CHAPTER 8

INTERVIEWING THE CLIENT

§8.1 CLIENT INTERVIEWING AS PROBLEM SOLVING

Lawyers conduct two kinds of interviews. Client interviewing is covered in this chapter. Witness interviewing is covered in Chapter 9.

Client interviewing is hard work for two reasons. The first is the intellectual challenge of beginning a diagnosis of the client's problem while, at the same time, carefully discovering the client's goals and the facts known to the client. The second is the emotional challenge of establishing a bond of trust and helping a person who may be under substantial stress.

If you're a very rational person, you might ignore the emotionally charged atmosphere of the interview, much to the frustration of the client. If you are more astute about emotions than about ideas, you might give a client an emotionally satisfying interview while leaving big holes in your development of the facts. If you are at one or the other of these extremes, you can improve your interviewing by becoming more rounded. Students at one of the extremes often gain a lot of insight about themselves from critiques of their first interviews.

An allied problem is the question of control. The professions in general are attractive careers in part because they offer opportunities to control one's environment. Aggressiveness and competitiveness are useful in performing many of the tasks in a professional's work life (such as trying cases in court). The urge and ability to control can help a lawyer keep an interview focused, but, if not carefully

managed, they can also smother a client's communicativeness. Many lawyers find that they must turn their control impulses on themselves, exercising more control over their own behavior than over that of the client. But even this can go too far. Spontaneous warmth and empathy are powerful professional tools.

§8.1.1 YOUR PURPOSES IN INTERVIEWING CLIENTS

Client representation usually starts with an interview. A person who wants legal advice or advocacy calls to make an appointment. The secretary finds a convenient time and, to help the lawyer prepare, asks what the subject of the interview will be. The person calling says, "I want a new will drawn" or "I've just been sued" or "I signed a contract to buy a house and now the owner won't sell." At the time of the appointment, that person and the lawyer sit down and talk. If the visitor likes the lawyer and is willing to pay for what the lawyer might do, the visitor becomes a client of the lawyer.

During that conversation, the lawyer learns what problem the client wants solved and the client's goals in getting it solved; learns, factually, what the client knows about the problem; and tries to get to know the client as a human being and gives the client a reciprocal opportunity. Then or later, the lawyer and client also negotiate the retainer—the contract through which the client hires the lawyer—but here we focus on other aspects of the interview, especially fact-gathering.

These, then, are the lawyer's purposes in interviewing a client:

1. To form an attorney-client relationship. That happens on three levels. One is personal, in that you and the client come to understand each other as people. To satisfy the client's needs, you have to understand the client as a person and how the problem matters in the client's way of thinking. If you and the client are to work together in the participatory relationship described in Chapter 3, you need to know each other fairly well. And the client cannot trust you without a solid feeling for the person you are. The second level is educational, in that you explain to the client (if the client does not already know) things like attorney-client confidentiality (see §3.6) and the role the client would or could play in solving the problem. The third is contractual, in that the client agrees to hire you and pay your fees and expenses in exchange for your doing the work you promise to do.

2. To learn the client's goals. What does the client want or need to have done? Does the client have any feelings about the various methods of accomplishing those goals ("I don't want to sue unless there is no other way of getting them to stop dumping raw sewage in the river").

3. To learn as much as the client knows about the facts. This usually takes up most of the interview.

4. To reduce the client's anxiety without being unrealistic. On a rational level, clients come to lawyers because they want problems solved. But on an emotional level, they come to get relief from anxiety. Even the client who is not in a dispute with anybody and wants something positive done, such as drafting a will, feels a reduction in anxiety when you are able to say—if you can honestly and

prudently say it:—"I think we can structure your estate so that almost nothing would be taken in estate taxes and virtually everything would go to your heirs. It would take some work, but I think we can do it." Most of the time, you cannot offer even this much assurance in an initial interview because there are too many variables and, at the time of the interview, too many unknowns. When first meeting a client, you are almost never in a position to say, "If we sue your former employer, I think we will win." You need to do an exhaustive factual investigation before you can say something like that responsibly.

Most of the time, clients in initial interviews experience a significant degree of relief from anxiety simply from the knowledge that a capable, concerned, and likeable lawyer is committed to doing whatever is possible to solve the problem. When you help a client gain that feeling, you are reducing anxiety without being unrealistic.

§8.1.2 ACTIVE LISTENING AND OTHER INTERVIEWING DYNAMICS

What is really going on in a client interview? Here are the otherwise hidden dynamics:

Inhibitors. What might inhibit a client from telling you everything the client thinks and remembers?

The interview itself might be traumatic for the client. It can be embarrassing to confess that a problem is out of control. And the details of the client's problem are often very personal and may make the client look inadequate or reprehensible, even when the client might in the end be legally in the right.

The client might be afraid of telling you things that she thinks might undermine her case. You are part of the legal system, and most inexperienced clients do not realize that you can help only if you know the bad as well as the good.

Traditionally, lawyers are seen as authority figures. A client might feel some of the same inhibitions talking to a lawyer that a student feels when meeting privately with a teacher. And this can lead to etiquette barriers: deference to an authority figure may deter a client from challenging you when the client does not understand what you are saying or when the client believes that you are wrong.

The client might feel inhibited by cultural, social, age, or dialect barriers.

Finally, the client's memory is subject to all of the problems described in Chapter 7.

Facilitators. What might help a client tell you as much as possible?

You can build a relationship in which the client feels comfortable and trusts easily. And you can show empathy and respect rather than distance. (See §5.2.2.)

You can encourage communication with nonverbal communication and active listening, and you can set up your office in a way that clients find welcoming (see the next few paragraphs).

You can ask clear and well-organized questions (see §8.3.2).

Nonverbal communication. You are used to "reading" people based on their posture, facial expression, eye contact, and the like. Some of the messages you

receive that way are inaccurate, but body language appears to tell us enough about another person's feelings that we take it for granted. A person who looks us firmly in the eye while talking to us seems to be taking us seriously. Someone who leans back in a chair with arms crossed looks bored or impatient, while a person who sits up straight with arms uncrossed appears to want to hear what is being said. When someone nods vertically while we are speaking, we think that means agreement, or at least "I hear you and accept the importance of what you say."

When does body language give us inaccurate messages? Sometimes, it is simple accident. A person might be very interested in what we have to say but lean back lazily because of fatigue. Sometimes, it is because body language means different things in different cultures.

Sometimes, a client's body language tells you something about the client's feelings. Sometimes, it does not. But you can use your own body language to show your interest in and respect for the client.

Active listening. The ability to listen well is as important in the practice of law as the ability to talk well (see Chapter 5). Some lawyers just want to get to the heart of the matter and quickly move on to other work, but they are in such a hurry that they leap onto the first important thing they hear, even if it is not in fact the heart of the matter. Instead, relax, let the client tell the story, and listen patiently and carefully.

Passive listening is just sitting there, hearing what is being said, and thinking about it. That is fine as long as the client does a good job of telling the story and is confident that you care.

Active listening, on the other hand, is a way of encouraging talk without asking questions. It also reassures a client that what the client is saying has an effect on you. In active listening, you participate in the conversation by reflecting back what you hear.

