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You Can't Always Get What You Want: Organizing Matrimonial Interviews to Get What You Need

DON PETERS*

Divorce is a significant component of contemporary social experience and the caseload of many lawyers. It also introduces many law students in clinical programs to the challenges and complexities of practice. Interviewing clients who seek to end their marriages presents a host of challenges that make the tasks involved in the process difficult to do well. The emotional stresses of the divorcing experience, the often dramatic differences between what clients want and what can be achieved, and time and economic constraints frequently complicate getting what lawyers need in matrimonial interviews.

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1. The estimated number of divorces in 1986 was 1,159,000 or a rate of approximately 4.8 per 1,000 population. Bureau of the Census, Statistical Abstract of the United States (108th ed. 1988). National census figures show that 2.9% of persons 18 years of age and older had been divorced in 1965; this figure had doubled to 5.8% by 1975, and had climbed to 6.7% by 1981. Pachter, An Investigation of Variables Related to Client Evaluation of the Lawyer-Client Relationship in Divorce Cases 23, Diss. Ab. Int'l. (PhD dissertation, University of Vermont 1984). Divorce touches many lives other than the spouses affected when extended families, remarriages of divorced parents, and marriages of children of divorced families are considered. It has been described as "a serious and growing social problem in which the involvement of lawyers is particularly salient and controversial." Sarat & Felstiner, Law and Strategy in the Divorce Lawyer's Office, 20 LAW & Soc'y REV. 93, 94 (1986). Litigation to get divorces, now often called marriage dissolutions, occupies a substantial portion of the civil business handled by state courts. For example, it accounted for 49.3% of all civil litigation in Florida in 1986. Office of the State Courts Administrator, Summary Reporting System Annual Report, 1986, as cited in Gifford & Nye, Litigation Trends in Florida: Saga of a Growth State, 39 U. FLA. L. REV. 829, 838 (1987).

2. A 1987 survey of legal education showed that 44 law schools offer clinical courses emphasizing family law. Powers, A STUDY OF CONTEMPORARY LAW SCHOOL CURRICULA II: PROFESSIONAL SKILLS COURSES 15 (1987). These are programs where students earn academic credit while studying and practicing matrimonial litigation. Another 77 courses are offered that emphasize general civil practice and presumably involve some work with clients seeking divorces. Id.

The Virgil Hawkins Civil Clinic at the University of Florida College of Law was founded in 1968 and has been directed by the author since 1973. During the time that the interviews in this study were compiled it enrolled ten students a semester, gave them academic credit equal to 60% of a normal term's load, and involved them in general civil practice that emphasized and largely consisted of matrimonial litigation.

3. The lack of agreement regarding what marriage terminations are called has
No framework for organizing inquiry to conduct matrimonial interviews effectively has been described in the growing literature about the skills of lawyering. This article fills this gap by proposing a model for organizing matrimonial interviews to get what lawyers need: the beginning of an effective working relationship and accurate information.

Clinical legal educators have defined their role to include developing models for effective lawyering. These models present sets of simplifying assumptions about effective behaviors in each of the major areas of task performance that lawyers use when representing clients. Behavior representing clients in simulated situations can then be interpreted and discussed using these models as frameworks. Students are encouraged to challenge these models and modify them when circumstances of particular contexts or cases warrant.

These theoretical frameworks necessarily focus on theories of action: ways to conceptualize and accomplish the tasks needed to practice law effectively. They typically define objectives in each area of task performance, and then develop behavioral suggestions for accomplishing these goals. The reasons why the recommended behaviors are likely to be effective are explained and exceptions to caused the term matrimonial to be used to encompass all facets of what was formerly labeled divorce practice. The term "matrimonial" is used in this context in that article.


These models also can be based on theories of lawyering that look at the process from either a micro or macro perspective. A micro perspective emphasizes what individual lawyers do, and a macro view examines the power, purposes, and structure of the lawyer's activities within the legal profession and society. See Menkel-Meadow, The Legacy of Clinical Education: Theories About Lawyering, 29 Clev. St. L. Rev. 555, 556 (1980). This article adopts a micro perspective and attempts to prescribe what should be done in matrimonial interviewing rather than simply describing what probably is done.

5. Binder and Price make the point well when they conclude:

"[t]o become fully proficient, the lawyer will have to learn a basic approach [based on the model] and, at the same time, retain sufficient flexibility to modify that approach to meet special circumstances." Id. See Kreiling, Clinical Legal Education and Lawyer Competency: The Process of Learning to Learn From Experience Through Properly Structured Clinical Supervision, 40 Md. L. Rev. 284, 311 (1981) (students encouraged to modify the theories of action they learn by evaluating them in terms of their experiences).
All legal interviews involve two inevitable and interactive features: (1) a relationship between client and lawyer which emerges from the exchange; and (2) inquiry into client situations and objectives which affects both the developing relationship and the information that is disclosed.

Inquiry, the task of acquiring information, has always been conceptualized as a central aspect of interviewing. The method used to conduct inquiry, including how it is phrased and how it is organized, affects the information obtained. This is as true in interviewing as it is during deposition and trial.

Clinical literature also looks at the interviewing process from the perspective of the relationship that begins to develop between lawyer and client during these interactions. A central insight provided by David Binder and Susan Price in their leading text on legal interviewing is that the organization of inquiry has predictable effects on the relationship that develops.

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6. These models derive philosophically from the pragmatic tradition of John Dewey. See J. Dewey, Human Nature and Conduct 160-62 (Modern Library ed. 1922); J. Dewey, Democracy and Education 227-228 (Modern Library ed. 1922). They start from the premise that “lawyering is a form of behavior susceptible to observation, analysis, and change.” Kreiling, supra note 5, at 288.


10. A recent survey showed that the Binder and Price text, Legal Interviewing and Counseling: A Client-Centered Approach, is currently used at approximately 90 law schools. Morris, Power and Responsibility Among Lawyers and Clients: Comment on Ellmann’s Lawyers and Clients, 34 UCLA L. Rev. 781, 782 n.4 (1987). The book has also been identified as the one used most often by schools participating in the client counseling competition conducted by the Law Student Division of the American Bar Association. Frank & Krause, Book Review, 18 Creighton L. Rev. 1427 n.3 (1985) (reviewing Binder & Price).

11. Binder and Price propose a three-stage interviewing process that suggests three separate explorations of the facts which form the basis of the client’s concerns with each examination becoming increasingly more detailed. This model is suggested as a way to develop an appropriate client-centered relationship, characterized by empathetic under-
A third issue involved in any initial meeting between client and lawyer are decisions by both about how to act within their relationship because some type of accommodation on this level is inevitably suggested or established during the exchange. These role decisions, which may both influence and be shaped by the method and sequence of inquiry the lawyer selects, also affect the relationship between client and attorney that emerges.

The central value assumption in clinical interviewing literature is that lawyers conducting inquiry should behave in ways that build effective working relationships with their clients. The rela-

standing, that will lead to greater client satisfaction with the ultimate decisions that invariably have to be made during legal representation. The approach also responds effectively to predictable inhibitors of communication and provides ample opportunities to use facilitators to encourage effective information-sharing. D. Binder & S. Price, supra note 4, at 6-19.

The first phase, called the preliminary problem identification stage, seeks descriptions of why the client came to see the lawyer and solicits narrative responses on the general nature of the situation that underlies the client's concerns, the basis of these concerns, and the ways in which the client would like to see them resolved. Id. at 38-52. The next stage involves a chronological overview where clients are encouraged to provide a step-by-step description of the events that gave rise to the problem. Id. at 53, 72-85. Finally, the third stage suggests mentally reviewing what has been gathered to determine all potentially applicable legal theories; and then systematically testing their potential viability by asking questions about the substantive elements of these theories and the factual possibilities that they suggest. Id. at 54, 92-99.

12. See G. Bellow & B. Moulton, supra note 4, at 8-11 (bemoaning ease with which beginning lawyers make role decisions based on what they see others do and their sense of the way things are done); D. Binder & S. Price, supra note 4, at 11-12 (identifying role expectations as an inhibitor of communication because of tendencies to choose hierarchial rather than collaborative relationships); and T. Shaffer & J. Elkins, Legal Interviewing and Counseling 73 (2d ed. 1987) [hereinafter T. Shaffer & J. Elkins] (people who plan to work together have to develop a sense about how they will proceed); see generally E. Goffman, The Presentation of Self in Everyday Life (1959).

13. See, e.g., G. Bellow & B. Moulton, supra note 4, at 207 (language communicates an image which directly impacts on progress of the attorney-client relationship); T. Shaffer & J. Elkins, supra note 12, at 90, 94-95, and 99 (attorney's openness influences relationship positively; excessive helpfulness encourages reliance and dependence; and undue directness generates client dependence); Appel & Van Atta, The Attorney-Client Dyad: An Outsiders View, 22 OKLA L. REV. 243, 252 (1969) (attorney's view of role as expert often causes taking over decision-making for client); and Hunt, supra note 9, at 731 (interviewer's performance helps mold the resulting relationship). Studies also show that interpersonal issues affect client satisfaction with the lawyer-client relationship. E.g. J. Casper, Criminal Courts: The Defendant's Perspective (1978) (relationship between increased time spent with defendant and client satisfaction discerned regardless of sentence and disposition); Feldman & Wilson, The Value of Interpersonal Skills in Lawyering, 5 LAW & HUMAN BEHAV. 311 (1981) (lawyer with low legal competence and high interpersonal skill ranked second most likely to satisfy client on 16 of 17 measures in simulated study); Richter, What the Layman Thinks of Lawyers, 39 LAW INST. J. 464 (1965) (clients identify lawyer's friendliness as most helpful to attorney-client relationship).

14. This is a central thesis of Binder and Price who suggest a three-stage approach that coherently anticipates and responds to probable inhibitors of communication, id. at 6-19; provides ample opportunities to utilize communication facilitators that also help build rapport, id. at 14-36; and effectively mixes open and closed inquiry. Id. at 59-99. See also M. Schoenfield & B. Schoenfield, supra note 7, at 1-25, 47-69; T. Shaffer & J. Elkins, supra note 12, at 73-120.
tional goal is an interactive dynamic that facilitates the development of mutual trust, confidence, and respect between client and lawyer. The approach recommended to achieve this goal requires behavior sensitive to communication dynamics. This facilitates the disclosure of complete, accurate information. It also helps produce an ultimate use of this information to make decisions that pursue client (rather than lawyer) objectives.\textsuperscript{15} The role aspect of this value assumption involves a collaborative rather than a hierarchial orientation.\textsuperscript{16}

This article proposes a model for organizing matrimonial interviews. The relationship building approaches advocated by Binder and Price provide the core for this article's suggested approach to organizing matrimonial inquiry. The model advocated here, however, contains a necessary, context-based modification of the approach developed by Binder and Price.

Binder and Price focus their suggestions for organizing inquiry on situations where past acts are recreated to establish what rights exist.\textsuperscript{17} Their proposed three-stage approach to organizing inquiry does not adequately fit matrimonial interviews because the de-emphasis of fault and the orientation of applicable legal rules usually make recreating what happened less significant than getting information about what clients want to do now and in the future. What is needed is usually not information about past events but rather details regarding specific topics affecting what should happen as assets, liabilities, and parental benefits and responsibilities are allocated.\textsuperscript{18}

Matrimonial clients litigate, but the character of their ultimate presentation is usually consensual rather than adjudicative.\textsuperscript{19} Although there are exceptions where past, usually fault-related, acts must be recreated either to earn rights or influence decisions, the

\textsuperscript{15} E.g. D. Binder & S. Price, supra note 4, at 6 (understanding human motivation facilitates learning why recommended techniques are likely to encourage client participation), and 147-53 (inability of lawyer to know client's values justifies maximizing client decision-making autonomy).

\textsuperscript{16} T. Shaffer & J. Elkins, supra note 12, at 77 (best working relationship requires strategy which encourages client to become a working member); see also D. Binder & S. Price, supra note 4, at 11-12, 14-19.

\textsuperscript{17} D. Binder & S. Price, supra note 4, at v (description of interviewing limited to traditional litigation contexts).

\textsuperscript{18} See infra notes 93-98 and accompanying text.

\textsuperscript{19} Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 951 (1979). A study of two California counties in 1970 concluded that although divorce cases comprised more than 50% of the docket, the vast majority involved routine processing rather than adjudication. See Friedman & Percival, A Tale of Two Courts: Litigation in Alameda and San Benito Counties, 10 Law & Soc'y Rev. 267, 296 (1976). See generally Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 28 (1983).
bulk of most matrimonial adjudication requires judicial application of broad, forward-looking standards designed to protect children and distribute property.\textsuperscript{20} Negotiation resolves the vast majority of matrimonial cases and usually turns adjudication into a routine, rubber-stamping ceremony. The preparation and presentation of these negotiations often includes a substantial planning or forward-looking orientation.\textsuperscript{21}

The model suggested here for organizing inquiry in matrimonial interviews to get what lawyers need urges a rapport-centered approach to the selection, definition, and exploration of topics subjected to inquiry after clients have been encouraged to narrate broadly about their situations and objectives. Rapport, a phrase borrowed from humanistic psychology, is used here, as elsewhere in clinical interviewing literature, to describe a harmonious, collaborative working relationship between client and lawyer.\textsuperscript{22} It contemplates a relationship based on mutual respect and trust with interactions free from excessive dependence and competition.

This article will analyze the two essential stages involved in organizing inquiry in matrimonial interviews: client narratives, followed by rapport-centered topical inquiry. Data drawn from interviews conducted at the Virgil Hawkins Civil Clinic at the University of Florida College of Law with thirty clients seeking to dissolve their marriages will also be integrated.\textsuperscript{23} The central

\textsuperscript{20} See infra notes 96-98 and accompanying text.
\textsuperscript{21} See Mnookin & Kornhauser, supra note 19, at 973-74; Sarat & Felstiner, supra note 1, at 126; see generally L. Brown & E. Dauer, \textit{Planning By Lawyers: Materials on a Nonadversarial Legal Process} 656-720 (1978) (lawyer's role in divorce planning); Freeman & Weihofen, \textit{Negotiating the Terms of a Divorce}, 18 \textit{Prac. Law.} 41, 47 (1973) (need more planning and less fighting).
\textsuperscript{22} See, e.g., G. Bellow & B. Moulton, supra note 4, at 139-40, 171-73; D. Binder & S. Price, supra note 4, at 14-15, 25-37; T. Shaffer & J. Elkins, supra note 12, at 73-87, 209-213. Surprisingly little discussion of the concept of rapport and how it entered interviewing literature exists. The closely related concepts of rapport and empathy are often linked together incorrectly. See R. Gordon, \textit{Interviewing: Strategy, Techniques, and Tactics} 18 (1969); Smith & Nester, supra note 8, at 302, 309; and infra notes 74-77 and accompanying text. In G. Egan, \textit{The Skilled Helper: A Model for Systematic Helping and Interpersonal Relating} (1975), rapport is said to encompass the first stage of the helping process which involves the client beginning to see the interviewer as an expert ally. \textit{Id.} at 36. The process also involves development of trust and a collaborative, rather than a hierarchial, relationship. \textit{Id.} This is the connotation given to rapport in this article.
\textsuperscript{23} These thirty clients were interviewed over three terms at the Law Center while the author was teaching and supervising in the Virgil Hawkins Civil Clinic; the summer and fall of 1986 and the fall of 1987. All of the clients were taken from a waiting list of applicants for legal services created by the local federally funded legal aid program, Three Rivers Legal Services, Inc. All had applied originally at Three Rivers indicating they wanted to dissolve their marriage, all had been interviewed briefly by a case intake worker primarily to determine financial eligibility, and all had been found entitled to legal services under the applicable indigency standards. It is reasonable to assume that some of these clients may have waited as long as three months for their interview because of the long
theme of conducting inquiry from the perspective of rapport or

semester break in summers.

All of these clients were contacted initially by the Clinic's Office Manager and told of the opportunity to be represented by third year law students who had been certified by the Florida Supreme Court to practice law as part of a clinical experience. Clients who agreed to be interviewed were scheduled and given directions to the Law Center. Clients were also asked during this telephone call if they would consent to having their initial interview videotaped. This inquiry included a statement that consent was optional and that the opportunity to leave the waiting list and receive Clinic representation was not conditioned on agreeing to be taped. This preliminary inquiry was done to insure that both the necessary equipment and a member of the Clinic trained to operate it would be present if the client had no objection to taping.

Several clients declined to be taped and were scheduled and interviewed along with those who consented. This affected the sample, which consequently does not include one transcript from each of the thirty students enrolled in the Clinic during this period. The sample includes transcripts of 23 different student interviewers, seven of whom did two interviews. The student interviewers were 15 women and 8 men. Four of the women and three of the men each did two interviews. The remaining seven students did not contribute a transcript to the sample for reasons that included client unwillingness to be taped, non-matrimonial problems, and mechanical difficulties with the equipment.

Client consent was solicited again by the students before the interview began and clients who had no objection were asked to sign a form acknowledging their consent. This form indicated that the tapes would be viewed by no one who was not a member of the law firm and that any subsequent use of transcripts made from these tapes for research purposes would be done with no attribution of names or other identifying details. This article honors that commitment.

The taping was done through a one-way mirror with the camera and technician in an adjacent room. Students enrolled in the Clinic were trained to set up and operate the video equipment to respect client privacy and avoid losing the privilege of confidentiality through the presence of third parties not lawyers in the firm. See Fla. Stat. § 90.507 (1987) (confidentiality is lost if third parties are present when communication is made) The camera was placed so that it recorded only the student conducting the interview. The students were required to review their videotape and write a paper evaluating their performance generally, and to prepare and critique a two minute transcript of a portion of the interview in detail. The videotapes were later transcribed by Clinic secretaries.

The data for this article was compiled by evaluating all thirty transcripts in this sample. (The word "sample" implies far more methodological validity than existed but it will nonetheless be used for lack of a better term.) Students were also required to represent clients in two-person teams. Both members attended these interviews. The one who was not conducting the session was encouraged to take notes and provide feedback to the student handling the interview after it was ended but often participated in the exchange. This article reports data from only the primary interviewer in each session.

Twenty-six of the clients interviewed in this sample were female; four were male. All were separated from their spouses at the time of their interviews. Their situations varied in degree of legal complexity and controversy. None qualified for the simplified dissolution procedure created by Rule 1.611(c) of the Florida Rules of Civil Procedure, which requires that no children of the marriage exist and that all property issues be resolved before the proceeding is filed.

The Clinic filed 23 dissolution of marriage lawsuits as a result of these interviews. It handled 20 of these cases to a final judgment. Two clients decided to dismiss voluntarily and the Clinic had to withdraw from the other to testify in support of the client's custody claim after one of the lawyers received threats from the husband against the wife and child. Thirteen of these cases were uncontested except that proof of the other spouse's ability to pay child support was required, along with notice of the final hearing so that this unliquidated issue could be resolved with both parties present if they desired. See Calder v. McNess, 427 So. 2d 393 (4th DCA Fla. 1983); Tallman Pools, Inc. v. Wood, 399 So. 2d 112 (1st DCA Fla. 1981); Turner v. Allen, 389 So. 2d 686 (5th DCA Fla. 1980).
relationship-building necessarily derives from adaptations of psychological theories. This article will therefore conclude by defending its proposed approach from recent critiques of psychologically-based lawyering theory.

Eight of these cases were contested and involved counsel representing the other spouse. Mediation was not required. One contested custody case used an optional mediation program and then required depositions of both spouses and a half-day hearing with testimony from competing expert witnesses. Four cases required temporary support hearings and three others needed an additional hearing on issues of temporary custody, visitation, and protection from domestic violence.

Twenty of the interviews were conducted in either the fourth, fifth, and sixth weeks of the fall term or the third and fourth weeks of the summer semester. Ten were done later, near the term's end in either the eleventh and twelfth weeks of the fall or the seventh and last week of the summer.

