's thoughts or feelings. It is possible to use the client's own words as part of a reflective statement, but this can be counterproductive. Frequently using the client's own words to construct a reflective statement can undermine the rapport being established. For example, a non-lawyer friend was counseling a client. She kept using the client's own words to reflect the content of the conversation back to the client. She hoped that by doing so she was letting the client know that she was paying attention to what she was
saying and that what she was saying had value. This went on for a period of time before the client finally declared, “Why are you just repeating what I say? Aren’t you listening to me?”

A paraphrase is a restatement of what the client has said. It condenses the client’s words and presents them in a slightly different way. Paraphrasing is neither a literal retelling nor a translation. That is, the lawyer should not put the client’s story into legal language. For example, a lawyer should avoid responding to a story about the client’s dismissal from state employment by saying, “So you think that your supervisor acted under color of state law to violate your civil rights.” Instead, the lawyer could say, “You were the first African American in the office and your supervisor gave you the most difficult assignments.”

The restatement must contain the essential point, meaning, feeling, or thought expressed by the client. Accuracy is crucial. Accurate paraphrases verify the lawyer’s understanding, build rapport with the client, and encourage the client to continue talking. Compare the following statements:

CLIENT: I never got the same kind of challenging assignments that the white workers got.

PARAPHRASE 1: You didn’t get good assignments.

PARAPHRASE 2: You weren’t allowed to do challenging work.

PARAPHRASE 3: They gave the best jobs to the white workers.

PARAPHRASE 4: They didn’t treat you like the other workers.

PARAPHRASE 5: They treated you differently than the white workers.

Each of these paraphrases emphasizes a different aspect of the client’s statement about job assignments. The first restates the client’s statement but omits the possible racial bias in the job assignments. It is likely to be affirmed by the client but may not produce any additional information. The others repeat the essential point the client made and include the element of differential treatment based on race. Not only are these paraphrases more factually accurate, they are more legally and emotionally accurate because they capture more precisely the nature of the client’s claim. As such, they are more likely to encourage the client to continue speaking in this vein.

Here is a checklist to follow in putting together an effective paraphrase:

- Remember exactly what the client said.
- Identify the essential content or feeling of what the client said.
- Compress and restate the essential content or feeling.

§ 3-5(b)(2). Reflecting Content Alone

These are relatively brief statements of what the client said to the lawyer. Using the client’s own words is most effective when the lawyer
§ 3-5(b)(3). Reflecting Emotion Alone

Like content reflections, emotion reflections are relatively brief but complete statements that reflect the emotional content of the client’s conversation. In their simplest forms, they reflect the emotions actually expressed by the client. For example, if a client tells the lawyer that he is “really mad” at his next door neighbor, he has clearly identified a feeling associated with his case. The lawyer appropriately reflects that feeling by saying, “So this problem with your neighbor really gets you angry (or upset, mad, etc.).”

It is more difficult to reflect emotional content that is implicit in the communication or that is not clearly expressed. Here, the lawyer must pay attention to the posture, conduct, language, and demeanor of the client. A client who describes his dispute with neighbor in an agitated tone is likely to be angry. Thus, the lawyer could respond by saying, “You seem very upset by this problem.”

§ 3-5(b)(4). Reflecting Both Content and Emotion

This is a more developed response that requires the lawyer to connect the content of the client’s conversation with the emotions associated with it and then to venture some conclusion about the two. For example, the lawyer might say to the client, “You must have felt betrayed when someone you considered a friend did that.” If accurate, this kind of statement greatly enhances both rapport and the quality of the communication. If inaccurate, the lawyer runs the risk of harming both.

Lawyers whose psychological type preference is thinking judgment may have to focus harder to recognize and accurately reflect a client’s feelings. The objective orientation of the typical lawyer may cause the lawyer to overlook and disregard emotions that may be seen as subjective and outside of reasonable consideration for decision making. Lawyers may consider feelings not as important as the “facts.” As the complaint goes, lawyers are not social workers, and therefore lawyers should deal only with the law and facts. Emotions are for psychologists.

This is short sighted, however. A client’s emotions influence everything about the case. They may be the primary motivation for seeking legal advice, they may have influenced what the client has done and what the client remembers, and they may determine what the client is willing to accept in settlement. In short, a lawyer who ignores emotions only learns about a part of the case.

Here is a checklist to follow in framing reflective feeling statements:

- Listen for the emotional content of the client’s statements.

