INTERVIEWING

CHAPTER 5

OBSERVATION, MEMORY, FACTS, AND EVIDENCE

§5.1 THE DIFFERENCES BETWEEN FACTS, INFERENCES, AND EVIDENCE

A fact is what actually happened (for example, “at the moment the car left the road, it was traveling at 82.4 miles per hour”).

An inference of fact is not a fact. It is a conclusion derived from facts (“the car was speeding” or “the car left the road because of its speed”).

Evidence is proof of a fact (“the state trooper testified that her radar device measured the car’s speed as 82.4 miles per hour”). Put another way, evidence is the source of our knowledge that a fact really is true.

Some evidence is testimonial, and other evidence is tangible. Testimony is what witnesses say in court, on the witness stand, after taking an oath to tell the truth. Tangible evidence is evidence you can put your hand on. Examples are the murder weapon, the contract signed by the parties, and the audiotapes on which people are recorded saying things they later regret.

Another way to divide evidence is into that which is direct and that which is circumstantial. Direct evidence proves a fact without the need for inference. A witness’s testimony that she saw the defendant get into a car at a certain time and place is direct evidence that the defendant got into the car at that time and place. Circumstantial evidence proves a fact through inference. If a witness testifies that he saw a car leave the road and hit a tree, that the witness got to the car a minute or two after it hit the tree, and that the witness found the defendant behind the wheel, that is circumstantial evidence that the defendant was driving
the car just before it left the road. (It is not direct evidence unless the witness
saw the defendant driving as the car left the road.)

Some of the most persuasive cases are built mostly on circumstantial evidence.
Suppose you buy an over-the-counter medication intended to open up your sinuses,
suppress your cough, and in other ways relieve you of the symptoms of a cold.
You leave the store carrying a small box wrapped in sealed cellophane bearing
the manufacturer’s trademark. Inside the box is a bottle, the top of which is
wrapped in a plastic band that also bears the manufacturer’s trademark and can
be removed only with scissors. After you have removed all this packaging, you
open the bottle and find, in addition to the medicine, the decayed remains of part
of an animal.

If you are inclined to sue, how much can you prove through eyewitnesses?
You will testify that you bought the product and removed the packaging. It would
be nice, but not necessary, if somebody who was with you at the time could testify
to corroborate that. The packaging and its contents will be tangible evidence.
Beyond that, everything is circumstantial. You will probably never find an eyewitness
who saw how the animal part got into the medication you bought. But you
do not need that witness because the circumstantial inferences from the other
evidence are so strong.

When you interview clients and witnesses, you have to think in terms of
evidence. Judges and juries make their decisions based on the evidence because
they can know about a fact only through its proof. For this reason, lawyers
develop an evidentiary instinct: when someone mentions a fact, a lawyer wants
to know what the evidence for it is.

Admissible evidence is evidence that a court will consider. If evidence is
inadmissible, it might be probative of something, but for one reason or another
the law will ignore it. The rules on admissibility are so complex that virtually the
entire law school course called Evidence is devoted to teaching them.

Although witness interviewing (covered in Chapter 7) is in many ways differ-
et from interviewing clients, nearly all clients are themselves witnesses to at least
some of the facts at issue, and clients often do testify if their cases go to trial. In
the chapter you are reading now, when we mention witnesses, we mean anybody,
including clients, who observed relevant events and might testify about them at
trial. In Chapter 7, we use the word to mean only those witnesses who are not
also your clients.

§5.2 THE MYTHS

Imagination and Memory are but one thing, which for divers considerations
hath divers names.

Thomas Hobbes

[Without corroboration, there is absolutely no way to know whether some-
body’s memory is a real memory or a product of suggestion.

Elizabeth Loftus
Much of our trust in the ability of witnesses to observe and remember accurately is based on myth. Because of that, a lawyer's ability to "know" the facts is much more limited than you might suppose. Experienced lawyers sense this intuitively, even if they are unaware of the psychological research described in this chapter. In a moment of candor, such a lawyer might tell you that it is easier to prove something than to know that it is true.

MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS
152-53 (1990)

A common misconception about memory is that it is a process of reproducing or retrieving stored information in the manner of a videotape or computer. In fact, memory is much more a process of reconstruction. Moreover, the process is a highly creative one, affecting what is "remembered" as much as what is "forgotten." . . .

Even before the process of remembering begins, . . . the content of what is perceived is often determined by the temperament, biases, expectations, and past knowledge of the witness. A great amount of what is said to be perceived . . . is in fact inferred, a process that has been called "inferential construction" and "refabrication." Experiencing a situation that is partially unclear or ambiguous, a witness typically "fills up gaps of his perception by the aid of what he has experienced before in similar situations, or, though this comes to much the same thing in the end, by describing what he takes to be 'fit', or suitable to such a situation." Thus, "recall brings greater symmetry or completeness than that which was actually observed." Moreover, the process of unconscious reconstruction continues with the passage of time, probably increasing considerably as the event is left farther behind.

We are not talking about dishonesty. A witness may reconstruct events "without being in the least aware that he is either supplementing or falsifying the data of perception. Yet, in almost all cases, he is certainly doing the first, and in many cases he is demonstrably doing the second." The "vast majority" of testimonial errors are those of the "average, normal honest" person, errors "unknown to the witness and wholly unintentional." Such testimony has been described as . . . "subjectively accurate but objectively false."

An interesting illustration of the tendency to eliminate ambiguities by imaginative reconstruction was provided in the Senate Watergate hearings. John Dean, who had been President Nixon's White House Counsel, was testifying about a meeting with Herbert Kalmbach, who had been Nixon's private attorney. Dean had no incentive whatsoever to lie about that particular incident; indeed, it was extremely important to him to state the facts with as much exactness as possible.

Dean testified that he had met Kalmbach in the coffee shop of the Mayflower Hotel in Washington, D.C., and that they had gone directly upstairs to Kalmbach's room in the same hotel. Dean was pressed several times on this point, in a way that implied that his questioners had reason to believe that he was not telling the truth as to whether the meeting had taken place at all. Each time, Dean confidently reaffirmed his clear recollection about the incident. Finally, it was revealed that the Mayflower Hotel's register showed that Kalmbach had not been staying at the hotel at the time in question. Dean nevertheless remained certain of the
occurrence, putting forth the unlikely theory that Kalmbach had used a false name in registering.

The difficulty was cleared up when someone realized that there is a Mayflower Doughnut Coffee Shop in the Statler Hilton Hotel in Washington—and Kalmbach had been registered at the Statler, under his own name, on the day in question. Thus, Dean's basic story was corroborated. Without realizing it, however, Dean had inaccurately resolved the ambiguity created by the coincidence of the two names by confidently "remembering" the wrong (but more logical) hotel, and by inventing the use of an alias by Kalmbach. He had done so, moreover, in a way that was "subjectively accurate" even though "objectively false."

John Dean is not unusual in this regard. Indeed, "accurate recall is the exception and not the rule." This is true even when the material to be memorized is short and simple, and when the witness knows that he will be asked to describe it later. Thus, in portions of "ostensibly factual reporting," we can be sure that "a large proportion of the details will be incorrect, even though presented with the utmost certitude and in good faith." Victims of assault are "notoriously unreliable" witnesses regarding the description of their assailants, but then "so are onlookers who watched in safety." . . .

[Similar effects] can result from interest or prejudice. A classic example of prejudice is the study in which subjects were shown an illustration of a scene in a subway car, including a black man wearing a jacket and tie and a white man dressed in work clothes and holding a razor in his hand. In an experiment in which people serially described the picture to each other (as in the game "telephone"), the razor "tended to migrate" from the white man's hand to that of the black man.

Another factor that affects both perception and memory is what witnesses understand . . . to be their own interest. Again, we are not referring to deliberate dishonesty, but to what is colloquially called "wishful thinking." . . .