All of the students conducting these interviews had completed a three-week intensive classroom component in the fall semesters, and a two-week mini-course in the summer term that required two 120 minute classes a day. The purpose of this instructional unit was to satisfy the requirement that students be "adequately trained to perform as a legal intern in a law school practice program." Rule 11-1.3(c) of the Rules Regulating The Florida Bar. This course allotted ten classes and twenty hours to interviewing instruction. The interviewing unit of the course required students to read a longer version of the model advocated here; observe and critique demonstration videotapes based on matrimonial interviewing situations frequently encountered in local practice; participate in simulated exercises where one student would interview for five minutes, stop and evaluate their performance, and then another would continue the inquiry; and conduct a simulated forty-five minute interview that was both observed by a student criticuer and videotaped. The demonstration videotapes emphasized listening, motivating, questioning, and organizing skills, all in matrimonial contexts. Two of the short simulated interviews also involved clients who wanted to dissolve their marriages; one who presented typical property distribution issues and the other who faced a custody contest.

Two other components of the intensive training course emphasized matrimonial practice. The counseling segment had two short divorce simulations. One presented the typical range of difficult choices Clinic clients confront on issues of visitation, shared parental responsibility, support, and debt allocation. The other was a difficult custody decision where a woman was assessing whether to retain custody and risk flunking out of graduate school or shift her children to her former spouse and risk losing them permanently. One of the thirty minute "complete" counseling exercises required students to explain the intricacies of personal jurisdiction to a client who desperately needed child support from a spouse who was on the lam. The direct examination unit then required students to present the testimony of the two dissolution clients they had interviewed one week earlier. Students were also asked to read detailed descriptions in the Clinic's Manual of local procedure, law, and office practices regarding dissolution interviewing, case processing, and handling hearings.

All of this was designed to prepare students for both their first actual client interviews, with people from the Three Rivers waiting list, and for final hearings in transfer cases which usually occurred shortly after this intensive seminar ended. The classroom experience after this intensive seminar lessened to two 120 minute sessions a week as student responsibilities for actual client representation intensified. For suggestions of clinical curriculum designs similar to that just described, see Condlin, "Tastes Great, Less Filling": The Law School Clinic and Political Critique, 35 J. LEGAL ED. 45, 47 n.6 (1986); Kreiling, supra note 5, at 306; Hoffman, Clinical Course Design and the Supervisory Process, 1982 ARIZ. ST. L.J. 277, 290-92; see generally D. Binder & S. Price, Instructor's Manual for Legal Interviewing and Counseling: A Client-Centered Approach 1-24 (1979).
I. ORGANIZING MATRIMONIAL INTERVIEWS

This article emphasizes organizational choices because they involve both value questions that differentiate matrimonial interviewing from inquiry focused on recreating what happened, and critique much existing practice. Organizational decisions are not the only important behavioral choices that lawyers must make to interview matrimonial clients effectively. Decisions about what information to pursue, and whether to use inquiry or other responses such as remarks proving listening and statements designed to motivate communication, are also important. Aspects of these decisions will be discussed here in the context of organizational behavior.

This article assumes an initial meeting between client and lawyer. It further assumes that this meeting will involve information gathering, explanations of law and procedure, and a mutual decision regarding continuing the relationship. Neither short meetings designed to let clients screen counsel nor situations where lawyers intend only to guide an agreement both sides have already made through the judicial process are necessarily benefited by all aspects of these decisions. Remarks proving listening, called active listening, are described later. See infra notes 67-76, 78-83 and accompanying text. Binder and Price discuss motivating statements extensively. The two approaches they recommend are: (1) providing positive feedback and (2) making statements that both acknowledge that the information sought by inquiry is potentially intrusive, embarrassing, or threatening and express an expectation that disclosure will occur. D. BINDER & S. PRICE, supra note 4, at 16-17, 76-77, 105-08; see generally H. FREEMAN & H. WEINHOFEN, supra note 7, at 18-19; M. SCHOENFIELD & B. SCHOENFIELD, supra note 7, at 14-17.

This article's focus on organizational behavior also restricts its analysis of the ethical and moral dilemmas created by potential applications of some of the behaviors advocated here. The important analysis of these issues by clinical scholars has begun. Ellmann, for example, has identified what he calls the manipulative potential of non-judgmental empathetic understanding communicated through active listening. Ellmann, Lawyers and Clients, 34 UCLA L. REV. 717, 734-39 (1987) [hereinafter Ellmann]; see infra notes 67-83 and accompanying text; Morris, supra note 10, at 803-05. The conflict between the potential closed inquiry has to either stimulate memory or generate distortion and falsehood has also been analyzed. See Ellmann, at 741-43; M. FREEDMAN, LAWYER'S ETHICS IN AN ADVERSARY SYSTEM 68-69 (1975). This article's decision to stay on a general level of model-building in a specific context, matrimonial practice, will disappoint those who seek further explication of the political tensions of the client-centered assumptions upon which the suggestions advanced here are based. See Condlin, supra note 23, at 50.

24. Remarks proving listening, called active listening, are described later. See infra notes 67-76, 78-83 and accompanying text. Binder and Price discuss motivating statements extensively. The two approaches they recommend are: (1) providing positive feedback and (2) making statements that both acknowledge that the information sought by inquiry is potentially intrusive, embarrassing, or threatening and express an expectation that disclosure will occur. D. BINDER & S. PRICE, supra note 4, at 16-17, 76-77, 105-08; see generally H. FREEMAN & H. WEINHOFEN, supra note 7, at 18-19; M. SCHOENFIELD & B. SCHOENFIELD, supra note 7, at 14-17.

25. Some attorneys prefer to let clients meet with secretaries or paralegals initially. See e.g., 2 B. ABRAMS, FLORIDA FAMILY LAW § 50.11[1], page 50-27 (1988); 1 A. RUTKIN, FAMILY LAW AND PRACTICE § 1.01[4], page 1-5, (1895); others prefer to screen clients over the telephone. See Mason & Sessums, Up the Organization 11 Fam. Advoc. 10, 59 (1989); McCusker, Client-Interviews—Initial Contact, In Managing Clients and Cases: Procedures and Systems for the Family Lawyer 5 (1986). Paralegals and other staff who meet clients can and should be trained in rapport-building skills. See 1 A. RUTKIN, supra at 1-5. Paralegal training manuals discuss these skills. See, e.g., W. PARK, MANUAL FOR LEGAL ASSISTANTS 256-83 (1979); W. STATSKY, INTRODUCTION TO PARALEGALISM: PERSPECTIVES, PROBLEMS, AND SKILLS 274-93 (1977).
pects of this proposed approach.26

Many contemporary approaches to lawyering theory suggest that analyzing sets of lawyering tasks in discrete stages or phases is helpful. Thus, counseling,27 negotiation,28 direct examination,29 and witness interviewing30 have been subjected to analysis by identifying separate stages and the specific tasks involved in each. Matrimonial interviewing is no different.

Two stages for matrimonial interviews are suggested by this article: an initial phase of soliciting client narratives and a subsequent period when inquiry is based on examination of specific topics. Each will be explained in detail.

A. Client Narratives

The first phase of a matrimonial interview is obviously its beginning. This article follows most literature on legal interviewing by suggesting that inviting clients to talk freely and openly, or to narrate, about their situations and what they want to do about them is the most effective way to begin inquiry.31 This approach

26. Divorce clients are increasingly shopping for attorneys to get a sense of the firm and meetings of this nature may involve more information giving than acquiring. See 1 A. Rutkin, supra note 25, at § 1.01[3], page 1-4. Similarly some divorce practitioners pursue high volume, standardized operations that provide limited work for a set, usually lower than normal, fee. See Smith, Finding Some Answers About Legal Clinics, 67 A.B.A.J. 126 (1981); see generally Neustadter, When Lawyer and Client Meet: Observations of Interviewing And Counseling Behavior in the Consumer Bankruptcy Office, 35 Buff. L. Rev. 177, 239-33 (1986) (describing standardized interviewing formats in similar mass merchandising approaches to bankruptcy practice). Although neither of these types of interviews require the same approaches to inquiry that are proposed here, both could benefit from modified application of these rapport building suggestions.

27. Binder and Price propose a three stage model for counseling which they define as helping clients make decisions. D. Binder & S. Price, supra note 4, at 5. These stages are: (1) providing a preparatory explanation; (2) identifying alternatives; and (3) analyzing and predicting consequences. Id. at 135-191.

28. See G. Williams, supra note 4, at 70-85. Williams argues that negotiation moves through four identifiable stages: (1) orientation and positioning; (2) argumentation; (3) emergence and crisis; and (4) agreement or final breakdown. Id.

29. See J. Jeans, Trial Advocacy 218-20 (Student ed. 1975) suggesting that all direct examinations include: (1) an introduction; (2) a theme presented in the body of the story; and (3) a climax or conclusion. Id.

30. D. Binder & P. Bergman, Fact Investigation: From Hypothesis to Proof 244-316 (1984). The authors propose four stages for witness interviews: (1) an introductory stage; (2) obtaining a chronological time line; (3) developing theory; and (4) concluding the interview. Id.

31. See, e.g., D. Binder & S. Price, supra note 4, at 53, 59-72; T. Shaffer & J. Elkins, supra note 12, at 77-83; H. Freeman & H. Weinofen, supra note 7, at 13-16; M. Schoenfield and B. Schoenfield, supra note 7, at 55-56; K. Hegland, Trial and Practice Skills 196-205 (1978); and A. Watson, The Lawyer in the Interviewing and Counseling Process 36 (1976). This type of inquiry should be distinguished from introductory conversation about the weather, mutual acquaintances, and so forth which some matrimonial lawyers suggest should be used to begin interviews. E.g. Moss, The Initial Interview in a Domestic Relations Case, 22 Pract. Law. 59, 61 (1976).
effectively responds to communication dynamics. It also promotes maximum opportunities to listen and thereby build rapport with clients, to develop ideas about what topics need to be examined in the post-narrative stage, and to formulate sequences to use when investigating these subjects.

Inquiry usually takes the form of questions; and the approach to interviewing advocated here suggests attending closely to question form. Questions may be phrased on a continuum based upon the breadth of information they seek. Inquiry which allows the client to select either the topic or the aspects of a designated subject are called open or open-ended questions. Questions can be formed much more narrowly by designating both the topic and the specific aspect of it that the inquiry seeks. These are often referred to as closed or narrow questions.\(^{32}\)

Soliciting narrative responses effectively usually requires a mix of question forms, but open inquiry should predominate.\(^{33}\) Open questions invite clients to respond from their frames of reference and relevance. They encourage clients to use their memory patterns and associational frameworks to narrate information that they think is important.\(^{34}\)

Using virtually unrestricted invitations to narrate such as “tell me about your situation,” “how can the law provide assistance,” and the generic “please, continue” and “tell me more” are often effective. So are topic-specific open inquiries—questions that identify a topic and then request unrestricted narration about it.

All of the topical categories encountered in matrimonial practice can be used this way to solicit narratives. For example, requests to narrate can be focused on the client’s marriage, spouse, children, parental relationships, property, and objectives regarding custody, visitation, support, maintenance, and property distribution. Each topic can be further reduced to specific components, with each of them then forming the basis of a further request to narrate; i.e., tell me more about your home, your spouse’s employ-

\(^{32}\) D. Binder & S. Price, supra note 4, at 38-40. The other forms of inquiry commonly encountered are leading questions, which suggest the answer desired, and questions phrased in such a way as to elicit only either a yes or no response. Id. at 39-40.

The questions asked in the thirty matrimonial interviews in the sample evaluated for this article were coded into five categories: (1) general open questions where the topic was not identified; such as “what should I know” and “tell me more;” (2) topic specific open questions where the subject was identified but the client was left free to discuss anything about it, such as “tell me about your children” and “what would you like to see happen as a result of this divorce;” (3) closed questions including yes/no formulations which may or may not be leading as a matter of evidence law; (4) leading questions; and (5) compound questions where more than one inquiry was joined in the same interrogative statement.

\(^{33}\) D. Binder & S. Price, supra note 4, at 59-64; see H. Freeman & H. Weihofen, supra note 7, at 13.

\(^{34}\) D. Binder & S. Price, supra note 4, at 41.
ment, and your wishes regarding the vehicles acquired during your marriage. Asking which topics, if any, the other spouse will predictably fight also facilitates effective post-narrative topic selection. The goal is a general understanding of the client's situation, what she would like to do about it, and what topics need further and more detailed development later in the interview.

Using open inquiry effectively requires acknowledging that the client is an important, essential resource in the information-gathering process. This conscious role choice requires lawyers to sacrifice a measure of control over the interaction by encouraging them to concentrate on inviting and listening to narratives. It also forces an acknowledgment that they cannot, at this stage of the interview at least, know enough about either the client's situation or objectives to ask every conceivably relevant question.

An open, non-focused approach rather than a checklist of specific inquiries is recommended, because it often generates more information quicker at the beginning of interviews. This result occurs primarily because open inquiry can produce specific information that would otherwise remain undisclosed. Clients who narrate can, and often do, disclose specific facts about which their lawyers would never think to ask. The sample interviews provided several examples of narrative answers identifying potentially important topics that probably would have otherwise gone unexplored. One client, for example, narrated that her husband had received and wasted a $170,000 personal injury judgment shortly before their marriage—an unexpected fact in a low income context.

Unexpected facts produced by narratives can be particularly valuable in matrimonial practice because the legal relevance standards applied are so broad that they often coincide with lay impressions of importance. It is difficult, for example, to develop specific factual categories that encompass all of the factors courts

35. See D. Binder & S. Price, supra note 4, at 59-60; 2 B. Abrams, supra note 25, at § 50.10, page 50-26.3. Notwithstanding this suggestion, which was made in both the reading materials and during the simulated divorce and custody interviews, only seven sample interviews had questions asking clients what aspects of their objectives would likely be contested in their dissolution proceeding.

36. D. Binder & S. Price, supra note 4, at 60.

37. Allowing clients to talk often answers specific questions before they are asked. H. Freeman & H. Weihofen, supra note 7, at 14; see also T. Shaffer & J. Elkins, supra note 12, at 82-83; Elkins, A Counseling Model for Lawyering in Divorce Cases, 53 Notre Dame L. Rev. 228, 234 (1977). A comparative study of psychiatric residents and student attorneys at the legal aid clinic at Southern Methodist University Law School, led to the conclusion that "the openness of the residents' questions, in contrast to the student attorneys' specific legal questions, frequently obtained a more fully responsive answer from the client." Baernstein, Functional Relations Between Law and Psychiatry—A Study of Characteristics Inherent in Professional Interaction, 23 J. Legal Ed. 399, 408 (1971).
deem relevant on issues affecting the best interests of children.\textsuperscript{38} Virtually everything becomes relevant if custody is questioned. Thus the client in one of the sample interviews, who narrated that her husband had told their five year old son that he was going to kill her, provided important information that might not have surfaced if only closed inquiry were used. Similarly, broad standards of equitable distribution of property and reasonableness in child and spousal support justify using open inquiry initially.\textsuperscript{39}

Dissolving marriages and allocating the resulting benefits and burdens are intensely personal experiences that leave most clients willing to narrate. All thirty clients interviewed for this article’s sample, for example, were willing narrators.\textsuperscript{40}

Closed questions, inquiries seeking specific details, can be used effectively during client narratives for several purposes. They can supply basic background information before a topic-specific narrative is requested. For example, asking: “Ms. Smith, do you have any children?,” followed by “tell me about your daughters,” is an effective, logical sequence using first a closed, and then a topic-specific yet open, question to solicit a narrative.

Closed questions can also be used to deal with rapport issues created by open inquiry. Clients who appear unwilling to narrate initially, for example, may experience that responding to a sequence of closed questions about routine, presumably non-threatening, background matters relaxes them. It may also increase

\textsuperscript{38} One author identified 32 factors that courts have considered when deciding custody. I. J. Atkinson, Modern Child Custody Practice § 401, p. 219 (1986). The same author in another work concluded: “judges are paying more attention to the factual merits of individual cases today than in years past.” Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 28 Fam. L.Q. 1, 42 (1984).

\textsuperscript{39} Forty-one common law property states now allow judicial distribution of marital assets upon divorce following the rationale of equitable distribution; and a number of states have adopted statutes identifying the factors to be considered. See Freed & Walker, Family Law in the Fifty States: An Overview, 34 Fam. L.Q. 417, 456, 462-463, 465-66 (1988).

\textsuperscript{40} No client in the sample responded to initial inquiry posed by their student lawyers with silence, verbal clues of discomfort, or evasive remarks suggesting an unwillingness to narrate. Most clients were willing to tell their story; often in response to primarily closed inquiry. See infra note 84. One client, for example, provided an initial narrative response that lasted approximately eight minutes and covered more than six pages.

Only three of the thirty clients interviewed gave vague responses initially. One of these clients, for example, answered an open question about her marriage by saying “we just don’t get along no more. We are all right for a couple of hours and that is it.” The student then switched to closed inquiry rather than asking a follow-up open question such as “tell me more,” and then stayed with predominantly narrow questions thereafter.

This willingness to narrate equates with the author’s personal practicing and clinical supervising experience that most clients who wish to dissolve their marriages are eager to talk about it. All of us may have a need to tell our story, particularly when it involves as much pain as a typical divorce does. Elkins, supra note 37, at 235 n.28, citing S. Keen & A. Fox, Telling Your Story: A Guide to Who You Are and Who You Can Be (1973); and S. Keen, To A Dancing God 70-74, 82-105 (1970).
their confidence with their lawyer and stimulate willingness to give narrative responses to topic-specific questions focused on issues commonly involved in matrimonial dissolutions.41

Closed questions also permit postponing threatening topics that surface early during the narrative stage. This is done by directing the client to presumably safer aspects of the topic, using the focus provided by closed inquiry. The sensitive areas can be reserved until later when more rapport has developed.42

Many matrimonial lawyers use questionnaires to develop detailed background information before meeting clients.43 While arguably efficient as a way to save time, this common practice poses two threats to effective solicitation of client narratives. First, it eliminates the option of using closed questions about background matters as a method of relaxing a nervous or anxious client because most of these inquiries are presumably on the form. Repeating them runs the risk that clients will resent answering twice and get annoyed at dealing with a person who apparently has not taken the time to read or remember what they said or wrote earlier.

Second, using these questionnaires risks ignoring open inquiry by making inappropriate assumptions from the background data. Question sequences like: “Ms. Jones, I see here that you have two children? And they live with you?” are frequently generated by interviewers who use a completed questionnaire.44 That second,

41. See D. BINDER & S. PRICE, supra note 4, at 110-12.
42. Id. at 43-44.
43. This practice is frequently recommended. See, e.g., N. Hurowitz, SUPPORT PRACTICE HANDBOOK § 1.06 at p. 8 (1985) (use form on clipboard to begin the session with more detailed questions and a strong start); 1 G. Schackow, FLORIDA FAMILY LAW PRACTICE MANUAL § 2.02, page 2 (1976) (give client simple, brief form in waiting room); Mason & Sessums, supra note 25, at 59 (use an intake person to get financial and personal information by telephone); McCusker, supra note 25, at 8 (use questionnaire to get basic information). The practice has been criticized for communicating to clients that they are being categorized and treated impersonally and bureaucratically, T. Shaffer & J. Elkins, supra note 12, at 148. Shaffer & Elkins suggest that forms be: (1) withheld until a working relationship is established; (2) limited to facts that are easier to write down than to speak; and (3) free from threatening, judgmental, and patronizing language. Id.
44. One lawyer suggests using questionnaires before the interview so that lawyers can “immediately begin the session with more detailed questions.” N. Hurowitz, supra

http://scholarlycommons.law.cwsl.edu/cwlr/vol26/iss2/3
leading question may threaten a woman who has voluntarily given up custody of her children because of an embarrassing personal problem. Although its suggestiveness will probably be resisted because the client knows the correct answer, it may do substantial damage to the lawyer’s goal of building a relationship where this information can be shared openly and fully after mutual trust and confidence have had time to emerge.

