What's Behind Good Client Interviewing?

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LEARNING OUTCOMES

After completing this chapter, you will be able to:

- Define the role of paralegals in the continuum of actions that comprise legal representation of a client, including the specific situations in which Ontario paralegals are permitted to operate without the supervision of a lawyer.
- Explain the importance of the initial client contact and of establishing rapport with your client.
- Recognize the necessity of dealing with both legal and non-legal issues in order to effectively serve your client.
- Appreciate the importance of conducting a thorough interview in helping your client to be prepared for a negotiation or hearing.
- Describe the important role of paralegals and law clerks at the hearing and post-hearing stages of a client matter.
- Name different approaches to dispute resolution and why the adversarial system may not be the best way for your client to resolve their legal issue.
- Identify different factors that motivate clients to seek legal help and how good interview skills can help overcome the challenges presented by different client motivations.

Representation as a Continuum

Representing any client is a continuum of actions, from the initial client contact through to closing the file. Although the lawyer can, but *should not*, be involved in every stage, you, as a legal professional, can, and often should, be involved in all phases, from the birth of the file to when it is sent to storage. Areas where legal professionals who are not lawyers are permitted to represent clients as primary counsel, without lawyer supervision, have expanded and are likely to expand further in the future. Paralegals with specialized training can represent clients in immigration matters as immigration consultants. After successfully completing an approved training program, paralegal professionals can apply for membership to become Regulated Canadian Immigration Consultants (RCICs).

In Ontario, paralegals are regulated by the Law Society of Ontario and are permitted to represent clients in specified matters without a supervising lawyer. As provided for in section 62 of the *Law Society Act*,[1] these matters include proceedings in Small Claims Court; criminal matters that are summary

1 RSO 1990, c L.8.

conviction offences, however, due to amendments effective September 19, 2019, the definition of these has changed;[2] administrative tribunal matters; and matters in the Ontario Court of Justice under the *Provincial Offences Act*.[3] These areas are likely to be expanded in the future and could include some family law proceedings. Other jurisdictions are more restrictive and require paralegals to operate under the supervision of a lawyer.

In most jurisdictions a lawyer must be involved in the life of a file from beginning to end. Even in Ontario, it is only in those specified areas where paralegals are authorized to practise on their own that a lawyer is not required to supervise. This, however, does not imply that a supervising lawyer is looking over the paralegal's shoulder throughout the entire process. Even in jurisdictions where a lawyer will necessarily be supervising the work of a paralegal, the greatest benefit for the client—and this includes savings in legal fees—is derived from the lawyer doing what they do best and a highly trained paralegal functioning as a key component of the legal team's representation of the client.

In fact, neither the lawyer nor the paralegal is the central person in the process. As you will see in the material dealing with client-centred interviewing, the client is the focal point in any legal action. All the efforts of the law firm must radiate from the needs and comfort of the client and keep the client as the centre of its efforts.

Another erroneous assumption is that the best way of serving the client is for the lawyer to be involved in every aspect of client representation. Certainly, each lawyer has their own level of comfort with delegating responsibility. However, with well-trained professionals, lawyers not only will be comfortable but also will come to *rely* on their staff to complete tasks in a competent and independent manner. As a professional, the better you are at these tasks, the more valuable you are to the firm. The more valuable you are, the more potential you have to command the two "R"s: respect and remuneration. Frankly, employers of legal professionals reward excellence. A law office, more than most environments, profits from quality work, and those profits mean more money available to reward valued staff.

As noted above, in Ontario, paralegals are in a position to take on a matter from beginning to end, provided it is authorized by the Law Society of Ontario. The determination of which matters a paralegal is authorized to handle without a lawyer's supervision can be complicated, however; for example, in criminal matters, offences are sometimes hybrid offences. This

2 The default maximum penalty for summary conviction offences was changed by Parliament from six months' imprisonment to two years less a day. This would have barred paralegals from representing people for such offences but law societies have acted to preserve, as closely as possible, the ability of paralegals to represent individuals in the manner they did prior to the amendments.

3 RSO 1990, c P.33.

means that the Crown may proceed summarily or by indictment. The Crown will elect to do one or the other at some stage; however, until that election has taken place, all hybrid offences are deemed to be indictable. Because of this, a paralegal cannot represent a client in such circumstances.

The information in the rest of this chapter applies equally to paralegals operating under the supervision of a lawyer and those who are authorized to represent a client without supervision. We will sometimes refer to a paralegal's dealings with a supervising lawyer, but it should be understood that in the matters specified above, licensed paralegals in Ontario may be operating without such supervision.

What follows now is the sequence of three stages in a legal proceeding. Each stage includes commentary about how your work can facilitate and reinforce the work done by lawyers in the firm. Appendix A provides abbreviated commentary about these tasks.

Initial Client Contact

Here, you face two elements: building rapport with the client and assisting with identification of the issues confronting the client. As we will discuss in some detail throughout the text, a client's comfort level with the law firm usually determines the degree to which they share information with you.

Most people do not require a lifelong commitment before they share intimate details of their lives, but they do require trust. People need to feel assured that you will not use their secrets, fears, and vulnerable experiences in a way that will harm them. Clients want the security of knowing that you will only use this information to help them. This only makes sense: why else would a law firm representing a client want information if it was not to help the client? This, of course, is the rational perspective. However, people who need legal advice are usually feeling beat up in one way or another. The beat-up feeling might be physical, emotional, or often financial, but it is frequently there. From this beat-up perspective, the world is a less predictable, perhaps even a scary, place.

AUTHOR ASIDE

A few years ago, I was on holiday in the Gulf Islands. In an idle moment I ran my hand through my hair and noticed some fairly substantial bumps on my scalp—and these were pretty big! Three of them were the size of a nickel and stood up from my scalp about the width of my finger. In shock, I concluded that I had brain cancer. I imagined the wildly multiplying cancer cells bursting through my cranium, distorting my scalp with these large

lumps. In a certain panic, I tried to prepare myself for the end. The biggest problem was that I was days away from obtaining any medical advice. Later, when I saw my doctor, it took him about five minutes to diagnose the problem as seborrhoea, a scalp condition. He prescribed a dandruff shampoo. While this was a bit anticlimactic—no tearful goodbyes, no 21-gun salute—it was a welcome relief. My point? Even the smartest people, given limited information and dealing with events outside their expertise, can come to the wrong conclusions.

The development of rapport with a client is important to the firm's long-term relationship with the client. Empathy and understanding can help in obtaining information necessary to assist the client with their concerns. Rapport or comfort in the relationship may not play a role in one interview, but it may prove to be crucial at another time, in another circumstance. Think of it as having a Mars bar in your coat pocket—sometimes a comforting thought, useful if you miss a meal, and downright essential if you get caught in a snowdrift while in your car.

After a particularly traumatic experience, when a client has been harmed in a physical, emotional, or financial way, you could be the first person that the client will trust. Or maybe not. It is really up to you to become that trusted person, to facilitate the sharing of information. Your efforts to get through the client's defences may not always work, but not trying is a failure on your part.