Similarly, we tend to exaggerate our answers in a way that enhances our prestige and self-esteem. We are more likely to "(mis)remember" that we did vote and that we did give to charity. "People tend to rewrite history more in line with what they think they ought to have done than with what they actually did."

Another important aspect of remembering is the witness's "readiness to respond and his self-confidence when in fact he ought to be cautious and hedge his statements." In a test to remember faces (what lawyers call "eye-witness identification") the person who unconsciously invented more detail than any other person in the test group was "completely confident throughout."

To sum up, remembering is not analogous to playing back a videotape or retrieving information from a computer. Rather, it is a process of active, creative reconstruction, which begins at the moment of perception. . . .

In recent years, DNA tests have been able to tell with absolute certainty from whom something like a hair or a spot of blood came. A surprising number of

*E. Bolles, Remembering and Forgetting, ch. 17 (1988) . . ., notes that Dean became known as "the man with the tape recorder memory" until the Nixon tapes showed that, in fact, "Dean had a terrible memory. . . ."
criminal convictions that occurred before DNA tests were developed have been vacated after DNA testing established that the defendant could not possibly have committed the crime. The U.S. Department of Justice has studied 28 of these cases—23 of which had resulted from identifications by eyewitnesses. In one of them, five eyewitnesses had identified a defendant who had been wrongly convicted and was awaiting execution under a sentence of death.

Experiments by social scientists illustrate the same thing. One experiment included two sets of subjects. Some acted as witnesses and others as jurors. Witnesses to a theft identified the thief from an array of photos. The theft had been staged, at the direction of the researchers, and the witnesses did not know in advance that it would happen. (The researchers, of course, knew who the "thief" was—which is what allows the experiment to reveal what it does.) In simulated trials, the second set of subjects—the jurors—observed cross-examinations of the witnesses and decided whether to believe the witnesses' identifications of the "thief." The jurors were divided into panels, and each panel observed one witness's cross-examination. About 80% of the jurors believed the witness they saw cross-examined, but they "were just as likely to believe a witness who had made an incorrect identification as one who had made a correct identification."2

Why are fact-finders eager to believe eyewitnesses? There seem to be two reasons. First, "in most of our life experience truly precise memory is not demanded of us. We often do not catch the mistakes of memory that we make, leading us to believe that our memory is more accurate than it actually is. Since people trust their own memories more than they should, they then trust the memories of others."3

Second, as you will learn in Chapters 8 and 11, people are persuaded by stories. Documents, fingerprints, DNA, murder weapons, and other tangible evidence usually do not tell stories, although they provide ingredients out of which a story can be constructed. Eyewitnesses, on the other hand, tell stories from the beginning to the end, explaining who did what when, and adding enough detail to make the story seem real.4

§5.3 WHAT SCIENCE KNOWS ABOUT OBSERVATION AND MEMORY

Elizabeth Loftus has studied extensively "the extraordinary malleability of memory,"1 and her book Eyewitness Testimony6 is the leading work in the field.

3. Id. at 6.
4. Id. at 5.
5. Id. at 54.
According to her and others' research, the following appear to be the major factors affecting the extent to which an eyewitness accurately observes an event, retains the observation in memory, and later retrieves it.

§5.3.1 WHAT AFFECTS OBSERVATION

The length of time the witness was exposed to the event. If a witness has more time, the witness will observe more. It also takes time to begin observing. If you are preoccupied with something else, it takes at least a short while for you to shift your attention and begin to observe an event that is just starting to unfold. Some events are so short that they are over before you can focus on them. (See §13.2.2.)

The extent to which the event in question stood out from (or blended with) its surroundings. Suppose you are traveling on a municipal bus that stops every four or five blocks so passengers can get on or off. You are on the bus for half an hour, during which you see a continual stream of people dressed in everyday clothing going to or from jobs, schools, shopping, and so on. About halfway through the trip, Batman and Robin get on the bus, ride for five minutes, and then leave. At the end of the ride, you are asked to describe, in as much detail as possible, everybody you saw. About whom would you have noticed more: Batman and Robin or the elderly couple who sat across from you near the end of the trip?

Whether conditions or simultaneous events helped or interfered with observation. How far was the witness from the event? Was the lighting good or bad? Did anything make it hard or easy for the witness to hear the event? Are the witness's hearing and eyesight good or bad? Did anything happen that would have distracted the witness?

What the witness was doing at the time of the event. Was the witness's purpose to observe the event? Or was the witness engrossed in some other activity that was interrupted by the event? Did the event cause the witness to do something (such as run away) that would have interfered with observation?

Whether the witness is by nature a careful observer in general or a careful observer of the type of event that is at issue. Some people often notice a lot of what goes on around them, and others tend to be oblivious. Sometimes, training or experience can heighten an ability to observe because the witness knows what to look for. A structural engineer who sees a bridge collapse might notice things that other witnesses miss. And sometimes much larger factors can make someone a good or a bad observer of a particular kind of event. During the Second World War, Eric Newby escaped from a prisoner-of-war camp in Italy and tried for many months to disguise himself as an Italian. Although he was at times stopped by German soldiers, they did not recognize him as an Englishman. After carefully studying his identity documents, which had been skillfully forged, the Germans would let him go each time. They did not seem to observe anything else about him. But Italians could tell just by looking at Newby that he was not whoever


he was pretending to be at any given time: invariably, something about whatever clothing he was wearing would turn out to be inappropriate to the role he was trying to play.  

**Whether the witness was under stress at the time of the event.** A moderate amount of stress has been found to make you more observant, but a greater amount of stress has the opposite effect, making you much less observant.

The event itself might stress the witness (violence being an example). It is commonly believed that dramatic events increase a witness’s ability to observe. The opposite is true. Dramatic events are often quick and unexpected, which means that witnesses are unprepared to observe. And any event that seriously stresses a witness sharply diminishes the ability to observe carefully. During a robbery, for example, victims and bystanders are usually not taking note of everything about which the police will later be curious; they are just trying to survive. The same thing happens during auto crashes. But later, when lawyers, police, insurance companies, judges, and juries expect reliable information from those present during a stressful event, the witnesses feel compelled to become more reliable than they really can be, which means that at least some of what they say is creative reconstruction.

A witness can, of course, be stressed by things completely unrelated to the event. A witness who is worried about career, family, or health might be a poor observer of a mundane event such as a casual conversation.

**The witness’s own self-interest, expectations, and preconceptions.** Often, people see what they want or expect to see.

A witness’s observations might be colored by the witness’s own self-interest. Experiments have shown that if witnesses are given an incentive, even a small one, to see or not see a particular thing, they honestly see and remember that which they have an incentive to see and remember. Sometimes, the incentive can be extraneous (people the witness cares about will be better off if the witness saw and remembers X rather than Y). Sometimes, especially when the witness is a party to the dispute, it is self-contained (the witness will personally profit from a favorable memory). And very often it is simple self-flattery:

People . . . tend to see themselves as more honest or more creative than the average person. When they work on a joint task, they tend to overestimate their own contribution to the task. . . . People remember themselves as having . . . received higher pay for work [than they actually did], purchased fewer alcoholic beverages, contributed more to charity, taken more airplane trips, and raised smarter than average children.  

Usually, little or none of this is conscious lying to get a reward or avoid a punishment. The witness honestly remembers observing whatever was in the witness’s own self-interest to remember.

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Or a witness might "see" something because it conforms to the way the witness assumes the world works. Suppose an airliner develops mechanical problems moments before take-off, and the flight is canceled. A line of anxious passengers forms at the check-in counter, each passenger hoping to make other travel arrangements that will not spoil a vacation or ruin a business meeting. A shouting match begins between one of the passengers and the airline employee working behind the counter, and security personnel forcibly take the passenger away. Witnesses who believe that airline employees or security personnel (or both) have difficult jobs will tend to see, hear, and remember details that suggest that the passenger started the argument and abused the airline employee and perhaps the security personnel as well. Witnesses who have the opposite assumptions (perhaps having been treated badly by airlines in the past) will tend to see, hear, and remember details that suggest that the airline employee started the argument and abused the passenger, who was then mistreated by security personnel. (These preconceptions are what Chapter 8 refers to as schemas.) Even when a videotape of such a scene is shown to jurors (converting the jurors into witnesses), the same thing can happen. Photographs, film, or videotape cannot prevent this because our preconceptions shade not only our memory of what we have seen; they shade what we see from the moment we first see it.

