LAWYERS AS COUNSELORS:
A Client-Centered Approach

Second Edition

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Chapter 3

ACTIVE LISTENING

1. INTRODUCTION

This chapter explains and illustrates a variety of effective listening skills. Certainly, core functions during initial client meetings typically include questioning and advice-giving. However, listening too is a crucially important skill. In fact, your ability to engender clients’ trust, develop rapport, elicit full descriptions of clients’ problems and help clients develop effective solutions may hinge as much on your listening as on your questioning and advice-giving skills. Thus, helping clients find satisfactory solutions to their problems often depends on your effectiveness as a listener.

If you listen carefully what will you hear? Of course, you will hear factual content. But often you will also hear feelings accompanying the content. That is, clients’ descriptions of what happened often include the feelings that events aroused at the time they took place.1 Moreover,
clients' acts of recall may trigger still further emotional reactions. For example, a client may say something like, "At the time I was somewhat upset, but now just talking about it makes me seethe." Finally, clients' discussions of proposed solutions almost inevitably generate emotional reactions. For example, a client may say, "I'm nervous about leaving the terms of the payout provision so uncertain." Accordingly, when you listen carefully you are likely to hear both content and current and past feelings.

Effective listening generally demands more than sitting back and saying nothing. Rather, and perhaps counter-intuitively, the sort of listening that motivates clients and helps to produce effective solutions often relies on what you say and how you say it when responding to clients' statements. In other words, far from being an intuitively simple task, listening is a skill requiring positive action. As with other skills, your ability to listen effectively rests on both awareness and use of specialized techniques. One such technique, "active listening," is this chapter's primary focus. 

2. IDENTIFYING CONTENT AND FEELINGS

"Content" consists of information that affects clients' legal interests and the likely effectiveness of potential solutions. "Feelings" are clients' internal reactions to their problems and possible solutions. When describing their feelings, clients may use words such as happy, amused, excited, sad, angry, anxious, disappointed, frightened, irritated, and confused.

Your legal training and experience undoubtedly means that you need no encouragement from this book to attend to the content of clients' problems and possible solutions. Thus this chapter emphasizes how to respond to clients' emotional reactions. To sharpen your ability to distinguish content from feelings, consider the following examples.

Client 1:

"My husband and I sat down shortly after we got married and wrote a will together, but I guess I never really thought we'd use it. Then they called to say my husband had had a heart attack at work. He died two days later. When he died, I was overwhelmed. Lately, I've been worrying about our finances. It's hard to think of money at a time like this, but I feel like I should. I can't sleep at night, and I just sit around all day. Other times, when I think about him, I start crying and it seems like it will never stop. On top of all this, his children from his first marriage


2. Chapter 2 stressed the importance of empathic understanding as a communication facilitator. Active listening is the technique through which you may most readily communicate empathic understanding.

3. Recall from Chapter 1 that recognizing and responding to clients' feelings is a hallmark of a client-centered approach.
are saying they are going to contest the will. They've already hired a lawyer. I'm really surprised, I never expected this.”

What is the content of the client’s situation?
What are the client’s past and current feelings?

Client 2:

“The chance to be part owner of a restaurant is really the dream of a lifetime. Over the last few years I've gotten increasingly disenchanted with being an aerospace engineer—you're always dependent on government contracts, and having to meet deadlines. When Mike called and said he had found a third investor and a great neighborhood restaurant for sale, it was like a huge weight came off my shoulders. My wife said, 'Do it—it's what you've always wanted.' She's been great. I'm sure it'll work out. The cash flow could be a little tight in the beginning, but according to the books the restaurant has always made money.'”

What is the content of the client’s situation?
What are the client’s past and current feelings?

Client 3:

“I think that filing a lawsuit is the best thing to do at this point. I know that the doctor should not have prescribed that medication for me with my history of asthma. He just never took much time with me and by suing I will recover what I can and maybe I can protect other patients. I'll never be the same as I was before—I guess you can't get my health back for me. But at least I'll show the bastard.”

What is the content of the client’s situation?
What are the client’s past and current feelings?
Here is how you might have conceptualized these three matters:

Client 1:

Content: Husband died unexpectedly and wife must assume responsibility for family finances. Children from the husband's first marriage plan to contest the will and have already hired a lawyer.

Feelings: Sad, overwhelmed, depressed, worried, surprised.

Client 2:

Content: Client, an aerospace engineer, has an opportunity to purchase an interest in and operate a restaurant. Two other people will be involved in the venture, and his spouse is supportive.

Feelings: Disenchanted, happy, relieved, optimistic, somewhat anxious.
Client 3:

Content: Client suffered ailments after a doctor who spent little time with her prescribed the wrong medication.

Feelings: Satisfied, hopeful, angry, sad, frustrated, revengeful.

3. OBSTACLES TO GOOD LISTENING

Effective listening requires a number of skills. Of these, perhaps the hardest to master is clearing your mind of distractors. We all are easily distracted by our own feelings and needs, and therefore may only “half listen” to what clients are saying. Consider the following factors that can easily distract you from fully attending to your clients:

1. Performance distractors: You are so eager to display how competent you are that you focus on what YOU are going to say next, rather than on what your client is saying now. Or, in contrast, you are so worried you will not know what to say next that you can barely focus on a client’s concerns.

2. Personal distractors: You are preoccupied with your own personal worries, such as a case that is not going well, a deadline you forgot, or an argument with your spouse, and therefore are less attentive to a client.

3. Client distractors: This category involves your reactions to any of a number of client characteristics. Perhaps a client’s personality is such that you are more focused on the sort of person a client is than on what the client is saying. Or, you may be so concerned about whether a client’s goals are consistent with your personal values that you become distracted. Perhaps you find a client either very attractive or very unattractive, and you pay more attention to your feelings about the client’s appearance than to what the client is saying.

4. Time and money distractors: Rather than focusing on a client, you are busy mentally calculating how much time a client’s matter will require and whether your client can afford to have you continue with the matter.

Keeping your mind clear of common distractors such as these requires considerable concentration and effort. Even if at the outset of a discussion you wipe your mind clear of distractors, they commonly creep back. A conscious effort to identify distractors when they arise may help you push them aside more successfully.

4. PASSIVE LISTENING TECHNIQUES

Passive listening techniques are those that encourage clients to talk with relatively little activity or encouragement on your part. Often,

4. Though this discussion focuses on obstacles to hearing clients' feelings, obviously such obstacles can block your reception of content as well.
when clients provide useful information, you simply want them to continue doing so. Yet, you also want clients to know that you are hearing and understanding what they are saying without running the risk of interrupting their trains of thought. The following passive listening techniques provide an ideal method for accomplishing these goals.

A. SILENCE

Clients may respond to your questions or comments by remaining silent. Rather than routinely immediately rushing to fill the conversational vacuum with additional questions or statements, often your most effective response is to remain silent yourself. By responding to silence with silence, you may allow clients the space they need to think carefully and to respond in a way that makes them comfortable.

If remaining silent seems awkward, the reason may be that in everyday life we often interpret others’ silence as indicating lack of understanding or confusion. However, clients’ silence may in fact suggest that they need additional time to consider what to say or how to say it. This is especially likely to be true for clients confronting crucial legal problems and for clients who are unused to talking with lawyers. For example, clients may need time to recall a sequence of events, to decide whether to reveal embarrassing information, or to decide how to word their responses. Or, consider a client whose lawyer reports that an adversary has no interest in settlement. The client may be so surprised by the unexpected rejection or so angered that the client wants to calm down before speaking. In situations such as these, remaining silent and allowing clients to collect their thoughts is often an effective way of motivating clients to provide information.

Of course, clients’ silence is not always an indication that they are working towards responding. Silence may well indicate a desire not to respond or confusion or uncertainty about what to say. In such situations, extended silence on your part may make clients uncomfortable and threaten their self-esteem. Thus, you’ll have to rely on judgment to decide whether to remain silent and how long to do so before speaking again. In this respect, take account not only of clients’ silence but also of non-verbal cues. Non-verbal reactions such as facial expressions can often help you gauge whether clients are befuddled or are working

5. Think about your experiences as a law student. Unfamiliarity with legal issues and uncertainty as to what kinds of responses were appropriate may well have made you hesitant to respond immediately to instructors’ questions.


7. This may be especially true for clients whose backgrounds (perhaps rooted in different cultures) tend to inhibit them from disclosing certain kinds of information, for instance facts regarding family background. See e.g. Sangsun Yang & Paul C. Rosenblatt, *Shame In Korean Families*, 32 J. Comp. Fam. Stud. 361 (2001). For a further discussion of silence as a cultural phenomenon, see Krieger, supra note 6 at 233-235.
towards responding. Moreover, if clients are silent for longer than five seconds, that may indicate that they do not want to respond or fail to understand you or do not know what to say. In that case, you may reconsider continuing to remain silent, and switch to active listening or other questioning techniques.