45. Research suggests that the distorting potential of leading questions is greatest when the client is unsure of the answer. See generally, G. Bellow & B. Moulton, supra note 4, at 210-11; D. Binder & S. Price, supra note 4, at 47; Marshall, Marquis & Oskamp, Effects of the Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony, 84 Harv. L. Rev. 1620 (1971). Leading questions that touch areas where clients sense that the truth may harm their litigation objectives, however, pose a strong risk of distortion because client desires to win may irresistibly tempt him to go along with a favorable suggestion. D. Binder & S. Price, supra note 4, at 47. Leading questions can also harm rapport because clients may feel either uncomfortable correcting their lawyers or that the suggestions these questions contain mean no confidence exists in their ability to give adequate answers. A steady diet of leading questions also totally deprives clients of any opportunity to express themselves.

The sample interviews contained a lot of leading questions, an average of 21% of the total number of inquiries per session. This compares favorably to Hosticka’s finding that more than 25% of the average lawyer’s questions were leading in the almost fifty interviews he observed. Hosticka, supra note 43, at 605.

None of the leading questions asked in the sample interviews were used in contexts where they were arguably effective formulation decisions. These include situations when the information is obvious and clients might be inclined to withhold it because of fears that they would be judged negatively. Using a leading or suggestive formulation here can effectively convey a message that the information can be disclosed without fear of judgment or disapproval. See D. Binder & S. Price, supra note 4, at 47. Non-marital sexual activity, for example, can be approached this way in matrimonial interviews if there are strong reasons to think that a client has been involved in this behavior and might be unwilling to acknowledge it. A leading question such as “I guess you’ve had some affairs too” might produce more accurate information and do more to build rapport in this circumstance than either an open or closed question.

46. Few of the leading questions in the sample interviews, see supra note 45, produced observable distortion. See G. Bellow & B. Moulton, supra note 4, at 211 (general prescriptions against leading questions in interviewing “greatly overstated”) Many, however, may have damaged rapport. This frequently occurred when students “summarized” things the client had not said. They then became leading questions because the form summarizing responses typically take, i.e. you said this about that, uses a suggestive phrasing.
Matrimonial clients will often volunteer facts and feelings about their spouse, marriage, and the reasons that they are divorcing that will prove to have no legal relevance under no fault standards. This reality leads many practitioners to recommend avoiding open inquiry in matrimonial interviews.\(^{47}\) It also contributes to the challenge that the suggestions advocated by this article are too time-consuming.\(^{48}\)

Although these responses indicated a valuable willingness to listen actively by reflecting content, see infra notes 67-71 and accompanying text, they also demonstrated ineffective listening. Here is an example:

\[C\]: It started off with lies, he told me a lot of stories, he told me he worked at one of the local hospitals and later I found out that he didn't, after we were married and several other things. He kept coming up with stuff, he was just a natural born liar. So, I was pregnant, so I didn't do anything until later, see if he would change a little bit. I couldn't stand it any longer.

\[L\]: So, you were pregnant when you got married?

\[C\]: No, I got married and I was pregnant a month later.

Evaluating the question forms used in the sample interviews suggests that learning how to phrase questions that are neither leading nor compound in the interactive dynamic that interviews present is a challenging and difficult task. The average percentage of leading and compound questions measured against the total number of inquiry responses per interview was 43\%. As indicated, the average percentage of leading questions measured against inquiry responses per interview was 21\%; compound questions averaged 22\% by the same measure. This occurred even though developing skill at forming questions that are effective for the context in which they are used was proposed as a primary skill goal during the classroom unit students experienced before conducting the interviews in this sample. The potential hazards of leading questions and the general ineffectiveness of compound inquiry were stressed in the readings, discussions of the demonstration videotapes, and critique sessions following performances of the simulated exercises. While the risks presented by both are often slight in interviews, see supra note 45, students were encouraged to use these encounters to practice forming non-leading, non-compound questions to develop habits of effective question formulation and avoid situations where these mistakes could be significant.

The leading questions used in the sample typically involved either suggestive formulations of inquiry that could have been easily phrased in a closed fashion or attempts to summarize that included things the client had not said. Compound questions featured combinations of open and closed inquiry, conjunctive phrasings, and many passages which can be best described as demonstrations of students verbalizing their thinking without putting it into an effective interrogative form.

These reoccurring patterns suggest that question formulation may often result from a cognitive process that focuses first on specific rather than general notions. The categorical nature of doctrinal law, for example, may generate notions of thinking "it may have happened this way" rather than "I wonder how it happened." Diagnostic legal categories generate inquiry this way. See D. Binder & S. Price, supra note 4, at 54, 86-89; D. Binder & P. Bergman, supra note 30, at 162-64. Students were encouraged to inject a moment of two of silence between thought and word and to use this time both to organize the question and to choose the form that would be the most effective for the particular context. The sample suggests that students found this advise difficult to follow because only 57\% of the questions asked were neither leading nor compound.

47. E.g., Kerr, How to Conduct the Initial Divorce Interview, 15 BARRISTER 29 (Winter 1976) (interrupt, if necessary, to get the "basics" and to keep clients from "rambling" through the "atrocities" at the start of an interview); Moss, supra note 31, at 61 (direct client's opportunity to ventilate problems in marriage to get only the "critical matters" and avoid "everything that has transpired during the entire" relationship).

48. This challenge also has been identified regarding client-centered interviewing
One response to this challenge is that open inquiry, even in this context saves time ultimately by avoiding reinterviewing. This response seems intuitively correct for several reasons. As indicated previously, lawyers cannot know with certainty what is relevant until they understand the broad contours of the client’s situation and objectives. Focusing inquiry initially on only that which lawyers define as relevant overlooks the possibility that information volunteered by a client blaming their spouse or seeking vindication may bear importantly on other issues like custody or property distribution. Although the justification for the divorce can probably be handled more efficiently by directive questions since it will be proved routinely under no fault, open inquiry is needed to develop more complete overviews of the other issues that will require more thoughtful processing.

The probability that a substantial amount of detailed financial and other information will be gathered by written forms after the initial meeting also does not diminish the need to use open inquiry initially to acquire accurate understandings of the situation as early as they can be achieved. Topic-specific open inquiry during the narrative stage facilitates post-narrative development of relevant issues even though it may produce non-legally relevant matters. This knowledge also may be needed to respond to preliminary questions because clients typically want advice at their interviews. Finally, the knowledge may be necessary if emergency situations develop before the written questionnaires are returned, a common experience in matrimonial practice.

In addition, open inquiry that produces truly non-legally rele-

generally. See, e.g., D. Binder & S. Price, supra note 4, at 58 (makes federal case out of routine matters); T. Shaffer, Teacher's Manual for Legal Interviewing and Counseling 15-16 (1st ed. 1976) (takes more time than lawyer can afford).

49. See, e.g., D. Binder & S. Price, supra note 4, at 58; T. Shaffer, supra note 48, at 15; Elkins, supra note 37, at 242-43.

50. The use of written forms to acquire detailed financial and other types of information after an initial interview has resulted in a lawyer-client relationship is widely recommended. See, e.g., 2 B. Abrams, supra note 25, at § 50.11[4], pages 50.32-37; 1 J. Atkinson, supra note 38, at 10; 1 A. Rutkin, supra note 25, at § 1.05, page 1-32; McCusker, supra note 25, at 8-9. It is one example of the type of effective use of written material to enhance the information gathering and giving processes suggested by Neustadter for consumer insolvency practice. See Neustadter, supra note 26, at 242-43.

51. See McCusker, supra note 25, at 6-7. McCusker notes:

A client often will ask for your opinion about the outcome after having given you only half the relevant information . . . . Some lawyers estimate that they give out more legal advice in the first interview that they do in any other. This is a natural tendency because [they] want the client to believe that [they] can help them at this difficult time.

Id.

52. E.g., 2 A. Rutkin, supra note 25, at § 17.03 page 17-21. Seven of the 23 divorce actions filed as a result of the sample interviews, for example, needed temporary relief. See supra note 23.
vant information permits lawyer responses that help develop an effective working relationship and thus promotes complete and accurate disclosure ultimately. Accepting the premise that non-legally relevant information can have relationship building value requires taking a patient view of matrimonial interviewing. Soliciting narratives effectively thus requires accepting that relationship building may need to take priority initially over specific fact-finding.

Initial open inquiry permits pursuing these relationship goals in matrimonial interviews in three important ways: (1) it responds effectively to the motivational realities of human communication; (2) it provides several important opportunities to build a working relationship with clients by listening to them; and (3) it allows judgment about what topics need to be explored in depth and what sequence this inquiry should adopt. Each of these advantages needs additional explanation.

1. Responding to Communication Inhibitors

All contemporary clinical literature acknowledges that effective interviewing must consider the motivational realities of human communication. One of these realities is that both aspects of the interviewing dynamic and questions seeking certain types of information can inhibit complete disclosure. The leading work on legal interviewing identifies seven general communication inhibitors: greater need; ego threat; case threat; role expectations; etiquette; trauma; and perceived irrelevancy. Although all are encountered in matrimonial interviews, greater need issues, along with case and ego threat problems, are the most frequently experienced.

The greater need inhibitor occurs when clients feel compelled to talk about topics other than the ones which their lawyers want to discuss. This block to communication does not stem from a per-


54. D. Binder & S. Price, supra note 4, at 9-14. Role expectations encompass the inhibitors of communication caused by beliefs about what constitutes appropriate behavior. Id. at 11; see supra note 16. The etiquette inhibitor includes the reasons information is not easily disclosed caused by cultural, class, status and sexual differences. A female client, for example, may think it is inappropriate to talk about relevant but intimate sexual matters with a male lawyer she has just met. Id. at 12-13. This barrier can arise frequently in matrimonial interviews. A trauma block occurs when a person has such unpleasant associations with a topic or event that recalling and recounting it is extremely painful. Id. at 13. It occurs in matrimonial interviewing when topics like domestic violence, physical and sexual child abuse, and other extremely unpleasant situations are investigated. The inhibitor of perceived irrelevancy is encountered when clients see neither a reason for nor value to be gained from exploring a particular topic. Id. at 13.
ception that the questions are either threatening or irrelevant but rather from a greater need to talk about something else. It is commonly encountered in matrimonial interviews when clients want to talk only about their emotional condition or general marital history to the exclusion of all other topics. Surveys of lawyers engaged in divorce practice identify client emotionalism as both the most common and stressful aspect of matrimonial practice.

The dramatic transformation of the legal system applied to matrimonial cases invites this inhibitor. The law until recently defined rights and remedies in fault terms that corresponded to strong needs felt by many matrimonial clients for blame to be assigned and vindication to be awarded in their divorce litigation. Now all states allow divorce on no-fault grounds, making information about the spouse’s misconduct that does not affect custody, maintenance, or property distribution irrelevant from a legal perspective.

Clients, however, often have strong needs to discuss these issues. Open inquiry initially lets them do so. Letting this happen at the beginning may also encourage them to stop talking about these issues later, after enough to satisfy the applicable no-fault standard has been disclosed.

The other two inhibitors commonly encountered in divorce interviews relate to the type of information sought. They reflect communicational realities that people ordinarily avoid talking about topics initially that harm their self-esteem, called ego threat by Binder and Price; and their notions of information that is harmful to their objectives, labeled case threat. Ego threatening inhibitors in matrimonial interviews range from feelings of embarrassment and failure that the marriage did not work to shame and guilt about past acts or future plans. Aspects of relationships to children may threaten clients' self-esteem. The fault-based issues

55. Id. at 14.
57. Freed & Walker, supra note 39, at 440-41.
59. Id. at 10-11. Binder & Price assert that in general litigation contexts this inhibitor, along with ego threat, “play the most pervasive role in blocking full communication.” Id. at 10.
60. Two clients in the sample, for example, did not volunteer their plans to marry the person with whom they were currently living in response to open questions about related topics. This fact surfaced only when closed questions about future plans were posed later in these interviews.
61. An example of this occurred during an interview with a woman who was reluc-
that remain legally relevant in many states, such as marital misconduct as it relates to property distribution and alimony, also can threaten client self-esteem.

The case threat inhibitor, on the other hand, deals with information that may not necessarily harm client self-esteem but touches topics that are perceived to be weaknesses in or harmful to their sense of what is important to their case. Clients can easily know or intuit what is harmful to their legal positions because so much of substantive matrimonial law is based on common sense notions of equity. Thus clients who may have no ego qualms about sharing information about extramarital sexual activity may be reluctant to discuss it because of perceptions that it will harm custody or property objectives.

Using open inquiry to invite narratives responds to these inhibitors effectively. It avoids the greater need inhibitor by giving clients opportunities to talk initially about whatever they want to discuss. Presumably, this will include the topics they have the greatest need to discuss, even if many of them are no longer legally relevant under no-fault.

Narratives also allow clients to avoid topics and details that threaten either their self-esteem or their sense of what is harmful to their interests or both of these concerns. Seeking details on these topics by specific, pointed questions can generate defensiveness and evasion. Focused inquiry can even create false information, which then erroneously guides planning and counseling until the errors are discovered during negotiation, discovery, or trial.

The suggestion is not to avoid inquiry on threatening topics, but rather to make purposeful choices about when and how to question clients about them in the most predictably effective manner.

tant to discuss her belief that her husband had sexually molested their five year old daughter nearly three years earlier. She dropped several hints about this during the interview but always stopped short of surfacing the issue directly. For example, she gave this response to a question about why she left her husband: “there were certain reasons but I really don’t want to bring them out unless it is absolutely necessary.”

One plausible explanation for this client’s reaction was a need to protect her self-esteem from adverse inferences that might be drawn from marrying a man who would do such a thing. Another self-esteem issue emerged at a subsequent interview before a pleading was filed when we learned that she chose not to have her child medically examined after the incident, a decision that hindered our efforts to prove the abuse three years later. Another rationale, of course, was the client’s desire to protect her daughter from becoming involved in a controversy on this issue.

The visitation issue, after much contested wrangling, was resolved by ordering supervision of all father-daughter visits by either the client or members of the husband’s family that she approved.

62. Many states make marital misconduct and economic misbehavior, such as wasting or dissipating family assets, a factor for consideration when adjudicating property distribution and alimony questions. See, Freed & Walker, supra note 39, at 462-63, 467, 472-73.
Systematic, detailed exploration of these topics generally should be left until later in the interview when a greater level of trust and confidence has presumably developed.63

2. Providing Opportunities to Listen

Beginning with open inquiry starts the building of an effective working relationship by letting clients avoid the frustration and embarrassment that prematurely focused interrogation on inhibiting topics might generate. This organizational choice also communicates a general positive regard to clients because it demonstrates that lawyers care enough to listen to anything they have to say. The choice additionally facilitates relationship development by giving lawyers numerous opportunities to listen. It lets clients feel that they have had a chance to tell their story and have it heard. Inquiry conducted exclusively by closed questions deprives clients from deriving these kinds of satisfactions from the encounter.

Listening skills have been categorized as either passive and active approaches to the task.64 Each type of listening is important in matrimonial interviewing and will be analyzed separately.

a. Passive Listening

Passive listening involves keeping silent to allow another to talk, maintaining attentive eye contact, and providing non-verbal encouragement to communicate.65 Narrative responses let lawyers be silent and listen to what their clients say at the beginning of their relationship with them. By not talking much, lawyers can increase the chances that they will hear what their clients tell them.

Lawyers have difficulty doing this effectively,66 even though this

64. Id. at 23-37.
65. Id. at 23-24. It also involves what Binder and Price call non-committal reassurances that the client is being heard; brief expressions like "mm-hmm," "I see," and so forth that communicate that the lawyer is listening. Id. at 24.
66. D. Binder & S. Price, supra note 4, at 23; T. Brown, How to Avoid Being Sued By Your Client: PREVENTIONS AND CURES FOR LEGAL MALPRACTICE 34 (1981); Ellmann, supra note 24, at 719-20; Smith, Avoiding Lawyer Malpractice Through Communication Skill, N.Y. St. B.J. 393, 395 (1978). Reviewing the sample interviews suggests that the students generally listened effectively to their clients from this passive perspective. There were few instances where the transcripts indicated that client statements were interrupted; a behavior asserted to be common in legal interviews. See G. Below & B. Moulton, supra note 4, at 211; Hosticka, supra note 43, at 604-05 (1979). Although interruptions are a gross way to measure passive listening effectiveness, there were only 17 in the thirty interviews, an average of .57 per interview. This compares very favorably with Hosticka's finding that legal aid lawyers interrupted their clients an average of 10.4 times a
kind of listening in matrimonial interviews is crucial. It helps develop understandings of what topics are safe and which are likely to be ego- and case-threatening; information that is often essential to conducting post-narrative inquiry effectively.

b. Active Listening

Open inquiry promotes opportunities to use another type of listening behavior that can be particularly important and effective in matrimonial interviews. Borrowing another label from psychology, this behavior is called active listening. It involves verbal responses that paraphrase or reflect what the speaker said. It proves that the lawyer has both heard and understood what the client said about a particular fact, issue, or feeling. It differs

session with an interruption occurring about every three minutes. Hosticka, supra at 605. More interruptions might be discovered if the videotapes, rather than just the transcripts, were reviewed because the audio record may not always show clearly when clients stopped speaking in response to lawyer comments. This measure also does not count the number of times clients had their associational and memory patterns disrupted by contextually inappropriate closed, leading, and compound questions. See supra notes 45-46.


Two other responses that demonstrate ineffective listening appeared frequently in the sample interviews. The first were statements made by the lawyer that demonstrated that an earlier client remark was not heard. Here is an example of this type of ineffective listening:

L: I understand that. Do you, let me see if I understand completely now, of course you're being very clear and I appreciate that you said earlier that he's living with another woman . . .
C: Has two children.
L: And he has two children by her?
C: Uh huh.
L: Now these are their children, his and her's?
C: Uh huh.
L: Children of the father?
C: Uh huh.

The other ineffective listening response, statements that echoed precisely what the client has just said was less potentially damaging to rapport. This common habit of repeating in the exact language what has just been said is often encountered in witness examination classes and actual presentations at both deposition and trial. It is probably less harmful in interviewing because it usually involves some aspect of an understandably spontaneous response. It is not fully effective listening, however, because it makes no attempt to paraphrase what was said to test whether the listener correctly received the message. It rather parrots what the client said and can convey the impression that the first answer was either not heard or not believed. See D. Binder & S. Price, supra note 4, at 25, 30.

These two additional types of responses, when added to the number of interruptions, produced an average of 5.5 ineffective listening responses per interview.

69. Binder and Price suggest using active listening to reflect aspects of both content and feelings that clients communicate. D. Binder & S. Price, supra note 4, at 21-22. Content includes the dates, places, names, specific transactions, and other objective criteria that make up the events relevant to the situations confronting clients. Id. at 21.
significantly from passive listening which only implies that hearing and understanding have occurred.

Active listening helps develop effective working relationships because it invokes the widely accepted assumption that being heard and understood makes speakers feel better both about the person with whom they are communicating and the process of talking with him or her. It also usually creates a motivation for and a climate conducive to further disclosure. This is important in matrimonial interviews which frequently involve private, personal matters that must be shared with virtual strangers who are busy professionals operating under time pressures.

Active listening also provides a useful mechanism for confirming, clarifying, and soliciting objective information because these responses are often heard as requests to share more detail about the topics paraphrased or reflected. The greatest utility of active

Scholars have predicted that lawyers and law students tend to focus on this aspect of interviewing more than on the emotional reactions the client has to these events. See D. Binder & S. Price, supra note 4, at 21; Barkai & Fine, supra note 67, at 505-06. Consistent with these predictions, the student interviewers in this sample made considerably more content than feeling reflections when they used active listening. Looking at statements in the transcripts that paraphrased client remarks and feelings, content reflections constituted an average of 80% of the active listening responses made per interview; feeling paraphrases averaged 20 percent. The percentage of feeling reflections compared to total active listening responses in individual interviews ranged from a high of 89% to a low of 0%. Eight interviews had no emotion-based active listening responses directed to client communications regarding emotions.