Compare these three examples:

1. lawyer listens ***passively:***

> *Client:* I wanted to buy a very reliable car with a manual transmission and a sunroof. The car has to be reliable. I can't spare the time to take it into the shop any more than necessary. You can't get a sunroof and a manual transmission from Toyota. You can at Honda, but the dealer didn't have any cars in stock. I had to special order it. I gave them a $5000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof. I told them that wasn't the car I ordered. They refused to return the deposit and said I had to accept the car. I don't want it. A sunroof helps cool off the car quickly, and in the winter it lets in light and makes the car feel roomier. And a manual transmission makes the car more fun to drive.

2. lawyer listens *actively.*

Client: I wanted to buy a very reliable car with a manual transmission and a sunroof. The car has to be reliable. I can't spare the time to take it into the shop any more than necessary. You can't get a sunroof and a manual transmission from Toyota. You can at Honda, but the dealer didn't have any cars in stock. I had to special order it. I gave them a $5000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof.

Lawyer: Really?

Client: I was astounded. I told them that wasn't the car I ordered. They refused to return the deposit and said I had to accept the car!

Lawyer: You must have been pretty upset.

Client: Absolutely. I don't want the car. A sunroof helps cool off the car quickly, and in the winter it lets in light and makes the car feel roomier.

Lawyer: They are nice.

Client: And a manual transmission makes the car more fun to drive.

3. lawyer listens *with a tin ear.*

Client: I wanted to buy a very reliable car with a manual transmission and a sunroof. The car has to be reliable. I can't spare the time to take it into the shop any more than necessary. You can't get a sunroof and a manual transmission from Toyota. You can at Honda, but the dealer didn't have any cars in stock. I had to special order it. I gave them a $5000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof. I told them that wasn't the car I ordered.

Lawyer: Did you sign a contract with them that specified that the car had to have a sunroof and a manual transmission?

Client: I didn't sign anything except the $5000 check. They refused to return the deposit and said I had to accept the car.

Lawyer: Is the car defective in some way, or is it just not the car you want?

Client: I don't want it. It's not what I ordered, and I shouldn't have to accept it. I want a sunroof and a manual transmission. A sunroof helps cool off the car quickly, and in the winter it lets in light and makes the car feel roomier. A manual transmission makes the car more fun to drive.

In the first example, the client tells the story without any reaction from the lawyer. At some point, most clients would become uncomfortable in such a situation, and eventually the client would stop talking.

In the second example, the lawyer's interjections show understanding and empathy and encourage the client to continue. But notice that the lawyer waits before saying anything. That is because clients "will reveal critical material as soon as they have the opportunity to speak,"[1] and in the first few moments of a client's narrative the lawyer should stay out of the way and let the client talk. Here, the first time the lawyer interjects is the first time that simple courtesy would demand an acknowledgement of the client's predicament. Before that point, it is often better to confine active listening to nonverbal support, such as nods and eye contact.

In the third example, the lawyer asks relevant questions but seems not to have heard any of the emotional content in the client's story, leaving the client with the feeling that the lawyer is unsympathetic. The lawyer asks the questions prematurely. They could have been asked later. When asked here, they get in the way of the client's telling the story. To the client, the lawyer's inability to hear all the client says suggests that the lawyer is not likely to be helpful.

An office arrangement comfortable for clients. Consider the furniture arrangement that would help you open up to a lawyer if you were a client. Some people are perfectly willing to talk over a desk to a lawyer. Other people would want something less formal, perhaps two chairs with a small table to the side (all of which can be in the same room as the desk). We believe most clients are more at ease if you are not behind a big desk, which is both a physical barrier and a symbol of your authority. Sitting *with* the client—rather than across from the client—communicates in a subtle way that you are open to the kind of participatory relationship described in Chapter 3.

Your office should also communicate professionalism. An office that is a mess, with papers piled everywhere, suggests that the lawyer's work is out of control. Some lawyers say that they "know where everything is." Clients instinctively doubt that.

Taking notes. Clients are not bothered by your note-taking, although the client might appreciate it if you were to ask, "Do you mind if I take notes?" If you become too wrapped up in note-taking, however, it can be hard to listen (and certainly hard to maintain eye contact). The most effective practice is to take minimal notes while the client is telling the story, perhaps writing down only topics you want to go back to later, and then to take a complete set of notes while you are asking questions after the client has told you the story.

The most important dynamic in the room. "What clients want more than anything is to be understood, both for who they are and what they have suffered."[2]

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1. Gay Gellhorn, *Law and Language: An Empirically-Based Model for the Opening Moments of Client Interviews*, 4 Clinical L. Rev. 321, 344 (1998).
2. Anthony I. DeWitt, *Therapeutic Communication as a Tool for Case Theming*, 29 Am. J. Trial Adv. 395, 404 (2005).

§8.2 ORGANIZING THE INTERVIEW

You can do a better interview if you prepare before the interview begins, as described below in §8.2.1. The interview itself can be broken down into five parts.

1. A brief opening part in which the lawyer and client become acquainted and get down to business (see §8.2.2).
2. An information-gathering part (see §8.2.3)—usually the longest part of the interview—in which you learn everything the client knows about the facts; if you are using cognitive interviewing techniques, this part of the interview is subdivided into the stages described in §7.6:
   a. an open-ended narration stage (the client tells the story);
   b. a probing stage (you ask detailed questions);
   c. a review stage (you describe the story as you understand it and the client makes corrections and additions).
3. A goal-identification part, in which you learn exactly what the client wants to accomplish in resolving the problem at hand (see §8.2.4).
4. A preliminary strategy part, in which you might discuss with the client—usually only tentatively—some possible strategies for handling the problem; in a dispute situation, this usually includes some consideration of possible theories in support of the client's position (see §8.2.5).
5. A closing phase in which you and the client agree on what will happen after the interview (see §8.2.6).

In practice, these parts usually overlap. For example, some theory-testing and strategizing (part 4) might happen during information-gathering (part 2). Or the client might volunteer clearly stated goals (part 3) in the first moments of the interview (part 1). Overlap is fine as long as it does not interfere with your own interviewing purposes (see §8.1.1).

§8.2.1 PREPARING

You might have spoken with the client briefly over the telephone when the client made the appointment. Otherwise, in a well-run office the secretary will have asked the client the nature of the problem the client is bringing to you. Some clients decline to say, but most of the time, you will have beforehand at least a vague sense of why the client wants to see you.

Unless you know well the field of law that seems to be involved, take a look at the most obviously relevant parts of the law before the client arrives. If the client says she was arrested for burglary, read the burglary statute and browse through the annotations. If the client wants you to help negotiate a franchise agreement with McDonald's, look through a practitioner's book that explains how franchising works in the fast-food industry.

The interview is more productive if the client brings the papers that are relevant to the problem. Whoever in your office speaks to the client when making the appointment should ask the client to do that. But clients are not good at judging relevance. Try to be specific. If the client is threatened with mortgage foreclosure, the client should be asked to bring the documents that created the mortgage, all

statements sent by the bank that holds the mortgage, records from the checking account used to make mortgage payments in the past, any official-looking notices sent by the bank or a sheriff or a lawyer, and anything else the client has that seems to be related to this mortgage.

