

LAWS1230 (Lawyers, Ethics and Justice) – Bachelor of Laws / Bachelor of Psychological Science Notes

Week 1 (Class 2): Community Legal Centres: Clinical Component

R Hyman, S Campbell & A Evans, Practical Legal Skills (OUP, 4th ed, 2013), Chapter 2

Introduction

- That interviewing is a fundamental aspect of lawyering as when a lawyer is introduced to a new client they are unaware of them and their problems.
- **The primary objective of the interview:** the lawyer must obtain all necessary facts and instructions from the client:
 - o The lawyer must establish respectful relationships with clients
 - o That client confidence (*rapport*) is essential to encourage ongoing relationships.
- **Three-stage process of interviewing:**
 - o 1) listening to the client's story in its entirety.
 - o 2) asking questions to obtain a complete understanding of the facts and of the chronology of the story.
 - o 3) assessing the options and providing advice.

Factors to Consider Before Commencing Dialogue with a Client

The Client's Perspective

- The client will most likely be experiencing a mixture of negative emotions, e.g. upset, anxious, impatient etc. starting point is to put the client at ease.

Meeting, Greeting and Introduction

- That the lawyer should always be on time – indicates respect and shows their time is important.
 - o A lawyer will often leave officer to meet clients in waiting rooms to show:
 - 1) respect by greeting them
 - 2) breaking ice by making small talk on the way to the office
- A lawyer must provide clients with their full name and inform them they can refer to them by their first name.
- A lawyer should use simple opening questions, 'how can I help you today?' or similarly 'what can I do for you'
- Therefore, prior to the interview, give clients:
 - o A brief introduction of yourself and/or firm;
 - o A brief on how the interview will be conducted;
 - o A discussion of expected cost – earlier on to ease client qualms
 - it is a **positive legal obligation** in most jurisdictions to discuss costs with clients before being retained as their solicitor.

The Three Stage Process of Interviewing

STAGE I: LISTENING

- A numerous amount of methods for enhancing listening:
 - o To not jump in and ask questions in early stages of interview.
 - o To encourage the client to give details from the beginning and make brief notes.
 - o To not interrupt, and do not worry about fine details e.g. names/places/dates.
 - o If a client has stopped to ask a question, assure them that you will explain later and encourage them to continue with their narrative.
 - It is essential to allow the client to tell the full story – it may also calm them down.
- Empathy:

- To demonstrate that a lawyer understands the ‘essence’ of the client’s story through words and gestures of encouragement and comfort.
- Sympathy:
 - To demonstrate that a lawyer must be sensitive to the emotional content of the interview through words such as ‘that sounds terrible’ etc.

Angry, Distressed and Challenging Clients

- It is best to acknowledge their feelings and direct them back to the story.
- To acknowledge and accommodate for their tears with tissue handkerchief, water etc.
- It is inappropriate to use physical gestures such as hugs and hand-holding, unless such gesture is characteristic of your already established relationship.
- Regardless, of the content of narrative a lawyer must act according to instructions, not do what they think is best for their client.
- To ensure that our role as a lawyer is clear - state what you can and cannot do for the client (esp. if there is evidence or suspicion of mental illness).
- If a suspicious client is lying, do not confront the client until later on – context may vary.

STAGE II: QUESTIONING

Open and Closed Questioning: The ‘Funnel’ Sequence

- In asking open ended questions that require more than a ‘yes’ or ‘no response - notes should be taken, and events sorted into chronological order.
- **A ‘funnel’ sequence:** asking open (wide, non-specific) and then closed (precise, explicit) questioning.

Notetaking

- The *file note* of the interview should include the following:
 - the date and time
 - detailed and legible record of interview (substantive account):
 - determined facts
 - discussion
 - advice provided.

Instruction Sheet

- An opposing view of using ‘pro forma’ instruction sheets when interviewing clients:
 - **PROS:**
 - Ensures important basic details are not missed.
 - Provides logical way of proceeding through subjects.
 - It creates consistency between files.
 - Helps if lawyer doesn’t know what to ask next.
 - It demonstrates to the client you are thorough and systematic.
 - **CONS:**
 - A client may have range of issues not covered by information sheet.
 - Encourages note-taking which may distract/mislead lawyer as to legal issues.

- Can be a barrier to communication - interview to intent on completely information sheet.
- Makes clients feel degrading or just another 'statistic'.

Interpreter and Cultural Issues

- A lawyer should assess client's English ability and arrange for interpreter if necessary.
- A lawyer should ask client how to pronounce their name correctly.
- If using interpreter, still direct questions towards client, and keep language simple, short and to the point.
- To explain any legal terms used and do not assume interpreter knows what it means

Summarising the Facts

- To provide a short summary of facts so:
 - The client can correct anything incorrect information or details
 - To demonstrate to the client your understanding of the narrative and attentiveness (*rapport*)
- To focus on the issues relevant and pertinent to the client interest.