A client may state a feeling while talking to the lawyer. For example, the client may say, “I’m really angry at my supervisor.” Stated emotions
can fall into seven categories: anger, fear, uncertainty, sadness, happiness, strength, and weakness. The picking out the correct emotion will be easier if the lawyer listens for words that fit into one of these categories.

Often the emotion is camouflaged by the content of the client's statement. The lawyer can pick it out by paying attention to the tone of the client's statement and the client's behavior. As discussed in § 3-2, the way a client delivers a message may be as meaningful as what the client says. Recall that facial expressions, tone of voice, and body placement can tell a great deal about what the client is feeling.

- Find **words that accurately state the client's feeling**.

  Do not overstate or understate the feeling. If there is any doubt, it may help to mirror the client's words. If the lawyer chooses a different word, make sure it conveys the feeling in a way the client can understand and appreciate. For example, a lawyer might say to a young person, "You feel pretty dumb about that." That same statement will sound foolish to a sophisticated adult client. The lawyer should also choose a word that accurately conveys the intensity of the feeling. Is the client annoyed, angry, or outraged? Finally, the lawyer can introduce the reflective statement with a statement that mirrors the client's sensory process. The following list matches introductory phrases with the primary process:

**Visual:**
- It appears that . . .
- It looks like . . .
- It's clear that you . . .

**Aural:**
- It sounds like . . .
- What I heard you say was . . .

**Cognitive:**
- I think you are . . .
- I wonder if you . . .
- It seems that . . .

**Emotional:**
- You felt . . .

**Physical:**
- That must have hurt.

- **Put the feeling in context.**

  Describe the feeling, but also connect it to the situation that prompted it. For example, suppose a client said with obvious emotion, "He made me

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20 *Id.* at 97.
§ 3-5. VERBALLY RESPONDING TO THE CLIENT

look terrible in front of my co-workers. I stormed out of the room as soon as it happened." The lawyer could respond, "I see (visual) you are still angry (feeling) about the way you were treated by your supervisor (context)." The context statement, with few modifications, can be plugged into each of the introductory phrases above.

It may help to place a short qualifying phrase in front of your reflection, especially if you are paraphrasing the client’s content or you are suggesting how the client feels. Put some distance between the comment and the lawyer with short phrases like, “It seems to me . . .,” or “If I were you I would have felt . . .,” or “If I understand you correctly . . .” Then offer the client the opportunity to verify the reflection. Be careful not to use these phrases too often, however. Frequently using such phrases may make the lawyer sound artificial. The client may come to believe that the lawyer is following a script and does not really care about what is being said. Sounding too psychological is another danger of overusing these introductory phrases. The client expects the lawyer to conform to a broad definition of lawyerly conduct. Sounding as though the lawyer is becoming a psychiatrist goes beyond these bounds.

§ 3-5(c). SUMMARIZING

The summarizing statement is longer and more fully developed than any the statements we have discussed so far. It reflects the main points or themes of the client’s story and any significant emotions. It should be succinct, but also comprehensive. It can include combinations of any of the reflective statements discussed above.

Summarizing has several purposes. First, it identifies the themes of the client’s case. This can be done either by isolating discrete statements or by tying together disparate strands of the client’s story. This helps both the lawyer and the client see aspects of the client’s story that may not have emerged otherwise. It puts the pieces of the story together in ways that may not have been obvious. For example, the lawyer might say

You said that you went to work here because this firm seemed friendly, but then they made demands on your time that seemed both excessive and unfair. It got worse after you talked to your supervisor about it. It seemed as though they were giving you all of the bad assignments and making it difficult for you to do your work. Now, you are so disillusioned with them that you are considering filing a lawsuit.

Second, frequent summarizing allows the lawyer to verify manageable amounts of information. It also helps the client break down the story into identifiable bits. Summaries focus the client and the lawyer’s attention on the parts of the story so far.

Third, effective summarizing moderates the pace of the interview. It imposes a momentary break in the client’s narrative, which gives a breather to both the client and the lawyer. This “breather” may be important for both cognitive and emotional purposes. The client may need to
take a break to recall important details or take a break before or after recalling emotionally significant information.

Summaries can indicate transition points in the client’s story and signal the client to continue with his or her narrative. A summary for this purpose may sound this way: “You told me that the firm began to make what you considered unfair demands on your time and that these demands increased after you talked to your supervisor. Tell me more about what happened after you first talked with your supervisor.”