When you do remain silent, send non-verbal cues of your own that you are remaining silent in order to give clients space to formulate responses. For example, you may maintain eye contact with clients, lean slightly forward, and nod your head as clients begin to speak. Such behavior tends to communicate your expectation that they will respond. Your silence together with your non-verbal behavior thereby takes advantage of the facilitator, “fulfilling expectations.”

B. MINIMAL PROMPTS

While silence on your part can motivate clients, your silence may also inhibit them. Particularly if you remain silent for a long period or on repeated occasions, clients may doubt your attentiveness and interest. As a result, they may feel anxious or on the spot and “clam up.”

To reassure clients of your attentiveness without interrupting their trains of thought, you may interject brief expressions termed “minimal prompts.” These include such brief comments as:

“Oh”
“I see”
“Mm-hmm”
“Interesting”
“Really”
“No fooling”
“You did, eh”

8. For a further discussion of the necessity to consider the context in which silence occurs, see Krieger, supra note 6 at 211, 243.

9. Allowing 5 seconds of silence before speaking is meant as a suggestion not as the “correct” amount of time. Counseling literature contains disagreement on how long one should allow clients to remain silent before one speaks. See Krieger supra, note 6 at 342.

10. What you think of as a long pause in a conversation may in reality be a very short one. Goodman notes that most people are uncomfortable with “conversational allowing” because the typical amount of time between when one person in a conversation stops talking and the other person starts is nine-sixths of a second. See GERALD GOODMAN, THE TALK BOOK 147-48 (1988). He gives an example of a conversation between Carl Rogers, a master of client-centered therapy, and a patient in which Rogers allowed pauses of up to 17 minutes. Id. at 167-68.

Here is an example of this technique in an interview:
C: I can see a lot of problems with this contract.
L: Mm-hmm
C: It really locks me in for five years and I'm not sure I want to do that.
L: I see.
Minimal prompts can be *nonverbal* as well. Consider this example:
C: My partner is very stubborn. He resists every suggestion to computerize our operations. (Pause)
L: [Nods her head.]
C: Maybe it's not so much stubbornness as fear. He's afraid we'll dramatically, and perhaps needlessly, increase our overhead and end up in bankruptcy.
L: Mm-hmm

Minimal prompts are non-committal; they give no indication of how you are evaluating a message. Yet they can be quite effective. Non-committal responses such as those above tend not to interrupt clients' trains of thought. They also tend to serve as re-enforcers that encourage further elaboration. As with silence, try to accompany prompts with body language that communicates your interest and involvement with what clients are saying.

**C. OPEN-ENDED QUESTIONS**

Open questions ask clients to discuss subjects in their own words.¹² Like minimal prompts, open questions allow you to move stories along without interrupting clients’ trains of thought. Examples of open questions include:

"What else happened?"
"What other reasons are there?"
"Can you tell me more about that?"¹³
"Please continue."

The techniques described in this section — silence, minimal prompts, and open-ended questions — are basically passive. They function primarily to give clients the space to freely communicate their thoughts and feelings. At the same time, these techniques involve little activity on your part. However, they do not communicate empathic understanding. To accomplish that goal, you must employ a technique known as active listening.

¹² For a more detailed discussion of open questions, see Chapter 4.
¹³ Often, open-ended questions are used interchangeably with directive probes such as "Tell me more about that" and "Please continue." Clients will generally perceive a directive request in the same way as an open-ended question. In this book, the two are treated as synonymous. See Chapter 6.
5. ACTIVE LISTENING

A. GENERALLY

Active listening is the "most effective talk tool that exists for
demonstrating understanding and reducing misunderstanding." It is
the process of picking up clients' messages and sending them back in
reflective statements that mirror what you have heard.

Client: "When I asked him for the money, he had the nerve to tell me
not to be uptight."

Lawyer: "Rather than offering to pay you back, he suggested that you
were somehow wrong for asking. You were angry."

Your reply is a classic active listening response. It demonstrates that
you understand the content of the client's remark. Also, the reply
reflects back your understanding of the client's feelings that accompa-
nied the incident. Further, the statement only mirrors the client's
statement; it does not in any way "judge" it. And, though your
statement reflects the client's feelings, you do not ask the client to
explore those feelings in greater detail. Rather, the statement simply
indicates your awareness that the client was angry.

As in the example above, active listening does not consist simply of
repeating, or "parroting," what clients say. Rather, your reply reflects
the essence of the content of the client's remark, as well as your
perception, based both on the statement and on the client's non-verbal
cues that indicate clients' feelings. You distill the information and
emotion from the clients statement, and then convey back what you have
heard and understood—hence the term, "active listening."

Active and passive listening responses share some similarities. Nei-
ther type of response is likely to disrupt clients' trains of thought, or
switch clients from one topic to another. The primary difference is that
reflective responses explicitly communicate to clients that you have
actually heard and understood what they have said; they explicitly
demonstrate your comprehension. By contrast, passive responses, such
as "Mm-hmm" or "Tell me some more about that," can only imply that
you have heard and understood. Active listening responses demonstrate
empathy and understanding, and in a way that encourages clients to
continue speaking on whatever subject they choose.

Moreover, active listening responses probably fulfill the empathic
ideal of "non-judgmental acceptance" more effectively than passive ones.
Reflective statements generally imply a greater degree of non-judgmental

15. For a discussion of active listening which contains illustrative samples drawn
from actual recorded dialogues, see Conner & Conner, supra note 11 at 87-104. See also
Bruce J. Winick, Therapeutic and Preven-
tive Law's Transformative Potential for
Particular Areas of Legal Practice, 5 Percu.
acceptance than do passive remarks. Again, it is the explicit mirroring of clients’ remarks that suggests a non-judgmental attitude.

While an active listening response may mirror both content and feelings, this chapter primarily emphasizes techniques for using active listening responses to reflect feelings. It does so for two reasons:

1. As a general rule, lawyers probably pay too little attention to clients’ feelings. Lawyers are prone to seeing themselves as rational fact-gatherers and decision-makers. At either a conscious or intuitive level, lawyers tend to perceive feelings as either irrelevant, or as unwelcome impediments to what should ideally be a completely rational process. This attitude towards the non-importance of feelings in the attorney-client relationship is wrong on at least two grounds. First, empathy is the real mortar of an attorney-client (indeed, any*) relationship. To be empathic you need to hear, understand and accept clients’ feelings, and to find a way to convey this empathic understanding to your clients. Second, as stressed in Chapter 1, clients’ problems do not come in nice, neat, rational packages devoid of emotional content. Problems evoke feelings, and feelings in turn shape problems. Lawyers can neither communicate fully with clients nor help fashion satisfactory solutions if they ignore feelings.

2. Everyday life and years of schooling have given most of us the skill to understand and respond to content. For example, what do we study more in secondary education—the strategic importance of Civil War battles, or the feelings of the participants? We have little formal training in listening for and articulating the human feelings that accompany events and future plans. And many of us do not intuitively discuss feelings with people with whom we are not close. Therefore, you are likely to need to devote more effort to learning to reflect feelings than to learning to reflect content.

Feelings, however, often do not come tightly packaged, ready to be reflected on. How clients express feelings influences how you reflect them. Hence, the next sections examine the different ways that clients are likely to express feelings, and the manner in which you may respond reflectively.

B. RESPONDING TO VAGUELY EXPRESSED FEELINGS

Clients often express feelings in poorly articulated, rather vague terms. In such situations, you can be empathic by making a reflective response that puts a precise label on the feelings. By specifically labeling feelings, you can help clients understand their own emotions. The labeling helps bring the feelings out into the open, so that the feelings are explicitly included in the counseling process. Examine a few examples of client statements that articulate feelings in a vague, abstract, or

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general way, and responses that attempt to identify and label the feelings:

Client: "I felt bummed out when I found out she was having an affair with him. I thought our marriage meant something. I guess I was wrong."

Lawyer: "You were hurt and disappointed when you learned about the affair."

Client: "I've felt out of it ever since I moved to Minneapolis. I don't have friends here or even neighbors to talk to."

Lawyer: "You've felt lonely and isolated since you came to Minneapolis."

Client: "With Marcia in the business I know we can make it. She knows more about accounting in the fashion industry than anyone."

Lawyer: "You feel happy and confident with Marcia as a partner."

In each example, you restate in more specific terms the feelings that each client expressed only vaguely. Note that reflective responses may begin with phrases such as, "That must have made you very ..."; or, "It sounds like you felt . . . ." However, the simple and direct responses illustrated in the three examples above are just as effective.

Try your own hand at active listening. As the lawyer in the examples below, what precisely-labeled feelings might you reflect back to the client?