ETHICAL MATERS

Reluctance

- If a client is reluctant, provide reason why you need certain information – if unimportant, then drop the matter.

Deception and Dishonesty

- It would be useful to 'cross-examine' client to root out dishonest information/misinformation
- To tactfully confront the client if under the assumption that the client may have lied.
- A lawyer's duty to the court is paramount, thereby taking precedence over a lawyer's duty to their client.

Unreasonable Instructions

- As long as instructions do not require breach of professional ethics, lawyer can pursue them even if contrary to given advice.
- If client is giving unreasonable instructions, may be best to refuse to act for client.

INTRODUCTION

- That good communication is essential to the lawyer-client relationship –
 - The client ultimately makes decisions/instructions based on advice given by lawyer, hence importance of ensuring client has clear knowledge of the law and the facts.

Client Satisfaction

- A lawyer must communicate and advise client thoroughly so client may take full responsibility for any decisions made.

K Lauchland, 'The Importance of Good Communication'

- A common complaint is that lawyer failed to communicate adequately with client – lawyer should always explain all options available and any possible outcomes.
- To ensure thfe law is explained clearly and in way client will understand.

Avoid the Law Society Complaint

- It is important to put all advice into writing – it would be particularly helpful if the client decides to act contrary to the advice.
- In receiving advice in writing it may make ‘bad news’ easier to break.

Client Care Rule

- The rule requires lawyers to **advise clients about cost at the initial interview + establish a client complaint handling procedure.**

Active Listening

- It is fundamental to actively listening will ensure lawyer does not rush the interview and, thereby miss the client point/reason for visiting the lawyer.
- **Every answer that the client provides, ask another question to ensure dialogue continues and to have a clearer understanding of the incident.**
 - o When a lot of information had been revealed then restate all the events and circumstances of what the client had provided.
 - o **At the end as the client any further questions that they have and ask any further questions you have.**

Establishing Rapport and Building Client Comfort

- It is appropriate to use the client name – ask tactfully what the client would be preferred to call.
 - o To make small talk during the initial interview (icebreaker) to ensure the client comfortability.
- 1. Introduce yourself: preferably first name to not sound too formal.
How are you/how has your day been: ask the person on how their day has been.
 - a. Additional/Optional: ‘have you got much on this afternoon’ – represent yourself as a friend do not act to formally.
 - i. In relation to work/study: how is university at the moment treating you.’
 - 1. Extension: ‘if they mention that they have an interest, ask them a question about it’
- 2. Allow a line of questioning – ask the client before you start if they have any questions they would want to ask.
- 3. Ask the client if they have ever seen a lawyer before, if not then state: ‘a brief overview we are going to cover:
 - a. some administrative matters,
 - b. then ask a few questions to find out why you are here,
 - c. get some good details on the issues you are currently facing,
 - d. information about you can proceed going forth.

4. Note to them that they can take notes, and that you are going to be writing notes to document a good understanding on the matter.
5. Comfortability: if you are uncomfortable about anything try and be as open as possible, the more information I have, the better able I am to help you, **you are covered by confidentiality so all matters mentioned today would stay strictly within the firm, unless you give your consent.**

Physical Environment

- A client may need to become comfortable in a work environment – consider the seating arrangement carefully to ensure that the client is comfortable.
- In regards to *privacy concerns*, whether to close the door, have an assistant listening in/taking notes or using a dictaphone – it is important to understand what you client is comfortable with.
 - o It is paramount for a lawyer to be flexible regarding physical environment considerations.

Communication Facilitator

Intentional Listening

- The use of non-verbal and verbal cues, open-ended questions and silence to ensure the client you are listening without interrupting their narrative.

Body Language

- The appropriate body language will make client more comfortable e.g. eye contact, open body position and leaning forward.
 - o It is important to be careful with body language as it may have different effects in different cultures/people -gauge impact on client and adjust accordingly.

Actively Listening

- There are two fundamental active listening techniques:
 - o **Reflecting:** A statement/question that reflect back to a client their own words.
 - In order to reassure the client that the lawyer is listening/hearing/understanding them.
 - o **Reframing:** A statement or question that acknowledges emotion/content of client's word and rephrases it.
 - This demonstrates to the client that they have been heard, and also clarifies/confirms that you have the right understandings of their words

Appropriate Questioning

- Key type of questions that exist within the client-lawyer relationship:
 - o Open: Initiates broad topic for discussion, and open-ended answers.
 - o Closed: Requires specific answer and limits scope of answer.
 - o Narrowing: Not closed question, but more limited than open questions.