Binder and Price anticipated that students may find active listening a difficult skill to practice and develop so they identified common objections and responses to them. D. Binder & S. Price, supra note 4, at 32-36. The students in this study clearly experienced these difficulties as demonstrated by the relatively low percentage of active listening responses they used when compared to the total number of inquiry and other responses. Only 17% of the average total number of inquiry and listening responses were active.

Studies have shown that active listening skills can be learned effectively. See Barkai & Fine, supra note 67, at 527; B. Pope, The Mental Health Interview 358 (1979). No general pretest was used to measure the students' preexisting abilities at active listening before they received their simulation-based training in these skills. Eight students in the fall semester of 1986, however, did participate in a pretest consisting of a simulated thirty minute interview with an actress that each conducted on the first day of intensive seminar. Comparing their pretest use of active listening with their actual interviews supports the view that active listening skills can be developed in a clinical legal context. An average of 7% of their total responses in the pretest were active listening statements compared to an average of 15% in the actual interviews.

70. D. Binder & S. Price, supra note 4, at 15; C. Rogers, Counseling and Psychotherapy 131-151 (1942); Barkai & Fine, supra note 67, at 507 n.13, 513.

71. D. Binder & S. Price, supra note 4, at 15. Barkai and Fine predicted that active listening would generate additional information in a legal aid setting. Barkai & Fine, supra note 67, at 509-10, 514. This prediction was clearly supported by the responses produced by active listening comments in the transcripts evaluated for this article. Although the content reflections were not coded, most of them produced either confirmation or clarification and then additional information. The client responses to feeling reflections were evaluated. Sixty-seven percent of them produced additional information. This suggests that the belief that actively listening to feelings creates an impetus to share more information is accurate. The clients in this sample heard a feeling reflection as an invitation to relate.
listening in matrimonial interviews, however, flows from its value in dealing with the emotional aspects that typically surface during these sessions.72

Open inquiry in matrimonial interviews often generates strong feelings. Even clients who have been physically separated for years can experience strong emotional responses when the consequences of divorce are discussed in a way that encourages clients to narrate.73 Using active listening responses when these emotional responses are raised builds effective working relationships in several ways.

The most important is the potential active listening responses have to convey empathy.74 Reflecting the emotional content of a client's situation accurately and non-judgmentally communicates that the lawyer can enter the client's world and see it from that perspective. It proves that the lawyer is, in a sense, feeling with, not for, the client—a crucial distinction between empathy and sympathy.75

Research has not fully identified why skillful feeling reflections

more information about the events linked to their emotional reactions two-thirds of the time.

72. See D. Binder & S. Price, supra note 4, at 25-26; M. Schoenfield & B. Schoenfield, supra note 7, at 130-31; H. O'Gorman, supra note 56, at 82-92, 113-17; Feiger, supra note 56, at 30.

73. Dissolving a marriage is seldom a happy process. It often generates intense feelings of anger, bitterness, and anxiety. Sadness, depression and guilt may also be experienced. See Elkins, supra note 37, at 229; Feiger, supra note 56, at 28, 30. The predictable non-mutual nature of the decision to divorce and anxieties caused by physical separation frequently exacerbate these strong emotions. See K. Kressel, supra note 56, at 32-33. These emotional responses can occur regardless of where a client falls in the discrete psychological stages of the divorcing process. See Turner, The Role of the Lawyer in Matrimonial Cases, 25 VILL. L. REV. 696, 706-07 (1980). Several commentators have suggested models for evaluating these stages. Kressel and Deutsch, for example, suggest four stages: (1) the pre-divorce decision; (2) the decision to divorce; (3) the period of mourning; and (4) the period of reequilibration. Kressel & Deutsch, Divorce Therapy: An In-Depth Survey of Therapists' Views, 16 FAM. PROCESS 413, 417-19 (1977). See generally Bohannan, The Six Stations of Divorce, in P. Bohannan, Divorce and After 33-62 (1970); Kaslow, Stages of Divorce: A Psychological Perspective, 25 VILL. L. REV. 718 (1986).

All thirty clients interviewed in this sample were physically separated from their spouse when their interview was conducted. Although evaluating emotional activity by reviewing only words on a typed transcript is hardly precise, broad judgments can be made. Two clients demonstrated an emotional reaction intense enough to cause their lawyers to suggest that a short recess might be appropriate. Two others used language suggesting they were having moderate to strong emotional reactions to the inquiry.


are so effective. Perhaps it is because it is such an unusual experience to have someone listen to feelings without either judging them or substituting other agendas. People want and need to have their feelings heard and understood; rather than analyzed, judged or minimized. Clients undergoing a divorce may intensely possess this need since it is often a time when they experience excessive self-doubt and receive primarily negative feedback from family and friends.

Active listening also provides an effective response when emotional issues surface during matrimonial interviews. Lawyers cannot avoid reacting to emotional issues when clients bring them to the surface. Active listening by paraphrasing the stated or implied feeling neither ignores nor blocks emotional expressions. Ignoring client emotions is a response to them that powerfully communicates that they are not important, even though they often are

76. D. Binder & S. Price, supra note 4, at 14, 25. Phrasing feeling-based active listening responses is more challenging than formulating content reflections for several reasons, many of which are discussed by Binder and Price. Id. at 31-36. The subjective nature of feelings often tempts lawyers to deviate from neutral responses and use judgmental or reassuring formulations. Neither positive judgment nor reassurance is fully empathic. See D. Binder & S. Price, supra note 4, at 31-32. Judgmental responses may inhibit subsequent communication because even positive evaluations can imply a willingness to judge less than favorable situations negatively. Statements approving a client's anger at her husband's infidelity, for example, may inhibit her willingness to disclose her non-marital sexual conduct. Positive judgments also can inadvertently minimize client emotions and overlook the complexity of the feelings and the situations which contributed to them. Saying "I don't blame you for feeling that way" when a client has expressed anger toward an alcoholic, abusive spouse, for example, minimizes the feeling by not acknowledging its full intensity. See Barkai, How To Develop The Skill of Active Listening, 30 Prac. Law. 73, 78-79 (1984). Many such positive but nonetheless judgmental responses were made by students during the sample interviews.

Powerful urges to help clients may also cause many lawyers, particularly at the beginning of their practice, to offer reassuring responses. These responses also are often heard as either messages that feelings are unimportant or as minimizations of emotional issues. Telling a matrimonial client "don't worry; you're doing the right thing," for example, ignores and thus minimizes that person's fear and anxiety. Id. at 82. Reassuring female clients that "they will be married again in no time" and males that they will soon find another woman "to take care of them" have been identified as ineffective. Schisgall, Counsel for the Divorce Lawyer: A Client's View, Legal Economics 32 (1984). Nevertheless, many students used reassuring responses during their interviews.

77. See, e.g., K. Kressel, supra note 56, at 84; I. Rutkin, supra note 24, at 1-4.

78. The message received from a failure to acknowledge statements of strong feelings is that these emotional issues are not important in the law office; that a "just the facts, ma'am" approach applies. See Barkai & Fine, supra note 67, at 506 n.5.

Questions about when and how frequently to reflect feelings present additional opportunities for contextual judgment. See D. Binder & S. Price, supra note 4, at 36-37. Matrimonial interviews will probably present more opportunities than many other contexts because the emotional issues are both numerous and central. Although identifying feeling-based active listening solely on written transcripts is problematic because it misses the non-verbal context through which much emotional nuance is conveyed, see T. Shaffer & J. Elkins, supra note 12, at 210-11, the interviews were nevertheless evaluated to isolate instances where the language used by the client strongly suggested that reflecting emotion would have been appropriate. Fifty-one of these missed opportunities to reflect feelings
critical factors in matrimonial decision-making. They can affect ultimate outcomes decisively. Blocking them may also stimulate the greater need inhibitor discussed earlier and encourage clients experiencing strong emotional reactions to continue venting them until their lawyers acknowledge these feelings.

Active listening reflections of client emotions also build rapport by either ameliorating or lessening emotional blocks to communication. Clients encountering understanding of their feelings may temporarily release and then partially discharge their emotions, experiencing at least a transitory sense of relief. This temporary discharge often makes them feel better and facilitates willingness

were identified in the 30 interviews, an average of almost 2 per interview.

Some of these missed opportunities were dramatic and thus particularly likely to convey to the client an insensitive, exclusively fact-oriented impression of the interviewing process. For example, a client who had just described the death of her baby after it had been dropped on the floor after delivery concluded: "and the baby still lived in that hospital for like 15 hours with no help of any kind." The student lawyer's response was: "This was in [a neighboring state]?" Another client, describing her husband's frequent infidelity culminating in his decision now to live with a woman and her three kids, concluded, "he can't seem to be married!" The student lawyer responded: "That's understandable."

The sample also contained examples of effective active listening to emotion such as this:

C: (After describing how her husband had not supported her and the children).
All I'm getting is a little bit of welfare and food stamps and that's it. 'Cept what my daughter brings home. And what I bring between times working in [a local grocery store] and cleaning house for my sister. She calls me every once in a while to clean her house. And, uh, it helps. I enjoy it. Stay home for a while and rest. I worked for a year and a half with no days off so it's about time I get a little rest before I go back to work again.
L: Small vacation.
C: There you go. I'm thinking about going, I was thinking about going back to the pizza place but I don't think I, I'm not gonna do that. I think I'll get something else.

This student earned two more "there you go" responses from her client during the interview.

It should be added that the level of effectiveness at identifying and paraphrasing emotional expression lawyers should seek is not the same as required for creating psychotherapeutic change. Two levels of empathy are identified in psychotherapy: primary which is aimed at building rapport, and advanced which focuses on therapeutic change. Clinical instructors generally agree with Barkai and Fine that lawyers should strive only for the lower level of primary empathy which is necessary for building rapport. Barkai & Fine, supra note 49, at 512 n.31.

79. E.g. K. Kressel, supra note 56, at 155-56 (lawyers surveyed report emotionality of clients is most significant obstacle to settling cases); H. O'Gorman, supra note 56, at 83, (emotions prevent clients from making decisions); Kressel, Lopez-Morillas, Weinglass & Deutsch, Professional Intervention in Divorce: A Summary of the Views of Lawyers, Psychotherapists, and Clergy, 2 J. Divorce 120, 134 (1978) (emotional distress of divorce often coincides with complex and intellectually demanding task of negotiating marital settlement agreements); Sarat & Felstiner, supra note 1, at 112-13 (describing conflict between client's need for vindication and lawyer's goal of satisfactory property distribution).

80. D. Binder & S. Price, supra note 4, at 34-35; H. O'Gorman, supra note 56, at 86; M. Schoenfield & B. Schoenfield, supra note 7, at 130-31. O'Gorman quotes a lawyer recommending that: "You have to let them get it off their chest. Let them talk to you. When they blow off about their troubles long enough, they feel better; and sometimes they are better able to see what can be done." H. O'Gorman, supra note 56, at 86.
to talk about other issues. Providing opportunities to let these issues surface and respond to them by active listening responses during initial narrations may also reduce the number and intensity of emotional responses during more focused questioning later in the interview.

Active listening responses allow lawyers to express their understanding of client emotions while resisting requests from their clients to approve excessively negative or partisan reactions linked to these strong feelings. This dynamic has been identified as one that occurs frequently in matrimonial interviews. It can significantly undermine the lawyer's need to remain objective about the situation, a stance usually consistent with the best legal representation. Explanations that legal rules are no longer concerned with finding fault and vindicating victims, as well as creative negotiation suggestions that benefit both spouses, can be more difficult to deliver if the client has successfully enlisted the lawyer in an excessively partisan perspective. Active listening responses can also help lawyers communicate the importance of looking at options from third party and long-range perspectives as well as from immediate, usually emotion-laden vantage points.

3. Using Narratives to Plan Later Inquiry

Lengthy narrative phases are necessary in matrimonial interviews because post-narrative inquiry will require lawyers to make judgments about which topics to explore and in what order to pursue them. As the next section indicates, these tentative judgments should be based on hypotheses about predictable client reactions to legally relevant topics. These predictions derive primarily from a topic's potential to be either non-threatening or familiar. The initial narratives are usually the best source of information for developing these hypotheses.

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81. H. O'GORMAN, supra note 56, at 85-86; See Sarat & Felstiner, supra note 1, at 107-08 n.6.
82. Id.
83. See D. BINDER & S. PRICE, supra note 4, at 173, 203-10; Sarat & Felstiner, supra note 1, at 112, 116-17, 122-23. Sarat and Felstiner describe a failure to use active listening regarding emotions when discussing typical matrimonial settlement conferences they observed:

The lawyer's definition of 'satisfactory' tends to exclude the part of the client's personality that is angry or frustrated. Satisfactory dispositions are financial. The question of who is satisfied is left unasked. For the client, no definition of the case that ignores her emotions seems right; to the lawyer, this is the only definition that seems acceptable. Moreover, the responsibility for finding ways to keep emotions under control is assigned to the client. The lawyer offers no help in this task even as he acknowledges its relevance for this client and for the practice of divorce law. Id. at 123.
Soliciting and encouraging narrative responses by using predominantly open inquiry should continue in matrimonial interviews until general understandings are developed about all of the broad topics that need to be explored during the remainder of the session.\footnote{84} Extending the narrative phase until general understand-

84. The student lawyers generally did not follow this suggestion as demonstrated by their infrequent use of open inquiry either at the beginning of their interviews or thereafter. Only an average of 6% of the total inquiry responses per interview were open. This ranged from a high of 19% to four interviews which had no effective open inquiry. Open questions that included closed or leading inquiry were coded as compound and this decision unquestionably lowered the average percentages.

No optimal percentage of open as opposed to closed inquiry has been articulated. None probably exists because this, like much else about interviewing, should be individually and contextually determined. The relatively routine, non-contested nature of many of the situations presented by the clients in the sample interviews, see supra 23, may also partially justify a diminished use of open inquiry. See infra note 99. Nevertheless, the average percentage of open inquiry seems low; and the review of the transcripts revealed countless situations where the interviewers opted for closed rather than open questions. This comparatively low use of open inquiry conforms to the tendency of lawyers to control interview by using primarily closed questions identified by other observers. See e.g., Bellow, Turning Solutions Into Problems: The Legal Aid Experience, 34 NLADA BRIEFCASE 106 (1977); Hosticka, supra note 43 at 604, 606; Neustadter, supra note 26, at 229.

It was difficult to determine when the narrative stage ended in the sample interviews. Students seldom used active listening to mark the end of the narrative stage (an approach recommended by D. Binder & S. Price, supra note 4). Id. at 60-61. Looking at just the first quarter of the interviews, a higher average percentage of the total inquiry responses then, 14%, was open. The range during the first quarter of individual interviews in the sample was from 100% open to the four interviews which had no open questions.

None of the contexts where open inquiry initially would be predictably ineffective were encountered. See supra notes 41-42 and accompanying text. All thirty clients were willing to narrate. See supra note 40. All did narrate when given the opportunity.

Time also was not a problem. Two hour blocks were allotted for the interviews and most of them lasted at least an hour. Most interviews were at a wrap up point by the end of a sixty minute videotape, so second tapes were unusual, but there were four sessions that used two tapes and ran approximately ninety minutes each.

These results certainly coincide with suggestions that lawyers and law students are primarily focused on specific facts during interviews. See Barkai & Fine, supra note 61, at 505-06. The results also are consistent with the findings of Baernstein, supra note 37. No general pretest was used so few precise conclusions can be drawn regarding the impact of the instructional unit. The eight students who did receive a pretest in the fall term of 1986 did show improvement in their average use of open questions, suggesting that the emphasis on open inquiry during the interviewing instruction had value. An average of 2% of the total inquiry responses were open when these eight students interviewed an actress in the same simulated situation on the first day of the term. These same eight students then used an average of 7% open inquiry in their interviews with actual clients.

This modest improvement is consistent with other studies showing that students increase their use of open questions after receiving simulation based interviewing instruction. See, e.g., Stillman, Silverman, Burpeau, Use of Client Instructors to Teach Interviewing Skills to Law Students 32 J. LEGAL Ed. 395, 401 (1982); Herman, A Study of the Effects of a Legal Interviewing and Counseling Course on Law Students and their Milieu 71, 39/11-B Diss. Ab. Int'l (PhD dissertation, George Peabody College 1978); Krash, Training Law Students in Interviewing Skills, 36/05-B Diss. Ab. Int'l (PhD dissertation, American University 1975). Herman, for example, found that law students increased their use of open inquiry after 36 hours of interviewing instruction from an average of 7% to an average of 15% of all coded behavioral categories. His categories included listening responses and advice giving in addition to other types of inquiry. Herman, supra at 71.
ings are developed on each broad topical category helps lawyers avoid inappropriate assumptions about these issues. It also increases opportunities for lawyers to learn what is different about this case and avoid the ineffective stereotyping and decision-making that can come from routinized processing of superficially similar situations. Not all 25-year-old graduate student mothers of two young children, for example, have the same experiences and objectives. Matrimonial cases present immensely varying factual patterns which need to be heard and analyzed correctly, even if they ultimately receive similar legal processing—for example, a settlement agreement that is rubber-stamped at a brief and routine hearing.

The comparatively slight use of open inquiry during the sample interviews is troubling. The students did not challenge this aspect of this model in their classroom discussions and evaluations of performances on the simulated exercises. Many of them also identified failures to use more open inquiry during their interviews as areas where their skills could be improved in the self-critiques they wrote after reviewing their videotapes. Presumably, then, most students wanted to use open inquiry but found it difficult to do so when interviewing actual clients.

The many variables left uncontrolled limit the value of conclusions that can be drawn. One probable conclusion is that phrasing inquiry openly is a difficult skill to develop in the multi-faceted, interactive dynamic of a legal interview. See G. Bellow & B. Moulton, supra note 4, at 139 (simultaneously dealing with immediate pressures and maintaining rapport and getting complete, accurate, understandable information make interviewing “surprisingly difficult”); A. Rutkin, supra note 25, at § 1.01, page 1-3 (properly conducted interview is a formidable task); Goodpaster, The Human Arts of Lawyering: Interviewing and Counseling, 27 J. LEGAL ED. 5, 19 (1975) (legal interviews are highly complex social interactions composed of separate component behaviors). Another probably valid conclusion is that repetition is a critically important aspect of skill development and that using open inquiry effectively requires more repetitions than the instructional unit provided. See Harbaugh, Simulation and Gaming: A Teaching/Learning Strategy for Clinical Legal Education, in Report of the Association of American Law Schools-American Bar Association Committee on Guidelines for Clinical Legal Education 191, 205 (1980); E. Hilgard & G. Bower, THEORIES OF LEARNING 58, 86, 118, 242, 276, 313-14, 343, 369-70 (4th ed. 1975). A final, tentative, and troubling observation is that many of these students may have experienced difficulty transferring behavior from simulated client interviews to actual client sessions. This speculation is based on the author’s sense that many of the students produced much more open inquiry in their simulated classroom interviews than they did when they sat down with actual clients a few weeks later.

85. See D. Binder & S. Price, supra note 4, at 54-55. A tendency to control method of inquiry and topic selection to slot client situations into standardized patterns or routines has been identified from observations of interviews in general legal aid and bankruptcy contexts. See Bellow, supra note 94, at 108; Hosticka, supra note 43, at 604; Neustadter, supra note 26, at 229.

