b. The statute implicitly excepts from its coverage interspousal wiretapping. The purpose of the statute is to regulate the law enforcement personnel and prevent them from invasion of privacy of citizens by wiretapping without court order. Congress would not have intended to interfere with domestic relations and household use of the telephone.

c. The legislative history concerns only law enforcement personnel and crime control. The only mention of other uses of wiretapping concerned testimony of matrimonial lawyers who used recording devices for divorcing spouses.

2. If the court holds that this statute applies to interspousal wiretapping, is Mr. Mack entitled to damages?

Section 2520(c)(2) provides that "the court may assess as damages" the plaintiff's actual damages, or statutory damages of $100 a day up to $10,000, whichever is greater. John Mack had no actual damages, and his wife violated the Act on two days.

At issue is whether the court has discretion to award damages or whether it must award Mr. Mack $200. Consider this information.

- In 1986, Congress amended the damages section, increasing maximum statutory damages to $10,000 from $1,000. The amendment also changed the language from "the court shall assess as damages" to the current "the court may assess...."
- Section 2500(c)(1) assesses damages in cases involving interception of private satellite video communication. That section's language is "the court shall assess...."
- The legislative history does not contain an explanation of why Congress changed "shall" to "may," or whether Congress intended damages as discretionary or mandatory.
- Besides increasing the maximum statutory damages and changing "shall" to "may" in § 2520(c)(2), the 1986 amendments changed the damages for intercepting private video satellites, and the legislative history documents contain information only about the penalty structure for this violation.
- The only precedent on this issue held that the statute does not give a court discretion to withhold damages. The court said that to adopt a literal application of the word "may" would lead to results at odds with the purpose of the statute, which is to protect privacy.

Evaluate these possible conclusions. Which is best supported by the previous information?

- Congress apparently intended to give the courts discretion in order to ameliorate the possible harshness of the increased statutory damages amount.
- The wiretap provisions were designed to protect the privacy of wire and oral communication and to set out uniform standards for courts to authorize wiretaps. To accomplish these goals, the statute does not permit the court to exercise discretion, but requires the court to assess damages for violation of the Act.
- In the absence of a legislative record explaining why Congress changed "shall" to "may," the court should hesitate to read a grant of discretion where none had been permitted in the past, especially when the language is somewhat ambiguous.

3. If the court decides that the Crime Control Act applies to spousal wiretapping, in that jurisdiction does the statute give a cause of action to a minor child against his custodial mother, when the mother recorded the child's conversations with his father from their home telephone, and the parents are divorced?

12

Research Strategies

I. Introduction

WHEN YOU WORK ON A PROBLEM, your research goal is to find the relevant binding and persuasive primary authorities of law. However, a law library contains many other materials that will not only help you find the primary authorities, but also will help you analyze the issues you are researching. This chapter will not explain the basic bibliographic information about those resources. Instead, it gives advice for using them for different types of research projects that you may encounter as a law student.

A client will come to you with a story, not an identified claim or defense. To determine how to proceed, you should gather all the facts that you can. You need a complete account of what happened, of the problems your client currently faces, and of the result the client seeks.[1] As a lawyer, your goal is often to convert the facts from your client's story into a legal claim that states a cause of action, into a viable defense to a legal claim, or into the terms of a transaction. If you are an experienced attorney, the client's information may suggest to you a claim or defense and the issues that are involved, without your having to do research to identify them. If you are an inexperienced attorney or a law student, however, you may have to do research first to identify the relevant claims and then to diagnose the problem and find an appropriate solution.

The facts of your client's problem are important at all stages of your work. Initially, you want to identify the important facts and use them both to determine which legal claims or defenses will be involved and to provide search terms with which to begin your research.

[1] *See* David A. Binder & Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* 2 (1977) and Chapter 13 on Interviewing the Client.

After you have begun your research and have read some of the primary and secondary authorities, you will be able to make a more sophisticated identification of the legally relevant facts. Then you can use those facts not only as search terms for your research, but also analytically to help you prove or disprove the elements of the cause of action and to provide analogies to the important precedents.

In your legal writing assignments, you may be told the nature of the claims and the particular issues to research and write about. If not, then first you should determine the general body of law that is involved. For example, the facts and the relief your client wants may bring your client's problem within the body of contract law because the problem involves a written or oral exchange of promises.

After making this general classification, try to identify the more specific problem within that body of law. If you identify the cause of action as a tort, for example, determine which particular tort or torts are involved. If you face a property law problem because your client is a tenant who has a disagreement with his landlord about terms in a lease, then you probably are concerned only with landlord-tenant law. Or the problem may be a statutory one in which a governmental agency is requiring your client to comply with a statute or with the agency's regulations.

Your research methodology depends on the nature of the problem and the knowledge you have to begin with. If you are not familiar with the cause of action and do not know, for example, which particular torts the client's facts suggest, then you need to begin differently from the way you would if you had previously done research in that area of law and knew relevant cases and statutes. The scope of your research will also depend on other factors, most importantly, the jurisdiction of the problem. Because the law of that jurisdiction governs, you should examine the jurisdiction's law first. Other factors that affect your research are whether you need state or federal materials or both, whether the problem involves statutes or common law or both, and whether it involves a new cause of action or statute or a well-settled body of law. When you are in practice, the scope of your research will also be influenced by the time and financial resources you have to expend on the case.

II. Practical Considerations

BY THE TIME YOU GRADUATE from law school and pass the bar exam, you will be much more experienced in doing research than you are

as a first-year law student. Your goal in doing research will always be the same: to get an understanding of the relevant area of law so that you can determine how it relates to your client's problem. However, the cost of the time you spend doing research will not be the same. As a student, you have a limited amount of time to do research because you have other academic obligations in addition to your writing and research course. And although your law school will probably be paying a significant amount for its package of computer services (LEXIS and WESTLAW), your personal use of computer-assisted legal research (CALR) is free. When you are an attorney, you will be busier than you are in law school, and time is money—yours and your client's. Your research must not only be effective, it must also be cost-efficient. For attorneys, computer time is not free; it must be paid for by someone, either the client, or as some clients are demanding, by the lawyers as overhead.

Therefore, to be an effective researcher in practice, learn how to develop appropriate research strategies while you are a student. First, do not assume you can always do research better and faster on a computer. A section in a good treatise can, in a short period of time, give you an enormous amount of information about an area of law and important cases. And computer time on LEXIS and WESTLAW can be expensive. Second, become proficient in using all of the research sources lawyers now use in practice (books, LEXIS, WESTLAW, CD-ROM, the Internet). Finally, learn the advantages and limitations of each, so that you can research a problem both fully and cost-effectively.

In addition to LEXIS and WESTLAW, two other technologies are having a significant impact on how some lawyers are doing research: CD-ROM (compact disc-read only memory) and the Internet. The CD-ROM disc has become very useful as a source of material for attorneys working in specialized areas like tax and bankruptcy, and attorneys in smaller law offices whose practice is largely based on local law. The CD-ROM disc stores large amounts of information (including historical information) and is updated usually through the issuance of a new disc on a monthly or quarterly basis. LEXIS and WESTLAW, in contrast, have extraordinary storage capacity, access to thousands of databases, and are constantly updated. However, the CD-ROM is a less expensive way than the online services for an attorney to maintain a "library." And it offers space-saving advantages over a traditional library. A great variety of material is now available on CD-ROM, including case law and statutes from

many states, and such titles as, for example, the United States Supreme Court on CD-ROM, the Occupational Safety and Health Administration Compliance Encyclopedia, the New York Times Ondisc, and the Federal Register on CD-ROM. When using a CD-ROM, you must be aware of the scope of the disc and of the need to update its contents.

As for the Internet, it is not possible to discuss in detail all of the legal and legally-related information available on the Internet or to describe the impact that the Internet will ultimately have on research techniques. However, some significant changes have already occurred. First, both LEXIS and WESTLAW are now available on the Internet and at some point will be available only on the Internet. Second, the Internet, at minimal or no cost, provides some material for which otherwise lawyers would have to pay. For example, government and law school web sites provide primary materials such as New York Court of Appeals decisions and Second Circuit decisions. Third, the Internet provides access to documents that are not easily available from other sources, such as current information from federal agencies. Finally, the Internet is a source of important non-legal information through the world wide web directories.

The Internet, however, has its own disadvantages. First, the Internet response time can be slow, especially compared to the speed of LEXIS and WESTLAW on proprietary software. Second, and more important, the reliability of web sites varies greatly. When using material on the Internet, you have to ask whether the source is authoritative, accurate, and current.[2] Ask yourself who the sponsoring institution is, who the author is, who posted the material, and how current it is (see "last updated on ..."). Despite these concerns, however, the potential of the Internet is enormous.

The research sources you will use when working in a law office will depend on that office's needs and resources. But today, even a sole practitioner has far more options than before. One option is to rely solely on books. Another option is to use a customized form of LEXIS or WESTLAW that would focus on the law of one jurisdiction, for example, the Massachusetts Reports and cases from the First Circuit Court of Appeals. A third option is to subscribe to a set of CD–ROM discs covering Massachusetts state law updated by quarterly discs and weekly advance sheets. Other general updating

[2] Jean Davis *et al., Using the Internet for Legal Research* 2–3 (1998).

options are legal newspapers, online services, or Internet sites of state and federal court opinions.

Whatever research tools you have available, to be an effective researcher, you should always begin by developing a research plan for the particular problem you are dealing with. Although the process is not linear, usually you start by getting an understanding of the general area of law before you focus on case-finding tools. This will also give you some familiarity with the particular vocabulary used in that area of law. The next step is to find, read, and analyze cases and statutes. Finally, you need to update your research and make sure it is current. Throughout, you must make the best possible use of all of the research tools relevant to your problem, going back and forth from one tool to the other as your research progresses.

III. Types of Research Materials

THE TRADITIONAL CLASSIFICATION of legal research materials includes three types: primary materials (cases, statutes), secondary materials (texts that analyze legal topics), and search materials (indexes, digests). But these classifications have become somewhat blurred. Some materials, such as the annotated American Law Reports (A.L.R.) series, combine features of primary and secondary sources. Computers are search tools, and also sources of primary and secondary authority.

A. Primary Materials

Primary materials consist of cases, statutes, constitutions, and administrative regulations. One kind of primary materials, reported cases, is reported in print form by jurisdiction and in a roughly chronological order, rather than by topic. In order to find cases about a particular topic, you will need to use the secondary and search materials published for this purpose that classify materials by topic.