Client: "When I told him I was going to a lawyer for a divorce, he just looked at me. He looked for a long time and then he left. It was strange."

Client: "After she told me the loan for the dental equipment had been approved, tears almost came to my eyes. My parents had worked so hard to put me through school, and I wish they could have been there with me."

C. RESPONDING TO UNSTATED FEELINGS

Frequently, without explicitly expressing emotion, clients discuss situations that your everyday experience suggests are emotion-laden. In such situations, the absence of explicitly-expressed emotions need not cause you to overlook clients’ real but unstated feelings.

For example, assume that you represent a parent whose young child was injured at a day-care center. The parent is describing what happened after the parent was notified of the child’s injury:
Client: It took them about an hour to find me at work to get the message to me that something had happened to Jan. After about 15 minutes Ms. Wyden, the day care director, told me that Jan wasn’t hurt too badly, and she told me which emergency room Jan had been taken to. When I got to the emergency room, the nurse in the reception area couldn’t give me any details on how Jan was or where Jan was. I had to wait for about 45 minutes for the doctor to come out.

Lawyer: Then what happened?

Here, the client’s statement is devoid of expressed emotion. And, perhaps focused only on content, your response was, “Then what happened?”

However, the client has described a situation that, for most people, would be extremely stressful. Therefore, an active listening response would certainly have been appropriate. You might have reflected the emotions that the client did not put into words, but which the client undoubtedly felt: “Despite the director’s assurance, you must have been really anxious about Jan and upset that you had to wait so long for information.”

Providing empathic responses to clients who neither directly nor indirectly assert any emotions is a two-step process. Once you recognize that a situation was probably emotion-laden, the first step is to identify and label the feelings. The second step is to mirror the feelings with a reflective response.

To carry out the first step of identifying and labeling clients’ unstated feelings, place yourself “in a client’s shoes.” If you had been in the client’s situation, what emotions would you probably have felt? Even if you have never experienced a client’s precise situation, you can almost always hazard an educated guess about how the client felt. Through vicarious (films, books, friends’ stories) and analogous experiences, you generally have a reasonably good idea of the emotions a client was feeling. Then, in the second step, incorporate the feelings into a reflective response.

The examples below provide practice in this two-step process. The clients’ statements do not overtly state feelings. Formulate an active listening response that you might make in response to each statement.

Client: “When he failed to pay, I sent him two letters. I got no response. I called three times. He was never in. The secretary said he would return the calls; he never did.”


18. Researchers have discovered that metaphorically placing oneself in the shoes of another is an important step in making empathic responses. Id.
Client: “The bank has been dealing with these builders for over 40 years. We’ve always provided all their construction financing, and often gone out on a limb to make loans when times were hard. Now they say that if we don’t refinance on more favorable terms they will take their business elsewhere.”

Client: “We’ve known each other for over 50 years. I know that people usually appoint their children as executors, but Pat is so familiar with everything and such a trusted friend that I really want Pat to be my executor.”

Sometimes, you may be confident that a situation was an emotional one, but less confident about precisely what emotion was aroused. If so, you may doubt whether the feeling you identify in a reflective response will be completely accurate. As a result, you may shy away from verbalizing feelings when a client has not done so first.

However, a reflective response need not be “in the center of the bulls-eye” to provide empathy. For example, assume that in the second situation above, your reflective response was, “You sound pretty aggravated.” If you are correct, your client may well validate the accuracy of your statement: “Yeah, I really am; given how we have helped these people for all this time, I can’t believe they are doing this.” But even if you are somewhat off the mark, a client will usually clarify the inaccuracy—“Well, I’m not aggravated yet, but I certainly am puzzled. What do you think they’re up to?” Thus, even if your statement is somewhat inaccurate, in all likelihood it will facilitate communication. The reflective response indicates your desire to understand, and may elicit further clarifying information.

D. RESPONDING TO NON-VERBAL EXPRESSIONS OF FEELINGS

Your everyday knowledge of how people are likely to react to situations is one basis for identifying unstated feelings. A second is clients’ non-verbal cues. Non-verbal cues are generally of two types—auditory and visual. Auditory cues include such things as voice intonation, pitch, rate of speech, and pauses in conversation. Visual cues include posture; gestures; facial expressions; body movements such as fidgeting fingers and constantly shifting positions; and autonomic physiological responses such as sweating and blushing. When non-verbal cues indicate the presence of a particular emotion, an active listening response is often appropriate.

19. Therapists and other listening “experts” agree that some distortion in labeling another’s feelings is unavoidable and therefore recommend that caution be used when reflecting or identifying an interviewee’s emotions or feelings. See Cormier & Cormier, supra note 11, at 94.

20. For a more detailed discussion of the interpretation of non-verbal behavior, see Cormier & Cormier, supra note 11, at 63–85.

21. Recall from Chapter 2 that clients from “high context” cultures may be especially likely to rely on non-verbal methods of communication. When clients identify
Though non-verbal behavior is extremely difficult to illustrate in a book, an attempt may be helpful. Assume that a client's voice cracks and that the client talks rapidly while describing the tentative terms of a proposed partnership deal. The deal is not of the sort that strikes you as laden with emotion. However, the non-verbal cues suggest that this particular client is extremely anxious to conclude the deal. Hence, an active listening response would be appropriate: "You seem anxious to have this deal concluded as quickly as possible."

You may feel somewhat hesitant to identify and respond to feelings evidenced by non-verbal cues, perhaps out of fear that you will make an inaccurate interpretation. After all, both individual and cultural variations in the way people express themselves may leave you uncertain about what inference to draw from non-verbal behavior. For example, is a smile a client's way of showing happiness or anxiety, or is it simply the client's typical facial expression? Do a client's tears signify sadness, relief, or your having left half an onion on your desk? Unless you are confident that you are reading a client's non-verbal behavior correctly, you may be understandably reticent to make a reflective response based on that behavior.

Developing "baseline pictures" of clients' non-verbal behavior is one technique for evaluating the meaning of possibly ambiguous non-verbal behavior. Over the course of representing a client, you may recognize that certain non-verbal behavior is "standard" and thus does not signify significant emotion. But a change of standard behavior may be an emotional clue.

For example, if a client habitually wrings his hands, wringing hands is probably not a sign that a particular topic is producing a significant emotional reaction. However, if a client who does not normally wring his hands suddenly begins to do so when you mention a particular topic, you may be able to infer that the client's emotions have been aroused.

Non-verbal cues tend to appear spontaneously; they are much less subject to conscious control than verbal expressions. Thus, they tend to "leak" information about clients' inner lives. Sometimes, clients try very hard to "maintain composure" by masking non-verbal cues. However, unless they have won an "Oscar" for "Best Actor," most clients are unable to repress all non-verbal expression. For example, an anxious client may avoid facial expressions, but be unable to hide body movements such as drumming fingers or rapid changes in position. Hence, if you are observant, you may detect those feelings that clients try to conceal, and respond empathically.

However, a more difficult question is whether you ought to make an active listening response when you sense that clients are consciously attempting to leave feelings unstated, perhaps by speaking and behaving

with "high context" cultures, therefore, you may be especially likely to active listen in response to clients' non-verbal behavior.
in a very guarded and restrictive manner. If clients do not want to face the emotional dimensions of a problem, should you attempt to pressure them to do so?

From the standpoint of technique, the question is probably irrelevant. As you recall, active listening responses do not direct clients to talk about their feelings. Rather, they are a method for keeping clients on track in an empathic manner. After active listening responses, clients typically respond by continuing to talk about whatever aspect of situations they feel comfortable discussing.

However, clients who consciously attempt to mask feelings may perceive active listening remarks as an attempt to probe feelings. For example, noting a client's clenched fists, you say, "This subject seems to worry you." If the client has been attempting to conceal that emotion from you, the client may interpret your active listening comment as an attempt to probe feelings.

If clients are likely to perceive active listening responses as unwelcome probes into feelings, client-centeredness suggests that you typically respect their wishes and avoid injecting feelings into discussions. For one thing, for some clients, the assumption that a solution should be chosen after several possible options have been examined may be incorrect. For example, a client may be paralyzed and unable to choose an effective solution if too many issues are on the table. Thus, a client's masking of feelings may be an attempt to simplify a problem and keep it manageable. In such a situation, client-centeredness suggests that you accede to a client's implicit wish to focus exclusively on content.

Second, as autonomous individuals, clients are entitled to privacy and should be allowed to decide how much of their emotions and private thoughts to convey to you. Some clients may value their privacy more than they do a solution that is reached only after consideration of all relevant dimensions of a problem. Again, client-centeredness may lead you to respect a client's wishes.