§5.3.2 WHAT AFFECTS RETENTION IN MEMORY

The amount of time that has passed since the event. Memory fades fast after observation. Can you remember where you were and what you did exactly one year ago today? If you are like most people, your memory about the day started fading before the day was over, and, unless something especially memorable happened, those memories were completely gone within a few weeks afterward.

The extent to which the witness has had past experience with aspects of the event. This is particularly important when the witness identifies a defendant in a criminal case. From the research, Loftus concludes that an eyewitness identification of a criminal defendant not already well known to the witness is—scientifically—virtually worthless. We can remember a face that we have seen many times before because we are remembering not just a face but also a person about whom we know other things as well. But it is extremely difficult to remember accurately a face we have seen only once.

Whether the memory has blended with other memories so that an aspect of one event becomes part of the memory of another. This is called "unconscious transference." It is particularly dangerous in identification testimony. Eyewitnesses have been known to identify as criminals people they saw shortly before or after the crime or even at the same place on a different day.

Contamination of the memory caused by the conduct of other people. Suppose you witness a crime. The police give you a dozen photos to look at and say, "We think the perpetrator might be one of these people." They do not say the perpetrator is one of these people, but you are trying to be a good witness. If you say
that none of the photos looks familiar to you, you are not helping to identify the criminal. There is a pronounced risk here that unconsciously you will try too hard to see similarities that do not naturally stand out to you. And if you do not do that at first, the police might inadvertently encourage you to. Suppose you look up and say, “I’m not seeing anyone familiar here,” and the police say, “Take another look.” Will you feel like a failure if you cannot “find” the perpetrator? Suppose you do identify someone and the police look pleased. Will you take that to mean that you are “right”? Two kinds of contamination are going on here. The police are giving you, by implication, new information (that they have reasons of their own to believe that one of the photos represents the true criminal). And their reaction confirms your guess, which encourages you to transmute it into a confident memory. The police might not have meant to do any of that, but this scene illustrates how other people (including lawyers asking questions in an interview) can contaminate memory.

Contamination of the memory caused by the witness’s own conduct. You do not need the police to contaminate your memory. You can do it yourself, unassisted. Suppose you are asked what you saw. You give lots of details, trying to be a good witness. Some of the details are not entirely accurate, but once you say them, they become frozen in your memory. Saying them locks them in, even if they are wrong. You will probably not say to yourself afterward that you are afraid you might be mistaken about some of the details. Instead, you will become more confident about all of the details, and the fact that you have lots of details helps you become more confident.

§5.3.3 WHAT AFFECTS RETRIEVAL FROM MEMORY

How questions are asked can alter memory:

[Even “straightforward questions of fact” may significantly affect what a witness remembers, and leading or loaded questions can be particularly powerful in inducing good faith errors in memory. This is illustrated by a study that showed that witnesses’ estimates of the speed of an automobile involved in an accident varied in accordance with the verb used by the interviewer in asking the question. For example, when the question was phrased in terms of one car “contacting” the other, the speed averaged 31.8 miles per hour. The speed of the car increased in the witnesses’ memory, however, as the verb was modified: “hit” (34.0 mph), “bumped” (38.1 mph), “collided” (39.3 mph), and “smashed” (40.8 mph).]

Here is another example:

[Killed trial lawyers know that once a witness accepts a version of the story, that version can “harden” and become the reality so far as that witness is concerned. An English barrister of long experience used the following hypothetical piece of witness interview to illustrate the point:

Q: When Bloggs came into the pub, did he have a knife in his hand?
A: I don't remember.
Q: Did you see him clearly?
A: Yes.
Q: Do people in that neighborhood often walk into pubs with knives in their hands?
A: No, certainly not.
Q: If you had seen Bloggs with a knife in his hand, would you remember that?
A: Yes, of course.
Q: And you don't remember any knife.
A: No, I don't remember any knife.

During the days or months between the interview and the trial, the story can harden, and what started as “I don’t remember” may come out like this at trial:

Q: When Bloggs came into the pub, did he have a knife in his hand?
A: No, he did not. 10

§5.4 HOW COURTS TREAT OBSERVATION AND MEMORY

When you interview in preparation for litigation, you need to understand what will happen to observations and memory in the courtroom. At trial, a lawyer who calls a witness to give evidence might try to bolster the testimony by asking questions that would show the witness to be reliable according to some of the factors listed in §5.3. On cross-examination, the opposing lawyer might ask questions that would show the witness to be unreliable according to other factors listed in §5.3. Otherwise, law and science follow different paths when evaluating eyewitness testimony.

First, the lawyers do not have to ask these questions, and many times they do not. “Repeated surveys of defenders, prosecutors and judges indicate that many (as to some respects, most) lawyers are ignorant” of the scientific research on eyewitness testimony.11 There are some exceptions. In criminal procedure, for example, the law has been aware of the risks that testimony might be contaminated if a witness is asked in a suggestive manner to identify an accused.12

Second, even if the lawyers do ask these questions, the fact-finder—the jury or, in a bench trial, the judge—is free to discount the answers. Fact-finders are more likely to discount answers that suggest that the witness is unreliable. Fact-finders are still persuaded by the aura of an eyewitness. To many fact-finders, “there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, ‘That’s the one!’ ” 13

Third, juries are instructed to use their own common sense and experience in life when evaluating evidence. This encourages them to subscribe to fallacies

11. Loftus & Doyle, supra note 2, at 8.
that science has shown to have no basis in fact. The most common is the fallacy that a confident witness is a reliable witness. The scientific research shows that confident witnesses can be wrong just as easily as tentative witnesses can be. In fact, tentativeness may be a sign that the witness is aware of the limits of her own knowledge, a humility that can be more trustworthy than misplaced confidence. But many fact-finders appear to consider the witness’s confidence to be solid proof of the witness’s reliability. The next most common fallacy appears to be the one of detail. Fact-finders are impressed by witnesses who can remember many details, whether or not the details are directly relevant to the factual issues. But “a witness’s memory for details about peripheral matters may not be related at all to the witness’s accuracy about central aspects.” In fact, a witness who can remember an endless supply of details about everything might be a witness with an active reconstructive imagination. Juries are at times even specifically instructed by judges to act on particular assumptions that science has shown to be wrong. For example, in criminal cases juries are often instructed that they may take into account the confidence with which a witness makes an identification. Even the Supreme Court has approved such an instruction.

Finally, only in unusual circumstances do judges allow juries to hear expert testimony to the effect that most of the “common sense” about eyewitnesses is in fact myth. In the overwhelming majority of the cases in which a party offers such expert testimony, it is excluded.

§5.5 THE PROBLEM OF STATES OF MIND

The law’s conception of states of mind leads to two problems in trying to learn the facts and prove them.

The first is that it is much harder to remember what you thought at any given time in the past than it is to remember what you saw, heard, or did. Your hopes, desires, and fears are so fluid that you have no solid base to start from when trying to remember them later, unless you found a way to make a record of them in something you said or wrote at the time. And because your past thoughts are so fluid, you may, every time you try to remember them, reinvent them to conform to what you would have liked them to have been in retrospect.