§8.2.2 BEGINNING THE INTERVIEW

In some parts of the country, "visiting"—comfortable chat for a while on topics other than legal problems—typically precedes getting down to business. In other regions, no more than two or three sentences might be exchanged first, and they might be limited to questions like whether the client would like some coffee.

When it is time to turn to business, the lawyer says something like:

> "How can I help?"
> "Let's talk about what brings you here today."
> "My secretary tells me the bank has threatened to foreclose on your mortgage. You're probably worried. Where shall we begin?"

Soon afterward, the client will probably say something that means a great deal emotionally to her or him. Some examples:

> "I've come into some money and would like to set up a trust for my granddaughter, to help her pay for college and graduate school."
> "I've just been served with legal papers. The bank is foreclosing on our mortgage and taking our home away from us."

Too often, when clients say these things lawyers just ask, "Tell me more," and start taking notes. That may be a sign of the law-trained mind at work, ever quick to find the legally significant facts. But clients rightfully dislike it. If given a choice, most clients would rather not hire "a lawyer." They want a genuine human being who is good at doing the work lawyers do. If you were to hear either of the statements above in a social setting, you would express pleasure at the first or dismay at the second because empathy and active listening are social skills that you already knew something about before you came to law school. Do the same for the client in the office—sincerely.

But do not leap in here with questions. Give the client a full opportunity to tell you whatever the client wants to talk about before you start structuring the interview. There are two reasons. First, many clients want to make sure from the beginning that you hear certain things about which the client feels deeply. If you obstruct this, you will seem remote, even bureaucratic, to the client. Second, many clients will pour out a torrent of information as soon as you ask them what has brought them into your office. If you listen to this torrent carefully, you may learn a lot of facts in a short period of time. You may also learn a lot about the client as a person and about how the client views the problem.

If the client is inexperienced at hiring lawyers, you will need to explain attorney-client confidentiality (see §3.6). But the best time to do so is probably not in the very beginning. It seems awkward and distancing there, and clients are eager to tell you the purpose of their visit anyway. A better time is in the information-gathering part of the interview, after the client has told you the story and before

you start asking detailed questions discussed below in §8.2.3. Most clients will tell you the basic story at the beginning regardless of whether they understand confidentiality. It is when they begin to answer your questions later that confidentiality encourages clients to be more open with you.

Use the client's name during the interview ("Good morning, Ms. Blount"). Saying the client's name at appropriate points in the conversation shortens the psychological distance between you and the client because it implies that you recognize the client as a person rather than as an item of work. Which name you say—the client's first or last name—depends on your personality, your guess about the client's preference, and local customs. If you live in an area where immediate informality is expected, it may be acceptable to call the client by first name unless the client is so much older than you that, out of respect, you should use the client's last name until the client invites you to switch to first names. But in most parts of the country, the safest practice for a young lawyer is to start on a last-name basis with nearly all clients and wait to see whether you and the client will feel comfortable switching to first names.

§8.2.3 INFORMATION GATHERING

After the client has explained why you are being consulted, the information-gathering part of the interview begins. If it is important for you to learn the details of past events, this is where you use the cognitive interviewing techniques described in §7.6.

Not all clients, however, need cognitive interviews. That is especially true in transactional work. When a client wants you to draft a will or help negotiate a contract, you will need to learn many facts, but usually you do not need to worry about the client's memory of past events. Much of the information you need is about current conditions. To draft a will, for example, you need a list of the client's assets, a list of the client's potential heirs, and so on. In situations like this, start by asking the client to tell you everything the client thinks you will need to know. After the client has done that, start asking detailed questions to get the rest of the information you will need.

If, on the other hand, you are using cognitive interviewing techniques, the information-gathering part of the interview is subdivided into three stages:

a. an open-ended narration stage in which the client is asked to describe everything the client remembers about the facts at issue;
b. a probing stage in which you go back over the client's story and ask questions to fill in gaps and clarify ambiguities;
c. a review stage in which you reiterate the most important parts of the story as you understand them to give the client an opportunity to correct misunderstandings and to supply additional information.

Before inviting the client to narrate the story, recreate the context and ask the client to describe everything she remembers about the incidents at issue, regardless of relevancy (see §7.6). Say something like this:

> *Lawyer:* I need to learn everything you can remember about what happened inside the store. Let's go back to the point where you got out of your car in the parking lot. Take a few minutes and return in your own mind to that moment. Think about what you were seeing and hearing at the time, as you were walking through the parking lot toward the store. Don't rush this. I can wait until you're ready. And when you are ready, tell me everything you remember—even if it does not seem to be related to the store manager's accusation about shoplifting.

If the client has trouble producing a complete and coherent story, you might ask her to recall the event in a sequence other than chronological, perhaps starting with the thing that impressed the client the most, or you might ask the client to change perspectives and assess what others present might have seen or heard (see §7.6).

While listening to the story, take two kinds of notes. Write down what you are being told, and make a list of topics to go back to later for clarification or to fill in gaps. You can use two pads of paper to do this. Or you can use one pad, drawing a vertical line on each page to separate the two kinds of notes.

After the client has told the story, you can start asking questions. This is the second stage of the cognitive part of the interview. Get a clear chronological view of events from beginning to end, as well as a firm grip on the precise details of the story. For example, exactly when and where did each event happen? See §8.3.1 for what to ask about and §8.3.2 for how to formulate and organize questions.

You can introduce the review stage by saying something like this:

> *Lawyer:* I think I've got a clear picture now. Let me tell you my understanding of what happened. If I've got anything wrong, please correct me. And if you remember anything else as I go along, please interrupt me to point it out.

Then briefly summarize the relevant parts of the story.

Regardless of whether you are using cognitive interviewing techniques, the time to bring up attorney-client confidentiality is when you start asking questions. How should you explain confidentiality? It is not accurate to say, "Everything you tell me is confidential." There are important exceptions to that statement (see §3.6). Most clients, however, do not want to hear a lecture on all the exceptions. A middle course is better:

> *Lawyer:* Before we go further, I should explain that the law requires me to keep confidential what you tell me. There are some exceptions, some situations where I may or must tell someone else something you tell me, but for the most part I am not allowed to tell anybody other than the people who work with me representing you.

You can explain the exceptions if the client asks about them or if one of them is obviously relevant.

Do not label the problem until you have heard all the facts. A client who starts by telling you about a dispute with a landlord might have defamation and assault claims instead of a violation of the lease or of the residential rental statutes.

§8.2.4 ASCERTAINING THE CLIENT'S GOALS

From the client's point of view, what would be a successful outcome?

If the client wants help in facilitating a transaction, the client will want the transaction to take a certain shape. For example, the client might want to buy a thousand t-shirts with pictures of Radiohead, but only if they can be delivered two days before next month's concert and will cost no more than $6.50 wholesale each, preferably less. And the client will not want the lawyer to kill the deal by overlawyering (see §2.2).