Summaries are condensations of either the content or the feeling of the client’s story. By condensing the story, the lawyer makes it richer in the same way that a chef condenses a liquid to concentrate its flavors. Elements of the story are highlighted and put in sharper relief with other aspects of the story. The summary may allow the lawyer and the client to see how important or unimportant certain matters are. A good summary signals the client to either continue with the rest of the story or that a shift in the interview is about to occur (e.g., that the lawyer may need to ask some clarifying questions, etc.). For example, the lawyer may summarize the client’s story by saying: “What I understand so far is that you and Mr. Smith have been neighbors for 15 years and you have always gotten along well. When you came home from work last week, you found him building a wall along a line that you believe extends three feet onto your property. When you asked him about it, he cursed you and said that he was tired of all the noise from your kids. Is that right?”

Listen for matters that the client emphasizes either by repetition, intensity of feeling, or placement in the conversation. These are clues to what the client considers important. These are the themes of the client’s story. Often the client will present the important theme of his or her case during the opening moments of the interview. At other times, the client will highlight his or her themes by returning to a certain item again and again during the interview. Finally, the theme may emerge by virtue of the client’s emotions that are attached to certain items.

An effective summary requires three steps:

- Organize the elements of the client’s story for presentation in the summary.

  Consider what elements to include in a summary and the order in which they will be presented. Frequently summarizing the client’s story makes this task easier.

- Choose an appropriate tone for the summary.

  A cold summary of the facts after the client has just given a heartrending story will leave the client hurt and cold. Try to match the summary to the emotional tone of the client’s story even if the summary is about facts.

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• Select the appropriate time for the summary.

Summaries run the risk of stopping the client’s narrative and sidetracking the client from matters the client considers important. Therefore, reserve summaries for moments when they can accomplish their purpose. Summarize after hearing a lot of cognitive or emotional information, or when the client seems to have reached the end of his or her narrative. Use a summary when it is time to move to a different stage of the interview and tie the summary into a short statement telling the client what will happen next. For example, the lawyer could conclude this kind of summary by saying: “Now let’s go back and explore in more detail what happened after your first conversation with the supervisor. Tell me what kind of assignments he gave you and what he said when he gave them to you.”

§ 3-5(d). SILENCE

Silence can be an effective response. Lawyers sometimes feel that every blank space in a conversation must be filled with sound. They are afraid that the client will not consider them competent if they remain silent for any extended time. However, silence can be appropriate in many situations. For instance, silence may be the correct response while a client is divulging a difficult and emotionally traumatic event. It can be useful when the client simply pauses in her narrative to collect her thoughts before continuing. Finally, silence may be the right response when the lawyer wants the client to continue and wishes the client to choose the direction to take.

Like everything discussed in this book, the effective use of silence requires the exercise of sound professional judgment. Effective interviewers know when to use silence by assessing the context of the conversation, the client’s emotional state, and the stage of the interview. Silences may be more effective later in the interview — after the client has had the opportunity to trust the lawyer and has begun to reveal important information. Silences may be less effective in the early stages of an interview — before the client understands the interview process or develops any rapport with the lawyer.

§ 3-6. ASKING QUESTIONS

Alfred Benjamin remarked that interviewers “apparently reason that since asking questions is good, the more they ask the better.” There is a danger that by asking a number of questions one after another, the client is “taught” that the lawyer is in control of the interview. Clients will simply sit back and wait for the lawyer to ask for information instead of actively volunteering it.

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22 See Chapter 4 on Beginning the Legal Interview.
23 See Chapter 5 on Hearing the Client’s Story.
24 See Chapter 6 on Developing the Client’s Story.
[The conversation] develops a rhythm of a question-answer, question-answer, question-answer, somewhat like a Ping-Pong match. Once this tempo has been established, it is usually difficult for either the interviewer or the client to break.\textsuperscript{26}

Lawyers naturally gravitate toward asking questions. Law students are subjected to questions from the first day of law school. Popular culture celebrates the trial lawyer who asks the incisive series of questions designed to reveal the “Truth” \textit{a la} Perry Mason. The problem is that asking too many questions undermines the twin purposes of legal interviews: gathering information and building rapport. The questions posed during the Socratic method and cross-examination have little relevance during the legal interview.

Since only clients know the facts and their importance, “such question-and-answer sessions usually stay at the superficial level and deal only with what is obvious. They are also often characterized by a certain sense of randomness and a ‘hit-or-miss’ flavor.”\textsuperscript{27}

Effective legal interviewers know when to ask a question and what kind of question to ask. This section explores the various forms of questions that can be asked, the kind and amount of information they are likely to obtain, and their advantages and disadvantages. In general, as to a topic of inquiry, it is best to ask questions in the reverse of the order in which we describe questions below; it is best to move from open questions to closed questions.

