

CHAPTER ELEVEN

INITIAL INTERVIEWS

by Stephen Yale-Loehr*

I. INTRODUCTION

By the time an immigration attorney has practiced for six months, he or she has already spent countless hours interviewing clients. However, most attorneys, including those who have practiced law for decades, have little or no training in interviewing techniques. Often the typical interview is unstructured, reactive, largely intuitive, and rather ineffective. A well-structured, initial interview can save the new as well as the seasoned attorney many hours of time and lay the foundation for an effective client-attorney relationship.

II. PURPOSE OF THE INITIAL INTERVIEW

The initial interview is essentially a mutual evaluation of the attorney and the prospective client. At this consultation, potential clients decide whether legal services will be of use to them, whether they want to retain the services of the particular lawyer or firm, and whether the proposed terms and fees are satisfactory. The attorney gathers sufficient information to: (1) determine the goals of the client; (2) identify options for action in the case that correspond to the client's goals; (3) establish the attorney-client relationship and the scope of the representation; (4) determine fees; and (5) set a short- and long-range agenda for the case.²

Some preparation can significantly increase the effectiveness of the initial interview. It is often helpful to spend a few minutes discussing the client's situation over the telephone when setting the office appointment. This brief exchange has several benefits. First, it puts the potential client at ease and provides assurance that the attorney cares about the case. Second, it provides the attorney with sufficient information to instruct the potential client to bring necessary documents. For example, when the attorney determines that a client's case may involve criminal issues, the client should bring copies of the criminal dispositions to the initial interview. If the client's case will require documentation such as university degrees or other credentials, it is helpful to have at least some of the documents available at the initial interview.

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² See Note, "Recognizing and Dealing with Professional Responsibility Issues Arising in Initial Legal Consultations," 18 Creighton L. Rev. 1461, 1461-62 (1985) (hereinafter "Professional Responsibility Issues in Initial Interviews").

After the attorney speaks to the potential client on the telephone, he or she may decide to conduct some preparatory research about an obvious issue in the case. Even a limited amount of preparatory research suggests to the potential client that the attorney is knowledgeable and allows the attorney to identify the core facts and issues in the case more quickly.

III. MANNER AND METHOD OF THE INITIAL INTERVIEW

A. Establish Rapport

The first step in a successful initial interview is to establish rapport with the client. Rapport is the comfortable and unconstrained mutual trust and confidence that exists between two or more persons.³ An attorney can develop rapport with a potential client by acknowledging the client's feelings and expectations, regardless of how inappropriate or unhelpful those feelings and expectations may be.⁴ The client's expectations will be an important factor in the case in the long term, and identifying those expectations provides both a basis for initial rapport as well as important information for evaluation of the case. Establishing rapport assists the attorney in factually developing the case, increases the effectiveness of the attorney's legal advice, and, on a broader scale, enhances the image of the legal profession.⁵

B. Clarify the Attorney-Client Relationship

It is important that the attorney communicate the ethical obligations and the limits on the scope of the representation to the potential client.⁶

1. Confidentiality—First, the attorney is more likely to obtain essential information if he or she advises the client that the information is confidential. An attorney is required to maintain confidentiality from the initial interview, throughout the representation, and after termination of the representation.⁷ The client may want the attorney to share information about his or her case with one or more family members or acquaintances. In immigration practice, this issue arises frequently where language barriers exist and the client communicates to the attorney with the assistance of third parties. The attorney must ask the client to identify the third parties to whom the attorney may communicate information about the client's case.⁸

2. Exception: Future Crimes—Attorney-client communication may not be covered by the confidentiality rule if the client informs the attorney that he or she intends to commit a crime. This situation may force the attorney to consider whether he or she has an ethical obligation to withdraw from representation. As confidentiality rules vary among jurisdictions, attorneys should check the rules of individual states for definitive guidance.

3. Fraud Issues—In some cases, the attorney may suspect that the client is not telling the truth or is seeking to procure a benefit by fraud. An attorney may develop suspicion based on statements, inconsistencies in the client's story, or nonverbal cues. A suspicion of fraud may also arise where the client appears to block communication between the attorney and the other

³ Note, "Cross-Cultural Legal Counseling," 18 Creighton L. Rev. 1475, 1480 (1985) (hereinafter "Cross-Cultural Counseling").