If the client wants help in resolving a dispute, the desired outcome may vary. The client might want compensation for a loss (money damages, for example) or prevention of a loss (not paying the other side damages, not going to jail, not letting the other side do some threatened harm out of court) or vindication (such as a judgment declaring that the client was right and the other side wrong).

Depending on the situation, the client might want or need results very quickly. And most clients also want economy: they want to keep their own expenses (including your fees) to a minimum or at least within a specified budget.

Goals often conflict. A client who wants a large problem solved immediately on a small budget might have to decide which goals are most or least important. If the client has to compromise on something, will the client spend more, wait longer, or accept less than complete justice?

Whether the problem is transactional or a dispute, the client might want comfort and understanding. Some clients are not under stress or would prefer to keep their emotional distance from lawyers. But most stressed clients at least want empathy.

Most clients do not volunteer all of their goals in an interview. Some clients know what their goals are and assume that they should be obvious to the lawyer. The goals might *seem* obvious to the lawyer, but because assumptions are dangerous, it is best to get a clear statement from the client. And some clients have not thought through the situation enough to be sure what their goals are. They need help from the lawyer in figuring that out.

Helping the client identify goals requires patience and careful listening, often for messages that are not literally being expressed in the client's words. "Find[ing] out what the customer wants [is something that l]awyers are famous for [doing badly]. They snap out the questions, scribble on a pad, and start telling you what you're going to do."[3] Here is an example of what might happen when lawyers do not take the time to do this carefully:

> Two law students under the supervision of a law professor represented M. Dujon Johnson on a misdemeanor charge. . . . The lawyers[4] investigated the case thoroughly, interviewed their client, developed a theory of the case, and represented Mr. Johnson aggressively. When the case came to trial the prosecutor asked the judge to dismiss the case, a victory for the defense. The client was furious. . . .

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3. Nicholas Carroll, *Dancing with Lawyers: How to Take Charge and Get Results* 5 (1992).
4. For conciseness, the author of the article from which this excerpt is taken uses the term "the lawyers" to refer to the team made up of the professor and the law students, who were practicing in a law school legal clinic. Because clinic students are not members of the bar, they may not hold themselves out as lawyers, however.

> Johnson . . . had been arrested by two state troopers when he pulled into a service station at night [and t]he troopers called out, "Hey, yo," to Johnson, an African American undergraduate. They ordered him out of the car and asked him to submit to a pat-down search. When Johnson refused, claiming that such a search would violate his constitutional rights, the troopers arrested him for disorderly conduct, searched him, pressed his face on the hood of the car while handcuffing him, and took him to jail.
>
> [When they first interviewed him,] the lawyers did not ask Johnson what his goals were. If they had, they would have learned that he wanted more than simply to be cleared of a misdemeanor charge. As he said later, "I would like to have my reputation restored, and my dignity."
>
> . . . If [the lawyers had inquired more thoroughly], they would have learned that he wanted a public trial. They would have learned that, at . . . arraignment, the prosecutor had offered to dismiss his case if he would pay court costs of fifty dollars, and he had refused. The trial itself was the relief Johnson sought. Without discussing it with their client, the lawyers filed a motion to suppress evidence that, if successful, would have drastically shortened the trial. . . .
>
> . . . [A]fter his case had been dismissed, Johnson said the lawyers had been "patronizing" . . . [that] he was always the "secondary person[," and] that they had treated him like a child.[5]

Here, the client understood what his goals were, but the professionals representing him did not. Another client might have only a vague sense of goals, and one of the lawyer's tasks is to work with the client to clarify them.

For example, after being served with an eviction notice, a client might have come to the lawyer just because that seems like the right thing to do when confronted with confusing and intimidating legal papers. But the problem may be a deeper one. The client might have lost a job, and the client's family might be disintegrating under financial pressures. There are two reasons why you should care. First, there may be legal issues inside the deeper problem (abusive discharge? child custody?). And second, even if there are no legal issues other than the eviction proceeding, the lawyer, as a disinterested observer, is still in a position to offer valuable advice that the client cannot easily find elsewhere (see §3.1).

Here are some questions that help clarify the client's goals:

> *"If you could imagine the best outcome we can reasonably hope for, what would that be?"* You want a list of the things the client wants to accomplish.
>
> *"If we achieve that best outcome, how will it affect you?"* Or *"how will it affect your family?"* Or *"how will it affect your business?"* These tell you why the client has the goals listed in response to the first question. If the goals the client has initially cannot be accomplished, you and the client can try to develop other goals that have as nearly as possible the same effect.

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5. Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 Buff. L. Rev. 71, 71–73 (1996) (summarizing Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 Cornell L. Rev. 1298 (1992)). (Johnson asked that Cunningham use his real name.)

"What possible bad outcomes are you worried about?" And *"Are there any other things that you want to make sure do not happen?"* You want to know what the client wants to prevent.

"If any of those negative things were to happen, how would each of them affect you?" (Or "your family?" Or "your business?") These tell you why the bad outcomes must be prevented.

§8.2.5 CONSIDERING A STRATEGY DURING THE INTERVIEW

During an initial client interview, you will not know enough to start making clear plans for solving the problem. You will probably need to investigate the facts and read the law, and you will certainly need to think over the problem. But you and the client can do some brainstorming, starting the process of generating solutions (see §4.1.2). And you can learn something about the ones that are generated by asking the client for relevant information (including the client's feelings). For example:

Lawyer: So the Santiagos do not seem to regret signing a contract to buy your house. In fact, they seem eager to move in. I get the sense that the only real problem from their point of view is that they can't get a mortgage because the house has a zoning violation. Am I missing something?

Client: No. The only complaint I hear from them is about that.

Lawyer: One way of handling that is to ask the local zoning board to issue a variance. That could take at least two or three months. Do the Santiagos seem to want the house enough to wait that long?

Client: They like the house a lot. And I think they're worried about having to sue to get their deposit back.

Lawyer: Do they have a strong need to move into a house—any house—as soon as possible?

Client: I don't think so. They're living in a rental now, and they haven't given their landlord notice that they're moving out.

Lawyer: I can't predict at this point whether the zoning board would issue a variance. I'd have to look at exactly what this violation is and then see what your zoning board has done in similar cases in the past. But there is one thing I know right now: if any of your neighbors object, the board might not issue a variance. Do you think we'd have a problem there?

Client: We're on good terms with our neighbors, and none of them has ever complained about our backyard deck, which seems to be what the violation is all about.

Lawyer: To get the Santiagos to agree to a delay, we might have to say that you will not return their deposit unless ordered to do so by a court. In other words, we'd be saying that if they won't wait, they'll have to sue to get their money back. Would you be comfortable taking that position?

Client: I don't mind saying it. But if they actually do sue us, I think I'd rather give them the money and find another buyer. A court fight doesn't seem like the fastest way to get our house sold.

Lawyer: That's certainly a reasonable way to look at it.

This is a transactional situation that could evolve into a dispute. In addition to some important details, the lawyer learns here that the client prefers to keep the situation transactional and will walk away from the deal to avoid litigation.