\textbf{§ 3-6(a). CLOSED-ENDED QUESTIONS}

Closed-ended questions are narrowly focused and seek specific information. Here are some examples:

- What did Mr. Smith say to you?
- Who else attended that meeting?
- When did you first see this memo?
- Where did this accident happen?
- How fast were you going?

As you can see, these questions ask the client to relate specific facts. These are prototypical closed questions because they ask for who, what, where, when, and how. Closed-ended questions do not have to appear in this form, however. Any question that narrows the focus of the answer falls into this category.

The advantage of a closed-ended question is efficiency. Because it narrows the focus of the client's answer, the lawyer is likely to acquire the information the lawyer is looking for. Closed-ended questions also allow the lawyer to control the topic if necessary.


\textsuperscript{27} Id.
On the other hand, closed-ended questions have several disadvantages. Because of their narrow focus, they may cause the client to neglect other important details. Closed questions divert the client’s attention from what the client considers important to what the lawyer considers important. They are necessarily framed from the lawyer’s perspective because they ask for specific bits of information. Although there are times when this diversion may be necessary, effective counselors limit these times to a minimum.

Closed questions also run the risk of distorting the client’s recall. This may happen for two reasons. First, the question may suggest the answer. Even if the question is not a leading question, the narrow focus of a closed question often suggests the scope of the answer. Second, the question may encourage the client to give the answer that the client believes the lawyer wants to hear. All of us want other people to think well of us. Thus, when a person in authority asks a question, the person responding may answer in a way that he thinks will cause the one in authority to think well of him. This is not deliberate deception. Rather, it is a natural response to another person. A client is likely to respond to narrow questions in the manner that he thinks the lawyer wants.

Finally, closed questions may also inhibit rapport. Continually subjecting the client to the equivalent of cross-examination and never letting the client control the flow of the conversation eventually takes its toll. If questions are asked aggressively, with hostility, or suspiciously, they will surely invite the client to respond defensively. Even when questions do not have these characteristics, continual questioning undermines the client’s trust for the lawyer because it introduces an evaluative tone to the relationship. Clients may think that something a lawyer does not ask a question about is not important. Clients in this situation may eventually assert their feelings of powerlessness and loss of control by withholding information, becoming indecisive, or refusing to cooperate with the lawyer.

The correct time for closed questions is when the lawyer needs to nail down precise details or confirm a specific fact. When in doubt, effective counselors opt for open questions over closed questions.

§ 3-6(b). OPEN-ENDED QUESTIONS

Open-ended questions broadly focus the client’s answer. They give the client more control of the topics to be discussed, their sequence, and the amount of information revealed. Here are some examples:

- How can I help you?
- Tell me about your goals for the partnership.
- How did you feel when that happened?
- What happened at the meeting?
- How will your children react if you get into a custody battle with your wife?

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28 See id.
Notice that even open questions limit the scope of the answer somewhat. In fact, it would be impossible to conduct an effective legal interview using open questions that do not narrow the focus of the answer. The difference between an open and a closed question is really one of degree. Although the open question may focus the client on a particular time, place, person, or event, it gives the client control over the answer. If a lawyer asks, “What happened at the meeting?”, the client chooses how to respond — which topic to introduce first, the sequence of those topics in the client’s narrative, and how much to say about each of them. In addition, it encourages the client to go beyond one word answers.

On the other hand, a closed question — e.g., “Who talked first at the meeting?” — gives the lawyer control of the topic and the sequence. In addition, it invites a limited response — “Karen spoke first.” Further exploration of the subject will depend on additional questions by the lawyer.

The form of an open question leads to distinctive kinds of answers:

- “What” questions invite the client to respond with facts;
- “How” questions elicit sequences or emotions;
- “When” and “Where” questions reveal answers relating to time and place;
- “Who” questions invite answers about people; and
- “Why” questions solicit reasons for certain actions or events.  

Of course, there is no magic at work here. A question that begins with one of the above words can be open or closed depending on what follows that first word. Effective interviewers are aware of the information they need and phrase their questions appropriately.

§ 3-6(c). GENERAL GUIDELINES FOR USING OPEN AND CLOSED QUESTIONS

§ 3-6(c)(1). The Advantages and Disadvantages of Each Type of Question

Open questions produce more accurate information than closed questions. A study of police interview techniques revealed that the accuracy of information gathered in an interview declined as the number of questions increased.  

