

## INTERVIEWING AS RELATIONSHIP

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The Oxford dictionary says that “interviewing” is a meeting of persons face to face, especially for the purpose of consultation.

“Interrogation”, says Oxford, is asking questions to obtain information.

Clearly one is a positive relationship; the other, as the Guantanamo experience has shown, can be negative and even unhelpful. I must add that many of my early interviews when I was a younger lawyer must have been difficult for my clients, because like Jack Webb all I wanted was the facts, just the facts. I extracted these legally relevant facts with fabulous efficiency. I often got them out on bail, and missed the person because I was working at becoming a good interrogator getting all the “good facts”.

My first assertion is that lawyers can learn to use relationship skills in a professional setting. My evidence is from my experience watching skilled counsel: I was often co-counsel in criminal and family law trials and I have seen some talented lawyers achieve wonderful results. I have taken courses in the process of becoming a family law mediator, and I have learned a few tricks from family therapists, social workers, psychologists, doctors, senior cops, and older probation officers. I have seen professionals use what follows below and it works.

Professor Susan Brooks of Drexel Law School (Associate Dean Of Experiential Learning) teaches Relationship Centered Lawyering to her clinical students. She is a former social worker who became a lawyer and worked for years with families whose children had been taken away by the government. She advises that there is a HUGE body of scholarly materials outside of law that supports this suggested style of interviewing.

The process I outline below is not new or controversial ... except for lawyers. There are many reasons why lawyers prefer interrogation over interviewing, which include legal rules (M’cNaughten rules, collateral evidence rule, hearsay exceptions), the cost of running a law office, notions of legal professionalism, personal fears of failing at something new and many others reasons I am sure you can recall.

The purpose of this paper is to provide some framework for the exercise in this Edmonton workshop. We will be doing interview role plays. Some will play lawyers, some clients. This session would be improved if we had a speech pathologist, an educational assessment psychologist, and a raft of other professionals at our elbows. Yet, as practising lawyers well know from any busy day interviewing in cells, we are on our own. It is not my intention to create skilled specialized psychological experts; rather, I am aiming to offer participants a platform that can improve the situation for both lawyers and clients--especially clients who may have cognitive issues that if ignored by the lawyer can have untold negative consequences.

Here we are specifically referring to interviewing clients in trouble in a legal setting who may or may not have fetal alcohol, or some related brain injury that results in reduced cognitive function. And you have been hired to make the situation better for the client.

I will refer to the RAITHBY method and 10 questions. David Raithby is a social worker, teacher, and family therapist who has shown me a few tricks about interviewing. I gather from Mr. Raithby that interviewing is taught differently in the MSW program than it is in the LLB program.

The “10 questions” refers to some questions I have gleaned from the many psychologists I have met who specialize in assessing persons for Fetal Alcohol Spectrum disorder (FASD). For more details refer to an article entitled: *WHAT LEGAL PROFESSIONALS NEED TO KNOW ABOUT FASD AND THE LAW*, written for another conference and found at: [www.davidboulding.com](http://www.davidboulding.com) in the Papers section. That paper contains the 10 questions and other relevant good bits experts have told me about interviewing. I am assuming all participants are familiar with *THE LAWYERS BRIEF* on FASD (also at [www.davidboulding.com](http://www.davidboulding.com)) and have a grasp of fetal alcohol basics.

In this exercise today, participants will also receive separate Lawyer and Client Instructions as well as a one page interview guide for these role plays.

The next section of this paper is presented in numbered paragraphs, and sets out my context and proposed method for this workshop:

1. All persons in trouble have a wide spectrum of their experience—their story.
2. Lawyers require a thin slice of that client’s spectrum to do their job.
3. For many of us this extraction of the legally relevant facts, this interrogation process, is not a relationship process.
4. Often the client feels disconnected, distant, cool to cold toward the lawyer, and there is little trust. Often the client feels closer to the guards than the lawyer assigned to the case. I hear this often. My clients will say what a great guy the sheriff is as the handcuffs come off. Often I see fake punches and small touches between jail staff and clients. It is my interpretation they have some form of close bond I do not share with them. Often my legal advice is measured against what the guards have said. This is puzzling until I realize they are closer to jail staff than me in terms of relationship. It is as if they trust the jail staff (and their advice) more than they do me and my advice.
5. A common result of a lack of trust between client and lawyer is that the client will not volunteer or disclose difficult personal information or negative facts about themselves.
6. Few clients, if any, will disclose: “I have impulse control issues”, or “I have a temper problem”, or “the school psychologist in high school said I needed help”. Even fewer will reveal past DSM 4 type diagnoses that suggest he has problems.
7. Thus it is hard to get an accurate read on the client’s brain if we rely solely on an extraction style of information gathering ... this is a core belief of mine.

