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INTERVIEWING CLIENTS ETHICALLY

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GOOD INTERVIEWING AND COUNSELING SKILLS are important to lawyers on at least three different levels:

--Malpractice--"The better I am at developing these skills, the better evaluator, pleader, litigator, negotiator, counselor, and problem solver I become. The better I am at developing these skills, the better my relationships with clients will be. Both of these things should reduce my susceptibility to malpractice claims."

--Ethics--"The more I communicate with my client, the less likely it is I will have an ethics complaint filed against me. The better I am at developing these skills, the more likely it is that I will fulfill my ethical obligations to maintain the integrity of the profession, make counsel truly available, preserve confidences and secrets, exercise independent professional judgment, and serve my clients competently and zealously."

--Business--"The more I know, the more effective I can be. The more effective I am, the better my reputation will be. The better my reputation, the more freedom I have, both economic and intellectual."

WHAT DO INTERVIEWING AND COUNSELING SKILLS HAVE TO DO WITH JUSTICE?

Perhaps the key to effective lawyering is good communication skills. A lawyer must communicate with clients, witnesses, interested parties, adversaries, lawyers, judges, juries, and others to be effective. But communication with clients (or potential clients) is where it all begins. If the communication is ineffective at the start, it is likely that the entire process will be endangered.

The Canons of Professional Ethics

So what do the rules of ethics have to offer us in terms of our communication with clients? The Canons of Professional Ethics (1908) had very little to say about it.

Specific Canons

Canon 8 says "A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation . . . . Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or end the litigation."

Canon 32 advises that "No client . . . is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law . . . . He advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law . . . ."

The Code of Professional Responsibility (1969)

The only place the Code of Professional Responsibility addresses interviewing and counseling, albeit indirectly, is under the rubric of Canon 7, which states " A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Specifically, EC 7-7 provides "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on the lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense." (Emphasis added.)

Further, EC 7-8 states "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible." (Emphasis added.)

Mutual Trust and Respect Important

It is unfortunate that the Code of Professional Responsibility does not raise any of these points to the level of enforceable disciplinary rules. Nevertheless, one common thread that runs through the Canons and the Code of Professional Responsibility is the notion that a lawyer and client have a relationship of mutual respect and trust, where the lawyer and client may speak openly and honestly about options and objectives, and the lawyer can help the client achieve objectives in a lawful and moral manner.

Therapists' findings are instructive on this point. Most experts say that people dealing with therapists and others in the "helping professions" value the following elements the most in their relationships with "helpers":

--Trust in the counselor;

--Being understood by the counselor;

--The counselor's acknowledgment that the client is allowed to make independent choices; and

--Open and honest communication.

The Model Rules of Professional Conduct

The Model Rules of Professional Conduct, which are now in force in over half the states, are at least a little more explicit than the Code of Professional Responsibility in this area. In addition to reiterating some of the lofty goals enumerated above, they also raise the ante on expectations, thereby raising the specter of both discipline and malpractice liability. Although the violation of a disciplinary rule is not usually enough to constitute malpractice, the behavior itself may be evidence of malpractice. If nothing else, the rules are intended to be a reflection of the expectations the law imposes on the lawyer-client relationship.

Specific Rules

Rule 1.1 states "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." According to Rule 1.2, "A lawyer shall abide by a client's decision concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued . . . . A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." (Emphasis added.)

Rule 1.3 provides "A lawyer shall act with reasonable diligence and promptness in representing a client." Additionally, "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information . . . and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4. (Emphasis added.)

"Neglect" a Common Problem

There is good reason to make the duty to inform clients an enforceable one. Studies consistently show that the failure to keep the client apprised of a case's progress is one of the most common problems in attorney-client relationships. The most frequent complaint is based on "neglect of a matter," which often means nothing more than that the lawyer has not kept the client informed of the rate at which matters can be expected to move.

The duty to keep clients well informed has even made its way into the American Bar Association Lawyer's Pledge of Professionalism, which states "I will keep my clients well-informed and involved in making the decisions that affect them." As part of this decision-making process, "a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."

Also, the ABA standards on the Defense Function are even more explicit. Standard 4-3.2 states "As soon as practicable the lawyer should seek to determine all relevant facts known to the accused. In so doing, the lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses."

When Is a Client a "Client"?

