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Smith, Linda F. () "DRINKING FROM A FIREHOSE: CONVERSATION ANALYSIS OF CONSULTATIONS IN A BRIEF ADVICE CLINIC," Ohio Northern University Law Review: Vol. 43 : Iss. 1 , Article 3.
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Drinking from a Firehose: Conversation Analysis of Consultations in a Brief Advice Clinic

LINDA F. SMITH*

The number of clients representing themselves in family law matters has ballooned in recent years.1 To address this situation, courts have established self-help centers to provide legal information, and “brief advice clinics” have been staffed by legal service programs, volunteer attorneys, and law students.2 Those concerned with access to justice have sought to study the efficacy of such brief information/advice programs through various means.3 This is an important endeavor, as most parties are proceeding pro se because they cannot afford an attorney4 and the “reduction in funding for civil legal services has resulted in significantly fewer attorneys” available to represent low-income clients.5 Accordingly, how well these brief advice clinics operate significantly determines the public’s access to justice.6

* © Linda F. Smith, James T. Jensen Professor of Law and Clinical Program Director, S.J. Quinney College of Law, University of Utah. This Article was made possible by a grant from the American Bar Association Litigation Research Fund and the Albert and Elain Borchard Fund for Faculty Excellence. The author wishes to thank Robert Dinerstein, Leslie Pickering Francis, Juan Camilo Lopez, Richard K. Neumann, and Paul Tremblay for commenting on an earlier draft, and her colleagues at the S.J. Quinney College of Law for commenting upon a presentation of these findings. The author is indebted to the Pro Bono Initiative Director JoLynn Spruance, Legal Aid Society of Salt Lake Director Stewart Ralphs, former Family Law Bar Section Chair Louise Knauer, and the many volunteer attorneys and clinic clients for their participation in this study.


2. Smith & Stratford, supra note 1, at 170-71.

3. See generally id.; JOHN M. GREACEN, SELF REPRESENTED LITIGANTS AND COURT AND LEGAL SERVICES RESPONSES TO THEIR NEEDS: WHAT WE KNOW (2002).

4. Smith & Stratford, supra note 1, at 169; see Engler, supra note 1, at 41 & n.14.


6. See CONFERENCE OF STATE COURT ADMINISTRATORS, supra note 5, at 1 (“The potential impact on the public is diminished confidence in the courts, as self-represented litigants face real and perceived barriers in the pursuit of justice.”).
This paper builds upon a survey of participants at a brief advice family law clinic and is the first study to rely upon Conversation Analysis to provide insight into the actual consultations in a brief advice clinic. The article is first descriptive, illustrating the ways in which: (1) pro bono attorneys approach these consultations and provide advice; and (2) clients share information and solicit advice. The article then turns to critique these consultations and to suggest best practices in conducting brief advice consultations and in operating a brief advice clinic.

Both attorneys and clients in the brief advice clinic may feel as if they are drinking from a firehose. The attorneys try to quickly home in on what precise advice and direction the client needs by reviewing documents and asking yes/no and short answer questions. At the same time, the clients often try to give narratives, explaining themselves and volunteering additional information they consider relevant. Attorneys begin to counsel the clients within a few minutes, sometimes before they have learned all the relevant facts needed to ensure that the advice is applicable. These attorneys, having substantial expertise in family law, provide the clients with extensive accurate counseling, often including personalized strategic advice, but sometimes including only information. These are not “simple” cases, and the flood of advice leaves one wondering if the clients have understood and will be able to remember it all. This article concludes by setting forth “best practices” for a brief advice clinic based on the evidence provided from these consultations.

I. DESCRIPTION OF STUDY

This research began by collecting data about the clients of a brief advice family law clinic and surveying the clients and advisors about the consultation.

That study revealed the demographics of the clinic patrons and the nature of their issues. A majority lived below the poverty line, with 86%

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8. See infra Part III.
9. See infra Part V.
10. See infra Part V.
11. See infra Part V.
12. See infra Part V.
13. See infra Part V.
14. See infra Part V.
15. See infra Part VII.
16. See infra Part VII.
17. Smith & Stratford, supra note 1, at 181-82.
below 200% of poverty; 63% of the clinic’s clients were women. Many clients presented more than one legal issue, and while custody was the predominant issue (52%), a full range of issues were presented: (divorce – 41%, child support – 37%, visitation – 34%, paternity – 20%, alimony – 16%, child abuse – 10%, spousal abuse – 8%, guardianship of a child – 6%, parental termination – 4%, adoption – 4%, guardianship of an adult – 2%).

Clients did not present “simple” matters, and many needed to change an order (28%) or enforce an order (14%).

Clients were surveyed both as they exited the consultation and then again a few months later. The advisors participating in the clinic were also surveyed regarding the degree to which they thought the consultation had been helpful. The exit survey results were very positive: overall client satisfaction was high; the clients felt listened to and believed they had understood their advisors.

<table>
<thead>
<tr>
<th>Exit Questions to Clients</th>
<th>Somewhat</th>
<th>Very</th>
<th>Combined positive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall, how helpful was the clinic?</td>
<td>15%</td>
<td>80.7%</td>
<td>95.7%</td>
</tr>
<tr>
<td>How well did the interviewer listen to you?</td>
<td>6.1%</td>
<td>92.7%</td>
<td>98.8%</td>
</tr>
<tr>
<td>How well did you understand what your advisor told you?</td>
<td>10.0%</td>
<td>88.4%</td>
<td>98.4%</td>
</tr>
</tbody>
</table>

The advisors (attorneys and law students) also assessed the consultations favorably, but somewhat less optimistically.

<table>
<thead>
<tr>
<th>Exit Questions to Attorneys</th>
<th>Somewhat</th>
<th>Very</th>
<th>Combined positive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overall, how helpful was the clinic for the client?</td>
<td>31.2%</td>
<td>61.3%</td>
<td>92.5%</td>
</tr>
<tr>
<td>How well did the client understand the advice?</td>
<td>30.1%</td>
<td>66.4%</td>
<td>96.5%</td>
</tr>
</tbody>
</table>

18. *Id.* at 186.
19. *Id.* at 187.
20. *Id.*
21. *Id.* at 190.
22. Smith & Stratford, *supra* note 1, at 211.
23. See *id.* at 190, 192.
24. *Id.*
25. *Id.* at 210.
26. *Id.* at 209.
The follow-up survey results showed clients were less positive. Though many clients were still very positive, the overall positive score dipped lower than the advisors had imagined.\(^{27}\)

<table>
<thead>
<tr>
<th>Follow-up Survey Questions to Clients</th>
<th>Somewhat</th>
<th>Very</th>
<th>Combined positive</th>
</tr>
</thead>
<tbody>
<tr>
<td>If you had a new legal problem, how likely would you be to return to the person who advised you?</td>
<td>13.3%</td>
<td>74.6%</td>
<td>87.9%</td>
</tr>
<tr>
<td>How likely would you be to recommend the Family Law Clinic to someone else?</td>
<td>7.5%</td>
<td>84.5%</td>
<td>92.0%(^{28})</td>
</tr>
</tbody>
</table>

Recordings were made over a four-month period, with clients independently deciding whether they wanted their consultations to be recorded.\(^{29}\) One advantage advertised to clients was the guarantee that an expert volunteer at the clinic (the author or an attorney overseeing the clinic) would review the recording within two weeks and re-contact the client if any additional advice should be conveyed.\(^{30}\) Perhaps for this reason, clients were quite open to being recorded.\(^{31}\) Over the study period, this research project recorded sixty-three consultations. Twenty consultations were with volunteer attorneys, and forty-three were with student volunteers.

After reviewing all the recordings, the author selected four consultations by different attorneys to analyze. The author considered these consultations to be generally successful in that correct and fairly comprehensive legal advice was conveyed to the clients, and this was confirmed by two senior attorneys who oversaw the clinic. These consulting attorneys all specialized in family law and had been practicing between five and eighteen years, so they had the capacity to provide excellent advice. Three of the four clients’ survey results had rated these consultations as very helpful (the fourth client did not complete a survey). The author also considered these consultations to be generally representative of the range of consultations in the clinic, given that each consultation presented different legal issues and three of the four clients lived below the poverty level, and one client lived above 200% of poverty.

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27. Smith & Stratford, supra note 1, at 193.
28. Id.
29. Id. at 182-83, 190 n.140.
30. See id. at 182.
31. See id.
These four consultations were transcribed. This article uses conversation analysis approaches to understand and assess these consultations.

II. APPLIED CONVERSATION ANALYSIS

Today, Conversation Analysis (CA) “is the dominant approach to the study of human social interaction across the disciplines of Sociology, Linguistics and Communication.”32 Conversation Analysis is “the close examination of language in interaction,” relying upon recordings and transcriptions of those interactions.33 Meticulous examination of those transcripts revealed basic truths to the originators of CA:

[P]eople perform the actions of everyday life by the way they design their turns in the sequential organisation of talk; those turns set up normative expectations on what it is to follow, which fellow-interactants abide by or flout; and the analyst’s job is to find evidence for varieties of turn-design, sequences and the actions they perform by looking to the internal construction of turns and the way in which the next speaker orients to the talk that has gone before.34

The originators of CA initially sought to study conversation in its own right, and this has been termed “‘pure CA.’”35 Later scholars of CA have also focused their attention on “institution-based materials such as meetings, courtroom proceedings, and various kinds of interviews. Their general purpose was to ‘apply’ the acquired knowledge of conversational organization specifically to these institutional interactions in order to show how these institutions were ‘talked into being’ . . . .”36 This later approach is often referred to as “applied conversation analysis.”37

There are a wide variety of ways in which Conversation Analysis has been and is applied in institutional settings. Approaches that could be relevant to legal institutions include “Social Problem Applied CA,” “Institutional Applied CA,” and “Interventionist Applied CA.”38 Social Problem Applied CA seeks to shed light on social problems such as conflict, power, gender, and so on by analyzing conversations through such lenses.39

32. Sidnell & Stivers, supra note 7, at 1.
33. APPLIED CONVERSATION ANALYSIS: INTERVENTION AND CHANGE IN INSTITUTIONAL TALK 1-2 (Charles Antaki ed., 2011) [hereinafter ANTAKI].
34. Id. at 2 (emphasis in original).
36. Id.
37. Id.
38. See ANTAKI, supra note 33, at 3, 6, 8.
39. See id. at 3.
Institutional Applied CA studies “routine institutional talk – the way that the business of the doctor’s clinic, the classroom, the interview, and so on is carried out.” Typically, this approach does not seek to solve the institution’s problems, but instead attempts to see and describe “how the institution manages to carry off its work . . . .” Interventionist Applied CA does seek to address some identified problems in the functioning of an institution through “the analysis of the sequential organization of talk.” This article will incorporate elements of: (1) Institutional Applied Conversation Analysis, using transcriptions from the Clinic to describe its operation; and (2) Interventionist Applied Conversation Analysis to make suggestions regarding ways to improve the Clinic’s operation.

Legal articles have been written about the benefits of using social science insights to study attorney-client talk and have used social science approaches including Applied CA to study attorney-client legal interviews, as well as student interviews and attorney interviews with actors.

The author consulted Gail Jefferson’s transcription methods and utilized the conventions of representing talk “as it is produced” (though with proper spellings and some punctuation inserted for ease of reading). The reader should be aware that transcriptions made for CA, representing talk “as it is produced,” do not look orderly like the imagined conversations included in

40. Id. at 6.
41. Id. at 7.
42. Id. at 8.
47. See Alexa Hepburn & Galina B. Bolden, The Conversation Analytic Approach to Transcription, in Sidnell & Stivers, supra note 7, at 57-67; see generally Harvey Sacks et al., A Simplest Systematics for the Organization of Turn-Taking for Conversation, 50 LANGUAGE 696 (1974). The author chose not to include the many other transcription conventions such as speed, tempo, pitch, etc., as not significant in this applied analysis of a legal clinic. See generally id.
interviewing and counseling texts, or like the script for a play or even a deposition transcript. These CA transcripts identify overlapping talk with brackets, passive listening back-channel cues with parenthesis (“uh-huh,” “I see”), pauses with a series of periods (one period per second), emphasis with bold print, and actions with <e.g. laughter>. Utterances are occasionally italicized in order to focus on them in the analysis. The italics do not indicate that there was any oral emphasis.

III. INTRODUCTIONS AT THE FAMILY LAW CLINIC

Upon arriving at the Family Law Clinic, each client receives a form that describes the clinic and is asked to sign a form giving consent to the limited scope services. The form then asks for identifying information, invites the client to give a brief narrative, and provides “check off” boxes for the client to characterize the situation (e.g. divorce, paternity) and the client’s goals (e.g. general information, review a document). The form asks the clients:

- “What happened? Briefly describe what has happened that brings you to the Clinic.”
- “How can we help? Briefly describe what questions you have and/or the help you think you want.”

The clients complete these forms while waiting to be seen. These forms are given to the advisors immediately prior to the consultation. Accordingly, the advisors should initially be “introduced” to the clients and the clients’ concerns through this form. The counselors all wear nametags that provide their first names and identify them as either an “Attorney” or a “Law Student.”

The oral openings from the four recordings were succinct and focused. In all four cases the client brought a companion to the interview, and in three, the companion was present at the outset and participated in the introduction. In one consultation, the attorney began by introducing herself and attempting to confirm the client’s name and the topic of the interview based upon the information provided in the form. This introduction also involved confirming exactly who was a part of the client “team.”

Attorney: I’m Laura and I’m an attorney . . and you are Diane and . . you’re here for a divorce?
Diane: Yeah.
Attorney: And you’re?
Sister: I’m her sister.
Attorney: Okay great. It’s great to have support in these situations [laughter].
Diane: [I just have some questions.]

In the second interview, the researcher introduced the attorney, who then eased into the interview by introducing her law student observer (who did not speak) and asking for an introduction of the client and the person the client has brought with her.

Ms. Attorney: Hi.
Addie: Hello.
Ms. Attorney: He’s a law student, and I was an available lawyer so that is why I got that. So, please, tell me who am I talking with?
Addie: I’m Addie.
Ms. Attorney: Hi Addie, and you are appropriately dressed for the day. <client was apparently wearing green for St. Patrick’s Day>
Addie: <laughs> That’s right.
Nate: And Nate.
Ms. Attorney: Nate. And how are you two related?
Nate: We are going to be getting married.
Ms. Attorney: Oh congratulations.
Nate: Thank you.
Ms. Attorney: And are you engaged yet?
Nate: Yes.

In the third consultation, there were two attorneys, as well as the client and a companion. The attorneys did not rely on the intake form but on oral introductions, made with a number of overlaps. These introductions preceded any mention of the client’s matter.

Ms. Attorney 1: Okay.
Vic: Hello.
Ms. Attorney 1: [Well I’m Sara]
Ms. Attorney 2: [I’m . . .]
Vic: I’m Vic.
Ms. Attorney 2: Heather.
Ms. Attorney 1: What was your name?
Vic: Vic.
Ms. Attorney 1: [Vic]
Ms. Attorney 2: [Vic]
Vic: Like Victor.
Ms. Attorney 1: And what is your name?
Girlfriend: [I’m Tina]
Vic: [This is Tina] my girlfriend.
Ms. Attorney 2: [Hi.]
Ms. Attorney 1: [Hi] Tina. So we’re Sara and
Heather, and we’re both attorneys.

In the fourth consultation, the attorney made polite comments about the client having a laptop. He then asked a maximally open question about the client’s matter, followed by a partial introduction to confirm the client’s name, but did not disclose his own:

Mr. Attorney: Oh, you’ve got your laptop, nice. With some internet.
So, what can I help you with? I’m an attorney, not just a law student.
Polly: [Okay.]
Mr. Attorney: [I shouldn’t say “just,”] they’re really good.
Polly: Should I move back?
Mr. Attorney: Yeah, you probably should. I’ve got a pen in my pocket, and then I sat on it. There we go.
Polly: Ha. <laughs>
Mr. Attorney: Polly . . . What can I help you with?

When comparing these encounters to the texts recommending interviewing techniques, one notes the degree to which “chit chat” or informal “ice breaking” conversation is minimized. Only two consultations involved an “ice breaking” exchange—one attorney commented that the client having a

48. See DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 83-84 (2d ed. 2004) (discussing “icebreaking” and “chit chat”); STEPHEN ELLMANN ET AL., LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING 19 (2009) (“Introductions and Greetings will include introductions and whatever ‘small talk’ that can help make a client comfortable.”); G. NICHOLAS HERMAN & JEAN M. CARY, A PRACTICAL APPROACH TO CLIENT INTERVIEWING, COUNSELING, AND DECISION-MAKING: FOR CLINICAL PROGRAMS AND PRACTICAL SKILLS COURSES 18 (2009) (“At the outset of a meeting, it is sometimes appropriate to engage in some ‘small talk’ to put the client at ease.”); STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS 102 (5th ed. 2015) (“In some parts of the country, ‘visiting’—comfortable chat for a while on topics other than legal problems—typically precedes getting down to business. In other regions, no more than two or three sentences might be exchanged . . . like whether the client would like some coffee.”).
laptop was “nice,” and a second attorney commented upon the client being dressed for St. Patrick’s Day. These comments were very brief. The other consultations’ first interactions involved introductions. Both the attorneys and the clients in this brief advice clinic began their sessions with simple introductions.

When a second person was present, these lawyers were quite direct in asking who the second person was. One attorney looked to the second person and asked, “And you’re?” to discover that she was the client’s sister. The second attorney responded to the second person’s introduction by asking, “And how are you two related?” The third attorney turned to the additional person and asked, “What is your name?” Both the third person and the client responded, and the client introduced his companion as “my girlfriend.”

It is noteworthy that all four recorded interviews involved clients bringing companions to the brief advice clinic. Since the clients are promised only brief advice, they may bring a companion to ensure that they understand everything and ask about everything. The clients may have brought companions to ensure that they maximize benefits from the consultation. Yet, as we shall see, the presence of a third person in the interview can complicate the attorney-client exchange.

It is also noteworthy that these succinct introductions to the client and the client’s companion nevertheless included some personal empathic responses. One lawyer confirmed, “It is great to have help in these situations,” and a second lawyer extended “congratulations” on the client’s engagement. It may be that these brief but targeted exchanges serve to establish rapport in light of the limited time available for the consultation.