More specifically, then, the question is how to identify those situations in which you are likely to help clients by bringing forth consciously-masked feelings. In the abstract, no answer may be possible. You cannot take refuge in the bromide of "informed consent." Clients cannot give informed consent until they are aware of the extent to which their disclosure of emotions and private thoughts will increase the chances of finding satisfactory solutions. But the very process of making clients fully aware of whether disclosure will provide increased chances for success requires an extensive foray into their privacy! Hence, a conundrum exists. Informed consent about whether to disclose feelings is possible only after an invasion of that which clients may want to keep quiet. In the end, then, you must exercise professional judgment about whether to reflect emotions that clients seem anxious to avoid.

22. Please understand that we are not discussing or attempting to deal with subconscious or unconscious repression of feelings.

23. For further discussion of issues related to informed consent, please see Chapter 13.
E. RESPONDING TO CLEARLY-ARTICULATED FEELINGS

When clients clearly state feelings, reflecting back those identical feelings is likely to affect clients negatively. For example, assume that a client mentions that she was disappointed in the reaction of her partner. You mirror the remark by saying, “You were disappointed.” The client’s internal reaction may well be something like, “Yes, that’s what I said, you dummy; I was disappointed.” The client’s verbal reply, however, will hopefully be more polite: “Yes, I really was.” But in terms of the self-generating force usually associated with empathic understanding, parroting responses are minimally effective. Clients usually will do little more than confirm that they were heard correctly.

Hence how do you mirror back the essence of clients’ clearly-articulated feelings without parroting? One opportunity arises when situations are so common that clients will readily believe that you have been in the same or similar situation. When a situation is of this type, you can empathize by directly expressing your understanding of the client’s reaction:

Client: I was so angry and frustrated when he again refused to go through with the deal.

Lawyer: I can understand how upset you’d be after he did it again.

Verbalizing your understanding often avoids the irritating aspect of “parroting” and is fully empathic at the same time.

Be hesitant, however, to make such a response when clients are likely to realize that a situation is probably quite foreign to you. If you assert your direct understanding of a situation that is obviously outside your world of experience, clients may think you insincere or patronizing. For instance, assume that a client who is unemployed and homeless states, “I really feel humiliated when I have to talk with the welfare worker about finding a place to stay.” The client is unlikely to feel empathy from your response, “I know just how humiliating that is.” In such a situation, a passive listening response may be more facilitative. Or, if you have had ongoing contact with the client and believe you know the client well, you might say something like, “I know how much you hate situations like this.” This response conveys understanding but does not imply that you have been in the same situation.

F. NON-EmpATHIC (JUDGMENTAL) RESPONSES

Consider the following examples of responding to clients’ feelings in non-empathic ways:

Client: When the promotion list came out, I was not on it. And I know I had been on the preliminary list. To see such blatant discrimination made me realize it was finally time to do something about it.
Lawyer:

No. 1: I don’t blame you.

No. 2: But I guess after a while you calmed down.

No. 3: You finally acknowledged what you probably knew all along. You as well as many others were victims of discrimination, and would probably continue to be.

Lawyer No. 1 has judged the appropriateness of the reaction. Lawyer No. 2 has treated the feeling as irrelevant and shifted the discussion to another time frame. Lawyer No. 3 has played amateur psychologist, by attempting to analyze the reason for the reaction. None has simply mirrored back the client’s likely emotions—"You were really furious," or "You feel wronged and want to take action."

Many of us are far more used to giving advice and searching for underlying causes of emotions than we are to simply reflecting others’ feelings.44 And generally we do so out of a genuine desire to be of help. However, judgmental responses may actually reflect our own discomfort in dealing with feelings. None of the lawyers above encourages the client to continue talking about feelings; if anything, the replies divert the clients' attention away from the feelings.

To think a bit more about the difference between empathic and non-empathic responses, consider the following examples, and analyze the lawyers' responses. In which instances, if any, does the lawyer provide an empathic response?

Case #1

Client: We had only been married for three years. She was only 32 and now she is gone. I can't believe it; she had so much to give. I feel like I'm not in this world.

Lawyer:

No. 1: Don't worry; most people feel that way at first. The feeling will pass with time.

No. 2: It's probably because her death was so unexpected; you had no time to prepare.

No. 3: You're feeling lost and abandoned.

No. 4: It's perfectly proper for you to feel that way. Under the circumstances, no one could expect anything else.

Case #2

Client: We've been working on landing this account for over two years. Our competitors were sure they were going to get it. I've got so many ideas for positioning the whole product line; I can't wait to finalize the contract and get going.

Lawyer:

No. 1: You have every right to gloat after pulling off a deal like this.
No. 2: You're enjoying the fruits of two years of hard work and anxious to move forward.

No. 3: That's great but you have to take your time and go over the contract carefully. If you don't you may regret it.

No. 4: You're probably happy because you feel you are achieving a potential you always knew you had.

6. DIFFICULTIES IN MASTERING ACTIVE LISTENING

Without doubt, you may find it difficult to become immediately comfortable with, and proficient in the use of, active listening. However, do not use this initial discomfort as an excuse to abandon your efforts to improve your listening skills. With a little practice, you are likely to develop confidence in your ability to incorporate active listening responses in counseling conversations. Therefore, if your initial reaction to active listening is one of discomfort, persevere. Your clients will be much better off for your patience and willingness to learn an unfamiliar technique.

To put your potential personal reactions into perspective, consider the following objections to learning active listening that some lawyers and law students have advanced, and rejoinders to those objections.

A. "FEELINGS ARE FOR 'SHRINKS,' NOT LAWYERS"

1. "I'm afraid we'll get so involved in feelings, I won't properly deal with the legal issues."

2. "Cases are decided on the basis of facts. Lawyers deal in facts; psychiatrists, psychologists, and social workers deal with feelings."

A belief that feelings are largely irrelevant to lawyer-client interactions may come from a number of sources. The word "feelings" may connote irrationality and trigger the idea that feelings must be avoided so that problems can be resolved in a rational and objective manner. Or,
feelings may seem irrelevant to the achievement of satisfactory solutions. Finally, thinking about feelings may generate discomfort. An easy way to avoid such discomfort is to deny the existence and importance of feelings. If the rationalization is successful, discomfort can be put to rest.

Remember, however, that your role is not to analyze feelings, but to acknowledge problems’ emotional aspects when clients raise them. As one scholar has noted,

A reflection doesn’t try to understand the other person’s thoughts or feelings better than he does. It doesn’t try to solve the other’s problems. It doesn’t try to add new meaning or to analyze the message. Reflections simply show that meaning has been registered. They reveal an act of empathy. They tell the listener that he or she has been heard.

B. “I FEEL EMPATHIC, BUT I JUST CAN’T FIND THE RIGHT WORDS”

1. “Reflecting feelings makes me feel awkward.”
2. “It feels so mechanical, reflecting back what they feel.”
3. “When I listen to myself, it sounds so hollow and forced. I’m sure the client will feel that way, too.”

Your comfort with active listening may be enhanced if you recognize that there is no one “right” way to phrase active listening responses. Empathy results from a reflection of feelings, not from a magic combination of words. For example, assume that a client says, “I had always trusted my broker, but then she went and bought shares over-the-counter without any authorization from me at all.” Assume further that the emotion you believe that the client is expressing is “disappointment.” Any of these reflections, and undoubtedly more that you can think of, would be appropriate:

“You must have been disappointed.”
“You felt disappointed.”
“You were disappointed.”
“It was very disappointing.”
“Your broker really disappointed you.”
“That must have been disappointing.”
“I imagine you were disappointed.”
“I can see how that must have disappointed you.”

Moreover, recall that reflections do not need to be absolutely correct to be useful. If a client feels that your reflection does not quite “fit,” the client may clarify and thereby gain additional insight into his or her feelings. For example, had the client above felt that “disappointment”
did not accurately capture her or his feelings, the client might have responded, “It’s not just disappointment. I’m pretty angry.”

Finally, if you find that reflecting feelings is extremely uncomfortable, you might start the learning process by reflecting only the content of clients’ statements. Once you feel comfortable making reflective statements about content, reflections of feelings will come more easily to you.

C. “THERE’S NO WAY I CAN EMPATHIZE WITH THAT CLIENT”

1. “Look, I just feel phony. There is no way I could say, ‘So you felt like you just couldn’t stop yourself.’ I can’t say that; people can control themselves.”

2. “Even if I try to be empathic, I’m sure my voice will give away the fact that I don’t really mean it.”

3. “Acknowledging those feelings makes me feel like I’m condoning that behavior.”

4. “The guy seems so slick that it makes me feel if I respond to his feelings, he’ll think I’m weak or just plain foolish.”

5. “She’s so aggressive, I feel that if I respond to her feelings, she’ll see me as saying it’s OK to act out of spite.”