⁴ Abbott, "The Anatomy of a Client Interview," 42 Prac. Law. 61, 65 (Dec. 1996).

⁵ Cross-Cultural Counseling, *supra* note 2, at 1481.

⁶ See generally Professional Responsibility Issues in Initial Interviews, *supra* note 1.

⁷ See *ABA/BNA Lawyer's Manual on Professional Conduct*. For a review of breaches of confidentiality, see J. Foonberg, *How to Get and Keep Good Clients* 236–43 (2d ed. 1990).

⁸ 81 Am. Jur. 2d *Witness* §§418-26 (1992).

parties in a multiple-party case, such as the spouse in an adjustment case based on marriage, or the employer in a labor certification case. Attorneys should advise the client of the consequences of fraud, including possible withdrawal of representation. Some attorneys advise their clients in writing of the potential consequences of intentional misrepresentation.

4. Scope of Representation—When representing clients from other countries, it is important for attorneys to anticipate that a client may hold misperceptions of the role or power of an attorney in the U.S. legal system. For example, potential clients may expect that attorneys are willing and able to commit acts such as exerting undue influence over Immigration and Naturalization Service (INS) officials or immigration judges. At times, a potential client may ask a lawyer to commit illegal acts such as bribery or fraud. Conversely, in some societies attorneys are viewed as part of a repressive legal system rather than as the advocate of the client. It is important that the attorney explain the limits of legal representation to establish trust and to avert the possibility of misunderstandings.

C. Gather Facts

1. General Techniques—The substance of the initial interview is the fact-gathering component where the attorney prompts the client to talk while at the same time focusing the interview to elicit the most relevant facts.⁹ The attorney should be in control of the interview but also allow the client to “tell his or her story” before establishing all of the essential facts. The technique of empathetic listening is a critical tool for a lawyer.¹⁰ For example, if the attorney feels that a prospective client is digressing, he or she might say, “That might be important for later, but right now we need to address...” In this way, the attorney is able to reassume control of the interview while at the same time indicating to the client that he or she is committed to ensuring the successful outcome of the case.

During the course of establishing rapport with the client, the attorney should observe the demeanor of the client and decide whether to conduct a client-directed or attorney-directed interview.¹¹ In the client-directed interview, the client tells the entire story and then the attorney follows up with questions. This method is effective with clients who are sophisticated and well-organized, and also with clients who are emotional or very nervous. In the attorney-directed interview, the attorney questions the client. This method may be preferred where the client is reticent or inarticulate.¹² Often, the ideal interview technique is a combination of these two styles, where the client begins to provide information and the attorney steers the direction of the discussion.¹³

⁹ For good articles on client interviews, *see, e.g.*, S. Loue, “A Guide to Better Client Interviews,” 89-7 Immigration Briefings 10–13 (July 1989) (hereinafter “Guide to Better Client Interviews”); Collins, “Tips for a Successful Client Interview,” 85 Ill. B.J. 441 (1997); Howarth, “How to Interview the Client,” 9 Litig. 25 (1983).

¹⁰ Gellhorn, “Law and Language: An Empirically Based Model for the Opening Moments of Client Interviews,” 4 Clinical L. Rev. 321 (1998); Kessler, “The Lawyer’s Intercultural Communication Problems with Clients from Diverse Cultures,” 9 Nw. J. Int’l L. & Bus. 64, 73 (1988) (hereinafter “Intercultural Communication Problems”); Barkai, “How to Develop the Skill of Active Listening,” 30 Prac. Law. 73, 74 (1984).

¹¹ Beckmeyer, “That Crucial First Contact: Should You Take the Case?” 6 Compleat Law. 16, 17 (Winter 1989).

¹² *Id.*

¹³ Guide to Better Client Interviews, *supra* note 8, at 9.

Regardless of the technique, attorneys should be careful not to prejudge the legal theory of the case and thereby cut off important lines of factual inquiry. After the client has disclosed sufficient facts to establish a legal theory of the case, the attorney should follow up with further relevant questions.