IV. CONFIDENTIALITY & ATTORNEY-CLIENT PRIVILEGE

Texts typically teach that the lawyer should explain confidentiality to the client and interview the client in a private setting so that the conference will also be privileged.49 Despite the presence of a non-client in all four consultations, only one of the attorneys addressed the issue of the privilege or confidentiality.

In the interview with Addie and Nate on St. Patrick’s Day, immediately after the excerpt above asking about their engagement, the following exchange took place:

Ms. Attorney: Okay, I just need you to know that when a person talks to a lawyer, the conversation is confidential; it’s

49. See BINDER ET AL., supra note 48, at 106; ELLMANN ET AL., supra note 48, at 251; KRIEGER & NEUMANN, supra note 48, at 102; HERMAN & CARY, supra note 48, at 19.
called ‘privileged.’ If a third person is present, that breaks privilege. So there may be some questions she wants to ask me or that I might want to ask her that I would not want you to hear the answer to because I would want them to maintain confidentiality. I don’t know if it’s going to happen, but for example, if I had reason to think you might be in the United States illegally, I wouldn’t ask you that with you listening.

Addie: Great.
Ms. Attorney: You see what I mean?
Addie: Right.
Nate: Okay.
Ms. Attorney: So if you have no objection
Addie: No.
Ms. Attorney: It is fine for him to be here.
Addie: Right.
Ms. Attorney: Okay? Just know that there might be some issues that come up. And it’s nothing personal.
Nate: Oh of course.
Ms. Attorney: I’m saying this. Is that okay with you?
Nate: That’s fine.

This appears to be a thorough explanation of why the attorney might need to conduct some portion of the interview in private, without the presence of the client’s fiancé, and a polite inquiry about the client’s and fiancé’s understanding and consent to this arrangement.

However, this attorney might have been justified in treating both individuals as clients without any conflict of interest, as they were there to inquire about Nate, as a stepparent, adopting Addie’s child. Had the attorney focused on Addie’s intake form and identified the stepparent adoption goal prior to the introduction, the attorney might have realized that both individuals could be considered clients. The other three interviewers did not discuss confidentiality or privilege at any point.

V. INTERVIEWING

Texts that teach about legal interviewing focus on the ongoing attorney-client relationship rather than the brief advice clinic. While the recommended structure of the interview varies somewhat, all texts recommend a client-directed narrative to identify the client’s problems and concerns, followed by attorney questioning to further explore facts and
goals.\textsuperscript{50} All texts consider ways to develop attorney-client rapport and recommend reflection or active listening.\textsuperscript{51} Despite the widespread use of forms in which clients provide information about themselves and their situation,\textsuperscript{52} instructional texts do not address how the use of such forms should relate to the attorney-client conference.\textsuperscript{53}

The clients in the Family Law Clinic are asked to introduce their problems and goals in writing on the intake forms before they confer with an attorney. One would expect the contents of the form to have an effect on the content of the consultation. At a minimum, the attorney might know the type of case the client thought was involved. Depending upon the details provided in the “what happened” and “how can we help” questions, one might imagine that the client’s oral narrative would be shortened and the attorney’s questioning tailored sooner.

In all four cases, it is clear that the attorney initially looked to the form to understand the client’s situation and/or goals for the consultation. In three cases, the attorney began the substantive part of the consultation by confirming what the form said. Then the attorney began narrow questioning or reviewing the client’s paperwork, rather than asking for a narrative. In these three cases, no extended client-directed narrative was provided outside of whatever the client had written on the form or interjected in response to questions calling for short answers. The fourth case involved the client insisting upon giving an oral narrative and the attorney relying upon the form to understand the client’s goals.

\textsuperscript{50} See Binder et al., supra note 48, at 86, 112, 149 (recommending “Preliminary Problem Identification” followed by a “Time Line” and “Theory Development Questioning”); Ellmann et al., supra note 48, at 20 (recommending an attorney allow her client “to describe her problem and related concerns” and then engage in “Fact Exploration,” where the lawyer asks more detailed questions); Herman & Cary, supra note 48, at 19-20 (recommending an attorney first invite “the client to tell his story” and then gain an understanding of his objectives or goals); Krieger & Neumann, supra note 48, at 102 (alteration in original) (recommending the attorney give the client “a full opportunity to tell [the attorney] whatever the client wants to talk about before [the attorney begins] structuring the interview.”).

\textsuperscript{51} See Binder et al., supra note 48, at 41-63 (discussing “active listening”); Ellmann et al., supra note 48, at 27-33 (recommending “creating connection” with the client through active listening, reflection, validation, and empathy); Herman & Cary, supra note 48, at 28-30 (recommending a conveyance of empathetic understanding and active listening); Krieger & Neumann, supra note 48, at 97-100 (recommending “active listening”).


\textsuperscript{53} See Binder et al., supra note 48, at 81 (mentioning pre-initial meeting communications by telephone or electronically, but not addressing intake forms); Krieger & Neumann, supra note 48, at 96 (posing a secretary discovering the “subject of the interview” in a telephone conversation); Herman & Cary, supra note 48, at 16-17 (similarly suggesting that a secretary or the attorney should screen the client by telephone).
A. Diane’s Divorce

In Diane’s divorce case, the intake form provided the following information:

- What happened? Briefly describe what has happened that brings you to the clinic:
  - Spouse—walked out after 18 yrs marriage. 20 yrs together. He left and taken no responsibility at all. Only sees the kids when he wants. Said he would finish paying rent on Apt. till lease was up (6 mo) and the next mo couldn’t pay rent. We had to leave the apt with nowhere to go.

- How can we help? Briefly describe what questions you have and/or the help you think you want.
  - Anything about Divorce & my rights.
  - Why I don’t qualify for Legal Aide.

This client provided a compelling narrative in her intake form, which highlighted her husband’s abandonment of her and their children, his failure to support them, and their eviction with “nowhere to go.” With her inquiry about Legal Aid, she has also indicated a desire for representation, rather than proceeding pro se.

The attorney obviously read the form, as in the introduction (see above) she confirmed the client’s name and that she came because of a divorce, but she did not reference or acknowledge the written narrative. After the introduction, the client indicated a desire to have her questions answered rather than to provide a further narrative. The conversation continued as follows:

Diane: [I just have some questions.]
Ms. Attorney: Okay, so it looks like you’re interested in getting a divorce?
Diane: Yeah.
Ms. Attorney: Tell me where you’re at in the process.
Diane: Clueless.
Ms. Attorney: Okay <chuckles>.
Diane: Yeah.
Ms. Attorney: Has anything been filed at all?
At this point, the client’s sister interjected the second goal—representation by Legal Aid—and the attorney turned to provide information about handling a divorce *pro se* or seeking free legal services.

Sister: I would like to know why she doesn’t qualify for legal aid.
Ms. Attorney: Um, uh, did you apply for legal aid and was turned down?
Diane: Yeah.
Ms. Attorney: Okay, that’s something that I would recommend you talking with them, they should be able to give you an answer to that. I, my, my very best guess is that you wouldn’t qualify because of income. That’s how they figure it out. So, but you can call them to ask. I don’t know their policies. But, so you at least you can check one thing off your list that you at least applied for legal aid. ’Cause that’s the first thing. So I’m sorry that you didn’t qualify. But there are several other options for you, okay? Um, one of them that I’ll go over is there, there’s forms available online. Have you heard about that?
Diane: Yes and no <chuckles>.
Ms. Attorney: Okay, so it’s called the online court assistance program. And the website is UTcourts—

Here, the lawyer began providing advice only forty-two seconds into the consultation. The consultation continues for a total of thirty-three minutes and thirty-three seconds, involving similar question/information exchanges and targeted questioning by the lawyer in order to provide the most relevant information (see “Counseling the Client” below).

**B. Addie’s Stepparent Adoption**

In Addie’s case, her intake form had checked off the following boxes regarding “legal matter” or “kind of legal issue (mark all that apply)”: adoption, custody, name change, and termination of parental rights.
The form also addressed “Type of Help – The kind of legal help I want is:” and Addie had checked off: Particular instruction about how to do something in my case (e.g. how to ‘serve’ a document).

Her intake form also provided the following information:

- What happened? Briefly describe what has happened that brings you to the clinic:
  - Get paternal rights taken away so my future spouse can adopt my daughter and get her name changed.

- How can we help? Briefly describe what questions you have and/or the help you think you want.
  - How I can go about this without hiring a lawyer/what paperwork I need to do.

Note that the client has twice focused on her goals and has not provided any narrative as to “what happened.”

After the introduction and discussion of confidentiality, this attorney began by referencing the checked “type of legal help” from the form and then turned to ask specific questions relevant to a birth father’s rights, terminating those rights, and seeking a stepparent adoption.

Ms. Attorney: Okay, you need help with ‘how to do something in my case.’ Who is the other part of your case?
Addie: Well I have a child by somebody else.
Ms. Attorney: You have a child, and has paternity been decided?
Addie: Well it was out of marriage, but he signed the waiver in the hospital, so his name is on the birth certificate.
Ms. Attorney: Out of marriage, does he, you have a natural child, but he did acknowledge paternity?
Addie: Right.
Ms. Attorney: That’s important, because just putting his name on the birth certificate is not enough. So, he signed papers in court, so he is acknowledged as the legal father?
Addie: Right.
Ms. Attorney: Okay, what, what is your child’s name?
Addie: Jasmine.
Ms. Attorney: Jasmine? How old is Jasmine?
Addie: Six.
Ms. Attorney: Oh okay, and who does Jasmine live with?
Addie: Me.
Ms. Attorney: Oh okay, does he pay child support?
Addie: No, he is in jail.
Ms. Attorney: Well was he ordered to pay child support?
Addie: Yes.
Ms. Attorney: And did you go through ORS or did you go through the courts?
Addie: ORS.
Ms. Attorney: So ORS sent a child support order and was he paying before he went to jail?
Addie: He’s never paid.
Ms. Attorney: Oh, that’s interesting! So you have Jasmine; how long has he been in jail? Jasmine is six.
Addie: Um, I think a year now. Going on a year.
Ms. Attorney: Now before the year, how often did he see Jasmine?
Addie: Once. I think he has seen her three times her whole life.

At this point, two minutes and forty seconds into the consultation, the attorney turned to provide the legal advice requested. The attorney asked seven narrow questions and six yes/no questions (two of these confirming a prior answer) to understand the legal rights of the father and to assess the viability of terminating his parental rights. The attorney will continue to collect additional information about the client’s circumstances while explaining the law and advising the client.

C. Enforcing/Modifying Vic’s Visitation

As soon as the introductions (above) were concluded, Ms. Attorney 1 took the client’s intake form and began to read from it. The form indicated that the “type of legal matter/legal issue” was “child support” and “visitation,” and that the “type of help” needed was “general information about the law, my rights, my responsibilities.” It stated the opposing party was “ex-wife” and provided the following narrative and requests:

- What happened? Briefly describe what has happened that brings you to the clinic:
  - For denial of parent time and child support issues. Unwilling to work with child support.
• How can we help? Briefly describe what questions you have and/or the help you think you want.

  o What can I do about getting my supervised visits taken off my divorce decree? Suggestions on how or what to do in court in a month when I go back to see what I can get my visitation. What rights do I have.

Note that as with the Stepparent Adoption case, the client provided topics and goals, but not a narrative about “what happened” on the intake form.

Ms. Attorney 1: [Hi ] Tina. So we’re Sara and Heather, and we’re both attorneys. And
Vic: Okay.
Ms. Attorney 1: so what we need is this right here. Okay. I will sign it . . . . .
Vic: May we begin?
Ms. Attorney 1: Okay, so what have you got going here?
Vic: [Child support.]
Ms. Attorney 1: [Child support.]
Vic: [Visitation.]
Ms. Attorney 1: [Visitation.] Parent time. General information about the laws. What you need. Hmm, oh, you’ve got supervised visits on your divorce decree?
Vic: I’ve never had them. But I’ve had them at the point, she never enforced them until just recently.
Ms. Attorney 1: Okay, why don’t you show me the paperwork you have?
Girlfriend: He’s already filed a motion (oh good) and he has a hearing date
Ms. Attorney 1: Oh, excellent.
Vic: That’s, uh, the first one, babe?
Girlfriend: Yeah, the first, uh, manila envelope.
Ms. Attorney 1: It says that the hearing is on Friday, February 10th?  
Vic: No, that’s the next one.
Girlfriend: She didn’t show. Well, her attorney I guess dropped counsel and didn’t notify the court.
Vic: She didn’t show to that one.
Ms. Attorney 1: Oh, I see.
Girlfriend: Yeah, so we had to set a new date.
Ms. Attorney 1: So March 10th is your date, and your commissioner is Thomas, who is a great commissioner. (Good.) So let’s take a look at-
Vic: I think it’s in there.
Ms. Attorney 1: Okay. So here’s your motion . . . Okay, so you’re saying that you guys agreed to something in your mediation session?
Vic: Yeah, I have a mediation memorandum right here—this is everything that was agreed to.
Ms. Attorney 2: [Inaudible] Sorry, seem like kind of an awkward little.

In this case, the client had already filed papers and was seeking guidance about “what to do in court” during the scheduled hearing. Accordingly, the attorneys began by reviewing the papers to see what they were, what the client asserted has happened, and which remedy the client had sought. After reviewing documents, Ms. Attorney 1 addressed a few focused questions to the client:

Ms. Attorney 1: When did you guys get divorced?
Vic: Uh, July 2006?
Ms. Attorney 1: And you have how many children?
Vic: Just one with her.
Ms. Attorney 1: One child. How old is your child?
Vic: She’s five.
Ms. Attorney 1: And you have supervised visitation?
Vic: Yes.
Girlfriend: [Inaudible]
Ms. Attorney 1: Through who?
Vic: I don’t have any. [Girlfriend: Her discretion.] I’ve never had her discretion. If you want to read the divorce decree. In my divorce decree says that, uh, <papers shuffle> . . . sorry.
Ms. Attorney 1: That’s okay.
Vic: See, I didn’t even, I didn’t go to court. I just signed, I wanted to be out of the divorce. You know, I told her, I said you can have
everything; I just want to see my daughter.

Ms. Attorney 1: So, you’ve asked to see your daughter, and she’s said [no]?

Ms. Attorney 2: [Supervised] with your parents, right—one or more of your parents?

Vic: Right, and, she didn’t, she called my dad; she wrote this, like, angry letter; my dad backed out. And then he recanted, and he’s like, “No, I’ll do it, I’ll do it,” and we tried to call her. Like this happened in September, the first of September. (I see) And by the third week, we had all of this set up. (Mm-hm) I started on the twelfth of September, and she just won’t answer the phone. That’s why we’re going to court.

Although the attorneys’ questions called for short answers (i.e. asking for the name of the supervising agency, etc.), the client, Vic, appeared to want to tell his story and inserted narratives when he was able. He tried to explain that, though the divorce decree calls for supervised visits, he has never actually had supervised visitation. He also tried to explain his reason for agreeing to her demands at the time of the divorce, and to recount what he has done to try to arrange for supervised visits in the past few months. At this point (three minutes and twenty seconds into the consultation), Ms. Attorney 1 expressed her opinion about the client’s case:

Ms. Attorney 1: Yeah, this makes sense. You’re doing the right thing.

Then Ms. Attorney 2 posed some additional questions to understand the status of the mediated agreement:

Ms. Attorney 2: Yeah, um, and so, your . . parent-time is supposed to be alternating weekend (yes) and one additional day each week for a few hours.

Vic: Yes, I had all of this and just recently.

Ms. Attorney 2: Supposed to be supervised by your parents until A, B, and C happen, right?

Vic: Yes, this was our mediation, but she didn’t file. She didn’t do any of it. [I didn’t get a single visit.]
Ms. Attorney 1: [You didn’t get a single visit.] Are you employed right now, Vic?

Vic: Yes I am. (Great) And then, uh, so I, uh—it happened on the 1st, and by the 3rd, she’d recanted all that, and she didn’t want to do nothing so. Like, this happened on Wednesday, and by Friday, she didn’t want to do nothing. She wrote this real angry letter to my family and said all kinds of crazy stuff.

Ms. Attorney 2: So what you’re saying is that this agreement was never formalized, (never formalized) because you filed it with the court, but she never responded?

Vic: Yeah. She never responded. She came; we did the four hours, and she never showed up.

Girlfriend: Well she signed it there though, didn’t she? Or no?

Vic: Well she agreed to it, and by Friday I went to sign out.

Ms. Attorney 1: So you didn’t ever write it up?

Vic: No, she had all this information; she had this information mailed to her through, um, the mediation coordinator, Nancy McGahey. And all these and so this next week she was going to come up and see the place and everything and

Ms. Attorney 1: It just all fell apart. So it never got written up [and finalized?]

Vic: [Never got written up.]

Here again, the attorneys attempted to determine the exact procedural posture by asking yes/no and short-answer questions, but Vic continued trying to tell his story of everything that occurred. After the attorneys believed they understood the facts, the attorneys again (at 4:44) turned to provide the client with a general positive assessment of the work he’d done so far.

Ms. Attorney 1: Okay . . . Okay, so I think you’re actually doing a really good job here. You know, asking for parent time.

Ms. Attorney 2: Yeah, you guys seem on top of it.
Ms. Attorney 1: And you’re being really specific, that you should have the minimum parent time under that statute and these are your requests.

Ms. Attorney 2 turned to clarify one additional detail:

Ms. Attorney 2: And is any of this different to what you guys agreed to in mediation?
Girlfriend: Just the supervised.
Vic: Just to the supervised, that’s it.
Ms. Attorney 2: Because you’ve met the A, B, and C stipulations that she was concerned about?
Vic: Pretty much, yeah.
Girlfriend: And in verbal conversation she said that if he wants supervised visits he can pay for it. But the thing is he can’t even.
Ms. Attorney 1: It’s expensive.

At this point in the conversation, both the Girlfriend and Vic turned to the lawyers with questions that were a slight expansion of the questions posed on the intake form.

Girlfriend: Yeah. It’s expensive. So, if it’s like, she can’t really prove a reason why they need supervised visits, why does that need to be enforced?
Vic: So, basically, I need to know—do I need to hire an attorney for? Because, like, I go back on the 10th.

This was the end of the “interview” portion of the consultation. The beginning of the “counseling” part of the consultation began at 5:28.