You are bound to encounter many individuals who tax your willingness to be empathic and non-judgmental. You may be reluctant to help people who have engaged in behavior you cannot personally abide or who have certain kinds of personalities. For example, some people may find that they do not want to help welfare recipients, bankrupts, tax evaders, child molesters, con artists, or rapists. Others find they are reluctant to assist people they view as having personalities that are extremely passive, dependent, aggressive or manipulative.

When clients or prospective clients are persons who, by dint of personality or past conduct, you are reluctant to help, you may experience a reaction similar to those above. Pursuing your own reactions further, however, you may differentiate between situations in which you totally lack empathy and situations in which you have partial empathy. For example, you may be unable to empathize with the passions that may have consumed an alleged child molester, but able to empathize with the abused childhood that helped produce those passions.

Unless you totally lack empathy for clients, you probably will be able to make some active listening responses to the emotional aspects of their problems. On the other hand, if you feel no empathy at all for clients, recognize that you may not be able to adequately represent them and consider referring them to other lawyers or withdrawing.26
D. “USING ACTIVE LISTENING WILL MAKE A CLIENT TOO EMOTIONAL”

1. “I really feel uncomfortable when the client starts crying.”

2. “I ‘active-listened’ to his anger and he just seemed to keep on going; I didn’t know what to do.”

3. “I think it might be a good idea, but I’m afraid the client will get so upset he’ll fall apart. What’ll I do then?”

Responding to feelings may result in an outpouring of even more intense emotions. If you are a beginner, experiencing such intense feelings may make you uncomfortable and lead you to back away from the use of active listening. You may feel that you are unable to stop the outpouring of emotion; that you inadvertently made the client feel worse; or that you are wrong to elicit all the emotion since there is little that you can do to resolve the feelings.

You usually can overcome concerns about eliciting an excessive amount of emotion if you recognize two propositions. First, although clients may express solely negative feelings, their overall reaction may be quite positive. The clients have had the opportunity to get “feelings off their chests,” along with the satisfaction of being heard and understood. Usually this experience will result in a feeling that a discussion was, as a whole, quite beneficial.

Second, often the best way to alleviate clients’ distress is to let an outpouring of emotion continue. Continued empathy usually causes an emotional tide to recede. If you can struggle through the initial discomfort, admittedly a difficult task, you will generally find that clients regain their composure. Thus, if you can, on a couple of occasions, continue to be empathic despite your discomfort, you will usually experience the success that comes from allowing clients the opportunity to ride out their emotions. With this success, you will likely experience less anxiety about eliciting and empathizing with intense emotions the next time they arise.

E. “TALKING ABOUT FEELINGS MAKES IT DIFFICULT FOR ME TO GET BACK ON TRACK”

1. “After talking about how angry she was with the Board’s decision, and how it had double-crossed the employees, I felt uncomfortable having to return to questions about the specific terms of the deal.”

2. “After he poured out his heart about how hurt he was when his wife left, I felt terrible having to start talking about what property they had and how title was held.”

Once active listening has put a clients’ feelings on the table, you may find it difficult to shift gears to matters of content. It seems
awkward when clients “pour their hearts out” to suddenly ask questions as if nothing of emotional importance had happened.

To smooth the transition, you may find it helpful first to summarize clients’ situations, including their emotional reactions, and then to ask if they feel ready to move to other topics. Consider this example:

**Lawyer:** You invested your lump sum retirement in various real estate projects with your friend Bill, whom you’ve known on and off since high school. He didn’t follow through on his promises, and as far as you can tell you’ve lost most of your investment. You’re extremely upset, and to make matters worse his family is calling at all hours of the night begging you to help find a way to stop him from squandering even more money. You find it hard to be sympathetic and helpful because you’re so angry at Bill. And to top it off, your doctor just told you that you’re headed for a heart attack, which isn’t surprising given all that you’ve been through.

**Client:** That’s right. Sometimes I wish I were dead and didn’t have to face this mess. It’s hard to live with myself, I feel so stupid for ever getting mixed up with him.

**Lawyer:** I can see how upset and aggravated you are, and I want to start helping as quickly as possible. If you feel ready, I’d like to ask some questions about the deal you had with Bill.

**Client:** I think I’m ready to get on with this, but I get furious talking about what happened.

**Lawyer:** That’s fine, feel free to express your anger as we go along.

Here, in addition to summarizing the client’s situation and feelings, you explicitly state your desire to help and willingness to allow the client to continue to express feelings.

**F. “THE CLIENT IS SO CONFUSED THAT I DON’T KNOW WHICH FEELINGS TO REFLECT”**

“He says he’s eager to go ahead with the deal, yet in the same breath says he’s afraid of committing himself.”

Sometimes clients express confused and contradictory feelings. You may feel stymied—should you focus on all the feelings, or just on one?

Recognize that contradictory feelings are the norm, not the exception. For example, when buying their first home, people typically have a variety of contradictory feelings such as wanting to put down roots vs. being afraid of feeling trapped; wanting to save money vs. being worried about taking on a big debt. Here, a young woman describes her feelings about buying a house alone:

“I want to put an offer on this house. I’ve been looking for months and I know this one will be a good investment. Best of all, I like this
house. But the mortgage payments scare me and I’ll be living there alone and it feels so disappointing. But my accountant says I’d be crazy to go on paying so much rent and taxes….”

When clients have contradictory feelings, your professional role is not to try to decipher and resolve the conflicts. Your most helpful response is to try to reflect the contradictory feelings:

1. “It seems like you feel very torn about buying this house all alone.”

2. “Right now you seem to have very mixed feelings. On the one hand it seems like a good investment, but on the other hand living there alone feels disappointing.”

G. “ACTIVE LISTENING IS MANIPULATIVE”

1. “Maybe she’s not stating her feelings because she doesn’t want to talk about her feelings. I don’t think I should do things to try to make her talk about feelings.”

2. “I don’t think lawyers should manipulate people to expose their feelings. It’s an invasion of their privacy.”

3. “Look, I can go through the right motions to make the person believe I feel understanding and supportive, but I’m really just doing it to get information.”

The use of active listening skills is in part the use of a technique to gain information. However, you do not employ active listening simply out of a voyeuristic interest in clients’ private feelings. Rather, active listening is one among many techniques you employ in order to assist clients to find satisfactory solutions to problems. If any technique that produces information that clients might not otherwise reveal is to be denounced as “manipulative,” then perhaps such standard practices as putting clients at ease with a bit of chit-chat and a cup of coffee, eliciting information in chronological fashion, probing for details with closed rather than open questions, and showing clients documents to refresh their recollection are all unfairly “manipulative.”

Thus, the answer to the claim that active listening is unfairly “manipulative” is this: Clients come to you for assistance and advice, and clients’ full participation is necessary if you are to help them find solutions that address all dimensions of problems. Active listening, which provides non-judgmental understanding, is an essential technique for gaining full client participation.27

27. As suggested in section 5 above, you may sometimes limit your use of active listening when you sense that a client is consciously avoiding a discussion of feelings. In the absence of client reluctance to discuss feelings, you need not routinely tell clients what active listening is, and secure permission to use it. Such routine requests are likely to drive a wedge into an attorney-client relationship, as clients do not normally come to attorneys for enlightenment as to lawyer techniques, whether it be active listening, forms of questions, sequencing of questions, or the inclusion or omission of particular topics. Moreover, seeking client permission to employ active listening, or any other “technique,” would almost certainly lead to the informed consent dilem-
7. **HOW MUCH ACTIVE LISTENING?**

Clients typically reveal emotions repeatedly as you gather information about their problems and seek to resolve them. Given this continual emotional presence, how often should you reflect feelings?

There is no single, right, or easy answer to this question. You might think that some kinds of legal matters (say, marriage dissolution and wrongful termination) are inherently more prone to emotion than others (say, antitrust litigation or a simple lease deal), and thus give rise to more active listening. Or, your reaction may be that the extent to which you use active listening typically depends on how open, reticent or emotional clients are. However, none of these categories is a sure guide to how much active listening is appropriate with any individual client.

For example, if a client is talking fully and openly, you may make a number of active listening responses simply to be empathic. But if a client is not participating fully in discussions, you may make a like number of active listening responses in an effort to encourage the client to “open up.” Similarly, of two clients involved in antitrust litigation, one may be an eager participant in a discussion, while the other may be the opposite. Hence, despite the subject matter similarity, you may use active listening in the latter matter more than in the former. Finally, whatever a client’s general personality, the same client may be quite open in one matter, and rather reticent in another. Hence, in any individual matter, you must ultimately rely upon your judgment when deciding how frequently to reflect clients’ feelings.

