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Gemma E. Smyth

University of Windsor, Faculty of Law

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Interviewing Adult Clients in Child Protection Matters: Advice for New Lawyers

Prepared for: Law Society of Upper Canada's Intensive Child Protection Program
Date: June 22-25, 2011
By: Gemma Smyth
Assistant Professor and Academic Clinic Director
Faculty of Law, University of Windsor¹

Client interviewing is a cornerstone of lawyer-client relationships, particularly in these often high-conflict family disputes. When a caregiver meets with her lawyer, she is offered the chance to tell her story, protect her rights, gain greater clarity regarding the social and legal context of the situation, and increase the chances of a timely and just resolution. Although there are multiple parties involved in child protection matters, including the child, the state and the caregiver, this article focuses on the initial interview with the caregiver.² This article does not address interviewing children, which is the subject of many comprehensive books and articles in the fields of law, social work and psychology.³ Rather, this article focuses on interviewing adult caregivers involved with child protection matters.

¹ Thank you to Gerri Wong, Jennifer Suzor and Sharon Murphy – all committed and experienced child protection lawyers - for their helpful comments on earlier drafts of this paper. Thank you as well to the Law Foundation of Ontario for research funding. Ryan Duval provided excellent editorial and research assistance.

² Although this article focuses on the initial interview, many principles apply to the remainder of the case whether it proceeds to a trial or not.

³ See, for example, M. Aldridge and J. Wood, *Interviewing Children: A Guide for Child Care and Forensic Practitioners* (Hoboken, NJ: John Wiley and Sons, 1998); C. Wilson Martine Powell, *Essential Skills for Counselors, Police, Lawyers and Social Workers* (New York: Routledge, 2001); N. Richman, *Communicating with*

Despite its importance, client interviewing is not a mandatory course or subject in Canadian law schools, nor did the Federation of Canadian Law Societies' Task Force on the Canadian Common Law Degree Report include client interviewing as a core competency for graduating law students.⁴ As such, there is little institutional impetus for law schools to provide this training. Even if students enroll in clinical learning experiences, there is no guarantee they receive systematic and comprehensive training in interviewing. While many students do receive superior training during their articles, there is no assurance that articulated students have had any opportunity to conduct client interviews or to receive feedback on their skills. There is also very little empirical data on live client interviews.⁵ Thus, from both pedagogical and research perspectives, expertise in client interviewing - particularly in the child protection context - is very much a work in progress.

Part I of this article sets out the social context of interviewing caregivers in child protection matters. Part II describes the theory of lawyering employed

Children: Helping Children in Distress (UK: Save the Children, 2000); D.P.H. Jones, *Communicating with Vulnerable Children: A Guide for Practitioners* (London: Gaskell, 2003).

⁴ Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Final Report* (October 2009), <online: <http://www.flsc.ca/en/pdf/CommonLawDegreeReport.pdf>>.

⁵ Because of solicitor-client privilege and ethical rules surrounding data collection, empirical research must generally be conducted using actors as clients, other re-creations, or through post-interview data collection. Although useful, it is difficult to replicate the emotional reality of "live client" interviews.

throughout the rest of the article. Given the context and theory, Part III of the article focuses on four stages of interviewing that may prove particularly difficult for new lawyers: rapport-building, fact gathering, reality checking and concluding.

Part I: The Context of interviewing

In child protection matters, the first interview with a caregiver or guardian occurs after the child protective authorities (hereinafter referred to as Children's Aid Society (CAS)) have already intervened. Depending upon the nature of the conflict and the relief sought, caregivers may have had their child or children removed and may risk losing access. Caregivers may not have been served with paperwork from the CAS, or may have limited understanding of what has happened.

Data from the United States and Canada demonstrates that families involved with the child welfare system are most often living in poverty, or experiencing additional socio-economic and personal challenges.⁶ In the most recent Canadian Incidence Study of Reported Child Abuse and Neglect, 78% of substantiated child maltreatment investigations involved a caregiver with at least one risk factor. The most common risk factor was domestic violence (46%), followed by few social supports (39%), mental health issues (27%), alcohol abuse (21%) and drug abuse

⁶ Child Welfare Watch, *Myths and Facts: The Big Picture* (Winter 1997); K.A. Bailie "The Other 'Neglected' Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers who Represent Them" (1997-1998) 66 *Fordham Law Review* 2285; D. Braveman and S. Ramsey, "When Welfare Ends: Removing Children From the Home for Poverty Alone" (1997) 70 *Temple Law Review* 447.

