Chapter 4
INTERVIEWING THE CLIENT

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§ 4.01 INTRODUCTION

Interviewing your client is, of course, a major component of the initial client meeting. As mentioned previously, at the initial meeting, your interview will often be limited to getting only a basic factual picture of your client's situation. Even if an attorney-client relationship is established at the initial meeting, the ultimate nature and scope of your representation may not be decided upon until you have met with your client again and conducted a more in-depth interview that is followed by counseling your client about potential courses of action and deciding upon an appropriate course of action.

This chapter discusses the process and techniques for interviewing your client at the initial meeting and during any follow-up meetings. The chapter begins with a brief discussion of certain commonly recognized facilitators and inhibitors of communication that are useful to keep in mind throughout the interviewing process and later when you counsel your client. The chapter concludes with an illustration of an attorney-client dialogue during an initial client meeting and interview.

§ 4.02 FACILITATORS OF COMMUNICATION

Psychologists have identified a number of factors or motivational circumstances that facilitate interpersonal communication. For purposes of legal interviewing and counseling, the most important of these are (1) conveying empathetic understanding, (2) engaging in active listening, (3) encouraging communication through conveying expectations and recognition, and (4) keeping an open mind about what is relevant.

[1] Conveying Empathetic Understanding

"Empathy" means identifying with another person's experiences and feelings. It means putting yourself in another person's shoes. Conveying empathetic understanding for your client is important because her feelings about her situation are often just as important as, if not sometimes more important than, the facts of the events giving rise to her situation or legal problem. Regardless of whether your client expresses her feelings openly, subtly, or not at all, she will have feelings about matters such as how and why her situation occurred, about the people who are involved or affected by her situation, and about what may happen as a result of her situation or legal problem. Conveying empathy for your client will enhance communication because it tends to make her feel more open and comfortable in talking with you.

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There is no single way to convey empathetic understanding. However, you can show empathy for your client’s feelings, personal perspectives, and points of view by, for example:

- Allowing your client to talk without unnecessary interruption;
- Maintaining appropriate eye contact;
- Being closely attentive to what your client is saying;
- Being closely attentive to your client’s non-verbal expressions (i.e., body language);
- Encouraging your client to express her feelings, thoughts, needs, interests, and concerns;
- Making responsive statements that acknowledge your client’s feelings and concerns;
- Refraining from asking questions about sensitive matters until rapport has been established;
- Expressly stating a willingness to help your client in whatever way you can; and
- Engaging in “active listening.”

[2] Engaging in Active Listening

Many lawyers like to talk more than they like to listen. This is a common and understandable shortcoming. As advisors, lawyers are accustomed to giving advice; and as advocates, they are accustomed to performing and making presentations. Even lawyers who make a conscious effort to listen, often listen only partially and become distracted by thinking about what they want to say or ask next. In addition, many lawyers listen only passively, rarely making any verbal or non-verbal responses to indicate that they have actually heard and understood what the client has said.

“Active listening” is an enhanced method of communication by which the listener (1) is highly attentive to the complete context, content, and feelings expressed by the speaker’s verbal and non-verbal behavior, and (2) accepts and acknowledges, in a non-judgmental way, the content and feelings expressed by the speaker by making reflective responses which mirror or capsulize what the speaker is saying and feeling. Active listening is a method of explicitly demonstrating not only comprehension, but also empathy and understanding.

There are five principal ways in which you can enhance communication with your client through active listening:

1. Allow your client to tell her story and avoid unnecessarily controlling the conversation.
2. Be attentive to your client’s non-verbal cues such as:
   - Tone of voice
   - Volume of voice
   - Pace of speech (pauses, accelerations, varying rates of speed)
   - Body posture
   - Eye contact
   - Gestures
   - Facial expressions
3. Be attentive to how your client structures her story by considering matters such as:
• Where did she begin her story? Where did she end it?
• What parts of the story did your client develop in detail? Which did she gloss over?
• Which parts of the story did she treat as background and which parts did she consider "the main event"?
• How did your client sequence her story? Was it chronological or in order of matters of importance? Which parts of the story seemed logically connected to one another?
• What parts of the story did she repeat”? Which parts did she omit?

Being attentive to these types of matters may provide you with clues about those things that your client deems most important, those things that she might be reluctant to reveal, and how she thinks and feels about her overall situation.

(4) **Acknowledge what your client is saying by occasionally using short prompts such as:**

"Yes" (or nodding your head, "Yes")
"Please, go on"
"So, then what happened?"
"That’s interesting"
"Can you tell me more about . . . ?"
"Uh-uh"; "Mm-hmm"; "I see"
"Oh"; "Really"

(5) **Mirror what your client is saying or feeling by occasionally paraphrasing the essence of her remarks in a non-judgmental way:**

"It sounds like you feel . . . ."
"That must have been hard for you"
"You must have been disappointed"
"I imagine that you are relieved by that"
"It seems like you’re torn about what to do"
"I can see how that might be troubling . . . I think I can help; but first, can you tell me more about . . . ?"

In employing the techniques in (4) and (5) above, it is critical not to overuse them. A ritualistic singsong of "Mm-hmm," "I see," "That’s interesting," "It sounds like you feel . . . .," "I imagine you were upset . . . .," etc., will come across as forced and fake. Focus on listening **intently.** If you do that, your active listening responses are more likely to be appropriately spontaneous and natural.

[3] **Encouraging Communication Through Conveying Expectations and Recognition**

Most people tend to act in accordance with the perceived expectations of those with whom they interact. In addition, most people have a strong need for attention and recognition from others. These desires to satisfy expectations and receive attention and recognition are strong motivators that often affect how people communicate.

Accordingly, when interviewing your client, if you explain your expectations about the types of information that would be useful to you in evaluating her situation or legal problem, she may be more forthcoming in providing that information than she would be had you not expressed those expectations. For
example, if your client is reluctant to talk about a particular subject, after gently reminding her about the attorney-client privilege (see § 3.05), you might explain why that subject is important to talk about in order to fully understand her situation. Moreover, if you give your client “recognition” for her forthrightness in sharing information (e.g., “I know this is difficult for you, but what you are saying is very helpful”), she is likely to continue to be responsive and cooperative in providing important information.