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28. Psychologists have praised helping conversations in which the helper’s remarks consisted almost entirely of reflections. See Comm & Comm, supra note 11. In lawyer-client dialogues, you probably will not active listen to this extent.
Chapter 4

FORMS OF QUESTIONS

1. INTRODUCTION

This chapter examines common forms of questions and their likely advantages and disadvantages. The chapter’s goal is to further your ability to adapt questioning consciously according to the circumstances of individual interviews and the type of information you seek. The potential benefits of an effective questioning style include enhancing rapport with clients, motivating them to participate fully, conducting interviews efficiently, and maximizing your opportunity to elicit full descriptions of clients’ problems and concerns.

It is probably fair to say that in everyday conversation, few us pay much attention to the types of questions we ask and respond to. Nevertheless, we are likely to react differently according to the kinds of questions we are asked. For example, assume that you are at a restaurant and that a friend asks you either: (1) “What kind of food are you in the mood for?” or (2) “Are you going to have the chicken breast with Dijon mustard sauce?” Or, assume that during one of your favorite law school classes, an instructor asks you either: (1) “Please tell us about Palsgraf.” or (2) “In Palsgraf, what did the trainman do to bring about the plaintiff’s injuries?”

In the restaurant example, would you be likely to respond more expansively to one question than the other? Does one question indicate more interest in your underlying feelings and attitudes than the other? In the law school example, do you have a preference for one question rather than the other? Would one put you more “on the spot” than the other? If your friend or your law school instructor is interested in specific information, which question is more likely to elicit it?

Perhaps not everybody would answer these questions in the same way. But most people would probably, for instance, state that the first restaurant question indicates more interest in them as a person than the second. Moreover, apart from the issue of whether everyone would react in an identical manner, undoubtedly most people would answer differently depending on which question in each pair was asked of them.
What is true in everyday life is true in legal interviewing and counseling conversations. The information you get from clients, their motivation to speak and their attitudes towards you are all a product to some degree of the kinds of questions that you ask. Of course, human behavior is too complex to conclude that a particular form of question will always generate the same type of client response. Nonetheless, research and experience demonstrate that different forms of questions are likely to affect the amount, nature and quality of information that you receive. Thus, awareness of different forms of questions and the typical consequences of each can help you make explicit questioning choices so as to motivate clients and further the effectiveness of information-gathering in client meetings.¹

2. FORMS OF QUESTIONS

A. GENERALLY

The forms of questions range from open to leading. No hard and fast line separates one form from another. But the principal touchstone that distinguishes forms of questions is the degree of freedom that questions allow in responses. For example, consider the following questions:

1. “Tell me about the car.”
2. “Tell me about the color of the car.”
3. “Tell me whether the car was red.”

On the surface, each question seems pretty much like the others; each begins with “Tell me” and asks about a car. Yet the questions differ markedly in the freedom of response they allow. The first question invites discussion of any or all characteristics about the car. The second question restricts the scope of discussion to characteristics pertaining to the car’s color. The third question allows no description at all; it restricts the respondent to verifying the car’s color.

¹ This chapter proceeds for the most part on the assumption that clients are generally able to recall and report their observations, experiences, and feelings. In reality, of course, clients are not perfect recording devices. The accuracy with which clients perceive, recall, and report data is subject to a variety of influences. These influences include factors within a client personally (e.g., how much attention a client was paying to an event; whether a client was under stress); and factors within the environment (e.g., light or dark when a client saw something.) For the most part, such factors potentially affect credibility, and are the subject of an extensive literature. See, e.g., Brian L. Cutler, Strategies for Mitigating the Impact of Eyewitness Experts, 37 Prosecutor 14, 18 (2003), and Per-
The fact that respondents are to choose the scope of responses, the more open questions are. The more questions restrict the scope of responses, the more closed they are. Neither form of question is necessarily more effective than the other. Given how clients typically react to open and closed questions, each has its purposes.

B. OPEN QUESTIONS

Open questions allow clients substantial latitude to select the content and wording of a response. Open questions generally communicate your expectation that clients will respond at some length and in their own words. At their broadest, open questions even allow clients to choose the subject matter of a response.

Examine the following questions:

1. "Tell me what brought you in here."2
2. "Tell me about your family."
3. "What happened after the meeting?"
4. "What took place during the conversation."
5. "How will your employees react if you move the business to a new location?"

Each question is open. Each invites a lengthy response, on a variety of potential topics, and in words of the clients' own choosing. Yet distinctions exist even among open questions. No. 1 imposes no subject matter restriction at all. Granted, a client will probably respond by talking about a legal problem rather than, say, an insight into the poetry of Byron. But the question allows the client to describe the problem in any way that the client sees fit, and to delve into whatever aspects seem most important.

No. 2 imposes a general subject matter limitation—"your family." But its openness allows the client to talk about family heritage; occupations of family members; statistical data such as names, addresses and ages; personality traits of family members, and the like. Also, the client can decide whether the term "family" means "immediate family only" or includes more distant relatives.

No. 3 imposes a chronological limitation—the client is limited to talking about what took place "after the meeting." But which post-meeting events to discuss are entirely up to the client.3

2. Note that an inquiry in the assertive form can be the equivalent of a question. Psychologists sometimes refer to such inquiries as probes since the comment is in the form of a statement rather than a question. See BARBARA F. OKUN, EFFECTIVE HELPING: INTERVIEWING AND COUNSELING TECHNIQUES 75 (6th ed. 2002); GABRIEL GANZ, THE SKILLED Helper 120–21 (7th ed. 2002) (discussing probes of many varieties).

3. At trial, open questions that ask witnesses to describe events that unfolded over a period of time, often are objected to on the ground that they "call for a narrative response." The basis of the objection, and the reason that the objection is sometimes sustained, is that the question leaves the witness to talk about a series of events in whatever words the witness chooses, and some portions of the response might be
No. 4 imposes a different type of limitation—the client’s response is limited to a single conversation. Yet, this question too is open. The client may talk about the parties to the conversation, what they said, and/or what activities took place during the conversation.

Lastly, No. 5 asks the client to discuss possible reactions of employees to a proposed decision. Its openness allows the client to discuss a variety of possible consequences, to differentiate among different groups of employees, and perhaps to talk about the client’s long-range business goals.

C. CLOSED QUESTIONS

Closed (narrow) questions typically seek specific information; they select the subject matter of responses and also limit the scope of replies. Examples of closed questions include:

“In which hand was she holding the gun?”
“How fast was the blue car going?”
“Just where did the chicken cross the road?”
“How many employees are likely to quit if you move the business to a new location?”

D. YES–NO QUESTIONS

“Yes–No” questions are a commonly employed form of closed question. Yes–No questions even more severely limit the scope of a client’s response by including in the question all the information you seek and asking the client only to confirm or deny it. All closed questions can, of course, be restated in Yes–No form. Thus, the Yes–No versions of the closed questions above are:

1. “Was she holding the gun in her left hand?”
2. “Was the blue car exceeding the speed limit?”
3. “Did the chicken cross the road in the crosswalk?”
4. “Will more than five employees quit if you move the business to a new location?”

E. LEADING QUESTIONS

As you are no doubt aware, leading questions not only provide all the information that you seek but also suggest the desired answer. Leading questions are little more than outright assertions, accompanied either by a tone of voice or language clue that you desire a particular answer. They are closed questions in assertive form. For example, in leading form the closed questions from subsection (C) are as follows:

[inadmissible. See Paul Bergman, Trial Advocacy in a Nutshell 308 (3d ed. 1997); Thomas A. MacLey, Trial Techniques 481–82 (6th ed. 2002); see also Fed.R.Evid. 611(a). Other forms of open questions, which do limit a witness to a particular chronological point in time, are much less likely to be ruled improper.]
1. "She was holding the gun in her left hand?"
2. "The blue car was going over 65, correct?"
3. "The chicken crossed the road in the crosswalk, right?"
4. "I take it you'll lose more than five employees if you move the business to a new location?"

The rather dramatic "Isn't it true . . . " phrase that cross-examiners tend to use during trial is certainly not a necessary characteristic of leading questions. Questions two and three have other and less dramatic verbal clues, while the first and fourth rely on voice intonation.

3. COMMON ADVANTAGES AND DISADVANTAGES OF THE DIFFERENT FORMS OF QUESTIONS

In addition to delineating the scope of responses, a question's form can also influence clients' ability and willingness to recall and provide information. This section examines this potential impact.

A. OPEN QUESTIONS

The typical advantages of open questions are as follows:

1. **Open Questions Often Motivate Full Client Participation**

Because they allow clients to decide what information is significant, open questions provide recognition. Open questions communicate confidence in clients' ability to know what information is significant. Both the recognition and the fact that clients talk about what they see as important tend to provide motivation.

Open questions typically avoid potential inhibitors. The primary inhibitors that open questions avoid are ego threat, case threat, and the etiquette barrier. For example, clients may be embarrassed about certain aspects of their problems and therefore reluctant to talk about those aspects. A closed question seeking information about an embarrassing topic may therefore harm rapport by forcing clients either to talk about the topic or consciously avoid it. Open questions by contrast allow clients to avoid talking about threatening subjects.