The second problem is that the law’s state-of-mind formulas—intent to do certain things, willfulness, maliciousness, voluntariness, and so on—do not fit the patterns in which people normally think. If you doubt this, stop someone who is about to jaywalk and ask whether that person intends to assume the risk or commit contributory or comparative negligence. Even after you explain those terms, the person you have stopped will think you are a nut, even though once

16. Loftus & Doyle, supra note 2, at 4.
she sets foot in the street, the law will probably judge her to have had at least one of those states of mind. Here is another example:

A young man and a young woman decide to get married. Each has $1,000. They decide to begin a business with those funds, and the young woman gives her money to the young man for that purpose. Was the intention to form a joint venture or a partnership? Did they intend that the young man be an agent or a trustee? Was the transaction a gift or a loan? Most likely, the young couple's state of mind did not conform to any of the modes of "intention" that the law might look for. Thus, if the couple should subsequently visit a tax attorney and discover that it is in their interest that the transaction be viewed as a gift, they might well "remember" that to have been their intention. On the other hand, should their engagement be broken and the young woman consult an attorney for the purpose of recovering her money, she might well "remember," after proper counseling, that it had been her intention to make a loan.19

This couple are not lying when they give these answers to their lawyers. People do whatever they feel like doing, and afterward the law has to put a label on what they thought at the time they acted. As a rule to guide courts' decision-making, the label works, but it often does not represent precisely what people were really thinking. That is why the jaywalker will think you are strange if you ask about an intention to assume risk or commit a form of negligence.

State of mind usually has to be proved through circumstantial evidence. And the law is usually satisfied with whatever the circumstantial evidence shows. Suppose the couple in the example above decide that they want to have the transaction considered a gift. It is honest for their lawyer to figure out what circumstantial evidence might prove a donative intent (an intent to make a gift) and ask whether that evidence exists. If it does, it is also honest for the lawyer to introduce that evidence in court to prove a donative intent, even though the couple have only the vaguest idea of what they had been thinking at the time of the transaction.

But it would be dishonest—a crime, in fact—for the lawyer or the couple to manufacture false evidence, such as a back-dated letter from the woman to the man saying, "Please accept this gift."

§5.6 HOW TO EXPLORE MEMORY ACCURATELY IN AN INTERVIEW

Traditionally, lawyers have interviewed by asking for a narrative ("please tell me what happened, from beginning to end"), and afterward asking follow-up questions designed to clarify or fill gaps in the narrative ("let's go back to what happened after the accident—how long did it take the ambulance to arrive?").

That is not a bad approach. But it can be improved with modifications that some researchers have called "cognitive interviewing." Cognitive interviewing

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helps the witness to remember by using any or all of four techniques. The most important is suggesting that the witness reconstruct the scene and relive the event in the witness's own mind before narrating it to the interviewer.

RICHARD C. WYDICK, THE ETHICS OF WITNESS COACHING

[Psychologists Edward Geiselman, Ronald Fisher, and their colleagues have developed] a package of interview techniques that they call the "cognitive interview." . . .

Technique One: Reinstall Context

[A witness remembers best when immersed in an environment substantially similar to the one that surrounded the event to be remembered.] The witness need not return physically to the scene; returning in one's mind is generally enough. Thus, Geiselman and Fisher recommend giving the witness an instruction something like this: "First, try to reinstall in your mind the context surrounding the incident. Think about what the room looked like and where you were sitting in the room. Think about how you were feeling at the time and think about your reactions to the incident."

Technique Two: Tell Everything

A memory is not a single candid snapshot of an event; "it is a complex array of many features." At a given time, some features are restricted and some are not. Geiselman and Fisher urge witnesses to lower their standards for relevance and to report every scrap they can remember, even if it seems incomplete or irrelevant. The hope is that incomplete or irrelevant scraps might cue other material that could prove useful.

The third and fourth techniques are based on another premise that is well-known in cognitive theory: there may be several retrieval paths to a particular piece of information, and when one retrieval cue does not work, a different one may.

Technique Three: Recall the Event in Different Orders

[This technique recognizes that information can be stored in memory according to a variety of patterns, and that one pattern of access may be more effective than others. Geiselman and Fisher recommend instructing the witness in the following manner:

[It is natural to go through the incident from beginning to end, and that is probably what you should do first. However, many people can come up with more information if they also go through the events in reverse order. Or, you might start with the thing that impressed you the most and then go from there, proceeding both forward and backward in time.]
Technique Four: Change Perspectives

The fourth technique likewise seeks to open a variety of retrieval paths. After the witness explains what she perceived from her perspective, she should be instructed something like this:

[Now] try to adopt the perspective of others who were present during the incident. For example, try to place yourself in [X]'s role and think about what she must have seen.

[Structuring the Fact-Gathering]

... In a cognitive interview ..., the witness should do most of the talking and hard thinking, while the interviewer should be mostly listening, gently guiding, and probing when necessary. [Getting the facts from the interviewee is a process that can be broken down into three stages.]

Introductory Stage

In the introductory stage, the interviewer should first seek to put the witness at ease. If the witness shows unusual stress, one way to do that is to begin with easy questions to get background information about the witness. Next, the interviewer should seek to build rapport with the witness and should explain the witness's central role in the interview. The witness plays the central role because the witness is the one who knows what the facts are! In a cognitive interview (unlike many ordinary interviews), the witness should do most of the talking and hard thinking, while the interviewer should be mostly listening, gently guiding, and probing when necessary. Finally, the interviewer should explain to the witness the four basic memory enhancing techniques, and encourage their use during the interview.

Open-Ended Narration Stage

In the open-ended narration stage, the interviewer asks the witness one or more broad, open-ended questions that are designed to elicit from the witness a narrative about the entire event. For example, "Tell me in your own words whatever you can remember about the [meeting]. Tell me everything you can in as much detail as you can." Despite the request for details, at this stage the interviewer should be listening, not for details, but for the overall pattern of the witness's memory about the event. This is not an information gathering stage—it is a planning stage, in which the interviewer should be designing the best way to probe the witness's memory.

Probing Stage

The probing stage is the main information gathering stage of a cognitive interview. The interviewer directs the witness's attention back to each significant topic the witness mentioned in the open-ended narration, patiently taking each topic separately and exhausting the witness's memory about that topic before moving on to the next. The interviewer should begin each topic with an open-ended
question that asks the witness to give a detailed narrative of everything the witness
can remember about it. For example, “You told me earlier that the thin man in
the blue suit mentioned something about ‘cutthroat bidding’. Tell me everything
you remember about that, in as much detail as you can.” The interviewer must
not interrupt the witness’s answer, and must not move to a different topic until
the witness’s memory about the first topic is exhausted. If the first open-ended
question fails to produce the needed detail, the interviewer can follow up with a
narrower but still open-ended question, such as, “Tell me what he said about
‘cutthroat bidding’.” If that does not work, the interviewer can resort to a closed-
ended (leading) question, such as, “Did he say that ‘cutthroat bidding’ is bad for
the industry?”

Review Stage
In the review stage, the interviewer should repeat in the witness’s presence all of
the relevant pieces of information the witness has provided. This has two purposes.
First, it gives the witness and interviewer a chance to make sure the interviewer
has understood correctly, and second, it gives the witness an additional chance
to search for forgotten details.

Practical Suggestions for Cognitive Interviews

. . . The single most important skill an interviewer can learn is not to interrupt
the witness in the middle of a narrative response. When the witness says something
worth pursuing, the interviewer should make a note of it and come back to it
later. Even if the witness pauses for several moments during the narrative, the
interviewer should keep quiet, or perhaps use a gesture, to encourage the witness
to continue.

Some interviewers insist on demonstrating dominance during the interview.
That can be a big mistake because the witness is the one holding all the memo-
ries.

One of the four basic memory enhancing devices urges the witness not to edit
out material that seems incomplete or irrelevant. Another urges the witness
to consider the event from the perspectives of other people. Some witnesses
misinterpret these suggestions as an invitation to guess or fabricate. The inter-
viewer should expressly caution the witness not to guess or fabricate.