[4] Keeping an Open Mind about What is Relevant

For reasons of efficiency and simplicity of legal analysis, lawyers often routinize certain legal services and reduce the facts relevant to them into standard patterns or categories that match familiar types of legal cases. One scholar describes this process as follows:

'The [client] 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.²

This tendency to reflexively and prematurely categorize the client’s legal situation before obtaining all the facts surrounding her story often causes a lawyer to make erroneous assumptions and jump to conclusions about what information from the interview is relevant and what information is mere surplusage. As a result, the lawyer may end up “hearing” only select portions of the client’s overall situation, which may inhibit complete communication by discouraging any discussion of facts that he perceives to be irrelevant. The danger is that the lawyer may end up largely misunderstanding the true nature of the client’s legal and non-legal needs.

To guard against this danger, it is important to keep an open mind about what may or may not be relevant when interviewing your client. It is far better to hear out the client’s entire story than to abbreviate the interview at the risk that essential information (and particularly information that your client deems important) will not be obtained. This open-mindedness will not only enhance communication, but also will build rapport and likely result in more effective representation.

§ 4.03 INHIBITORS OF COMMUNICATION

Just as psychologists have identified various circumstances that facilitate communication, they have identified factors that tend to inhibit full and open communication. In lawyer-client interactions, the most important inhibitors are (1) fears of embarrassment or hurting the case, (2) anxiety, tension, or trauma, (3) etiquette barriers and prejudices, and (4) differing conceptions about relevant information.³

[1] Fears of Embarrassment or Hurting the Case

Clients often come to lawyers with situations or legal problems that are personally embarrassing or that sometimes cause strong feelings of guilt or shame. For example, a client may have committed a crime for which she has now been charged or neglected a business matter for which he has now been sued. In these types of situations, she may be understandably reluctant to provide complete information about what happened for fear that you will view her conduct as being disgraceful, or at least, foolish.

Similarly, regardless of whether the client’s particular situation may produce feelings of embarrassment or shame, a client may be reluctant to disclose information that she perceives may somehow “hurt her case” in the sense of producing an adverse outcome. This reluctance to reveal damaging information may also be grounded in a fear that you will consider her case to be a “loser” and decide not to represent her.

Whether your client fears embarrassment or fears that she will hurt her case, complete disclosure of all pertinent facts is, of course, essential to effective representation. Knowing the full extent of your client’s participation in the events giving rise to a criminal charge or lawsuit is critical in order to evaluate potential defenses. Information that may be damaging to your client’s cause of action or assertion of some legal right is important in assessing the merits of her claims and in preparing to counter anticipated defenses or other legal efforts to defeat her plan of action. Neither you nor your client can run or hide from adverse facts. The sooner you know the bad facts, the sooner you can prepare to counter them.

Accordingly, when faced with these communication inhibitors, you should draw upon the communication facilitators of (1) conveying empathetic understanding for your client’s difficult situation, (2) engaging in active listening by non-judgmentally accepting and acknowledging her uncomfortable feelings, and (3) encouraging her to communicate by explaining the need for full information and by expressing recognition for her forthright disclosures. In addition, in an appropriate situation, you might once again explain that her confidences are protected under the attorney-client privilege.

[2] Anxiety, Tension, or Trauma

For the same reasons discussed in the preceding subsection, a client’s willingness to communicate may be inhibited due to anxiety or tension. Alternatively, a client may be reluctant to talk about a traumatic event, such as the

death of a loved one, a debilitating injury, or the circumstances surrounding the break up of a marriage. Apart from fears of embarrassment or hurting the case, the client may be angry, depressed, or humiliated. Here again, communication is likely to be enhanced if you draw upon the facilitators of empathetic understanding, active listening, and encouraging communication through expectations and recognition.

[3] **Etiquette Barriers and Prejudices**

Sometimes a client will be uncomfortable in talking with her lawyer about certain matters due to "etiquette barriers" grounded in social norms or conventions. For example, a client may have difficulty talking about intimate matters (such as sex or intimate medical problems) with a lawyer who is of the opposite sex. Similarly, the age, social status, or economic status of a client may affect how comfortable she is in talking with a lawyer of a significantly different age or significantly different social or economic status. Depending on the extent of these differences, the client may feel inferior or subordinate to the lawyer or, alternatively, superior and dominant to the lawyer. In short, differences in gender, age, and socio-economic status may sometimes inhibit open communication between you and your client when talking about certain subjects.

In addition, various prejudices, biases, or cultural differences may impede communication. Unfortunately, racial or sexual stereotyping may cause a client to be uncomfortable in trusting and interacting with a lawyer who is of a different race or of the opposite sex. A bias against public defenders may cause an indigent criminal defendant to lack initial confidence in her court-appointed lawyer. Even religious, moral, or philosophical differences between client and lawyer may inhibit open communication.

To deal with an etiquette barrier or prejudice that is impeding communication, you can use sensitivity and explanation. Tactfully acknowledge the barrier or prejudice and, if necessary, openly discuss the differences between yourself and your client. If the barrier or prejudice relates to the subject matter of the representation, acknowledge the delicacy of the matter and explain to your client that you are accustomed to handling such matters with the confidentiality, respect, and sensitivity they require. If your client still remains uncomfortable talking about the matter, you might consider calling upon an associate lawyer who does not have the same identity differences to interview the client on the particular subject.

[4] **Differing Conceptions about Relevant Information**

Clients frequently approach lawyer interviews with preconceived notions about what information is legally relevant to their situations. Indeed, some clients even have strong preconceptions about the exact types of legal remedies or services that would be appropriate to resolve their problem. Consequently, it is not unusual for clients to have conceptions about relevant information that are markedly different from what their lawyers consider relevant. This may make it difficult for a client to see the connection between her lawyer's questions and the client's situation, and make it difficult for the lawyer to understand why the client persists in talking.

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about certain matters that the lawyer thinks are essentially irrelevant to the problem at hand. Either way, communication is impeded.