Statutes, another kind of primary materials, are published in a variety of sources. A jurisdiction's statutes are first compiled and published as session laws, which are the statutes passed during each session of the legislature. Because the session laws are published in chronological order and not by subject matter, they too are difficult to use for research. Instead of using session laws to find statutory materials, a researcher uses the statutory publication called a code in which the

jurisdiction's statutes are arranged by subject matter and indexed. In a code, all statutes pertaining to a topic are grouped together (for example, the criminal laws) in numbered chapters or titles.

The commercial publishers' unofficial editions of each jurisdiction's code are especially valuable for research because they are annotated and provide you with citations to the cases that have applied each statute, or part of it. The codes also contain other information about the statutes, such as historical information that can help you begin a legislative history.

Each jurisdiction also publishes its constitution and court rules of procedure. Administrative regulations, the regulations of government agencies, usually are published in official publications (the Code of Federal Regulations and the Federal Register) and in publications by commercial publishers.

B. Secondary Materials

Most of the other research materials that you will use, such as treatises, legal periodicals, and legal encyclopedias, fall into the next category of materials—secondary sources. They provide text that explains and analyzes legal topics. Secondary sources also provide citations to primary sources of law and to other secondary materials. Unlike primary authority, however, the secondary sources do not supply binding law; they are persuasive authority only.

C. Search Materials

Search materials, the third category, are tools that help you find the other materials. A familiar example is an index. The most specialized search tools are the West Group digests and the Shepard's and KeyCite citators. These search materials contain no original text of their own, and you never cite them in your written work. LEXIS and WESTLAW are both search tools and sources of primary materials. You may cite to LEXIS or WESTLAW for primary authority if the primary authority has not yet been published, but is available on a computer.

D. The Weight of Authority

As you do your research and writing, you should become aware of the differences among these materials, not only as to the informa-

tion they provide, but also as to their value as authorities. Primary sources are always the most important legal authorities. Primary sources do not all have the same weight, however; among primary authorities, always look first for the binding authority in the jurisdiction of your problem, and then look for sources from other jurisdictions and from analogous areas of the law.

Secondary materials are generally of less weight than persuasive primary authorities. However, not all secondary materials have the same weight. For example, a well-written treatise by a named author who specializes in that field is far more authoritative than an encyclopedia article about that topic. Certain treatises and law review articles may even be more authoritative to some judges than some case law. Many non-legal research materials, such as statistical or sociological studies, are also secondary materials and can prove very useful to your research.

Whichever sources you use to find primary authority, be sure that you yourself read the relevant primary sources. It is not acceptable research to rely on the descriptions of those sources in the secondary materials.

IV. Beginning Your Research

A. Statutory Research

WHEN YOU BEGIN YOUR RESEARCH for a problem, you should determine if there is a statute that governs. Even if no state statute applies, a federal statute may, or both federal and state statutes may apply.

1. Starting With Known Relevant Citations

If you know statutes relevant to the subject matter of your problem, you can begin your research differently from the way you begin if you do not know of relevant materials. When you know the citations to relevant statutes, read the statutes immediately, and then expand your search as described below in Part A(2). If your client is being sued for violation of a statute, for example, then the litigation has already identified the statute by citation. You could find the statute in that jurisdiction's code either by using the printed version of the code or by using the FIND command in WESTLAW or the LEXSTAT service on LEXIS. (As of the fall of 1998, annotated codes

for all jurisdictions are not available on CD–ROM or the Internet.) Although proper citation form is to the official code, for research purposes you probably will want to read the statute in the unofficial code because of its annotations. Then, proceed with your research as explained below.

2. Starting With No Research Information

If, as you begin your research, you do not have citations to relevant statutes, then you have to search for them yourself. Unless you are very familiar with the structure of the jurisdiction's code and can go directly to the title that includes the subject matter of your problem, start by using the index volume of the code to find whether there are statutes related to your topic. Indexing techniques and problems associated with indexing are discussed below in Part B(2). You can also find statutes by using one of the computer services, but statutory research on computer may be more difficult. It is harder to formulate a search request that anticipates the language of a statute. Statutes are generally not written using ordinary speech patterns. The language may be stilted and the structure of statutes—definitions, headings, sections and sub-sections—may undermine precise and complete retrieval. Moreover, in books, indexes to codes are easy to use and provide cross-references, and case annotations are easy to browse through. So if a statute and its annotations are merely replicated on the computer screen, it would make more sense to simply pick up the book and read the material there.

If you cannot find an index entry, you may be using the wrong search terms. If there are treatises available, or other secondary sources about that area of law, look through the information to pick up the correct terms. For example, it is a crime for a person with knowledge that someone has committed a crime not to report it. This crime is called misprision of justice and is indexed under that term. If you knew nothing about this area of law, you would not likely know that term and would not find this statute in the index.

If there are statutes that appear relevant to your problem, read them to determine whether they apply to your case. Then use the statutory annotations or the computer services to find the cases applying that statute.

You must update the statute in the code by using the pocket parts to the statutory index and to the code volume, and also by using the

interim annotation services that accompany codes. Besides providing citations to more recently decided cases applying the statute, these sources tell you whether the statute has been amended or repealed, or whether a new statute has been passed. You may also have to update the statute on the computer's database.

Other reference sources besides the code volumes and computer services supply information about statutes. For example, you can use a Shepard's statutory citators for information about the legislative changes in the statute, such as amendments, and for cases that cite the statute. Also use the indexes to legal periodicals, which include tables of statutes with citations to articles about them. Loose-leaf services, either of national or state-wide scope, are especially helpful for specialized statutory subject matter like labor law or securities law. Law review articles may lead you to a specific statute. But you usually would not use an encyclopedia for research on statutory issues.

B. Case Law Research

1. Starting With Known Relevant Citations

If you already know an important case and know its citation, either from an annotated code or another source, and you want to limit your research to finding other relevant cases, one way to begin is by reading that case.

A quick way to retrieve a case when you know the citation is to use the FIND feature on WESTLAW or the LEXSEE service on LEXIS. Or you may read the case in a regional reporter and use the West Group headnotes to work from the case to the most relevant topics and key numbers. Then use the key number to look through the relevant digests or do a key number search on WESTLAW to find more cases on the point of that key number. Or, using the parties' names, you can find the case by doing a field search (WESTLAW) or segment search (LEXIS) to retrieve the case with its citation.

You can find more cases using the case citation by using Shepard's in print, the citator functions in LEXIS or WESTLAW, or Shepard's on CD-ROM. WESTLAW has its own online service called KeyCite, which gives the direct and indirect history of cases and analyzes their treatment. You can then find more recent cases citing your original case that are likely to be relevant to your topic. Moreover, the case

itself will give you citations to earlier cases that the court regarded as relevant. The context of the opinion should help you to determine which cases you should track down and read. Finding new cases and updating are immensely easier on a computer. Citations to a case are collected in one place and given at the touch of a key.

2. *Starting With No Research Information*

If your problem is a common law problem, and you start with no citations to cases, then you should first get relevant background information by using secondary sources. You can then use digests or computers to find relevant cases. In general, use the facts of your problem to provide words for your search.

a. Using Secondary Sources

If you are unfamiliar with an area of law, you would be wise to begin with a secondary source. These materials provide background information and citations to relevant cases. If you have identified the general area of law in which the problem belongs, such as tort or contract, then a good place to start your research may be a treatise in that field, or an A.L.R. annotation. Then look for articles in law reviews and other periodicals. For many conventional legal problems, however, articles in periodicals may be too specialized to use at the beginning of your research. But if your problem involves a fairly new claim, then a periodical article may be a useful place to begin. You probably would not use a computer at this point because you would not be able to formulate accurate search terms. However, some people use a computer to begin if the problem involves very distinctive concepts that provide accurate search terms, like surrogate motherhood.

Use the indexes for these sources by identifying and searching under key words or ideas you have developed from the facts of the problem. Concentrate on the relationships among the parties, the underlying events, and their chronology. These concepts will describe people, relationships, places, things, and events that supply search terms.

For example, your client may be a person who is legally a minor and seeks to disaffirm a contract he made for a used car. However, when buying the car, he misrepresented himself as an adult to in-

duce the salesperson to contract with him. He asks whether he can disaffirm the contract.

To find out you would research the problem using such words as:

- minor
- child
- infant
- contract
- disaffirm
- age
- misrepresentation
- voidable

Remember also the legal theory that appears to be involved and the relief your client is asking for. If your client wants someone to stop doing something, for example, then your research should concentrate on the requirements for injunctive relief, not for civil damages.

Many of the secondary sources provide cross-references to other materials published by that same publisher, thereby saving search time. Remember also to use looseleaf services. If there is a service for that particular area of law, it will include the most current information available (except for that in computer databases).

b. Using Digests to Find Relevant Cases

If you are familiar with the broad area of law and do not need explanatory or analytical text from a secondary source but immediately want to find relevant cases, then you may want to start your research with a digest. Although other publishers publish digests, the most extensive digest system is that of West Group, which digests every case it publishes in its case reporters. To use the digest system, you must identify the topic and the key number for the specific legal point you are researching. A useful place to start is with the Descriptive Word Index.

Using a general index such as a Descriptive Word Index to a digest sometimes is a simple task, but also can be a frustrating one, and one that requires creativity. For certain problems, it is easy to formulate index search terms, but finding the proper entries in a general index may be more difficult. Even a relatively straightforward

topic requires perseverance and willingness to search under a variety of words that describe the problem when the first attempts fail. Be prepared to use synonyms for your original search terms. For example, try the words "counsel" and "lawyer" as well as "attorney." If your problem involved a doctor, you could look under "physician" or "surgeon" as well as doctor; if your problem involved a car, you could look up "automobile."

You should also be ready to formulate broader categories, using more general terms, such as "motor vehicle" instead of automobile. Remember, however, that the more specific the term is to your problem, the more relevant the materials your research turns up should be. Thus, start with the specific term. Also remember that at a certain point, categories can become too broad to be accurate. Although "litigation" instead of "trial" may not go far afield from your needs, the term "professional" instead of "attorney" would. You also must be prepared to use terms describing other aspects of the problem. Finally, you need the patience to look line-by-line through an index entry that is long and contains many sub-divisions. Once you have found the most relevant topic and key number, you can use them to look through the entire West Group digest system to find cases for your problem.

Remember that the digest entry for each case is not necessarily the holding of the case. Rather, the digests are statements about a point of law mentioned in the case, not all of which will be relevant to your problem. You must read the case yourself before you cite it for the point of law at issue. Moreover, even if a case is in the digest, you must check to see that the case is still good law.