One thing to note is that all of these rules deal with a lawyer's duty to a "client." As obvious as that is, it is worth mentioning that how a person actually becomes a client is not covered by the rules of ethics, but by the substantive law of contract. The test is a subjective one, focusing on the lawyer's and client's states of mind, especially the client's. Nevertheless, courts focus on objective factors such as the payment of fees, the request for and receipt of legal advice, reliance upon the lawyer, and the like in deciding whether a lawyer-client relationship has been created.

In recent years, several cases have dealt with the question of whether a person became the lawyer's client even though the lawyer and client never explicitly entered into a long-term relationship. In other words, people sometimes become "clients," thus invoking all the principles relating to malpractice and discipline, without the lawyer's specific agreement to become the person's lawyer. Therefore, you must tell the interviewee exactly where you stand (preferably in writing following the initial interview) when you have made your decision about continuing a relationship with the interviewee.

WHAT IS AN INTERVIEW ALL ABOUT?

An interview has been defined in many ways, but perhaps the best definition is this: "An interview is a (face-to-face) conversation with a purpose (or purposes) and a direction." You might want to ask yourself whether your interviews have both purpose and direction. In terms of purposes, there are at least five:

--Getting information. Keep in mind that "information" comes in many forms and the process is a continuing one. Sometimes the information that is conveyed is that which you least expect or desire to gather;

--Giving information. Unfortunately, however, lawyers tend to talk too much and in tongues;

--Expressing and exploring feelings. This is the least well understood and executed by lawyers. Lawyers are apt to think that "feelings" are the province of therapists and mental health counselors and that they are unnecessary or superfluous to legal interviews. In my view, how things are communicated (the process) may be at least as important as what things are said (the content);

--Problem solving. If you haven't helped your client "solve the problem," your time and the client's time is being wasted. Sometimes "solving the problem" means letting the client know that the problem cannot be solved through legal means; and

--Planning for the future. You and the client must have a common understanding of the goals to be achieved and the method(s) for reaching those goals. The success of your venture is directly related to the clarity with which your shared goals and methods are communicated. It is essential that you have a very clear understanding of what your client's real "goals" are. Sometimes those goals are beyond the province of the legal system.

In terms of direction, having a method for conducting interviews is important. More on that later.

HOW GOOD ARE MY INTERVIEWING SKILLS?

There are two common myths about interviewing. One is that everyone can do it and that training is unnecessary. This myth is encouraged by traditional legal training which makes no attempt to teach the three skills most often used in practice: interviewing, counseling, and negotiating. The second myth is that people are born as good or bad interviewers and that training is a waste of time.

My own experience tells me that neither one of these myths is true. You can and should learn proper interviewing techniques. Since it's never too late to learn, here are some questions that may prove helpful in evaluating your own interviewing techniques. Every "no" answer points to a potential problem.

Did I "Break the Ice" First?

Studies indicate that people may fear going to lawyers as much as opposing them. Lawyers need to "acknowledge" the fear by making explicit attempts to put people at ease by "reducing the strangeness" of the experience.

Did I Explain the Interview Process to the Client Before We Got Started?

Was there really a process at all? Once I explained the process, did I live up to the "contract" to conduct the interview in the manner promised? If not, did I acknowledge the reason for varying from my stated format?

Suggested Five "Stages" in the Process

My interviews are composed of the following five "stages":

--Icebreaker. Noncontroversial introductions, including an introduction to the process (i.e., methods, time limits, follow ups, etc). This is also a good place to initiate the "conflicts screening process." You must get enough information to decide whether it is even appropriate to continue;

--Initial problem identification. Sometimes known as the "gush," this is where the client first gets to talk openly. In addition to identifying the "problem," the lawyer should ask the client about expectations and goals. Try to limit note taking to "trigger notes" (i.e., notes that will trigger later questioning);

--Chronological overview. This is the stage where the client retells the story, with an emphasis on chronological order. It's still too early to ask too many questions. Whatever questions are asked should be for clarification only;

--Verification. The aim here is to support potential solutions to the problem by filling in gaps. This is the point when you start to "funnel" your questions, using "secondary" or "follow up" questions;

--Closure. Where do we go from here? The most important question to deal with is whether you now have an attorney-client relationship.

Did I Explain Confidentiality?

There is little, if any, evidence that confidentiality plays a major role in the attorney-client relationship. Nevertheless, you must make the client understand that a relationship of trust is partly supported by the promise of confidentiality.

Did I Give the Client My Undivided Attention?

Think about possible distractions here. They may range from the papers on the desk to the ringing telephone to a client's peculiar habits, looks, speech, etc. Notes are often nothing more than a distracting crutch. Do you listen more than you talk?