86. A guest instructor in a Domestic Relations Litigation Practicum co-taught by the author demonstrated this risk once when, discussing the issue of children expressing their preference regarding which parent with whom they would like to live, he announced the following general rule: “Fifteen year olds are like gorillas; they can sleep wherever they want.” While this rule is probably a generally valid prediction, it overlooks the possibility of developing specific factors presented by a client during an initial interview that would negate its applicability.
B. After the Narratives: Rapport-Sensitive Topic Selection and Sequencing

Concern about conducting inquiry in ways that enhance development of effective working relationships with clients should continue after narratives end. An important issue in accomplishing this task is how to structure and sequence post-narrative inquiry. Three methods of organizing inquiry have emerged in interviewing literature: chronological; reverse chronological; and topical.

Chronological organizing patterns encourage clients to select a beginning to their situation and then recount it, using time as the device which provides structure. This corresponds with the way in which many cultures relate stories, beginning with "once upon a time" and ending with "happily ever after." It also can facilitate recall, because associating events with dates in time is a common memory device. A reverse chronological approach also uses time but reverses the sequence of inquiry, beginning with the most recent events and going backward to the most distant.

A topical organizing pattern, on the other hand, proceeds by using topics as the basis of the inquiry. It is not based on time or any other arguably neutral organizing device. It is probably the most common organizing pattern and occurs in all legal interviews at some stage. Lawyers also engage in topically organized inquiry when they negotiate, take depositions, and examine witnesses in judicial and administrative proceedings.

1. Topical Inquiry is the Necessary Next Stage in Matrimonial Interviews

Binder and Price presented the valuable insight that reviewing a client's situation chronologically is effective when recreating past events in order to obtain relief from an external decision-maker will be necessary. They suggest that this be done before a final phase of topical inquiry is started. This approach, which they call a chronological overview, works as a minimally structured narrative using time relationships (a simple, easily understood device) as its organizing polestar. The lawyer's role is limited to guiding

88. See D. Binder & S. Price, supra note 4, at 57.
89. See, e.g., G. Bellows & B. Moulton, supra note 4, at 188-97; D. Binder & S. Price, supra note 4, at 54, 85-99; and H. Freeman & H. Weihofen, supra note 7, at 15, 20-21. Binder and Price urge a topical organization as their third and final stage of inquiry in a traditional litigation setting where past acts must be identified to ascertain which legal theories are both available and ultimately preferable. D. Binder & S. Price, supra note 4, at 54, 85-99.
open inquiry along chronological lines. Closed inquiry is suggested only to seek clarification of points that leave lawyers confused.91

This approach allows more facts to emerge while clients remain able to avoid topics and details that threaten their sense of self-esteem or litigation positions. Lawyers have more chances to display empathy by making effective active listening responses. Lawyers also have more time to postpone the analytic activity of identifying potential legal theories to accomplish client objectives and guide further inquiry during the topical phase of the interview.

Many traditional litigation situations can be analyzed under several legal theories. A client victimized by an auto repair shop, for example, may be helped by a tort theory of negligence, a contract theory of breach of warranty, and a statutory remedy if consumer protection legislation reaches the activity. Developing numerous and alternative analytic possibilities usually facilitates further inquiry and better results.92 Locking into one legal theory quickly and inflexibly also limits inquiry and options when decisions about whether and how to proceed are discussed. An intermediate inquiry stage based on chronology thus provides both more information upon which tentative legal theories can be developed and more time to generate them.

This valuable insight, however, does not fit matrimonial interviews well because the focus of inquiry must correlate to the governing legal rules and how judges will apply them. As noted earlier, contemporary divorce law links few benefits directly to recreations of past acts.93 The client’s marriage, for example, will predictably be dissolved regardless of past events because all states now allow some form of no-fault divorce. Most no-fault provisions also substitute a finding of present condition, usually an irretrievable breakdown of the marriage, for the previously required judicial determination that past acts justify the divorce. Minimal evidence is usually needed to prove this condition and often the defending spouse cannot contest an assertion that the marriage is broken.94 Most no-fault systems also have repealed

91. Id. at 73-74.
92. Id. at 86; see G. Bellow & B. Moulton, supra note 4, at 191-97.
93. A few exceptions exist in matrimonial practice where proving an act has the same directly consequential result as proving negligence per se in a torts case. These are the scattered circumstances where the substantive law provides that misconduct alone equals a benefit or burden. Proving adultery by the claimant when applicable substantive law makes it a complete bar to a claim for alimony is one example. This apparently is the law in only seven states. See Freed & Walker, supra note 39, at 472-73.
94. Most states interpret their no-fault provisions to allow one spouse to get a divorce even though the other denies that the marriage is irretrievably broken if the court concludes that the relationship is beyond repair. See 3 L. Wardle, C. Blakesley, & J. Parker, Contemporary Family Law: Principles, Policy, and Practice § 21:07, pp.
traditional defenses based on past events, such as condonation, re-

5 crimination, collusion, and connivance.95

Similarly, the presence of others needing protection minimizes the impact of recreating past acts. Custody decisions are articu-

lated as future predictions of welfare as courts attempt to assess which parent will best promote the interests of the children.96 Past acts, although certainly important as evidence influencing that de-

cision, are seldom directly decisive in the sense that acts of negli-

gence control tort litigation. Misconduct alone, for example, does not equal loss of custody; it usually must be shown to have di-

rectly and adversely affected the child’s welfare.97 Moreover, child and spousal support questions now turn largely on present eco-

nomic situations rather than on recreations of past acts.98

21-26 to -33 (1988) In Florida, for example, the assertion by one spouse that the marriage is broken is sufficient if it is supported by a factual basis. Thus, as a practical matter, a spouse cannot prevent a dissolution if the other spouse wants one. See, e.g., Riley v. Riley, 271 So. 2d 181, 184 (1st DCA Fla. 1972) (marriage is broken if one spouse says it should be terminated); Nooe v. Nooe, 277 So. 2d 266, 271 (2d DCA Fla. 1973) (clear showing parties intend to reconcile only allowable defense); 1 B. Abrams, supra note 25, at § 30.04, pp. 30-20 to -21 (1988).

95. Twenty-seven states have made all traditional defenses inapplicable when a di-

vorce is sought on no fault-grounds. See L. Wardle et. al., supra note 94, at 21-33. Seventeen, including Florida, have abolished all traditional defenses to all possible grounds for divorce. Freed & Walker, supra note 39, at 467-68.

96. The universal standard for deciding custody issues when a marriage is dissolved is the best interest of the child. 1 J. Atkinson, supra note 38, at 220; see 2 A. Rutkin, supra note 25, at § 20.05[7] at 20-116 (1985).

97. See 2 A. Rutkin, supra note 25, § 32.04[5], pp. 32-83. This approach has been applied to past acts proving: (1) marital infidelity; see, e.g., id. at 32-82 to 83; 1 J. Atkin-

son, supra note 38, at 282-90; L. Wardle et al., supra note 94, at 22-4; (2) alcohol and drug abuse, see, e.g., 1 J. Atkinson, supra at 268-69; 2 A. Rutkin, supra at 32-92 to 93; and (3) abuse of the other parent; see L. Wardle, et. al., supra at 22-4. Pursuing evidence of these acts unrelated to their impact on children can and does, however, exert tremendous emotional pressure and negotiation leverage in custody litigation. See Hunter and Polikoff, Custody Rights of Lesbian Mothers: Theory and Litigation Strategy, 25 Buff. L. Rev. 691, 716-20 (1976). Moreover, there are situations where proving the misconduct alone is usually sufficient to trigger a judicial inference that equals loss of custody. The most obvi-

ous example of this is evidence of sexual abuse of the child. This usually prevents the abuser from obtaining custody. See 1 J. Atkinson, supra at 264-65.

98. Child support is typically based on factors such as the general care, medical, and educational needs of the child, the financial resources of the parents, and the standard of living enjoyed by the child during the marriage. 2 H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 360 (2d ed. 1987); N. Hurowitz, supra note 43, at 80-82. Past acts have little independent probative value beyond the extent to which they prove the above factors.

The trend in spousal support has also been either to minimize or remove the role that past acts of misconduct play in the decision on this issue. For example, a majority of states provide that marital fault should not be considered in making alimony or maintenance awards. Freed & Walker, supra note 39, at 472-73. Eight states retain marital fault, typically adultery, as a complete bar to alimony. Id. Eleven others including Florida make it a factor that can be considered. Id. In Florida, for example, evidence of adultery is deemed relevant only if it: (a) either caused or contributed to the breakup of the marriage; e.g., Smith v. Smith, 378 So. 2d 11 (3d DCA Fla. 1979); or (b) is genuinely related to an
Inquiry regarding relevant past acts is needed, however, after narratives identify these issues as potentially important. Parental misconduct that affects a child's welfare and marital or economic fault as it bears on spousal support and property distribution, for example, should be explored in detail after the narrative stage suggests that these issues are likely to be involved or contested in the divorce. Focused chronologically-organized inquiry is often a very effective way to explore these issues within this general topical framework. Once a decision has been made that the spouse's abuse of the children needs exploration, for example, chronological inquiry regarding this topic is appropriate. A reverse chronological pattern may also be appropriate, particularly with topics affecting custody, because more recent evidence usually has more probative impact on which residential placement promotes the child's interests.

The guidance provided by a topical framework also helps limit inquiry to events that remain legally relevant. Inviting a general chronological review, on the other hand, will predictably generate much information about actual and perceived misconduct between the spouses that no longer has legal relevance. Responding effectively to this type of often emotionally germane but legally immaterial information when clients initiate it during post-narrative economic or financial issue in the proceeding; e.g., Mendel v. Mendel, 386 So. 2d 627 (4th DCA Fla. 1980); Joldersma v. Stewart, 370 So. 2d 80 (2d DCA Fla. 1979); 1 B. ABRAMS, supra note 25, at § 31.05[3][a], pp. 31-44 to -45. Florida also treats other types of marital fault, such as domestic violence, dissipation of marital assets, alcohol and drug abuse, abandonment, nonsupport, and fraud, the same way. See 1 B. ABRAMS, supra note 25, at § 31.05[3][b], pp. 31-46 to -49.

Inquiry is usually an incremental process in lawyering, with additional information gathered as the representation proceeds. Issues clients initially think will not be contested thus often generate substantial controversy, necessitating additional inquiry as the divorce progresses. The question of how fully to explore issues initially in the post-narrative stage, like virtually everything else in interviewing, must depend ultimately upon the particular context of the exchange. Information relevant to these judgments can be explored during the narrative stage by questions inquiring: (1) whether the issue has been discussed with the spouse; (2) whether he is likely to retain counsel; and (3) why the client has concluded that the issue will not be contested. Several clients in the sample interviews presented situations where nothing was likely to be contested because their separated spouse had: (1) little involvement with the children; (2) no apparent ability to provide an adequate environment for them; (3) predictably insufficient financial resources to pay maintenance beyond child support; and (4) no marital assets about which claims for property distribution could arise. Tentatively concluding that little need existed to pursue focused inquiry regarding potential custody, spousal support, and equitable distribution issues during the post-narrative stage of these interviews, as most students did, was effective because none of these cases were likely to be contested beyond the question of the amount of child support that should be ordered. These predictions generally proved accurate, as such situations allow matrimonial interviews that are basically long narratives with focused information gathering limited to issues affecting child support: including need; ability to pay; health and life insurance; jurisdiction; and service of process.

99. See discussion supra in note 47 and accompanying text.

100. See discussion supra in note 47 and accompanying text.
inquiry remains an important part of continuing to build rapport.\textsuperscript{101} Avoiding inquiry regarding non-legally relevant topics after the narrative stage, however, seems a reasonable, context-based accommodation to the economic and time pressures of matrimonial practice.\textsuperscript{102}

Avoiding lawyer-initiated inquiry into these issues is justified by several factors. First, the use of a suitably open and lengthy narrative stage has presumably given clients ample opportunities to discuss these topics. Pursuing inquiry that has no legal relevance is also potentially insensitive in view of both the personal and emotionally volatile nature of the divorcing process and much of this information.\textsuperscript{103} Finally, this inquiry does not use time (always a scarce resource) efficiently. A general chronological organizing approach also does not work well as a method of exploring the entire situation initially, after the narratives end, because more focus is inevitably needed. There is no inherent chronological relationship between the past and the information that is important in matrimonial practice. Many important categories of information have no time relationships.\textsuperscript{104}

The financial situation of the client and the other spouse, for example, always has relevance if children need to be supported,
but it has no inherent and internal chronological relationship. The economic situation of each parent at the beginning of the marriage matters little. Neither do subsequent financial developments, except to the extent they show either life style or intentional divestment of assets to avoid a reasonable support obligation.\footnote{105}

In addition, the long time periods often involved in marriages make a general chronological overview inappropriate. Asking a client who wants to dissolve a twelve-year marriage to start at the beginning and relate the situation step by step, chronologically supplying detail, is simply not an effective way to organize inquiry.\footnote{106} The time period is too long. The focus of the inquiry is too broad. The guidance it gives is too minimal.\footnote{107}

Risks of incorrect legal analysis by moving immediately to topical inquiry, which partially justify an intermediate overview stage,\footnote{108} are also lessened by the limited nature of options available in matrimonial practice. Clients who decide to end a marital relationship have few legal alternatives, usually only divorce, separation, and possibly annulment. This limited array of theoretical possibilities minimizes the risk that an ineffective general legal approach will be chosen.

The problem is further reduced by the broad legal standards that exist for resolving disputes about custody, support, maintenance, and property distribution. They emphasize fact rather than law and effectively change the process from one that rewards cre-

\footnote{105. See N. HUROWITZ, supra note 43, at 94, 96-97.}
\footnote{106. The point may be demonstrated by the old, bad joke that the principle cause of divorce is marriage. One student learned this lesson in a humorous way by asking early in the interview: “What can you tell me about the . . . your married life?” The client responded: “Umm. From the beginning to the end?” Then both laughed. Another student used a chronological approach to develop details of abuse unrelated to custody or shared parental responsibility issues even though her client protested that it “was so long ago.” Two other students attempted to use a chronological review as a way to get a greater understanding of the relationship but soon abandoned it in favor of topic-based inquiry. One student asked a client who had been married nine years this question: Why don’t we go back now and kind of take it chronologically from the beginning. Um. From whenever you think the beginning was. When you all were married or when you met and just in detail. And you know, really a lot of detail now. Where you were married, when you were married, that much detail. He learned that the client met her husband while they were both in junior college, that she was married to another at that time, and that she got pregnant two months after marrying her current husband. None of that information was useful in a case that ultimately was tried on a custody question and required a great deal of fact gathering focused on the many topics made relevant by the dispute over where the couple’s four children should reside.}
\footnote{107. See G. BELLOW & B. MOULTON, supra note 4, at 209. As the authors note, open inquiry, if continued too long, may leave clients wondering whether they are being heard and why they have to bear the entire burden of focusing the conversation and raising issues. Id.}
\footnote{108. D. BINDER & S. PRICE, supra note 4, at 56-57.}
ative legal thinking to one that benefits effective information gathering and negotiating.109

Lawyers do, however, need to develop alternative theories to guide inquiry within this narrower framework, because many common matrimonial issues can be handled under differing approaches. Marital property, for example, can be pursued under theories justifying special equities, alimony, and equitable distribution.110 Moreover, premature and inaccurate factual assumptions that limit and possibly distort the information obtained can still be made.

Topical inquiry which minimizes these risks, while maximizing the relationship-building objectives of the interview, is needed. The principal techniques for conducting such inquiry are: (1) to explore less threatening topics first; and (2) to mix open and closed interrogation effectively by funnel questioning patterns. Both will be explained in detail.

2. Explore Less Threatening Topics First

The topical approach necessary in matrimonial interviews runs more rapport risks than the three-step model suggested by Binder and Price for general litigation contexts. It involves lawyers sooner in the process of defining topics from their perspective of legal relevance. This necessary exercise of control over the process risks that clients may be left feeling that they have not had an opportunity to tell their story fully; this problem is aggravated if the narrative stage is either shortened or avoided. It may also infringe on client senses of what is important to talk about, generating the greater need inhibitor.111

The narrative stage provides guidance regarding which topics need to be explored in depth and which ones can be postponed for later development, either during the interview or thereafter, if subsequent events make them relevant. A client who expresses a wish to obtain the marital home, for example, triggers a need to explore topics testing whether the facts necessary to accomplish this desire exist. This exploration in most jurisdictions would include topics testing the options of special equity; equitable distribution; spousal support; and exclusive use during the children's minority.

Similarly, a client who says custody will probably be contested

109. See K. KRESEL, supra note 56, at 6, 283-85; Mnookin & Kornhauser, supra note 19, at 950-56.

110. This is a matter of state law and the text summarizes the options available in Florida. E.g., 2 G. SCHACKOW, supra note 43, at § 10, 10A, 10B (1976).

111. See supra note 55 and accompanying text.
opens up a veritable universe of potentially relevant inquiry.\textsuperscript{112} This type of inquiry from a client who indicates that custody will not be contested is not appropriate, however, until later information or events suggest that this preliminary judgment was incorrect.\textsuperscript{113} Judgments about which topics to explore thus must be tentative and subject to revision as additional inquiry or subsequent events suggest that modification is necessary.

A topical approach also narrows inquiry more because it necessarily focuses on specific subjects. This narrowing, if not carefully monitored, can directly threaten rapport by pressing clients for specific details on topics that harm their self-esteem or sense of their case’s strength.\textsuperscript{114} Organizing inquiry by relevant topics immediately after the narrative stage thus requires extreme sensitivity to the potential rapport and information damage that can result from exploring these threatening areas prematurely.

Therefore, the goal should be a topical sequence that explores predictably less threatening topics first and reserves more risky issues until later in the interview, when more rapport has developed. This requires making purposeful decisions about what topics should be selected, how they should be defined, and in what order they should be explored. These decisions need to remain tentative and should be revised when client responses suggest that the prediction of minimal threat was wrong.\textsuperscript{115}

The narrative stage also provides the best clues regarding what topics and aspects of them are likely to trigger these communication inhibitors. Verbal clues regarding potentially relevant, fault-related acts such as extramarital activity, physical abuse, and alcohol addiction may surface during initial narrations. Non-verbal clues may also be given.\textsuperscript{116}

Selecting topics also involves deciding how to define them. Most matrimonial topics can be defined broadly or narrowly. A custody issue, for example, could be explored using broad topic definitions such as why the children should stay with the client and what the other spouse will say to justify an alternative placement. Custody topics can also be defined more narrowly by inquiry focused on negative things the other spouse has done that have harmed the child, positive things the client does that benefit the child, aspects

\begin{footnotes}
\item[112.] See supra note 38 and accompanying text.
\item[113.] See supra note 99.
\item[114.] See supra notes 58-62 and accompanying text.
\item[115.] See D. Binder & S. Price, supra note 4, at 90.
\item[116.] Non-verbal clues of reluctance typically include visual signals like changes in facial expressions, drumming fingers, bouncing knees, and frequent posture shifts. They also encompass auditory messages like changes in voice tone, rate of speech, and long speech pauses. D. Binder & S. Price, supra note 4, at 29, 105.
\end{footnotes}
of the child's welfare that will be promoted by placement with the client, and so forth.

The initial narrative stage again should help lawyers make tentative judgments about how openly or narrowly they should define the topics they select to explore. Open definitions ordinarily allow greater freedom for clients to avoid threatening aspects of the topics identified. The most open definitions, however, may have already been used as topic-specific invitations to narrate. Repeating them is predictably ineffective, so some narrowing usually needs to occur.

Client responses during the narrative stage may also suggest that very narrow definitions are advisable. After narratives indicating strong anxiety about retaining custody of the children, for example, a lawyer may decide to approach this topic by narrowing the focus to the spouse's parental misconduct by asking "tell me what your spouse has done that has been bad for the children." A more open definition of the topic, such as "tell me about your spouse's history as a parent," could threaten this client because it might be heard as an invitation to talk about the strengths of the spouse's custody claim. This could then intensify the client's anxiety, harm rapport, and possibly even encourage distorted information if closed inquiry is used to pursue the responses.\(^{117}\)

The narrower definition that inquires into the spouse's parental shortcomings asks for information with which the client is presumably familiar. It also implies that the lawyer is on the client's side because the strengths of the claim are asked about first. Letting the client recite these strengths may build confidence and trust in the lawyer, increasing the likelihood that any negative information which may be causing the client's anxiety will be disclosed ultimately.