- Clarifying: Refers back to earlier remarks to reflect/reframe what client has said in order to confirm understanding of situation.
- Reflective/empathetic: Active listening techniques.
- Leading: Avoid this type of question - leads client into saying what the questioner wants to hear.
- Hypothetical: Puts out propositions to test client response - use minimally as may lead client to particular answer.
- Value-lading: Use general terms when questioning so as not to mislead client i.e. 'What size...?' as opposed to 'How big...?'.
- Neutral: Frame questions in neutral terms to encourage clients to recall as honestly and accurately as possible.

Techniques

- Summarising
 - Summarising will prompt client, seek clarification, aid in recollection and move interview process from one stage to the next.
 - Summarising can move client back on track if they've gone on a tangent and help lawyer identify relevant legal issues
- Verbal Tracking
 - Interrupting client with question and comments, and using non-verbal cues can direct the conversation
 - In decreasing eye contact, not taking notes etc. will indicate to client they are rambling.
- Communication Blockers
 - A lawyer must avoid the use of conversation blockers - failing to maintain eye contact, failure to provide adequate physical facilities, ignoring client emotions etc can prevent conversation from flowing.
- Plain English
 - Never talk up or down to a client – minimise use of legal jargon unless certain client understands it.
 - To adjust language to fit client but keep within natural range to remain natural.

Introduction

- The indigenous community have very distinct communication styles and cultural perspectives – it is imperative that a lawyer is aware of this.
- That indigenous individuals may be nervous dealing with the legal system due to the community's mistrust in the system stemming from past experiences (persecutions).

Language and Communication

- There is a diversity of indigenous cultures and communication patterns, it is important to be aware of this in order to minimise miscommunication (such as checking and learning about the local indigenous tribe).
- It is important not to assume that a client would be able to speak English, thereby establish whether you will need an interpreter/translator.
- There exist a number of potential differences in communication style:

- **The avoidance of direct eye contact demonstrates politeness and respect.**
- **That silence plays an important and valued role in communication.**
- **Aboriginal people use sign language quite widely.**
- **Aboriginal people prefer to communicate indirectly, rather than to ask direct questions**
- Aboriginal people may experience problems in understanding English, both linguistically and conceptually (these are listed and explained).
- Aboriginal people may experience difficulty in specifying numbers, time or distance.
- An Aboriginal person may have difficulty in answering questions which are put directly.
- A tendency to agree with a particular proposition or question, regardless of whether the speaker in fact does agree with it may be a particular problem
 - **Do:**
 - **Speak slowly and clearly.**
 - **Use an ordinary tone of voice.**
 - **Use the name by which the speaker wishes to be addressed.**
 - **Use an indirect approach to the asking of questions (three suggestions)**
 - **Check with the speaker of Aboriginal English to establish if he or she understands the legal words being used.**
 - **Don't:**
 - **Don't attempt to speak Aboriginal English.**
 - **Don't use complex sentences or figurative speech.**
 - **Don't ask negative questions.**
 - **Don't use "either-or" questions.**
 - **Don't use technical legal words unless it is essential.**
 - **Don't use terminology and descriptors which may cause offence**

Initial Engagement and Intake Procedures

- That having an indigenous receptionist would create a strong first impression with clients
- That the client should be informed that prior to providing assistance that they will be asked a number of questions.
- It would not be appropriate to assume the validity of an individual's indigenous background as there are various linkages to the cultural background.
 - Therefore, a client should be asked whether or not they identify as an indigenous person.
- It is important to inform the client that they are provided with full confidentiality.
- It is important to get the contact details of their support person as they may not be able to contact the centre themselves.

Community Legal Services

Legal Professional Uniform Law (NSW) ss 116-118

- s 116 (status of community legal services):
 - o (1) The status of a community legal service as a body established on a not-for-profit basis is not affected by any profit made by it so long as the income cannot or will not be distributed to any member or employee of the body otherwise than by way of...
 - o (2) A community legal service may, subject to Part 4.3, recover legal costs incurred by it in respect of legal services that it provides.
- s 117 (supervising legal practitioner):
 - o (1) A community legal service or its governing body is required to have at least one Australian legal practitioner who--
 - (a) is employed or engaged by the service or is a member of its governing body; and
 - (b) is designated by the governing body as a supervising legal practitioner for the service and responsible for the provision of legal services by the service.
 - o (2) A community legal service contravenes this section if it or its governing body does not have any supervising legal practitioners for a period exceeding 7 days
 - Penalty: 250 penalty units.
- s 118 (uniform rules for community legal services):
 - o The Uniform Rules may make provision with respect to any aspect of community legal services, so far as concerns the provision of legal services or matters that affect or may affect the provision of legal services.