D. Dismissing the Protective Order Against Polly

In the fourth case, the client’s form provided confusing information.

- What happened? Briefly describe what has happened that brings you to the clinic:
  - The Women’s Resource Center (@ USU) referred me after their Director (Allison Bona) recommended me after knowing my history as victim—housed at YWCA.
• How can we help? Briefly describe what questions you have and/or the help you think you want.

  o Need to get a “Protective Order” dropped and have my Employee “work hours” subpoenaed verifying he lied to receive it as well as getting acquaintance to testify I’d violated it, thus committing perjury. I’d been beat-up by friends of my Ex on the day arranged for him to finally let me see my kids (after 3 years) . . . .

The answer to the “what . . . happened that brings you to the clinic” question, referencing who referred the client to the Clinic, demonstrates a very concrete understanding of the question and may suggest mental health or cognitive issues. The answer to the “how can we help” question identifies getting a “Protective Order dropped,” although the “kind of legal issue” checked was “custody” and “guardianship of a child,” not “domestic violence” or “changing an order.” The “how can we help” question is further followed by a confusing series of goals and a written narrative about having been beaten up. In both her narrative and her identification of the referral source, the client reveals herself as a victim of domestic violence.

Perhaps the interviewing attorney did not read the form, or perhaps he read the form and concluded that it was not helpful in understanding the client’s matter. In either case, this attorney asked an open question, interrupted the answer with a clarifying question, and ultimately listened to the narrative the client insisted upon telling.

Mr. Attorney: Polly . . . What can I help you with?
Polly: Well, um, my ex has a, a protective order and got it [when he]
Mr. Attorney: [You mean]
Polly: It’s a big, long, complicated story (Okay) but anyway (Okay) you know, he, he beat me up.
He made me sign a divorce papers [so he got the kids]
Mr. Attorney: [So when you]
Polly: and all this stuff.
Mr. Attorney: And when you say, he’s got a protective order, you mean you put one [against him?]
Polly: [No,] he put one against me.
Mr. Attorney: Oh, okay.
Polly: Because after he decided he’d let me see my kids, uh, for three years, he decided he didn’t want me to see the kids anymore, because they were still missing me, and he wanted to keep me out of their lives. And

Mr. Attorney: Hm, that sounds like a really mean guy.
Polly: He’s a real jerk. He’s—makes O.J. Simpson look like an angel (Mmm) but he um-

Mr. Attorney: Well, this is tough stuff though.
Polly: He didn’t let me see my kids for several years. And then, when he finally, um, I kept trying to reach him and finally agreed I could come see the kids on a set day. And I went to see the kids, and then they wouldn’t let me in the door. And they called the neighbors that they’d previously arranged to come over. And they came and beat me up. And so I was charged with that assault. Went to court, and then before I could say anything, he had Mike Nicholas, as a good attorney I guess, to make him look good before my legal defender could even say anything they charged me (wow) with that and gave him the protective order. And

While the client attempted to give a narrative seemingly related to the protective order, the attorney interrupted to ask narrow questions to determine the procedural posture of the case. During the client’s narrative, the attorney made empathic statements (“that sounds like a really mean guy,” “this is tough stuff,” and “wow”). Again, the attorney also interrupted with narrow questioning to diagnose the sort of “protective order” involved and determine the action that could be taken.

Mr. Attorney: [So] does he have a **criminal** protective order against you, or what they call a **civil** protective order, the one by a commissioner or?
Polly: Yeah, it was by a commissioner.
Mr. Attorney: Do you know which one?
Polly: I think it was Thomas.
Mr. Attorney: Okay, so yeah, that’s a civil protective order then, okay. And how long ago was that?
Polly: It was in . . it was uh
Mr. Attorney: The magic number I’m looking for is two years.
Polly: I think it was 2011.

Once the attorney ascertained that it was a civil protective order and verified the date when it was issued, the attorney began to provide advice. The attorney addressed the goal set out on the intake forms of “need to get a Protective Order dropped”:

Mr. Attorney: Okay, if it’s over two years, you can move to dismiss it.
Polly: Yeah, so I did file through the court, and I do have a date.

At this point, the attorney told the client she could move to dismiss the protective order, and the client provided additional crucial information—she had already filed and had a court date! The attorney then began to access the court’s docket through his cell phone to more accurately discover the status of the case.

Mr. Attorney: Let me see if I can look that docket up for you. Do you have a case number or let’s just look by your name.
Polly: Yeah, I don’t have the case number with me.
Mr. Attorney: That’s fine, we’ll take a look.
Polly: ’cause my court date is next month.
Mr. Attorney: Okay. So are you asking for some advice about what it’s going to take to get it dismissed and things?
Polly: Yeah.
Mr. Attorney: Okay.

At this point in the interview, the Attorney and client reached an agreement as to the purpose of the consultation, and the attorney began counseling the client. However, the attorney also continued to consult the docket pertaining to the client’s case, and, during pauses for this, the client continued the narrative that she wanted to convey.
E. Analysis of the Interviewing Segments

1. Presentation of Self

In many attorney-client conversations, opening exchanges are meaningful, perhaps conveying something about the client as a person or the client’s attitude toward the problem. Sometimes these opening revelations occur during the introduction or “ice breaking,” which interviewers should not miss. Other times, a client provides them in response to an open question inviting a client narrative. In this Clinic, we must also consider the intake form as the client’s first opportunity to share meaningful information about himself.

Sociologist Erving Goffman proposes that, in all interactions with others, the person is playing a role or presenting himself in the way he wishes others to see him. “Thus, when the individual presents himself before others, his performance will tend to incorporate and exemplify the officially accredited values of the society, more so, in fact, than does his behavior as a whole.”

In cases where clients first complete a form describing “what happened” and their goals, the initial presentation of self is accomplished through a written form. It is interesting that two of the clients (Diane’s Divorce and Polly’s Protective Order) included very personal and emotionally charged narratives in their intake forms, portraying themselves as victims wronged by their spouses. Where a client has elected to be so personally self-revealing on the form, it should be incumbent upon the attorney to pay particular heed to the information conveyed. Diane’s attorney did not reflect or reference the facts conveyed through the form. Polly’s attorney appeared to understand from this written narrative that Polly had strong feelings about her situation.

In Vic’s Visitation and Addie’s Adoption, the clients chose not to share relevant facts about “what happened” but only shared their goals and questions about what they should do. These clients chose a more protective, less self-revelatory approach. Attorneys who use intake forms should not be surprised that some clients will decline to present certain facts about

54. See Gellhorn, Law and Language, supra note 44, at 325-26; Smith, Always Judged, supra note 44, at 442.
56. See id. at 327.
58. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 35 (1959) [hereinafter GOFFMAN, PRESENTATION].
themselves and their cases in writing prior to an actual meeting.\textsuperscript{60} This would be entirely in keeping with Goffman’s theories about presenting one’s best face.\textsuperscript{61}

2. \textit{Problem Identification and Questioning}

In all four cases, each attorney relied upon the client’s intake form, the client’s paperwork, court records, or narrow questions to learn about the client’s situation and goals. The attorneys’ approaches to each client was to find out what information or guidance the client wanted or needed, and in turn provide him or her with advice at the earliest opportunity. The attorneys rarely asked for a client’s narrative. The attorneys also never encouraged the client to expand on any narrative they provided and occasionally interrupted the client’s narrative. This absence of a narrative goes against the almost universal instruction to begin client interviews with a client-directed narrative.\textsuperscript{62} Instead, when conducting the “interviewing” portion of the consultation, the attorneys preferred narrow or yes/no questions, looking only for enough information as was necessary to provide relevant advice in this brief advice clinic. Once the advice-giving begins, we will explore whether the absence of a narrative was problematic.

Two cases involved clients who wanted general guidance and advice about legal rights and procedures—one regarding divorce, and one regarding stepparent adoption. In the divorce case, the client provided a succinct narrative-like statement on the intake form about her current situation (having been abandoned after twenty years of marriage, with three children and no support) and her questions (regarding her rights in a divorce). The attorney may have found that introduction sufficient to begin providing the client with relevant information about her rights in a divorce. Below, the Counseling section will consider the extent to which further “interviewing” occurred (or should have occurred) on particular topics within a divorce case.

In the stepparent adoption case, the attorney asked a handful of yes/no and narrow questions to ascertain whether termination of parental rights would be a viable claim. In both of these cases, as the clients began to search for legal answers, the attorneys continued to inquire about the client’s situation as they counseled the client.

The other two cases involved clients who had already filed legal papers and wanted confirmation and further direction in their cases. Perhaps

\textsuperscript{60} See GOFFMAN, \textit{On Face-Work}, supra note 57, at 228-29.
\textsuperscript{61} See id. at 245-46.
\textsuperscript{62} See Binder et al., \textit{ supra} note 48, at 89, 91; Ellmann et al., \textit{ supra} note 48, at 20; Herman & Cary, \textit{ supra} note 48, at 19; Krieger & Neumann, \textit{ supra} note 48, at 102.
because of this situation, the interviewing portion of these cases was choppier. The attorneys wanted to home in on exactly what was pending before the court in order to advise the clients. In so doing, they may have missed important information and provided less than ideal advice. The clients, in contrast, wanted the attorneys to understand the complete context of their cases and often responded with narratives when the attorneys asked yes/no or narrow questions.

In the visitation case, the status of the case became clear from the intake form and the client’s presentation of legal papers. The attorneys largely relied on the client’s paperwork to efficiently understand the situation presented. The attorneys’ narrow and yes/no questions evoked truncated narratives. The client attempted to explain that while the decree ordered supervised visits, until recently the opposing party had permitted unsupervised visitation and reneged on a deal reached in mediation. The client seemed to want to fully explain his situation and to portray himself as a reasonable person. There was nothing about the client’s presentation of his situation or his questions to the attorney that suggested he was incapable of providing a useful narrative.

In the protective order dismissal case, the attorney began by asking an open question, and the client responded by launching into a narrative. However, the attorney quickly interrupted the narrative to ask narrow clarifying questions. Both the intake form and the client’s narrative were confusing. They appeared to involve problems that gave rise to the protective order years ago, rather than facts that would be relevant to dismissing it. Neither the intake form nor the opening narrative indicated that the client had already filed appropriate court papers and received a hearing date. It was only when the attorney began to advise her (“you can move to dismiss it”) that he learned she had filed papers and had a court date. At that point, the attorney turned to look up the client’s case on his cell phone so he could better understand the situation. As in the visitation case, the attorney preferred to review the court papers, rather than listen to the client’s oral account, to succinctly understand the situation. In this case, the client’s ability to present a coherent story related to the matter, whether through the intake form or in her initial narrative, was suspect and probably encouraged the attorney to limit what the client said.

Because narratives were largely absent, the attorneys could not conduct follow-up questioning based on the clients’ narratives. Instead, any questioning had to be targeted from the outset. The absence of a narrative imposed a greater responsibility on the attorneys to ask all the relevant questions if the clients were to receive the best and most thorough advice.63

63. See HERMAN & CARY, supra note 48, at 34.
As explained below, at least three of these consultations fell short on some topics due to the attorney’s failure to obtain all relevant information before offering advice.

3. Rapport

In the absence of a substantial client-directed narrative, one may wonder how the attorneys established rapport. In the excerpts above, two attorneys provided case-specific encouragement. The divorce attorney told her client, “at least you can check one thing off your list that you at least applied for legal aid. ’Cause that’s the first thing.” She then concluded with the genuinely empathic statement: “So I’m sorry that you didn’t qualify.” In the visitation case, the attorney reviewed the documents and commented, “Yeah, this makes sense; you’re doing the right thing.” Later, both attorneys opined that the client was “doing a really good job . . . on top of it,” and identified what had been effective—“asking for parent time . . . being really specific, that you should have minimum parent time under the statute.” After the client in the protective order case accused her ex of having her beat up and denying her parent-time, the attorney provided empathic comments: “that sounds like a really mean guy” and “well, this is tough stuff though.” To a large degree, the attorneys seemed to try to establish rapport by promptly giving the clients what the attorneys believed the clients sought—concrete advice about what to do next in their cases.

4. Companion Involvement

It is interesting that in all four cases the client brought a companion to the interview. These individuals included a fiancé, girlfriend, sister, and friend. In only one case did the presence of a third party evoke a discussion of confidentiality and attorney-client privilege.

While the attorneys generally spoke to the clients and the companions talked much less than the clients or the attorneys, companions nevertheless played a significant role in these interviews. In some cases, the companion served an important role in moving the interview forward and posing pointed questions. However, sometimes the companion’s involvement may not have advanced the case in the way the client wished.

In the divorce case, it was the sister who interjected with the first question—why the client did not qualify for legal aid—that resulted in the first mini-counseling session. As explained further below, the sister continued to select topics for the attorney to address and provide conclusions for the client. One can question whether the sister was primarily helping Diane or was using the legal interview to convince Diane of what she thought Diane should do.
In the visitation case, the girlfriend volunteered that the client had already filed court papers and had a hearing date, provided the paperwork, and later clarified that the opposing party missed the first scheduled hearing. She added that the ex-wife had asked that the father pay for the supervision of his visits, and then she argued against that: “But the thing is he can’t even.” The girlfriend also broadened the inquiry to include the reasonableness of supervised visits in the first place: “So if it’s like she can’t really prove a reason why they need supervised visits, why does that need to be enforced?” This is consistent with the stated goal on the intake form of “getting my supervised visits taken off my divorce decree.” The girlfriend appeared to be very helpful to Vic by providing information, advocating for Vic, and insisting that the attorney address Vic’s questions. In the stepparent adoption and the protective order dismissal, the companions did not play an important role. They were involved only later in the counseling portion of the consultation.

VI. COUNSELING

Texts typically present the structure of a counseling session as one in which the attorney clarifies the client’s goals, presents alternative solutions to the client, explains the consequences of each choice, and then helps the client decide upon the best course of action. This structure was not replicated in these consultations. There was little goal clarification. Although there was some discussion of alternatives, the attorneys did not frame the counseling as a choice among alternative courses of action. Instead, most of the counseling was the attorney explaining the law and advising the client what to do and how to do it. Sometimes, the “counseling” was driven by the client’s questions rather than by the attorney’s analysis.

All four attorneys conducted the “interviewing” portion of the consultation so as to arrive at the advice-giving portion as expeditiously as possible.

64. See BINDER ET AL., supra note 48, at 300 (“Clarifying clients’ objectives; [i]dentifying alternative solutions; [i]dentifying the likely consequences of each alternative; and [b]helping clients decide which alternative is most likely to be satisfactory.”); ELLMANN ET AL., supra note 48, at 72 (recommending the attorney “clarify . . . the client’s goals; identify the choices available to the client to achieve the goals . . . predict the most likely outcomes of those choices; [and] identify the consequences of these options . . . .”); HERMAN & CARY, supra note 48, at 63 (recommending that an attorney should address six questions: What is your client’s factual and legal situation? What are your client’s objectives or goals? What legal and non-legal options are available to your client for achieving his objectives? What are the pros and cons and likely outcomes of each option? Which option should your client choose? And [sic], How will the option chosen be implemented?”); KRIEGER & NEUMANN, supra note 48, at 231 (identifying “the client’s goals and . . . potential solutions” and analyzing “the advantages, costs, risks, and chances of success of each potential solution.”).
A. Diane’s Divorce

Counseling began only forty-two seconds into the consultation, when the attorney answered the sister’s question about not qualifying for Legal Aid and then pivoted to other options for obtaining a divorce. The attorney described the court’s Online Court Assistance Program (OCAP), the possibility of hiring a private attorney, and the additional option of getting the opposing party to pay attorney’s fees.

Over a thirty-three minute consultation, the attorney discussed relevant topics: child support, child custody, procuring temporary orders, removing the husband from the client’s health insurance, the process of filing motions and serving the husband, the time involved, the divorce education class, possession of the parties’ cars, the possibility of alimony, and responsibility for the parties’ debts. The sister, rather than the client, initiated many of these topics. At various points, the attorney moved from a substantive law topic (e.g. child support) to discuss processes—filing the case and filing temporary motions. On most of the topics, the attorney did little or no questioning before providing the information that she deemed relevant. Much of the attorney’s “counseling” was generic information as opposed to targeted advice for this particular client in her particular situation.

The first topic—how to do the divorce—became confounded with the issue of custody:

Ms. Attorney: Okay, so it’s called the Online Court Assistance Program. And the website is UTcourts—
Sister: One word?
Ms. Attorney: Uh huh—dot gov. And it looks like that—you’ll recognize it up there. And they have the forms available. They have lots of great information. It’s kind of information overload, so just take some time and go over that, um, if you want to do a divorce by yourself. A lot of people do. It’s called doing a divorce pro se, which means you’re doing a divorce without an attorney. And a lot of people, that’s a great fit. Um, one of the advantages is that it’s very cost effective, um.
Sister: Okay, what if it’s probably not going to be an easy divorce?
Ms. Attorney: And that’s one of the things you might also want to do, is meet with an attorney. So, um, there’s a lot of attorneys that you can call and ask for a free consultation. You can look in the phone book; um,
you can call the Utah State Bar, and you can call attorneys randomly and ask them for information, how much their retainers are. Um, depending on the the divorce, retainers can range.

Sister: Well, there’s three kids involved.
Ms. Attorney: Okay, and, and are, they’re, they’re all under 18?
Diane: Yeah.
Ms. Attorney: Okay. [Okayee]
Sister: [So how] easy do you think it would be to do it yourself? With the custody?
Ms. Attorney: It—will custody be contested?
Diane: Probably.
Ms. Attorney: It’s going [to get pretty complicated.]
Sister: [Can’t say no] to that. <chuckling>
Ms. Attorney: It’s going to get pretty complicated. So I think the first thing is to understand what your rights are and really make an informed decision on whether you want to do it without an attorney, or whether you want to do it with an attorney. You should also know that attorneys are occasionally also able to ask for attorneys’ fees from the other side if they’re able, in a better financial situation to pay for, um, that.

Diane: [Yeah, that was my question.]
Ms. Attorney: [However, oftentimes,] they’re not awarded. So you would, I don’t want to get into the specifics on your case, but just know that that can sometimes happen. It is rare in a lot of cases, especially when there’s just not a great deal of money one way or another. But that’s something to keep in mind too when you’re considering your options. But, um, what direction do you want me to go? Do you want me to tell you the basic process of how you would go file and by yourself?