The trust you establish helps the client to speak freely. In this way, you gather information that will be essential in helping the legal team identify the issues. Although clients, when they come to see a legal professional, often have a clear idea of what needs to be resolved, they may also have misdiagnosed their situation. With complete information, the issues can be correctly analyzed and a reasonable course for resolving the conflict charted.

In the process of fact gathering, not all facts are equal. Some facts are more compelling—the busload of nuns who observe the incident from beginning to end—while others are less helpful—Arty, the local heroin addict/drug dealer, who vouches for your client's whereabouts. The process of gathering information includes the assessment of the value of that information and looking to secondary sources that confirm or undermine that information. Uncertainty or loose ends are unacceptable in a law office if anything can be done to eliminate them. Your job of securing information that will help the firm advise the client is akin to a bloodhound's relentless pursuit of a scent. The effectiveness of this process can make the difference between winning or losing the client's case.

Legal/Non-Legal Issues

Counsel sometimes choose to ignore anything that isn't narrowly defined as a legal problem because these matters are confusing or emotionally troubling. Some describe these issues as touchy-feely.

From the opposite perspective, a legal professional who takes a client-centred approach will insist that unless the non-legal aspects of the client's circumstance are addressed they will continually interfere with resolving the client's difficulties. While I largely agree with the latter approach, I disagree generally with the legal/non-legal dichotomy. Anything that interferes with a person's ability to deal effectively with legal issues is a problem.

Rather than getting caught up in semantics, we should try to clear away—or at least minimize—any obstacle to client communication and action.

Frequently, the expression "the lawyer advises, the client instructs" is used to characterize the unique relationship between counsel and client. This axiom reminds us of the limit on the legal professional's control or authority in dealing with the client's concerns. In my opinion, lawyers and other legal professionals cannot be reminded of this important principle too often. Although they rightly exert a powerful influence over clients, legal professionals often forget who is directing the show.

How then can a legal team advise clients if they do not know the factors that are influencing a client's decision-making? Some believe in the hands-off approach and avoid exploring the personal factors that drive the client to act in the way that they do. Their advice, now limited to their understanding of the narrow legal issue, may have disastrous consequences for the client. Perhaps a legal professional cannot be blamed if the client takes such advice and blindly applies it without playing out the consequences. Blameless as the interviewer may be, why not help the client to think things through and to understand the consequences of their actions on their life outside the litigation? We are a service industry after all.

I would like you to prepare a new will.

All right. Have you considered what changes to your old will you wish to make?

I want to cut my son entirely out of my will.

All right. Any other changes?

No, that's it.

Okay. We'll have that ready by Friday.

One perspective on this exchange is that it is not the law firm's business if the client wishes to take such an extreme step. I don't agree. There are aspects of legal advice here that counsel should go into, and a good interviewer can help the client sort through their feelings on this matter.

Why do you want to cut your son out of your will?
He's just wild and unpredictable. He's probably into drugs and he refuses to make anything of his life.

How old is your son?
Nineteen.

And do you think that his lifestyle isn't going to change?
Well … maybe … probably given some time … I mean, I was pretty wild in my youth. Gave my parents some things to worry about. But I just hate what this is doing to his father.

Have you spoken to your husband about cutting your son out of your will?
Well, no … I guess maybe that might be wise … at least a first step.

Shall we wait to hear back from you?
Yes, please … let's keep this on hold for a while … until I've worked it through.

There is a balance between respecting the client's right to make a decision (and following through with their instructions) and helping the client to sort out exactly what they want to accomplish. The interviewer must not tell the client "I wouldn't do that if I were you," but it is legitimate—and indeed may be of great assistance—to point out aspects that the client may not have considered. This may cause them to rethink their instructions; at the very least, the client will be acting in a reasoned manner and is more likely to make a decision that they will be happy with in the future. In the example above, the results may avoid costly estate litigation. (While the law in this regard differs between jurisdictions in Canada, judges have been known to overturn a testator's wishes where a child is cut out of a will, at least without a clear indication of why the testator felt that this was fair and reasonable.)

To Act or Not to Act

Few people like to waste time, even fewer, money. Once the issues have been identified, a certain clarity usually emerges.

The analysis of the legal matter, based on the information elicited from the client, must include alternative actions (or non-action) by the client. The client has the right to hear from the firm what the likely outcomes would be from each course of action and to have some assistance from counsel in choosing the most appropriate course of action at any given time.

New facts (acquiring information either favourable or unfavourable to the client's case) or changes in the law can all affect whether a particular course of action or non-action is appropriate. There may not be enough information to pursue an action at this time. However, six months later, when the smoking gun is uncovered, the decision might be to move ahead with an action. Even

during a hiatus a paralegal can continue preparing the file, if the client so instructs, including maintaining and building rapport with the client and conducting effective interviews with other sources that come to light. This may prove invaluable in representing the client's interests.

Negotiation and Hearing Preparation

In the process of negotiating a settlement of an action, it is vitally important that both the client and the opponent are convinced that their law firms are well prepared for an upcoming hearing. Cases aren't settled without a hearing because that is the right thing to do; they are settled because each side is convinced that they could do worse before an adjudicator and both sides want to move on with their lives. A large part of this process is getting the other side to see how effective your firm will be in presenting your client's case in a hearing. For example, if the other side can visualize your client's *winning case*, then they will be prepared to settle in a manner that is advantageous to your client.

Your interviews will help prepare the client for the discovery process and will help shape the firm's strategy in directing the action. Be receptive to new information popping up as the litigation proceeds, and be aware that information that either was not relevant or did not appear relevant at one stage in the proceedings may become crucial at a later stage. The discovery process, which varies among jurisdictions, is the means used by each law firm to find out information, both positive and negative, about the other side's case.

The earlier your firm has sufficient facts to proceed to a hearing, the earlier serious negotiations can begin, and thus your client can grapple with the thorny settlement question of what is enough to satisfy them or what is too much for them to pay. Negotiations and hearing preparations continue simultaneously until a resolution has been reached, either through settlement or adjudication.

The discovery process is important, almost as important as a hearing itself. This is because what happens in discovery often determines whether a matter settles or proceeds to a hearing. Effective interviewing can provide a rich vein of information to assist the firm in determining what avenues to pursue when questioning the opposite party. Discovery can also be a mechanism to uncover weaknesses in your client's case and thus prepare your client for potential lines of questioning from opponent's counsel.

Let's look at a case where your client lost a lot of money by investing in a laser toothbrush that was not successful, primarily because it caused the user's teeth to fall out. Your client was designated as a "sophisticated investor," meaning he is deemed to have sufficient knowledge of investing to weigh the pros and cons of a risky venture. Your client might have a

certain amount of pride at stake that could get in the way of the best legal argument—that the laser toothbrush promoter should have insisted your client have investment counselling before taking his money. Preparing your client for examination from the opponent might go like this:

> ***So, you have done pretty well for yourself, Mr Jones.***
> I like to think so.
>
> ***And you have made some very astute investments over the years.***
> Yes, thank you.
>
> ***You've done very well without having to rely on investment counselling, isn't that so?***
> Yes, well, I haven't had much advice, that's true.
>
> ***So, you would consider yourself a pretty savvy, let's say, a sophisticated investor.***
> I guess.