C. Using Computer-Assisted Legal Research (CALR)

To use the computer for your research, instead of looking words up in an index as you would using books, you formulate your own search request or query. Before you can use CALR effectively, however, you should read enough background materials to find the words that describe your problem.

Computers are most successful in searches involving unique terms and somewhat narrow topics. To use CALR to retrieve cases, you can either formulate a query of your own or use a natural language feature. Because of the cost of using computers, you need to develop a plan before you turn the computer on. That means determining

how computers fit into your overall research plan, thinking about the relevant jurisdiction so you know which database to use, and writing out a query. You formulate a query using terms and connectors by identifying the words that courts are likely to use in writing an opinion about the topic you are researching, and by determining how those words are likely to appear in relation to each other.

If, for example, you are doing research on whether a mother who saw her child killed by a negligent driver can recover for the tort of negligent infliction of emotional distress, you would first identify words like:

- mother
- child
- see
- negligence
- death
- emotional distress

Since computers are literal, they retrieve only what has been requested. Thus, you need to identify appropriate synonyms, like "parent" for mother and "watch" or "witness" for see. Finally, you need to picture how the words are likely to appear in relation to each other in courts' opinions, and use appropriate connectors.

To broaden your search, include synonyms connected by the word OR. Where you want to retrieve documents that contain two or more of your words, link them with the AND connector. Or you could use a numerical proximity connector when you want to narrow your search by retrieving only those documents in which words appear in a specific relation to each other. With a numerical connector, w/n or /n, the words must appear within the specified number of each other. For example, "emotional /5 distress" indicates that the words "emotional" and "distress" must appear within 5 words of each other for the document to be retrieved. The number will differ depending on whether you are using LEXIS or WESTLAW. Each system considers some words to be non-searchable (for example articles), but WESTLAW counts them with a numerical connector and LEXIS does not.

The exclamation mark (!) at the end of the word instructs the computer to retrieve the root word with various endings. The emotional distress search might ultimately be:

"Mother or father or parent and child or daughter or son and saw or witness! and negligen! /5 inflict! and emotion! /5 distress and death."

In addition to the terms and connectors method of case finding, both WESTLAW and LEXIS have a retrieval mechanism in which the computer formulates the query for you after you type in a statement of the issue in your problem. WESTLAW calls its program WIN (WESTLAW is Natural) and LEXIS calls its program FREESTYLE. For example, if you type "Can a mother who saw her child killed by a negligent driver recover for negligent infliction of emotional distress?", the computer will 'translate' that to "mother saw child killed negligent driver recover 'negligent infliction of emotional distress'." The computer will retrieve the cases which have the highest statistical probability of matching the words in the query. (Usually the program is set at 20 or 25 words, but it can be set to retrieve more.) To do this, however, the computer ignores the date of decision and level of court, two very important factors in determining the weight of authority.

Natural searching language is not intended to provide complete information. Query formulation is necessary when you want to limit your search to documents which contain every concept in the search request or when you want to specify the relationship between words. And even the computer companies do not suggest that you use only natural language searching. Rather, they suggest that terms and connector formulation and natural language searching supplement each other.

Computers can perform specialized functions like finding the opinions of a judge on a particular topic or giving you the citation to a recent case not yet reported in print. Computers also make updating easier, give with remarkable speed the text of opinions from some courts, and provide the text online of a number of background sources, like law reviews and A.L.R. However, computers are less useful in getting an overview of a topic, or in searches involving broad issues, complex concepts, procedural questions, or common terms. In these contexts, books are much more useful and can save considerable time and money.

Example 1: Your client has been charged with unlawful possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841 (a)(1) (2000). You want to bring a motion to suppress evi-

dence of drugs seized in his apartment on the ground that his fourth amendment right to be free from unreasonable searches and seizures under the United States Constitution was violated after the police entered his apartment building and had a dog sniff outside his apartment door. The question is whether the dog sniff is a search within the meaning of the fourth amendment and so requires a warrant. The only thing that you know is that there is no law directly on point in your federal circuit. And you believe that there have been a lot of cases involving dog sniffs. You, therefore, need to research how the Supreme Court and the federal circuit courts have dealt with this or similar questions. Because constitutional issues are so broad and because there are so many cases, you begin by getting background information.

A good place to begin is a well-respected treatise, so you find Wayne R. LaFave's multi-volume treatise on Search and Seizure. You look up dog sniff in the Index. There is a reference to "Dog's nose, use of"; you turn to a 16-page section which discusses the issue of dog sniffs under federal law. It analyzes the two governing Supreme Court cases, discusses several circuit court cases in the text and footnotes, and in the pocket part, identifies *United States v. Thomas*, a case in which the Second Circuit held that a dog sniff outside an apartment door was a search within the meaning of the fourth amendment, since the defendant had a heightened expectation of privacy inside his home. Although this case is very useful persuasive authority, you can also tell from the section in LaFave that the federal courts, in general, give the prosecutors a lot of leeway on this question, so your argument will not be easy.

Another place to get background information on this question is A.L.R. Federal, which also has a very useful article on dog sniffs. Or there may be some law review articles dealing precisely with this point. However, if you were to begin with a query on the computer in the West ALLFEDS database or the Lexis COURTS file of the GENFED library, such as "Dog or canine w/5 sniff or smell and apartment or house or home and door and search and fourth w/5 amendment," you would retrieve almost a hundred and fifty cases. This is too many to read and analyze efficiently. (The first case alone is 99 pages long on the computer.) And if you limit the number of cases by doing a natu-

ral language search of 20 cases, you will retrieve *United States v. Thomas* and some other useful cases, but you will not get either of the Supreme Court cases, or a helpful explanation by an expert in that area of law.

Example 2: You are representing a woman in New Jersey who wishes to have a child, but is unable to for medical reasons. She and her husband are thinking about having someone act as a surrogate mother, but they are worried about what the surrogate's rights would be and whether she could change her mind and refuse to give up the child. This is the type of question for which CALR will be quite effective since the terms are unique.[3] Moreover, this is a state law question so you can limit your research to the laws of one state. If you use the search request "surrogate /5 mother!" in the New Jersey database, you will retrieve 12 cases. If you browse through them, you will soon view the *Matter of Baby M* case, the decision by the New Jersey Supreme Court on surrogate motherhood. You could then either continue to browse through the cases, or print a list of the cases. In any event, you will probably want to turn off the computer and read the cases in full in the reporters. You could then go back to the computer to update them.

V. Tailoring Your Research

A. Researching Federal Law

WHEN YOU ARE DOING RESEARCH on a problem governed by a federal statute, your approach will frequently be different from the approach you would use in doing common law research or even researching a state statute. The digest approach in books or the query formulation approach in computers will not give you an overview of the problem. Moreover, reading the annotations to the statute may not be an effective way to begin if the statute is complex and has hundreds of annotations.

You may find it more helpful to begin this type of problem by reading about the issue in a law review article. Law reviews can give you

[3] Even a term as unique as surrogate motherhood may not give you all of the relevant cases. A few courts in the country have started using the term "surrogate parenthood."

an overview of the problem, identify the major issues, and provide references to other materials analyzing the problem. Since even the best law reviews cannot tell you about cases decided after their publication, however, you may also find looseleaf services helpful. You could use either a general looseleaf service, like United States Law Week, which can identify recent cases on a variety of topics, or a specialized looseleaf service that deals with a particular subject area, like employment discrimination law or securities law.

If you are doing research on a federal constitutional issue, you might begin with a treatise, and then go on to law reviews for a more detailed analysis. Some looseleaf services are also very important when researching constitutional issues. The Supreme Court edition of Law Week will tell you whether and how the Supreme Court has dealt with an issue; the general edition of Law Week will provide the lower courts' treatments of important issues. A looseleaf service for a specific subject area, like criminal law or first amendment law, should also be consulted.

If your case involves issues of federal law only, then you will use some different sources from the ones you would use for issues of state law.[4] If your research concerned only a federal statute imposing penalties for criminal contempt, you would find that legislation in the United States Code. Federal administrative regulations, such as those by the Equal Employment Opportunity Commission on employment discrimination, are published in the Code of Federal Regulations and the Federal Register. Federal administrative decisions on this topic may be found in looseleaf services, such as CCH Employment Practice Decisions. In addition, some research tools publish separate volumes for federal law. For example, you could use the federal law digests to find cases from the federal courts only. You could also look for annotations in the A.L.R. Federal. Moreover, various treatises discuss federal law topics such as civil procedure or securities law.

You can limit your search for federal law on a computer by choosing the database: federal law in general; the decisions of a particular court, like the Supreme Court or the Second Circuit; or even the decisions of a particular judge. You can also make excellent use of the Internet for certain problems relating to federal law.

[4] Of course, some problems involve research into both federal and state law.

If you know the address of a web site that is likely to have the information you want, you can go there directly. You may have found this information from a text that lists web sites or from previous research. If you do not know the address of a web site, you can find it in different ways. If, for example, you want the web site of a federal agency, you can go to a web site designed for locating agencies, like *www.cilp.org/Fed–Agency/* or to a law school web site which has links to federal agencies, like *www.law.vill.edu* or to a legal directory like *www.FindLaw.com.* If you were researching a problem relating to AIDS, for example, you could go to the web site of the Centers for Disease Control or the Department of Health and Human Services resources (AIDS-related information).

You can also use the Internet to do related nonlegal research. In 1998, for example, the Supreme Court interpreted the term "disability" in the Americans with Disabilities Act to cover a person who was HIV positive, but asymptomatic. One issue that arose in the HIV case is whether reproduction is a major life activity, since one method of defining "disability" is through a physical impairment that substantially limits a major life activity. If you were representing a male client who said he would not attempt to father a child because of his HIV infection, you might want information about the likelihood of a male's transmitting the HIV virus to a fetus. Since this issue is not discussed in any of the court opinions, a possible source of information would be the many web sites dealing with AIDS and HIV.

B. Researching the Law of One State

You can also narrow your research if your case involves the law of only one state. If, from your own experience, or from the instructions with your assignment, you limit your research to one state's law, then you can use sources limited to that state's law. Start with the state code to see if there are any relevant statutes. Use the state's annotated code not only for citations to cases applying the statute, but also for its cross references and for citations to such sources as law review articles about state law. See if there is an encyclopedia of that state's law. Use the digest or digests that are limited to that state. An assignment limited to one state's law permits you to limit your citator search to a state citator, where you will also find references to state law materials, such as the attorney general's opinions.

You can limit your search in LEXIS and WESTLAW by selecting a data base limited to the local scope of your problem, like a single state. In addition, you can use a CD-ROM for that state's law.