Moreover, the amount of information recalled was optimized when the witness was not interrupted by frequent questions.  

Open questions build rapport by enhancing the client’s role in the interview. Alfred Benjamin noted that interviewers can condition the client to a certain mode of participation:

31 Id.
§ 3-6. ASKING QUESTIONS

If we begin the helping interview by asking questions and getting answers, asking more questions and getting more answers, we are setting up a pattern from which neither we nor surely the interviewee will be able to extricate himself. By offering him no alternative we shall be teaching him that in this situation it is up to us to ask the questions and up to him to answer them.32

Open questions are also more efficient because they produce a great deal of important information in a shorter period of time.33

One of the authors of a book on interviewing in business settings summarized the advantages of open questions this way:

I have often sat through meetings in which the interviewer’s questions actively prevented the other person from giving the relevant answers. This was because all the questions were from the “asker’s” frame of reference, and the asker did not know enough about the other person’s situation to ask relevant questions. In most of these situations, the questioner would have received his answers more quickly and with less frustration if he had just shut up and listened long enough to hear how the other person described his situation.34

An open question may be inappropriate if the lawyer needs only a specific bit of information. They may encourage laziness in the lawyer if the lawyer relies on client narrative for all of the information about the case. They may inhibit rapport if the client believes that the lawyer is not paying attention to his story.

§ 3-6(e)(2). Asking these Questions in Context

The advantages and disadvantages of both open and closed questions can not be assessed in a vacuum. The advantage of one form of question may be a disadvantage in a different context or at a different stage of the interview. Moreover, interviews will have varied purposes which may suggest the use of one kind of question over another.

§ 3-6(e)(3). Summary

Asking open-ended questions is useful in these situations:

- At the beginning of an interview (or during its early stages).
- When the lawyer does not know either the purpose of the client’s visit or the nature of the legal problem.
- When the lawyer is undertaking a new line of inquiry in the course of the interview.

• When the lawyer is interviewing a new client.
• When time is not a factor.

Asking closed-ended questions is useful when the lawyer needs:
• To obtain specific information.
• To quickly clarify something the client said.
• To narrow the focus of the interview.
• To explore the applicability of alternative theories to the client’s case.
• To focus on specific aspects of the client’s story.

The following are guidelines for effective questioning:
• Ask questions based on what the client said or on the client’s concerns and not on the lawyer’s curiosity.
• Pause after asking a question to give the client time to respond.
• Ask questions clearly.
• Ask one question at a time.
• Use questions intentionally, i.e., to achieve a specific purpose, rather than randomly.

§ 3-6(d). LEADING QUESTIONS

Leading questions present special problems. Although these are excellent for cross-examination, they are generally ineffective in legal interviewing. They exacerbate the disadvantages of closed questions. They greatly narrow the focus of the question by suggesting the answer. They rob the client of any control of the topic, the sequence, or the amount of information conveyed. Moreover, they pose the very real risk of distorting the recall of the client. By suggesting the answer, they may cause an otherwise truthful client to unconsciously alter his memory to conform to the suggested answer. The client already inclined to lie will not need much encouragement.

Consider the following sequence from an actual case:

Q: Did you make statements to the police?
A: Nope. They couldn't get anything from me.
Q: Good. And they took you back to this house in the police car?
A: Yeah.
Q: And that’s when the two witnesses identified you?
A: (Nods affirmatively).

In fact, the client had made damaging admissions to the police during the ride to the house, and the identification at the house could have been
challenged if the lawyer had been made aware of some additional facts. The leading questions caused the lawyer to get a distorted version of the facts.

Nevertheless, leading questions have some usefulness in legal interviews. They may prompt a client to continue talking when the client is unsure if he or she should continue. They may also help to verify information that the client has already given. The suggested answer should involve a fact that is not crucial to the case or a fact that the lawyer is certain exists.

Here are some examples:

You felt angry when your husband left, didn’t you?

You didn’t say anything to the other driver, did you?

You quit your job the next day, right?

The car hit you as you were turning left?

Leading questions may also help clients discuss difficult material or talk about things they may not consider important. Consider the following excerpt from an interview where the lawyer suspected that the client was minimizing the seriousness of her injury:

CLIENT: It didn’t hurt much — I was back at work in a few days.

ATTY: You weren’t in a lot of pain?

CLIENT: Not really. It wasn’t so bad.

ATTY: Didn’t you have trouble sleeping?

CLIENT: Well . . . as a matter of fact, I did.

ATTY: Well, most people would have complained like hell if it had happened to them. Do you feel uneasy about being a complainer?