Now, that would be round one. After pointing out to your client that the very purpose of the litigation is to establish that he is *not* a sophisticated investor, he might get the point that acknowledging that he in fact *is* would not be helpful. The second round might look like this:

> ***So, you have done pretty well for yourself, Mr Jones.***
> I have done all right, but there is a lot of luck involved, and I happen to have benefited from rising house prices.
>
> ***Well, you have made some pretty astute investments over the years.***
> Well, my wife and I wanted to own our home, and real estate values have gone through the roof. On top of that, we try to avoid credit cards and heavy debt. That's about it.
>
> ***You have done quite well without investment counselling, isn't that so?***
> Well, not much counselling is necessary when your house keeps going up in value, and also my wife inherited money from her father … which didn't take much thought.
>
> ***So, you would consider yourself a generally savvy, let's say, sophisticated investor?***
> I think if I were sophisticated I would never have gotten myself into this mess.

The idea here is that in representing a client, the law firm must always keep the opponent's perspective in mind and be prepared—and help the client be prepared—for challenges that would otherwise seem to come out of the blue.

Hearing and Post-Hearing Processes

Even at the point of trial, those working under the supervision of a lawyer continue to play an important role in assisting counsel with representation of

clients. Most commonly, you would organize the interview notes and master the documents to facilitate the examination of witnesses to best advance your client's proposition.

Interviewing witnesses immediately prior to their testimony to help prepare them for the trial may be another role played by a paralegal. However, while some lawyers practise on the British model (solicitors interview clients, barristers appear in court), most Canadian lawyers want to do the final preparation themselves.

One exception to this preferred method of operation is the emergency witness interview. Mid-trial, circumstances may dictate that a witness who did not initially appear to be necessary will have to be called to testify. The lawyer, who is busy in court all day, would then need to have the witness prepared on short notice.

Post-trial procedures are often delegated to paralegals. While lawyers generally want to quickly move on to the next big file, maximizing their productive capacity, good client service involves tying up loose ends and ensuring that what the client achieved through your firm's representation of them is not diminished post trial. By this time, you should have a good relationship with the client and have a complete understanding of the file. Therefore, taking care of the myriad details to conclude your firm's representation of the client may often fall onto your shoulders. If the client has been successful in their action, this can be a very rewarding time in representing them. If the client has been unsuccessful, they will need to be supported in this transition.

Regardless of the outcome, effective representation of the client, even post trial, is essential for the client's satisfaction and, of course, instrumental in whether they will use or recommend your firm's services in the future. Surprisingly, successful representation is not the ultimate determinant of whether a client recommends your services to others or even uses your firm to help them out of the next jam they find themselves in. Trust and good rapport matter more.

Appendix A lists the various stages of client representation, their purposes, and the interviewer's tasks at each stage.

As Seen Through My Eyes: The Two-Sided Nature of Litigation

A legal dispute can be seen as a difference in perspectives between parties about the same incident(s) or set of facts. One party (who wishes to avoid being held legally responsible) may be liable for another person's misfortune; the other party in the dispute may be a "victim." Usually, each party is acting more or less in good faith; they just happen to view the world, or at least this

set of circumstances, differently. I say "more or less in good faith" because, in my experience, few disputes include a completely innocent party; often, both people have, in their own way, helped fuel the conflict. However, in most cases, one person is most culpable.

Here is an example by way of a personal confession. In my student days I occupied a basement suite with my girlfriend. It was a nasty and brutish place, but we called it home. Our landlord was nice enough so long as there was no dispute between us, but when a dispute arose he became unyielding and unpleasant. Our basement suite developed some water problems—the part of the basement outside our kitchen door was a small lake, water lapped up under the floor boards, the shower backed up, and the toilet rarely flushed.

My girlfriend and I tried to be patient, but when the water problem did not get resolved, we told the landlord we were moving out at the end of the month. The landlord's response was to inform us that we were required by law to give one calendar month's notice. This meant that we would be paying rent for two places at once—something we couldn't afford. This was long before I went to law school, and our landlord seemed to know what he was talking about. I was quite intimidated by his self-assuredness.

I felt that one factor gave us some leverage: the suite was really not fit for habitation (unless the new tenant was a duck). To his credit, the landlord was trying to solve the water problem, and from time to time various people inspected or tried to fix the issue, although without doing any major repairs.

So we had this legal dispute: the landlord insisted that we pay another month's rent, and we were refusing because of the flooding. Then, about ten days before we planned to leave, something strange happened. The water began to recede. One morning, the lake was considerably reduced in size. This created a conundrum: by this time, our relationship with this landlord was soured to the point where we did not want to live in his house. We had made other arrangements. Yet the foundation of our "defence" was evaporating before our eyes.

What to do? What would any self-respecting litigant do? Quietly, we began pouring pots of water into the lake to stop it from receding. Late at night and early in the morning we would sneak into the darkened basement and deposit enough water to bring the lake back up to a level that maintained our justification for vacating the premises.

No matter how much I justified my actions, I was clearly not acting in an open and honest manner. This is the lot of litigants in our society; they tend to justify their actions by demonizing the opponent—and honesty becomes a relative term. This relativity, by the way, is something to keep in mind when interviewing clients about their legal concerns.

It is important, for example, to listen carefully for "hedge" words from the client or the absence of a direct or expected response. Common hedge

words include things like "pretty much," "typically," "uh-huh," or other non-committal phrases.

> *Did you try to avoid the collision?*
> Pretty much.
>
> *What do you mean by pretty much?*
> Well, typically that's what a person does, don't they?
>
> *Perhaps, but we are dealing with this particular situation, not the typical one. Did you try to avoid the collision?*
> More or less.
>
> *I have to tell you that an answer like that will get you in trouble. It is important that I know exactly what happened so that we can protect you from some serious consequences. Tell me exactly what happened, so we have something to work with.*
> Well … I was eating a meatball sandwich … and one of the meatballs fell onto the floor of the car, and when I was hunting around for it, I heard this thud … is it bad?
>
> *Better that we know this now than in the middle of a trial.*
> Okay, good. Do you mind if I eat?

The scenario of a client not being fully forthcoming is remarkably common. For example, at the time of this writing, there is a news story about a politician who is alleged to have made inappropriate comments to an interest group. After the news broke, the politician was asked directly by a reporter, "Did you say … ?" to which he responded, "Our government is committed to … ." Asked again an unambiguous yes-or-no question, "Did you say … ?" his response again was, "Our government is committed to … ." Now, you likely wouldn't buy a used car from this politician, and if he were a client, it would be important to call him out on this behaviour. Other than being caught in a direct lie, nothing undermines the credibility of a witness more than avoiding a clearly stated question. You want to help your client so that they have credibility at trial or in discovery, but you also need to know why they have avoided a particular question.

Without a legal process for resolving disputes, the two sides of an argument would be in a continual stalemate. The situation would be akin to the classic children's taunt:

> *You're a liar/thief/bully.*
> Am not!
>
> *Are too!!*
> Am not!!
>
> *Are too!!!*

Adding exclamation marks brings the basic conflict no closer to resolution. Now, if you impose a system where somebody "bigger," such as the courts

or justice system, can impose a judgment, then the elements of a dispute resolution mechanism begin to be put in place.