VI. Doing Your Research

BEFORE YOU BEGIN YOUR RESEARCH, develop a plan. Make sure that you understand your problem and its issues. If the problem is from a class assignment, read it carefully to determine exactly what you have been asked to do. Try not to waste your time by going off on tangents. Make preliminary identifications of the jurisdiction of the problem, the claim involved, the issues within that claim, and the most relevant facts. Identify statutes that may apply and other relevant reference materials. Reserve computer time if your library provides sign-up reservations.

When you begin your research, take steps that will save you time later. Do not print a case identified from your computer search until you have at least skimmed the case to find out if it is relevant. If you read the cases to determine their relevance before you photocopy, you may save time and money. Even if you photocopy and highlight information on your copies, you should read the cases as you go along and take notes about what you are reading. Your notes should identify your emerging analysis of the issues and facts and which cases are relevant to them. In that way you are not faced with a mass of undifferentiated highlighted copies when it is time to analyze the problem and write. You may want to start an outline right away. The outline should identify the issues and break them down into their component parts. Then preliminarily fill in the cases and statutes you need for each part. (See Chapter 8.)

Copy important information so you will not have to retrieve it later on. Be careful to put quotation marks around all exact quotes so that if you use a quotation in your written work, you will identify it as such. Write down the page numbers of the text you are quoting or paraphrasing to use in the citation. Remember that you must attribute paraphrases and ideas from the texts with citations to their sources, including the pages on which they are found.

Take down full citation information of all authorities when you read them, including parallel citations if needed, the courts and dates of the cases, and the edition numbers of books such as treatises. If you read a case in which more than one issue was decided, write down

the headnote numbers for those issues relevant to your research. You will shorten your search in citators and eliminate the reading of cases cited for statements about issues different from yours if you search with the relevant headnote numbers.

One of your most difficult judgments will be to decide when to stop your research. On the one hand, a little more digging may turn up the perfect case. On the other hand, that time, for which you will be charging your client, may yield nothing that you have not seen, perhaps many times. When you already have found and read the cases and secondary sources that are cited in the new materials you are turning up, then you probably have done enough research.

Often, you will find deficiencies in your research when you outline or begin to write. You may not have thought through every relevant line of analysis, or you may not have enough support for a particular conclusion. Once you start writing and thus must commit your reasoning to paper, you should confront these flaws in research or analysis. If you begin writing early enough, you leave time to evaluate your progress and your understanding of the problem. Then you can continue research in those areas in which you are not satisfied with your work.

For all research, remember: (1) learn which sources are most useful and efficient for particular research; (2) be resourceful when you use indexes; (3) update all printed sources by using pocket parts and supplements, and then updating materials since the cut-off date; (4) eliminate sources that merely duplicate what you already have done; (5) update with a citator all primary authorities you rely on; (6) evaluate the authoritative value of the sources and the quality of their analyses.

Exercise 12–A

For each of these problems, write out a research plan:

1. In the newspaper, you read about a case that the Supreme Court of the United States decided the day before, June 26, 1998. You want to read the case. You know that the names of the parties are Beth Faragher and the City of Boca Raton.

2. You are representing Betty Abbott. She tells you that her supervisor at work has been continually upsetting her. It started a few months ago. He began making lewd remarks about her figure. She told him that

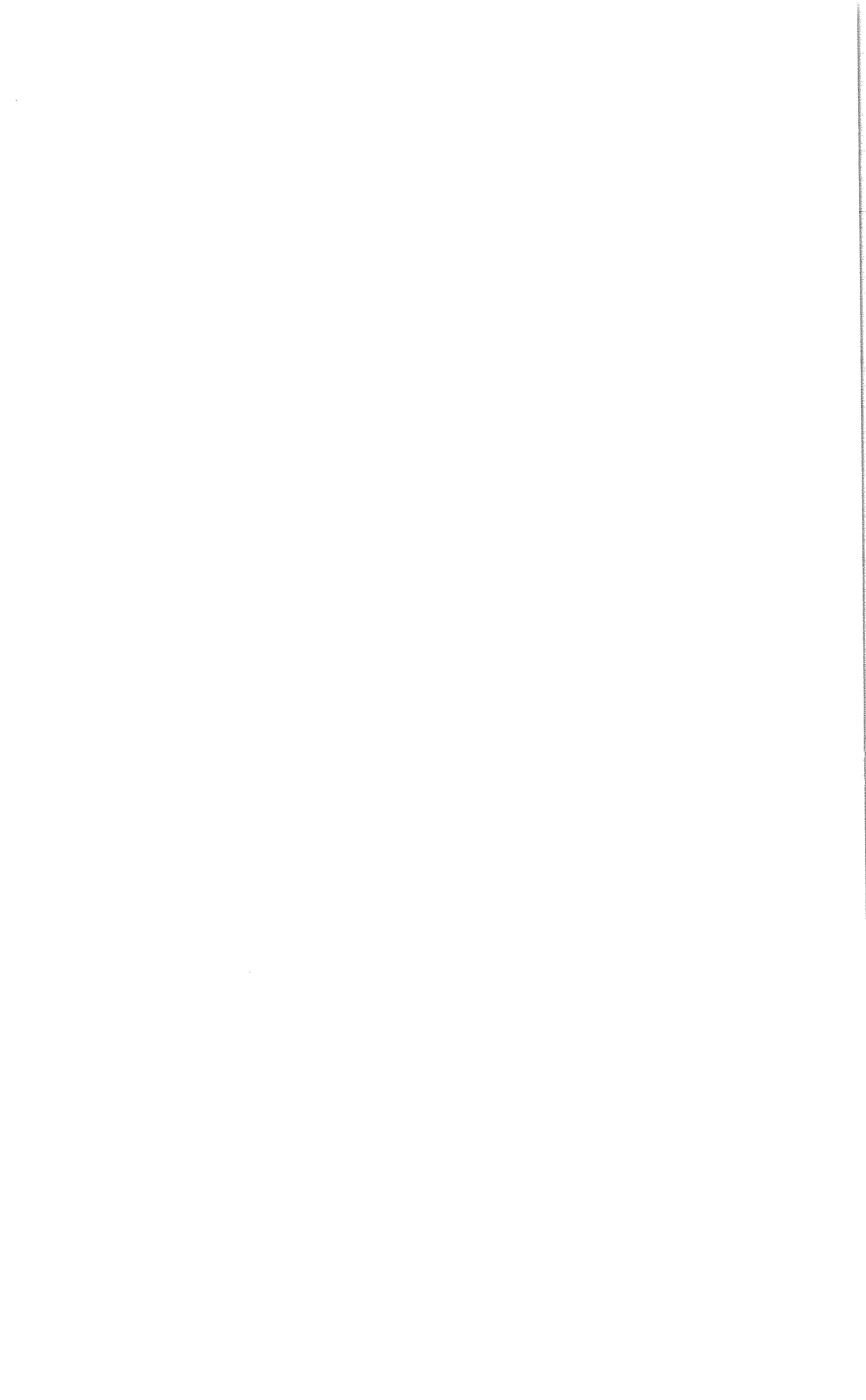
she did not think the comments were funny or flattering, but he told her he was just a friendly guy. Lately he has been putting his arm around her shoulder when he comes by her desk and squeezing her shoulder. Two days ago, he suggested that if she slept with him, her career would take off, but if she did not, she would find herself getting poor evaluations.

You believe her supervisor's conduct is sexual harassment and is a form of sex discrimination.

Ms. Abbott works in Philadelphia, Pennsylvania, in an office with 35 employees. Philadelphia is in the Third Circuit.

3. Your client has been charged under 18 U.S.C. § 1111 (2000) with the second degree murder of his doctor. He was not charged with first degree murder because his act was not premeditated. Based on your conversations with him, you believe that at the time he stabbed the victim, he was suffering from Post Traumatic Stress Disorder, a result of his wartime experience in Vietnam. You want to research whether his mental condition would be a defense to the crime, either because he could not formulate the necessary mens rea (intent) or because he was not guilty by reason of insanity. The crime took place in a federal veterans' hospital in Boston, Massachusetts. Massachusetts is in the First Circuit.

4. An attorney in your law office is going to be arguing a case before the Supreme Court of the United States. She wants you to find all of Justice Scalia's opinions on the confrontation clause.



13

Interviewing the Client

I. Introduction

In your first few weeks of law school, you may have been assigned a legal office memorandum, a document containing a section called the Statement of Facts. But you may not have thought about the process by which a lawyer gathers the facts that appear in that section. You may have assumed that the client would provide all of the relevant facts and that the lawyer would easily know what facts are relevant to the client's problem. But you may not have considered how often in describing a problem, people are likely to omit critical facts, to characterize facts in a way that puts them in the best light, to misstate facts, and to give facts in an idiosyncratic order. You may also have assumed that a lawyer would know which facts to probe. However, if a lawyer is not familiar with all of the issues relating to a legal theory, a lawyer is not likely to initially ask about all relevant facts. Moreover, a lawyer's ability to help the client may depend on whether the client trusts and has confidence in the lawyer. A client who does not trust a lawyer will probably not be forthcoming about providing facts or even revealing objectives.

Thus, effective interviewing involves skills in listening, in questioning, and in understanding the full dimensions of a client's problem. At your initial interview with the client, you will have your first opportunity of what will probably be an ongoing process of both gathering facts related to a client's problem and establishing a relationship of trust with the client.

To understand how a client may feel when meeting a lawyer for the first time, imagine that you are a college senior on your way to see a doctor. You have had recurrent headaches and blurred vision for the previous two months and have decided to do something about

the problem. Although you assume that nothing terrible is happening to you, you are uneasy about what the doctor may conclude. In fact, this has not been an easy year for you. You have done well academically, but have developed major doubts about a career in law, although this had been your goal since high school. Ultimately, you decided not to apply to law school. Your parents were surprised, then concerned, then anxious about why you changed your mind and about what you are going to do with your life. They have said that they cannot support you indefinitely. You do not want to cause them economic or personal anxiety, particularly since your father is not well. Moreover, the person you have been dating seems to have lost interest in you now that your career plans have changed.

How would you want the doctor to deal with your situation? First, you would want the doctor to be skilled in diagnosing and treating the medical issues relating to the headaches and blurred vision. But you might also want to doctor to be interested in some of the other problems that you have been having, both because they are troubling you and because they may be related to the medical issues. What would make you likely to discuss these other problems with the doctor? The doctor would have to be someone who listened carefully to what you are saying, who seemed both to understand what your concerns are and to care about them, and who believed you could decide better than anyone else what the right career choice was for you.