In dealing with differing conceptions about what information is relevant, as discussed in Section 4.02[4], you should always guard against prematurely categorizing your client’s legal situation and keep an open mind about the potential relevance of any information that your client wants to impart. At the same time, because the information you begin to obtain during the interview will inevitably alert you to particular legal considerations, you should not hesitate to ask about specific, potentially relevant information that your client does not otherwise gratuitously volunteer to you. If your client appears to be irritated at your seemingly irrelevant questions, simply provide her with a brief explanation of why the requested information may be important to fully understand her legal situation.

§ 4.04 PURPOSES OF INTERVIEWING

As mentioned in Section 3.04, your initial purpose in interviewing the client is to get a basic factual picture of his situation so that you can determine whether you can help him. In addition, you need to obtain a sense of his overall objectives — i.e., what he wants to accomplish (see § 3.06). If you determine that you may be able to help the client, the purposes of your interview become more expansive. Either at the initial meeting or at a subsequent meeting, you must obtain all information pertinent to his situation, objectives, and potential legal theories or courses of action that may be available to accomplish his objectives. Knowing how to ask different types of questions during the interview and how to use effective information-gathering techniques can significantly facilitate these purposes.

§ 4.05 TYPES OF QUESTIONS

Knowing how to craft a question to obtain the desired information is one of the lawyer’s most important tools. Young children learn the art of asking questions as soon as they learn to speak. With practice, they learn that certain forms of questions will give them more information and other forms will give them less information. As a lawyer, you will need to hone your questioning skills so that you can maximize information gathering.

Most questions can be categorized into five different types: (1) open questions, (2) follow up questions, (3) closed questions, (4) leading questions, and (5) summation questions. In a client interview, you will usually use all five types of questions. Choosing when to use which type depends on the exact information you need and where you are in the information-gathering process. Regardless of the particular type of question you use in an interview, it is useful to always keep two rules in mind: first, make your questions as simple as possible; and second, ask only one question at a time.

[1] Open Questions

Open questions invite the client to answer with as much information as possible. When a lawyer first asks the client an open question such as “How can I help you?” she is inviting the client to explain in as much detail as possible why the client has sought help. An open question is a broad invitation to convey information. Open
questions are not limited in scope or narrowly focused. Open questions are non-judgmental and do not suggest an answer. Instead, they permit the client to choose his own topic and his own way of responding to and structuring the information requested.

Journalists are taught to ask open questions by beginning most questions in the early stages of an interview with one of the following words: “Who?”, “What?”, “When?”, “Where?”, “Why?”, and “How?”. As lawyers, we can learn much from journalists. They are trained questioners who make a living by efficiently gathering as much information as possible from the people whom they interview. In addition to the journalists’ “five W’s and an H”, as these words are nicknamed, you can add three other phrases to the group: “Please tell me about . . . .”, “Describe . . . .”, and “Explain. . . .”

In a client interview, the client is usually the one who possesses the most knowledge of the facts of the potential case. The most efficient way for you to learn the facts is to permit your client to convey them in his own way, unfettered by interfering questions. Open questions turn control of the release of information over to your client. By listening to your client’s choice of words, characterization of the facts, the cadence of his responses, and the structure of his answers, you can maximize information gathering.

For example, assume a client has sought representation in a personal injury case involving a car accident. Contrast the amount of information the lawyer obtains by asking open questions that invite information as opposed to leading questions that suggest the answer:

• Open Question:

Q: How can I help you?

A: I was injured in a bad car accident. The other driver’s insurance company has refused to pay my hospital bills even though the other driver was at fault. My friends suggested that a lawyer might be able to help me get the money I’m owed.

• Leading Question:

Q: You were in an automobile accident?

A: Yes.

The lawyer who asked the open question has learned that (1) the client was injured; (2) the client thinks the other driver was at fault; (3) the other driver was insured; (4) the client’s injuries required medical treatment; and (5) the client has discussed his case with friends. The lawyer who has asked the leading question has learned only one fact: the client was in an automobile accident.

• Open Question:

Q: What happened?

A: Well, on December 28th I was driving from my home in North Carolina to visit my mother in Kentucky when a snowstorm came through the mountains of Western North Carolina. The road conditions were treacherous and I was driving really slow. There were all these ice patches on the road, and it was hard to stop
without skidding. The car in front of me slowed to a crawl and I slowed down. The guy behind me was driving too fast and plowed into me. That set up a chain reaction. I hit the car in front of me and that car hit the one in front of him. My car was squashed like an accordion.

• Leading Question:

Q: Your car was damaged in the accident?
A: Yes.

Again, contrast the amount of information the open question elicited as opposed to the single fact the lawyer learned from the leading question. Note that the open question began with one of the journalist's recommended words (i.e., "what"), while the leading question was a sentence that suggested a specific answer. The open question resulted in a paragraph of information, while the leading question resulted in a monosyllabic response.

Open questions are particularly useful at the beginning of an interview because they encourage your client to talk. After you ask an open question, listen carefully to the response. Many clients have planned what they want to tell you about their case before coming to the interview. Through careful listening you can quickly learn which things are most important to your client.

By allowing your client to control the initial flow of information through his answers to open questions, you are permitting him to vent his feelings as well as the facts relevant to his situation. The rest of the interview will go more smoothly if he has permission to express his feelings early in the interview. If your client is focused on his anger or frustration at what has happened to him and does not have permission to express his feelings, he may not be able to listen to any advice you give later in the interview. If you encourage him to tell you about his case by using open questions, and demonstrate that you are listening carefully to his feelings as well as the facts, he will believe that he has finally been "heard." Once he realizes you are focused on his case and are empathetic to his feelings as well as the facts, he will usually be able to respond to more detailed questions and listen to your advice.

Because your client has permission to choose which information to share in response to an open question, open questions also provide him "recognition" (see § 4.02[3]). Your client quickly perceives that you have confidence in his ability to decide what is important and how to structure his story, and this often motivates him to answer more forthrightly and thoroughly.