In a more typical dispute situation, where litigation is likely, strategizing includes finding the client's persuasive story—finding a way of looking at the facts that will seem most persuasive to a fact-finder. Lawyers call such a way of looking at the facts a factual theory. In an initial client interview, you are not in a position to develop the theory fully. As with strategies generally, you need to do a factual investigation and read the law first. The most you can do in an initial client interview is to come up with some tentative theories and test them against what the client knows of the facts.

In Chapters 10–17, we will examine in detail how to develop a theory and what makes one persuasive. For now, however, it is enough to understand two things about effective theories. First, if you will have the burden of proof, your theory must satisfy the elements of the legal tests that make up your burden. If the other side will have the burden of proof, your theory must prevent the other side from satisfying at least some elements of the legal test the other side must prove. Second, a persuasive theory is based on solid evidence and the inferences people will typically draw from that evidence. In court, ambiguous evidence and debatable inferences are usually resolved in whatever way is most consistent with the evidence that cannot be questioned.

§8.2.6 CLOSING

Assuming that the client wants to hire you and that you want to be hired, two agreements conclude the interview.

One is an agreement that the client is in fact hiring you to do the work discussed in the interview. If the client has not made clear that is happening, you can ask a simple question like this: "Now that we've talked about it, would you like me to defend you in this lawsuit?" Some clients will say yes or no on the spot. Others will want to think about it after the interview. If you are hired, that should be formalized through a written retainer (see §8.4.5).

The other agreement concerns what each party will do—and not do—next. Here is a typical example: the client will provide copy of the lease by the end of today; the lawyer will check the law on constructive eviction and call the client tomorrow; in the meantime, the client will not speak to the landlord and will tell anybody who makes demands to call the lawyer. In agreeing on what to do next, consider the following:

1. The client should not do anything to make the situation worse. Agree specifically on what the client will not do. This could involve restraints that might seem unnatural or abnormal to the client. Most clients do not realize that anything they say to an adverse party might escalate conflict, or that anything they say to anybody other than you might be later testified to by the other person, perhaps not accurately. In addition, it is part of a lawyer's job to bear some of the pressure that would otherwise be inflicted on the client. If people have been demanding that the client do something that the client does not want to do, the client should now start telling them to communicate only through you.
2. You should make a realistic and clear commitment of what you will do in the immediate future, together with a schedule for when you will do it. Clients feel much better if you set a schedule for accomplishing certain tasks, keep to the schedule, and report back to the client on what you have accomplished. Otherwise, a client has no idea whether you are working diligently or are ignoring the problem.
3. The client should commit to provide specific things that you need (information, documents) to do your share of the work, and there should be a schedule for this, too. (Paying your retainer is included; see §8.4.6.) Some tasks—for example, asking the Internal Revenue Service for copies of prior tax returns—are things that you and the client are each capable of doing. If the client does some or most of them, the client can avoid paying what it would cost for you to do them.

The end of the interview should provide the client with a sense of closure—a feeling that a problem has been handed over to a professional who will do whatever can be done to solve it. Some clients get closure from the mutual agreements described above. Others may appreciate a comment from you that shows that you understand what this problem means for the client and are concerned about it on a human level.

Explain to the client how best to contact you. That is most easily done by giving the client your business card, which will include your phone number and your email address. You might explain your habits in returning phone calls and email. For example, if you are in court a lot and tend to respond late in the day, explain that to the client and add that if the client needs a faster response she should tell your office's secretary or paralegal that the client is calling about something urgent.

What if you do not want to be hired to do this particular work? Make absolutely clear that you are not in a position to take it on. If you think another lawyer would do a good job and would want the work, you might make a referral.

If you are not hired—whether by your choice or the prospective client's—it's wise to document that with a follow-up letter to the client in which you thank the client for the interview and reiterate that you have not been hired. Lawyers call this a "nonengagement letter." Some clients do not hear a soft no when a lawyer refuses their case. If such a client were not to seek another lawyer, and some bad thing were to happen (such as the expiration of a statute of limitations), you want it on record that you are not this person's lawyer. A typical nonengagement letter

warns the would-be client of a statute of limitations or whatever other deadline might compromise rights if ignored.

§8.3 QUESTIONS

Remember that one of the marks of an effective professional is the ability to ask useful questions in a productive way (see §5.2). In a client interview, you need to know what to ask about and how to organize and formulate questions.

§8.3.1 WHAT TO ASK ABOUT

During the information-gathering part of the interview (§8.2.3), be sure to explore the following:

Ask for the raw facts and the client's source of knowledge. Do not ask whether the other driver's car was exceeding the speed limit (a conclusion). Ask how fast it was going and how the client knows that. At trial, the client can testify only to the client's estimate of the car's speed in miles per hour. And that can happen only after the client has laid a foundation by testifying that he has a source of knowledge that the law of evidence recognizes as sufficient. If all you know is that the client thinks the car was speeding, you have no idea what the client will testify to at trial, or even whether the client will be allowed to testify on that point. If the client says he does not know the car's actual speed, but that a friend told him the car had been traveling at about 60 miles per hour, the client will not be allowed to testify to that unless the friend's statement fits within one of the exceptions to the hearsay rule. The friend's name goes on your list of witnesses to interview.

Ask for all the details. If the client says, "Ling told me about that last week," do not go on to the next topic. Ask when this conversation happened—not just the day, but also the time. Where did it happen? Who else was present? What else was discussed? How long did the conversation last? How did it start? How did it end? What words did Ling use, and what did the witness and anybody else present say? You are going to need these details to prepare your case. Because in nonprofessional life vagueness and approximation are usually enough, young lawyers are too casual about these things. Experienced lawyers know that in representing clients only precision works.

Ask about everything the client saw, heard, and said. You need to be able to see and hear in your own mind the scene in which the events described by the client occurred. Do not assume anything. If the events happened at the busiest intersection in town, do not assume that cars were whizzing past while the client was standing on the sidewalk. If the cars actually matter, ask. You might be surprised to learn that the street was torn up for construction and all the traffic routed elsewhere. Ask about *any detail* that might matter.

If a diagram would help you understand what happened, ask the client to draw one. That can be particularly important if the position of people and things in a scene is important.

Make sure you learn all the basic information as well: the client's full name, age, address, all telephone numbers, occupation and job title, employer, job site, and work hours. Get similar information for the client's spouse, as well as the ages of and some details on any children. For each witness or other person with a role in the problem, get as much identifying information as the client can provide.

Ask whatever questions are needed to prevent The Three Disasters. The Three Disasters are (1) accepting a client who creates a conflict of interest, (2) missing a statute of limitations or other deadline that extinguishes or compromises the client's rights, and (3) not taking emergency action to protect a client who is threatened with immediate harm. If you allow any of them to happen, you may commit malpractice and may also be punished for unethical conduct.

A lawyer or a law firm has a conflict of interest where the interests of one client conflict with those of another client, a former client, or the lawyer or law firm.[6] A well-run law office will have a conflicts database so that, if you suspect a conflict, you can quickly find out whether the office represents or has represented a conflicting party. Once a new client has begun to reveal confidential information to you, the damage might be uncontainable, and you or the firm might have to withdraw from representing either client or both. (There are exceptions, which are complicated and explored in the course on Professional Responsibility or Legal Ethics.)