(17%).⁷ Caregivers also were found to have higher rates of part-time, multiple or seasonal employment (10%) and receipt of social benefits (33%) than the general population.⁸

Many scholars and practitioners argue that lawyers acting for caregivers in child protection proceedings must see the circumstances of each case through the lens of poverty as a causal factor.⁹ Caregivers living in poverty often face social isolation, have few supports, may be over-policed and suffer from higher incidents of chronic disease and other health problems.¹⁰ Poverty is also linked to decreased access to education, which may lead to difficulty accessing and understanding legal rights and obligations. While all adults involved in child protection matters

⁷ Public Health Agency of Canada, *Canadian Incidence Study of Reported Child Abuse and Neglect: Major Findings - 2008* (Ottawa, Ontario: Public Health Agency of Canada, 2010) at 40-41.

⁸ *Ibid* at 41-42. Also note that in 5% of cases, employment was unknown and in 2% of cases, caregivers did not appear to have any income whatsoever.

⁹ See, for example, B. Boyer, "Ethical Issues in the Representation of Parents in Child Welfare Cases" (1996) 64 *Fordham Law Review* 1621 at 1646-48.

¹⁰ For a Canadian perspective, see Ontario Physicians Poverty Working Group, "Why Poverty Makes Us Sick" (May 2008) *Ontario Medical Review* 31. Also see K. E. Fox, "Are They Really Neglected? A Look at Worker Perceptions of Neglect through the Eyes of a National Data System" 1(1) *First Peoples Child and Family Review* 73; N. Trocmé, H. Maclaurin, B. Tallon, D. Knoke, I. Pitman, and M. McCormack, "Mesnmink Wasatek: Understanding the Overrepresentation of First Nation Children in Canada's Child Welfare System: An Analysis of the Canadian Incidence Study of Reported Child Abuse and Neglect (CIS-2003)" (Ottawa: First Nations Child and Family Caring Society of Canada, 2007).

may not face social or economic challenges, they are certainly faced with highly charged and deeply impactful conflict.¹¹

Child protection matters are also unique because of the often urgent and complex nature of the relationships. In Ontario, for example, CAS may apprehend a child, with the caregiver required to attend in court as quickly as 5 days after apprehension. Caregivers and children are also often involved with third parties including psychiatrists, social workers and psychologists from child- and family-serving agencies. Other family members and interested parties may also be involved. As such, child protection disputes occur in a context fraught with both internal and external pressures.

Theories of Practice: From “Hired Gun” to Engaged Client-Centred Advocacy

Client interviewing has been the subject of several notable books that have informed and shaped lawyers’ approaches to client interviewing and counseling more generally.¹² The “white knight”, “gladiator”, “rights warrior”¹³ or “hired gun”

¹¹ Of course, this data is not intended to infer that caregivers involved with child protection are incompetent, or that lawyers should treat them as such. In fact, the Rules of Professional Conduct dictate that lawyers should “maintain as typical a relationship as possible” with their clients. Law Society of Upper Canada, Rule 2.02(6), *Rules of Professional Conduct*, 2000.

¹² D. Binder, *Legal Interviewing and Counseling: A Client-Centered Approach* (St. Paul, MN: West Publishing Co., 1977). R.F. Cochran, *The Counselor-At-Law: A Collaborative Approach to Client Interviewing and Counseling*. (New York, NY: Lexis Publishing, 1999).

¹³ J. Macfarlane, *The New Lawyer* (Vancouver: UBC Press, 2008).

approach,¹⁴ in which lawyers are litigation experts and clients are conduits for facts relevant for trial, has to a certain extent ceded to other conceptions. Carrie Menkel-Meadow describes a shift to the “lawyer as problem solver”.¹⁵ Julie Macfarlane’s “new lawyer” has “evolved beliefs and new habits of practice” including negotiation skills, interpersonal communication skills, and greater collaboration between lawyer and client.¹⁶ David Tanovich examines various conceptions of role morality in lawyers’ roles, positing that “an ethic of client-centred zealous advocacy has slowly begun to be replaced with a justice-seeking ethic that seeks to give effect to law’s ambition”.¹⁷

From a theoretical perspective, lawyers have struggled with using constructivist and narrative approaches to client representation. Constructivist approaches recognize that clients do not provide lawyers with a legally relevant list of experiences or facts; they describe events. These events are not a series of unrelated occurrences but patterns formed from how humans construct and

¹⁴ For a survey examining lawyers’ perceptions of their roles see M.A. Wilkinson, C. Walker and P. Mercer, “Testing Theory and Debunking Stereotypes: Lawyers’ Views on the Practice of Law” (2005) 18 *Canadian Journal of Law and Jurisprudence* 165.