Like patients seeking medical advice, clients come to lawyers first for legal advice and help. Foremost, the client wants a competent lawyer. In fact, the first rule in the ABA Model Rules of Professional Conduct deals with competence.

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. Rule 1.1.[1]

But your ability to help your client also requires your understanding that the "legal" problem may not be the whole problem.[2] Thus

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[1] Model Rules of Professional Conduct.

[2] Throughout this chapter, the authors have drawn on material from the following very helpful texts: David A. Binder *et al.*, *Lawyers as Counselors: A Client–Centered Approach* (1991); Robert M. Bastress and Joseph Harbaugh, *Interviewing, Counseling and Negotiation: Skills for Effective Representation* (1990); Marilyn J. Berger *et al.*, *Pretrial Advocacy: Planning, Analysis & Strategy* (1988); and Thomas L. Shaffer and James R. Elkins, *Legal Interviewing and Counseling in a Nutshell* (2d ed. 1987).

your interpersonal skills are as important as your research and analytic skills. Clients' legal problems often relate to other nonlegal concerns that the client has, just as medical problems may relate to non-medical concerns. For example, the college senior who has decided not to go to law school might be wondering if the headaches are related to the other concerns which may be psychological (where do I go from here?), interpersonal (I am causing my parents a lot of worry by changing my mind about law school), economic (I have to go out and get a job now), or moral (I should not be a burden to my parents at their age).

Finally, your ability to help your client may depend on your understanding the lawyer-client relationship. You may have thought that your role as a lawyer means that based on your legal expertise, you tell the client how to solve the client's legal problem. After all, what did you go to law school for if not to dispense legal advice?

Yet Rule 1.2(a) of the Model Rules of Professional Conduct[3] on the Scope of Representation states:

> A lawyer shall abide by a client's decisions concerning the objectives of representation....

Comment 1 on the Scope of Representation states:

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be achieved by legal representation, within the limits of the law and the lawyer's professional obligation.

Your role, then, is not simply that of the technical expert and adviser. Although you must be knowledgeable about the law (just as a doctor must be knowledgeable about medical issues), you also need to understand that the person in the best position to make the decision about a legal problem is the client. After all the client, not you, is the person who must live with that decision. Your role is to help the client find the best solution to the client's problem. To do this, you need to understand the problem as the client perceives it, and to discover what is most important to the client.

Every client is different. So your approach to each client will vary depending on the client's basic situation. Is the client meeting with a

[3] Model Rules of Professional Conduct.

lawyer for the first time? Does the client want to bring a lawsuit? Is the client a defendant in a civil lawsuit? Has the client been charged with a crime? Is the client a sophisticated business person who wants to set up a new company and who has had significant contact with lawyers? Is the client someone who has no knowledge of the law? Is the client dealing with painful personal issues like divorce or a relationship with estranged children? Is the client worried about the cost and stress of litigation? Just as you consider your audience when you write, you should consider each client individually when you meet with that client.

II. Goals of the Interview

A CLIENT MAY COME TO DISCUSS a matter relating to litigation (suing a hotel for negligent infliction of emotional distress, defending an adverse possession claim, defending a charge of armed robbery) or relating to a transaction (buying a house, negotiating a commercial lease, signing an employment contract). Consider then what you want to achieve in an initial interview with the client. You may think it is obvious—you want to find out what the client's legal problem is. You can then research the problem to find out if the client has a good case, or if the client should renew the commercial lease under the terms offered, and then tell the client what you know.

Certainly, one of the major goals of the interview is to get the facts that are relevant to the client's problem and to understand what the client's goals are. However, if you focus your efforts in the interview on the facts relevant to the "legal" problem, you may discourage the client from providing other highly important information. For example, if a client describes a series of conflicts that have occurred between her and her spouse, you might assume that the client has come to get representation for a divorce. You may be tempted to tear yourself away from the interview so that you can immediately begin researching the state law on divorce. But the client may not consider divorce for religious or moral reasons. Rather, the client may be concerned about the escalating conflicts with her spouse and wants to know if there is a way in which she could get an order of protection or could force her spouse to vacate the premises. Or the client may ultimately want a referral to a marriage counselor. If you failed to elicit or develop this information, you would have completely misunderstood the client's objectives. So a more useful way of viewing the goals

of the interview would be to try gather facts that relate to what brought the client to see you, to what the client would like to happen, and to how the client feels about the situation.

Gathering facts is not your only goal. The interview is also the critical first stage of your developing a lawyer-client relationship based on trust and mutual respect. The client will be revealing information about issues of importance and concern. The client will want to feel that you are an understanding and trustworthy professional, capable of effectively representing the client's interests.

Finally, assuming that the client agrees to hire you and you agree to represent the client, you and the client will be establishing a contractual relationship. That relationship entails your assuming obligations to the client under the Model Rules of Professional Conduct. Moreover, you will probably discuss your fee arrangement with the client at the end of the initial interview and indicate what tasks you will probably need to undertake in order to achieve the client's objectives. Accordingly, bear in mind your goals for the initial interview: to gather as many of the relevant facts as you can, to establish a relationship of trust with the client, to establish a contractual relationship (you may have the client sign an agreement), and to assign tasks to yourself and to the client in preparation for the next meeting.

III. Preparation for the Interview

PLANNING IS IMPORTANT AT EVERY STAGE of your relationship with your client. Interviewing is a skill. You cannot expect to "wing it" and assume that you will intuitively know how to conduct an initial interview, even after you have gained some experience.

Even before you have met the client, you may be able to begin considering the client's situation. Often the client making the appointment over the telephone will have provided you or your assistant with some information about the problem, or the client may have dropped off some documents before the interview. In these situations, you may have learned some of the facts relating to the client's problem and some idea of what to expect. Thus you can think about the client's situation in advance, and even do some preliminary research on what the legal problem seems to be. Consider, also, if there are any documents you want to ask the client to bring (a notice from the landlord, a summons and complaint in a lawsuit filed against the client, a business contract which is about to expire).

For example, assume that a new client, John Starr, has made an appointment to meet with you in two days. Mr. Starr mentioned over the phone that his wife is Jane Starr, the newly elected city councillor. You remember that around three months ago, there was a terrible incident during the election in which Jane Starr was shot and wounded by a hotel security guard. Before meeting with John Starr, you looked up the newspaper account of the shooting. You consider whether Mr. Starr's visit relates to the shooting incident. Or since Mr. Starr, but not Mrs. Starr, is coming to talk with you, you wonder if the meeting deals with a totally different matter. So although you should consider the likely content of the interview and how you would generally like to structure it, you should keep an open mind and not prematurely diagnose the client's problem or prejudge the client personally.

IV. The Interview

YOU WILL PROBABLY BEGIN YOUR INTERVIEW of the client by meeting the client in your waiting room, introducing yourself, and bringing your client into your office. Once you sit down, spend some time chatting with the client about nonlegal issues to put the client at ease. This is not a waste of time. Remember, you are a stranger. The client has to feel comfortable about discussing all sorts of issues with you. In addition, the preliminary conversation may give you some insight into the client's personality and concerns.

> *Good morning Mr. Starr. My name is ______ ______, I'm pleased to meet you. Let's go into my office to talk. Would you like some coffee, or tea, or perhaps a cold drink?* [*Did you have any difficulty finding the office?*] OR [*I understand that Joe Black gave you my name. How is Joe doing? I haven't seen him in a while.*]

When you feel the time is right, begin with a general question to the client. [*Mr. Starr, what brings you here today?*] This will give you an idea of how the client characterizes the problem that brought him to see you. This is the best way to begin understanding the problem from the client's perspective. Asking an open-ended question and permitting the client an initial opportunity to talk without interruption will give you very important information and will also aid in putting the client at ease. If you take control of the conversation

too early, you may inadvertently silence the client. You should also ask how the client would like to have the problem resolved. The client may have already considered some possible solutions or at least can give you a range of objectives. [*I want the hotel management to admit that they should never have hired that guard and to pay for the misery they caused.*] In telling the story, the client may also gradually feel unburdened and begin to feel a rapport with you. Finally, the client may reveal important nonlegal concerns that may bear upon the client's situation. [*I have to tell you that my wife thinks this is a bad idea. We have had a lot of arguments about it, and I don't know if I am doing the right thing or if a lawsuit would just make things worse between us.*]

While listening to the client's story you will probably begin thinking of potential legal theories which relate to the client's case. But before prematurely diagnosing the client's problem, ask the client for a chronology of the events (often called a time-line) which led to the client's coming to see you. [*Mr. Starr, could you give me a step-by-step account of the events leading to the shooting of your wife, and of what has happened since.*] Remember that although you may ask the client to start at the beginning, do not expect a flawless narrative which proceeds from one legally relevant fact to another in perfect chronological order. Like all of us, clients are likely to include irrelevant facts, to omit important events assuming the other party is aware of them, to provide information out of order, and to be reluctant to provide certain information because it may be personal, embarrassing, or even incriminating. To get a reasonably complete time-line, you will have to ask different types of questions (open-ended, specific, leading, follow-up, yes/no) to try to get a step-by-step sense of what happened.

A broad, open-ended question will encourage the client to respond at length, focusing on the material that seems most important to the client. [*Mr. Starr, would you tell me about what happened the day you and your aunt were watching television coverage of your wife's campaign.*] A narrow, specific question or a yes/no question will elicit detail. [*Where were you and your aunt sitting in relation to the television set?*] A leading question will clarify or verify information or enable to client to respond to a difficult question. [*And you and your wife continue to disagree about whether you should sue the Hotel?*] You will likely use a combination of these types of questions. A general approach is using a "funnel" technique; that is, beginning with

open-ended questions and then moving on to narrower, more specific questions.

Your skill as an interviewer depends on your ability both to listen and to ask questions. Of course, you need to listen carefully to the client's account of the events in order to learn the details that relate to the client's case. This is particularly important at the beginning of the interview when you have asked the client a general question about why the client came to see you. However, you are listening not only for an understanding of the client's legal problem, but also for the client's concerns. You need to understand what the client wants, as well as what the client needs. You may sometimes become aware of the client's attitude and concerns by observing the client as he or she is telling the story. Non-verbal cues like facial expressions and hand gestures can help you understand the client's concerns. Finally, you want to establish a rapport with the client, and to do that you have to give your full attention.