The interviewer should avoid skipping from topic to topic during the probing
stage of the interview. How many times have we seen some television lawn
interviewing the witness in his office like this:

Q: How tall was he?
A: Oh, average, maybe six feet or so.
Q: What color car did you say he had?
A: Puce. It was a puce Cadillac coupe.
Q: Puce, eh. Any tattoos, scars, or other marks on his face or body?

This interview style makes for fast-paced television, but it wastes the witness’s
mental effort. It takes effort to summon up the mental image of the car. Instead
of skipping to tatoos, scars and marks, a real life interviewer should stay with
the car image until the witness cannot summon up any more about it. . . .

The following are typical of the experiments that have validated the technique
of cognitive interviewing:

About half the detectives in a police department were trained to interview
cognitively. Afterward, researchers studied tape recordings of real witnesses in
real cases conducted by these detectives and compared them to similar recordings
of interviews conducted in other real cases by the detectives who had not been
trained to interview cognitively. “The results were dramatic. The detectives who
used the cognitive interview obtained significantly more information.”20

In another experiment, people witnessed a crime staged by the researchers.
Five months later, the witnesses were asked to pick the “criminal” out of a line-
up. Some of the witnesses were simply shown the line-up and asked whether
they could identify the “criminal.” (This is the traditional police practice.) Other
witnesses were asked, just before seeing the line-up, to relive the context by
reliving the event in their own minds (the primary technique in a cognitive inter-
view). Of those who were shown the line-up in the traditional manner, about
40% correctly identified the “criminal” (who was, of course, known to the re-
searchers). Of those who tried to relive the event mentally before seeing the line-
up, about 60% were able to identify the “criminal” correctly.21

20. Loftus & Doyle, supra note 2, at 73.
21. Loftus & Doyle, supra note 2, at 69.
§6.1 CLIENT INTERVIEWING AS PROBLEM-SOLVING

Lawyers conduct two kinds of interviews. Client interviewing is covered in this chapter. Witness interviewing is covered in Chapter 7.

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

If you are an overly rational person, you might ignore the emotionally charged atmosphere of the interview, much to the frustration of the client. If you are more astute about emotions than about ideas, you might give a client an emotionally satisfying interview while leaving big holes in your development of the facts. (Lawyers more often have the first problem rather than the second, and clients often complain about it; see Chapter 3.) If you are at one or the other of these extremes, you can improve your interviewing by becoming more rounded. Students at one of the extremes often gain a lot of insight about themselves from critiques of their first interviews.

An allied problem is the question of control. The professions in general are attractive careers in part because they offer opportunities to control one's environment. Aggressiveness and competitiveness are useful in performing many of the tasks in a professional's work life (such as trying cases in court). The urge and ability to control can help a lawyer keep an interview focused, but, if not
carefully managed, they can also smother a client's communicativeness. Many lawyers find that they must turn their control impulses on themselves, exercising more control over their own behavior than over that of the client. But even this can go too far. Spontaneous warmth and empathy are powerful professional tools.

§6.1.1 YOUR PURPOSES IN INTERVIEWING CLIENTS

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

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

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

1. To form an attorney-client relationship. That happens on three levels. One is personal, in that you and the client come to understand each other as people. To satisfy the client's needs, you have to understand the client as a person and how the problem matters in the client's way of thinking. If you and the client are to work together in the participatory relationship described in Chapter 3, you need to know each other fairly well. And the client cannot trust you if the client does not have a solid feeling for the person you are. The second level is educational, in that you explain to the client (if the client does not already know) things like attorney-client confidentiality (see §3.6) and the role the client would or could play in solving the problem. The third is contractual, in that the client agrees to hire you and pay your fees and expenses in exchange for your doing the work you promise to do.

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

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

4. To reduce the client's anxiety without being unrealistic. On a rational level, clients come to lawyers because they want problems solved. But on an emotional level, they come to get relief from anxiety. Even the client who is not in a dispute with anybody and wants something positive done, such as drafting a will, feels
a reduction in anxiety when you are able to say—if you can honestly and prudently say it: “I think we can structure your estate so that almost nothing would be taken in estate taxes and virtually everything would go to your heirs. It would take some work, but I think we can do it.” Most of the time, you cannot offer even this much assurance in an initial interview because there are too many variables and, at the time of the interview, too many unknowns. When first meeting a client, you are almost never in a position to say, “If we sue your former employer, I think we will win.” You need to do an exhaustive factual investigation before you can say something like that responsibly.

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

§6.1.2 INTERVIEWING DYNAMICS

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

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

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

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

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

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

Finally, the client’s memory is subject to all of the problems described in Chapter 5.

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

You can build a relationship in which the client feels comfortable and trusts easily. And you can show empathy and respect rather than distance. (See Chapter 3.)

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

You can ask clear and well-organized questions (see §6.3.2).
Nonverbal communication. You are used to “reading” people based on their posture, facial expression, eye contact, and the like. Some of the messages you receive that way are inaccurate, but body language appears to tell us enough about another person’s feelings that we take it for granted. A person who looks us firmly in the eye while talking to us seems to be taking us seriously. Someone who leans back in a chair with arms crossed looks bored or impatient, while a person who sits up straight with arms uncrossed appears to want to hear what is being said. When someone nods vertically while we are speaking, we think that means agreement, or at least “I hear you and accept the importance of what you say.”

When does body language give us inaccurate messages? Sometimes, it is simple accident. A person might be very interested in what we have to say but lean back lazily because of fatigue. Sometimes, it is because body language means different things in different cultures. For example, in some cultures—including some that can be found in the United States—making eye contact is rude, and looking away from someone while talking to them shows respect.

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

Active listening. Remember that the ability to listen well is as important in the practice of law as the ability to talk well (see §2.2). Some lawyers just want to get to the heart of the matter and quickly move on to other work, but they are in such a hurry that they leap onto the first important thing they hear, even if it is not in fact the heart of the matter. Instead, relax, let the client tell the story, and listen patiently and carefully.

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

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

Compare these three examples:

1. lawyer listens passively.

Client: I wanted to buy a very reliable car with a standard transmission and a sunroof. The car has to be reliable. I can’t spare the time to take it into the shop any more than necessary. You can’t get a sunroof and a standard transmission from Toyota. You can at Honda, but the dealer didn’t have any cars in stock. I had to special order it. I gave them a $5,000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof. I told them that wasn’t the car I ordered. They refused to return the deposit and said I had to accept the car. I don’t want it. A sunroof helps cool off the car quickly, and in the winter it lets in
light and makes the car feel roomier. And a standard transmission makes the car a little more fun to drive.

2. lawyer listens actively.

Client: I wanted to buy a very reliable car with a standard transmission and a sunroof. The car has to be reliable. I can’t spare the time to take it into the shop any more than necessary. You can’t get a sunroof and a standard transmission from Toyota. You can at Honda, but the dealer didn’t have any cars in stock. I had to special order it. I gave them a $5,000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof.

Lawyer: Really.

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

Lawyer: You must have been pretty upset.

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

Lawyer: They are nice.

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

3. lawyer listens with a tin ear.

Client: I wanted to buy a very reliable car with a standard transmission and a sunroof. The car has to be reliable. I can’t spare the time to take it into the shop any more than necessary. You can’t get a sunroof and a standard transmission from Toyota. You can at Honda, but the dealer didn’t have any cars in stock. I had to special order it. I gave them a $5,000 deposit. Two months later, they called to tell me the car had arrived. But it had an automatic transmission and no sunroof. I told them that wasn’t the car I ordered.

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

Client: I didn’t sign anything except the $5,000 check. They refused to return the deposit and said I had to accept the car.

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

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

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

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

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

It is the opposite of active listening to say “O.K.” in response to a client’s description of suffering:

Client: . . . And then the ambulance took me to the hospital. Or I’ve been told that happened. I wasn’t conscious at the time.

Lawyer: O.K. Who did the hospital get to sign the consent-to-treatment form?