Did I Control the Interview Without Being "Controlling"?

Lawyers often approach clients as if they were "cases" that can be handled by using a checklist, whether that list is in the lawyer's head or on paper. Consider who determined what subjects were covered in the interview and at what time.

Did I Ask Mostly Open-Ended Questions Before Closed-End Questions?

Open-ended questions and narrative answers elicit more information than closed-ended or directed questions and answers. Although open-ended questions are generally better at getting the conversation started, they may not always be preferable. Varying the types of questions is helpful.

Did I Periodically Check My Understanding with the Client?

Summaries are valuable. They tend to: show the client you are listening; keep the interview on track; aid memory; and clarify things for the speaker and the listener.

Did I Avoid Concluding Too Early in the Interview What the Problem Was?

The danger of the "premature diagnosis" is a very real one. It can mislead and stifle the process.

Did I Find Out What the Client's Real Objective Was?

Find out exactly what it is that the client wants. Lawyers think in terms of legal solutions and approach problems accordingly. The fact that a client has sought a lawyer's help does not mean that the best solution is a legal one.

Did the Client and I Nonjudgmentally Explore Alternative Solutions?

Did I recognize the existence of non-legal problems or solutions? Brainstorming with the client is essential.

Did I Communicate Empathy and Understanding?

The evidence is overwhelming that clients are more likely to be complete, accurate, and honest if they believe the listener is empathic.

Did I Effectively Handle Questions I Was Unable To Answer Immediately?

Did I say "I don't know" when I didn't know? Did I say "no" instead of "maybe" when the answer should have been "no"? Did I make sure that important questions or concerns were adequately addressed?

Did I "Hear" Things the Client Didn't Say?

Did I pay attention to "when" and "how" things were said? Pay particularly close attention to: word emphasis; unresponsiveness; adjectives; and gestures.

Did I Acknowledge and Respect My Client's Feelings?

Although you are not expected to be a therapist, remember that feelings are facts. Even if you can't make the problems go away, you can at least acknowledge them. This will help in your honest evaluation of your client's strengths and weaknesses, as well as showing the client that her feelings "count." Try to focus on "what" questions instead of "why" questions.

Did I Leave the Situation Where Fairness and Honesty Demand That It Be Left?

Sometimes the hardest thing to do is to say "no." Considerations of fairness and honesty, as well as potential liability, demand that you give clients the bad news when it is warranted.

Did I Deal With the "Hard Stuff" Myself?

Some lawyers don't like to talk about money with their clients, leaving fee agreements, etc. up to their secretaries, paralegals, assistants, or (even worse) the mail!

Did I Pay Attention to the "Environmental" Factors?

These factors include proximity, lighting, and seating. They are very powerful in communicating messages about importance, sharing of responsibilities, etc. Are they communicating the messages you want them to communicate?

Do My Client and I Have a Relationship Based on Mutual Respect, Trust, and Understanding?

Keep in mind that although the client is the boss and you are the employee, this relationship is unique and requires open communication.

Does My Client Know What His "Role" Is?

Clients should not be treated as passive recipients of services. Give them a stake in the enterprise and they will be more likely to help you. They'll also be more likely to accept responsibility if things don't turn out exactly as planned.

DO I KNOW HOW TO LISTEN?

Contrary to popular belief, talking is not the lawyer's most important task in conducting interviews-- listening is. The following are some rules for learning how to listen.

--Be attentive and create a positive atmosphere through both verbal and nonverbal behavior. When you are alert, attentive, and nondistracted, the other person feels important and more positive;

--Don't tune out to difficult material. You can always come back to it later on if need be;

--Learn to listen actively and passively. Active listening consists mostly of "mirroring" what is heard, summarizing occasionally, and encouraging the client to continue along productive paths. Passive listening consists primarily of using extralinguistic sounds to demonstrate your interest ("Uh huh, I see, hmm");

--Don't interrupt, unless you need to change the subject;

--Don't imagine things or compare your own experiences to those of the client;

--Don't rehearse in your own mind;

--Don't cross-examine;

--Don't teach or lecture;

--Don't be afraid of silence; and

--Use and pay attention to eye contact, "body language," facial expressions, posture, etc.