2. Immigration-Specific Issues—Under the current immigration system of restrictive laws and strict enforcement, several factors are critical in every immigration case. Practitioners should make every effort to determine any past criminal history of all clients. Under the U.S. immigration law, a number of crimes that may seem minor to clients, such as domestic violence, driving under the influence, or shoplifting, may have significant immigration consequences.¹⁴

Similarly, due to the bars to admissibility based on past immigration violations, it is important that the attorney determine the presence of any previous immigration history and periods of unauthorized presence in the client's case.

D. Retain the Information

It is essential that the attorney note all of the client's important information. There are a number of techniques for effective retention of information for a client's file. One is the client intake sheet that the client completes before the interview. Another is note-taking on paper or computer. Many attorneys find it helpful to develop customized standard intake questionnaires or checklists to record basic information and then ask clients to sign the document at the end of the interview.

E. Barriers to Communication in Initial Interviews

Immigration practitioners often experience barriers to effective client communication that are unique to the practice.

1. Language—Clearly an interview is more difficult to conduct where the attorney and the client do not speak the same language. There are several ways to overcome the language barrier. One is to ask the potential client to bring a family member or other interpreter to the initial interview. If many of an attorney's clients speak a certain language, he or she may choose to employ someone who speaks that language to interpret in client interviews.¹⁵

Even if the attorney and the client speak the same language, there still may be communication difficulties. For example, the client may not understand complex concepts inherent in immigration law. The attorney may use words that are unfamiliar to the client due to the client's geographic area of origin, age, or socioeconomic status. Conversely, the client may use terminology that the attorney does not understand. The attorney can reduce the impact of these misunderstandings if he or she is attentive to nonverbal cues that indicate that the client may have misunderstood.¹⁶ For example, a client may appear restless, bored, confused, or lost if he or she is having trouble understanding what the attorney is saying. To help alleviate this feeling of discomfort and facilitate the client's understanding of the case, the attorney might

¹⁴ Kaiser, "A Lawyer's Guide: How to Avoid Pitfalls When Dealing with Alien Clients," 86 Ky. L.J. 1183 (1998).

¹⁵ For a good law review article on translations, see McCaffrey, "Don't Get Lost in Translation: Teaching Law Students to Work With Language Interpreters," 6 Clinical L. Rev. 347 (2000) (discussing the difficulties of translation and ways to overcome its problems).

¹⁶ Guide to Better Client Interviews, *supra* note 8, at 3.

ask, “Does this make sense to you?” periodically to make sure the client understands and to reduce the client’s feeling of being confused, intimidated or threatened.

2. Cultural Barriers—Immigration practice often pairs attorneys and clients of different cultures. The differences between the two parties may lead to cultural barriers other than language that inhibit effective attorney-client communication. Value conflicts can impede communication where the client or the attorney does not understand the reason that the other adheres to certain value constructs. Stereotyping can occur where the client or attorney applies a rigid preconception based on membership in a racial or nationality group to the other party regardless of individual variation. Bias occurs where one of the parties has a prejudice or tendency toward a particular matter based on personal experience.¹⁷ Not recognizing one’s own prejudices is ethnocentrism, *i.e.*, viewing the world only through one’s own eyes with one’s beliefs, values, and attitudes and not acknowledging that others may not see the world in the same way.¹⁸ In general, the attorney should examine his or her own prejudices and work to minimize their clouding effects.

3. Trauma—Any legal client may require emotional support at some time, but in some immigration cases, fear and trauma may become a significant factor in the attorney-client relationship. First, many clients undergoing removal proceedings and other types of immigration proceedings experience tremendous stress. In some cases, past or present experiences can lead to trauma, a condition where an individual experiences intensely unpleasant feelings associated with crisis experiences.¹⁹

Trauma may pose a barrier to effective communication, particularly in cases where the client has symptoms of disorders such as post-traumatic stress disorder²⁰ or concentration camp syndrome,²¹ resulting from torture or extended detention. These types of conditions may lead to failing memory, inability to concentrate, intense fear, helplessness, and emotional instability. It is often helpful both for the client’s mental health as well as for attorney-client communication to refer such clients to a psychologist or psychiatrist for further evaluation.