8. Who we are as people, as lawyers, can be seen in how we question clients. Not surprisingly we bring all our own stuff to our professional processes. You may have noticed I have a peculiar political viewpoint, and it takes about 10 seconds for this to become apparent. If all my clients had read Foucault, Chomsky, and Aristotle, I would be a better lawyer.
9. I also believe that all criminal law (*actus reus* facts aside) can be reduced to the single question: WHAT WERE YOU THINKING? For clients with brain issues this question can be difficult to answer. The answer may require uncomfortable disclosure that the client is unwilling to make to a person he does not trust. The consequence is that possible defenses are not seen or worse, possible facts are not uncovered that may make the difference between jail and probation.
10. We ask our lawyerly questions from our viewpoint, not from the point of view of the client in jail. This is not a bad habit especially if addressing primary and secondary grounds in a bail hearing. The point is to uncover what we are missing by selecting an interrogation style of information collection. Scholars call this “noticing your assumptions”. I believe that in *PIRATES OF THE CARIBBEAN*, Capt Jack Sparrow says “the treasure you find depends on which map you use.”
11. We all know most of what we do is speak to sentence, as statistics indicate that upwards of 80% of persons arrested are eventually found guilty of something. I believe that for persons with fetal alcohol issues, the number might be 99%. I also believe that this 99% number will drop if we investigate our client’s brain and the mental issues—that is, if we look at our client’s brains right from the start.
12. I believe that if we develop a relationship with clients—at the first meeting—we can get answers that will lead us to do better work for our clients. If we can build a body of facts that leads us to investigate the client’s brain, not just the facts of charge, we can go different places. I am suggesting here that we need to focus on creating an external brain. This term “the external brain”, coined by Dr. Sterling Clarren, is the ultimate goal. If we do not look at the brain we will often decide not to create an external brain, and the client is soon back in jail.
13. Lawyers expect clients to answer questions with the same skill as the lawyer has used to ask the questions because we assume all brains are more or less the same. For example, we will tell other lawyers that “my client is a little slow” or “my client forgets almost everything” or “my client is as dumb as a post, I gotta explain everything three times”. We do not say “my client has a brain-based birth defect and I need to do something different”.
14. Unless your client is a clear minded criminal lawyer there is always a gap between what was expected as an answer and what was answered. Our expectations of our clients is a fact we need to examine. And we need to look at the differences between our possible answers and the actual answers. This looking further requires curiosity, and curiosity begins by considering the brain before you.
15. Obviously if your client has brain issues, brain problems, brain defects, and you do not catch that there is a brain problem, you may misinterpret answers, or get wrong answers, thinking they are correct.
16. There is no easy guaranteed fix.

17. This paper asserts that the answer gap can be repaired by relationship.
18. Unsurprisingly persons with FASD will try to pass as people who have a complete brain, as no one likes to advertise qualities that are seen as negative. Here, ask yourself this: how many clients have you had that disguised that they were illiterate or unable to do math or arithmetic.
19. Faking relationship is easily spotted by clients.
20. The consequence of you the lawyer being seen as a fake by your client is a disaster for the client.
21. By relationship I mean the professional relationship. You are not the client's mom, grandma, or big brother. There are other professional relationships that include social worker, psychologist, pastor, coach, doctor, and probation officer that rely on these same methods.
22. For me, the concept of a professional relationship was given a new quality by David Raithby, a social worker and therapist from Nanaimo, British Columbia. He, like many other professionals, has developed ways that work relationally with clients while maintaining professional boundaries. I believe that when working with clients with brain-based birth defects, Mr. Raithby and other similar professionals have much to offer lawyers.
23. It is a common statement that interviewing involves the head and the heart. This kind of statement offends most lawyers. It may be news to some here: we are often seen as heartless. And we all know that many clients find our lawyerly styles difficult to appreciate. Mr. Raithby uses the word "relational". Ask yourself this: were you "relational" in this interview; would you describe what happened as a relationship or an extraction process?
24. In the article referred to above (*WHAT LEGAL PROS NEED TO KNOW*) I go into more detail: the short story is that other professionals can be relational. Let us learn how they do it.
25. The following elements seem to emerge when I examine other MORE RELATIONAL interview styles:
  - a) Clear professional boundaries;
  - b) Genuine focus and attention to the person before you: notice details of being, manner, speech, dress, and note what is not said that you might expect them to say;
  - c) Respect for the context of the person: this includes emotions and physical cues to their state of mind. Pay close attention to their speech patterns, vocabulary, and other language oddities;
  - d) Ask permission, when asking difficult questions. Again, ask permission to touch and to maintain touch and eye contact;
  - e) State a shared desire for a positive outcome;