The attorney’s counseling focused on process at the expense of substance. In this segment, she encouraged the client to consider the option of proceeding pro se, calling it “a great fit” for a “lot of people,” since it is “very cost effective.” The sister pointed out potential problems with this approach, first interjecting with a question—”what if it’s probably not going to be an easy divorce?”—later mentioning that there are “three kids involved,” and still later asking how easy would it be to proceed pro se “with the custody.”
The attorney declined to interview to discover what would be difficult about this divorce and why. She asked if custody would be contested, and when the client replied, “probably,” she concluded, “It’s probably going to get pretty complicated.” Again, the attorney declined to inquire about the merits of the custody case. The attorney should have known from the intake form that the husband had walked out on his family, not taken any responsibility at all, saw the children only when he felt like it, and failed to pay rent after promising to do so—which led to his family’s homelessness. These facts do not make for a strong custody case on the father’s behalf. Yet, the attorney never provided the client with any opinion as to the strength of her custody case, with or without representation. The attorney never even explained the legal standards for custody.

The attorney did suggest different processes: proceeding pro se, calling private attorneys and finding out how much they will charge, or retaining an attorney with the hope that the other party would be ordered to pay the fees. But, she did not predict how the consequences of one approach would be different from another approach. Ironically, the attorney urged the client to “understand what your rights are and really make an informed decision” on whether the client wanted to proceed pro se or hire an attorney. However, the attorney failed to give the client an opinion as to the strength of her case or the likelihood of having the husband ordered to pay the fees.

The attorney offered to better describe the pro se process, but the sister interjected and changed the topic to “child support.” During this exchange, it was primarily the sister who was directing (and sometimes confusing) the consultation:

Ms. Attorney: But, um, what direction do you want me to go? Do you want me to tell you the basic process of how you would go file and by yourself? Or even if you—
Sister: Child support.
Ms. Attorney: Child support, [okay.]
Sister: [Child support.] Does, um, ORS, you need a court order don’t you before they can do anything about child support?
Ms. Attorney: Um, yes. So, basically what, um, right now, there’s no orders in place, okay? So, what a lot of people do is they file the petition for divorce, or the compliant for divorce, I believe it’s what it’s called. And that gets the process going. Okay? But that often takes a long time to resolve. So, especially when there’s children, and do you, do
you own a home?

Diane: No.

Ms. Attorney: Okay, um. If there’s children and other issues that need to be dealt with immediately, a lot of people file what’s called a motion for temporary relief. Which is saying, okay, we filed the pet- overall big petition, right? But until we get all the major things resolved, we need guidelines to follow while we’re getting this divorce resolved. And that’s if it’s going to be contested. And so you would do a motion for temporary orders where you would ask for child support. And you would ask to define to custody. So in your case, if you were trying to get sole custody, doing not just on a permanent basis, but on a temporary basis, you would need an order, and you would ask for that. Otherwise, there’s no orders guiding, for example, custody. Um, there’s [just no nothing.]

Sister: [‘Cause technically] right now you don’t have custody, and neither does he.

Ms. Attorney: Well you, you both do <chuckles>. [That’s how]

Sister: [He could come], he could file it, if he files it before you do, he could have [custody.]

Ms. Attorney: [Not necessarily] who files it, because just because you file it does not mean that there’s an order. I, I kind of look at divorce petitions as like wish lists. This is what you’re asking for, this is your wish list, but no one has [signed off on it.]

Sister: [I’m not saying] it’s not necessarily going to happen, but <chuckles>

Ms. Attorney: So that’s more [if it’s contested.]

Diane: [Well see he left me] and the kids. (Okay.) He walked right out on us. (Okay.) And he hasn’t supported us at all since he left. He hasn’t given them money for food, nothing.

Ms. Attorney: Okay. So, if you file a divorce, you file for
Rather than explaining the standards necessary for obtaining child support, or helping this client calculate the amount of child support she should receive, the attorney focused upon the process for obtaining child support—filing a motion for temporary orders. This approach was probably useful, as the client was not receiving any support from her husband. However, the process is complicated because the client must first file the divorce petition before filing a motion for temporary orders. The attorney tried to explain this by referring to the “overall big petition” and the need for interim “guidelines.” Recalling the client’s desire for custody, the attorney explained that the client would also ask for temporary custody in the motion.

Once the topic of custody was raised, there were seven turns, each of which was interrupted by the next speaker, seeking to control the floor or to correct another’s analysis. The sister interjected her advice that neither parent had custody. The attorney countered the sister’s assertion with the technically correct answer that both had custody. This led the sister to warn that if the husband filed first he would have custody. Here, the attorney corrected the sister again by clarifying that it is not necessarily who files first, and that filing alone would not result in an order. The attorney neglected to explain that both parties would be notified of the hearing for temporary orders. The attorney went on to describe the complaint as the client’s “wish list.” At this point, perhaps defending her assertion that the husband might file for custody first, the sister interjected, stating, “it’s not necessarily going to happen.” The attorney began to respond to the sister, but the client finally spoke up, interrupted the attorney, and provided her short narrative. The client asserted facts that she had included on the intake form and which she felt gave her case merit: the husband abandoned her and the children, and he had not supported them since he left. The attorney turned her attention to the client and her strong assertions, saying “okay” after each utterance.

Unfortunately, the client’s strong assertion did not evoke an empathetic reflection from the attorney, nor did it lead to further interviewing about the custody issue. Furthermore, the client was not provided assurance that she was likely to be awarded custody and child support. Instead, the attorney urged the client to seek temporary orders “right away,” to which the client responded, “okay.” Here again, the attorney focused on the process that needed to be followed without providing any substantive advice or assurance to the client that her theory of the case had merit and that she
would likely prevail. However, the client explained (not in excerpts) that she had difficulty completing the online forms, and the attorney directed her to the Legal Aid office that helped people use the Online Court Assistance Program. Thereafter, the attorney empathized with the client about all the paperwork that is required and the amount of time required to complete it.

The next topic (not in excerpts) was selected by the client—removing the husband from her health insurance, because covering him had become very expensive, and he had his own insurance. She explained that her employer needed a “legal separation or divorce paper” to allow her to do this. Here, the attorney first suggested that the temporary motion would provide for reimbursements by the husband for these costs. Additionally, the attorney suggested that the client ask for the temporary order to permit the husband to be removed from her insurance. The attorney concluded: “But again I’ve never dealt with that issue, but that’s, that’s one way that might be a possibility. It’s worth looking into, but I’m not going to tell you that it’s going to work.” The attorney continued the conversation by discussing the ultimate arrangements the parties may have on health insurance. The attorney explained that because of the legal standard that would apply, the client also had the option of having only one party insure the children while the other parent would reimburse that party for half of the costs to insure the children.

At the conclusion of the insurance discussion, the attorney again asked the client if there was anything else she wanted to know: “So I have a little more time to go over more of the process or whatever information that you would like?” This led to the following exchange:

Diane: Yeah, just like where I would start.
Sister: Do you do divorces?
Ms. Attorney: I, I don’t do any type of—I have experience in it. But, I don’t do any referrals from here at all. So I’m not even going to tell you [my last name].
Diane: [chuckling] No, it just
Sister: How many divorces have you done?
Ms. Attorney: Quite a few, quite a few.
Sister: [That’s all I was wondering.]
Ms. Attorney: [chuckling] Oh, okay, okay.] Um, so, I can tell you just the process. For example, once you file, you, if you serve the other person, you can do that service through a constable. Or, um, actually taking it to him and having him served?
The attorney understood the sister’s question as an inquiry into whether the client could retain the attorney’s legal services. The attorney’s response was a face-threatening statement that she did not take referrals from the Clinic. Furthermore, the attorney refused to give her last name. The attorney did not explain that due to the bar’s prohibition on personal solicitation, she had chosen not to accept paying cases from the Family Law Clinic.\(^{65}\) This situation could have left the client and her sister feeling rejected without any clear reason. The sister dealt with the attorney’s rejection by asking a follow-up question regarding how many divorces the attorney had done—as if suggesting she was more concerned about the attorney’s competence rather than looking to retain her. The attorney was inexact in her answer, and the sister did not follow up with any challenge, commenting that she was just wondering. Fortunately, this uncomfortable exchange was concluded when the attorney reiterated her offer to further explain the process to the client.

The consultation continued with the client’s sister continuing to name new topics and the attorney responding to them. The next topics were the time it takes to finalize a divorce and the divorce education class. While explaining the divorce education class, the attorney returned to the topic of temporary orders, recommending that the client seek temporary orders when filing her complaint. When explaining what could be addressed in the motion for temporary orders, the attorney was reminded that the client was currently homeless. Then the attorney took the opportunity to explore the possibility of alimony.

**Ms. Attorney:** Okay. So in the temporary orders, you want to do child support, the health care issues, um, and you’re not, you don’t own a home, so you’re renting.

**Diane:** [Are you both on the lease]?

**Ms. Attorney:** So, are you staying with the family?

**Diane:** Yeah.

**Ms. Attorney:** Okay. Um, and do you have a big difference in your income?

**Diane:** Yes, he makes like $27 an hour; I make nine.

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\(^{65}\) **UTAH RULES OF PROF’L CONDUCT R. 7.3(a) (2016)** (prohibits in-person solicitation of clients “when a significant motive for the lawyer’s doing is the lawyer’s pecuniary gain . . . .”); see **MODEL RULES OF PROF’L CONDUCT R. 7.3** (2013).
Ms. Attorney: Okay, so, and you have a long-term marriage. So, um, they don’t give alimony quite as much. They usually, if they do, it’s more on a temporary basis. However, where there’s longer term marriages, where there’s a big discrepancy in income, your chances of getting alimony are much higher. Now, it’s very, very important to fill out what’s called the financial declaration. Okay? And I believe that’s available online too. Now, if you ask for alimony, it’s, um, you have to fill out the financial declaration form. And you can ask for alimony on your petition and that’s usually the difference—this is kind of hard to think about here. But the difference of your monthly expenses and what you, your net income.

Diane: Oh, there’s a big difference on that one <chuckling>.

Sister: So, between what she brings in and what he?

Ms. Attorney: Not him. It’s not about him right now. It’s about when you’re asking for alimony; it’s what you need every month to survive.

Diane: It’s different from the kids’ though, right?

Ms. Attorney: Mmm, you’ll need to add in the child support. When you’re kind of calculating it, it doesn’t need to be exact. But

Sister: In the alimony?

Attorney: Um hm. Let me do a quick—okay, let’s say that you, your living expenses for you and the children are $3,000. Okay. And you’re going to have the kids, so that’s part of it, right? So, it’s $3,000. And right now, when you fill out the financial declaration, you would need to put what you’re paying for housing, or, and that’s important when you do the worksheet, and for all of your expenses, all of your gas, your electricity, the kids’ activities, groceries, all of that. So, let’s say that that turns out to be $3,000. And you gross $2,000, but with all of your—I’m just making it up here. And then you have all of these taxes and everything else, so you bring home let’s say $1,500 after everything.
So, you have a $1,500 gap, right? Let’s say he makes, we don’t, we’re not really focusing on him, but let’s say he makes, his gross is $4,000. And we’ll say, you know what, he makes that amount, he has the ability to make up that difference. And if your child support, let’s say is $600 when you’re thinking about it, you don’t need to justify it there, but if you’re really credibly thinking about it, you’re like “I’m going to get based on this specific income, I’m going to get $600 in child support, so I need $900.” That’s what you ask for.

Diane: Okay, I get it.
Ms. Attorney: So, I’m not saying you’re [going to get it.]
Diane: [I haven’t have a clue] at that.
Ms. Attorney: I’m [not going] to say you’re getting it.
Diane: [Oh no.]
Ms. Attorney: But, you might as well ask for it. But, be aware that puts a more burden on you to fill out the financial declaration form—to be really careful and honest about that. Okay?

Diane: Very detailed. [and Sister inaudible]
Attorney: To provide your income verification. And you’re going to need to file your W-2’s from last year as well as your to-date paycheck stubs. That’s really important. The commissioners get really, get annoyed if you don’t do that. And be sure, right now to any documents that you have, I would make sure that they’re in a safe place, financial documents. I don’t know how many times you hear people say, ‘well I put it in a safe but he stole the safe!’ So you keep, be smart about that.

In the course of explaining what should be included in the motion for temporary orders, the attorney again forgot that the client was homeless and asked who was on the client’s lease, only to have the client again recount the facts conveyed on the intake form.

The attorney next asked about the parties’ respective incomes. Once the attorney learned that the husband earned about three times as much as the
client earned, she reached out from beyond what the client was inquiring about and advised the client to request alimony. Although the attorney declined to gather enough information to provide personalized counseling when discussing the issue of custody, here the attorney independently identified an issue and recommended that the client pursue it based on the limited information she had learned from the client. The attorney explained how the need for alimony is assessed and provided a hypothetical mathematical calculation to do so. While the dialogue about the calculation may seem difficult to follow, it is likely that the attorney and client were doing the calculations on a sheet of paper to illustrate them concretely. The final topic was also suggested by the sister—how do they divide up the bills. This led the attorney to further advise the client about dealing with debts, payments on debts, and possession of automobiles in the motion for temporary orders.

In the end, the attorney provided a wide-ranging description of procedures necessary to file for a divorce while also elaborating on legal issues that would arise during the divorce. The attorney implicitly encouraged the client to consider proceeding *pro se*, mentioning that many people manage to do so because it is often a “great fit” economically, but it takes patience to fill out the forms. Furthermore, the attorney also proactively recommended temporary orders and alimony. When it came to discussing alimony, the attorney concretely illustrated how alimony would be calculated. Unfortunately, the attorney did not cover the issue of custody thoroughly. The attorney neither interviewed the client about the factors that would be relevant to a custody determination, nor did the attorney explain the legal standard for determining custody. In addition, the attorney failed to provide an opinion about the strength of the client’s case on that issue. Thus, in some regards, the attorney gave the client “information” and told the client “how” to go about doing something. In other areas, such as alimony, the attorney gave the client an idea of the strength of her case by explaining how alimony is calculated. Both recommendations by the attorney—to file for temporary orders and seek alimony—seem well founded, particularly because the client and her children were homeless and without any support from the husband.

A major difficulty with this consultation was its scope. It is unclear what the client will be able to remember and act upon, because so many topics were covered. While the attorney attempted to focus on the most pressing issues, which were getting a petition filed and drafting temporary orders, the sister’s and client’s frequent questions about more fine-grained issues (such as health insurance and debts) made it difficult to know how the attorney should have simplified the consultation. While the court’s website contains a plethora of information that the attorney recommended
and the attorney referred the client to the Legal Aid office for help with the OCAP forms, this client might have benefited from a summary of the advice and a written outline of what to do next.

B. Dismissing the Protective Order Against Polly

As set forth above, the attorney began providing this client with relevant information only two minutes into the conference. Once the client informed the attorney that she had already filed the necessary motion, the attorney provided the following advice:

Mr. Attorney: Okay. So are you asking for some advice about what it’s going to take to get it dismissed and things?

Polly: Yeah.

Mr. Attorney: Okay.

Polly: I want to make sure I defend myself right because he [plus the fact]

Mr. Attorney: [Well first of all,] you’re not really defending, because you are the one moving to get it dismissed.

Polly: Yeah?

Mr. Attorney: But the main issue here is that it’s no longer needed is your main argument.

Polly: Yeah?

Mr. Attorney: To put it in layman’s terms, the simplest argument is the protective order isn’t needed. If you get into why it’s fake and why it’s bad and all these other things, those are great, but you know he’s going to come [back to that].

Polly: [That won’t], yeah, it won’t be the time to bring up those points. You think that-

Mr. Attorney: It, it **could**. I mean, they’re not bad points; they’re good points, and you might want to use them.

Polly: [It’s about picking your battles.]

Mr. Attorney: [In defense if I need to.]

Polly: Well, it’s about picking your battles. And if you attack that, he is probably going to come back and say alleged mental health issues, alleged all these
Polly: Yeah.
Mr. Attorney: If you don’t fight with the main issue, which is when you tell the judge, which is what I would focus on if I was your attorney, and say it’s not needed . . because if it’s not needed it gets dismissed. Let’s see if I can find it for you. It’s under this name?

Here, the attorney was advising her as to what she should argue without doing an interview to see if such an argument was merited by the facts. He had obviously read the intake form, as he also advised her not to focus upon the argument that the Protective Order was based on perjury—an approach that would not have had any chance for success.

However, he left the choice up to her while suggesting that she needed to, “pick her battles,” and predicted that challenging the legitimacy of the Order in the first instance would invite the opposing party to allege “mental health issues . . . all these things.” After reiterating the argument that it was not needed, the attorney turned to look up the case on his cell phone.

As the attorney searched the docket, noting that it appeared there were seven separate cases, the client continued to provide a narrative. She provided further detail about the incident that she had already described by detailing her interaction with the police who arrested her and discussing another dispute with her ex-spouse. Then the client volunteered as follows:

Mr. Attorney: [I see like seven cases.]
Polly: [And so then what he did on top of that] . . . And so then, um, in December I was arrested for violating the Protective Order (Okay) on false charges, and I spent a year in jail for it.

Mr. Attorney: Oh, you did? Okay.
Polly: And so that’s what he’s using against me now. So I’m wondering—because that’s based on lies, and I cannot get—the—like I wrote—if I get a subpoena to get the records from my employer to prove I was at work all that day! (Okay.) I mean I went to that building only because my friend had a son, um, and I was just a spokesman [and contact person for this].

Although the attorney had already advised Polly to argue that the Protective Order was not needed, he now discovered that she had been arrested and
convicted for violating the Protective Order, and had spent a year in jail for that violation. These facts make this argument seem very weak, if not foolish. This exchange highlights the importance of interviewing before counseling.

It is noteworthy that the client chose to reveal these negative facts about her situation without any prompting and as part of the narrative she insisted upon giving. This client’s insistence upon presenting relevant, even negative, facts is consistent with philosopher Grice’s maxims included in the cooperative principles, which are that conversation partners say as much as required, and say what is true and relevant. Similarly, these disclosures were worked “into the conversation,” so that the “face-threatening” implications should be lessened. This is an additional reason to allow the client to give a narrative, so she can share negative facts in the least face-threatening way.