This example illustrates two general guidelines that can be used when making rapport-centered decisions regarding what topics to explore and how to define them. The first is to pursue the strengths of the claim first. In a contested custody situation, for example, this guideline suggests exploring why the children should be placed with the client rather than the other parent before investigating topics falling under the general category of weaknesses

\(^{117}\) This client's anxiety could stem from information that threatens either self-esteem or an intuitive sense that it will reduce chances of custody; the understandable concern about the risks of litigation with an angry spouse and an unpredictable judge applying uncertain norms; discomfort with the attorney and the notion of getting a divorce; or any combination of these possibilities. Assuming the concerns are the ego and case threat inhibitors identified in the first possibility, closed questions focused on these issues could generate either "minimal or even false information." D. BINDER & S. PRICE, supra note 4, at 41.
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of the client's claim.118

Potentially threatening topics are important and should be explored fully before counseling is undertaken regarding decisions that have to be made. The goal of rapport-centered topical inquiry is to postpone this investigation until later in the interview, when a better relationship between client and lawyer may exist.119 This generally should be done even though another approach to topical inquiry might suggest that they be covered together, because strengths and weaknesses may be different perspectives on the same issue.

More neutral topics which present no apparent rapport threats can be analyzed by looking at the client's predictable familiarity with the issue. Generally, clients are less threatened by aspects of a topic with which they are familiar than they are by elements of the issue about which they know little.120 A client who seeks alimony but hints unfamiliarity with details about the family's financial situation, for example, may feel less comfortable if the topic of spousal support is approached first by detailed inquiry regarding the other spouse's ability to pay. Discussing the client's need

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118. Students generally handled this suggestion effectively in their interviews when either custody or visitation was likely to be contested, tending to focus their explorations of strengths and weaknesses on non-marital sexual relationships. Although this may have happened because the issue appeared in two of the simulated interviewing exercises in the intensive seminar, the factor appears to be the one most often discussed in appellate cases deciding custody issues. J. Atkinson, supra note 38, at 283. This factor was discussed in 21.5% of all reported custody cases decided in 1982 and 1983. Id. at 283 n.315. Most of this inquiry in the sample produced valuable information, and students usually asked about the other spouse's non-marital sexual activity before inquiring later about whether the client had engaged in similar behavior. Seldom, however, did this inquiry target details suggesting that the non-marital sexual activity had directly affected the children, notwithstanding discussions during the intensive seminar of precisely the need for such focus.

119. This should ordinarily be done before the interview ends, unless compelling reasons justify postponing it to another interview. There is some risk that rapport-motivated topics delays can lead to failing to make this necessary inquiry later through forgetfulness. One sample interview, for example, involved a female client who wanted custody. She indicated in her first narrative answer that her children had lived with her husband for approximately three years while she was first "on the run from the law" and then incarcerated at a correctional facility. She also indicated that her children had returned to live with her more than a year before the interview when her husband moved in with another woman, and she implied, though never questioned about this point directly, that her husband was not going to contest custody. The student was saved from having his possibly rapport-oriented delay of inquiry on this topic become an oversight when this occurred more than fifty minutes into the interview:

C: Can I ask a question?
L: Go right ahead please.
C: My prison record, my track record, what bearings are they going to have on custody of my children?

It had no effect, as it turned out, because the divorce was granted without contest and the client was awarded primary physical residence, as custody is now defined in Florida. FLA. STAT. § 61.13(2)(b) (1987).

120. D. Binder & S. Price, supra note 4, at 90.
for alimony first is probably advisable, since it presumably pursues information with which the client is familiar. Ability to pay can then be deferred until either later in the interview or to another conference following completion and review of a financial questionnaire.

Another factor influencing topic selection, definition, and sequencing is the clients' sense of probable relevance. Topics that clients do not understand to be relevant or important typically harm rapport more than those that are viewed as clearly pertinent to the client's situation and wishes. Topical inquiry that begins with topics the client does not understand to be important may also encounter the greater need inhibitor.121

A client who knows little about family finances, for example, may not see the importance of questions about topics relating to them, and an organizational choice that sequences these issues first may harm rapport development for this reason. Facts affecting jurisdiction and venue, while often crucial legally, can also strike clients as neither relevant nor significant. Brief, general explanations of why this inquiry is necessary may be needed in each instance.122

121. They can also trigger the communication of perceived irrelevancy. See D. Binder & S. Price, supra note 4, at 13; supra note 54.

122. Providing a brief statement communicating why the inquiry is important in general terms is suggested as a useful way to motivate clients to respond. These explanations describe how responding to the inquiry will assist development of the case. D. Binder & S. Price, supra note 4, at 17-18; 106-07. General rather than specific language is suggested to avoid biasing the responses by communicating directly what legal effects they will have.

These skills also proved difficult to master in the sample interviews. Four students, for example, pursued focused inquiry on jurisdiction and venue questions as soon as they arose, without regard to its possible effect on rapport. Presumably this was done because these issues had been emphasized during the intensive seminar and had been involved in one simulation that they had experienced. No discernible rapport damage, however, appeared from the transcripts.

Many students also experienced difficulty avoiding specificity when explaining legal consequences before conducting inquiry on a point, thereby risking that the answers would be influenced by the knowledge communicated regarding what legal impact the information would have. Eighteen instances where this occurred were identified in the sample. Here is an example on the issue of venue:

L: The only problem that I see with us taking your case, and we'll discuss it with our supervising attorney, is that the last acts of your marriage was in Jacksonville. If he happened to get an attorney to represent him, I don't know whether he would or he wouldn't, he probably would have the right to change venue to Jacksonville because that's where the last acts of the marriage were and that could be a problem. We would have to look into that and see. You don't expect that he'll contest the divorce?
C: No.

Other examples of this type of influencing included: (1) telling a client the irretrievably broken standard will be met if husband committed adultery before asking if he did; (2) giving examples of specific situations where husband's dope-dealing would harmfully affect a child before inquiry about these situations; and (3) telling a non-public assistance client that filing fees could be waived before asking whether and when she could afford them.
Rapport-centered topical inquiry, consisting of tentative selection and sequencing choices that are carefully monitored, is an example of the type of purposeful approach to lawyering advocated by clinical scholars.\textsuperscript{123} It suggests that lawyers substitute decisions guided by predictable effects on rapport for other topical organizing alternatives. How the law is organized either in their minds or on the checklist with which they may be working, for example, may not be consistent with choices that are effective from a rapport-centered perspective.\textsuperscript{124}

Effective topic selection, definition, and sequencing is not enough to insure that post-narrative inquiry will produce what lawyers need. Concern about question formulation continues in this stage with the next section’s suggestion that funnel patterns be used to mix open and closed inquiry effectively.

3. Mixing Open and Focused Inquiry Effectively: Funnel Questioning Patterns

Many of the important topics that need to be explored in the post-narrative stage will require more than one question. A very effective approach for organizing multiple questions about a topic continues the use of open questioning whenever possible, while introducing closed inquiry in a mix that takes advantage of the strengths of each form. This approach involves a funnel questioning pattern, a technique which derives its name from its mix of open and closed questions.

A funnel pattern begins with open questions on a topic and then funnels, or narrows, to more focused inquiries about additional details and aspects of the matter. It uses open inquiry to solicit additional client narrative and exhaust the client’s associational patterns and memory about the topic. Then closed inquiries are used to develop facts drawn from the lawyer's sense of relevance; these questions may serve to stimulate client memory about the specifics

Similar problems occurred during the interviews when clients were asked about what they wanted in their divorce. For example, one client was told she could get sole parental responsibility because of spouse abuse before she was asked whether she wanted it. Another client seeking to end a short marriage was given an incorrectly narrow description of alimony as something “most often granted when the wife spent her 20 best years with her husband and suddenly she has never had a job in 20 years and they split up” before she was asked if she wanted to seek maintenance.

\textsuperscript{123} See, e.g., G. Bellow & B. Moulton, \textit{supra} note 4, at 290 (good lawyering is a purposeful activity); D. Binder & S. Price, \textit{supra} note 4, at 105 (deciding when to explore topic a client seems reluctant to discuss should be conscious decision).

\textsuperscript{124} D. Binder & S. Price, \textit{supra} note 4, at 90-91. The advantage of using a checklist, avoiding the omission of important information, is widely advocated in matrimonial practice. See, e.g., 2 B. Abrams, \textit{supra} note 25, at § 50.11, p. 50-27; 2 A. Rutkin, \textit{supra} note 25, at § 1.02, p. 1-9; 1 G. Schackow, \textit{supra} note 43, at § 2.04, pp. 5-9.
identified as important legally.

Binder and Price call these patterns "T funnels" because the series of initial open questions may be visualized as the horizontal bar of the letter T.\footnote{125} The ensuing focused inquiries then visually comprise the vertical line of the letter T.\footnote{126} The pattern may also be visualized as an "I funnel" because an effective way to end many of these sequences is an additional open question. This concluding open question facilitates the communication of any new details stimulated by but not made the subject of the closed inquiry before the next topic is addressed.

Funnel questioning patterns, whether run out of a T or an I formation, capture many of the advantages of open inquiry that were described earlier. They let clients choose the aspects of the topic that they are comfortable sharing in a detailed way, using their associational patterns, which may aid their ability to recall them. They avoid the distractions and potential confusion that closed inquiry often brings.\footnote{127} They also help lawyers to avoid biasing responses by removing the suggestiveness that often accompanies even the most non-suggestively phrased closed inquiry.\footnote{128}

\footnote{125. D. Binder & S. Price, supra note 4, at 93. They stress the importance of this technique, which they recommend for their concluding stage of inquiry in litigation contexts, as follows:}

\begin{quote}
In our judgment, the failure to competently utilize this technique is, perhaps more than any other omission, responsible for the most infamous of all post-trial lawyer-client colloquies:

L: Why didn’t you tell me that before you got on the stand?

C: Because you never asked me.

\textit{Id.} at 99.
\end{quote}

\footnote{126. \textit{Id.} at 92-99; see also G. Bellow & B. Moulton, supra note 4, at 188-89; R. Kahn & C. Cannel, supra note 8, at 158-60; R. Gordon, supra note 22, at 266-71.}

\footnote{127. Ample evidence supports the conclusion that closed, focused inquiry is the predominant approach lawyers use in interviews. See, e.g., Bellow, supra note 84, at 108, Hostika, supra note 43, at 604; Neustader, supra note 26, at 229. This occurred in the sample interviews. See supra note 84. This itself can harm rapport by subjecting clients to what can feel like a cross-examination experience, particularly when the closed questions target facts that are hard to admit or acknowledge. It can also imply negative connotations about both the client’s self-worth and the merits of his or her case. The occasional open questions allowed by funnel patterns, even though they are usually topic specific, counteract these negative interpersonal experiences and provide an independent, rapport-centered reason for using this approach. Students in the sample did do some of this during the last three-fourths of the interviews. An average of 4% of the total inquiry in the post-narrative stage per interview consisted of open questions with a high of 12%.}

\footnote{128. See R. Kahn & C. Cannel, supra note 8, at 159; R. Gordon, supra note 22, at 268. A reverse funnel pattern, for example, initially uses closed inquiry that suggests a desired general conclusion which is requested later with an open probe and is an important part of deposition and cross examination practice. It should be avoided during initial client inquiry if the lawyer wants to refrain from directly biasing the responses produced.}

It has been suggested that lawyers cannot avoid subtly influencing events because interviewing a client affects how clients view and report situations. G. Bellow & B. Moulton, supra note 4, at 290. For a critique of teaching this view without fully examining its political and ethical dimensions, see Simon, 	extit{Homo Psychologicus: Notes on A New Legal For-
Funnel patterns also permit topic-focused, narrow inquiry after the advantages of more open questions on the subject have been exhausted. These questions inquire about specific details, narrowing the focus even further. Focused inquiry has the obvious information-gathering advantage of eliciting detail. Most people tend to talk in broad, general terms, and getting to detail often requires focus. Closed inquiry supplies this focus by bringing specific aspects of the topic to the client's attention.

Providing this focus may also help clients remember details. Unlike open inquiry, which relies on a client's unaided associational patterns, closed inquiry can stimulate memory searches by focusing on specific details. Asking "did he ever hit the children with anything when disciplining them?," for example, may help a client's memory more than an open inquiry such as "how did he discipline the children?" will. Although this closed inquiry would follow that open question in a funnel pattern, the focus may help a client remember details she assumed were unimportant.

Visualizing the initial open inquiry as a series of questions is important because effective funnel patterns directed to significant topics often need more than one openly phrased initial probe. Clients often have more to say on a topic than they can share in response to one open question.129 Asking several questions helps them communicate fully.

There are several ways to encourage this additional communication. Following an open question that identifies the topic with a "what else" question is often effective. The "what else" question can then be repeated until the client's sense of broad detail on the topic has been exhausted.130 Active listening responses summarizing the earlier answers can help clients check off in their minds what has been covered, al-

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129. Unhappily from this theoretical perspective, the sample revealed only ten instances where the next inquiry after an open question was another open probe.

130. Using "what else" questions during funnel patterns demonstrates the subtle effects inquiry can have on the information it produces. See supra note 128. Asking "what else" happened, for example, implies an expectation that something else exists. It can be an effective way to use the lawyer's expectation that additional details exist to motivate clients to search their memory more and harder. D. Binder & S. Price, supra note 4, at 94. It has been suggested that lawyers convey this expectation a couple of times on topics of substantial importance, but then stop to avoid motivating the client to make up details that the lawyer apparently wants. Id. at 95. A different phrasing, such as "is there anything else," could imply the converse; the inquirer's expectation that no additional information exists. Id. at 94. The risk undeniably exists that the inquirer will use the positive expectation when pursuing details regarding the strength of the client's position and the negative connotation when exploring weaknesses. No examples of this were found in the sample even though several interviews did contain "anything else" inquiries. Purposeful formulation of inquiry and self-awareness are probably the only effective methods for combating this risk.
lowing them to focus on what information remains regarding the topic. They let clients know that what they have already said about the topic has been heard and understood.

The open questions at the beginning of funnel patterns are tremendously important because they test the accuracy of a judgment that exploring *this* topic at *this* point in the matrimonial interview is appropriate. The client’s verbal and nonverbal responses to the open questions in funnel patterns will usually confirm or challenge the diagnosis that this is a non-threatening topic. Lawyers, by monitoring these responses closely, can shift topics if they sense that their original decision that this topic would not be threatening was wrong and that pursuing it now would damage development of rapport with this client.

Matrimonial interviews are probably unique in their potential for generating unexpectedly strong, emotional reactions to questions about seemingly non-threatening topics. Remembering that divorce is usually one of the most stressful and turbulent life experiences humans endure may help lawyers stay alert for these unexpected reactions. An open question asking how the children interact with their father, for example, might produce a testy response that this is not important because the client has done all the work “taking care of them since they were born.” Such a response soon after the narrative stage ends suggests that exploring what the client has done may be a more effective direction to take at this point in the interview.

The same question could also produce a tearful statement that “the kids love him and don’t want to be apart from him.” This response certainly challenges whether the topic as defined in the inquiry is non-threatening. If this situation occurs soon after the narrative stage ends, the lawyer should consider either making a rapport-motivated topic switch or narrowing the definition of the inquiry by focusing more on the strength of the client’s custody claim.

The most effective immediate response to this example, however, would probably be an active listening comment reflecting the emotional portion of the client’s communication. A neutral, non-judgmental reflection of this client’s feelings of sadness and anxiety regarding the pain her children are suffering now will predictably build rapport. It may also produce more information than

132. The two strongest emotional reactions by clients in the sample interviews, for example, happened in response to an open question seeking a chronological overview of the marriage, and a question about how the client got along with her husband during the infrequent times he visited the marital home.
additional inquiry on the topic would generate.\textsuperscript{133}

Whether a topic shift to avoid rapport harm is generally advisable is difficult to predict because it always depends on the context of the exchange. If the matter appears by client initiation, as occurred in the second example, staying with the topic may be the best choice. On the other hand, when these issues arise early in an interview, an instantaneous, often intuitive judgment must be made regarding whether the client's need to discuss the matter now outweighs the lawyer's miscalculation in defining the issue as non-threatening.\textsuperscript{134}

The topic can be changed easily by directing the next question to another, presumably less threatening topic the lawyer has selected. This option is probably more appropriate if the situation arises shortly after the narrative stage ends, because less time has elapsed for rapport to grow. Both a mental and a short written note about the shift are appropriate to insure that the topic was changed to avoid damaging rapport. This note also will help guard against the tendency to assume that the topic was exhausted because earlier questions were asked about it.

Rapport motivated topic shifts may also be made during the closed inquiry portion of a funnel pattern, if the client's response suggests that a change is appropriate. A comment about this shift may be effective at this point, particularly if the topic change is obvious to the client. This comment should negate any inappropriate client expectation that this topic may be avoided permanently as a result of the shift.\textsuperscript{135}

Conversely, exploring the topic selected fully before moving to another is appropriate if client responses suggest that the tentative judgment that the issue was non-threatening was correct. Switching topics before inquiry about them is completed, when the change is not necessary to avoid harming rapport, is probably the most common cause of incomplete information gathering, inappropriate assumptions, and subsequent misunderstandings.\textsuperscript{136}

Most topic changes in matrimonial interviews are initiated by lawyers. Sometimes they are intentional choices to avoid premature probing of threatening areas. More often, however, they are inadvertent, non-purposeful decisions.\textsuperscript{137}

\begin{footnotes}

\item[133] See supra note 71 and accompanying text.
\item[134] D. Binder & S. Price, supra note 4, at 105.
\item[135] See D. Binder & S. Price, supra note 4, at 16.
\item[136] See D. Binder & S. Price, supra note 4, at 95-99.
\item[137] The sample interviews were not coded to ascertain who initiated topic shifts and how many followed conversational leads offered by the clients. Nevertheless, the general sense that emerges from reviewing the transcripts is that the vast majority of topic switching was initiated by the lawyers; that much of it was done before relevant inquiry on the
\end{footnotes}
Many of these topic shifts happen in response to conversational cues given by clients. Inquiry about one topic produces a response about another related issue and the lawyer follows that lead to the new matter. Although this is a spontaneous, entirely human response, it may not be the most effective way to gather information unless it is felt that the client initiated the other topic to avoid discussing the one asked about initially.

Not all non-responsive or topic shifting answers mean the client is uncomfortable with the issue. Many result from either client misunderstandings of the need for detail or simple associational jumps. The closed questions in a funnel supply this focus on detail and should not be abandoned non-purposefully.

In addition, difficult topics need to be pursued and exhausted later in the interview before decisional options and their consequences are discussed with clients. Conceptualizing inquiry as a process of mixing open and closed questions about a topic, while assessing whether full exploration will unduly damage rapport, may help lawyers avoid non-purposeful topic shifts, which often leave them with less than complete information about important issues.

Many critically important topics in matrimonial interviews will benefit from a layered approach to inquiry that uses funnel patterns sequentially. This approach first uses a broadly phrased funnel pattern to identify subtopics for later exploration. Then follow-up inquiry uses narrower funnel patterns directed toward each subtopic identified.

A spouse's parental misconduct in a custody contest, for example, could be approached initially by a broad funnel pattern designed to identify whether general topic categories like inappropriate discipline; physical, psychological, and sexual abuse; neglect; exposure to alcohol and drugs; and harmful role-modeling ex-

http://scholarlycommons.law.cwsl.edu/cwlr/vol26/iss2/3
ist. The organizational guide for this approach will necessarily be topical. Then more focused funnel patterns could be used for each topic the client identified during the first sequence.\textsuperscript{138} Here, focused chronological inquiry can be used effectively. Clients, for example, can be asked when was the first, or most recent, instance of excessive disciplining, and the fact-gathering can then proceed using time as its organizational guide.