Suppose a client has suffered a wrong and seems to be entitled to a remedy in court. Suppose also that during the interview you don't bother to pin down the date on which the statute of limitations would have begun to run, and after the interview you don't bother to read the statute. And suppose the statutory period expires tomorrow. You have accepted a client and allowed the client's rights to be extinguished. The client still has a remedy, but now it is against you in a malpractice lawsuit. Although the statute of limitations, because of its inflexibility, is the most dramatic example, other deadlines can have similar effects. For example, if the client has been sued by somebody else, when was the client served with the summons and complaint, and when does the time to answer the complaint expire?

Suppose the client has been served with a notice of eviction, and the notice says that the sheriff will evict the client tomorrow. Are there facts that could lead a court to grant an emergency order temporarily restraining the sheriff from putting all your client's belongings on the sidewalk? The only way to find out is to ask pertinent questions during the interview so that, if there are grounds, you can start drafting a request for court relief immediately.

Ask about pieces of paper. Ask whether there are any pieces of paper, not already mentioned by the client, that might be related to the problem. Avoid using lawyer jargon. Do not ask about "documents." Is a memo a document? You might say yes, but many clients would think no. If relevant pieces of paper exist, ask where they are and who has possession of them. Ask whether the client has *signed* any papers connected to the problem. In a dispute situation, ask whether the client

6. See Rules 1.7, 1.8, 1.9, 1.10, and 1.11 of the Model Rules of Professional Conduct.

has *received* any pieces of paper from a court, a lawyer, or a government agency. Many clients will not understand if you ask whether they have been "served with papers."

In a dispute situation, ask all the questions needed to find the story in the facts. In the movie *Amistad*, Africans who have been brought to Connecticut against their will in 1839 sue to gain their freedom. Slave traders claim they own the Africans, who in turn claim they were kidnapped. At a critical point in the movie, one of the Africans' supporters (played by Morgan Freeman) seeks the advice of a former President, John Quincy Adams (played by Anthony Hopkins). The case is going badly for the Africans, and the Morgan Freeman character wants to know how to handle it better. Adams says "Well, when I was an attorney a long time ago . . . , I realized after much trial and error that in a courtroom whoever tells the best story wins. In an unlawyer-like fashion, I give you that scrap of wisdom free of charge."

That is the first of two great insights in the conversation between these two characters. Then, Adams explains how, although the Morgan Freeman character *knows the facts* about the Africans, he has not yet discovered their story. The second great insight is that *you can know the facts but miss the story.* Inside a mass of facts—hundreds of events and circumstances—is a story that touches your heart and makes an audience—the judge and jury—hope that one person gets better treatment in the future and another person gets worse. The story does not leap out of the facts. You have to *find* it. Ask questions that reveal the story you need to represent this client well.

For more on how to do this effectively, go back to §5.2.4 and reread the material on finding and telling stories. We return to this skill in later chapters as well.

In a dispute situation, ask questions that would reveal what arguments the other side might make. There are two sides to every dispute, and you cannot prepare without knowing what the other side will claim. But you will learn little if you ask in a way that seems threatening to the client. For example, if your client has been charged with a crime, do not ask whether she is guilty. Ask what the police and the complaining witness will say about her. Before doing that, explain in detail why you can be a good advocate only if you know in advance what the other side will claim.

In a dispute situation, explore for other evidence. For example, ask who else saw or heard any of the things the client describes. Ask who else might know of aspects of the dispute that the client does not know about.

In a dispute situation, evaluate the client's value as a witness in court. Is this client likely to tell the story in a way that can influence a fact-finder? Is the client credible and likely to earn the fact-finder's respect? Are there any doubts about the client's honesty or ability to observe and remember accurately?

In a dispute situation, ask whether the client has talked with anybody else about the subjects you are asking about. Those people might help corroborate what your client is telling you. Or they might end up testifying against your client at trial, saying that your client made statements that hurt her case.

In a transactional situation, learn the posture of the deal so far. What is the present state of discussions between the client and the other party? What has already been agreed to? What issues have not yet been resolved? What obstacles does the client see to wrapping up the agreement? How much does the other party want or need this transaction? Is either party in a hurry?

In a transactional situation, learn the parties' interests. What is the big picture? What about this transaction is most important to the client? To the other party? (In other words, what is each party trying to accomplish?) How will the deal operate financially? Where will the profit be made? How does the client envision, on a practical level, the transaction will operate once agreement is complete? How does the transaction fit into the client's larger plans for the future? Is the transaction part of a long-term relationship—or a hoped-for long-term relationship—between the parties? In agreeing to this deal, is the client relying on factual assumptions about which the other party has or should have superior knowledge? (If so, the client can be protected by drafting the contract so that the other party represents and warrants the truthfulness of those facts.) Is there a risk that the transaction might violate the law? Can the transaction be structured to minimize the client's tax? In drafting the agreement, what potential future difficulties should be provided for in advance? (The most obvious example would be breach: how should the agreement define breach, and what consequences would follow breach?) Are there any other ways that the agreement can be drafted to protect the client? What provisions does the client want in the drafted agreement?

In addition, for each type of agreement, there's a laundry list of issues that a prudent lawyer would typically resolve in drafting. If you rent an apartment, look at your lease; it probably reflects the residential lease version of such a list from the landlord's point of view. What do you need to know in order to handle the laundry-list issues?

Ask whether the client has talked about this problem with another lawyer. If you are the seventh lawyer the client has consulted about this problem, there is a reason why the other six lawyers have not done what the client wanted. It might be a reason that should not influence you. But most of the time the other lawyers are not presently working for the client because the case is meritless or the client tends to sabotage a lawyer's work.

§8.3.2 ORGANIZING AND FORMULATING QUESTIONS

Organizing questions. When you start exploring various aspects of the problem in detail, try to take up each topic separately. Too much skipping around confuses you and the client.

[*a period of silence*]

Client: O.K. I was standing at the dairy counter. The manager walked up from my left and grabbed me by the arm and said, "I saw you put something in your bag." I said, "What?" or something like that. And he pulled me to that back room, closed the door, and told me to sit down. [*As the client describes the scene in detail, we learn that the police arrived and arrested the client.*]

Here, the lawyer asked the client to recreate the context, and then let the client tell the whole story before beginning to probe (see §7.6).

Ask broad questions until you are not getting useful information any more. Then go back and ask narrow questions about the facts the client did not cover. While the client is answering the broad questions, you can note on a pad the topics you will explore later by means of narrow questions.

Formulating questions. Phrase your questions carefully. Remember that how you say something has an enormous effect on how people respond (see §2.2). A good question does not confuse, does not provoke resistance, and does not help distort memory (see Chapter 7).

Ask one question at a time. If you ask two at a time, only one of them will be answered.

Lawyer: How much did Consolidated bid on this project? Were they the low bidder, or was somebody else?

Client: I think somebody else submitted the lowest bid, a company in Milwaukee that later had trouble posting a performance bond.

Did we learn how much Consolidated bid?