From the client’s point of view, it is not O.K. O.K. can mean two different things. It can be a throwaway transition word, which is what the lawyer here intended. And it can mean “That’s good,” which is what many clients hear. If you find yourself saying “O.K.” at times like this, you might be forgetting that the client is a real person who is actually living with the consequences of the facts being described.

An office arrangement comfortable for clients. Consider the furniture arrangement that would help you open up to a lawyer if you were a client. Some people are perfectly willing to talk over a desk to a lawyer. Other people would want something less formal, perhaps two chairs with a small table to the side (all of which can be in the same room as the desk). We believe most clients are more at ease if you are not behind a big desk, which is both a physical barrier and a

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symbol of your authority. Sitting with the client—rather than across from the client—communicates in a subtle way that you are open to the kind of participatory relationship described in Chapter 3.

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

**Taking notes.** Clients are not bothered by it, although the client might appreciate it if you were to ask, "Do you mind if I take notes?" and if you were to explain how note-taking helps you do a better job. If you become too wrapped up in note-taking, however, it can be hard to listen (and certainly hard to maintain eye contact). The most effective practice is to take minimal notes while the client is telling the story (see §6.2 below), perhaps writing down only topics you want to go back to later, and then to take a complete set of notes while you are asking questions after the client has told you the story.

§6.2 ORGANIZING THE INTERVIEW

You can do a better interview if you prepare before the interview begins as described in §6.2.1. The interview itself can be broken down into five parts.

1. A brief opening part in which the lawyer and client become acquainted and get down to business (see §6.2.2).
2. An information-gathering part (see §6.2.3)—usually the longest part of the interview—in which you learn everything the client knows about the facts; if you are using cognitive interviewing techniques, this part of the interview is subdivided into the stages described in §5.6:
   a. an open-ended narration stage (the client tells the story);
   b. a probing stage (you ask detailed questions);
   c. a review stage (you describe the story as you understand it and the client makes corrections and additions).
3. A goal-identification part, in which you learn exactly what the client wants to accomplish in resolving the problem at hand (see §6.2.4).
4. A preliminary strategy part, in which you might discuss with the client—usually only tentatively—some possible strategies for handling the problem; in a dispute situation, this usually includes some consideration of possible theories in support of the client's position (see §6.2.5).
5. A closing phase in which you and the client agree on what will happen after the interview (see §6.2.6).

In practice, these parts often overlap. For example, some theory-testing and strategizing (part 4) might happen during information-gathering (part 2). Or the client might volunteer clearly stated goals (part 3) in the first moments of the
interview (part 1). Overlap is fine as long as it does not interfere with your own interviewing purposes (see §6.1.1).

§6.2.1 PREPARING

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

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

The interview is more productive if the client brings the papers that are relevant to the problem. Whoever in your office speaks to the client when making the appointment should ask the client to do that. But clients are not good at judging relevance. Try to be specific. If the client is threatened with mortgage foreclosure, the client should be asked to bring the mortgage, all statements sent by the bank that holds the mortgage, all canceled checks used to make mortgage payments in the past, any official-looking notices sent by the bank or a sheriff or a lawyer, and anything else the client has that seems to be related to this mortgage.

§6.2.2 BEGINNING THE INTERVIEW

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

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

"How can I help you?"

"Let's talk about what brings you here today."

"My secretary tells me the bank has threatened to foreclose on your mortgage. You're probably worried. Where shall we begin?"

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

"I've come into some money and would like to set up a trust for my granddaughter, to help her pay for college and graduate school."

"I've just been served with legal papers. The bank is foreclosing on our mortgage and taking our home away from us."
Too often, when clients say these things lawyers just ask, “Tell me more,” and start taking notes. That may be a sign of the law-trained mind at work, ever quick to find the legally significant facts. But clients rightfully dislike it. If given a choice, most clients would rather not hire “a lawyer.” They would rather hire a genuine human being who is good at doing the work lawyers do. If you heard either of the statements above in a social setting, you would express pleasure at the first or dismay at the second because active listening is a social skill that you already know something about. Do the same for the client in the office—sincerely.

But do not leap in here with questions. Give the client a full opportunity to tell you whatever the client wants to talk about before you start structuring the interview. There are two reasons. First, many clients want to make sure from the beginning that you hear certain things about which the client feels deeply. If you obstruct this, you will seem remote, even bureaucratic, to the client. Second, if you listen to what the client wants to tell you, you may learn a lot about the client as a person and about how the client views the problem.

If the client is inexperienced at hiring lawyers, you will need to explain attorney-client confidentiality (see §3.6). But the best point is probably not in the very beginning. It seems awkward and distancing there, and clients are eager to tell you the purpose of their visit anyway. A better time is in the information-gathering part of the interview, after the client has told you the story and before you start asking detailed questions discussed below in §6.2.3. Most clients will tell you the basic story at the beginning regardless of whether they understand confidentiality. It is when they begin to answer your questions later that confidentiality encourages clients to be more open with you.

§6.2.3 INFORMATION GATHERING

After the client has explained why you are being consulted, the information-gathering part of the interview begins. If it is important for you to learn the details of past events, this is where you use the cognitive interviewing techniques described in §5.6.

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

If, on the other hand, you are using cognitive interviewing techniques, the information-gathering part of the interview—as you learned in §§5.6 and 6.2—is subdivided into three stages:

a. An open-ended narration stage in which the client is asked to describe everything the client remembers about the facts at issue.

b. A probing stage in which you go back over the client’s story and ask questions to fill in gaps and clarify ambiguities.
c. A review stage in which you reiterate the most important parts of the story as you understand them to give the client an opportunity to correct misunderstandings and to supply additional information.

Before inviting the client to narrate the story, recreate the context and ask the client to describe everything she remembers about the incidents at issue, regardless of relevancy (see §5.6). Say something like this:

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

If the client has trouble producing a complete and coherent story, you might ask her to recall the event in a sequence other than chronological, perhaps starting with the thing that impressed the client the most, or you might ask the client to change perspectives and assess what others present might have seen or heard (see §5.6). While listening to the story, take two kinds of notes. Write down what you are being told, and make a list of topics to go back to later for clarification or to fill in gaps. You can use two pads of paper to do this. Or you can use one pad, drawing a vertical line on each page to separate the two kinds of notes.

After the client has told the story, you can start asking questions. This is the second stage of the cognitive part of the interview. Get a clear chronological view of events from beginning to end, as well as a firm grip on the precise details of the story. For example, exactly when and where did each event happen? See §6.3.1 for what to ask about and §6.3.2 for how to formulate and organize questions.

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

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

Then briefly summarize the relevant parts of the story.

Regardless of whether you are using cognitive interviewing techniques, the time to bring up attorney-client confidentiality is when you start asking questions. How should you explain confidentiality? It is not accurate to say, "Everything you tell me is confidential." There are important exceptions to that statement (see §3.6). Most clients, however, do not want to hear a lecture on all the exceptions. A middle course is better:
Lawyer: Before we go further, I should explain that the law requires me to keep confidential what you tell me. There are some exceptions, some situations where I may or must tell someone else something you tell me, but for the most part I am not allowed to tell anybody.

If the client asks about the exceptions, you can explain them.

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

§6.2.4 ASCERTAINING THE CLIENT'S GOALS

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

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

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

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

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

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

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

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

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

[In letters to the law professor afterward,] Johnson explained that he [had] wanted to participate as an equal in a process of collaboration with his lawyers.

Johnson had been arrested by two state troopers when he pulled into a service station at night (and the troopers called out, “Hey, yo,” to Johnson, an African American undergraduate. They ordered him out of the car and asked him to submit to a pat-down search. When Johnson refused, claiming that such a search would violate his constitutional rights, the troopers arrested him for disorderly conduct, searched him, pressed his face on the hood of the car while handcuffing him, and took him to jail. At his arraignment, the judge appointed the lawyers to represent him.