The client concluded her narrative by using a “coda”—shifting, “to present time-reference to restate the meaning or moral of the story,” in explaining this is what her ex-husband is using against her, and then the client also included an “evaluation,” commenting “on the action from outside the story.” The client explained that the conviction for violating the Protective Order is one reason she thought it could be useful to attack the validity of the Protective Order in her quest to have it dismissed. What may have seemed like a client rambling on was actually a complex narrative the client had a reason to tell.

The attorney knew that such an argument would not have any merit in seeking to dismiss the Protective Order, so he addressed the only theoretical possible approach, which was to attack the conviction itself.

Mr. Attorney: [Well, here’s a], here’s a problem. You’re crossing over the criminal domain by trying to fix things that have happened criminally. Um, unfortunately, you know, once you’re convicted, you’re convicted. It’s very hard to get [those set aside.]

Polly: [That’s what] I’m wondering; how do you, how do

66. See H. Paul Grice, Logic and Conversation, in 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975); see also Smith, Client-Lawyer Talk, supra note 43, at 530-34 (discussing clients’ motivation to provide relevant information irrespective of question form).


68. See id.

69. DEBORAH CAMERON, WORKING WITH SPOKEN DISCOURSE 153 (2001) (identifying the five sections of the prototypical spoken narrative: abstract, orientation, complicating action, coda, and evaluation).
you get the evidence there? Like the—three people—that’s perjury—they all lied—that I came, and
[was at the school all day screaming and yelling (inaudible).]

Mr. Attorney:  [Well, unfortunately, only the DA can charge perjury cases.] Only the DA can charge crimes. So that’s part of the problem we have is that.

Polly:  So I can’t talk to the DA then?

Mr. Attorney:  No, you can, but the DA is the one that has to make that call. So I would advise you to speak to the DA (Okay) then to see. I would also advise you to, uh, consider, um . . . I’m trying to figure out how you can consider looking into that. I mean, it’s hard to do post-convictions remedy relief, um, you know, but that’s an option. You’re going to want to see a kind of a specialist criminal defense attorney on that though. I’d recommend that. Some sort of specialist defense attorney to probably see if it’s worthwhile, or even if you can do a post-conviction remedies act on the new evidence . . . So I see several cohabitant abuse actions.

It appears that the scope of the client’s goals had now been widened to include vacating her criminal conviction and charging the witnesses against her with perjury. This counseling, while technically accurate and respecting the client’s right to choose her course of action, seems to suggest a wild goose chase, rather than a reasonable alternative solution to the client’s problem.

The attorney returned to his cell phone seeing “several cohabitant abuse actions,” and the client returned to a disjointed narrative about abuse she had suffered at the hands of her ex-spouse. Ultimately, the attorney discovered that the hearing on the client’s motion had been scheduled for a set date, but then noticed that the minute entries on the docket said something “was returned unserved.” What follows are multiple exchanges in which the attorney advised Polly that she should make sure that the ex-spouse is served with her motion.

Mr. Attorney:  Oh, okay, well then, you don’t need to—you’re ready to go on June 15th!

Polly:  Yes [so I just need to know what]

Mr. Attorney:  [It was returned unserved.]
Polly: But that’s just to, to drop the Protective Order.

Mr. Attorney: It was returned unserved. You need to make sure you get him service.

Polly: . . . What, what was returned unserved?

Mr. Attorney: Well, this says that the notice of hearing on the request to dismiss or vacate the Protective Order was returned unserved. You needed, you need to serve upon him the notice of the hearing.

Polly: So he didn’t receive the one for June 15th?

Mr. Attorney: I don’t know, I don’t know—this indicates that there may be an issue with that.

Polly: [Well he does live there and I’ve] given them his work address and [everything too.]

Mr. Attorney: [Like I said], all this says is, it says that notice of hearing was returned unserved. I don’t want a judge seeing that and going, oh, well that means he didn’t know. If (inaudible)

Polly: Is that what happened then for last month?

Mr. Attorney: [I don’t know.]

Polly: Is that why I got a new date? That’s why they told me originally. Nobody showed up they said, and so [set up a new date.]

Mr. Attorney: [Well, no, no, no, no.] This is different. You filed your new notice on April 18th; it gave you the hearing date on June 15th, um, for June 15th, and then on the 29th, so nine days later,

Polly: [They tried to serve him the papers and then]

Mr. Attorney: Well, I don’t know what happened. All I know is that the court filed a notice that was returned unserved, so you need to make sure that he gets service. I don’t know exactly what happened, but it’s an issue I wanted you to be aware about so you don’t [inaudible].

Polly: [So can I serve] him myself? ’Cause the Protective Order does not

Mr. Attorney: A party can’t serve. A party can’t serve.

Polly: [Can I have a friend deliver it?]

Mr. Attorney: Friend deliver it, mail, he needs to get a copy
somehow. (Okay.) And he may have gotten a copy. It’s just this concerns me when I see that. (Okay.) So you’re going to want to check that out to make sure he got notice. (Okay.) So I’d hate for him not to show, and then the commissioner to say ‘well, I don’t see record that he was served, so we need to set another date.’ Okay.

Polly: So I filed it; it was on April 18. And that was the 29th that he said he wasn’t served (inaudible).

Mr. Attorney: Yeah, a, we can get a copy. In fact, with your computer or we can go down to W-15 and get a printout of the docket. But the court said, that on the 29th they filed notice saying that something was returned unserved, so you just want to look into that. I see a bunch of other cohabitant abuse actions from ‘08. Did you want me to look into those? Some you’re the petitioner; some you’re the respondent.

This exchange is an example of the brief advice clinic focusing, out of necessity, on how to do something, rather than legal analysis or choices between options. Non-lawyer personnel could very well relay this sort of information about how to accomplish service; however, the lawyer’s access to the court’s docket was crucial in helping the client prepare for the hearing.

After the attorney volunteered to look into the other cases between Polly and her ex-spouse, Polly again launched into a narrative of her ex-husband abusing her. This time she concluded with complaints about the way the divorce was resolved. Mr. Attorney then turned to advise about that issue:

Polly: . . . . [dialogue deleted] . . . I didn’t have an attorney. I’m just sitting here struggling to going to school, trying to support myself, because he beat me up and made me sign his divorce decree. He got custody, the house, the kids; he doesn’t pay any alimony or child support. So I was penniless, trying to support myself and get on track here [and so]

Mr. Attorney: [You may] want to consider motion to modify on that. Um, you

Polly: Can I still do that?

Mr. Attorney: You can always move to modify the divorce.
Polly: Oh, I didn’t know that.
Mr. Attorney: I’m going to go show you the forms for that. Sounds like you have what I call a trunk load of legal problems. (Yeah.) One is you’ve got a problem with the divorce being unfair; you can move to modify that to fix it. That is a long, difficult process. But I can give you the forms to get started.

[More importantly]

Polly: [Well I didn’t know that I can] if he’s the one that divorced me.
Mr. Attorney: Yes you can, yes you can. You have to show a substantial change in the circumstances. (Okay.) Something that wasn’t contemplated at the time of the divorce. That’s something we can do. (Okay.) Other than that, all of the cohabitant abuse that I was looking up, I was looking at one of the six, and a lot of them look like they were dismissed. The one that I have here is the ’06 one, um, that’s the one that it looks like you have your hearing on. The important thing to realize is that you need to show that the Protective Order doesn’t need to exist anymore. That’s the main issue.

Here, the attorney picked up on the client’s frustration with the outcome of the divorce, and advised her that she could move to modify the divorce. Again, he did not interview her to determine whether there were grounds for a modification. However, he did provide her with the relevant legal standard for a modification. In this exchange, the attorney did both too much and too little. He recognized and validated her strong feelings about the unfairness of the divorce by telling her that divorces can be modified, and gave her the legal standard, but he failed to inquire about her circumstances, which prevented an analysis of whether there would be any likelihood of success in such a case. She might have felt good about this consultation, but she remained ill-prepared to do anything based on this advice.

At this point, a male friend of the client arrived and began to participate in the consultation. The client caught him up on what she had been advised. Then, the attorney looked up the statute that deals with dismissing protective orders, and volunteered to read it to the client and her friend:
Mr. Attorney: Uh, yes, no you can do it whenever . . . . . I’m trying to get you the code for dismissal of protective orders.

Male Friend: That would be helpful.

Mr. Attorney: Okay! “A protective order that has been in effect for at least two years may be dismissed if the Court determines that a petitioner no longer has a reasonable fear of future abuse. <Pause, and Friend chuckles.> In determining whether the petitioner no longer has a reasonable fear of future abuse, the Court shall consider the following factors: whether the respondent has complied with treatment recommendations related to domestic violence entered at the time the protective order was entered; whether the protective order was violated during the time it was in force; claims of harassment, abuse or violence by either party during the time the protective order was in force; counseling or therapy by either party; the impact and well-being of children if relevant; and other factors the court may consider relevant with the case at hand.”

Rather than apply this standard to the facts of her case, Polly and her friend turned to discuss abuse that happened twenty years ago and her ex-spouse’s violation of a prior Protective Order. The attorney again advised that prosecution for such a violation is in the control of the DA. The attorney returned to the statute he had just read on his phone, and provided them with the proper citation. Then he explained that it can be found in the court’s law library or online.

Next, the client complained that Legal Aid would not help her because her ex-husband was once represented by Legal Aid, which then prompted the attorney to explain conflicts of interest and confirm that Legal Aid would not be allowed to represent her because “that’s Utah’s bar rule.” He did refer her to Utah Legal Services, a second agency that often accepts clients when Legal Aid has conflicts of interest. Polly updated her friend on the advice about completing service for the upcoming hearing, and Mr. Attorney reiterated his advice on that point to both the client and her companion. As the attorney provided his final review, the friend raised a new topic—the custody of the client’s children:

Polly: Okay.

Male Friend: What if the children, because they’re over 14 and
Mr. Attorney: [inaudible]?
Male Friend: [Want to come and live with her?]
Mr. Attorney: Don’t want to.
Mr. Attorney: Don’t want to come to live with her? Any child over the age of twelve
Polly: [Can pick who they want, huh?]
Mr. Attorney: [Not really.] There’s, there’s a factoring system. Custody’s got like nine factors the judges look at to determine where custody should go. That would be in your motion to modify. Any child over twelve, more and more weight is given to their determination. It’s not the only determination, but more weight is given. A child over the age of sixteen, very, very, very much weight is given to it. So if you have a seventeen-year-old saying he doesn’t want to live with mom, or he doesn’t want to live with mom, it’s going to take a mountain of evidence to show that he should.

Polly: He hasn’t lived with me for ten years so, and he hasn’t seen me for seven, so it’s like, how can you prove the point that he violated my visitation rights which has affected, you know, had quite an impact on the kids, so?
Mr. Attorney: You’re right, it’s difficult. But, sometimes with a seventeen year old, because as soon as he’s eighteen he gets to make his own call anyway—sometimes with a seventeen year old, your motion is less important to actually get custody, because by the time you got it, it would be too late (Mm-hm.), and more important to let him know that you’re here (Mm-hm.) and that you want to have that connection.

Polly: Yeah.
Mr. Attorney: So it’s not, it’s not in vain. Okay, so those are really your main issues. Let me take you down to show you those motions to modify.

Polly: Okay.

Here, the attorney explained that children’s preferences are not the determining factor in deciding custody, but are given more weight as the children get older. The client clarified that the children have not seen her in many years, and then asserted that her ex-husband had violated her
visitation rights and had “quite an impact on the kids.” The attorney appeared to understand that it is the client who has suffered “quite an impact” from having been excluded from her children’s lives for so long. He concluded that her Motion for Custody is “less important to actually get custody . . . and more important to let him (her son) know that you want to have that connection.” For this reason, the attorney concluded that “it’s not in vain” and proposed to show her the form for a Motion to Modify Custody.

The counseling session was quite far-ranging. It focused upon dismissing a protective order and serving notice of the hearing, but also touched upon vacating criminal convictions, prosecuting witnesses for perjury, prosecuting the ex-husband for violation of a prior protective order, conflicts of interest preventing Legal Aid from taking the case, and pursuing a modification of the divorce decree. In general, the attorney failed to interview the client to see if she had grounds for what she wished to do and to advise her from that perspective. Indeed, the fact that the client had violated the Protective Order and served a substantial sentence for that violation would argue strongly against her succeeding in getting the Protective Order dismissed.

The counseling session also focused on how to carry out the various processes, instead of why or whether to proceed. Because the attorney did not explore the client’s goals—why the client wished to have the protective order dismissed—the attorney was not able to advise whether the dismissal would provide the benefit sought. The context of the consultation suggests that the client may have felt that the Protective Order (prohibiting her from communicating with her ex-husband or going to his home) had been the reason she had been kept out of her children’s lives. Perhaps she thought that the first step in being able to see her children was to dismiss the Protective Order that prohibited her from communicating with their father and going to their home. If so, the attorney’s final suggestion of a divorce modification spoke to the client’s emotional needs. He concluded by telling her that bringing a modification case would not be “in vain,” because it would communicate to her child that she wanted to have a connection.

The strength of this consultation was the attorney’s empathy for the client, who presented an immense number of problems and appeared to have a near hopeless case. The attorney’s approach of providing legal standards (rather than personalized advice) after a thorough interview may have avoided a discussion of how difficult it would be to achieve the client’s goals. Similarly, while the attorney’s willingness to address the full range of issues the client raised showed respect for this client, the attorney avoided candidly predicting that these solutions were pipe dreams. Just as
with Diane’s Divorce, the attorney faced a difficult choice of either addressing a litany of issues or focusing on the most immediate one.

C. Addie’s Stepparent Adoption

During two minutes and forty seconds of interviewing, this attorney learned that the biological father acknowledged paternity at birth, was ordered to pay child support, has never paid any support, has now been in jail for a year, and has seen the six-year-old child one to three times in her life. With this factual basis, the attorney began to provide legal advice to the client, but also continued to interview, explaining the relevance of the questions and the legal standard for parental termination:

Ms. Attorney: Okay, well the reason that is important is I know you checked termination parental rights. One of the things the courts look at is, is there a parental bond between the parent and the child. So like my answers to later questions would be different if you said he had a regular visitation schedule; he bought her clothes; he did all this other stuff versus he’s seen her once or twice. Okay, so you are interested in terminating his parental rights?

Addie: Right.

Ms. Attorney: Okay. That usually goes through juvenile court.

Addie: Okay.

Ms. Attorney: Okay. And, um, there are several factors involved in that. Probably one of the most important in that is, is there a parent-child relationship. So the court will be most interested in what happened before he went to jail, okay? Now other things that the court looks at, for example, did he buy Jasmine presents for her birthday and Christmas?

Addie: Okay.

Ms. Attorney: I, I mean these are specific questions. So after you left the hospital, he never paid child support? (Inaudible) Don’t make a big deal out of that, because the financial part is not the reason to terminate parental rights. If anything, it would be reason to keep him on it, so don’t make a big deal about that. (Okay.) But he never bought her birthday presents or Christmas presents, but did he contribute to her clothing or anything like that?
Addie: Hm-m.
Ms. Attorney: Okay, he saw her maybe once or twice? And when he saw her, was it because you asked him to, or did he do this on his own?
Addie: He did it on his own.
Ms. Attorney: And how long did he have Jasmine at the time?
Addie: Well I was there the whole time; it was probably about an hour.
Ms. Attorney: All right. That is important too. So he saw her once or twice, for about an hour and you were there. (Mm-hm.) Those will all become important. It is called a Petition to Terminate Parental Rights. It’ll go through, it would go through the juvenile court system. (Okay)

The lawyer began to counsel by describing a general legal standard (whether “there is a parental bond”) and then interviewed further about that standard, asking about presents for holidays and asking the details of the few brief visits between father and daughter. At the conclusion, she explained that these facts would be important and advised that the proper case to bring is a “Petition to Terminate Parental Rights,” and to file the Petition in Juvenile Court. The client came away with the legal standard and some idea of the evidence she needed to present to the court for the parental termination case.

At this point, the attorney returned to the client’s intake form to cover other questions the client had identified. These include custody, name change, and stepparent adoption. Each topic resulted in a short interview and personalized advice about what to do in light of the applicable law. The attorney and client returned to the parental termination/stepparent adoption to further discuss strategy.

Regarding custody, the dialogue was as follows:

Ms. Attorney: Uh, now, you are a single parent, custody has never been established—so it is assumed that you have custody?
Addie: Right.
Ms. Attorney: So, you checked custody, what were your questions on that?
Addie: Well, I wasn’t sure if I needed to like gain custody and then terminate his rights or like, how to go, what I needed to do?
Ms. Attorney: I would say go—what you need to do is file to terminate his parental rights.
Addie: Okay.

Given that the client’s goal was to terminate parental rights, that she had a strong case, and that the opposing party was incarcerated, this attorney gave the client direct and strategic advice to simply pursue a parental termination case rather than begin a custody case. This is clearly the correct strategy in this case. It is also a good example of where an attorney may tell the client what to do rather than provide the client with lengthy explanations of options.

In a case in which the biological father was able to interact with the child and could endanger the child, it might be preferable to obtain a custody order in a parentage action as an initial matter. In such a case, one would conduct counseling that provided the client with the choices of the two options.

The next topic is the stepparent adoption, which the attorney also initiated, and then returned to further advise about the parental termination action:

Ms. Attorney: Um, now you have also checked adoption?
Addie: ’Cause he wants to adopt her so he can change her last name.
Ms. Attorney: Okay, well that’s called a stepparent adoption, and y’all would have to be married for a while before you could do that.
Addie: Right.
Ms. Attorney: And, you could even do that without terminating parental rights. to What’s the father’s name?
Addie: Chuck.
Ms. Attorney: Would Chuck agree to let you adopt Jasmine?
Addie: No, he wouldn’t.
Ms. Attorney: Have you raised that issue with him?
Addie: Uh-huh.
Ms. Attorney: Okay, ’cause that, I don’t believe people should spend money on lawyers if they don’t have to.
Addie: Right.
Ms. Attorney: If Chuck would agree to it, then you wouldn’t have to go through all these termination of parental rights . . .
Um, this is not exactly a legal question, but it becomes a legal question. Does Chuck have money?
Addie: No.
Ms. Attorney: Does his family or somebody who knows him have money that they would give him for legal proceedings?
Addie: Um, they have money, but they wouldn’t give it to him.