An interesting aspect of such a process is the pressure on the parties to find their own resolution, given the cost and uncertainty inherent in the legal process. Interestingly, because the justice system outcome is unpredictable, the parties to the dispute often prefer to resolve things themselves rather than leaving it to chance.

> ***We might as well compromise and reach a resolution; otherwise, who knows what crazy results the courts might come up with.***

I have heard that when Richard Nixon was president of the United States and Henry Kissinger was the secretary of state, they actually developed a strategy for dealing with foreign powers where Kissinger would tell their representatives,

> You know Nixon is crazy; there's no telling what he will do. I may be able to keep him in line, but this is the best I can do. If you don't accept these terms, I shudder to think what might happen!

This may raise moral issues, and the strategy smacks of brinkmanship, but whatever other faults Nixon had, he is largely regarded as having had a successful foreign policy, at least from the American perspective. So keep in mind that part of your role is to help anxious litigants through the confusing maze of legal conflict. Because of your expertise and the expertise of the legal team you are part of, a litigant's chances of a good outcome are enhanced. Even in circumstances where the odds are against your client, there are few instances where you cannot make it better through effective representation. As Canada found in dealing with the Trump administration, it is difficult to negotiate in an irrational, changing landscape. But, in spite of the perceived irrationality on the other side, it is often better to achieve a certain result through reaching a deal than to risk all by going to court.

Many people enter the litigation process believing that their version of events is so right that they can't possibly lose. They think that all their lawyer has to do is put the facts before the adjudicator and they will win, hands down. I suspect that these clients imagine the adjudicator severely chastising their opponent for even challenging the correctness of their case.

Our adjudicative system is less dramatic than that and more flawed. Your client must be made aware that even good representation cannot always carry the day. A settlement that a client can live with, which may not be satisfying, is almost always preferable to the uncertainty and the emotional and monetary expense of a trial.

The exception to this negotiated-settlement rule is when your client's opponent is so economically powerful and unaccountable that they believe they have nothing to lose in a court battle. In these elephant-and-mouse

battles, as frustrating as they are, if your client wishes any form of justice, it will come only from the courts and only after the most complex and expensive legal processes have been exhausted.

Here is one example. An insurance company, ignoring its duty to actually insure clients from damage caused to them in motor vehicle crashes—against all morality and principles of contractual obligation—determines that they will deny coverage because the injured person's car suffered only "minimal damage." This blanket position, which ignores any evidence of real injury, is designed to save the insurer money because the cost of litigation to enforce an insured's rights is prohibitive. In one such instance, I am sure the insurer spent in the neighbourhood of $100,000 defending a claim that could have been settled for less than $15,000. For the elephant, the individual claim is irrelevant; it is done to discourage other potential litigants—that is the "benefit" to the insurer.

However, not all people in a legal dispute resolve differences through litigation. Mediation—with its win–win cachet—is becoming more common and acceptable. It has one big benefit over litigation: the element of certainty. In a mediated resolution, each side knows what the result will be before agreeing to it. Litigation, on the other hand, has been described by experienced counsel as a crapshoot where often, in spite of the merits of an individual's case or the thoroughness of their representation, it is not possible to know the results until the judge gives their verdict. After that, it will usually be prohibitively expensive to appeal a decision and it is not possible to offer additional arguments after a judge has ruled on the issue in dispute.

AUTHOR ASIDE

I had a huge fish tank in my former office. It would have been even more impressive if I ever found the time to stock it with fish. I got the tank quite cheaply from a glass shop whose owner told me that he had made the tank for a seafood restaurant, but the client never paid him for it. After numerous and frustrating demands for payment, the tank's maker went to the restaurant during its busy lunch hour and demanded payment. When he was rebuffed once again, he took a hammer from his tool kit and told the owner that unless the tank was returned right away, he would smash it on the spot. He got the tank back then and there. For him, this approach was preferable to lengthy and expensive litigation. Now, I would never advise a client to take such an action. He broke a number of laws and could easily have ended up cooling his heels in jail. But there are often solutions to problems that do not entail marching lockstep through the legal system. Lawyers should recognize those situations and advise clients, when they can, about other legal solutions that are not litigious, like mediation or negotiation.

One other dispute resolution process needs acknowledgment: the truth and reconciliation process instituted by Nelson Mandela in South Africa at the end of the apartheid era. This process is based on traditional justice as practised in tribal governance. With the adversarial model so often practised in North America, winning is everything. Success is determined solely by defeating the adversary before the court. No thought is given to an ongoing relationship between the parties or to the overall good (or bad) done to society by the dispute resolution process. In the adversarial process, it is often more important for the litigants to hide the truth from the decision-maker than to disclose all the facts. It is irrelevant how devastating the decision is to one of the parties. The assumption is that society's interests are best served by having a system of justice to deal with disputes in an impartial manner, and individual outcomes are not important in that scheme of things.

Perhaps it was in recognition of Canada's justice system not having served everyone well that our own Truth and Reconciliation Commission of Canada (TRC) was established. The TRC travelled the country and heard from scores of individuals and groups who suffered from the consequences of colonialism. Its final report, *Calls to Action*, contained harsh criticism of the manner in which Indigenous people have been treated in Canada and a means for assessing both individual and governmental action moving forward. The TRC's 50th recommendation calls upon the

> federal government, in collaboration with Aboriginal organizations, to fund the establishment of Indigenous law institutes for the development, use, and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada.[4]

Under a truth and reconciliation model, the community becomes involved in resolving a dispute. The interrelationships between the individual disputants and the larger community are central to the process, as is the importance of coming to a resolution that will allow the parties to coexist in the future. Under this process, and of central importance, is the search for truth, because only where the truth is revealed can the parties leave the past behind and move ahead with their lives. The concept of punishment or retribution is replaced by the concept of reconciliation—living with, as opposed to destroying, your foes.

Some Canadian Indigenous communities use restorative justice programs in both criminal and civil cases. Many judges have accepted, even imposed, healing or talking circles in their sentencing decisions. For the justice system

4 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015), online (pdf): <http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>.

to develop so that it meets the needs of all the people in Canada we must be cognizant that there are many ways of approaching a problem. A healthy society is aware of and open to alternatives.

Why Legal Representation?

In order to consider the role of the law office in the client's life, we must first consider why the client has come to a law firm. There are two basic types of clients. The first is a person who wants help in enforcing a right that they feel they have: a landlord trying to evict a tenant who has declined to pay the rent, a person who wishes to sponsor a parent for immigration purposes, or an individual who has purchased a car and the transmission has failed after a week. In all of these instances, the client feels that they have a right to something. They need to know if they are correct in that belief—*legally correct*, that is. They also need to know what it would cost to get what is rightfully theirs. As you will quickly discover in your law office, there is a big difference between having a right to something and being able to enforce that right. The most obvious obstacle to a legal remedy is money. Litigation is often unconscionably expensive. There may also be other factors, such as social relationships, time constraints, pressure from interested parties and practical considerations of running a business, that may impede a client's ability to pursue remedies that exist in theory.