When asking open questions, avoid using phrases that communicate any limitation on information you seek. If there are no restrictions on the information requested, your client will recount not only what is important to him, but he will also provide more detailed information. Many lawyers unconsciously include limiting phrases such as "a little about," "generally," or "briefly" in their questions. These phrases tend to limit information gathering. They discourage a full recital of events and feelings. Contrast the following open questions with the following limiting questions:
§ 4.05 TYPES OF QUESTIONS

• Open Question:
  Q: Why were you traveling to Kentucky?
  A: My mother was having a difficult time. It was her first holiday after my Dad's death. I hoped my visit would cheer her up. Also, I needed to check on the administration of my Dad's estate before the end of the year.

• Limiting question:
  Q: Would you tell me a little about why you were traveling to Kentucky?
  A: To visit my mother.

• Open Question:
  Q: How long is the trip from Durham, NC to Louisville, Ky?
  A: Well, it can take anywhere from ten to fourteen hours depending on the weather and traffic. In the winter there's the risk of snow and ice. In the summer, they're always tearing up the road somewhere, funneling the traffic to one lane and holding everyone up.

• Limiting Question:
  Q: Briefly, how long is the trip from Durham, NC to Louisville, KY?
  A: About twelve hours.

Although you may need to ask more pointed or narrow questions later in the interview, at the open-question stage you want to avoid any limitations on obtaining information.

In addition to asking open questions, you should also use the active listening techniques discussed in Section 4.02[2] to keep your client talking. Encourage your client to expensively recount his story by occasionally using the short prompts of “I see,” “Mm-hmm,” and “Can you tell me more about?” Avoid interrupting your client or seizing control of the interview when your client pauses in his story. In most instances, the unrestricted client will convey information more quickly and in greater depth if he has control over the flow of the story. Your silence at a pause in his story will encourage your client to keep talking. (See § 4.06[3]).

In addition to using open questions at the beginning of an interview, you will find that they are useful at the beginning of a new topic. An open question signals your client that you want to know everything about the topic and you trust him to give you that information. For instance, in the car accident case illustrated above, assume that you now want to change the subject from how the accident occurred to the injuries the client suffered:

• Open Question:
  Q: Now that we've covered how the accident happened, please tell me about your injuries.
  A: When the guy behind me hit my car, my head was thrown forward. And then when I hit the car in front, my head was thrown back. I've
had to wear this collar since the accident. Also, my right leg was broken when my car hit the car in front.

Although this question is technically not a "question," it acts as an open question by inviting a broad response with the phrase, "please tell me about." Similar phrases such as "please explain" and "please describe" make a sentence into an open question and encourage your client to give you the details on a new topic.

One danger of open questions is that they are not effective with a client who cannot focus on a coherent story but instead rambles through a maze of unconnected details. In that situation, you will get more information if you ask narrow questions to help your client focus on the subject of the interview. However, you need to guard against prematurely concluding that your client is rambling. Some lawyers who are anxious to "get to the bottom of the problem" assume the client is rambling and attempt to seize control by jumping to closed questions before giving the client a chance to fully respond to open questions. This causes the client to edit and limit the information he is sharing.


Effective interviewers use pointed or directed follow up questions to clarify a client's series of responses to open questions. These follow up questions seek clarification of subjects raised in the client's initial story. They are more narrowly focused than open questions, but do not suggest an answer. They seek limited information and anticipate a short response. Such questions frequently incorporate phrases from the client's previous answer. For example, in the car accident case, the lawyer might ask a series of pointed or directed follow up questions to clarify the information obtained in the client's answers to the open questions asked above:

- Pointed or Directed Follow Up Questions:

  Q: What time of day did the accident happen?
  A: It was late in the afternoon, a little before dark.

  Q: What lane were you in just before the car following you "plowed" into the rear of your car?
  A: I was in the far right lane designated for trucks and slow-moving vehicles.

  Q: Exactly what did you mean when you said the road conditions were "treacherous"?
  A: Icy, slippery, low visibility.

Follow up questions build rapport with your client because they indicate how closely you are listening. If you incorporate into your questions some of the phrases your client has used in his answers, you will communicate to your client that you are paying attention to his story and want to understand him completely. Such attention is comforting and flattering to your client.

The danger of follow up questions is that the lawyer can move too early into the follow up stage of questioning and thereby shut down the client's expansive answers to open questions. Once the lawyer interrupts the flow of the story with more directed follow up questions, the client often has a tendency to assume that the information about which the lawyer is inquiring is the most important. He may then
omit other details of the story and focus only on what the lawyer has asked about. Most effective interviewers stick with open questions until they have heard the basic story. Then they go back through the story with more pointed follow up questions that seek clarification of important details.

[3] Closed Questions

The third type of question in the lawyer’s repertoire is the closed question. These questions are very narrow and seek one or two-word answers. They do not suggest the answer, but they do convey an expectation of brevity to the client. These questions often begin with a verb. They are used to clarify minute details. Examples of closed questions from our car accident case might be:

- Closed Questions:
  
  Q: Were you wearing a seat belt at the time of the accident?
  A: Yes.
  Q: Were you alone in the car?
  A: No, my son was asleep in the back seat.
  Q: Was he injured?
  A: Not really. Just a few bruises.

Although closed questions are extremely important to clarify details, they will inhibit information gathering if they are overused or used too early in the interview. They can turn the interview from an in-depth story told by a client into a back-and-forth exchange of short questions from the lawyer followed by short answers from the client.

If you find that your interview has degenerated into labored questioning followed by monosyllabic responses from your client, pause and reflect on the types of questions you have been asking. If you want your client to do more of the talking, release control to him by starting your questions with the reporter words or phrases discussed in Section 4.05[1]. Once you craft open questions, your client will usually start talking in longer sentences and volunteer more information about his case.

[4] Leading Questions

Leading questions suggest an answer in the question. When a lawyer asks a leading question in an interview, she is expecting the shortest possible answer. Leading questions are used to confirm facts that logically flow from the story the client has told. They are a short cut to gathering information. Examples of leading questions from our car accident case might be:

- Leading Questions:
  
  Q: You were traveling at less than twenty-five miles per hour at the time of the accident weren’t you?
  A: That’s right.
  Q: The car in front of you was also traveling at less than twenty-five miles per hour, isn’t that right?
A: Yes.

Q: Your son was the only passenger in your car?
A: Yes.