This layering of funnel patterns can continue as subtopics are broken into their component details. A client who identifies inappropriate discipline as a subtopic, for example, can be asked to narrate about these activities. That response could identify narrower subtopics, such as physical discipline, verbal harassment, and harmfully inconsistent punitive activity. Each of these could then be investigated by using even more focused funnel questioning patterns. Closed questions about frequency, whether weapons are used, and injuries that resulted, for example, could follow an open question inviting the client to narrate about the subtopic of physical discipline.

An alternative approach exhausts each subtopic as it surfaces before moving on to identify and explore the next sub-issue. A client answer to a general question about harmful activity that mentions inappropriate discipline, for example, would trigger funnel patterns exhausting all aspects of this issue before the client is asked what else the spouse does that harms the children.

Both approaches can be effective. Choosing between them, and selecting the appropriate level of breadth for the funnel patterns, are more decisions that must be made purposefully yet tentatively. They should be revised when client responses suggest that modification of the initial approach is necessary.\textsuperscript{139}

Broad funnel patterns designed to identify subtopics of major

\textsuperscript{138} One student used this approach very effectively in an interview with a woman who feared a custody fight regarding her son and who also wanted to deny visitation to her husband because of his harmful influence on the boy. This student used a layered funnel pattern on the issue of potential obstacles to accomplishing the client's objectives and identified the following subtopics concerning potential weaknesses in the claim: partying, drinking, smoking dope, and living with someone else. He then subjected the last two of these topics to more focused funnel patterns. Each produced sufficient detail to permit a prediction that neither obstacle presented significant risks of losing custody because they did not relate directly to harmful impacts on the child. The case was ultimately resolved by obtaining custody for the client and restricting visitation.

\textsuperscript{139} See D. Binder & S. Price, \textit{supra} note 4, at 93-99, 105-08.
issues probably work better near the beginning of interviews because they postpone very focused inquiry and allow clients greater freedom to avoid detailed interrogation that could harm rapport. The layered sequence also may provide more memory stimulation for identifying relevant subtopics, because it keeps the focus on them rather than on their supporting details. For example, a client might have difficulty recalling what else it is about her spouse’s parenting that troubles her after a lengthy and complete exploration of her husband’s abusive disciplining behavior.

Funnels featuring immediate follow-ups, on the other hand, are necessary later in interviews, particularly when potentially threatening topics are investigated. The narrower focus of funnel patterns directed at subtopics, and the guidance provided by their closed questions, may help reduce the threatening potential of the inquiry by avoiding the client’s dilemma of how much to tell. They also let clients proceed step by step and build confidence as the harmful information is heard non-judgmentally.140

This concludes the organizational approach to matrimonial interviewing proposed by this article. Virtually all of these suggestions are united by the theme that the behavior is likely to develop a working relationship between lawyer and client that emphasizes collaboration and respect for the client’s freedom to make all important decisions; and that this type of arrangement will best generate full and accurate disclosure of the information needed to pursue the options chosen.

This emphasis on relationship and rapport derives from adaptations of psychological theories and insights. Much general clinical literature about lawyering skills, and virtually all that discusses interviewing, may be fairly characterized as promoting a social-psychological perspective.141 This substantial reliance upon psychological theory has produced criticism that insufficient attention is paid to critical analysis of what lawyers both do and fail to do.142 The remainder of this article will defend its proposed approach for organizing matrimonial inquiry from this criticism.

II. RAPPORT-CENTERED MATRIMONIAL INQUIRY AND THE CRITIQUE OF PSYCHOLOGICAL LAWYERING

Criticisms of psychologically-derived lawyering theories fall into four categories relevant to the inquiry and relationship-building objectives of interviewing: (1) the importance of client emotions

140. D. Binder & S. Price, supra note 4, at 108.
141. See Menkel-Meadow, supra note 4, at 565 n.61.
142. See generally Condlin, supra note 23; Simon, supra note 8.
are exaggerated; (2) the role of social context, policy, and power are inappropriately minimized; (3) the attitudes and practices of elite practitioners are merely rationalized; and (4) critical analysis of conventional conceptions of effective behavior is avoided. Evaluating and rebutting these criticisms is important to this article, which argues that a rapport-sensitive approach to topic definition, sequencing, and exploration produces effective matrimonial interviewing. Thus, each argument will be examined to the extent that it relates to the approach for organizing inquiry in matrimonial interviewing advocated here.

A. The Appropriate Role of Client Emotions and Objective Facts

One criticism of psychologically-based lawyering theory is that it exaggerates the importance of client emotions at the expense of objective facts. The theoretical assumptions regarding inquiry and rapport-building which underlie this article advocate no such hierarchial balancing. Facts remain the explicit subject of inquiry, as they have to be, for the lawyer to invoke law and procedure for the client's benefit.

Acquiring this information is the necessary first step in legal representation because lawyers can do little effectively without it. Inquiry must occur to learn basic information about clients, their situations, and what they wish to accomplish. This is true regardless of whether the matter is a routine matrimonial case having no social or political impact beyond the parties and their children or an attempt to change divorce law and policy that has far-reaching consequences.

143. See Simon, supra note 128, at 506-20. Simon gives several examples from clinical literature to support his claim that psychologically-dominated theories of lawyering translate legal discourse into exaggerations of individual feelings at the expense of political, social, and economic concerns. None of these examples directly involve the functional tasks of inquiry and relationship-building that are central to interviewing. Although acknowledging that his examples lack "balanced assessments" of the writers discussed and that he is emphasizing "defects . . . rather than virtues," id. at 489, Simon supports his argument with portions of discussions that touch elsewhere on the skills needed to pursue inquiry effectively. For example, Simon suggests that the insight that drafting wills involves matters of death anxiety, personal involvement with property, and the need to express caring through property disposition beyond death ignores issues of wealth distribution, government financing, and channeling private conduct. Id. at 506-07 (critiquing T. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 8, 11, 12-19, 19-26 (1979). Simon also asserts that conceptualizing inquiry from a man charged with conspiracy to sell dangerous drugs as requiring consideration of the predictable psychological forces operating on this client detracts from concern about actual guilt, justice and punishment. Id. at 507 (critiquing Goodpaster, supra note 84, at 24, 26-27). Simon appears to be criticizing micro theories for a failure to articulate macro perspectives simultaneously. See Menkel-Meadow, supra note 4, at 560-72.

The apparent distinction implied by the critique of psychological lawyering between objective, presumably non-emotional, and subjective facts may be challenged for not correctly describing what lawyers encounter during initial inquiry with clients in any context. Few important "facts" are truly objective at the beginning of inquiry. Most are connected on some level to emotional issues, if only those affecting motivation to communicate.

Information often remains connected to emotional factors in matrimonial practice because feelings play a major role during and subsequent to decision-making. A psychologically-inspired vision of interviewing identifies that role. It advocates conducting inquiry sensitive to the impact emotions have both on communication and the relationship between lawyer and client; these in-

building was necessary with Gladys Boddie and the other named members of her class to obtain sufficient information to ascertain whether a law suit could be filed and to predict legal and non-legal consequences to let these women decide what course to pursue. The result of that inquiry and decision to litigate broadened the rights of indigent matrimonial clients throughout the country by removing the barrier that service of process expenses imposed on their access to divorce courts. Simon would presumably approve of this political litigation even though the use of psychologically inspired theories of inquiry may have played a central role in making it possible. Cf. Simon, supra note 125, at 557-59 (advocating notions of activist and transformist pursuit of political ends).

145. Simon defines facts to include "norms, events, and institutions." Id. at 515. Inquiry in matrimonial practice certainly deals with events to the extent they remain legally relevant. It also treats norms of acceptable conduct regarding relevant fault-based acts in areas that receive adjudicative decision. Finally, matrimonial practice focuses on a social institution; the family. It is not easy to discern what Simon's critique that psychologically-based lawyering theory leads to detached, apolitical decision-making means with regard to inquiry in matrimonial contexts. If it means that lawyers should search only for the objective, i.e. legally relevant, facts to the exclusion of other issues, it sounds dangerously close to a call for the kind of "just the facts ma'am" approach to inquiry thought to characterize much of matrimonial practice. See infra notes 184-90 and accompanying text.

146. See, e.g. T. Shaffer, Legal Interviewing and Counseling 3-4 (1st ed. 1976) (feelings play such an important role in law offices that they ought to be viewed as facts); T. Shaffer, supra note 143, at 8, 11, 12-19, 19-26 (estate practice includes dealing with client feelings about death, property, and expressing love through estate distribution); Hegland, Fun and Games in the First Year: Contracts by Roleplay, 31 J. Legal Ed. 534, 540 (1981) (contract litigation often about broken promises and anger).

147. A rapport-centered approach to inquiry necessarily emphasizes the role of client emotions because they affect both the quantity and quality of information that is disclosed. This occurs on two levels: feelings toward the interviewing lawyer, and reactions to the situations which clients are confronting. Regarding the relationship between client and lawyer, rapport-centered inquiry theory travels on the assumption that feelings of trust and confidence increase the likelihood that adequate and accurate information will be shared more quickly. See, e.g., L. Brammer, supra note 74 at 49-50 (crucial dimension is trust); T. Shaffer & J. Elkins, supra note 12, at 73 (client's ability to trust counselor is the heart of counseling effectiveness); Gozansky, Renjilian, & Zuckman, Divorce Law Practice, 26 Pract. Law 11, 14 (1980) (trust is critical); Schoenfield & Schoenfield, Legal Interviewing and Counseling in a Legal Setting, 11 Akron L. Rev. 313, (1977) (trust needed to maximize information disclosure from client). Conversely, negative emotional reactions to lawyers characterized by distrust and fear diminish the likelihood of successful inquiry measured by complete and accurate information. E.g., G. Bellow & B. Moulton, supra note 4, at 220 (distrust potential problem in interviewing); L. Brammer, supra at
sights do not necessarily require ignoring objective fairness and justice.\textsuperscript{148} Concern for client emotions, like everything else, can be exaggerated. An obvious form of exaggerated emphasis on emotion during inquiry would involve completely refraining from pursuing information that would threaten rapport to preserve the good feelings that may be developing between the client and his lawyer.\textsuperscript{149} Nothing in either clinical interviewing literature or this article, however, proposes emphasizing rapport to this extent. Neither suggest avoiding difficult or threatening inquiry. Both, rather, suggest that difficult inquiry should be postponed until rapport has had time to develop.\textsuperscript{150}

\section*{B. Minimizing the Role of Social Context, Policy and Power}

This article responds to the criticism that psychologically-based lawyering theory minimizes social context by suggesting an approach for organizing inquiry focused directly on a specific social context: divorce.\textsuperscript{151} This context primarily involves individualized

\begin{itemize}
\item \textsuperscript{49-50} (distrusts generates resistance rather than disclosure).
\end{itemize}

On the other level, client emotions about the situations they are confronting are often near the surface in matrimonial interviews. Discussing the dissolution of what presumably once was a close, intimate relationship; the allocation of custody and support privileges and obligations; and the distributions of marital assets often generates strong emotions. See \textit{supra} notes 72, 73, 103, 132. It has been estimated that 50\% of matrimonial clients are emotionally unstable during the divorcing process. See K. Kressel, \textit{supra} note 56, at 155-56. These realities make it impossible to disregard the substantial obstacle that these emotional issues present when developing a theory of effective matrimonial interviews. It may also be that sensitivity to client emotions needs to be over-emphasized to counter observed and expressed tendencies to ignore them when conducting inquiry. See, e.g., N. Hurowitz, \textit{supra} note 43, at § 1.06, p. 8; Kerr, \textit{supra} note 47, at 29; Moss, \textit{supra} note 31, at 61; Sarat & Felstiner, \textit{supra} note 1, at 112, 116-17, 122-23.

\begin{itemize}
\item \textsuperscript{148} Scholars have criticized Simon's attack for aiming too broadly and overlooking the value that thoughtful use of psychological insights can have. See e.g. T. Shaffer & J. Elkins, \textit{supra} note 12, at 6; (misleading to believe that psychology "is separate from the social, political, and professional world in which we live"); Elkins, "\textit{All My Friends are Becoming Strangers: The Psychological Perspective in Legal Education}, 84 W. Va. L. REV. 161, 206 (1981) (must consider interaction and interrelation of private and social worlds); Neustadter, \textit{supra} note 1, at 236 n. 121 (judicious borrowing from psychological theories can improve legal interviewing without a retreat from social and political commitment into a refuge of exclusively subjective personal experience).
\item \textsuperscript{149} For example, Simon pejoratively labels the excessive emphasis of client and lawyer emotion as the "community of two," blames undue reliance on the writings of Carl Rogers for the phenomenon, and concludes that it causes retreat from political and social commitment into a sanctuary of exclusively subjective personal experience. Simon, \textit{supra} note 128, at 496-505, 511-16. Although this critique is probably based on a misreading of Rogers, see Kreiling, \textit{supra} note 5, at 305 n.68, it also has little application to inquiry theory which requires disturbing the client's tranquility with difficult questions on threatening topics designed to obtain a full understanding before any decision-making is undertaken.
\item \textsuperscript{150} \textit{See supra} notes 42, 63, 229, 149, and accompanying text.
\item \textsuperscript{151} The importance of looking at lawyering in specific contexts is increasingly em-
\end{itemize}
claims, because it treats the adjustment of personal marital relationships and the transformation and protection of families. Matrimonial practice does present difficult political, moral, and ethical questions within its individualized context, but it seldom permits the kind of organized, collective action that psychological lawyering theory allegedly masks.

Clinical models of lawyering also separate the process of inquiry from the skills related to helping clients decide what to do. Interviewing theory concerns itself only with relationship development and inquiry, while counseling looks at the tasks of developing options and presenting them and their predictable consequences to clients. This separation, while artificially rigid because the functions often overlap in practice, facilitates effective conceptualization and evaluation of experiences in simulated and actual client encounters. It also, however, blunts the force of the criticism that a primarily psychological vision of inquiry ignores moral and ethical issues.

Obtaining information may be usefully seen as a prerequisite to choice because the client’s situation and objectives must first be


153. See Simon, supra note 128, at 503. Simon’s argument that focusing on the interpersonal dynamics of lawyer-client relationships directs attention away from political action does not discuss how inquiry should be conducted to develop the information necessary to suggest to clients that organizing with others and collective action are options to consider.


155. This overlap frequently occurs in matrimonial interviewing when clients are asked what relief they want as a result of their divorce. Answering that question when no subsequent information requires further analysis probably confounds inquiry with choice on the issue. Thus a client who states a desire for custody, indicates that her spouse is not likely to contest that or any other aspect of the divorce, and discloses no information suggesting either that her children are at risk or that a judge might intervene to protect them has effectively removed any need for a formal presentation of alternatives and their consequences on the issue. See also supra note 99.

156. See Menkel-Meadow, supra note 4, at 565 n.12.
understood before alternatives and their consequences can be ex-
амined. The initial inquiry stage of the lawyer-client relationship
is thus essentially neutral as to the consequences of client choice
because decisions about how to proceed are not reached at this
stage. Even clients who begin interviews by requesting apparently
morally or politically questionable action usually generate only re-
responses designed to collect information before these objectives can
be assessed realistically.

An excessively psychological vision of lawyering can admittedly
block consideration of important political, social, and moral real-
ties when clients and lawyers make decisions even in individual-
ized matrimonial contexts. A situation where a client wants to as-
sert a custody claim solely to pressure the spouse on economic
issues presents an example. This appears to happen frequently.\textsuperscript{157}
An exaggerated psychological emphasis would conclude that this
objective be pursued in the diligent service of the client's interests,
without regard to any other social or moral concerns.\textsuperscript{158} Nothing
in psychologically inspired inquiry theory, however, suggests car-
ying these concerns this far. Clinical scholars advocate interven-
ing to seek to change such a decision because of harm to children
and the future co-parenting relationship, and then either declining
or withdrawing from representation.\textsuperscript{159}

157. See, e.g., R. Neely, The Divorce Decision 62-64 (1984); L. Weitzman,
\textit{supra} note 152, at 224-25, 310-11; Glendon, Fixed Rules and Discretion in Contemporary
Family Law and Succession Law, 60 Tulane L. Rev. 1165, 1179-81 (1986); Mnookin &
Kornhauser, \textit{supra} note 6, at 972-73; Neely, The Primary Caretaker Parent Rule: Child
Custody and the Dynamics of Greed, 3 Yale L. & Policy Rev. 168, 177-79 (1984); Note,
Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes
Arising From Divorce, 87 Yale L.J. 1129, 1131 n.21 (1978). Weitzman reports that one-
third of the 114 divorced women in Los Angeles who were interviewed for her study indi-
cated that their husbands threatened to ask for custody to exercise leverage in their
settlement negotiations. L. Weitzman, \textit{supra}, at 310-11; see generally Foster & Freed,
Law and the Family: Politics of Divorce Process — Bargaining Leverage, Unfair Edge,
192 N.Y.L.J. 6 (July 11, 1984).

158. \textit{Cf.} Simon, \textit{supra} note 128, at 505 (arguing how exaggerating individualized
representation deprives the disadvantaged of opportunities to organize and aggregate ac-
tions and claims).

159. See Morris, \textit{supra} note 10, at 796-97. Lawyers also express this view. \textit{See} 2 J.
Atkinson, \textit{supra} note 38, at 28 (emphasizing interest of child and society in keeping child
from harmful situation); Steinberg, Paternal Custody: An Overview, Trial 16 (1981) (re-
quiring fathers seeking custody to consult with expert to determine parental skills and
sincerity before asserting custody claim). A false custody claim asserted to exercise eco-
nomic leverage constitutes an unprofessional act violating prohibitions against filing non-
meritorious claims and making untruthful statements to others. \textit{E.g.} Rules 4-3.1 and 4-4.1
of the Florida Rules of Professional Conduct. No reported ethical decision involving this
issue, however, was found.

Ascertaining the sincerity of a client-initiated custody request that may also exert eco-
nomic leverage presents difficult and troubling questions. Simon uses a dramatic descrip-
tion of students and clinical professors wrestling with these questions in a custody case to
conclude that the conflicting and ambiguous feelings of counsel were emphasized to the
Matrimonial practice also often places lawyers in situations where they may need to mediate between immediate, strong client emotional needs, and long-range issues that may have more ultimate impact on client satisfaction.\textsuperscript{160} Emphasizing the psychological feeling components of these situations would again suggest letting clients make a possibly detrimental decision when viewed from a long range perspective. Clinical literature does not adopt this view. A situation where an emotionally overwrought client seemingly needs and clearly is entitled to alimony, but does not want to plead for it because of a desire to avoid alienating the spouse, for example, has been offered as an example of when intervening to seek to change the decision by recommending that it be delayed is appropriate.\textsuperscript{161}

The psychological vision of lawyering has also been criticized for diverting attention from the connections between practice and power.\textsuperscript{162} This criticism has focused more on institutional contexts than on power relationships between attorneys and their clients. The relationship between client and lawyer, however, is also rife with political and moral issues. Some of them, including how the relationship should be conceptualized and structured, and to what degree lawyers should attempt to influence the information they

\begin{footnotes}
\footnote{160}{Sarat & Felstiner, \textit{supra} note 1, at 112 (lawyers are frequently caught in middle between issues of immediate, emotional vindication and long range economic and social concerns).}
\footnote{161}{D. Binder & S. Price, \textit{supra} note 4, at 203-09. This is presented as an example of an "extremely detrimental" decision and lawyers are encouraged to intervene by: (1) empathizing through acknowledging the factors causing the emotional pressure the client is experiencing; (2) sharing that their past experience indicates that decisions made under stress are often regretted later; and (3) suggesting that the decision be delayed because they know many clients who did delay in similar situations and they were ultimately happy they did so. \textit{Id}. A significant study of matrimonial practice suggests that lawyers have no difficulty making these and other kinds of interventions and often do so in ways that leave little room for clients to disagree. \textit{See} Sarat & Felstiner, \textit{supra} note 1, at 112.}
\footnote{162}{Simon, \textit{supra} note 125, at 495-96.}
\end{footnotes}
seek as they gather it, surface initially during inquiry. Rapport-centered inquiry targets rather than obscures issues of power between lawyer and client. The power relationship of the inquiry practice observed in other contexts suggests that lawyers should dominate clients.\textsuperscript{163} This view has also been articulated in articles about matrimonial practice.\textsuperscript{164} One prominent matrimonial lawyer, for example, emphasized the great importance of exercising "client control" in the typical divorce case.\textsuperscript{165}

Rapport-centered inquiry theory questions the value of lawyer domination and control and offers a vision of the relationship that is collaborative and that pursues the elusive goal of client autonomy in decision-making. This article argues that a rapport-centered approach to matrimonial inquiry will best generate a working relationship that redresses the potential for lawyer dominance to the maximum extent possible. This relationship then will be one likely to develop client autonomy to make decisions, aided by the lawyers skill at generating relevant information during inquiry, developing and presenting options when decisions need to be made, and then encouraging and allowing clients to choose.