One of society's most significant challenges is to try to bring the process of enforcing one's rights in line with most people's ability to afford to obtain satisfaction from the legal system.

The second type of client is one who is resisting claims made against them. Examples include the corporation being sued for negligently manufacturing a child's toy; the environmental protester charged with criminal trespass; the homeowner being sued because a branch from their tree broke off in a storm, crushing their neighbour's beloved dog. Similar to those people who wish to enforce a right, these clients also need to know what their legal responsibilities are and what it will cost to defend themselves from the claims against them.

What service the law firm gives either type of client will depend on an analysis of the consequences of either taking or not taking a certain action. The latter may be the more cost-effective option, but in all instances, lawyers and other legal professionals should help the client make an informed decision, one that will reduce the risk of a bad outcome and maximize the chances of a good result.

How do you fit in, given the role of the law firm in providing legal advice and representation in dealing with the client's legal concerns? As we will

discuss a number of times in the text, only persons authorized by the regulations in their jurisdiction—often lawyers—can give legal advice or represent the client in a hearing. What then is left for paralegals to do? A multitude of things.

The practice of law is not like television's popular legal dramas, where issues are resolved in the space of an hour (minus the time for commercials). Good legal representation is 90 percent perspiration and only 10 percent inspiration. It is in the hard work of gathering information, thoroughly understanding the complexities and details of the client's situation, and properly preparing for settlement or litigation where legal professionals show their worth.

AUTHOR ASIDE

As duty counsel, I have represented people arrested by the police and detained until they can appear before a judge to determine whether they will be released, perhaps on bail. The police generally don't detain people unless they believe that they will go right back to committing crimes or are unlikely to appear in court. In conducting interviews with many individuals in jail cells, before speaking on their behalf in court, a surprising number of people have lied to me about their criminal records, either claiming to have no record (extremely unlikely since the police have not released them) or to have a more minor record than is actually the case. Or they have claimed that they have never failed to appear in court on a criminal charge. Well, of course, when I have spoken with the prosecutor after such interviews, I have invariably been shown a copy of the actual criminal record.

If you base your submissions on the information that the client gives you, then you are blindsided, left fumbling for some justification that would permit their release. It is particularly embarrassing if you have not had an opportunity to speak with the prosecutor. (You watch as the Crown counsel takes the printout and, with a flourish, allows the pages to tumble from an outstretched arm to the floor—all six pages of a criminal record about which your client had developed amnesia.) Aside from the embarrassment aspect, a lawyer forewarned of these details might muster some arguments—no convictions in the past four years, for example—that might prevail and get their client released.

Client Motivation

To understand some of the potential pitfalls in the interviewing process, it may be helpful to consider the client's underlying motivations that could be involved at different stages in the process.

It is particularly important to look at factors that may cause clients to behave in ways that are unpredictable and even, sometimes, in ways that are demonstrably contrary to their best interests. Certainly, clients do not consciously undermine their legal representation, but it does happen that the actions or omissions of a client can do considerable damage to your firm's representation of them. An understanding of these factors may help us to save clients from themselves.

Many lawyers, in dispensing legal advice, have developed a preamble that essentially says, "Based on the facts as you have outlined them to me … ." What this really says is, "If you haven't lied to me, then I feel safe in stating the following."

This underscores the frequency with which clients either lie to their counsel or colour their version of events so significantly that caution must be exercised in relying on what the client says.

Most people would acknowledge that a legal representative needs to have accurate information in order to provide effective advice. However, for a variety of reasons, a client may fail to disclose information that could be crucial to your firm's successful representation of them. On the basis of a brief initial interview, even a trained psychologist would be unable to pinpoint the exact reason why any particular individual might compromise their chances of success in litigation by misinforming their legal representative. It would be a monumental task to illustrate all the possible traps used by clients. What we can do here is try to understand some of the underlying motivational factors that can lead a client to provide misleading information or withhold valuable information in an interview setting.

By understanding some of these motivational "glitches," your interviews can be structured to minimize the likelihood of these factors coming into play. By being alert to the potential for these corrupting influences, you will, hopefully, recognize when they are present, so you can take steps to overcome them.

To get beyond this nasty business of clients who mislead counsel, we must do everything we can to encourage candour from clients during the interview process. To decide what will work effectively, some analysis of the common reasons for client misrepresentation may assist. Appendix B presents a summary of obstacles to communication and some tactics to overcome them.

Like Me, Please Like Me

As already indicated, clients will often screen out facts that would place them in a negative light. The most obvious explanation for this is their need for you to like them. As any lawyer will tell you, you don't have to like a client to do

a good job for them. Indeed, in some instances, liking a client can make you less objective.

In criminal matters, clients will often insist on their innocence. Yet, when the prosecution divulges the details of their case against your client, the inescapable reality of your client's guilt may be obvious. Nevertheless, the client often wants counsel to believe in their innocence, thinking that their counsel will only work hard and do a good job for an innocent client. This is not correct, of course. If law firms worked only for innocent clients, very few accused persons would have good legal representation. Part of the challenge facing good criminal lawyers is obtaining an acquittal in circumstances where their client is, in fact, guilty.

In many areas of law, clients appear to feel that the law firm is more likely to do a good job if they are representing "the good guy." In family situations, clients will deny committing petty and vindictive acts, even at the point of being faced with indisputable proof. In a personal injury matter I dealt with some time back, my client insisted he had not run a red light, although every witness to whom I spoke confirmed that he had. Ultimately, it took the statement from his front-seat passenger to break down his resistance so he would admit the obvious.

One problem with misinformation is that counsel can't make an effective case as long as the client clings to the falsehood. Few situations exist where counsel can't improve the client's circumstances based on the true facts being revealed. However, in most instances, the client can do irreparable harm by misdirecting counsel.

Most clients don't tell outright lies, but many shade the truth. During your client interviews, you should be alert to a client's tendency to shave off negative information. You need to ensure that when you ask a direct question you get a direct answer, not one that could have two meanings or is so vague that it hides the truth.

> ***How fast were you going?***
> Pretty much the speed limit.
>
> ***How many drinks did you have that night?***
> I wasn't intoxicated.
>
> ***Were you having an affair?***
> My wife and I have not been getting along.

One potential way of dealing with this phenomenon is to "add back"—to assume exaggerations, based on your assumptions about how much shaving was done by the client. There are two concerns here. First, it adds another layer of dishonesty to your relationship with the client—and your client feels they have gotten away with their white lie, when in fact you haven't

accepted this information at face value. By doing this, you are taking an oppositional stance in relation to your client, which is clearly contrary to your role in representing them. In its worst form, the client realizes your tendency to discount what they tell you, and they therefore feel compelled to inflate the story further to compensate for the discounting.

The second problem is that you have reinforced your client's opinion that it is okay to mislead the law firm. In this scenario, the client concludes that you are turning a blind eye to the misstatement, that you are not concerned with the truth where it may harm the client's case. That is, the client comes to believe that the two of you are engaged in a conspiracy in the fact finding.