Q: It was snowing at the time of the accident?
A: Yes.

Leading questions can be constructed in two ways. In the first method, the lawyer who wants to confirm a fact makes a statement of the fact and adds a tag line that indicates the statement is a question. In the first two examples of leading questions above, the statements occur at the beginning of the questions, and the tag lines of “weren’t you?” and “isn’t that right?” at the end of the sentence signal the client that he is expected to confirm or deny the stated fact. In the second method of constructing leading questions, the lawyer makes a statement of fact, but uses her voice to indicate that the statement is actually a question that requires a response by the client. The third and fourth questions above show the lawyer making a statement, but raising her voice in a questioning manner as indicated by the question mark at the end of the statement.

Either method of asking leading questions will work if the question is confirming a single fact. If the lawyer includes two facts in her question, the client’s answer will be confusing because it will be unclear which fact the client is confirming or denying. For example, if the lawyer asks, “Your son was the only passenger in the car, and it was snowing at the time of the accident?” the client’s answer of “Yes” might be to the first fact, the second fact, or both facts. When asking leading questions, it is essential to limit the inquiry to one fact per question in order to obtain accurate answers.

Occasionally, the lawyer will ask a leading question to which she thinks she already knows the answer and she receives an unexpected response. If the answer to the leading question is unexpected, the lawyer will then need to pursue the topic with more open questions to understand the details and clarify the facts. For example, if the lawyer asks the leading question, “You had your high beam headlights on didn’t you?” and the client says, “No”, the lawyer who was expecting a “Yes” answer should then pursue the topic with a more open question such as, “Why not?” or “How did you make sure other drivers could see you in the snow?” The client can then elaborate on his earlier response by explaining, “The visibility was so bad that I found my high beams reflected off the snow as it fell. I turned on my hazard lights so the guy behind me could see me, but I left my headlights on low beam to minimize the reflection.” By asking an open question after the unexpected response to the leading question, the lawyer has learned clarifying details.

Skilled lawyers can also use leading questions to give a client permission to admit a fact that he may be embarrassed to disclose. For instance, a lawyer might recognize that a client does not want to admit that he had been drinking before driving home from a party. The lawyer might ask, “Since it was New Year’s Eve, I assume you might have had something to drink at the party?” The lawyer’s leading question has given the client an acceptable way to disclose a difficult fact.

In summary, leading questions are useful in an interview for two purposes. First, they are useful to confirm information. Second, they can be used to facilitate a
client's admission of an embarrassing or difficult fact. If they are overused or used too early in the interview they may inhibit the free flow of information from your client. If you ask leading questions in a cold or hostile tone, they can also impair the rapport you are trying to establish with your client. Because leading questions are often considered the province of trial attorneys as they conduct a harsh cross-examination, they should be used sparingly and gently in an interview. Your client will not take kindly to being cross-examined in an interview.

[5] Summary Questions

Summary questions list the facts and feelings the lawyer has learned in the interview. Summary questions are useful to make sure that the lawyer has heard everything the client has shared. They invite the client to elaborate or explain anything the lawyer may have misunderstood or omitted. A lawyer uses summary questions at the end of a topic and at the end of an interview to verify that she has learned the important facts and feelings from the client. For instance, in our car accident case, a lawyer might ask the following summary questions:

- **Summary Questions:**

  **Q:** Now I want to make sure that I have all the facts that show the other driver was at fault. The road conditions were treacherous. You were in the far right lane traveling slowly behind a line of cars that were moving at less than twenty-five miles per hour. You were using your hazard lights and your low beam headlights so that you were visible to cars behind you. There were icy patches on the road that made driving any faster dangerous. The car that hit you was traveling at a much higher rate of speed when it plowed into you. Have I omitted anything?

  **A:** The only thing you didn't say is that it was snowing at the time of the accident.

  **Q:** Is there anything else I have left out?

  **A:** No, I think you got everything.

  

  

  **Q:** Let's go over how you felt when the other driver's insurance company denied coverage for the injuries you suffered. Initially you were angry. Then you felt that they didn't understand what had happened. When you tried to explain how fast their driver was going on the icy road, you felt they weren't listening to you. Have I understood what you said?

  **A:** Yes, I think that about covers it.

Generally, summary questions should only be used for the more important topics in the interview. They should not be a verbatim playback, but a paraphrase of the client's story. They act as a probe of the client's memory to verify that he has completely and accurately recounted the important facts for each topic. If summary questions are overused, they can unnecessarily prolong the interview with boring recapitulations of every detail the client has shared.
§ 4.06 INFORMATION-GATHERING TECHNIQUES

There are a number of special techniques that can facilitate efficient and comprehensive information gathering in an interview. Lawyers have come to rely on five particularly helpful techniques: (1) the funnel, (2) the time line, (3) the strategic use of silence, (4) the use of probes to rouse failed memories, and (5) the use of writings or demonstrations to re-create events. The funnel and the time line incorporate the five types of questions discussed in the preceding Section into a framework that maximizes the retrieval of information. The strategic use of silence often helps to facilitate the disclosure of delicate information from the client to the lawyer, particularly when combined with empathetic understanding, active listening, and recognition. The fourth technique, the use of probes to rouse failed memories, helps the client remember events he has temporarily forgotten or suppressed. The last technique, the use of writings or demonstrations to re-create events, may be helpful to understand matters that may be difficult to picture from purely verbal descriptions.

[1] The Funnel Technique

Gathering valuable information in an interview may be likened to searching for valuable items in a dark room. Suppose you enter a dark room with three things to help you find your way: a floodlight, a regular flashlight, and a penlight. Naturally, you would first orient yourself to the entire room by using the floodlight. As you identified particular areas where valuables might be stored, you would explore with your flashlight. When searching the smallest crevices or spaces, you would use your penlight. Similarly, in interviewing, skilled lawyers will seek out valuable information by beginning with open questions (like a floodlight) to illuminate the client's overall story. They then will use follow up and closed questions (like the flashlight) to explore and understand particular parts of the story. And finally, they will use leading questions (the penlight) to pinpoint and clarify the finest details of the story. In interviewing, this method of obtaining valuable information is illustrated by a different metaphor, commonly referred to as the "funnel" technique.