Ms. Attorney: The reason I say that is ’cause sometimes parents, or grandparents, or other relatives, uh, have strong feelings and will loan a relative money to fight in court. And while it shouldn’t make a difference, if you’ve got someone who has $20-30,000 to fight something, and you’re scraping by, sometimes the tactics that are used can make a difference. They c’—you can generate a lot of expenses.

Addie: Well, even the grandparents, they don’t see her ever. [They (inaudible).]

Ms. Attorney: [Okay, I’m just, I’m] raising that just on the basis of experience, ’cause when you have a discrepancy in finances, sometimes it can become a pressure point. If, for example, you’re doing—taking all the money you can commit just to get it started, and he has got somebody who’s gonna do lots of depositions and discovery, you can easily spend over $10,000 before you even see the inside of a courtroom. It’s always a thing to keep in mind in the real world. How much money each side has. Um, what’s he in jail for?

Addie: Um, I know it was something to do—um. something like forcing sex on a minor, somebody under the age of 14.

Ms. Attorney: Where was his case?

Addie: I’m not sure what his term is, what his sentence is.

Ms. Attorney: Okay, so he’s in Utah—so how long is he in jail for?

Addie: Well, usually, you will have to have him served with the papers. The nice part about having somebody in jail or prison is you know how to serve them; that is not hard. And these days there are a couple ways like certified mail or things like that to getting them served. You may have to do a Notice of Transport. Because if there is a hearing, the additional thing you have to do is make sure he gets transported to the courthouse for the hearing. Now, do you live in Salt Lake County?

Addie: Yeah.

Ms. Attorney: And is that where Jasmine has lived?

Addie: Yeah.
Ms. Attorney: So this is the right county and the right state. There is federal law and state law about children. And the law talks about the home state of the minor child. And it has to be where the child has lived for six months. So if for the past six months Jasmine has lived here?

Addie: M-hm.

Ms. Attorney: And you live in Salt Lake County, so you’d file here in Salt Lake County.

Addie: Okay.

This attorney chose topics based on the checked boxes on the intake form: parental termination, custody, adoption, and name change. Had the attorney asked for a narrative at the outset, or focused on the short statement of goals on the intake form (“get parental rights taken away so my future spouse can adopt my daughter and get her name changed”), the attorney would have understood that the parental termination and the adoption were intertwined. Once she realized this, she interviewed about the option of the birth father consenting to the adoption and explored advantages to that strategy. Here, the attorney offered the client two choices, but she only briefly raised the pros and cons of the two different courses of action. This comparison led to further questions relevant to the termination case—interests of relatives, costs of litigation, type of crime, and length of sentence. After advising about jurisdiction, she returned to further discuss the termination case and to further interview and advise about the adoption:

Ms. Attorney: And you’d file a petition to terminate parental rights. And it’d be filed in the juvenile court system. He would be served the papers. Since he’s in-state, he’d have twenty days to respond. Um, it’s a civil case, not a criminal case, so he’s not going to be awarded an attorney. Um, and then what happens after that will depend on how the case unfolds. You are not in a position to adopt until after you’re married for a while. Okay? And that, that’s called a stepparent adoption. Um, that’s fairly simple, particularly if the term—if the parental rights have been terminated. You don’t have to do things, like normally with the evaluations and investigations of a regular adoption, that don’t have to be done for the stepparent adoption. Stepparent adoptions are fairly simple. You just need to get an attorney that does stepparent adoptions. But you need
to be married for a while first. Now, does Jasmine know you?

Nate: Yes.

Ms. Attorney: Are you guys living together?

Nate: Yes.

Ms. Attorney: So she’s used to you already. That’ll help.

Nate: Right, right.

Ms. Attorney: Now, does she call you “daddy”?

Nate: Yes.

Ms. Attorney: That’s all in your favor. So when are you guys getting married?

Addie: Don’t know yet, ha ha.

Ms. Attorney: Okay, alright. Well, just know, that you have t—to ring the bell on that for—the last time I checked, it was a year. I don’t know if it’s a year or three years. But you have to be married for a while. So the stepparent adoption is a ways down the road.

Nate: Okay.

Ms. Attorney: The ter—termination of parental rights, how long does that take? Depends on what happens. It—you know, it’s one thing if he doesn’t answer; it’s another thing if he either answers—if he writes anything to the court, he doesn’t have to have a lawyer. But, if he sends an answer to the court, that means you’ve got to go on Plan B. Plan A is if he doesn’t do anything and you can default, that’s fine. Although the court doesn’t like to do those kinds of things. If he answers, that means you have to set up a hearing. And so how long it takes could depends on what happens after that.

Addie: Okay.

The attorney contrasted the “fairly simple” stepparent adoption to other adoptions, about which the client probably knew nothing. Here again, the lawyer both interviewed (child’s relationship with stepfather) and advised (the relationship will help), and provided more explicit recommendations (“ring the bell” on getting married) and assessments as she learned additional facts about the client’s situation.

It is of note that the attorney did not know the exact length of time the parties must be married before the stepfather can adopt, and admitted that she did not know. In most of these consultations, the attorneys admit they do not know something or are unable to predict an outcome. If it were important to give this client the precise answer, the lawyer could have
accessed the Internet and read the adoption statute. Declining to get the answer, but highlighting the issue in this way, probably struck the right balance between efficiency and efficacy.

The client’s intake form stated the question: “How can I go about this without hiring a lawyer.” Having already advised them to hire a lawyer, Ms. Attorney turned to this question and explored potential options with the clients:

Ms. Attorney: What else did you say? Uh . . . How do you go about this without hiring a lawyer? <laughs>
Addie: Yeah.
Ms. Attorney: The last time I checked, there were not forms to terminate parental rights.
Addie: Oh, really?
Nate: Right.
Ms. Attorney: Or you could go to the front office is where the clerks are. Do you know where that is?
Addie: No, I don’t.
Ms. Attorney: Well, you know how you came in the front and went through security?
Addie: Yes.
Ms. Attorney: If you turn half a circle right after you went through that, the last office is the clerk’s office. And they’re often very helpful. You could just go in there and say, “Are there forms for terminating parental rights?”
Addie: Okay.
Ms. Attorney: And if the forms are there they’ll tell you. They can’t give you legal advice, but they’re usually very knowledgeable about what forms exist.
Addie: Okay.
Ms. Attorney: The program’s online—do you have access to a computer?
Addie: Yes.
Ms. Attorney: It’s called OCAP—Online Court Assistance Program. That also has a list of all the forms that are there.
Addie: Okay.
Ms. Attorney: And when you get on the one form, it talks about once you, well, different kinds of things. And I don’t remember if terminating parental rights is its own category. There is a category for custody, but that’s not what you want. And the other thing you need to know is that it’s juvenile court, not district court. It’s on the second floor of this building. It has its own set of judges; its own set of rules. And so those are the two things. Kind of a one-two process: terminating the parental rights and then at some point in the future, a stepparent adoption.

Addie: Okay.

Ms. Attorney: Okay? Two different procedures. You want to know how to do it without an attorney. There is a new thing that they have just started. It’s called bundling and unbundling services. You don’t have to hire a lawyer and pay a big retainer. What you can do is, for lawyers who do it, you hire them just for a specific purpose. Like, I’m not asking you to take on the whole case, I’m just asking you to draw up the initial papers. And so, you can hire a lawyer just to do the first papers for you. Then, if you want, you can go back and just talk to that lawyer about what to do next, if he answers or if he doesn’t answer. So it’s called unbundled services. So it’s not exactly not doing it, not using a lawyer, but limiting how much you would have to pay. And so that’s what you’d be looking for, is unbundled services. And they’ll do just what you want, just draw up the first papers for terminating parental rights, or draw up the first papers and giving you most of the steps that would be. Usually, people who do it do it at the beginning, and then if there’s no answer, they’ll hire the lawyer to draw up the papers at the end. That way, you know it’s getting done right, but you’re not having to pay for a lawyer for all of that other stuff.

Addie: Okay.
Ms. Attorney: Okay, so that’s as close as I can come to “not hiring a lawyer.” I just don’t think, you know, Jasmine’s got so much riding on this, I don’t know if you can do terminating parental rights without. Maybe, maybe you know what you want to do is consult a lawyer and ask the lawyer, “Do you think we could do this ourself?”

Addie: Okay.

Ms. Attorney: And see what the lawyer says. My opinion as a lawyer is “no you can’t.” But find a lawyer who disagrees. There are lots of good lawyers out there with different opinions. Or you might want to just hire a lawyer to draw up the first papers.

Addie: Okay.

Ms. Attorney: And give you a list of what would happen next.

Addie: Okay.

Ms. Attorney: Look into that unbundled services, because that’s usually, not always, but usually cheaper.

Addie: Okay.

Ms. Attorney: The reason I say not always is sometimes people wind up going back to the lawyer—one lawyer told me that she did a separate contract for each thing she did, and she’d done like thirty contracts, and she said it would’ve been cheaper for the man just to hire me, but he felt more comfortable just having the lawyer do specific things. Like you can also hire a lawyer just to show up for a hearing.

Addie: Oh, [okay.]

Ms. Attorney: [Know] what I mean? So this unbundled services is fairly new. Uh, and I think people are—it’s, it’s kind of like an accommodation between trying to do it yourself and spending thousands of dollars retainer on a, a lawyer.

Nate: Right.

Ms. Attorney: So it seems to be meeting a need, and so you might want to think about that.

Nate: Okay.

This exchange makes clear that this attorney approached the consultation as an opportunity to give the client an idea about her legal rights and remedies, rather than instructing her on how to proceed pro se. Throughout the conversation, and especially when advising how costly a parental
termination case could be, it is evident that this attorney had been thinking the client would hire an attorney to represent her in this case. This is demonstrated when the attorney first laughed and then later opined that she did not believe the client would be able to proceed pro se. The attorney identified two alternatives: (1) looking for online forms; or (2) hiring a lawyer for limited scope legal services. Giving the client these two choices appeared to be consistent with the literature regarding client counseling.\(^{70}\) While the attorney did not explore the pros and cons of each choice, or predict the likely outcomes of each approach, she did describe how unbundled legal services work and where to obtain the necessary forms, if they do in fact exist.

Ms. Attorney began to wrap up the consultation by restating her advice concerning the stepparent adoption when the client raised an issue that was identified in the intake form, but had not yet been discussed—changing the child’s name:

Ms. Attorney: And then you hold on to the stepparent adoption until you’ve been married.
Addie: Okay.
Ms. Attorney: And you know, you could actually go online and key in “stepparent adoption” and it will tell you what the current laws on how long you have to be married before you’re eligible.
Addie: [Okay.]
Nate: [Okay.]
Ms. Attorney: Okay, as I remember it’s either one or three years.
Addie: And then at that point can you get her name changed? The last name changed?
Ms. Attorney: For a single parent, you can do whatever you want.
Addie: Can I? Do I have to terminate the rights before I can change her name?

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\(^{70}\) See Binder et al., supra note 48, at 300 (clarifying objectives, identifying alternative solutions, identifying consequences of alternatives, and deciding); Ellmann et al., supra note 48, at 72 (recommending that the attorney should clarify goals, identify the choices to achieve the goals, predict outcomes, and identify the consequences); Herman & Cary, supra note 48, at 63 (recommending an attorney address six questions: What is your client’s factual and legal situation? What are your client’s objectives or goals? What are the pros and cons and likely outcomes of each option? Which option should your client choose? And [sic], How will the option chosen be implemented?”); Krieger & Neumann, supra note 48, at 231 (identifying goals and analyzing each potential solution).
Ms. Attorney: The last time I checked, it’s a policy in Salt Lake County. So you won’t find the statute or regulation in Salt Lake County, the last time I looked. If you’re an unmarried mother, you can give your child any name you want to. Now, I don’t know—are you going to change your last name when you two get married?

Addie: Yes.

Ms. Attorney: Okay, I wouldn’t change your child’s last name until you get married.

Addie: Right, okay.

Ms. Attorney: [Inaudible] You could give your daughter about any name you wanted when she was born. You could call her Princess Bride or

Addie: Right, ha ha.

Ms. Attorney: Or Princess Leia.

Addie: Right.

Ms. Attorney: So you can, you don’t have to, I mean that’s different. Unless you, did you sign some kind of an agreement with the father that you would leave the name the same?

Addie: No.

Ms. Attorney: Okay.

Addie: Okay.

Ms. Attorney: That you can do by yourself.

Addie: Okay. Alright.

Ms. Attorney: I’m sorry, is that good enough?

Addie: Yes, that’s great.

Nate: It works.

The attorney provided some legal information that is not germane to the consultation (that a parent can select any name at birth), but interviewed about the client’s plan to change her own name upon marrying the fiancé and then advised the couple to wait until that time before changing the child’s name. Perhaps the attorney did not provide the information that a name change is typically part of an adoption case because she was focusing on concluding the conversation in a timely manner.

This counseling session was also quite far-ranging. However, all of the issues explored—parental termination, stepparent adoption, name change, custody, and proceeding without an attorney—had been conveniently identified by the client on the intake form. The legal issues explored are
typical parts of a stepparent adoption, and evidently the attorney relied upon information on the intake form to interview and advise the client.

In this consultation, the attorney never provided advice or information without first collecting relevant facts from the client through her own direct questioning. This approach not only allowed the attorney to inform the client of the legal standards that apply, but also allowed the attorney to highlight the facts that were needed in order to meet the legal standards. Typically, the attorney would conduct further questioning as she was advising, so that the rhythm followed the steps: questioning, advising, more questioning, more tailored advising.71

This attorney also addressed strategic questions, such as whether a custody case should be brought before a termination case (not in this case), and whether the unwed father had money or family with money who would cause difficulties. Furthermore, the attorney offered practical advice, including the following: the client and her fiancé ought to marry promptly to move forward with this case; the couple should wait on any change to the child’s name until the mother’s name has changed through marriage; and the couple should consider hiring an attorney for limited scope legal assistance.

This consultation was straightforward because it concerned a “new” case and was a “strong one” at that. A strong point of the consultation was the personalized legal advice due to the sufficient questioning. Its minor weaknesses were the failure to learn about the interrelated issues through a client narrative and the inclusion of more information than the client needed or was capable of understanding (e.g., naming rights at birth, service of process in prison, and orders to transport from prison for a hearing).

D. Enforcing/Modifying Vic’s Visitation

After three minutes and twenty seconds, the attorneys began to give Vic their opinions that he was in fact “doing the right thing.” Additional interviewing occurred with further attorney affirmation—“you’re actually doing a really good job here”—followed by more questioning, so the “counseling” portion of the consultation began at 5:28. At this point, the attorney began to explain that Vic may not be able to achieve his goal of eliminating the requirement for supervised visits through the procedural path he was on, but it was worth a try:

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71. See, e.g., ELLMANN ET AL., supra note 48, at 20 (recommending that the attorney should allow the client “to describe her problem and related concerns” followed by “fact exploration” where the lawyer asks more detailed questions).
Vic: So basically, I need to know, do I need to hire an attorney for? Because, like, I go back on the 12th. [I want to know]

Ms. Attorney 1: [Well, here’s what could happen,] here’s what could happen. You could get in front of a judge and the judge could say, “you know, you can’t really do this by motion. What you really want, what you’re trying to do is modify or change your decree of divorce. (Hm-hm.) And so you need to file a petition to modify.” So the judge may or may not let you do this by motion—does that make sense? Do you understand what I’m saying?

Vic: Okay. So basically I’ll have to [inaudible.]

Ms. Attorney 1: [There’s a possibility.] She may say (She may say) “Oh, you can do this by motion and I don’t see why you guys agreed to something, and I don’t see why we can’t do it.” But, under the rules, if you’re going to change the decree of divorce, you do it by a petition to modify—that’s a whole new pleading that you file with the court. And you have to pay—I don’t know how much it is—it’s probably like three hundred and some?

Ms. Attorney 2: Yeah something like that, like two-fifty.

Ms. Attorney 1: [It’s pretty expensive.]

Ms. Attorney 1: [So with the petition] to modify, you have to allege that there has been material change of circumstances—something has really changed (Hm-hm.) since your divorce, and that this supervised part should be taken off. So I’m not sure whether the judge will let you do that by a motion or not, but it’s good to try.

Vic: I’ve never had supervised visits, ever (Right.) since we’ve been divorced; she’s just dropped him off.

Ms. Attorney 1: And, and that’s certainly, and I think that’s how you can probably get in, [by saying]

Ms. Attorney 2: [Well, and what’s in] the divorce decree [though?]

Ms. Attorney 1: [Supervised] visits.
Vic: Supervised visits.
Ms. Attorney 2: Okay.
Ms. Attorney 1: But he’s saying he [hasn’t even]
Vic: [I’ve never].
Ms. Attorney 1: Got them.
Vic: I’ve never had them.
Ms. Attorney 1: So, this is a motion to enforce visitation, “and by the way, judge, let’s drop the supervised part.” And I think she’ll allow you to do that. So I think you’ll be okay, if you want to, going on your own. You know, if you want an attorney to represent you, it’s not a bad idea (Girlfriend: Maybe if) but you seem to be doing pretty well.

Girlfriend: So, maybe if this doesn’t work, (Yes, yes.) and the judge says go back (Yes.) and [then maybe look into it.]
Ms. Attorney 1: [Yes, I would agree with that.]
Vic: ’Cause she had an attorney, then they just all of a sudden, they just dropped it. We’re sittin’ there, and she didn’t show up, but she didn’t even call the court or nothing. Before I got there, I literally called his office and ask him what happened. (Mm-hm.) And she’s just like, well, what’s going to happen, and she’s not comin’ and so, therefore, I thought I would win. But I didn’t; she, she really couldn’t, she said she’s a pre-judge [because]
Ms. Attorney 1: [Yes, she’s] a commissioner.
Vic: So she didn’t get all the facts in, and I’m like, I gave her everything pretty much. So I just wanted to know, so you think I should just.
Ms. Attorney 1: I think you should run with it.
Vic: Run with it?
Ms. Attorney 1: Yeah, just understand that it’s possible that the judge could say at some point, you know, “if you want unsupervised visits, you need to change your divorce decree. We’re not going to do it by motion.” But you might be able to get in this way.
With two attorneys, the client, and his girlfriend present, there was a lot of over-lapping talk. In addition, the attorneys appeared to disagree at one point. Both of these factors may have made this conversation somewhat confusing for the client.