A leading question is one that suggests its own answer ("When the store manager took you into the back room, he locked the door, didn't he?"). A leading question puts some pressure on the person answering it to give the answer the question suggests ("Yes, he locked the door"). The question implies one or both of two things. One is that the questioner expects that answer because the questioner already thinks or knows that it is true. The other is that the questioner *wants* that answer (for example, to help prove something, such as false imprisonment).

Because of the malleability of memory (see Chapter 7), leading questions have the potential to cause inaccurate answers. If a leading question—or any type of question—in an interview causes a client to "remember" things more favorably to the client's case, and if the client is later to testify to that "memory" at trial, the leading question creates an ethical problem (see §8.4.1). (At trial, a lawyer is normally not allowed to ask a leading question of the lawyer's own witness on direct examination. But leading questions are permitted when a lawyer cross-examines the other side's witnesses, who can be expected to resist attempts to influence their memories.)

Leading questions, however, can be useful when the client might be fabricating (see §8.4.3) and for the review stage of cognitive interviewing (see §§7.6 and 8.2.3).

At times, you can probe for information without using questions at all. For example, active listening or body language indicating that you are particularly interested in what the client is saying can encourage the client to go into the facts in greater detail (see §8.1.2).

§8.4 SPECIAL PROBLEMS IN CLIENT INTERVIEWING

You may face problems of ethics (§8.4.1), information that the client considers private or too unpleasant to discuss (§8.4.2), a possibility that the client is not being honest with you (§8.4.3), pressure from the client to make a prediction before you have had an opportunity to research the law and investigate the facts (§8.4.4), or negotiating a fee agreement with the client (§8.4.5).

§8.4.1 ETHICS IN CLIENT INTERVIEWING

First and foremost, you and those who work for you are obligated to keep confidential that which the client tells you, with the exceptions noted in §3.6.

In addition, you may not "falsify evidence [or] counsel or assist a witness to testify falsely."[7] If your client will become a party to litigation, your client will probably become a witness. Thus, you may not suggest that your client testify falsely or that your client falsify evidence. Nor may you help your client do either of those things. Falsifying evidence and suborning perjury are also crimes. And "many jurisdictions make[] it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen."[8] Even those that do not make it a crime may impose sanctions, including dismissal or claim preclusion on those who fail to preserve evidence crucial to an adversary's case.

Perhaps the best known ethical dilemma in client interviewing is called the *Anatomy of a Murder* problem, after the novel[9] and movie of the same name. There, a lawyer interviews his client, who is accused of murder. Before asking the client for the facts in detail, the lawyer gives the client a lecture explaining all the defenses to a murder charge. After listening to this, the client describes facts that would support a defense of temporary insanity. We are left with the impression that if the client had not heard the lecture, he would have told a different story—that the lawyer essentially told the client what the client would have to say in order to escape conviction.

Lawyers are not allowed to help create false testimony. But clients are entitled to know the law and to get that knowledge from their lawyers. How can you observe both of these principles while interviewing clients? The best approach is to interview for facts first and to explain the law afterward. The reasons are partly ethical and partly practical. In the novel and the film, the client invents a story and wins at trial. That is harder to do in the real world than it is in fiction. There are

7. Rule 3.4(b) of the Model Rules of Professional Conduct.
8. Comment to Model Rule 3.4.
9. Robert Traver, *Anatomy of a Murder* (1958).

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always other witnesses and evidence and facts, some of them incontrovertible. Not many clients are clever and lucky enough to be able to invent stories that are either consistent with or more believable than everything else the fact-finder will be exposed to at trial. Much of the time, you can do a better job of advocacy if the client does not invent a story.

If the client is an organization, you have some special obligations. You do not represent the organization's officers or employees, even though they are the people you normally deal with. This can be difficult in a situation where the people with whom the lawyer is dealing fear damage to their careers. Rule 1.13(f) of the Model Rules of Professional Conduct requires that, when dealing with officers or employees whose "interests are adverse" to those of a client organization, you make it clear that you represent the organization and not them. The Rule's Comment adds that you "should advise . . . that [you] cannot represent such [a person,] that such person may wish to obtain independent representation[, and] that discussion between the lawyer for the organization and the individual may not be privileged." The evidentiary attorney-client privilege and the ethical duty of confidentiality belong to the client (the organization) and not to the client's officers or employees. In fact, the lawyer is obligated to tell responsible people elsewhere in the organization whatever the officers or employees tell the lawyer.

§8.4.2 HANDLING PRIVATE OR EMBARRASSING MATERIAL

If you suspect that the client will be reluctant to talk about some things because they seem embarrassing or especially private, you might wait until the end of the interview to explore them or even wait until a subsequent interview. Give the client time to appreciate that you are a person of discretion who can be entrusted with the kind of information that the client might not even be willing to tell friends about.

When you do raise the topic, begin by saying that you need to ask about something that the client might not find it easy to talk about; that you apologize for having to do so; and that you can do a good job for the client only if you ask these questions. Explain why you need to know, and remind the client of the rules on confidentiality. Then ask, respectfully but precisely.

Sometimes it helps to reverse the normal sequence of beginning with broad questions and moving toward narrow ones. Instead, start with carefully chosen narrow questions that take the client well into the subject. Then ask general questions, such as "Please tell me all about it."

§8.4.3 WHEN THE CLIENT IS DISTRAUGHT

Sometimes clients bring an enormous amount of emotional pain with them into a lawyer's office. The situation that has compelled them to seek legal assistance may be one of the most distressing things that has ever happened to them. You have just met this person. What can you do about the pain?

First, do not make superficial comments such as "Everything will be all right" or "I know how you feel." Everything will not be all right. And unless you have suffered something very similar to what the client is suffering, you do not really know how the client feels.

Second, listen, patiently and attentively, to the client's description of the most painful parts of the situation. Listen with care to anything the client says about the emotional aspect. You might be one of the few people to whom the client confides this. Try to understand, and let your tone and body language imply that you consider the emotional aspect important and are trying to understand. The fact that you are trying to understand may be a comfort to the client. Other people might not be trying to understand. You may not be able to understand fully, but your listening in a caring way may mean a great deal to the client.

Third, although you cannot honestly guarantee to solve the problem, your commitment to do the best you can may introduce hope.

§8.4.4 HANDLING POSSIBLE CLIENT FABRICATION

When you suspect falsity, the cause might be unconscious reconstruction of memory, semiconscious fudging, or conscious lying. Most clients try to tell you the truth as they understand it, which means that when the client is wrong, there is a good chance that something other than lying is involved.

Unconscious reconstruction of memory. Chapter 7 explains why this can happen, and §7.6 explains what to do about it. We are all capable of unconsciously reconstructing memory. When a client does it, that does not mean the client is a bad person.

Semiconscious fudging. Some people try to bolster their positions by putting a spin on objective facts. If something occurred three times, a person like this might say it happened "many" times (if more is better) or "barely at all" (if less is better). This can become so habitual that the person might not be fully conscious of individual exaggerations. But it is conscious in the sense that the person can stop doing it if she really wants to. When you find someone doing this, it means that even though the person might be wonderful in other ways, she is not always a reliable reporter of facts. The best thing to do is to press hard for precise answers.