When utilizing the funnel approach, a lawyer visualizes a common funnel as the structure of the questions she will ask on a particular topic. Each question corresponds to a place along the length of the funnel. The open questions, discussed in Section 4.05[1], correspond to the open mouth of the funnel. The follow up questions, discussed in Section 4.05[2], that pursue clarification of the answers given in response to the open questions, fit just below the mouth of the funnel. The narrower closed questions, discussed in Section 4.05[3], correspond to a place one-half to two-thirds of the way further down the funnel. Leading questions, discussed in Section 4.05[4], are toward the bottom of the funnel. Finally, summary questions that are asked at the end of a topic to make sure that the lawyer has understood all the information, see Section 4.05[5], fit at the bottom of the funnel. The summary questions correspond to a filter that strains and tests the information that has been winnowed down through the funnel. The diagram below shows how these different types of questions fit along the length of the funnel.
As shown in the diagram, a lawyer will start with an open question to elicit a broad response. As the lawyer learns more about the client's situation, the lawyer will move from open questions to follow up and then closed questions. When the lawyer thinks she has obtained a fairly clear picture of the situation, she then begins to ask a few leading questions to confirm that she has learned the necessary details. Finally, after she has a complete picture of the client's situation, she then asks some summary questions to verify that she does in fact have the complete picture and has not misunderstood or forgotten any of the important facts. By asking these five types of questions in an orderly pattern, the lawyer has "funneled" the information and ensured that she has gotten all the important details as well as the entire picture.
Each major topic of your client's situation may be "funneled." For example, if your client tells you that he wants to discuss how he can recover for the personal injuries he suffered in the car accident as well as for the damages to his vehicle, he has presented two topics that should be funneled separately. Although many of the facts obtained by funneling the two topics will overlap because the personal injuries and the damages to the vehicle occurred in the same accident, each topic includes separate facts. Accordingly, you will need to conduct at least two separate funnels to exhaust the information your client has on these separate topics.

Many lawyers think of the first few open questions in the interview as a way to "get the list" of topics that the lawyer will funnel throughout the interview. Because you cannot effectively funnel two topics at the same time, it is usually a good idea to jot a note to yourself to return to the second topic after you have completed the first funnel.

The advantage of the funnel technique is that it presents an orderly framework for comprehensive information gathering. The disadvantage of the technique is that it is helpful only to the extent that the topic or topics you choose to funnel merit the time spent in inquiry. Therefore, efficient use of the technique requires that you choose the important topics that merit the time spent in funneling.


Another technique for enhancing information gathering is to construct a time line of the client's situation. A client will often feel comfortable describing his situation with an opening sentence that begins with the phrase, "Well, the whole problem began with. . . ." The lawyer can then encourage her client to recount his story in chronological order by asking open questions that focus on what happened next.

When using the time-line technique, most lawyers attempt to get an overview of the client's story by asking open questions that reveal the beginning, middle, and end of the situation. They then go back to fill in the details with follow up and closed questions. After they have a fairly good picture of the situation, they then ask a few leading questions to verify information that appears to logically follow from the sequence of events. Finally, they ask summary questions to make sure there are no gaps in the time-line picture they have obtained.

When you use the time-line technique, make sure you understand where the story appropriately begins and ends. Too often clients and lawyers start the time line too late or end it too early. They tend to think the time line should start with a legally significant event, instead of with a factually significant event. For instance, in a personal injury case, the car accident that resulted in the injuries to your client is not the beginning event of the time line. Instead, you will want to inquire about the road conditions before impact, the condition of the cars before impact, and the physical condition of the drivers before impact. Likewise, the time line should include not only the present medical condition of your client, but also his future treatment needs.

The advantages of using a time line are that gaps or omissions in the story are easy to spot, and the time line is easy to follow for both lawyer and client. The disadvantages are that some topics do not flow sequentially and therefore may be omitted, and some clients think more topically than chronologically. For instance, in a contract dispute, the events leading up to the signing of the contract and the
subsequent breach may flow chronologically and be easy for the client to recount in a time line. However, the fact that the other party to the contract became insolvent may not occur to the client as part of the chronology of the overall story. Instead, that fact is more likely to be revealed in response to a topical question about the financial condition of the other party.

The time-line method works particularly well when your client is trying to recall a specific sequence of events or when it would be useful to slow down what happened into a slow-motion description, as in a slow-motion movie. The time line can also aid a client who is reconstructing the important events in written form. If your client is having difficulty focusing on the time line during the interview, or if the interview time has drawn to a close before the client has finished recounting all of the key events to his story, you can ask your client to write out a time line at home. Most clients find the time line method easy to use on their own.

[3] The Strategic Use of Silence

As mentioned previously, lawyers often talk too much. They are accustomed to oral presentations. Words are their stock and trade. They forget that others are not as accustomed to verbalizing facts and feelings. Consequently, lawyers sometimes forget that a client may need time to think through an event in order to organize and formulate the words to completely describe it. To be an effective interviewer, you must be a patient listener; and one technique of patient listening involves the strategic use of silence.

Novices in the use of open questions sometimes mistake silence on the part of the client as a misunderstanding of the question. They then ask a second narrower question to clarify the first open question. The client then answers the second question. The broad initial question that invited expansive information remains unanswered.

In contrast, effective interviewers resist the temptation to prematurely ask a second narrower question. They patiently wait in silence while the client organizes his thoughts to answer the broad question. They do not attempt to fill the silence. As a result, they are often rewarded with a well-reasoned and detailed answer to the broad question.

In addition to using silence to permit your client to organize his thoughts to respond to a question, you may also use silence as a probe when no question is pending. Psychologists and psychiatrists have learned that people will often volunteer important information to fill an uncomfortable silence. This information might otherwise be withheld due to embarrassment or fear. Accordingly, just as a therapist uses silence to encourage her patient to reveal information, you can strategically use silence to encourage your client to reveal additional information.