Nevertheless, this counseling segment seemed to be effective. Attorney 1, the primary counselor, took the task of explaining what may happen in court by enacting what a judge might say. Posing as a judge, Attorney 1 delivered the news that this may be the wrong procedure. The attorney also illustrated that the judge might find the procedure acceptable, again quoting the hypothetical judge. Later, Attorney 1 provided the language that the client might use to argue his point and concluded by quoting the hypothetical judge, instructing the client to use a different process. It seemed as if the attorney’s enacted dialogue would be helpful to the client in preparing for and appearing at a hearing.

The attorney also explained the difference between the client’s chosen procedure (a motion to enforce the decree) with the technically appropriate procedure (a petition to modify the decree). The attorney differentiated the two by defining “modify” as “change” and by describing the “petition” as a “whole new pleading” that is filed and for which one has to pay filing fees. Ultimately, the attorney suggested that the client should go forward with the current procedure to see if the judge would be open to it, seeing as the opposing party had previously agreed to eliminate the supervision during mediation and had never actually enforced this provision in the decree. The girlfriend appeared to understand the advice, as evidenced by her comments. The client, who had not been permitted to give a narrative, volunteered that he had exercised unsupervised visitation. He then relayed the events of the last court hearing when the opposing party and her attorney did not appear, but the judge (a commissioner) rescheduled the hearing instead of ruling in his favor. These insertions appear to be driven by the client’s need to tell his story and express his frustration. The client ultimately returned to reiterate the attorney’s advice that he should “run with it.”

The girlfriend then chose the next topic, which dealt with payment for supervision, and expressed her opinion regarding the inappropriateness of supervised visits:

- Girlfriend: Legally, if she’s requesting supervised visits, does she have to be the one to pay for it?
- Ms. Attorney 2: [No.]
- Girlfriend: [If it’s] by her request?
- Ms. Attorney 2: No.
- Ms. Attorney 1: It’s—they both agreed to it. It’s not just
Vic: [her request.]
Ms. Attorney 1: [No, I didn’t] agree to it.
Vic: See when I sign
[When I signed]
Ms. Attorney 1: [Yes, you]
Vic: Yes, so I did.
Ms. Attorney 1: Yeah. And it’s silent about who, um, it says “all visitation shall be supervised by an adult at the sole discretion of (Right.) the petitioner.” Well, but, but, she has to be reasonable. (Mm-hm.) And if you’ve got a good family member, and if it’s a very legitimate option, then she should go for it. And the judge can compel her to. So I think you’re, you’re okay there. It doesn’t have to be paid for; it doesn’t “shall have to say it shall be supervised by a professional (Mm-hm.) supervisor.” (Mm-hm.) It just says by an adult. But, it is in her sole discretion. But again, she has to be fair and reasonable. She can’t just say, “Well, you’ll never satisfy me, so you’ll never get visitation.” It doesn’t work that way.
Vic: But this is what she’s been doing.
Ms. Attorney 1: Right, and that’s why you go to court.
Vic: [This is what]
Ms. Attorney 1: [You say,] “You know what, I don’t like this supervised visitation. But I can work with it. Here’s my dad. He’s willing to do it.” She even agreed to it.
Vic: [She did.]
Ms. Attorney 1: [The judge] is going to order it, I think.
Girlfriend: And can he go in and claim, I mean, ’cause really, I guess in my opinion, when you have a child and he’s with his dad, it’s not really normal to have somebody.
Vic: ['Cause he’d come for the whole weekend.]
Girlfriend: [tagging along twenty-four hours a day.]
Vic: Yeah, since I, since I signed that, I
Ms. Attorney 1: You can go back on a petition to modify it and say, “You know what, things have changed completely.” (Mm-hm.) You have to think about how things have changed. (Mm-hm.) But,
maybe you were doing some things way back then that you’re not doing now. (Mm-hm.) Maybe there was a reason why she wanted supervised visits.

Vic:  

Well, that’s what I’m saying, way back then there wasn’t any problems. But when I acquired a girlfriend, it was just all of a sudden, she just wanted to throw it out there.

Ms. Attorney 1: Well anyway, I think you’re definitely, this is the right approach.

Vic: Okay.

Ms. Attorney 1: Because you’re saying, “My dad can be the supervisor,” (Okay.) so you’re not now really trying to change things; you’re just trying to enforce things.

Vic: Yeah, and she said this, I mean like, me in the mediation, she was like, “After three months I’ll drop it [if everything].”

Ms. Attorney 1: [Yeah.] that’s great. Then you two can agree to change your decree of divorce. It sounds like when she’s actually brought into the room with a mediator she behaves well.

Vic: Yeah.

Girlfriend: Yeah.

Ms. Attorney 1: But when she’s left to her own devices things get—You might actually want to bring her back to mediation and have her sign something right there, even handwritten, (Mm-hm.) with a mediator there. (Mm-hm.) Don’t wait until next week when she doesn’t like you anymore.

Girlfriend: Yeah, ’cause that’s what happened [inaudible].

Ms. Attorney 1: M’kay.

Again, there were multiple overlaps with the client, Vic, attempting to tell his story (see italics). Vic asserted he “didn’t agree” with supervision, perhaps referencing his feelings about the necessity or appropriateness of supervision. The attorneys were both oriented to the legal fact of his agreement, as expressed in the court papers. Vic came to accept that, as a legal matter, he agreed to these terms. Ms. Attorney 1 read the provisions of the decree and again showed Vic, through dialogue, how he might argue his case to enforce the decree with supervision by his father. Both the
girlfriend and Vic returned to argue the unreasonableness of supervision, with the girlfriend asserting it is not normal to have supervision, and Vic sharing that he regularly had the child for the entire weekend.

This protest caused the attorney to return to the idea of filing a petition to modify the terms of the divorce decree, because “things have changed completely,” and positing that maybe there were reasons for supervision in the past that have changed. This caused Vic to try to tell his story again, alluding to his prior assertion that the child came regularly for the entire weekend without supervision, asserting that the only change was his “acquiring a girlfriend,” and noting that the ex-wife had agreed to drop the supervision during the mediation.

The lawyers had previously failed to interview as to the initial reason for a request and order for supervision. Perhaps they believed Vic’s story that he “just signed” agreeing to her petition “to be out of the divorce,” or perhaps they thought it impolite to inquire about past problems in the presence of the girlfriend. This may have caused Vic to feel that he was not heard and prevented the lawyers from giving Vic personalized advice about how to prepare or argue a petition to modify. The attorneys advised him to, “think about how things have changed,” and neglected to tell him that because the ex-wife permitted unsupervised visitation for an extended period, a substantial change in circumstances had occurred, justifying the requested modification. This is one way in which less thorough interviewing unnecessarily led to an informational session rather than personalized advice.

The girlfriend further pursued the topic of filing a petition to modify by asking about fee waiver forms and whether the “household income” is Vic’s income or their joint income. The next topic was selected by Vic: whether he should have to pay for Montessori school tuition.

Vic: Then another thing about what I go see—you know, like my child support? She has him in private school. But I, you know, since I signed this, does that mean that I should be paying for the—I mean, I pay child support plus the school. The school’s like a private school, so it’s like a Montessori, so it’s like $900 a month.

Ms. Attorney 1: Let’s see if it . . . child support, child support, insurance. In this divorce decree it might be too broad in general to state it . . . . . . You know, I don’t think that this agreement, it doesn’t look like you have the whole thing here. But, I don’t think this is detailed enough to handle, like private school and
things like that.

'Cause she enrolled him in private school, and then, [inaudible] then put it under the ORS, so they're automatically taking that from his checking too.

Well you know, I don’t see . . . I don’t see anywhere in there that obligates you to pay half of educational expenses. They’re in private school?

Vic: Mm-hm.

It sounds like a choice that she made. You have to just kind of pour over your document and see, you know, you pay half the cost of the educational costs of the kids, then you do. (Mm-hm.) But if it doesn’t say that you do, I would say, “Hey, I’m not up for this.” And if ORS is taking it, then I would go to make an appointment, and take this with you, and say, “It doesn’t say anywhere in here that I pay for this.”

I think it does say in there. But it says, ’cause I read through it, and it says that he pays half, but if she doesn’t provide him with the information as to what school, where, then he’s, he’s not, he could be not responsible.

Okay, if that’s what it says. You have to kind of look through.

And she hasn’t done that. But if she does, then is it her discretion as to where he can go to school?

If she has legal, sole legal custody, then she makes all the decisions. If they had joint legal custody, then they make the decisions together.

Okay, so, so that means that if she has sole custody that means that, uh, I have to pay for all the education? Half of it?

If it’s in here. And you think it is in there?

I think I did read that.

It does say that she, she has sole custody.

That’s for insurance.

I think it was right around there somewhere.

Well it does say—I know there’s a provision for, um, education costs, meaning like daycare relating to education.
Attorney 2: Yeah.
Ms. Attorney 1: But I don’t think that’s it. I mean that’s if she’s going to school, and she needs day care.
Ms. Attorney 2: Her share of childcare expenses.
Ms. Attorney 1: Yeah, childcare expenses . . . . What are the, yeah, okay there it is. Okay, so “both parties shall share equally the work-related, career, or occupational training related child care expenses.” And that means, you know, when you get day care for your kid, you pay half, of course. But it doesn’t say you pay half of their private school tuition. That’s what we’re looking for now, to see if there’s a clause that says that.
Ms. Attorney 2: Yeah.
Ms. Attorney 1: These are [subcategories].
Ms. Attorney 2: [These are all] childcare, huh.
Ms. Attorney 1: And then there’s life insurance, debts, see that’s what—this doesn’t seem to me like the type of document that’s detailed enough to get into private schools. It’s very stock.
Girlfriend: So how would he go about getting that?
Ms. Attorney 1: I’d go to ORS if they’re taking it, and take your thing (Okay.) and say, “Hey, it’s not in here, why are you taking it out?” (Okay.)
Girlfriend: Yeah.
Ms. Attorney 1: You do a motion in court just like you did here, and say you shouldn’t be responsible for private school when I didn’t agree to be in my decree.
Girlfriend: And maybe, I, maybe the way she’s, I mean ’cause it’s pre-school, so it’s day care. But it’s still a Montessori school I guess. I don’t know if that’s like.
Ms. Attorney 1: Oh, so it is kind of like a daycare?
Girlfriend: Well it’s still private; it’s still a private institution.
Ms. Attorney 2: It’s a Montessori pre-school that she has him in?
Girlfriend: Exactly, exactly.
Ms. Attorney 2: So she’s not dropping him off at someone’s house to play with blocks all day. It’s like structured educational environment?
Girlfriend: Exactly, exactly.
Ms. Attorney 1: I think it’s not covered in your divorce decree.
Ms. Attorney 2: Yeah, it doesn’t sound like it.
Ms. Attorney 1: So I don’t think you should have to pay for it.
(Okay.) Well, I think we’ve pretty much covered it.
Does it make sense?
Vic: Yes.

Here, the attorneys accepted Vic’s characterization (“private school”) and attempted to answer his legal question by looking through the decree, without interviewing him about the situation. They forgot there is just one child (referring to “they”) and did not interview about the child’s age, or explore whether this expense could be childcare for a pre-school child. Despite Vic’s statement that “it’s like $900 a month,” the attorneys did not explore what is $900 a month (His total support? The total cost of the school? His share of the school expense?), or explore whether this cost was reasonable for childcare. After reading the clause related to childcare expenses, they explained it: “And that means, you know, when you get day care for your kid, you pay half, of course. But it doesn’t say you pay half of their private school tuition. That’s what we’re looking for now—to see if there’s a clause that says that.” Because they did not interview him about the facts, they rendered an uninformed opinion that the decree did not cover “private school tuition.”

It is only after the attorneys advised Vic to file a motion to correct this charge that the girlfriend shared how she thought the ex-wife might approach the situation, explaining that it is a pre-school, “so it’s day care” (see italics above). As with Polly admitting to violating the Protective Order, this is an example of the client’s companion pressing bad (but relevant) facts on the lawyer, so that the lawyer can give the most informed opinion.72 The girlfriend sharing the relevant and truthful information is consistent with philosopher Grice’s maxims of cooperation in conversation.73

The attorneys confirmed the fact that it is a “Montessori pre-school” and “kind of like a daycare,” but did not explore the costs, how they compared to other childcare institutions, whether the costs were incurred to allow the mother to work or go to school, or whether Vic knew of a cheaper child care alternative (such as spending parent time with him). Instead, they stayed anchored to their previously stated opinion, even when confronted with the fact that this “tuition” was for a pre-school that was essentially high-quality day care.

Here, Vic did not get the same careful attention to detail and discussion of strategy that he received regarding his right to visitation. While he may

72. See Smith, Client-Lawyer Talk, supra note 43, at 530-34; see also Grice, supra note 66, at 45.
73. See Grice, supra note 66, at 45.
have an argument that he is being charged too much, it is doubtful that a judge would eliminate the charge entirely when the mother needs the child to be in a preschool childcare center while she works.

VII. ANALYSIS OF COUNSELING SEGMENTS

In all four cases, the attorneys turned to providing information and advice very early in the consultation (forty-two seconds, two minutes, two minutes and forty seconds, and three minutes and twenty seconds). Thereafter, the dynamics of the consultations were brief questioning followed by advice on one topic, then brief questioning and advice on another topic. The advice and information covered a broad array of topics in each case.

1. Effect of Missing Narratives

The lack of initial client narratives and insufficient questioning created difficulties in some consultations, which became clear when the clients provided the attorneys with their complete stories.

The attorney advised Polly on what to file, then discovered she had already filed the needed document. The attorney advised what to argue without knowing whether there was a factual basis for the argument. As the attorney was silently searching the court docket, Polly volunteered very relevant and damning information (that she “was arrested for violating the protective order . . . and . . . spent a year in jail for it.”). This information suggested that the attorney’s prior advice to argue the Protective Order “isn’t needed” will not have much success. But the attorney did not recalibrate the interview and adjust his advice accordingly. Polly went away with the statutory language about dismissing protective orders, but without personalized advice about how to argue her case.

Similarly, Vic’s attorneys appeared not to understand his interjected narratives that his ex-wife regularly permitted him to have weekend-long unsupervised visits, and has only insisted upon supervision because he has a new girlfriend. Nor did they interview to learn the alleged reason for supervision. Accordingly, they gave him the general standard for modifying a divorce, but asserted they did not know what changed, and failed to provide personalized advice about how to plead and argue a petition to modify. The attorneys opined that Vic should not be obligated to pay the Montessori school tuition before his girlfriend revealed that it was a Montessori pre-school, “like day care.” However, they failed to gather further information or to reconsider their opinion upon learning this important fact.
Polly’s, Vic’s, and Vic’s girlfriend’s desires to fully explain their situations drives home the importance of the narrative.\textsuperscript{74} It also illustrates the cooperative principle that the client will be informative on the topic and say as much as required.\textsuperscript{75}

The other way in which the absence of narratives created challenges was the amount of overlapping speech and interjected explanations. Polly insisted on a narrative while the attorney looked up her docket. Vic often inserted brief narratives to explain himself in response to questions that only called for short or yes/no answers. Diane occasionally returned to the story she shared on her intake form when the attorney’s questions appeared to forget the crucial facts that her husband had abandoned and failed to support her and the children and that they were left homeless. These examples show that the clients wanted to be understood. Allowing a narrative and remembering the facts shared in that narrative would improve not only understanding, but also rapport.\textsuperscript{76}

Only in Addie’s case was the absence of a narrative not problematic. This may be because her attorney always questioned her before advising and as a result provided uniquely personalized counseling, rather than general information.

2. Content of Counseling – Advice and Information

In Addie’s Stepparent Adoption case, the attorney first advised about parental termination, then turned to stepparent adoption, and then to name change. Ultimately, the attorney linked them together from a strategic point of view, and advised that it would be ideal to get the father to consent to the stepparent adoption in order to avoid litigating a parental termination case. The attorney also advised that changing the child’s name should await the client and fiancé’s marriage. The attorney advised that the client did not need to pursue a custody case first. She also recommended hiring an attorney to provide limited scope representation, as it would be difficult to do these cases \emph{pro se}. This attorney learned sufficient information about the facts and goals to provide personal counseling, encouragement, and strategic advice on each issue. However, she sometimes provided more information about the law and legal proceedings than was needed at that point.

Each of the other consultations involved some personalized counseling coupled with some legal information that \emph{may} have been useful for the

\textsuperscript{74} See, \textit{e.g.}, Smith, \textit{Client-Lawyer Talk}, supra note 43, at 519.

\textsuperscript{75} See Grice, \textit{ supra} note 66, at 45; see also Smith, \textit{Client-Lawyer Talk}, \textit{ supra} note 43, at 530-34 (discussing Grice’s cooperative principles in relation to legal interviewing).

\textsuperscript{76} See Smith, \textit{Client-Lawyer Talk}, \textit{ supra} note 43, at 520.
client, but could have been more personalized had further interviewing occurred. In Vic’s Visitation case, the attorneys managed to explain the difference between enforcing an existing order and petitioning to modify the order. The attorneys advised strategically that the client should attempt to do both at one hearing, but warned that it may not be possible to modify the order to remove the required supervision without filing a separate petition. The attorneys explained that a petition to modify is an entirely new case, requiring court fees, and a material change of circumstance, but did not interview sufficiently enough to be able to counsel Vic on what to argue in such a petition. The attorneys modeled the dialogue of what the judge might say and what the client could argue at the upcoming hearing. This strategic advice and concrete demonstration seemed particularly useful. This was a complicated situation, but the client and his girlfriend took away a good understanding of the case’s posture and the ways they might need to proceed.