¹⁵ C. Menkel-Meadow, “When Winning isn’t Everything: The Lawyer as Problem Solver” (2000) 28 *Hofstra Law Review* 905.

¹⁶ *Supra* note 13 at 23-24.

¹⁷ D. Tanovich, “Law’s Ambition and the Reconstruction of Role Morality in Canada” (August 2005) *Dalhousie Law Journal* 1 at 9.

interpret themselves in the world, past, present and future.¹⁸ This approach is particularly challenging for new lawyers, who may perceive law through the lens of appellate-level judicial reasoning. Although this lens is, of course, a construction as well, it requires additional interpretive skills in order for lawyers to make sense of clients' lived experiences and the direct impact of law.

This evolution in lawyering is reflected in literature on client interviewing and counseling, most notably Binder and Price's *Legal Interviewing and Counseling: A Client-Centred Approach*¹⁹ and Ellmann *et al*'s recent *Lawyers and Clients*.²⁰ Binder *et al* describe the client centred approach as originating in "a perspective that legal problems typically raise both legal and non-legal concerns for clients". They also argue that "collaboration between attorneys and clients is likely to enhance the effectiveness of problem-solving, and that clients ordinarily are in the best position to make important decisions".²¹ Ellmann and his co-authors adopt many client-centred approaches, but emphasize the importance of acknowledging the role of difference in lawyer-client relationships. They also note

¹⁸ See especially E. von Glasersfeld, *Radical Constructivism: A Way of Knowing and Learning* (London: Routledge Falmer, 1995); B. Poerksen, *The Certainty of Uncertainty: Dialogues Introducing Constructivism* (Exeter: Imprint, 2004).

¹⁹ D. Binder and S. Price, *Legal Interviewing and Counseling* (Eagan, MN: West, 1977).

²⁰ S. Ellmann, R. Dinerstein, I. Gunning, K. Kruse, A. Shalleck, *Lawyers and Clients: Critical Issues in Interviewing and Counseling* (St. Paul MN: Thomson West: 2010).

²¹ D. Binder, P. Bergman, S. Price, P. Tremblay, *Lawyers as Counselors: A Client-Centred Approach* (St. Paul MN: Thomson West, 1991).

that the lawyer should “bring to the relationship all of the insight and wisdom she possesses, while preserving - in fact enhancing – the client’s control over his own life choices”.²²

The skills, knowledge and values involved in using a client-centred, or engaged client-centred, model of interviewing are perhaps not the “paradigm-shift” described by Macfarlane,²³ but they certainly involve a set of skills and perspectives that may seem in occasional tension with the “gladiator” or “rights warrior”. These skills include: ability to actively listen, engender confidence and calm, analyze conflicts for appropriate outcomes, gauge urgency and respond appropriately, engage one’s client in empowered decision making, and remaining culturally competent. Weinstein writes that

[t]he knowledge required by.... professionals [in child welfare matters] covers a broad spectrum. It includes human behavior, intervention methods, family dynamics, child development, substance abuse and mental health issues, an understanding of the legal requirements for intervention and the process by which legal decisions are made, and effective collaboration skills.²⁴

Research on what separates novice interviewers from those more experienced in demonstrates that, while there is little difference in the ability to organize information, there is marked difference in the ability of novice lawyers to understand the relevance of what they interpret to be ‘non-legal’ information. For

²² *Supra* note 20 at 7.

²³ *Supra* note 13 at 20-21.

²⁴ J. Weinstein, “And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System” (1997) 52 *University of Miami Law Review* 79 at 157.

example, in an immigration interview, a novice lawyer indicated that fear of being kidnapped at night (expressed by a refugee) was not within the lawyer's role to address, even though it was relevant to the social and political environment from which the client came, and thus relevant for his hearing.²⁵ The tendency to confuse "social work" skills with information important to the legal dispute can lead not only to ignoring important information about the client's emotional and psychological state, but also information important for legal argument.