Client:	It happened many times.
Lawyer:	How many times—exactly—did it happen?
Client:	I don't know—a lot.
Lawyer:	Let's list each time you can remember. On what date did the first one happen?
Client:	Right after that blizzard we had last February. [*Client gives details.*]
Lawyer:	When was the next time?

You have to ask these precise questions anyway with every person you interview. But with one who is fudging, you have to be firm and determined. Do not give in to a fog of vague generalities spoken by the client.

Conscious lying. Here the client deliberately tells you something that is not true. Some clients do this because they are fundamentally manipulative. But others

might be generally honest people who are in desperate or embarrassing situations, are lying reluctantly, and naively do not understand that it is in their own best interests to tell you nothing but the truth.

You probably don't know for sure that the client is lying. If you become annoyed or accusatory, you may damage the attorney-client relationship irretrievably. But you do need to know the truth from the client. The best way to get that is to show the client that it is in her own interest to tell you the truth and that other people—a judge and jury, for example—will not believe what she is telling you. If you say that you do not believe the client, you are accusing the client, and the client will fight back.

Start by giving the client a motivation to tell you the truth. Explain how you can do a good job only if you know everything—including the unfavorable facts—from the beginning. You might give one or two illustrations of how disaster can happen if you learn of an unfavorable fact for the first time in the courtroom when there is no longer time to prepare. Choose illustrations that are similar to the situation the client is in.

Say that your first loyalty is to the client, and summarize the rules on attorney-client confidentiality. Do all of this before you turn to the lie you suspect you are being told.

If the client seems manipulative, you can use leading questions to box the client into a corner. Think this through very carefully. You do not want to humiliate the client, and you are not absolutely certain the client is lying.

You might explain how opposing counsel will cross-examine at trial. Tell the client that you will give a demonstration of what that will be like. Start from what is undeniably true and conduct a determined but polite cross-examination, showing the client how a disinterested fact-finder is not likely to believe what the client is saying, given how inconsistent it is with what is undeniably true. Do this in such a way that the client can begin to tell you the truth without losing dignity.

Alternatively, you can ask questions—some of them leading—based on the assumption that the truth is something other than what the client has said. Do not point out the difference between your assumption and what the client said. If the client answers the questions consistently with your assumption, you have begun to establish the truth without a confrontation.

If the client seems to be a generally honest person who might be lying out of desperation or embarrassment combined with naivete about your role as an advocate, you might use some of the same techniques. But remember that this client does not really want to lie. You can probably be more gentle than you would with a manipulative client.

§8.4.5 WHEN THE CLIENT WANTS A PREDICTION ON THE SPOT

Clients often want the lawyer to predict immediately whether the client will win or lose. In nearly all instances, you cannot make that prediction. You might have to check the law or investigate the facts, or both. And you need to think about it. Predicting hastily raises the risk of error.

But clients want assurance. What can you give them? Usually, it's enough to explain what work you will do, what issues you need to research, and what facts you need to investigate. You can add that you take the problem very seriously and

want to do something about it ("I want to try to find a way to get you compensation for this injury"). Choosing a time by which you will have an answer also helps.

Some lawyers feel comfortable saying something noncommittal about what they are thinking. For example, "I'm hopeful, although I'm also worried about what the harbor master will say about the docking arrangements." Or: "It might be difficult to win unless we can find witnesses who saw the other boat exceeding the speed limit; I want to work on that right away." If these comments accurately summarize the lawyer's reaction, it seems fair to share them with the client. They are explicitly tentative and point to what the lawyer sees are the variables. It would also be prudent to tell the client that the whole situation can change based on other facts that you do not know about yet.

§8.4.6 NEGOTIATING A FEE AGREEMENT

There are four different ways for a client to pay for a lawyer's services.

The client can pay an hourly rate. In a firm, the rate will differ according to the status and experience of the lawyer (senior partner, junior partner, senior associate, junior associate). If two or more lawyers are assigned to the case, the client will be billed at different rates depending on who did what. The advantage of an hourly rate is that the client pays for exactly the amount of effort the lawyer expends. The disadvantage to the client is that the total cost of the work can only be guessed at when the client hires the lawyer. The disadvantage to the lawyer is that she needs to fill out detailed time sheets and have office staff convert them to detailed bills.

Or the client can pay a flat fee for specified work, such as $850 for an uncomplicated will. The client knows from the beginning how much the job will cost, and the lawyer does not need to keep detailed time records. But flat fees are appropriate only for very routine work where the lawyer can predict in advance how much effort the task will take.

Or the client can pay a contingency fee. Typically, the lawyer would be paid a percentage, such as 33%, of any money recovered on behalf of the client. If the client recovers nothing, the lawyer gets nothing. A contingency fee makes justice theoretically available to a client who wants to sue for money damages but cannot afford an hourly fee. In nondamages cases, a contingency fee is impractical, and in criminal and domestic relations cases, it is illegal.[10] Contingency fees are sometimes abused by lawyers, and in many states they are strictly regulated by statute or court rule.

Or the client can pay a percentage of the value of a transaction. To probate an estate, for example, a lawyer might in some situations charge a percentage of the value of the estate.

Usually, the lawyer suggests the type of fee that makes most sense from the lawyer's point of view, and the client either agrees or tries to persuade the lawyer to charge another kind of fee. Whatever the type, a fee is unethical unless "reasonable" according to the rules of ethics.[11] In addition to the fee, the client usually pays certain expenses, such as photocopying, messenger services, court reporter fees, and the like.

10. Model Rule 1.5(d).
11. Criteria for "reasonableness" are set out in Model Rule 1.5(a).

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The appropriate time to negotiate the fee is usually in the closing part of the interview (see §8.2.6). Earlier, you do not know enough about how much work will be involved, and the client is usually not yet ready to hire you formally. The fee agreement should explicitly define the services you will provide.

Lawyers cost more—often much more—than clients want to pay, and fees generate more conflict between lawyers and clients than almost any other issue. For that reason, in a well-run law office all fee agreements are reduced to writing, usually through an engagement letter, which the lawyer sends or gives to the client. When the client countersigns it, the engagement letter becomes the contract through which the client hires the lawyer and agrees to pay the fee. A thorough engagement letter will describe the work the lawyer is to do, specify the fee and how it will be billed and paid, and so forth.

If the client is ready to hire you on the spot and wants you to start work immediately, you can ask your secretary to word-process an engagement letter quickly so the client can sign it before leaving. Otherwise, the engagement letter can be mailed to the client.

Except when the client will pay a contingency fee, lawyers usually ask for a retainer, which is a payment in advance for the first part of the lawyer's work. The retainer should be large enough to assure the lawyer that the client is serious about paying for the lawyer's work. Retainers of $2,000, $5,000, or $10,000 are common for the typical work that an individual or a family might ask a lawyer to do. Business retainers might be larger.

A careful lawyer usually will not do any work until after the client has signed an engagement letter and paid a retainer.

Many—but not all—lawyers do not charge for the initial client interview.