An issue of concern when dealing with a person experiencing the results of trauma is that the potential client may see the legal counselor as therapist or emotional confidant. For attorneys, it is vital to recognize the fine line between caring legal advice and therapy.²² Legal counseling is geared toward the resolution of specific and immediate problems, not long-term therapy.²³ In these types of situations, it is advisable for the attorney to express sympathy for the client’s situation but not attempt to deal with complex, emotional issues that require professional

¹⁷ B. Lott & D. Maluso, *The Social Psychology of Interpersonal Discrimination* (1995); F. Jandt, *Intercultural Communication: An Introduction* (1998); Cross-Cultural Counseling, *supra* note 2, at 1478–79.

¹⁸ Intercultural Communication Problems, *supra* note 9, at 68; Bryant, “The Five Habits: Building Cross-Cultural Competence in Lawyers,” 8 *Clinical L. Rev.* 33 (2001).

¹⁹ Note, “Lawyers and Clients: The First Meeting,” 49 *Mod. L. Rev.* 351 (1986).

²⁰ See American Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 463–68 (4th ed. [text rev.] 2000).

²¹ A. Strom (ed.), “Psychiatric Aspects,” *Norwegian Concentration Camp Survivors* 45–85 (1968).

²² See generally Stern, “How to Respond to a Client Who Wants Comfort as Well As Counsel,” 26 *Ariz. Att’y* 36 (Mar. 1990).

²³ See Cross-Cultural Counseling, *supra* note 2, at 1476.

assistance. In some cases, the attorney should recommend a mental health professional to help alleviate emotional problems. Many communities have referral lists of professionals and peer support groups that address these types of issues. A referral to a mental health professional for an emotionally troubled client will help to clarify the attorney-client relationship, take some pressure off the attorney, and potentially result in long-term benefits to the client.²⁴

4. *Special Barriers: Children, Elderly, and the Mentally Ill*—Certain clients, including those who are children,²⁵ elderly, or mentally ill or disabled, present additional barriers to effective communication. It may be more difficult for the attorney to explain the case to the client. There may be legal issues with respect to the client’s ability to give consent. There are a number of techniques that can assist the attorney in overcoming these particular barriers. In certain situations it may be necessary to consider the appointment of a third party to represent the client’s interests, such as a guardian ad litem or a conservator. Attorneys should consult with the rules of the appropriate state to be advised of ethical restrictions governing such appointments.

F. Evaluate the Case

1. *Review Relevant Facts*—After the attorney and the client have had the opportunity to discuss the situation, it is time for the attorney to do a preliminary evaluation of the case. A preliminary evaluation begins with a review of the relevant facts. A review of the facts allows the attorney to double check the accuracy of the facts and elicit any final necessary details.

2. *Explain the Law*—Next, the attorney should explain the relevant law to the client. A well-educated and informed client is the attorney’s most valuable asset in developing relevant facts and documentation. An understanding of the case will allow the client to be an active participant in the process and to provide informed consent.²⁶ A client who has a grasp of the legal theory of his or her case will best be able to assist the attorney in identifying important facts in the case and is likely to be a more effective witness. Of course, it is necessary to explain the legal parameters in language and concepts that are comprehensible to the client.²⁷ It is often helpful to use real-life metaphors or analogies to the client’s line of work. The attorney should encourage the client to ask questions.

3. *Identify and Rank Goals*—After explaining the law the attorney should establish the preferred goals of the client. In immigration cases, it is critical that the attorney identify what

²⁴ See Weiner, “Playing Counselor Without Playing Therapist,” 2 *Compleat Law* 22, 22 (Summer 1985).

²⁵ See generally Perry, “Interviewing, Counseling, and Court Examination of Children: Practical Approaches for Attorneys,” 18 *Creighton L. Rev.* 1461, 1461–62 (1985); Smith, “Considerations When Interviewing Children,” 12 *Children’s Legal Rts. J.* 2 (Summer 1991); Lutheran Immigration and Refugee Service (LIRS), *Working with Refugee and Immigrant Children: Issues of Culture Law and Development* (1998), available from LIRS at <http://www.lirs.org>; C. Nugent & S. Schulman, “Giving Voice to the Vulnerable: On Representing Detained Immigrant and Refugee Children,” 78 *Interpreter Releases* 1569 (Oct. 8, 2001).