[4] Failed Memory Probes

At times, a client may "shut down" during the interview. The client may say, "I don't remember" in response to a question; he may switch to another subject without finishing the particular story he was relating; or he may just sit back in uncomfortable silence. Before the interview can continue, you must diagnose what has caused this momentary interference or interruption in the dialogue. Clients usually shut down due to memory lapse, discomfort with the topic, or exhaustion.
If you conclude that your client has merely forgotten details that he once knew, you can use either a time line or visualization to rouse his memory. For instance, if your client says he can’t remember whether he was wearing a seatbelt at the time of the collision, you might try the time-line technique to jog his memory:

• Time Line Probes:

Q: Where was the last rest stop you took before the collision?
A: We stopped for gas and a snack in Hickory, NC.
Q: Describe each thing you did right before you got back onto the highway.
A: Well, first I unlocked the car. Then, I opened the door and got into the driver’s seat. I was carrying a cup of coffee that I placed in the drink holder between the two front seats.
Q: What happened next?
A: I guess, I put on my seatbelt and started the car, but I don’t really remember.
Q: Where was your son when you started the car?
A: He was in the backseat. Oh, I remember now. He wanted me to put his half-finished can of Coke in the drink holder between the front seats because he wanted to take a nap. I had to unbuckle my seatbelt to reach the can. I took the can, placed it in the drink holder and buckled the seat belt back. I remember because we joked that he always waited until I had already buckled my seat belt before he asked me to take something from the backseat. That’s the conversation we had as I was buckling my seatbelt for the second time.

With some clients you can also try to use visualization to probe failed memory. When using this technique, you ask the client to visualize a certain event and describe the details as if he were experiencing the event in the present. For instance, if your client says he can’t remember if he was wearing his seat belt at the time of the collision, you might try the following:

• Visualization Probes:

Q: Imagine yourself immediately after the collision. Visualize that time if you can. The guy behind you has just plowed into the rear of your car. I know this may be difficult for you, but try to go back in your mind to that time and tell me exactly how you feel.
A: I’m stunned. Then the pain hits. I can’t move. My right leg is bleeding and the pain seems unbearable. The entire weight of the front of the car seems to be on my leg.
Q: What else do you feel?
A: Well, I’m panicked about my son. I call out his name. He answers. He says he’s scared. He wants to know what happened. Then he starts crying when he sees the blood on my leg. He gets real upset when he realizes I can’t move.
Q: Is he hurt?
A: He says his knee hurts, but he'll be okay. He's scared about me.

Q: What else do you feel?

A: My head and neck hurt from being thrown forward and then backward. My chest also hurts.

Q: Why does your chest hurt?

A: I don't know. I guess from hitting the steering wheel. No, wait a minute. I know why it hurts. It's from the seat belt. I remember now. I did have on my seat belt because the next day I had a big bruise across my chest where the seat belt was.

Sometimes when your client shuts down, it is not the result of a loss of memory, but from a feeling of awkwardness about the topic. Use your active listening skills to diagnose if the reason for the sudden change of topic or claimed lack of memory is truly from a memory lapse or from your client's discomfort with the topic. If you sense that your client is attempting to avoid the topic, you can either come back to it after you have established greater rapport with him, or you can pursue the topic by acknowledging the difficulty in discussing the issue. For instance, if your client seems uncomfortable discussing what happened to his son after the accident, you might empathetically acknowledge the difficulty of the matter as follows:

- Acknowledging the Difficulty of the Topic:

  Q: It must have been hard to care for your son when you were in such pain. What happened to your son when the ambulance arrived?

  A: It was terrible. I didn't know what to do. They let him go with me to the hospital, but I was really in too much pain to think much about his needs.

  Q: Earlier, you said you were divorced. It must have been hard to call your ex-wife after the accident happened.

  A: You're not kidding. She was fit to be tied. She hadn't wanted me to take him on the visit to Kentucky. She had been worried about the weather conditions. I called her just before I went into surgery. She was furious. I felt terrible because our son had to stay with a social worker until his mother could get to the hospital to pick him up the next day. My ex blamed me for putting our son at risk.

Finally, a client may shut down during an interview from exhaustion. If your client has been recounting the facts of his case for a period of time, he may lose his focus and need a break. Suggest a break, or offer him a cup of coffee or drink of water. If your client still has trouble focusing on your questions after the break, you need to schedule a follow-up interview at a later time.

[5] Using Writings or Demonstrations to Re-create Events

Some events are difficult to understand from purely verbal descriptions. For example, in an automobile accident case, a diagram of the accident scene and the positions of the vehicles will often provide the best picture of what happened. When there are numerous heirs to a will, a diagram of a family tree may be helpful in understanding potential beneficiaries. A written time line of the phases of a construction project may be helpful in drafting a contract governing the parties'
obligations in developing a residential subdivision. A physical demonstration may help explain a key event, such as how a person was injured or how a person acted. Accordingly, when appropriate, you should not hesitate to have your client re-create an event on paper, whether a drawing, chart, or written summary. Similarly, having your client physically demonstrate an event will often help you better understand what happened.

§ 4.07 EXPLORING THE CLIENT’S OBJECTIVES

When a client first enters your office, he has at least one objective or goal in mind. He is seeking legal representation for a reason. Often he comes to the initial interview with several objectives. He may be able to articulate one or more of his objectives, but others may not yet be fully formed in his mind. As mentioned previously, one purpose of the initial interview is to begin the process of identifying your client’s objectives. A second purpose is to begin the process of translating your client’s objectives into a concrete plan of action.

A client will often indicate his objective in the first few sentences of the initial interview. The client may say, “I need a will,” or “I have been sued,” or “I want help in recovering for my injuries.” Each sentence articulates a reason why the client scheduled the initial meeting with the lawyer. However, many times the reason initially expressed for seeking legal representation will only be the beginning of the process of identifying the client’s objectives. For instance, when a client says that he has been sued, the lawyer will realize that she has to analyze the lawsuit, explore possible defenses, investigate potential counterclaims, and discuss settlement prospects. In other words, the client’s initial expression of his objective is only the first step in a lengthier process of clarifying objectives and arriving at potential solutions.