Inhibitors

Inhibitors are those factors that make a client unable or unwilling to communicate accurately. Some typical ones are:

--Competing time demands. If either of you really does not have the time to do an adequate job, it might be worth exploring the possibility of rescheduling;

--General anxiety. Many, if not most, people are very fearful of lawyers. One way of changing their perceptions and fears is to acknowledge them and send them a message that is different from what they expect;

--Ego threat. This comes in several varieties, but it basically consists of refusing or hesitating to admit things for fear that the interviewer will disapprove. Do not automatically assume that the failure to tell the complete truth is deliberate deception;

--Forgetfulness. Contrary to popular belief, people are not able to remember details of traumatic events better than other events--exactly the opposite is true;

--Role expectations related to role, sex, race, or socioeconomic status;

--Greater need. Sometimes the client is so preoccupied with something of "greater importance," that it is best to discuss that first;

--Case threat. Clients often do not give lawyers the bad news because of their fear that it will "hurt" their case. Do not assume that this is intentional. When you discover it has happened, be open with the client about the results of that behavior, without being judgmental;

--Trauma of reliving the event. It is sometimes best to let the client wander for a while to reduce the pain and tension associated with a particular event;

--Expectancy and "pragnanz." Pragnanz is an attempt to derive meaning from something that is unsatisfactorily incomplete. It is the result of reinterpreting past events so that they make sense. It may even occur if a person thinks that remembering will make him a "good person" or not remembering a "bad person";

--Etiquette barrier. Lots of information does not flow equally well among all persons in society;

--Chronological confusion. Once events occur, people often "remember" things out of chronological order. It's not best to press them on this immediately though, so take note and come back;

--Inferential confusion: (a) of induction, when asked to convert concrete instances to higher levels of generalization; or (b) of deduction, when a client is asked to give concrete examples of categories of experiences;

--Stereotypical expectations, in the acquisition, retention, and retrieval of information. People often have expectations regarding certain "types" of people's behavior; and

-- Problems associated with the acquisition, retention, and retrieval of information. People's ability to accurately recall information is closely related to their own age, sex, race, and other factors.

Facilitators

Facilitators are those things that help you conduct an effective interview.

--Empathic and nonjudgmental acceptance. It is well known that showing an empathic interest in the client's problem will induce greater communication;

--Recognition--acceptance plus approval. "Your cooperation is very helpful and I appreciate it";

--Extrinsic rewards;

--Catharsis;

--Altruistic appeals;

--Fulfilling expectations. You should try to create a set of realistic expectations about the client's behavior. When they do fulfill the expectations, it's good to encourage them to continue. When they do not, try the feel/felt/found technique often used in negotiation. ("I understand that you feel uneasy about discussing this. I've often felt that way myself. But I've usually found that if I just try to come back to it after I've covered all the other ground, it's easier. Why don't we try that?"); and

--Enforcing "the contract." If you and the client have certain specified duties, your fulfillment of your duty makes it easier to encourage the client to fulfill his or hers.

COUNSELING CLIENTS: EXPLORING THE ALTERNATIVES

The lawyer who employs good listening and communication skills in interviewing is well over half way home in terms of counseling his or her client. Counseling clients consists mainly of two things: identifying possible methods of meeting the client's stated goals and deciding which methods will be used. The most important part of the whole process is making sure that both you and the client keep an open mind while exploring the alternatives. In the words of Roger Fisher and William Ury, "Focus on interests, not positions." Since important decisions are up to the client, this openness must be actively communicated to the client.

As suggested before, try to concentrate more on the "what" type questions than the "why" type when you and the client are evaluating choices. In other words, ask:

--"What alternatives could conceivably address this problem?" In exploring alternatives, it's best to first name them without judging them. This serves at least three purposes. First, it prevents the premature rejection of a creative idea. Second, it gives you and the client the sense that you've exhausted all the alternatives and you've reached the best one. Third, it is helpful when entering into negotiations later on;

--"Which alternative would you like to discuss first?" Take three factors into account here. One is primacy, one is recency, and the third is status. The order in which things are discussed, and who actually chooses the order, can greatly influence the decision;

--"What do you see as the advantages of this solution?" Instead of challenging the client, get the client to articulate his or her own views about what is productive about this solution;

--"What do you see as the disadvantages of this solution?" and "What consequences will probably follow from the implementation of this solution?" In addition to understanding the cause and effect relationships inherent in certain decisions, it is important to be able to judge the likelihood that certain things will happen. Once that is done, clients can compare choices by comparing their likelihood of success, among other things; and

--"What other factors come into play?"

Paying attention to the matters mentioned above should help make you a better listener, and that should ultimately make you a better lawyer. Happy listening!

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