[When they first interviewed him,] the lawyers did not ask Johnson what his goals were. If they had, they would have learned that he wanted more than simply to be cleared of a misdemeanor charge. As he said later, “I would like to have my reputation restored, and my dignity.”

... If [the lawyers had inquired more thoroughly], they would have learned that he wanted a public trial. They would have learned that, at ... arraignment, the prosecutor had offered to dismiss his case if he would pay court costs of fifty dollars, and he had refused. The trial itself was the relief Johnson sought. Without discussing it with their client, the lawyers filed a motion to suppress evidence that, if successful, would have drastically shortened the trial.

... After his case had been dismissed, Johnson said the lawyers had been “patronizing” ... [that he was always the “secondary person[,]” and] that they had treated him like a child.

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

For example, after being served with an eviction notice, a client might have come to the lawyer just because that seems like the right thing to do when confronted with confusing and intimidating legal papers. But the problem may be a deeper one. The client might have lost a job, and the client’s family might be disintegrating under financial pressures. There are two reasons why you should

3. For conciseness, the author of the article from which this excerpt is taken uses the term “the lawyers” to refer to the team made up of the professor and the law students, who were practicing in a law school legal clinic. Because clinic students are not members of the bar, they may not hold themselves out as lawyers, however.

(Johnson asked that Cunningham use his real name.)
care. First, there may be legal issues inside the deeper problem (abusive discharge? child custody?). And second, even if there are no legal issues other than the eviction proceeding, the lawyer, as an interested observer, is still in a position to offer valuable advice that the client cannot easily find elsewhere (see §3.1).

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

“If you could imagine the best outcome we can reasonably hope for, what are the ingredients of that outcome?” You want a list of the things the client wants to accomplish.

“If we achieve that best outcome, how will it affect you?” Or “how will it affect your family?” Or “how will it affect your business?” These tell you why the client has the goals listed in response to the first question. If the goals the client has initially cannot be accomplished, you and the client can try to develop other goals that have as nearly as possible the same effect.

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

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

§6.2.5 CONSIDERING A STRATEGY DURING THE INTERVIEW

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

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

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

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

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

**Lawyer:** Do they have a strong need to move into a house—any house—as soon as possible?
Client: I don’t think so. They’re living in a rental now, and they haven’t given their landlord notice that they’re moving out.

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

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

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

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

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

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

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

In Chapters 8–14, we will examine in detail how to develop a theory and what makes one persuasive. For now, however, it is enough to understand two things about effective theories. First, if you will have the burden of proof, your theory must satisfy the elements of the legal tests that make up your burden. If the other side will have the burden of proof, your theory must prevent the other side from satisfying at least some elements of the legal test the other side must prove. Second, a persuasive theory is based on solid evidence and the inferences people will typically draw from that evidence. In court, ambiguous evidence and debatable inferences are usually resolved in whatever way is most consistent with the evidence that cannot be questioned.
§6.2.6 CLOSING

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

One is an agreement that the client is in fact hiring you to do the work discussed in the interview. If the client has not made clear that is happening, you can ask a simple question like this: "Now that we've talked about it, would you like me to defend you in this lawsuit?" Some clients will say yes or no on the spot. Others will want to think about it after the interview. If you are hired, that should be formalized through a written retainer (see §6.4.5).

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

1. The client should not do anything to make the situation worse. Agree specifically on what the client will not do. This could involve restraints that might seem unnatural or abnormal to the client. Most clients do not realize that anything they say to an adverse party might escalate conflict, or that anything they say to anybody other than you (or in another privileged situation, such as to a spouse, doctor, or clergyperson) can be later testified to by the other person, perhaps not accurately. In addition, it is part of a lawyer's job to bear some of the pressure that would otherwise be brought to bear on the client. If people have been demanding that the client do something that the client does not want to do, the client should now start telling them to communicate only through you.

2. You should make a realistic and clear commitment of what you will do in the immediate future, together with a schedule for when you will do it. Clients feel much better if you set a schedule for accomplishing certain tasks, keep to the schedule, and report back to the client on what you have accomplished. Otherwise, a client has no idea whether you are working diligently or are ignoring the problem.

3. The client should commit to provide specific things that you need (information, documents) to do your share of the work, and there should be a schedule for this, too. (Paying your retainer is included; see §6.4.5.) Some tasks—for example, writing a letter to the Internal Revenue Service requesting copies of prior tax returns—are things that you and the client are each capable of doing. If the client does some or most of them, the client can avoid paying what it would cost for you to do them, and you and the client will start working together in the participatory relationship described in Chapter 3.

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

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

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

§6.3 QUESTIONS

Remember that one of the marks of an effective professional is the ability to ask useful questions in a productive way (see §2.2). In a client interview, you need to know what to ask about (§6.3.1) and how to organize and formulate questions (§6.3.2).

§6.3.1 WHAT TO ASK ABOUT

During the information-gathering part of the interview (§6.2.3), be sure to explore the following:

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

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

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

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

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

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

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

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

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5. See Rules 1.7, 1.8, 1.9, 1.10, and 1.11 of the Model Rules of Professional Conduct.
Ask about pieces of paper. Ask whether there are any pieces of paper, not already mentioned by the client, that might be related to the problem. (Remember to avoid using lawyer jargon. Do not ask about "documents." Is a memo a document? You might say yes, but many clients would think no.) If relevant pieces of paper exist, ask where they are and who has possession of them. Ask whether the client has signed any pieces of paper connected to the problem. In a dispute situation, ask whether the client has received any pieces of paper from a court, a lawyer, or a government agency. (Many clients will not understand if you ask whether they have been "served with papers."

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

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

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

In a dispute situation, ask whether the client has talked with anybody else about the subjects you are asking about. Those people might help corroborate what your client is telling you. Or they might end up testifying against your client at trial, saying that your client made statements that do not help your case.

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

In a transactional situation, learn the parties' interests. What is the big picture? What about this transaction is most important to the client? To the other party? (In other words, what is each party trying to accomplish?) How does the client envision, on a practical level, the transaction will operate once agreement is complete? How does the transaction fit into the client's larger plans for the future? Is the transaction part of a long-term relationship—or a hoped-for long-term relationship—between the parties? Is there a risk that the transaction might violate the law? Can the transaction be structured to minimize the client's tax? In drafting the agreement, what potential future difficulties should be provided for in ad-
vance? (The most obvious example would be breach: how should the agreement define breach, and what consequences would follow breach?) Are there any other ways that the agreement can be drafted to protect the client? What provisions does the client want in the drafted agreement? In addition, for each type of agreement, there is a laundry list of issues that a prudent lawyer would typically resolve in drafting. (If you rent an apartment, look at your lease; it probably reflects the residential lease version of such a list from the landlord’s point of view.) What do you need to know in order to handle the laundry-list issues?

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

§6.3.2 ORGANIZING AND FORMULATING QUESTIONS

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

On each topic, start with broad questions (“tell me what happened the night the reactor melted down?”) and gradually work your way toward narrow ones (“just before you ran from the control panel, what number on that dial was the needle pointing to?”). Broad questions usually produce the largest amount of information, especially information that you have not anticipated. (A surprisingly versatile broad question is “What happened next?”) Narrow questions produce details to fill in gaps left after the board questions have been asked.

Move gradually from broad questions to narrow ones. If you jump too quickly to the narrow ones, you will miss a lot of information because it is the general questions that show you what to explore. Here is an example of what can go wrong:

**Lawyer:** What happened next? [*a broad question*]

**Client:** The store manager grabbed me and took me to a back room, where they opened my shopping bag and accused me of shoplifting. They were really abusive and embarrassed me in front of everybody in the store.