Your chosen profession may often require you to ask clients about sensitive subjects. When planning a client's estate, for example, you may raise the possibility that a client's child may predecease the client. Talking to a business client, you may ask about the integrity of the client's partner or office manager. As a criminal defense lawyer, you may explore a client's mental functioning and past criminal record. Clients may be uncomfortable and reluctant to talk if, with closed questions, you directly seek such sensitive information. Open questions allow clients to

4. Of course, you may well be unable to allow clients to duck discussion of uncomfortable topics entirely. But open questions may allow you to postpone discussion of such topics until clients are comfortable with you and understand the need to talk about the topic.
discuss sensitive information in their own way and when they are ready to do so.

Similarly, open questions also tend to overcome the inhibitor of “greater need.” Since open questions allow clients to talk about what to them seems most important, you avoid any reluctance that might be created were you to ask closed questions about topics that clients regard as being of secondary importance.

2. Open Questions Often Enhance the Amount of Information You Uncover

Because both problems and clients’ experiences are unique, you almost never will be able to think of everything that might be important to achieving a satisfactory solution. As one author has put it, “Qualitative answers—feelings, reasons, other experiences—can only come when the question is open-ended, not closed, and when the answer must be a paragraph, not a word.” For example, whether the issue is past events giving rise to a lawsuit, or potential consequences of a proposed resolution, you usually cannot think of all the factors that might bear on the issue. Thus, you cannot rely on closed questions to elicit all important information.

Open questions promote clients’ recall of information by preserving their trains of thought. When clients are allowed to describe matters in their own words, their paths of association remain intact and they tend to recall data that they might not in response to closed questions.

Open questions also promote the accuracy of information. Psychological research suggests that answers to open questions are more accurate than answers to closed questions.

Open questions also tend to be more efficient than closed questions. Even if you could think of everything that might affect clients’ problems, pursuing each and every detail with closed questions would consume an inordinate amount of time. An answer to a single open question will often cover more ground than the answers to a series of closed questions.

However, lest you be ready to award a Nobel Prize to open questions, be warned that they have disadvantages as well.


6. See Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal, 64 (3d ed. 1997); cf. Akira Memoon, et al., Psychology and Law: Truthfulness Accuracy and Credibility 158 (1998) (“Indeed recollection of an experience is more likely to be most successful when a retrieval cue reinstates a person’s subjective perception of the event, including any thoughts, fantasies and inferences.”).


8. Of course, in some situations you may need specific data very quickly. For example, if you are conducting a jailhouse interview of a recently arrested client, you may need bail data quickly. In such situations, you may rely on closed questions.
3. Open Questions May Inhibit Full Client Participation

Open questions put much of the burden for recalling and describing information on clients. Many people are not comfortable in the conversational limelight and will prefer you to carry the load. In such situations, open questions may elicit only short, minimal responses.

4. Open Questions Do Not Thoroughly Mine Clients’ Memories

Open questions do little to stimulate memory. As a noted psychologist suggests, “Compared to other forms of report, narrative reports tend to be less complete... [A] narrative produces much higher accuracy but much lower quantity.” As a result, events or other information known to clients typically remain undisclosed in response to open questions. For example, the open question, “What happened next?” might unearth conversations A, B and C. However, it may not uncover conversation D, nor details about A, B and C.

Thus, to get sufficient information you typically have to combine open with closed questions. Because of their ability to call specific data to clients’ attention, closed questions are generally more successful than open ones at stimulating their recall. For example, the closed question, “Did you talk about precise geographical limits during conversation A?” may remind a client of details that might not emerge in response to the open question, “What did you talk about during conversation A?” The reason is that in response to closed questions, clients may recognize data that they do not recall in response to open ones.

Open questions may also fail to elicit information that clients do remember, but that they do not recognize as being legally salient. When clients are mistaken about or unaware of legal requirements, they may well omit information from narrative responses in the belief that the information is without legal significance.

5. Open Questions May Be Inefficient

Open questions may not be effective with clients who ramble or are extremely verbose. Certain clients may regard a question such as, “What


10. However, closed questions can be as suggestive as leading ones, and therefore produce inaccurate responses. Stephen A. Richardson, Barbara Shell Dohrenwend & David Klein, Interviewing: Its Forms and Functions 173, 181 (1965). Because closed questions may pressure clients into believing that they should answer questions, id. at 180, the risk of inaccurate replies in response to closed questions may be especially high in attorney-client interviews. See Robert F. Cochran, Jr. et al., The Counselor at Law: A Collaborative Approach to Client Interviewing and Counseling 50 (1999); Cormier & Cormier, supra note 7 at 112–114; Allen Ivey, Intentional Interviewing and Counseling (5th ed. 2003).

11. For further discussion of the differences between recall and recollection, see George Mandler, Consciousness Recovered: Psychological Functions and Origins of Conscious Thought 82–83 (2002).
happened since our last meeting?" as an invitation to describe irrelevant events in great detail, and to vilify all with whom they disagree. Asking open questions of such clients may be the equivalent of pouring gasoline on a fire.

B. CLOSED QUESTIONS

The typical advantages of closed questions are as follows:

1. Closed Questions Elicit Details

Perhaps the most important advantage of closed questions is that they allow you to elicit details. For example, assume that Fong consults you concerning problems that have developed with a partner over how to best operate the partnership's business. One of Fong's options is to dissolve the partnership. The following dialogue ensues:

L: And what occurred at the meeting?
C: Well, my partner Miyoko started off by complaining that sales were down, especially in the sports apparel line, and asked us for our ideas. There were a number of suggestions made, ranging from getting out of the line altogether to trying to get the line into bigger retail stores like Sears. Everyone had their own ideas—the meeting went on for almost an hour.

L: Anything else that you can recall?
C: I know that Miyoko got really angry when we went over sales figures.

L: Anything else?
C: Not that I can remember.

Here, you rely only on open questions. In response, Fong quickly provides a picture of what took place at a meeting. But, as is often the case with responses to open questions, the picture is incomplete. It lacks many details that may well be significant. For instance, what specific sales figures did Miyoko report? What were the various suggestions that were presented at the meeting, and how did Miyoko respond to each? What exactly does Fong mean by "really angry?" The answers to such questions are likely to be critical in helping Fong to decide whether staying in business with Miyoko makes sense.

To elicit such details, you would probably need to ask closed questions. Such questions focus on specific topics, thereby stimulating memory and producing details that clients might otherwise omit or not remember.

2. Closed Questions May Provide Motivation

Clients may be uncertain of how to respond to open questions. For example, a question such as, "What consequences do you see if we reject the proposal?" may confuse a client. Does the question call for every possible consequence, or only for the most significant ones? How much
elaboration do you expect? Does the question somehow “test” the client to see how many consequences the client can identify? Clients for whom open questions create such thoughts will probably be reluctant to answer fully and openly. Such clients may find closed questions “easier” to answer: their topics are readily identifiable, their scope is readily apparent, and a client has only to produce a limited amount of information. Therefore, for such clients, closed questions may provide greater motivation to answer.

Closed questions may provide greater motivation than open questions in other contexts as well. Recall the suggestion that open questions often motivate clients by allowing them to postpone discussion of sensitive topics. You may employ closed questions to delay discussion of sensitive matters as well. Closed questions allow you to “tippy toe” either into or around sensitive topics. When you know or strongly suspect that clients are reluctant to discuss a particular topic, closed questions may allow you to pursue the topic a small bit at a time, and stop at the point that clients become reluctant to proceed further.12

For instance, assume that in the partnership example above, Fong’s responses lead you to believe that Fong feels foolish for having started the partnership with Miyoko in the first place. However, you want Fong to talk about the reasons for going into business with Miyoko initially. You might ask an open question: “Can you tell me how the partnership came about?” However, Fong may be reluctant to respond fully to this question. Thus, you may try to tippy-toe through the discussion with a series of closed questions that allow Fong to disclose information at a slower and perhaps less threatening pace:

“When did you first meet Miyoko?”

“How many times did you meet before you formally entered into the partnership?”

“Who first suggested a formal partnership?”

“Did you talk about how long the partnership should continue?”

You might continue this type of questioning into Fong’s reasons for entering the partnership, or you might stop questioning before arriving at that point. At least, closed questions may motivate specific responses and provide you with insight into how far to pursue the topic.