Your relationship with the client must be established on the basis of trust and openness. If you allow a double standard to exist, you acquiesce in the client's actions, undermining these cornerstones of your relationship. How is the client to know when you really want them to be truthful and when you are condoning a discrete modification of the facts?

Control Freak

Some people need to control every situation they are in. One sign of this is the client carefully offering you snippets of information. These little packages are provided on what the client perceives as a need-to-know basis. In other words, the client insists on determining what is important for counsel to know and what is best left unstated, perhaps never to be revealed. In this case, counsel acts with tunnel vision on the issues.

This is not only discomforting but also dangerous: counsel will not see the Mack truck until the fatal collision is imminent. Behaviour like this should not be permitted. It really must be an all-or-nothing agreement. A woman can't be a little bit pregnant, and a client can't be a little bit represented. If the law firm is representing the client, then the firm has ultimate responsibility for the effectiveness of that representation. Not only is the client harming their own case, the reputation of the law firm is also on the line. If the firm ends up looking stupid because the client was playing games, and if the firm could have avoided this by shaking the client out of this controlling approach, then the client's team probably *is* stupid.

As early as the first interview, the client must be informed of the importance of complete openness, but, additionally, the client must understand that nothing less is acceptable. This message in its full-frontal bluntness should be presented by counsel dealing with the file, but it is a message that can and should be reinforced in all interviews with the client. You, as an interviewer, will probably have more client contact than the lawyer responsible for the case, and it is vital that you present a united front to the client about the type of representation your firm will be providing.

Lend a Helping Hand

Now here's a strange thing. Clients are more likely to contribute effectively to resolving their concerns if they like you. What's this all about? Why should liking the people you hire to resolve your legal problems matter?

You might better understand this phenomenon in this way: when you are in love, really in love, there is nothing you wouldn't do to help your chosen one. The old expression "I would give my right arm for … " comes to mind.

Now, consider the guy who gave you the finger as he cut you off in traffic. When you see him five minutes later with his car hood up, frantically waving at you for assistance, you would need to be a saint to go to his aid.

The point? We tend to be more willing to help those people whom we like and to whom we feel close. That becomes even stronger if we perceive that our relationship is such that they will be there for us in the future.

Clients behave in a similar manner when interviewed about their legal concerns. If clients take a liking to you, they will be attentive, interested, and cooperative. They will go out of their way to ensure that you have a clear picture of the events and will care more about making your job easier. Without a good rapport, your client may visibly withdraw from the interview, folding their arms and sitting back in their chair. Their answers may become monosyllabic and even misleading. The client can appear to adopt an attitude of "figure it out if you're so smart" or "I'm paying you to deal with this, so do your job."

The short-sightedness of this approach is obvious. However, the client's response is an emotional one, and either the client is unaware on a conscious level of what they are doing or unable to stop this behaviour in spite of their recognition of what is going on.

I don't mean to suggest that all clients have to like all of the people they deal with in the law firm, but it is important that, at the very least, clients do not *dislike* the people they are dealing with.

Clients need to feel comfortable in discussing the details of their legal matters; otherwise, they may withhold information. They have to have a sense that what they say matters and that you care about them and the troubles they find themselves in. If they feel that you are receptive to them and to their perspective on the legal issues they face, clients will feel more at ease in sharing information with you.

The *strategy* of having a client feel liked and supported is not meant to be dishonest. Most people are likeable, albeit often more likeable when they are not stressed out by their legal woes. The particular effectiveness of this strategy is that as you continue to work positively toward a solution to the client's legal concerns, the client becomes more likeable; they become a helpful and trusting person in your life. You reinforce them in their efforts to deal

with a difficult situation, and they reinforce your sense of accomplishment at handling a difficult task well.

Working in a law office can develop your sense of self-worth because you can be a very valuable person, making a huge contribution to fixing some terrible problems, even some grave injustices.

Your Problem, Not Mine

When clients seek legal advice, they are hiring the law firm based on a perception of its expertise. This is a good thing, although it brings with it a high level of responsibility. Law firms are well paid to provide excellent service and so must provide the highest level of representation to the client.

A potential pitfall here, however, is that the client may see it as the role of the law firm to figure it all out. The client can then assume a passive role in the whole process. Somehow, in this scenario, the client's legal concerns become the law firm's problems, not their own. Now, a measure of this is a good thing. The client should find a sense of relief in placing their problem in your hands and relying on your expertise. But it also can lead to the client resisting your efforts to involve them in solving the legal issues. This client may resent having to attend meetings; may expect you to fill in gaps in the information on your own, even where the information may be at the client's fingertips; and they may not bother to check the information you have acquired, even when given the opportunity to review pleadings or notes from meetings.

This attitude may stem from the client's lack of understanding of their importance in the process or perhaps from an insecurity about their ability to assist with the legal matters. Whatever the reason, the lack of involvement by the client can be very detrimental to the potential success of their legal conflict, and it must be addressed.

From the beginning of your involvement with a client, it should be emphasized that your representation is a cooperative effort. The team tackling the client's legal matters gains its strength from how focused and smoothly it operates. Each person has a vital role in the success of the operation. The client must understand that these statements are real and not token suggestions patronizingly made to give the appearance of a client-centred approach to problem solving.

Clients' true commitment to helping you help them will only come to the extent that they believe in the law firm's commitment to this approach and adopt it as their own.

Stress

The role of stress cannot be overemphasized. It can impair the way clients function as reliable witnesses. This is a frequent phenomenon in court: a client

who was clear and precise in interviews outside of court suddenly becomes a babbling fool on the stand. Counsel has to prepare a client for testimony or examinations for discovery, but as an interviewer, whether you are counsel or paralegal support, you should be prepared for the outbreak of incoherence to happen, even in the office.

To clients, a law office can be an intimidating place. Their initial visits are often the first time they are obtaining legal advice. The mystique surrounding a law practice can be a disservice when it comes to gathering information from an overly stressed client. It may seem strange, but for your client, being in a law office with thoughts of the legal process sweeping over them can be a debilitating experience.

This stress can cause your client to blank out on dates and other details, which causes more stress, resulting in fumbling answers, and more stress, and so on. The litigation itself may have potential outcomes that would be devastating to the client's life, and their fixation on that aspect may virtually disable the client from functioning in their normal manner. Having a client relive traumatic events can cause them to freeze or even misstate facts in surprising ways.

Naturally, one of the best approaches in dealing with this situation is to make the client feel more comfortable. Practice, as with so many things, improves performance. Creating an atmosphere of trust and acceptance is important in breaking through some of the barriers that arise in this situation. However, if you have concern for the accuracy of any information, it is your duty to check it.

> ***Now, you told me that you had two bottles of rye before leaving home that night.***
> Did I say bottles? I meant glasses, sorry.

If a client is traumatized, it may be necessary to give them permission to emote. Simply saying to a client that they can take a few minutes to gather themselves together is often enough acknowledgment of the significance of the events. It permits the client to get back on track with the interview. If it isn't sufficient time and the client needs a bit of a break, it is far better to take the break than to try to force the interview ahead with the client emotionally distracted.