²⁶ Andersen, “Informed Consent: Giving Clients the Opportunity to Make Fully Informed Decisions,” 24 *Trial* 61, 62 (1988).

²⁷ See generally T. Shaffer, *Legal Interviewing and Counseling in a Nutshell* 46–49 (2d ed. 1987).

the client really wants from the case. For example, in a removal case, some clients wish to remain in the United States as long as possible with permission to work, regardless of the long-term legal consequences. Other clients may wish to return to the country of origin with minimum expense and legal complications.

In the business immigration context, some clients may wish to work in the United States for only a few years without worrying about future visas or permanent immigration. Other clients may have a high priority to leave open all possible routes to future permanent residence.

In some cases, the initial interview is also the only meeting, and the interview serves as an informational consultation where the parties decide that the client will gain no significant benefit in retaining an attorney. In each case, the final decision must reflect the goals of the client. A letter indicating that the attorney no longer represents the client may be useful to avoid any misunderstandings.

4. Create Realistic Expectations and Identify Risks—Along with understanding the specific needs of each individual client, the attorney should explain the risks involved in the proposed course of action and create realistic expectations. For example, it is to the attorney’s benefit to forewarn the client about possible delays in the labor certification process or the risks associated with failing to disclose material information. In addition, the attorney must avoid making promises that he or she cannot or will not keep.

5. Choose Strategy Toward the Solution—Based on the analysis of the facts within the legal framework, the assessment of the client’s goals, and the discussion of potential risks, the attorney and the client need to determine the best solution to the problem. It is important that the attorney does not make personal or legal decisions for the client. For example, it is not appropriate for the attorney to advise a foreign student to marry his U.S. citizen or permanent resident girlfriend, although the lawyer can advise the client on the legal consequences of the decision.

There is debate in the legal community regarding whether the attorney or the client should be the primary decision-maker. A concept that has gained some popularity is “client-centered counseling,” which emphasizes client-centered decision-making.²⁸ While a client-centered approach deprives the attorney of some autonomy and authority, its proponents argue that it significantly increases client participation and satisfaction. In any case, the direction the case ultimately takes must reflect the client’s priorities.

6. Outline the Course of Action—After the attorney and client have made the preliminary assessment and set the direction for the case, the final step at the initial interview is to identify the responsibilities of the attorney and client to further the case. The attorney will likely need to conduct further analysis and research. In most cases, the attorney should provide the client with a list of documentation and other evidence that the client needs to obtain. The attorney and client should agree on a realistic time frame to which the attorney should adhere.

²⁸ For a general discussion of the theory, see Binder, “Lawyers as Counselors: A Client-Centered Approach,” 35 N.Y.L. Sch. L. Rev. 29 (1990); Dinerstein, “Client-Centered Counseling: Reappraisal and Refinement,” 32 Ariz. L. Rev. 501 (1990). See also Hurder, “Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration,” 44 Buffalo L. Rev. 71 (1996).

IV. FEES AND RETAINER AGREEMENT

Whether or not the client articulates it, one of the most important factors to every potential client is the cost of legal services. It benefits both attorney and client to establish a clear understanding of fees for the case at the first interview.²⁹ Many attorneys choose to use written retainer agreements to provide clarity regarding the scope of the legal services and the fees for those services.³⁰ However, some clients may be intimidated by the complexity of a retainer agreement, particularly if the client is not proficient in the language of the agreement. In this type of situation, the attorney should review the contents of the document with the client before signature.

Some states require written retainer agreements and regulate the contents. Attorneys should consult with the local bar association regarding specific rules.

²⁹ See Professional Responsibility Issues in Initial Interviews, *supra* note 1, at 1467.

³⁰ Jackson, "Avoiding Malpractice and Client Complaints: Twelve Golden Rules," 47 Ala. Lawyer 269, 271 (1986). For an example of a retainer agreement, *see* 9 C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* Appendix B Exhibit 18 (rev. ed. 2001).