**Lawyer:** Did they touch you? [*a narrow question, asked before the client has finished answering the broad one*]

**Client:** Yeah, the manager grabbed me by the arm and practically dragged me to that back room. And when I tried to leave, a big security guy stood in front of the door, took me by the shoulders and sat me back down.
Lawyer: How many people heard them call you a shoplifter? [another narrow question]

Client: Maybe a dozen or so. They looked at me as though I was disgusting.

Lawyer: Do you know any of them by name? [yet another narrow question]

Client: Oh, yeah. A couple of them belong to the PTA at my children's school. Another is the receptionist in my doctor's office.

Here, the lawyer is constructing a case against store personnel for assault, false imprisonment, and defamation. What the lawyer does not know is that the police came and arrested the client, who is scheduled for trial next week. The lawyer missed this by going too fast to narrow questions. If the lawyer had not done that, the following might have occurred:

Client: The store manager grabbed me and took me to a back room, where they opened my shopping bag and accused me of shoplifting. They were really abusive and embarrassed me in front of everybody in the store.

Lawyer: Let's start from the point where the store manager first approached you. Please take a few minutes and remember everything that happened. Then, after you've finished running it through your mind, tell me everything you remember.

[a period of silence]

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

Here, the lawyer asked the client to recreate the context, and then let the client tell the whole story before beginning to probe (see §5.6).

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

Formulating questions. Phrase your questions carefully. Remember that how you say something has an enormous effect on how people respond (see §2.2). A good question does not confuse, does not provoke resistance, and does not help distort memory (see Chapter 5).

Ask one question at a time. If you ask two at a time, only one of them will be answered.
**Lawyer:** How much did Consolidated bid on this project? Were they the low bidder, or was somebody else?

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

Did we learn how much Consolidated bid?

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

Because of the malleability of memory (see Chapter 5), leading questions have the potential to cause inaccurate answers. If a leading question—or any type of question—in an interview causes a client to “remember” things more favorably to the client’s case, and if the client is later to testify to that “memory” at trial, the leading question creates an ethical problem (see §6.4.1). (At trial, a lawyer is normally not allowed to ask a leading question of the lawyer’s own witness on direct examination. But leading questions are permitted when a lawyer cross-examines the other side’s witnesses, who can be expected to resist attempts to influence their memories.)

Leading questions, however, can be useful when the client might be fabricating (see §6.4.3) and for the review stage of cognitive interviewing (see §§5.6 and 6.2.3).

At times, you can probe for information without using questions at all. For example, active listening or body language indicating that you are particularly interested in what the client is saying can encourage the client to go into the facts in greater detail (see §6.1.2).

### §6.4 SPECIAL PROBLEMS IN CLIENT INTERVIEWING

You may face problems of ethics (§6.4.1), information that the client considers private or too unpleasant to discuss (§6.4.2), a possibility that the client is not being honest with you (§6.4.3), pressure from the client to make a prediction before you have had an opportunity to research the law and investigate the facts (§6.4.4), or negotiating a fee agreement with the client (§6.4.5).

### §6.4.1 ETHICS IN CLIENT INTERVIEWING

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

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

Perhaps the best known ethical dilemma in client interviewing is called the Anatomy of a Murder problem, after the novel8 and movie of the same name. There, a lawyer interviews his client, who is accused of murder. Before asking the client for the facts in detail, the lawyer gives the client a lecture explaining all the defenses to a murder charge. After listening to this, the client describes facts that would support a defense of temporary insanity. We are left with the impression that if the client had not heard the lecture, he would have told a different story—that the lawyer essentially told the client what the client would have to say in order to escape conviction.

Lawyers are not allowed to help create false testimony. But clients are entitled to know the law and to get that knowledge from their lawyers. How can you observe both of these principles while interviewing clients? The best approach is to interview for facts first and to explain the law afterward. The reasons are partly ethical and partly practical. In the novel and the film, the client invents a story and wins at trial. That is harder to do in the real world than it is in fiction. There are always other witnesses and evidence and facts, some of them incontrovertible. Not many clients are clever and lucky enough to be able to invent stories that are either consistent with or more believable than everything else the fact-finder will be exposed to at trial. Much of the time, you can do a better job of advocacy if the client does not invent a story.

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

6. Rule 3.4(b) of the Model Rules of Professional Conduct. In the Model Code of Professional Responsibility, similar provisions appear at DR 7-102(A)(6) and 7-109(C).
7. Comment to Model Rule 3.4.
people elsewhere in the organization whatever the officers or employees tell the lawyer.

§6.4.2 HANDLING PRIVATE OR EMBARRASSING MATERIAL

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

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

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

§6.4.3 HANDLING POSSIBLE CLIENT FABRICATION

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

Unconscious reconstruction of memory. Chapter 5 explains why this can happen, and §5.6 explains what to do about it. We are all capable of unconsciously reconstructing memory. When a client does it, that does not mean the client is a bad person.

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

Client: It happened many times.

Lawyer: How many times—exactly—did it happen?

Client: I don’t know—a lot.
Lawyer: Let's list each time you can remember. On what date did the first one happen?

Client: Right after that blizzard we had last February. [Client gives details.]

Lawyer: When was the next time?

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

Conscious lying. Here the client deliberately tells you something that is not true. Some clients do this because they are fundamentally manipulative. But others might be generally honest people who are in desperate or embarrassing situations, are lying reluctantly, and naively do not understand that it is in their own best interests to tell you nothing but the truth.

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

Start by giving the client a motivation to tell you the truth. Explain how you can do a good job only if you know everything—including the unfavorable facts—from the beginning. (You might give one or two illustrations of how disaster can happen if you learn of an unfavorable fact for the first time in the courtroom when there is no longer time to prepare. Choose illustrations that are similar to the situation the client is in.) Say that your first loyalty is to the client, and summarize the rules on attorney-client confidentiality. Do all of this before you turn to the lie you suspect you are being told.

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

You might explain how opposing counsel will cross-examine at trial and tell the client that you will give a demonstration of what that will be like. Start from what is undeniably true and conduct a determined but polite cross-examination, showing the client how a disinterested fact-finder is not likely to believe what the client is saying, given how inconsistent it is with what is undeniably true. Do this in such a way that the client can begin to tell you the truth without losing dignity. Alternatively, you can ask questions—some of them leading—based on the assumption that the truth is something other than what the client has said. Do not point out the difference between your assumption and what the client said. If the client answers the questions consistently with your assumption, you have begun to establish the truth without a confrontation.

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

§ 6.4.4 WHEN THE CLIENT WANTS A PREDICTION ON THE SPOT

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

But clients want assurance. What can you give them? Usually, it is enough to explain what work you will do, what issues you need to research, and what facts you need to investigate. You can add that you take the problem very seriously the problem and want to do something about it (“I want to try to find a way to get you compensation for this injury”). Choosing a time by which you will have an answer also helps.

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

§ 6.4.5 NEGOTIATING A FEE AGREEMENT

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

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

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

Or the client can pay a contingency fee. Typically, the lawyer would be paid a percentage, such as 33%, of any money recovered on behalf of the client. If the client recovers nothing, the lawyer gets nothing. A contingency fee makes justice theoretically available to a client who wants to sue for money damages but cannot afford an hourly fee. In nondamages cases, a contingency fee is imprac-
tical, and in criminal and domestic relations cases, it is illegal.9 Contingency fees are sometimes abused by lawyers, and in many states they are strictly regulated by statute or court rule.

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

Usually, the lawyer suggests the type of fee that makes most sense from the lawyer's point of view, and the client either agrees or tries to persuade the lawyer to charge another kind of fee. Whatever the type, a fee is unethical unless "reasonable" according to the rules of ethics.10 In addition to the fee, the client usually pays certain expenses, such as photocopying, messenger services, court reporter fees, and the like.

The appropriate time to negotiate the fee is usually in the closing part of the interview (see §6.2.6). Earlier, you do not know enough about how much work will be involved, and the client is usually not yet ready to hire you formally. The fee agreement should explicitly define the services you will provide.

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

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

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

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

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

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