CLIENT: I guess I do. I’ve never found it very easy to admit I was hurt — or even to talk about it.

ATTY: I thought maybe that was it. Why don’t you tell me exactly what pain you experienced in as much detail as you can.

This example also illustrates the importance of using leading questions carefully. Context is crucial. If the lawyer is not correct in his assessment that the client is minimizing the seriousness of the injury, the same questions could lead the client to create facts. Leading questions may increase
the possibility of an answer. Clients may not want to reveal something that will cast them as immoral, etc. Clients may deny their behavior rather than admit something that is inconsistent with their public image or their public morality. Thus, a question that leads a client toward this admission is more likely to get an accurate answer than a neutral question. There is a danger that such a question will be seen by the client as accusatory. The lawyer's non-judgmental acceptance will limit the possibility that such questions will damage the rapport with the client.

Robert Gorden lists these pre-conditions to leading questions:

- The information is clear in the respondent's mind, free from fading memory, chronological confusion or inferential confusion.
- Neither the information to be reported nor the relationship between the interviewer and respondent constitute an ego threat.
- There is no significant power imbalance between the respondent and interviewer.\(^{37}\)

He warns that if the interviewer does not know in advance if these conditions exist, the interviewer should not use leading questions.

§ 3-7. FINAL WORDS

Be wary of prescriptions (even the ones in this book) about the “right” and “wrong” way to ask questions. Good questions depend on the personal dynamics of the questioner; the context in which they are asked, the purpose for which they are asked, and the stage of the interview in which they are asked. If you want to know the time because you may be late for class, a closed question (“What time is it?”) works better than an open one (“Tell me about your watch.”). Finally, even perfectly formed questions may be rendered ineffective by the personality of the lawyer or the limitations of the client.

Bellow and Moulton offer the following pragmatic advice:

[The effectiveness of questioning] depend[s] on the personal strengths, vulnerabilities, and perceptions of the client, as well as on the skills of the interviewer. . . . Do all of these reservations mean that attending to question form is unimportant? Perhaps. It may be that those who reflect on [the conventional techniques] 'learn' no more than the value of (i) care in their use of language, (ii) controlling their own tendency to interrupt; (iii) expressing their confusion or doubts; and (iv) using questions to assist the client in clarifying what he or she is trying to express. But even if focusing on question form is only a roundabout way to develop these general, rather obvious orientations, if it does that much — for many of us — it has done a great deal.\(^{38}\)


\(^{38}\) Bellow & Moulton, supra note 35, at 211-212.
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.\(^1\)

§ 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.

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. 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. They wanted to see if a

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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.
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.
§ 4-5(a)(2). The Lawyer’s Office

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. 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. 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

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4 The material in this section is drawn from IRVING L. JANIS, SHORT-TERM COUNSELING (1983).
5 Id. at 90-91.
6 Id. at 90.
comfortable. Being genuine “means being oneself without being phony or playing a role.” 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

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

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7 Id. at 91.
8 The material in this section is drawn from IRVING L. JANIS, SHORT-TERM COUNSELING (1983).
§ 4-5. THE OPENING STAGE OF THE CLIENT INTERVIEW

detachment. That cast of mind in turn fosters a sturdier form of
tolerance than that produced by mere relativism or pacts of nonag-
gression. Strong tolerance can be attentive, protective, and
respectful to the other person without being "nonjudgemental." 9

These techniques are designed to build trust in the client and under-
standing 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. 10 They may also
inhibit clients from making full disclosures to their counselors who espe-
cially need to know embarrassing information in order to anticipate prob-
lems 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 refer-
rent 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 im-
portant 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. 11

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 rela-
tionship 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

11 These may include associates who will be working on the case, secretaries, or para-
degals. 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, 11 Law
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. Listen to how the client in this excerpt indicates his discomfort at having to seek disability payments.


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
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.] [introdu-
ing 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.14

In the following excerpt, Professor Gellhorn emphasizes the importance of attending to the client’s first words during an interview. She extrapolates from 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.


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[Legal 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

14 We provide an extended discussion of this case study in Chapter 6.
is that minds wander, particularly during the “ice-breaking” stage, and new questions are formulated mentally without listening carefully to the client’s 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 client’s 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-judgmental 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.16

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

16 See JAXIS, supra note 4.
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.\(^{17}\) 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

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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."18 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.19

18 Model Rules of Professional Conduct Rule 1.5(b) (1994).
19 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.
§ 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.20 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.21 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

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.