AUTHOR ASIDE

I heard a witness in an immigration matter who was trying to sponsor her husband to come to Canada. When asked by her counsel what her birthdate was, she insisted her birth year was 1990. This would have made her 12 years

(*Continued on next page*.)

old. She certainly looked to be in her early 20s, and her birth certificate showed that she was born in 1980. However, no matter how her counsel put the question to her, she kept insisting she was born in 1990. We all shrugged, and her counsel finally gave up on the effort to get her to say the right thing.

Memory problems can be an obstacle to obtaining good information from a client, even when the client has the best of intentions. It may be a momentary distraction, confusion, or simply an inability to focus at that point that fuels the memory loss. And while I always encourage a caring and empathetic approach, there is a role for a little tough love in an interview. You can be too lenient with a client.

> *Now I know you are having difficulty remembering the details, but we need to have more information to help you. I want you to go back in your mind and really work at giving me the details. I know it's hard work* [or unpleasant, tiring, stressful, frustrating—pick one]*, but I am confident that you can help me out.*

If you say, "That's okay, we can come back to that later," that suggestion can be a caring response, but it may be a little too easy. The "later" may never come, particularly if your initial interview is close to the events and therefore valuable information may be lost with a delay in the interview. For some people, memory loss is remarkably exponential over time.

Having said this, one has to be careful in breaking out the hot lights and rubber truncheons. Simply being considerate and attentive to clients' needs will go a long way in helping them relax so that they can assist you with acquiring the information your firm will need in representing them. Firmly pressing the client for more information has its place, but that technique should normally be used sparingly.

Politeness

Canadians have a reputation for being polite, but politeness has its dangers. Considerable difficulty can be created if a client, through politeness, declines to correct errors you are making in gathering information. The need to have permission to correct a mistake seems silly, but it is very real for some people.

This may help explain why a client can hear you say something they know to be wrong and not correct you. Whereas, if you ask them to confirm whether you have recorded the information correctly, they will immediately show you where you went wrong.

There is a related concept that should also be kept in mind when interviewing a client, particularly for the first time. For some people, certain

conversations are very difficult because of the social relationship that exists. For example, a man may have difficulty discussing certain things with a woman, particularly if he perceives that the topic may make him seem less manly. Likewise, a woman may not want to discuss intimate matters with a man she barely knows. A young person may not feel comfortable with an adult but may be able to discuss matters freely with his peers, and so on. Age, sex, religion—there are many barriers to open communication. You can allow these obstacles to thwart your interview, or you can work to overcome them.

Canada is a multicultural country, something we are rightly proud of, but with this mixture of cultures comes a mixture of traditions, attitudes, behaviours, and perceptions. The range of cultural practices can run from the custom of using both hands to give someone a business card to the awareness that in certain cultures a man should not offer to shake a woman's hand. Needless to say, unless she is guided by the latter custom, a woman is likely to be offended if a man shakes hands with the men present and does not offer her his hand. In a nutshell, you just have to learn the rules. I have not met anyone professionally who could not get over a cultural lapse, provided it was an honest mistake resulting from simple ignorance of a particular practice. In fact, most people will be impressed, perhaps honoured, that you have taken the trouble to study their cultural practices and incorporate them into your dealings with them. This can only enhance your working relationship.

You must find ways to deal with a client's "interview resistance." A rare instance of terminating an interview because a client is uncomfortable with an interviewer is not a serious problem. However, if it happens frequently, the law firm will have to consider having someone handle interviews who can deal with the clients more effectively.

Developing rapport with the client, using empathic interventions in the interview, confirming the importance of having all the correct information, and simply being a good listener will all help in this task. And you can use the force of your magnetic personality to persuade clients to confide in you.

On the other hand, ignoring the obstacle will not work. If there is a problem that interferes with your communication with the client, put it on the table and deal with it!

> ***Mr Williams, I notice that you are somewhat nervous about discussing the sexual assault allegation. We do need to have a clear picture of what happened. Is there something I can do to help you talk about this?***
> No … it's just that … well, it's difficult to talk about with a … girl.
>
> ***Well, it's nice to know someone still thinks of me as young, but you should know that I have been dealing with matters like this for many years, and I think I can safely say that nothing you will tell me will be upsetting or embarrassing to me.***

A little humour will usually help, but you must make a concerted effort to help the client through this block. You may be dealing with a client over a number of years, and you can't go running for help every time something uncomfortable crops up.

What's That Got to Do with Anything?

Many clients will screen out information, not because they are worried about how it will look for them but simply because they don't think it is important. The importance might be obvious to a person with legal training, but not to the client. When the importance becomes obvious, counsel might ask the client, "Why didn't you tell me that before?" The typical answer to that question is "You never asked." This scenario will often present itself when dealing with the controlling client, but is not limited to that personality type.

Counsel conducting interviews will often strive to limit the amount of talk from the client. This stems from a fear of the babbling brook that can't be stopped and the common experience of counsel that there simply isn't enough time to do everything. It may also point to an arrogance that says, "I know what is important, so I'll ask the right questions and you limit your answers to those brilliant and insightful questions."

The combined effect of the client self-limiting by screening out information that they deem irrelevant and the interviewer limiting the client by narrowly programming the question–answer process is almost certainly guaranteed to lose valuable information.

To overcome these obstacles, it is important, particularly in the early stages of fact gathering, to invite the client to provide as much information as possible. The client should be encouraged to tell you everything about the incident(s), without worrying about screening out information. You can assure the client that you will be capable of determining what is important from the body of information they provide. And BE PATIENT. The client will get there.

Generally speaking, clients can be trusted to make intelligent decisions about what is relevant to their legal concerns.

In some instances you can appeal to your client's better instincts: they might be more inclined to provide full particulars if they understand the importance of the information that you are requesting. If they realize the benefits of having good information (and the problems created by poor information), they may see the advantage for their case and work harder at assisting with information gathering.

Occasionally, you will need information from an interviewee to help someone else out—for example, if you are interviewing a witness who saw an accident where your client was injured as a result of another person's

negligence. The appeal to a witness's civic spirit is not entirely lost, even in today's cynical world.

Personality

All other factors aside, there could be just that "something" indefinable between you and your client that just doesn't click. It may sound easier said than done, but you have to rise above those feelings. People under stress often do not exhibit their best side. You must draw upon the calm, caring part of yourself and not react to those traits or actions in this person that seem to bait you. If you don't have a calm, caring part in you, then borrow it for the length of the interview. You are a professional and, like doctors who don't get to choose whom they treat, you must work with everyone the firm represents.

If you can't bring yourself to conduct interviews in an open and sensitive way, then that is an issue between you and the law firm. You are, quite frankly, less valuable as an employee if you are not able to provide excellent service to all the firm's clients.

There may be aspects of your personality that could cause unwanted reactions from some clients. You may strike the client as too abrupt, impatient, distant, hostile—any number of less-than-flattering characterizations. While learning to be a good interviewer, part of the necessary introspection that you must undertake is to understand how you appear to others. This is particularly important when it comes to persons that you meet professionally, clients most of all.