Format and Skills in Client Protection Matters

Interviews can generally be divided into four stages: the introductory stage in which basic information is gathered, role parameters are established and rapport is generated; the second stage involves gathering information and perspectives from the client, ultimately organized in a chronological or other logical fashion; thirdly, the lawyer establishes his or her theory of the case, locates missing information, and discusses options and consequences. Finally, lawyer and client (ideally) agree on a plan of action and next steps required of all parties. As Ellmann *et al* write,

the heart of any good counseling interaction entails the lawyer working with the client to clarify... the client's goals; identify the choices available to the client to achieve the goals (to whatever extent may be possible); predict the most likely outcomes of those choices; identify the consequences of these options, and work with the client to determine which of these consequences are positive and which are negative;

²⁵ F. Colono-Navarro, "Thinking Like a Lawyer: Expert-Novice Differences in Simulated Client Interviews" (1996) 21 *Journal of the Legal Profession*: 107 at 131-132.

weigh the options against each other, complete with their pros and cons make a decision; and identify the steps, and the actors, needed to implement the decision.²⁶

Because of the complexity of the issues in child protection matters, some lawyers call for specialized, interdisciplinary training, particularly to understand the professional strengths and limitations of the various disciplines involved in families' lives. However, there are more generalizable skills to be gleaned from best practices in client interviewing that transcend the boundaries of discipline. These skills include: the ability to fact find, reality check, establish empathy and rapport, and the ability to engage the client with the facts, information, values, and assumptions that will allow him or her to make informed decisions. This article focuses on four main stages: introductory rapport building, fact gathering, reality checking and concluding.

Beginning the Interview: Establishing Rapport and Explaining Roles

Every interview must begin with some rapport building. The importance of, and approaches to, rapport building are well documented.²⁷ Suggestions to build rapport include establishing some commonalities, using plain language, engaging in 'small talk', and using appropriate tone and body language. But underlying these skills are attitudes, values and assumptions about the client and the lawyer

²⁶ *Supra* note 22 at 72.

²⁷ See Binder and Price; Ellmann *et al*; C. Abbott and C. Bubany, "The Anatomy of a Client Interview" (December 1996) 42(8) *Practical Lawyer* 61;

that can hinder rapport, regardless how honed one's skills. An essential part of this approach is taking a non-judgmental attitude towards the client. As Binder and Price write, establishing rapport "does not necessarily mean being sympathetic, or approving of the client or what the client does or has done or feels."²⁸ However, making a genuine effort to set aside judgment and engage in dialogue is essential to a meaningful (and efficient) lawyer-client relationship. Many lawyers describe interviews that failed to elicit information that becomes vitally important during mediation, or during direct or cross-examination. Although it is tempting to blame the client, it is also possible that a more fulsome interview could have alerted the lawyer to this information at a less damaging stage.

It is also important to explain the role of the lawyer and the client in the early stages of an interview. Although the lawyer may have conducted many interviews, it may be one of the few times the client interacts with a lawyer. Particularly in child protection matters, there may be a wide gap in the cultures and lived experience of lawyer and client. This may exacerbate pre-existing disparities in knowledge and assumptions about the role of law and the lawyer. Simply differentiating between, for example, the roles of CAS workers, CAS lawyers, the police, the judge, other authority figures and the client's own lawyer may be confusing. Therefore, it is essential to very clearly explain the roles of all parties and their relationships to one another.

²⁸ *Supra* note 27 at 63.

Fact Gathering and Clarification

Understanding the client's story in a relatively focused and organized way can also be a difficult and frustrating part of interviewing clients who are experiencing high conflict. Clients, understandably, do not present facts and remedies in a way that resembles what may be legally 'relevant'. They may not understand the role of a lawyer, or the events that brought them to see a lawyer. This context may lead lawyers to feel impatient and frustrated with what they perceive to be a lack of client focus and understanding. However, without carefully understanding the client's perspective of the events, advice may be given too quickly.

Fact gathering and clarification generally occurs after the client has already given an initial description of the problem from his perspective. To best understand the client's story, Abbott and Bubany suggest picturing the events in the dispute as a series of building blocks, with each block being built with "how, what, where, when, who, and why". Reviewing the events as told to the lawyer through the perspective of these questions can ensure the lawyer has all relevant information.

It is also essential to remember that facts and clients' perspectives of facts are not the same thing. Lawyers may confuse a client's rendition of her own opinions or emotions with events that may can be supported by evidence. In addition, child protection matters are also both past and future-focused. The caregiver's past conduct will be examined, as will his ability to care for the child in

future. Interviews therefore must address the past events that led to child protection intervention as well as the client's future aspirations for her family.

Gathering this depth of information in a relatively short period of time is not easy. Because of time pressures, or perhaps because of litigation training, lawyers may tend to 'interrogate' clients during the interview. Purposely mixing open and closed ended questions and hypotheticals may help the lawyer avoid asking, for example, a series questions that may will not elicit the information required for an effective interview and may damage rapport.