Client autonomy in matrimonial practice is appropriate for several reasons. First, it is extremely difficult for lawyers to know exactly how clients value the options and consequences that exist

\textsuperscript{163} The tendency of lawyers to dominate their clients has been noted often in different contexts and aspects of lawyering. \textit{See}, e.g., Gifford, \textit{supra} note 149, at 839-43; Spiegel, \textit{The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring Lawyer-Client Dialogue,} 1980 \textit{Am. B. Found. Res. J.} 1003, 1011-12. Simon acknowledges this tendency when he described the lawyer-client relationship as one "characterized by distrust and impersonality in which the stronger party usually dominates the weaker." Simon, \textit{supra} note 128, at 501. Several justifications for dominating clients during inquiry may be advanced. The expert justification is that lawyers know what clients should do because of their knowledge of what is legally relevant and what factors local judges will deem important if issues must ultimately be adjudicated rather than negotiated. \textit{See} Appel & Van Atta, \textit{supra} note 13, at 252. The efficiency justification is that talking about non-legally relevant issues takes time and time is money in the practice of law. \textit{See supra} note 47. The protective justification is that lawyers are uncomfortable dealing with strong expressions of emotion and unequipped to handle it in any way that may help the client.

\textsuperscript{164} \textit{See}, e.g., McCusker, \textit{supra} note 25, at 7 (suggesting that lawyers quickly ascertain whether they can control prospective clients); Spero, \textit{Handling the Domestic Relations Case—A Specialized Problem in Lawyering}, 3 \textit{Am. J. Trial Ad.} 399, 400 (1980) (client control is essential).

\textsuperscript{165} Spero, \textit{supra} note 164 at 400. Although not talking directly about inquiry, Spero concluded:

Client control is essential in the typical domestic relations case. When you advise the client that the case should be settled upon certain terms that you have successfully negotiated, the desired result is achieved only if the client can forget his emotional response and trust in your professional judgment. This result can be reached only when the lawyer has learned to successfully exercise client control. \textit{Id.}
in the situations they confront. The client is at risk, not the lawyer. Clients must live with whatever outcomes result from the decision. This is a critically important fact in matrimonial situations, which always involve an extremely personal threshold choice of whether to divorce, and then other relational questions where traditional legal expertise, doctrinal knowledge, and procedural talent play little role.

Moreover, a lawyer’s capacity to predict outcomes on these issues is limited to describing a range of uncertain consequences. Predicting how judges will rule on close questions of custody, support, maintenance, or equitable distribution can never be done with certainty. Given this, and the intensely personal nature of matrimonial choices, clients, not lawyers, should make these decisions.

This article contends that organizing inquiry in matrimonial contexts around rapport concerns is an effective, perhaps necessary way to begin the development of a relationship promoting client decision-making autonomy for several reasons. It forces consideration of these important relationship and role choices during the first task in representation: inquiry into situations confronting clients and what they want to do about them. The relationship and role decisions made initially often continue throughout the relationship. It may even be that lawyers who build effective


168. The broad, equitable norms applied to deciding these issues make prediction difficult. See K. Kressel, supra note 56, at 50. Empirical studies confirm what lawyers know from their experience; it is extremely hard to predict judicial outcomes precisely before a judge is assigned to the case. Once the judge is known, some, but seldom comfortable, levels of certainty can accompany predictions. For example, a study of 1300 judicial opinions on alimony and child support issues found no consistency among judges in the same district regarding either the use of a decision-making approach or the choice of which factors to consider when fashioning awards. White & Stone, A Study of Alimony and Child Support Rulings with Some Recommendations, 10 Fam. L. Q. 75, 83-84 (1976). More consistency was found regarding how each judge awarded child support. Id. at 80, see also Yee, What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court, 57 Den. L.J. 21 (1979). The federal mandate that each state set child support guidelines may remove some uncertainty in predictions about child support. See Goldfarb, Child Support Guidelines: A Model for Fair Allocation of Child Care, Medical, and Educational Expenses, 21 Fam. L.Q. 325, 349 (1987) This author’s experience supervising clinical practice has shown that this goal has yet been fully achieved in his locale.

169. T. Shaffer & J. Elkins, supra note 12, at 77. Communication research also suggests that the more directive the professional’s questions and responses are, the more likely the resulting relationship will be based on undue reliance. Id.; see Appel & Van
working relationships during inquiry can make more effective interventions raising important social, policy, and political issues later when decisions are made, meeting one of the main criticisms confronting psychologically-based theories of lawyering.\(^\text{170}\)

A rapport-centered approach also encourages collaboration because it advocates letting clients talk and lawyers listen. This may be particularly important in divorce interviewing, because applicable legal rules often may render much of what clients want to say initially of little ultimate legal value. Collaboration is encouraged at a time when its functional value is most apparent. Lawyers need information which their clients possess.\(^\text{171}\) Pursuing inquiry in ways that encourage clients to share what they know helps avoid the two most common characteristics of non-collaborative relationships: dependence and competition.\(^\text{172}\)

Finally, a rapport-centered approach to inquiry may be a more personally and professionally satisfying role for lawyers to assume.\(^\text{173}\) It is personally satisfying because it avoids the stress that

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This article may exaggerate the importance of interviewing because mistakes made during initial inquiry can be corrected. Talking clearly about the errors, and expectations about the relationship that both lawyer and client want, is a good way to correct them. See D. Binder & S. Price, supra note 4, at 15-16; T. Shaffer & J. Elkins, supra note 12, at 73-77. A clinical emphasis on interviewing skills, however, is understandable in a 14-week, primarily matrimonial practice clinic where students will handle an average of two hearings but interview between ten to sixteen clients during their semester of experience. It may also be warranted by studies showing lawyers spend more time interviewing than in any other professional activity. See T. Shaffer & J. Elkins, supra note 12, at 7-8.

170. See supra notes 157-160 and accompanying text. A largely implied premise of the Binder and Price counseling model is that a good working relationship between client and lawyer will facilitate necessary interventions that may affect client decision-making autonomy. These interventions are suggested when apparent client choices will "very likely result in substantial economic, social, or psychological harm in return for very little gain." D. Binder & S. Price, supra note 4, at 203. The inclusion of "social" in the Binder and Price analysis encourages raising fairness issues when clients seek to act in ways that might be unjust or immoral. In matrimonial contexts this includes looking at the interests of others such as children and the other spouse from the perspective of co-parenting with him or her. Cf. D. Binder & S. Price, supra note 4, at 203-04, 207-09 [discussing an alimony hypothetical]. Condlin notes this inchoate political dimension of Binder and Price and calls for its further development. See Condlin, supra note 23, at 50 n. 16. Ellmann and Morris have contributed impressively to this development. See Ellmann, supra note 24, at 721-33, 750-79; Morris, supra note 10, at 785-94; see also Ellmann, Manipulation By Client and Context: A Response to Professor Morris, 34 UCLA L. Rev. 1003, 1017-22 (1987).

171. Shaffer and Elkins suggest a role reversal of perceiving the interview as a time when lawyers should seek help, the information needed to activate legal options, rather than give it. T. Shaffer & J. Elkins, supra note 12, at 127. They also offer Alfred Kinsey's successful extraction of information about private, personal matters as evidence to prove the value of thinking about interviewing from this perspective. Id. at 126-128; see also A. Kinsey, Sexual Behavior in the Human Male (1948).


173. It seems obvious that lawyers have an interest in what they do in the attorney-client interaction independent of the client's interests and goals. See Morris, supra note 10,
can be generated by more dominant approaches, which tend to generate either a dependent relationship requiring excessive lawyer responsibility for decisions and their consequences or the struggle for control that often accompanies competitive interactions. It is professionally satisfying because the substantial evidence linking client satisfaction to interpersonal variables suggests that a rapport-oriented approach contributes significantly to a successful practice.

C. Rationalizing the Practices of Elite Lawyers

The challenge that a functional approach to inquiry derived primarily from psychological theories justifies existing attitudes and practices must travel initially on an understanding of what these values and behaviors are. Unfortunately, very little empirical work has been done on how lawyers typically conduct initial inquiry with clients in any context. No empirical study has been found, for example, discussing this topic in the context of matrimonial interviewing. It is impossible to say whether the prescriptions of

at 788-89 (1987). This interest includes choosing an approach to inquiry and relationship building that best suits their needs and desires and many lawyers have used this concern to justify more directive, allegedly efficient interviewing approaches. See infra notes 182-85.

174. Taking responsibility for the satisfaction of another can generate stress, particularly when ultimate outcomes are as uncertain as they are in judicial resolutions of contested matrimonial issues. See generally, Cory, Stress: How it Affects Trial Lawyers and Their Clients, 24 TRIAL 55 (1988). One effective way to manage stress is to identify the factors that are within one's control and then relinquish feelings of responsibility for those that are beyond your control. Peters, Burnout: The Modern Malady of Helping, in D. Avila & A. Combs, PERSPECTIVES ON HELPING RELATIONSHIPS AND THE HELPING PROFESSIONS 145-46 (1985). Approaching inquiry with an intent to foster a collaborative relationship where clients choose and retain responsibility for the consequences of those decisions is an appropriate response to these potential stressors. See Zimmerman, Stress and the Trial Lawyer, 9 LITIGATION 37, 42 (1983). Moreover, the potential for stress of competitive, adversarial encounter has been documented in other contexts. Id.

175. See supra note 13.


177. Two come close. A survey of 205 individuals following marital separation looked at satisfaction with result rather than method of inquiry used. See Spanier & Anderson, The Impact of the Legal System on Adjustment to Marital Separation, 41 J. MARRIAGE & FAMILY 605 (1979). An investigation of variables related to client evaluation of their relationship with their divorce lawyers did not use categories that correlate directly to the aspects of inquiry discussed here and produced a partial response rate of 21% (64 out of 302) Pachter, supra note 1, at 33-34. The early and important work by O'Gorman did not target task and skill matrimonial practice, but rather featured interviews with 82 New York City divorce lawyers directed toward their attitudes and experiences. H.
contemporary legal interviewing theory modified here for a matrimonial context merely rationalize what lawyers do because we do not know what that is.

Considerable non-empirical evidence suggests that a rapport-centered approach to inquiry is critical of, rather than an apology for, the interviewing methods used in actual practice. Interviewing in non-matrimonial contexts has been described as dominated by lawyers and routines.\textsuperscript{178} Clients are typically given little chance to respond to anything other than standard and pointed questions.\textsuperscript{179} Interruptions are frequent\textsuperscript{180} and lawyers control the topics discussed and the depth with which they are explored.\textsuperscript{181}

Much of the anecdotal literature about matrimonial interviewing suggests these same approaches. Matrimonial lawyers are urged to begin their interviews immediately with "more detailed questions and a strong start."\textsuperscript{182} Specific, fact-oriented questions framing the situation in legally relevant perspectives are recommended at the beginning to help lawyers evaluate cases quickly.\textsuperscript{183} Lawyers are also advised to interrupt rambling descriptions of domestic atrocities at the beginnings of interviews to get the basic facts.\textsuperscript{184} They are also told to direct client digressions regarding matrimonial problems by focusing them only on "critical matters."\textsuperscript{185} Concluding that the approaches to inquiry advocated by this article sentimentally rationalizes these observed and encouraged practices is difficult.\textsuperscript{186}

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O'GORMAN, supra note 56.
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\textsuperscript{178} See e.g., Bellow, supra note 84, at 108; Hosticka, supra note 43, at 604; Neustadter, supra note 26, at 229.
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\textsuperscript{179} Bellow, supra note 84, at 108; see Hosticka, supra note 43, at 604, 606.
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\textsuperscript{180} See Hosticka, supra note 43, at 604-05.
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\textsuperscript{181} See Bellow, supra note 84, at 108; Hosticka, supra note 43, at 604; Neustadter, supra note 26 at 229.
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\textsuperscript{182} N. HUROWITZ, supra note 43, at § 1.06, p. 8.
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\textsuperscript{183} Moss, supra note 31, at 61.
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\textsuperscript{184} Kerr, supra note 47, at 29. Although Kerr suggests beginning with a "pleasant smile" and then asking "What can I do for you," she then urges:
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When your client indicates that a domestic problem is involved, do not allow the client to ramble through the atrocities at the start of the interview. Interrupt and say, "Well, if you don't mind, there is some information that I must have before I can give you any advice." Explain that you have often found that if you begin by listening to the problems before you have the basic facts, you become confused and so worried about the problem that you forget to ask the required basic information. At this point you should open your folder, which contains divorce information sheets, expenses lists, and letters describing your fee policy.
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Id. She then concludes that clients respond very well to such an "ordered approach," that it provides "a preview of the domestic problem without [the] client realizing it," and that it allows demonstration of the lawyer's competency by "the thorough and precise questions asked." Id.
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\textsuperscript{185} Moss, supra note 31, at 61.
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\textsuperscript{186} Clearly Simon's critique does not contend that it does because he does not address the issue of inquiry and the value using psychologically derived theories can have in
D. Avoiding Self-Critique

The final criticism that rapport-centered inquiry theory has not adequately engaged in self-critique is troubling because few of its proscriptions have been verified empirically. A critique premised on an absence of empirical validity is hard to circumvent. Open inquiry’s value in developing details, for example, has been justified as saving time ultimately by avoiding reinterviewing later. Neither this, nor the contrary and apparently prevalent view in practice that clients ought to be interviewed primarily by closed questions, has been tested empirically.187

This article’s suggested compromise for matrimonial interviews, that initial narrative seeking inquiry be unfocused while lawyer-initiated post-narrative questions be linked to rapport-centered exploration of legally relevant topics, similarly lacks empirical validation. A plea that aspects of rapport-centered inquiry theory are so basic that they cannot be readily subjected to the kind of critique sought may be true but does little to convince busy practitioners to change their method of interviewing. Very little can be said with certainty until more empirical work has been done.

A better response to this critique may be that this article deals with two inevitably interactive aspects of initial inquiry: relationship formation and the effect questions have on answers. Lawyers cannot avoid creating a relationship with clients whom they interview. Similarly, lawyers cannot totally avoid influencing responses to their inquiry by the method they choose to present it.188 Per-

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187. Condlin calls for clinical critique that analyzes ways lawyers perform tasks, evaluates them against conceptions of what would be better, and links the exposition to a political view encompassing theories of social justices. Condlin, supra note 23, at 48-49. The first two steps would seem to require empirical validation to insure that both the behaviors identified and the suggested improvements accurately reflect the world lawyers and clients both do or should experience.

188. A similar conclusion was suggested after an extensive review of client-centered practice to see whether it was inevitably manipulative and therefore impossible to attain. See Ellmann, supra note 24, at 753-54, 777-79; Ellmann, supra note 170, at 1003, 1004-06; Morris, supra note 10, at 783. The analysis targeted the use of active listening when lawyers really didn’t feel empathy with clients and the structuring of the client decision-making that the Binder-Price model advocates. Similar concerns exist regarding whether lawyers who structure inquiry along the lines advocated here also infringe on client freedom to use a different process. Ellmann dealt with an aspect of this concern when he described the dilemma accompanying the use of questioning strategies intended to stimulate recall that might instead create distorted or unintentionally false “memories.” Ellmann, supra note 24, at 742-43.

Resolving these dilemmas is not easy. Morris is correct when he suggests that any model,
haps, then, all a model can do is all this article attempts: propose a general, context-based framework for thoughtful, individualized modification.

CONCLUSION

This article recommends that matrimonial interviews should be organized in ways that reflect the psychological dynamics that influence inquiry. These factors suggest beginning inquiry with initial narratives that allow clients to: (1) discuss what is important; (2) avoid focused inquiry on points perceived to be harmful to their litigation objectives and self-esteem; and (3) experience being heard and understood by their lawyers. Recommended approaches for post-narrative inquiry, which is necessarily topical in matrimonial interviews, include definitional and sequencing choices based on continued concern with rapport and frequent use of funnel questioning patterns.

These suggestions flow from the belief that these approaches are likely to develop a working relationship between lawyer and client that features collaboration and respect for the client's right to make important decisions; and that this type of interaction will best generate full, accurate disclosure of the information needed to pursue the options chosen. Although not empirically verified, these assumptions probably critique, rather than rationalize, the way matrimonial interviewing usually is conducted.

Evidence also suggests that the model for organizing inquiry advocated here require skills that many may find difficult to learn and apply. The clinical students whose performances were evaluated in connection with this article, for example, had difficulty applying them. They followed the tendencies noted in other contexts to use specific inquiry predominately and to control topic selection in the thirty matrimonial interviews that were evaluated. Open inquiry was not used to the extent recommended here. Leading and compound questions also were used far more often than recommended.

Whether this article's model pointed these students away from concerns about creating a more just society was not measured, but

consisting necessarily of simplifications, can miss empirical realities of law practice and convey a false sense of certainty. Morris, supra at 809. The model advocated here suffers these limitations; its empirical deficiency has already been acknowledged. See supra note 187 and accompanying text.

Ellmann and Morris agree that one path for either resolving or dealing more effectively with these dilemmas is the development of models focused more on individualized contexts that correspond better to the realities of practice. Ellmann supra note 170, at 1022; Morris, supra at 810. This article was written to start a response to this call in the context of matrimonial practice.
seems doubtful. Inquiry's context, involving only information acquisition and initial relational development, is not particularly conducive to the type of political and social action called for by the critics of psychological lawyering. Adequate and accurate information generally must be acquired before lawyers can confer with and influence clients about any decision or course of action.

The context of matrimonial practice also limits opportunities for the type of broad political action called for by the critics of psychologically-derived lawyering approaches. Matrimonial clients want divorces, allocations of parental benefits and burdens, and distribution of property; not test cases and political action. Moreover, none of the situations presented by the thirty clients offered any realistic possibility of far-reaching litigation or other lawyer-assisted activity.

Many of these situations did, however, provide opportunities for surfacing narrow concerns about fairness and justice when clients made decisions about what relief to seek in their divorces. Reasonable interpretations from the interviews in this sample show clients who wanted to: (1) deny visitation when that might not be fair and just to either the child or the other parent; (2) waive child support to avoid future hassles with their soon to be ex-spouse; and (3) refrain from seeking fair property distributions to avoid conflict. Client-centered advocacy does not preclude surfacing these issues and it seems doubtful that rapport-centered inquiry detracts from lawyer willingness to do so. The approaches to inquiry advocated by this article may even facilitate this process of seeking fairness within the individualized, often routine contexts presented by matrimonial practice.

Finally, getting what most lawyers want in matrimonial interviews (the relevant facts, quickly and concisely) may not be possible because the legal system no longer reflects what many people starting a divorce desire: vindication and punishment. This article proposes a less-traveled, rapport-centered path to get the effective working relationship and accurate information lawyers need.