You can pursue your understanding in this area through practice and feedback, open discussions with lawyers or other personnel who observe interviewing, from time to time, and even from conversations with clients. Having a frank discussion with the client as to how they felt about the interview can help to overcome any negative reactions they may have had during the interview process. It can also open up lines of communication, helping you to work more effectively with the client.

Part of your job is to keep options open with clients. Developing solutions is up to the lawyer to work on with the client, unless you are authorized to advise the client in this way. Your contribution as interviewer is to accumulate information that will fuel the advice leading to solutions, to ensure that the client is comfortable with your involvement in the process, and to encourage the client to keep an open mind about strategies and expected outcomes.

Appendix B lists various obstacles to client communication, possible explanations for them, and some suggested tactics to overcome them. Appendix C lists the main types of avoidance responses people employ,

with some suggestions as to why clients use them and a few tactics that interviewers can use to deal with them.

To end on a positive note, I am sure you will be able to overcome the petty annoyances that will surface as you learn to be a legal interviewer. You are clearly an intelligent and adaptable person or you would not be where you are now.

REVIEW QUESTIONS

1. Outline four factors that can impair a client's ability to talk openly about their legal issues.
2. What two elements of initial client contact are important for you, the interviewer, to do well?
3. Why is it important to deal with the emotional aspects of a client's concerns?

EXERCISE

1. In your interactions with people over the next week, both at work and in your non-work life, observe how both of you are interacting. Consider the motivation behind each person's approach to their behaviour and speech. Consider the effectiveness or ineffectiveness of each person's approach and try to listen more than you talk.

ROLE PLAY

One of the best ways of learning to be an effective interviewer is to do mock interviews, particularly where you have the benefit of receiving thoughtful criticism. Role play suggestions have been included at the end of chapters in this text. The idea is to enlist friends, other students, or co-workers to play client to your interviewer. You can invent a scenario, replay an actual situation you have experienced, or take a fact pattern outlined in the text and run with it. The most important thing is to be realistic and to make the interviewer work for the key facts. And, while your partner might not want to give you a hard time, definitely don't let your "client" go easy on you. These exercises can and should be very real.

Client

In this role play, you are a widowed senior who has been taken advantage of by an unscrupulous contractor who has signed you up for a household maintenance contract for $1,500 per month so "you can be assured that your house will still be standing when you pass the property on to your loved ones." The house is in great shape, as it has always been well maintained. You

should be a typical elderly person, intelligent and capable but not managing things as well as you did in your prime. You were an accomplished worker and own your home as a result of managing your finances well and carefully setting money aside. Currently you get by fine on your pension but do not live an extravagant lifestyle. After signing up for the house maintenance you went over your accounts and realized that you will have a very difficult time with these monthly payments. You also noticed that the contract has a penalty clause that is incredibly high. You are frightened about what will happen and mortified at your stupidity in getting into this mess. You definitely don't want to bring your grown children into the situation, since they have their own lives and worries and do not live close by.

Many provinces have provisions regarding door-to-door sales that allow for cancelling a contract with no questions asked within a certain time limit. Check that out for your jurisdiction and consider inserting into the interview a situation where if the interviewer acts quickly the problem can easily be solved.

Interviewer

While it may be hard for those of us who are wary of sales pitches to appreciate, a person who is lonely and feeling vulnerable can be easy prey to someone adept at exploiting insecurities.

As the interviewer, you must explore the interactions leading to the signing of the contract to see if there is a basis to void the agreement and recover what the firm can for the client. For the purpose of this role play, I have imagined a client who feels a bit foolish and guilty for being duped, but also wants to be helpful and is overly agreeable with the interviewer, just as they may have been with the agent who signed them up for the household maintenance contract. For example, the interview could go like this:

> ***Good morning, Mr Sido, how are you today?***
> Oh, can't complain, can't complain. Kind of you to ask. How are you doing?
>
> ***Very well, thank you. Now if you don't mind, I would like to ask you about the household maintenance contract.***
> As you wish—though I can't imagine anything can be done about it. A bit of a slip up, you know, fine print and all.
>
> ***Well, these things happen more than you might imagine, but let's start with that point, the fine print. Did you read the contract before signing it?***
> Of course, I always read things before signing them. Isn't that what you're supposed to do?
>
> ***Hmm. What would help me the most, Mr Sido, is to look at exactly what happened, not what should have happened. That way we will be sure to have all the information we need. It's a pretty long document here, do you recall what it says?***

My goodness that is a long document—I might not have read all that. You know, skip to the good parts. Is that all right?

Please don't worry about what I think, let's just find out more about what happened. When you sat down with the salesperson, did you get a chance to read what you were signing?

He was a very nice young man, very nice. Asked about Pippi, my cat, and all. When I started to read the thingy, he said he could tell me what it said, you know, in language I could understand, and he did, so that's as good as reading it, right?

I see. What kind of things did he tell you about the contract?

The important things, like where the date goes and where to sign—oh, should I be saying that I was never told those things?

Not at all. Just tell me exactly what happened, and we will then know the best way to help.

You're so patient with me. I wish I wasn't making this so hard for you. If you just tell me what to say, then that will be easier. I want to get this right for you.

Let's try this. How long did the meeting take when you signed the contract?

Well, I'm not … actually I put the kettle on for tea, but by the time the water boiled it was all over and that nice young man had to rush on to his next appointment. They work so hard, those young people, don't they?

Yes, too hard—in this instance, way too hard. Let me ask … .

So, you get the idea. The client is trying to be helpful, doesn't want to say anything bad about the other party, doesn't want to cause trouble for the interviewer or the "nice young man" who fleeced them. They don't want to think ill of anyone (that part is your job) and would be willing to change what they say to help the interviewer out.

Your task is to draw out facts—reliable information that can form the cornerstone of your representation of this person. It is important to do this fully while at the same time not re-traumatizing your client—and believe me, this experience would be very traumatizing for an elderly person who is likely worrying about finances, whether their mental faculties are failing, and how their grown children will react to this if they find out. It's a different subject, but I have a friend who was on a telephone call with her mother, and her mother, in remembering a date, said, "That was after your father's cancer treatment." My friend tells me she almost collapsed, because her parents had not mentioned the cancer treatment—they "didn't want to worry her."

General Comments for Client and Interviewer

Just to underscore the point, this scenario is not meant to be acted out by memorizing lines. It is simply an example of how such an interview might progress. What is key is that the interviewee plays the role of the kindly, accommodating elderly person and the interviewer sorts through the barrage

of niceness to find out objective information that will help with the legal dispute. Taking from the above sample interview, we can't expect the client to have tracked the precise amount of time that the whole interaction took. But we can find out how long it takes for the kettle to boil, and we know that it took less than this amount of time for the transaction to complete. There is no way that the client read the whole contract in this time, and given his accommodating personality, it is likely that he just signed where the salesperson pointed.

A side note: This witness is lacking in guile, which could work to his advantage in a hearing because an adjudicator may find him very credible. However, it could ultimately be a disadvantage if he is inclined to agree to everything counsel says in cross-examination: "You're an intelligent person, so you'll agree with me that you knew exactly what you were getting into when you signed this contract … ."