Alas, as you undoubtedly suspect, closed questions also have disadvantages:

3. Too Many Closed Questions May Harm Rapport

Over-reliance on closed questions may result in clients leaving meetings with the feeling that they never had a chance to say what was really on their minds. The more you ask questions that limit the scope of responses, the less likely are you to learn everything that clients think is

12. This discussion assumes that a compelling reason to pursue a sensitive matter at once does not exist. In the absence of a compelling reason to pursue a sensitive matter at once, it often makes sense to postpone discussion until a client is comfortable.
important. In turn, clients are likely to be less engaged in identifying problems and actively participating in their resolution.

4. Closed Questions May Prevent You from Learning Important Information

Asking numerous closed questions is likely to cause you to miss both trees and forest. You miss trees, because in any matter there are too many for you to find with closed questions. Moreover, clients tend not to volunteer information when faced with a plethora of closed questions, figuring that if a bit of data is important, surely you will seek it out.

At the same time, your focus on individual trees is likely to obscure your view of the forest. The immersion in bits of detail may undermine your learning clients’ overall stories.

5. Closed Questions Can Create Inaccurate Responses

Closed questions tend to produce more erroneous information than open questions. The tendency may be due in part to the influence of the motivator, “fulfilling expectations.” That is, your asking closed questions may signal your expectation that clients are able to answer them. Rather than frustrate your expectations (and perhaps damage their own self-esteem), clients may guess or respond with what they think “probably” happened rather than admit that they do not know or do not remember.

Closed questions may distort responses in another way. Because closed questions define topics for clients to a greater extent than do open questions, closed questions are likely to reflect your choice of vocabulary, not that of your clients. For instance, compare the open question, “Describe Jones’ behavior” with the closed question, “Was Jones angry?” The closed question identifies a specific emotion and attaches your label to it. If the term “angry” captures at least an aspect of Jones’ emotional state, a client may simply answer “yes” in response to the closed question even though the open question would have elicited a different response.

In one study, for example, changing a word in a question from “frequently” to “occasionally” produced markedly different results. In this often-replicated study, one group of random respondents was asked, “Do you get headaches frequently and, if so, how often?” Another group was asked, “Do you get headaches occasionally, and, if so, how often?” The first group reported an average of 2.2 headaches per week; the second group only 0.7 headaches per week. Changing even the word “a” to “the” in a question can affect results. It is not surprising that one

researcher has concluded, ""[I]n a variety of situations, the wording of a question about an event can influence the answer that is given.""

C. LEADING QUESTIONS

Although the term "leading question" is often accompanied by or greeted with sneers, such questions are sometimes proper and necessary for eliciting an adequate picture of clients' problems. The sub-sections below examine leading questions' common advantages and disadvantages.

1. Leading Questions May Overcome Potential Inhibitors

Leading questions may help you to overcome the inhibitors of ego threat, case threat and the etiquette barrier. These inhibitors tend to make clients reluctant to disclose matters they perceive as sensitive. Hence, when discussions touch on sensitive matters, use of leading questions suggests that you already know about the troublesome data, that a client need not fear letting the cat out of the bag, and that you are prepared to talk about it in a forthright manner.

The classic example of this use of leading questions is provided by the Kinsey study of American sexual mores. Rather than asking individuals if they had engaged in such potentially embarrassing conduct as oral sex or homosexuality, Kinsey's researchers asked when or how often they had done so. The leading form of the questions suggested to respondents that the interviewers expected that such activity had taken place, would not condemn the respondents for admitting it, and were prepared to discuss it openly. The examples below illustrate how leading questions may overcome embarrassment in two typical legal situations. Compare the following sets of questions:

"Have you ever been arrested before?"

"I guess you've had some problems with the police before?"

"Do you see any problems in letting them look at your books?"

"The acquiring company's examination of your books will bring to light things like allowing employees to use company cars for personal use. How should we talk to them about these matters?"

Assuming that you strongly suspect that the troublesome conduct has in fact occurred, the use of leading questions may overcome these clients'
fear and embarrassment, and consequent reluctance to talk openly and honestly.

However, as the sneer that often accompanies or greets the term “leading” suggests, leading questions are not without their disadvantages.

2. Leading Questions May Enhance the Possibility of Eliciting Incorrect Information

Leading questions often reflect your ardent desire to have facts come out in a way favorable to your clients. For example, if an appellate case or a statute uses a word, you might want a client to use precisely that word in recounting a past event. Hence, you may incorporate that word in a leading question. Though that word may be an inaccurate label, the leading question may cause a client, consciously or unconsciously, to affirm it. You may thereby introduce inaccuracy into discussions. When you later discover an inaccuracy (or have it pointed out to you by another party), it may be too late to seek solutions that you and a client might have pursued if the true information had come to light earlier.

3. Leading Questions May Be Ethically Improper

Use of leading questions in your office can be even more problematic than it may be at trial. Generally, you cannot ethically suggest “correct” answers to clients. For example, assume that a couple consults you about a new house that they purchased, based in part on their understanding that the roof on the house was brand new. When it later turns out that the roof is old and needs replacing, the clients seek advice about what they should do. Might you ask, “I take it that the seller actually told you that the roof was new?” Such a question does nothing except tell the clients what to say and absent unusual circumstances is surely improper.

D. FACTORS TENDING TO RESULT IN OVER-RELIANCE ON NARROW QUESTIONS

As the discussion above suggests, effective motivation and information-gathering typically involves a mix of open and closed or leading questions. The sub-sections below examine two factors that may influence your questioning choices by inclining you towards over-reliance on narrow questions.

1. The “Filling in” Phenomenon

The “filling in” phenomenon refers to a subconscious tendency we all have to complete (or “fill in”) stories with information drawn from everyday experiences. That is, we may fill in clients’ stories with information that they haven’t mentioned. When this happens, you may ‘picture clients’ stories as more complete than they really are. As a result, you may eschew open questions in favor of closed questions seeking those details that your experience doesn’t provide.

This phenomenon grows out of the reality that none of us approaches events from a totally neutral perspective. Instead, we carry
around mental "schema," or expectations drawn from experience about how events commonly unfold. Schema are valuable; they allow our past experiences to make sense of new ones.\textsuperscript{18} Think about how complicated life would be if each trip to a supermarket, say, were a completely new and unique experience. At the same time, schema may cause you to "fill in" by completing clients' stories with information drawn from your experience. To recognize your capacity to fill in, think about the following situations:

1. Two cars collided in an intersection.
2. A wife suddenly deserted her husband and their two young children.

Take a moment and try to conjure up a picture of each situation. In the first example, can you visualize, if only hazily, a particular intersection, makes of cars, the point of collision, and how the collision came about? In the second, do you have an image of the feelings, desires and concerns of the husband whose wife has left home, and of factors that might have led the wife to abandon her family?

If you do, recognize that these images are not explicitly set forth in the sentences themselves. Rather, you "filled in" the gaps with information furnished by your own schemas. In the same way, you may fill in information as you listen to clients describe past events or concerns. And as a result you may tend to over-rely on narrow questions to elicit the specific details that your general schema cannot provide.

For example, assume that a client seeks your help in negotiating the terms of a long-term lease. Especially if you have had prior experience with such matters, you may have developed schema concerning the "needs and concerns of long-term lessees."

If so, you may overlook open questions seeking information about this particular client's goals and concerns in favor of narrow questions focusing on specific terms to include in the final lease agreement.

With schemas such a routine and important part of everyday life, an attitude of "ignore schemas" is impossible. However, cognizance of the advantages of open questions and active listening can help you minimize their influence during information-gathering.\textsuperscript{19}

2. Premature Diagnosis

"Premature diagnosis" is a second factor tending to produce over-reliance on narrow questions. Premature diagnosis occurs when you


pigeonhole stories around legal claims even before clients finish describing their problems. For example, at the drop of a few facts you may pigeonhole a story as a “products liability” case, an “inter vivos trust” matter, or a “securities issuance” problem. Your diagnosis may well be inaccurate, or at least incomplete. But once you place problems into pigeonholes, you may rely on closed questions in an effort to shoehorn stories into them.

As with “filling,” inoculating yourself completely against the tendency to engage in premature diagnosis can be difficult. Early awareness of legal possibilities can in fact help you gather information effectively and efficiently. Thus, be of two minds during initial client meetings. Even as you instinctively riffle through legal claims as clients begin to relate their stories, continue to use open questions that may activate legal theories you otherwise might overlook. For example, even though you may pigeonhole a plaintiff’s story as involving a claim for monetary damages, you might nevertheless ask an open-ended question such as, “If you could write your own ticket, what result would you like to see?”

4. CONCLUSION

Even though you may employ the “correct” forms of questions at the “correct” times, you cannot be sure that the result will be motivated clients who provide full, accurate information. Clients vary greatly, and a question that motivates one client may inhibit another. Moreover, one client may respond to a yes-no question as though it were open, while another client may interpret questions quite literally. Lastly, any one client may respond to the same form of question differently at different times. Thus, you need to adapt the forms of questions to the dynamics of individual conversations.