A good starting point for identifying your client’s objectives is to focus on his actual needs. By using open questions to explore your client’s feelings and concerns about his situation, you can begin to discern a picture of his overall needs. As you learn more about those needs, you can employ either the funnel method to explore specific topics or the time-line method to establish a framework for understanding important events. Once the factual picture becomes clearer, you can then ask more direct questions to find out what your client wants to accomplish.

It is also helpful to encourage your client to express his objectives in terms of factual results instead of legal remedies. For instance, if your client says that he wants to declare bankruptcy, you should ask him to articulate his objective factually. What, exactly, does he want to protect? If he says he wants to protect his home from creditors, then protection of his home, not bankruptcy, is his factual objective.

By encouraging your client to define his objectives factually, you may be able to broaden the legal remedies that may be available to accomplish those objectives. For instance, you and your client may be able to explore several methods of protecting your client’s home and not be limited to the single remedy of bankruptcy. For example, it may be possible for you to draft a notice that the client claims his homestead exemption as a means of protecting his home, or you may be able to negotiate a debt repayment plan with your client’s creditors that will extinguish the need for bankruptcy. In sum, exploring your client’s objectives in terms of his needs and what factual results he wants to obtain will help clarify his objectives and the
most appropriate means that may be available for achieving them.

§ 4.08 EXPLORING LEGAL THEORIES

After you have a basic understanding of your client’s overall objectives, you should begin exploring legal theories that may be relevant to accomplishing those objectives. As a result of your legal training, it is inevitable that even during the initial stages of the interview you will have already begun to spot potential legal issues and remedies in the case. In exploring legal theories, however, it is essential not to prematurely diagnose your client’s legal situation. As the interview progresses, you may find it helpful to jot simple legal terms on a sheet of paper as you listen to your client’s description of the situation. After you have a complete factual picture of the situation, you can refer back to your list to see if any of the legal theories you initially identified are applicable and should be more fully explored in connection with your client’s factual objectives.

It will often be appropriate to ask closed questions when obtaining information relevant to potential legal theories because their viability depends upon specific factual showings. For example, a claim for intentional infliction of emotional distress typically requires a showing that the client’s distress was severe or disabling in nature; a temporary restraining order requires a showing of irreparable harm; waiver may be a defense to conversion if the owner of the property accepted it back from the converter along with a sum of money for use of the chattel; a contract may not generally be rescinded based on unilateral mistake, but it may be avoided based on mutual mistake. Thus, to identify legal theories, you will have to ask specific questions that focus on the particular elements of potential claims, defenses, and legal remedies that may be applicable to your client’s situation.

§ 4.09 TAKING NOTES DURING THE INTERVIEW

During the interview, it is very difficult to convey empathetic understanding and engage in active listening if you are preoccupied with note taking. To maximize information gathering and build rapport with your client, you should avoid doing anything that will distract him from telling his story and distract you from understanding it. On the other hand, you must have a method for remembering what you are told during the interview and documenting the matters decided at the meeting.

Lawyers usually use one of four methods to document the substance of the interview: (1) tape-record it, (2) have a paralegal or secretary sit in on the interview and take notes, (3) personally take detailed notes, or (4) personally take brief notes and write out or dictate a memorandum to the file shortly after the interview is over. No single method is best in all circumstances, and in some situations a lawyer may use more than one of these methods at the same time.

Generally, tape-recording the interview or having a third person take notes may inhibit or distract the client from sharing information. Many people feel more self-conscious when they are being tape-recorded, and many feel somewhat less relaxed when they are speaking to an audience of two people instead of one. However, these inhibitions are unlikely to exist if you are meeting with clients who are members of the board of directors of a corporation or city council. In these types of situations, using a tape recorder or using another person to take notes during the
interview will be neither inhibiting nor distracting.

Many lawyers find that the handwritten notes they take during an interview are sufficient to adequately document it. This is particularly true when relatively simple or standard legal services are involved. Many other lawyers prefer to take only abbreviated notes during an interview; and, shortly after it is over, they use those notes to dictate or type a more detailed summary of what transpired in a memorandum to the file. As between these choices, most lawyers use the one that best fits their personal style and the relative complexity of the client’s situation. You can employ either method effectively so long as your note taking does not become a distraction to your client or impede you from engaging in active listening. Finally, basic information about how to contact your client and short notes about preliminary objectives and initial tasks that will be undertaken in the representation might be documented on a simple form like the “New Client Information Form” shown at the end of Section 3.13.

§ 4.10 ILLUSTRATION OF INITIAL CLIENT MEETING AND INTERVIEW

Larry Odden is a partner in a general-practice law firm of eight lawyers. He received a phone call from a prospective client, Clara Miles, who told him she had been injured in a car accident approximately one year ago and wanted to talk with him about it. (The statute of limitations in a personal injury action is three years). During the phone conversation, Clara said that a pickup truck ran a red light, broadsided her car, and that she sustained whiplash-type injuries to her neck and back. She said that her own insurance company paid the property damage to her car. She said she had a copy of her current medical bills and a copy of the accident report taken by the police officer who investigated the accident. She has not been contacted by anyone else about the accident, and she has not consulted with another lawyer.

Larry scheduled an appointment to meet with Clara at his office during her lunch break from her employment at a nearby clothing store. It was agreed the initial meeting would be limited to about an hour, and a follow-up appointment would be scheduled if necessary. Larry told her there would be no charge for the initial conference, and he asked her to bring the medical bills and accident report to the meeting.

At the time scheduled for the meeting, Larry greeted Clara in the firm’s reception area and escorted her to a small conference room. After exchanging some pleasantries and small talk, the meeting proceeded as shown in the transcript below. (The footnotes in the transcript point out Larry’s use of various techniques discussed in the preceding sections of this Chapter).

1. L: Well, Clara, tell me how this accident happened.⁶

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⁵ This illustration is intended to show how a skilled attorney might handle an initial client meeting and interview. Of course, however, you might conduct the interview quite differently and may even disagree with some of the approaches taken by the lawyer. Bear in mind that the lawyer’s approach is, in significant respects, affected by his personal style and interviewing philosophy. In addition, the lawyer’s interaction with the client is significantly affected by the client’s personality, demeanor, and body language—all of which are not readily apparent from a mere transcript.

⁶ This is an open question to elicit the basic story.