You can encourage the client to talk using two different listening techniques (sometimes described as "passive" and "active" listening). When your client is responding to an open-ended question and you want to promote the free flow of information, you can encourage him or her by using short phrases [*I see. Really? And then what happened?*] and by nodding or maintaining eye contact. Even "passive" listening requires that you remain involved and attentive. A more difficult technique but one which demonstrates empathy with the client's situation, is to respond to a statement by summarizing the content of the statement and the client's feelings about it. [*So you are furious at how the Hotel's carelessness disrupted your life?*] If a client can respond to your summary by saying "Yes, that's what I meant", then you have been successful in using that technique.

As you listen to the client's account and record the events, you may at the same time be considering the legal theories that the account suggests. At some point, though, you need to consider elements of the potential legal theories and ask questions eliciting facts that relate to those elements. Here you are seeking detail, wanting to verify certain facts and clarify others. To get these details, you will probably have to ask specific questions and be a more active questioner than you were in the initial part of the interview when the client was doing more of the talking.

At the end of the interview, the client will probably ask you for a legal opinion. If you are sufficiently familiar with the law, you may

want to give a tentative assessment of the client's situation. But as a new associate, it is likely that you would need to do some further research into the client's case before you can provide a final assessment. Moreover, you may not have gotten all of the relevant factual information in the initial interview. Accordingly, a useful way to end the interview is to tell the client what you are prepared to do and tell the client what you would like the client to do. [*Mr. Starr, I am going to .... I would like you to ....*] You should also indicate a future date at which you will meet again or at which some event will take place. Finally, if the client wishes your representation and you wish to represent the client, you need to formalize an attorney-client relationship. That means you have the authority to act on the client's behalf and have reached an understanding as to fees.

V. The Memo to the File

AFTER A CLIENT INTERVIEW, lawyers often write a Memo to the File. This is different from the legal office memo described in Chapter Seven. The Memo to the File summarizes:

- who the client is
- the nature of the client's problem as the client perceives it
- the client's goals
- the factual information the client gave
- what the lawyer told the client
- how things were left:
  - the lawyer's tasks
  - the client's tasks
  - the next steps
- the lawyer's preliminary case theory assessment

Here is an example of a Memo to the File written by an attorney who just completed an initial interview of John Starr, a new client.

Memo to the File: First Interview of JOHN STARR

Attorney Work Product

July 1, 1999

I met a new client, JOHN STARR, this morning. John is a 38-year-old computer programmer who is married to Jane Starr, a newly-

elected member of the city council. John has recently returned to work after a three-month absence. He said he was unable to work during that period because of depression and nerves stemming from an incident before the election involving the shooting of his wife by a Hotel security guard at the Pennsylvania Deluxe Hotel. John spoke at length about the problems he and his wife have been having, focusing on a major disagreement over her continuing as a city council member. John believes the position is too public and that Jane could be in more danger. I remembered the incident when he called to make an appointment, and re-read the newspaper account before our interview. I was not sure for the first half of the interview whether John was coming to me because he wanted to institute divorce proceedings. But he says he loves his wife and is just concerned about her safety.

John came to see me because he is furious at the managers of the Pennsylvania Deluxe Hotel. He wants to sue them because they hired the security guard who wounded Jane. Jane's campaign headquarters was at the Hotel. John believes the Hotel did not adequately check the references of the security guard, and if they had, they would have discovered that Raymond Acker, the security guard, had a history of violent behavior. John seems less interested in the money he would get from the Hotel if he succeeds than in holding them accountable for the injury to Jane, for his shock, and for the continuing disruption of their normal lives.

As John described the facts, on election day, April 2, 1998, he and Alice Doe, Jane's great aunt and former guardian, were watching the television election coverage at campaign headquarters at the Hotel. They were waiting for Jane to return to the Hotel after visiting her supporters in local campaign offices. At 9:30 p.m., Jane and several staff members arrived at the Hotel and Jane began walking towards the Hotel's entrance. When she was halfway there, Acker pulled out a gun and shot at Jane. John and Alice heard the shot on the television. The cameras showed Jane lying on the sidewalk, unconscious, in a pool of blood. John said they realized immediately after the shot was fired that Jane was seriously hurt. John collapsed and Alice became hysterical.

Jane was elected, recovered from her injuries in a month, and according to John, wants to put the whole thing behind her. But both John and Alice became depressed and anxious after the incident; Alice is still under a doctor's care for her nerves. Neither of them has any

physical problems resulting from the incident and its aftermath, but John has just now felt able to return to work.

John seems to be largely recovered from his depression. But he still seems agitated about the incident and it is not clear whether he will be able to resume his work without any psychological aftereffects. John and Jane also have a number of issues that they need to work out between them. Jane personally does not want to sue the Hotel. Acker has been charged with aggravated assault and will either be incarcerated or committed to an institution. That seems to give Jane a sense of closure.

I told John that, depending on the results of my research, I would represent him on a claim against the Hotel if he decided to sue them and told him my customary fee in cases like this. Since he personally was not injured by Acker, I told him he would not be able to sue the Hotel under general negligence theories. But one possible theory of recovery would be negligent infliction of emotional distress. I told John we would have to prove certain things to recover, and that we would have difficulty with some of them. First, we would have to prove that the Hotel was indeed negligent in hiring Acker. Then we would have to convince the court that seeing an event on television was the same as seeing it in person. I forgot to ask John if he and Alice actually saw Jane getting shot on television. It could make a difference if they heard the shot, but did not actually see her being shot. And I need to make sure that they saw live coverage as the event occurred, rather than a later taped version. Finally, since he did not suffer any physical injury, we would have to prove that his emotional distress from the incident was nonetheless severe.

I also strongly suggested to John that he and Jane should discuss his desire to sue the Hotel even though she opposed the idea. This conflict could create a major source of tension between them in addition to their already serious dispute about whether Jane should keep her seat on the city council. Their entire relationship could be at risk. Moreover, as a practical matter, if Jane refuses to cooperate, the success of the lawsuit would be unlikely.

We set up a second interview for July 14th. I said I would do some research on the cases in this state dealing with negligent infliction, and, in particular, how strict the courts have been in requiring that the plaintiff actually be present at the time of the injury. I also need to do some research on whether the plaintiff has to see the injury at

the exact moment that it occurred. In addition, I would check the cases dealing with the severity of the psychological injury when there was no physical injury. I asked John to bring in his medical bills containing a diagnosis from the psychiatrist he has been seeing over the past three months. I asked him for the psychiatrist's name and phone number and got John's written permission to call him at a later time. In addition, I asked John if I could speak with Alice to get some additional information from her. He was not sure that she was in a strong enough condition to review the events, and also thought that Jane might have strong feelings about my speaking to Alice. John said he would get me a list of other people who worked in Jane's campaign headquarters and their phone numbers to see if they had any information about Acker.

John has a chance to succeed in his claim, but I will have a better sense of that after I do some research. He will be a credible witness and remembers many details of the shooting. I also need to get a clearer sense of Acker's history, and will try to find out if he has a conviction record. Finally, I think that John and Jane have a number of issues to work out which will bear upon whether John decides to go ahead with his suit.

Exercise 13–A

In this exercise, your teacher or one of your fellow-students is going to play the role of Anne Atkins who is coming to your law office to see you for the first time. You got very little information over the phone. You only know that she is furious about an incident in which her parents hired a "deprogrammer" in an effort to convince her not to live on a communal farm run by an organization called the "Family of Truth and Light."

The person acting as Ms. Atkins will be provided with the facts. Before you interview her, think about the likely content of the interview and how you would like to structure it. Consider what questions you would need to ask to determine her objectives and the facts of her case.

After the interview, write a Memo to the File on Ms. Atkins' case.

14

Counseling the Client

A LAWYER OFTEN ENGAGES in an on-going relationship with a client that involves counseling, either in person or by letter. Because our focus in this text is on writing, we have concentrated on counseling by letter. (See Chapter 15.) However, more often than not, a lawyer would not simply write a letter to a client without also counseling the client in person. An interpersonal meeting provides an opportunity for dialogue, client involvement, and client decision-making not possible in a letter, which is solely under the lawyer's control.

This brief chapter is not intended to deal with counseling in all its complexity. Rather, the chapter is intended to give you an introduction to the process of counseling.

I. Roles of the Lawyer and the Client

BOTH THE LAWYER AND THE CLIENT have significant roles in decision-making. We noted in Chapter 13 on Interviewing that the client is the ultimate decision-maker. About certain decisions, the Model Rules of Professional Conduct[1] are explicit. Rule 1.2 states:

> A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Moreover, according to the Model Rules, Rule 1.2, the lawyer must abide by the client's decisions concerning the objectives of the litigation, and must consult with the client as to the means by which

[1] Model Rules of Professional Conduct.

they are pursued. The final decision is appropriately the client's, since the client is the one who has to live with the decision.

Yet lawyers also have a very important role in the process of decision-making. This role has been characterized in two ways: counseling and advice giving.[2] Counseling is primarily guidance and is part of virtually every lawyer-client interaction. A lawyer is counseling when the lawyer discusses with the client the client's objectives in light of the facts of the situation, suggests alternatives, identifies the pros and cons of each, helps the client evaluate the pros and cons of the alternatives, and finally, helps the client come to a decision which provides the best solution to the client's problem.

But clients may sometimes ask their lawyers for more. The client may want the lawyer's opinion about what the client should do. The client may simply say, "What would you do if you were me?" This is a question you may have asked a doctor at some point in your life. In responding to this question, lawyers must be aware both of their professional obligations and of the client's objectives and values, so as not to suggest a result based on the lawyer's own values, which could yield an unsatisfactory result for the client. On the other hand, this situation requires the lawyer to be a more complete counselor than one who only provides information about the law. On the lawyer's role as counselor, Rule 2.1 of Article II of the Model Rules states

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The Comment to Rule 2.1 goes even further:

> [2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.

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[2] Throughout this chapter, the authors have drawn on material from the following very helpful texts: David A. Binder *et al.*, *Lawyers as Counselors: A Client-Centered Approach* (1991); Robert M. Bastress and Joseph Harbaugh, *Interviewing, Counseling and Negotiation: Skills for Effective Representation* (1990); Marilyn J. Berger *et al.*, *Pretrail Advocacy: Planning, Analysis & Strategy* (1988).

Since nonlegal factors may be as important to the client's decision as legal factors, the lawyer must also make them a part of the counseling process and help the client give them appropriate weight in the client's decision-making. And to encourage frankness, the lawyer must be both objective and nonjudgmental. In all of these ways, the lawyer can help the client make a decision, while giving the client a sense of support and confidence.