The Reality Check

As lawyers with any experience know, giving clients news or information that challenges their established views of past, present or future events is an essential but difficult part of client interviewing. It is doubly difficult if the practitioner takes a client centred approach, valuing the perspectives and lived realities of their clients. "Reality check" is a loaded term, suggesting that the person doing the "reality check" is knowledgeable about what is true and real, whereas the client has unclear, unrealistic, or false information and perspectives. Of course, most people – especially those in serious conflict – have trouble seeing outside their own worldview. For the purposes of decision-making, however, this is essential. Therefore, offering "reality checks" not as a single answer that significantly departs from the client's established view, but as a menu of options, may assist the client in making informed decisions. A key element of the reality

check is the client's ability to trust that the lawyer understands his situation, and that the outcome of the matter is the client's decision. If lawyers frame the reality check as a "partnership", they are more likely to elicit an unguarded and more realistic response. For example, "we have some decisions to make. We can proceed by agreeing to the conditions, or I can assist you in contesting this application. One option will be time consuming for both of us, but we don't want to sacrifice efficiency for quality" may paint the decision-making as a joint venture.

Engaging the client in decision-making may also act to empower the caregiver and the family. Beyer writes about the process of getting families involved in crafting their own choice of programs and solutions that will educate and prevent harm:

[r]eaching agreement with a family on [its] needs leads to [its] active involvement in crafting services and helps the family take responsibility for change. Instead of sending the family to a program to have something done to it, the message is: you have agreed on what you need. The services you have helped to plan will assist you in getting your needs met.²⁹

From a practical perspective, clients who are involved in the resolution of their own dispute are more likely to craft realistic, workable options. Clients are also more likely to be satisfied with the lawyer's service and reduce the likelihood of lawyer-client conflict.

However, reality checking can be just as important for the lawyer as for the client. Abbott and Bubany write that "[s]o much of office lawyering involves getting

²⁹ *Supra* note 8 at 316.

the client to accept a common-sense solution to a situation; the law and its processes may be only tangentially relevant, if at all. The problem for law students and even for lawyers is viewing the client and the client's problem as an abstract hypothetical, rather than as a real-life, common-sense situation."³⁰ The ability to understand the social realities of a client is critically important in order to craft a workable solution.

Ending the Interview

Ending an interview is also an important point of client education and preparation. Colon-Navarro's study of novice and expert lawyers, discussed above, also noted that novice lawyers tend to leave clients with an unclear conception of what is required and expected after an interview. He writes, "attorneys who have dealt with clients have learned that the client wants to hear that their problem (for which they came seeking advice) can be dealt with appropriately, and that there is something to be done to bring about relief".³¹ Although this may seem obvious, lawyers may not appreciate that the client does not intuitively know what she is supposed to do while awaiting next steps. The client is also looking for some reassurance that his dispute will be taken seriously, and that his seemingly insurmountable barriers can be addressed. Ending the interview with 'homework' and setting expectations can prepare the client for potential future interactions with

³⁰ Supra note 27 at 6.

³¹ Supra note at 129.

family, children, CAS and, of course, the court process. Giving the client a clear indication that there are clear outcomes can also provide some reassurance.

Conclusion

A number of studies have been conducted examining what clients want in an initial client interview. Tom Tyler describes the findings:

Clients care most about the process by which their problems or disputes are resolved. In particular, they place great weight on having their problems or disputes settled in a way that they view as fair.³²

A critical part of this perception of fairness is the initial client interview. When clients feel heard, respected, and understood, they are far more likely to engage productively in the lawyer-client relationship. This article has also emphasized the importance of understanding the context of client disputes in child protection cases. Using an engaged client-centred approach, the article provides suggestions for several points during the initial client interview: establishing rapport, gathering information, reality checking and concluding. Ongoing mentorship and critical

³² T. Tyler, "Client Perceptions of Litigation" (July 1988) *Trial* 40 in C.D. Cunningham, "The Client's Perspective on the Initial Interview: A Social Science Approach" (1999) 67 *Fordham Law Review* 1959 at 1960; C.J. Hosticka, "We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality" (1979) 26 *Social Problems* 599; E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (New York, Plenum Press, 1988), T. Matriuglio, *Plaintiffs and the Process of Litigation* (Sydney: Civil Justice Research Centre, 1994).

self-reflection are essential to contextualize these and other practice tips for new lawyers involved in child protection work.