- f) Maintain an appropriate pace--some brains need more time; and some brains need more time to create relationships. Trust takes time;
  - g) Attempt, as much as possible, to be on the same page emotionally, intellectually, and physically. Raithby suggests breathing slower, with deep circular breaths, and responding curiously when the client goes in an unexpected direction.
26. The goal is to connect with the client so that you can get the sense of the brain before you. The facts of the offence or the family law situation are important; I am not saying ignore the facts. I am saying that heartfelt curiosity will give you clues as to how the brain before you is different from yourself ... if you tune in.
  27. Many criminal law interviews prohibit touch, the simple handshake, because there is often a glass barrier. This is a bad thing and often I cannot do anything about it. I try. I believe the handshake is the first contact that counts, followed by sustained eye contact.
  28. Most of these clients have had a life of failure and exclusion. They have had little positive contact with other persons. This explains the close bond they often get with jail staff—people that sometimes touch them with care and respect.
  29. Get permission to continue the handshake. I have interviewed women outside busy court rooms whilst their sons were about to go to jail. I had to ask them difficult questions about possible maternal drinking when they were pregnant. A prolonged handshake contact is both professional and a welcome lifeline to a woman who has participated in the process that will put her son in jail. I have had clients hang on my hand for 45 minutes, letting go only when they had to leave the room. Some of my clients, it seems, have never had someone hold onto them in a comforting way, and a handshake does the job.
  30. Set clear boundaries: For example, “we have a few minutes now before we go back to court and I need to know about.....”
  31. Encourage and model slow deep breath. The breath is the way in. Slowing respiration is calming and comforting when another does likewise. The breath can create contact and connection--thus trust.
  32. Be attuned to your responses: what are you experiencing? Your client is hugely attuned to your body signals; he is looking for guidance from you; he is looking at you for second by second reports on how we are doing. This constant positive feedback is the most reassuring single behaviour you can do.
  33. These are all relational skills, all within our professional boundaries, and they will go far to creating a relational interview.
  34. Sometimes you will need to intuit, or guess. For example: “I notice you are shuffling your feet and have stopped looking at me...is there something I need to know about you right now....it might not be about the court case?” Or: “right here right now...what’s going on for you?” Use gentle touch with permission and eye contact.

35. Here I refer you to the 10 questions in the *WHAT LEGAL PROS NEED TO KNOW* article. You may not need them if you have learned about FASD and how brains work. You are not expected to be a forensic psychologist. You are expected to be a professional interviewer and if brain issues seem to be coming up, investigate...using head and heart in a curious non-judgmental way.
36. Being non-judgmental is tremendously difficult for lawyers, because we are paid to make snap judgments. Good lawyers make good snap judgments; the best lawyers make informed snap judgments. Always be asking yourself “hmmm, that is an interesting answer ... *my* brain would not do that. What is going on in this brain?”
37. The aim here is to get an answer to the question “*What were you thinking?*”
38. Armed with this answer, I believe you can begin to create an external brain you can sell to Crown Counsel and later to the Court.
39. I have a retired friend, Jan Frison, a psychiatric registered nurse for all of her professional career at Riverview Hospital (B.C.’s warehouse for the mentally ill). She is always at me to try using “soft eyes”, not the “laser eyes” of a lawyer. She means that relational interviewing is a gentle process; a soft process. Trust me: she is wise and correct.
40. The above suggests a method of relational interviewing. In this workshop we will divide into two groups: Lawyers and Clients. I am offering you a chance to practice being relational.
41. Please note that another group--a bunch of hard-assed, tough law school professors who run clinical programs in Nigeria, Cambodia, India, Kentucky, Australia, Poland and other exotic lands-- tried this relational interviewing in a conference last December in Manila. And I am curious how Albertans will do compared to the professors.

*Thank you*

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ENCLOSURE:

*The Lawyer and The Client Instructions and Interview Guide*

## INTERVIEW GUIDE

- **Start differently: stop trying harder.**
- **Ask permission! Ask permission to touch. Reach out, shake the person's hand—gently. Do not let go.**
- **Ask permission! Is it okay to put your other hand on the wrist of the hand you are shaking, as if you were going to take their pulse.**
- **Maintain soft eye contact. Do not drill them with your laser-like-lawyer's steely gaze.**
- **Stop: do not ask closed questions—that is, questions with yes/no answers. Instead of asking a second question, try saying “and” and pausing ... let them fill up the space. Instead of asking more questions, when they are speaking, nod, and allow there to be a silence;**
- **Model calm behaviour;**
- ***Ask how are we doing in this interview?***
- ***Ask are you comfortable with this interview? Right here, right now, what's going on for you?***
- **Ask the client to breathe with you: slow, circular breath; and try using “and” instead of another question—draw them out so that they continue with their story, instead of responding to specific questions;**
- **Be professionally personal. Try to see the person, not the offender.**