II. Preparation for Counseling

A LAWYER MAY COUNSEL A CLIENT at various points in their relationship. Certainly, the lawyer is likely to counsel the client soon after the initial interview. But since the lawyer-client relationship may be an ongoing one, a lawyer and client may discuss strategy many times during the course of litigation or a transaction, or the lawyer may be asked to deal with a legal question tangential to, or completely unrelated to, the original problem.

Moreover, preparing for and conducting a counseling session will be different where the matter deals not with litigation, but with a transaction, such as an employment contract. For that, the initial interview will likely focus on the client's objectives, any contractual terms upon which the parties may already have agreed, other potential terms of the contract, and any conflicts between the parties on the terms. The lawyer must become familiar with business practices in that area and the client's business situation in particular. The lawyer may then prepare a draft agreement, send it to the client for review, and discuss it more fully with the client at their next meeting. When the lawyer and the client have come up with a satisfactory revised draft, they will send that draft to the other party. Or the client may receive a draft agreement from the other party that would be the basis of a counseling session. Then the lawyer would negotiate with the other party, which may lead to further discussions with the client, further revisions, and, one hopes, a deal which meets the client's objectives.

To get a sense of how to prepare for a counseling meeting with a client in a litigation context, however, assume that you are representing John Starr whose problem was discussed in Chapter 13. At the end of your interview with him, you indicated that you were going to research certain issues relating to negligent infliction of emotional distress, to speak with John's psychiatrist when John gave you

permission, to speak with Alice Doe if you got John's permission, and to try to learn more about Raymond Acker's history. John, in turn, was going to provide you with copies of medical bills, his written consent to speak with his psychiatrist, and a list of people involved in the campaign of John's wife, Jane Starr. John also said he would discuss the whole question of a lawsuit against the Hotel with Jane. You and John agreed to meet in two weeks.

To be prepared, you should plan the counseling meeting in advance. This means focusing again on the client's problem, researching the law as it relates to the problem, and investigating the facts as much as you can. Begin by thinking about what the client said in the interview that relates to the problem as the client sees it, and what the client would like to happen. Then consider the results of your research. In researching John Starr's problem, you have come upon the question of whether the plaintiff has to be physically present to satisfy the requirement that the shock results from a sensory and contemporaneous observance of the act. You are not sure whether watching the shooting on television is enough. If Pennsylvania courts strictly enforce the requirement of physical presence, you then need to decide if there is a Rule 11 problem in bringing a suit on Starr's behalf. You may conclude from reading the precedents that extending the law to cover Starr's situation would not be frivolous and that there would be no impediments to suit on that account.

As to the facts, John told you over the telephone that he spoke to Alice Doe, Jane Starr's great aunt and former guardian. Alice said she does not want to talk about the incident anymore and refuses to meet with you. You did speak, however, with John's psychiatrist. She said that John was seriously depressed following the shooting. He was unable to work for more than three months, had difficulty sleeping, and when he did sleep, often had nightmares about the shooting. He lost weight and became withdrawn. Now, the psychiatrist said, she believes he has fully recovered. His spirits are good, he is looking forward to returning to work, and he has regained his equilibrium. Finally, you checked the Hall of Records, which contains records of criminal convictions for the city and surrounding counties. You learned there that Raymond Acker was convicted of assault three years ago.

Ultimately, your goal in a counseling meeting is to help the client reach a decision that best meets the client's objectives and solves the client's problem. You may find it helpful to write out a plan, so that you and the client are less likely to forget important issues. First, iden-

tify the client's objectives. Then list the alternative courses of action, both legal and nonlegal, that have been suggested by your research, your investigation of the facts, and by the client's statements to you. For each of the alternatives, write the pros and cons to clarify the probable legal and nonlegal consequences of each alternative in your own mind and in your client's. Then indicate the costs and the likelihood of success of each alternative. You may also want to make notes beside each alternative of questions for the client that can explore the client's feelings about the alternatives and consequences.

Before meeting with the client, think about how to present this material to the client and how the client is likely to respond. Try to anticipate problems. Finally, consider having either a written agenda or an outline to give the client near the start of the meeting. But make sure that you have significant room to add comments or responses from the client. You do not want to give the client the impression that you have already decided what is best. You have a lot to hear from the client about clarification of objectives and of the relative importance to the client of various consequences.

Exercise 14–A

Based on the information in the lawyer's Memo to the File in John Starr's case in Chapter 13, write a plan for a counseling meeting with John Starr. This plan assumes that you have already developed you legal theory (you know what claims would be viable). Your plan could use the format below or another format that you find useful. For your guidance, one alternative has been completed.

JOHN STARR

Objectives: Possibly sue Pennsylvania Deluxe Hotel for negligent infliction of emotional distress based on Starr's TV viewing of his wife's being shot by Hotel security guard; hold Hotel accountable for pain, stress, disruption to his life (and his wife's life and great aunt's life?); get financial compensation (damages from Hotel); maintain strength of marriage to Jane Starr.

Alternatives:

COURSE OF ACTION #1—DO NOTHING FURTHER

A. *Pros*
   - no future expenditure of time or money

- alleviate stress on marriage due to different views on lawsuit between John and Jane
- maybe put incident behind them and get on with their lives
- no conflict with Alice [and therefore Jane]

B. *Cons*

- no resolution of John's anger at Hotel
- no possibility of award of damages

C. *To evaluation the pros and cons, what questions would you ask John?*

- How strongly does he feel about compensation (financial? psychological?) from the Hotel?
- How strongly does Jane feel that she does not want him to file a lawsuit, that she wants to put the whole thing behind her?
- How strongly does Jane feel that Alice should not be further distressed? Would refraining from suit end the stress between John and Jane?
- How much of the stress is due to Jane's new position (exposure to danger; position of importance)? [be careful asking this]

COURSE OF ACTION #2—______

A. *Pros*
B. *Cons*
C. *Questions*

COURSE OF ACTION #3—______

A. *Pros*
B. *Cons*
C. *Questions*

III. Structure of the Counseling Meeting

BECAUSE A CLIENT IS LIKELY to want to quickly hear a lawyer's assessment of the situation, the lawyer should spend little time talking about general issues and begin the meeting by focusing directly on the client's major concerns. Remember the college senior who visited a doctor for recurrent headaches and blurred vision. The senior's first question to a doctor who had done some tests would probably be, "Am I all right?" The law client's equivalent is probably to ask for a single, bottom line answer. Often, there is no single answer. However, the lawyer can briefly summarize the alternatives at the start of

the meeting (with an explanation of the legal basis for the suit), indicate the pros and cons of each alternative, and then discuss them with the client in what seems to be the order of importance to the client.

Before discussing the alternatives in detail, however, it would be useful for the lawyer to summarize the client's objectives as the lawyer understands them. In this way, if the lawyer is mistaken about what the client really wants, the client can clarify the situation at the start. And the lawyer does not waste time emphasizing what turns out to be of minor importance to the client.

The lawyer's goal in the counseling session is to help the client decide on a course of action that will best help the client achieve his objectives. Clients should be encouraged to take an active role in the process of considering alternatives. However, the meeting is not likely to follow the orderly format of the lawyer's plan. Rather, the client, like most people, is likely to bounce from one topic to another before exhausting all of the relevant considerations, go back and forth, and sometimes go in circles. The purpose of the lawyer's counseling plan is not to control the meeting, but to have a reminder of the major issues the lawyer and the client should discuss.

IV. Techniques of Counseling

ALL OF THE INTERPERSONAL SKILLS important in interviewing the client are equally or even more important in counseling a client. The counseling meeting may very well be stressful for the client and the lawyer needs to be aware of the client's state of mind and concerns. The lawyer should also consider the particular client's level of sophistication and experience with similar problems, his aversion to risk, time pressures the client may be under, and financial concerns. Finally, throughout the meeting, the lawyer's attention should be undivided.

The lawyer is in the best position to predict the legal consequences of each of the alternatives. The lawyer has researched the law and can explain the legal context. This means telling the client how courts have decided similar cases, indicating what issues of law remain unresolved, and suggesting how a jury or a court is likely to view the case. In Mr. Starr's case, for example, the lawyer would need to explain the elements of the tort and, in particular, the element of a sensory and contemporaneous observance of the accident, which

Mr. Starr may have difficulty proving because he did not see the shooting in person. The client, however, is the most important predictor of the nonlegal consequences of each alternative. And the client is the only source of the client's values. Mr. Starr may feel that he will not have closure if he does not get some sort of satisfaction from the Hotel.

Throughout the counseling meeting, the lawyer can use different types of questions to advantage. (See Chapter 13.) Open-ended questions will enable the client to respond fully, to play an active role in the discussion and decision-making, and to encourage the client to explore a range of issues. Narrow questions can elicit specific information and clarification. A lawyer may help the client focus on certain issues by summarizing the client's responses in a way that gives the client an opportunity to confirm, clarify, or reject the summary. The lawyer may also need to point out to the client when the client's wishes are in conflict and help the client determine which objectives are paramount.

The client will want to know what the probability of success is for each alternative. Some lawyers suggest that stating the percentage likelihood of success is easier for a client to evaluate [*You have a 70% likelihood of success if you go to trial.*] than a general statement [*You have a pretty good chance to win if you go to trial.*] Another way to express the client's likelihood of success concretely is by stating the odds. For example, a lawyer might say that the client's likelihood of success at trial was 60–40 in favor. But above all, the lawyer must give candid advice. Although no one wishes to be the bearer of bad news, the client's best interest can only be served by the lawyer's honest assessment of the claim.[3]

Finally, a client may have difficulty making a decision and may ask the lawyer not for predictions about consequences, but what the lawyer would advise him to do. Under this circumstance, assuming the lawyer has had an opportunity to review the alternatives and consequences with the client and the client is still undecided, the lawyer should try to give an opinion based on the client's values. For ex-

[3] Section 1 of the Comment to Rule 2.1 on Counseling states in part: In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving advice by the prospect that the advice should be unpalatable to the client.

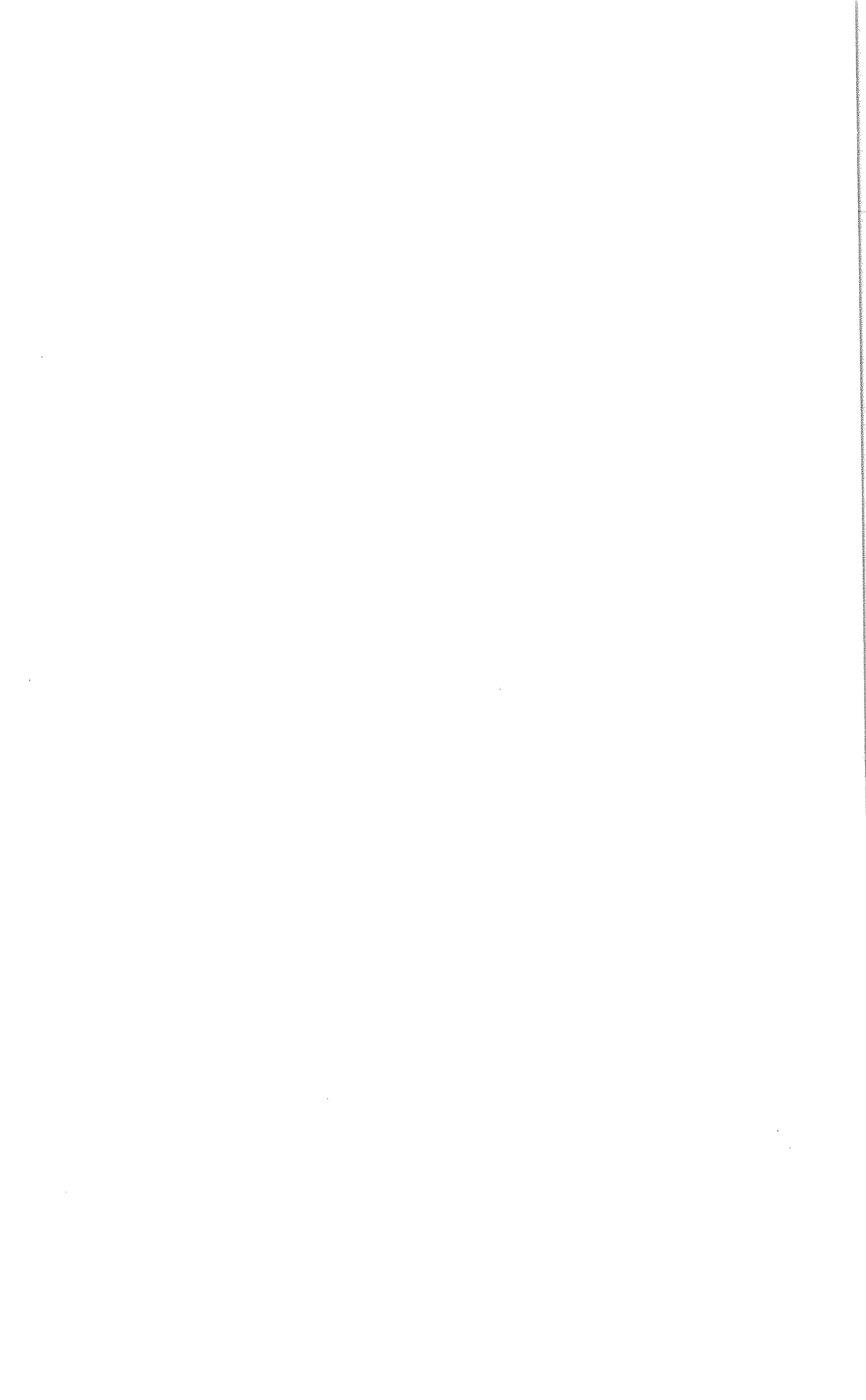
ample, the lawyer might say [*Since you feel strongly that the Hotel should have to admit its negligence in hiring the security guard and compensate you for the misery this has caused in your life, since your claim on the merits is fairly strong, and since your wife is willing to go along with your decision, then I think you should file a lawsuit against the Hotel.*] At a later stage in the proceedings of the same case, the lawyer might say [*Since you feel the Hotel has acknowledged its error by offering to settle the case and since you would now like to put an end to the whole incident, I think you should accept the Hotel's $30,000 offer of settlement even though you asked for a much higher amount in the complaint.*]

If the client then asks what you would personally do, you can give your opinion, indicating what the basis for that opinion is. For example, you could say [*Since I personally don't have any immediate financial need and since I don't mind taking a risk, I would wait before accepting the settlement offer.*] Where you feel you could not give a basis for an opinion, do not give one.

Exercise 14–B

All of the students in the class completed a counseling plan for John Starr in Exercise 14–A. However, for purposes of this exercise, half of you will play the role of John Starr and half of you will play the role of Mr. Starr's attorney in a 20-30 minute counseling session.

Those of you acting as Mr. Starr should try to put yourself in his position, thinking about his objectives and state of mind. Those of you who are acting as attorney should think about your plan and about counseling techniques in general.



15

Letter Writing

LETTERS MAY BE THE MOST FREQUENT TYPE of writing that lawyers do. Even lawyers whose practice does not require them to write interoffice memos or court documents write letters. In fact, Rule 1.4 of the Model Rules of Professional Conduct requires a lawyer to "keep a client reasonably informed about the status of a matter," and clients are quick to complain when their lawyers do not communicate with them enough.

Like office memoranda, the letters that a lawyer writes to or on behalf of a client often require total familiarity with the law, the facts, and their interaction. But letter writing is also the most personal kind of writing a lawyer does and the most stylistically varied because, in letters, analysis and tone must always be tailored to individual audiences and specific purposes. A lawyer who begins the letter-writing process by analyzing audience and purpose—the two primary elements of the rhetorical context—is thus in a good position to formulate effective writing strategies.

Given the importance of rhetorical context in letter writing, this chapter begins by discussing the elements that comprise it. Section II then examines four types of letters that lawyers commonly write: client opinion or advice letters, letters to adversaries, letters to third parties, that is, to parties indirectly but significantly involved in a legal dispute, and finally, transmittal letters, letters that accompany documents and provide instructions.

I. Analyzing the Rhetorical Context

A. Audience

WHETHER WRITING MEMORANDA OR LETTERS, you must know your audience or you will be unable to develop effective strategies. But while

the audience for law school memos is unvarying—legal practitioners with a generalist's knowledge of the subject matter—the audience for letters is varied and diverse. It is rarely adequate, therefore, to label your audience as "client" or "adversary." Rather you must analyze your reader in detail.

There are a number of factors you can consider in drawing a portrait of your reader. First, consider your reader's legal experience. Is she a general practitioner, specialist, business woman aware of the laws affecting her business, or lay person? Second, determine your reader's level of education. Is he a professor or a high-school dropout? Third, take into account your reader's physical, mental, and emotional condition. Is your reader emotionally fragile, hostile, or physically debilitated? Finally, note the age of reader. Are you communicating with a teenager or with a senior citizen?

Such an analysis will help you make a variety of rhetorical decisions. First, it will help you determine whether a letter is the most appropriate way to communicate with your client. In a number of situations, a phone call or a counseling session in your office may be preferable. Certainly if the client is distraught, personal communication is more suitable. If your client is uneducated, you would probably want to meet with the client in person to make sure that your client fully understood your analysis and his or her options. A stubborn or angry client would be better met in person. And under any circumstances, a personal meeting provides an opportunity for interaction, listening, and discussion that a letter cannot provide.

Nevertheless, there are a number of instances where lawyers would write letters to clients giving an opinion or advice. First, business clients often want letters giving legal advice regarding a transaction. Second, a client may be unable to come to the lawyer's office because of distance or the client's infirmity. Third, the lawyer may be unable to reach the client by phone. Fourth, a lawyer may want to write to a client in advance of a counseling meeting to set out some issues that will be the basis of his discussion. Finally, a client may find it helpful to receive a follow-up letter summarizing the options discussed at a counseling meeting so that the client can review the options at leisure.

If written communication is in order, an audience analysis will help you find the level of analysis and detail that is appropriate for your reader. It will also help you determine whether you can use terms of art or must stick to plain English. In addition, it will help you make

decisions about the kind of personal interaction that is appropriate. Although young lawyers worry that the human touch might make them appear unprofessional, responding to a client's implicit or explicit worries is central to establishing rapport. Clients often need and appreciate a few words of sympathy, reassurance, and good humor and may be put off by a technocrat.

Of course, the business of audience analysis is complicated by the fact that lawyers often write for multiple audiences. For example, a letter from a defense attorney to an elderly witness to an accident might be read by the attorney's supervisor, the witness's family, the family's lawyer, the court, and even the public-at-large.

When you have multiple audiences, you probably want to target your strategies at your primary reader—or at the middle range of possible readers. When, however, your audiences have vastly different backgrounds, consider drafting different letters for each or, if appropriate, include your office memorandum for those who might need a more detailed understanding of the dispute. Finally, remember that some letters are read from the file long after they are written. Thus all your correspondence should be accurate and ethical. Although courts rarely review letters, it is wise to write letters as if review was inevitable.

B. Purpose

Decisions about content and tone do not depend solely on audience assessment. Equally important is the purpose of the letter. Indeed sometimes your letters to a single individual will differ in tone or content because the purpose of each letter is different. A short note informing a client about a meeting the attorney had with a witness may be, for example, more informal than a letter setting out the client's legal options.

Most letters have at least one of three primary purposes:

- to counsel a client about available options
- to persuade someone to a course of action, or
- to inform someone of something.

The "counseling" category includes letters advising clients about their best legal options. The "persuasive" category includes letters negotiating settlements or letters requesting favors or information.

Within the "informative" category fall letters notifying a party of a legal development, letters describing an event, letters analyzing a legal problem, letters denying a request, or letters giving instructions.

Frequently, letters have more than one primary purpose. For example, one common client letter, the advice letter, offers both a general analysis of the client's legal problem and a description of the advantages and disadvantages of each of the client's legal alternatives.

In addition to these primary purposes, an advice letter may also have a host of secondary goals:

- to establish rapport
- to check facts
- to request directions as to how to proceed
- to establish a time-frame for response

Sometimes all these goals work in harmony. Your analysis of the client's problem informs your discussion of the client's alternatives. Sometimes, however, a letter has conflicting purposes. Although you think the claim is strong on the merits, you feel obligated to warn the client about the risk, stress, expense, and prolonged nature of a court trial. Prioritizing and balancing primary, secondary, and conflicting purposes are part of the art of letter writing. You need to organize your document so that your highest priorities receive the greatest stress.

C. *Writing Strategies*

Once you have examined your audience and purpose, you must think about what kind of approach would best achieve your purpose with that audience. In other words, you must develop a rhetorical strategy. There are four central elements to consider in developing a strategy.

1. *Writer's Persona*

Because readers form impressions of their lawyers largely on the basis of their letters, it is a good idea to think about how you want to appear to your reader—about what kind of persona, or image, you want to present in that document. Ideally, you want to adopt a persona that your reader will find appealing, or at least worthy of respect.