In Diane’s Divorce, the attorney provided a tour de force, which covered a dozen topics, including: acquiring an attorney (through Legal Aid or privately and having the husband ordered to pay); using the OCAP service for completing pleadings; using the Legal Aid office for help with the pleadings; filing for temporary orders to get child support and custody; procuring an order to remove the husband from her health insurance; seeking alimony; the process for serving the husband; the time involved; the divorce education class; possession of the parties’ cars; and responsibility for the parties’ debts. The attorney identified alimony as a possible goal, and explained and illustrated how the need for alimony is assessed. Unfortunately, the attorney did not provide this same level of personalized counseling regarding child custody, which the sister raised as a point of conflict. This counseling session included a great deal of advice on how to go about doing something. The attorney’s focus on filing the petition and bringing a motion for temporary orders seemed entirely sensible in light of the client’s lack of any support and concerns about custody and health insurance premiums. A nagging question is whether the attorney covered so much territory that the client may be unable to remember or act on much of it.

Polly’s Protective Order case included largely legal information, rather than personalized legal advice. The attorney told her, in general, what to argue at the hearing, without exploring the facts to see what argument might be viable. Also, he informed her that she would need a criminal specialist to attack a criminal conviction, and that the DA could charge perjury or violation of a protective order. It could be argued that providing this accurate legal information was the most sensible and respectful thing to do, as the client appeared to have little chance of success with any of these
goals. The attorney was personally helpful by researching the case record, as he discovered the notice for the hearing may not have been served on the other party, and emphasized the importance of service. The attorney appeared to recognize the client’s emotional upset over not having seen her children, and volunteered that she could petition to modify the terms of the divorce decree if they were unfair. It is possible that this client sought to vacate the protective order so she could contact her ex-spouse and arrange to see the children, and the attorney was imagining this ultimate goal when he advised about the modification. It is unfortunate that the attorney did not initially explore the client’s “real life” goals to understand why she wanted the Protective Order dismissed. Had that occurred, the consultation might have more usefully focused on the client’s goal of reestablishing contact with her children, rather than the instrumental goal of dismissing the Protective Order.

In very short periods of time (sixteen to thirty-three minutes), these attorneys interviewed, analyzed, and provided both information and some personal and strategic advice to these clients on many issues. Yet, the tension between efficiency and effectiveness remained. Because so much information and advice was conveyed, one must wonder how much has been understood and will be retained by the clients. Although the attorneys did occasionally ask if the clients “understood,” they did not do anything to test the clients’ understanding.

3. Structure of the Conversations

The structures of the counseling conversations did not look like the client choice counseling contemplated in textbooks.\footnote{See, \textit{e.g.}, \textsc{Binder et al.}, \textit{supra} note 48, at 300; \textsc{Ellmann et al.}, \textit{supra} note 48, at 72; \textsc{Herman \\& Cary}, \textit{supra} note 48, at 63.} The organization of the counseling was not anchored in describing two or more possible courses of action, predicting the consequences of each course of action, and weighing the pros and cons of each course of action. Instead, much of the counseling involved explaining the one process the client needed to follow or the essence of the argument the client needed to make. Diane’s attorney repeatedly returned to the need to file a complaint and then a motion for temporary orders. Polly’s attorney emphasized the need to obtain service on the opposing party and the essence of the argument that the protective order “isn’t needed.” Vic’s attorneys demonstrated how Vic should argue that the visitation order be enforced and hopefully changed. In providing this advice, the attorneys were thorough, worked to define legal terms the client may not have understood, and sometimes illustrated how the client might draft or argue a position.
While the conversations were not structured as choices amongst options, the attorneys often described options to the clients. Diane was invited to consider self-representation, hiring an attorney, and seeking to have her husband pay the fees. Addie was invited to consider seeking forms or hiring an attorney for limited scope representation, as well as seeking consent to the stepparent adoption rather than litigating a parental termination case. Vic was invited to try to proceed with his enforcement action, but turn to a modification action if needed; and to consider further mediation. Polly was invited to consider filing a modification action to address the inequities she felt from her divorce. In these ways, the counseling was client-centered and respectful of the clients’ feelings and desires.

The clients themselves did much to structure the consultations by posing particular questions in the intake forms and by posing even more questions during the consultations. “Here again, conversation analysis suggests that the client is as much in charge of the attorney-client conversation as is the attorney.”78 Yet, these many client (and companion) questions contributed to extend (and perhaps confuse) the consultations.

VIII. ENDINGS

Some consultations end almost as abruptly as they begin, while others have a more extended ending. In Polly’s Protective Order case, after the attorney counseled her that “it’s not in vain” to bring a modification case to let her son know she wanted to have a relationship, he concluded: “Okay, so those are really your main issues. Let me take you down to show you those motions to modify.” He then escorted her to the Legal Aid office on site where forms were available. The entire consultation lasted almost twenty-seven minutes.

Diane’s Divorce consultation began to end with the attorney asking if there were “any other issues” and the client’s sister stating, “No, I think you answered the main questions that we had to get her started . . . And if not, we’ll be back on the next Wednesday.” The attorney then returned to further advise on the topic of hiring an attorney or proceeding pro se:

And if he goes out and gets an attorney, I’d strongly recommend you looking into it. I would still look into it as an option and see if it’s a good fit for you. In some cases, you’re just paying for convenience . . . . And in some cases you’re paying because you really need an advocate too. Each case is different, but tons of cases go forward without an attorney too, so.

The client then asked one further question about fee waivers (If you don’t qualify for Legal Aid, could you get your fees waived?) to which the attorney responded that she didn’t “know the guidelines.” Ultimately, the attorney ended the consultation by offering to give the client the survey for this study. This consultation took the most time—slightly over thirty-three minutes.

In Vic’s case, one attorney began to end the consultation by asking Vic to complete the survey, and the second attorney reflected on Vic’s goal. This provided yet another occasion for Vic’s girlfriend to insert a small narrative about his circumstances. This, in turn evoked further reinforcement, offers for further help, and best wishes from the attorneys:

Ms. Attorney 1: What’s your last name, Vic?
Vic: Robbins.
Ms. Attorney 1: Okay, would you guys mind filling this out? (Mm-hm.) And this is just, they’re doing a study.
Vic: Just to follow up?
Ms. Attorney 1: [Yeah.]
Ms. Attorney 2: [Yeah,] and the bottom line is you want to see your kids right?
[Vic wanna see your kid, right?]
Vic: [Yeah, I mean it’s been four months. It’s ridiculous.]
Ms. Attorney 2: So, yeah, you’re doing the right thing.
Girlfriend: He, you know, offered to be flexible—whatever she wanted. He was totally an open book. He was like, “Come to our house, see where we live, see our environment, meet my friends, meet whatever you want, like I’ll be willing to do” and she’s just-
Vic: Yeah, she just kind of blew me off.
Ms. Attorney 2: Yeah, she’s obviously not very happy with you.
Client 1: She wasn’t happy . . . . .
Ms. Attorney 1: [So]
Vic: [What, I] need to take this back over there?
Ms. Attorney 1: What you do is you just put it in that pink box (Okay.) up there when you’re done. And we’re actually going to head back with another group (Okay.) right here. ’Cause I think there’s room at the table. (Okay.) So I just want to wish you guys the best.
Vic: Thank you, I’m-
Ms. Attorney 1: I’m really
Ms. Attorney 2: [impressed with what] And you guys know when we’re here, right?
Vic: Just every Wednesday, right?
Ms. Attorney 2: Every other Wednesday.
Vic: [Every other] Wednesday.
Ms. Attorney 2: It’s the first and third Wednesdays, right?
Ms. Attorney 1: Yes. (Okay.) Hopefully you can come back for some more input.
Vic: [Yeah, so I’ll come back after my court.]
Ms. Attorney 1: Well, you’re definitely doing the right stuff.
Ms. Attorney 2: Yeah.
Vic: I’ll let you know what happens.
Ms. Attorney 1: Alright, and you’ve got a good judge. She’s really nice.
Girlfriend: She seems like it.
Vic: [Yeah.]
Ms. Attorney 1: [She is.] She’s smart.
Girlfriend: We’ve been in there a couple of times.
Vic: Yeah, she’s kind of, woo.
Ms. Attorney 1: Yeah [she is.]
Vic: [Ha ha.]
Ms. Attorney 1: But you know what, you guys will be fine.
Ms. Attorney 2: Yeah, [good luck.]
Girlfriend: [Thank you for your time.]
Vic: [Thank you.]
Ms. Attorney 2: [Good luck] you guys.

This extended goodbye with overlapping talk is consistent with these attorneys having assessed this client’s case as a strong one, and having given him advice as well as encouragement. In slightly over nineteen minutes, it seems that a good attorney-client relationship was forged. Yet the girlfriend and Vic continued to try to tell their story (see italics above), portraying Vic as a reasonable person.

Addie’s Stepparent Adoption consultation lasted not quite sixteen minutes. The attorney initiated the ending by asking if her counseling had been adequate. Then she returned to the theme of St. Patrick’s Day:

Ms. Attorney: I’m sorry, is that good enough?
Addie: Yes, that’s great.
Nate: It works.
Ms. Attorney: Well, I’m glad to meet you.
Nate: You too.
Ms. Attorney: And I really appreciate people who dress for the occasion.
Addie: Thank you, ha ha.
Ms. Attorney: Happy Saint Patrick’s Day.
Addie: Thank you.
Ms. Attorney: That’s why I have this on; it’s the greenest thing I have.
Addie: It’s great.
Ms. Attorney: Thanks.
Addie: Thank you.

The multiple exchanges, laughter, Addie’s “thanks” and “great,” and the attorney’s return to the ice-breaking topic also suggest that the consultation had been a positive one for this client and her fiancé.

IX. CONCLUSIONS

This section moves from the descriptive conclusions set forth above to more prescriptive conclusions for the attorneys and for brief advice clinics.

A. The Clients and Their Matters

The first point is that these were not “simple cases.” They were not cases in which the clients chose self-representation because the problem seemed so easy that there was no need to employ a lawyer. Indeed, in three of four cases the consultation included a discussion of the benefits of having an attorney handle the matter and the ways in which the client might obtain an attorney, for example, by having the opposing party ordered to pay, or by pursuing limited scope representation. The complexity of these pro se cases raises serious questions about access to justice.79

Secondly, these clients had many questions and looked for guidance on a variety of topics. Sometimes these topics were related, as with Addie’s Stepparent Adoption, which covered termination of parental rights, parental assent to the adoption, the adoption itself, name change, and whether custody needed to be sought first. Sometimes the topics were only tangentially related, as with Vic’s desire to change visitation and to not pay the Montessori preschool tuition. Although clients typically had one pressing legal matter, they took the opportunity of a free consultation with a family law expert to ask about many issues. For example, Diane wanted to

79. See, e.g., Smith & Stratford, supra note 1, at 176-77.
know “anything about divorce [and] my rights” and sought or obtained guidance on a dozen different issues related to divorce.

Third, it was important to most of these clients to share their stories and to explain themselves. Two clients took the opportunity to tell distressing stories on their intake forms. Three clients (Diane, Polly, and Vic) included narratives during the consultations. These clients pressed to share their stories, which resulted in simultaneous or overlapping talk. Only Addie (who had no current legal problem, but the desire to pursue a stepparent adoption, and whose attorney thoroughly questioned her before providing advice) did not insist upon sharing her narrative and enjoyed a consultation with minimal simultaneous talk.

Fourth, all clients cared about how they presented themselves and shared facts and questions in ways that might save face. Both Addie and Vic chose to state only goals on their intake forms. Addie’s intake form identified the goal of a stepparent adoption and did not recount “what happened” (the face-threatening facts that she had become pregnant by a deadbeat who thereafter failed to support the child or form a relationship with the child, and who is now in prison for sexual abuse of a minor). Vic’s intake form similarly identified the problem as “denial of parent time” and identified the goal of eliminating supervision in visitation, but did not tell the story of how supervision came to be required. He saved this story for his many oral narratives—when he could portray himself as reasonable and his ex-wife as irrational. Diane and Polly both gave written narratives that presented themselves as victims. When her right to custody was questioned or the attorney forgot she had no apartment, Diane orally returned to her narrative of having been abandoned with the children and no support. Polly’s intake form identified herself as a spousal-abuse victim and told the story of having been beaten up and lied about, while identifying the goal of getting a protective order dropped. This left it unclear that the protective order was against her. Ultimately, Polly was able to tell a complete narrative, continuing to portray herself as the real victim in not only having been beaten up and maligned, but in also having been denied access to her children for years.

Finally, all of these clients brought companions with them to this consultation. They probably felt the need for support and wanted help recounting what had happened and remembering the advice. Nevertheless, the presence of a second person complicated the consultations for the lawyers.

This combination of factors—the complexity of the cases, the range of issues, the clients’ desires to tell their stories, the clients’ desires to present themselves in the best light possible, and the presence of companions—resulted in these consultations being very challenging. As the clients and
their companions tried to present their stories, justifications, and questions, the attorneys undoubtedly felt as if they were drinking from a fire hose.

B. The Attorneys’ Interviewing and Counseling

Because the clients’ matters were neither simple nor unitary, a great deal of legal expertise was needed to diagnose the clients’ situations and determine what advice and counsel should be provided. These attorneys each knew a great deal about the law and local practice, and were able to provide both strategic advice and information on many of the issues presented.

1. Discovering the Facts

The attorneys relied on the intake forms, court papers, and narrow or yes/no questions to quickly identify the client’s situation and what the client needed to know. In some cases, this targeted questioning allowed the attorney to learn enough to provide personalized legal advice (e.g. parental termination for Addie, alimony for Diane).

However, none of the attorneys asked for a client narrative. Polly’s attorney finally listened to the complete narrative Polly insisted upon sharing while he looked up the court docket. Both Vic’s and Diane’s attorneys were faced with many mini-narratives in which Vic explained his rationale, and Diane reasserted the narrative in her intake form. All three of these consultations involved simultaneous talk and interruptions where the clients pressed their stories upon the attorneys.

Given that the Clinic saw as many as sixty clients in a two-hour period, and often had to turn away clients, the attorneys’ desire for efficiency is understandable. However, Addie’s attorney, who asked questions before providing any advice, also conducted the shortest consultation. Moreover, the amount of simultaneous talk in the other three consultations suggests that there would be some merit in inviting a client to give a short narrative at the outset. Where the client has given a narrative in the intake form, as Diane did, the attorney should begin by reflecting her understanding of the situation recounted on the form and then turn to more targeted questioning.

2. Exploring the Client’s Goals

In most of the cases, the clients had shared their goals on the intake forms, and the reasons for the legal remedy sought (divorce, stepparent adoption, visitation) was clear. However, it was not immediately clear why Polly wanted to have the Protective Order dropped, and the attorney did not explore this goal with her. As the consultation continued, it appeared as if the client was concerned about not having seen her children for several
years. Perhaps she believed the Protective Order was standing in the way of her being able to contact them. The consultation might have been more productive had the attorney explored why the client wanted the Protective Order dismissed. This may have led to a discussion of other approaches to seeing her children—an issue only touched on at the end when the attorney advised her that she could seek to modify her divorce.

3. Providing Counseling and Information

The attorneys were motivated to provide these clients with guidance as soon as possible. Accordingly, they began counseling within seconds or within a few minutes of beginning the consultation. This prompt pivot from interviewing to counseling had costs. Polly’s attorney had already advised her what to argue to have the Protective Order dismissed before he learned the crucial fact that she had violated the order, making any argument very weak. Here, he provided legal information rather than personalized legal advice, and never returned to collect sufficient facts to help her prepare a convincing argument. Similarly, Vic’s attorneys advised him that he could file a Petition to Modify the supervised visitation in his divorce decree. They explained that Vic needed to say that there had been a change in circumstances, but declined to explore what had changed. In so doing, they appear not to have heard Vic’s story—that his ex-wife had willingly let him have the child for the weekends without any supervision and only began denying unsupervised visitation when he acquired a new girlfriend. This, in and of itself, would constitute a significant change that would justify such a modification. Diane’s attorney had the benefit of a short written narrative, but immediately began answering questions propounded by the client’s sister without any further questioning or analysis. The attorney failed to inquire about the facts relevant to determine child custody. She failed to explain the standard for custody or advise Diane that she had a strong custody case, but instead warned that it would be difficult to proceed pro se if custody was contested. Here again, the attorney failed to provide thorough counseling on an issue that appeared to be important to the client.

Although the attorney for Addie also began counseling quickly, she did so only after interviewing about the father’s status, behavior, and relationship with the child. The answers to her ten or twelve questions allowed the attorney to conclude that the client had a good case to seek termination of parental rights. She helpfully explained the legal standard and identified the sort of evidence that would meet it.

The counseling focused heavily on what to do and how to do it. In some ways, this was necessary and useful. Vic needed to know how to argue his case in the near future, and his attorney provided him with a
model of what he could say, what the judge might say, and what strategy he might then employ. Similarly, because Diane and her children were homeless and receiving no support, urging her to seek temporary orders (and to promptly file the petition so that the motion for temporary orders could be filed) made sense. Polly’s attorney helpfully looked up the docket for her case and discovered that the notice of the hearing may not have been served. This led the attorney to explain the importance of seeing that service was accomplished. The attorney told Addie to proceed with the stepparent adoption and to dispense with any custody case.

However, this focus on what to do and how to do it resulted in less emphasis on explaining the legal standard and how the facts of the client’s situation would meet (or fail to meet) that standard. It was only in Addie’s Stepparent Adoption that an attorney emphasized the legal standard and proof needed to meet it.

Similarly, the counseling attorneys did not frame the conversations as choices among optional courses of action. The attorneys occasionally and helpfully discussed different options. For example, Diane was told about Legal Aid, seeking private attorneys, and seeking to have the spouse pay attorney’s fees. Vic was counseled about the difference between enforcing an order and filing a new petition to modify the divorce decree. Addie was advised that she could seek the father’s consent to a stepparent adoption rather than proceed with a possibly contested parental termination case. However, these choices among strategies were less prominent than the explanations about what to do and how to do it. It may be that the structure of a counseling session might include choices as appropriate, but be structured around “teaching” the client the law, the process, and how the law applies to the client’s case.

Finally, one must comment on how much information and advice these attorneys attempted to convey in such short periods of time. This may be because the client (or her companion) posed a series of questions, as with Diane’s Divorce and Polly’s Protective Order. Sometimes the attorney identified strategic nuances, as with Vic’s Visitation Enforcement/Modification and Addie’s Stepparent Adoption. In some cases, attorneys raised legal nuances that did not need to be understood. For example, Diane’s attorney explained that both Diane and her husband had legal custody, Polly’s attorney explained that Polly was not defending herself but advocating for herself, and Addie’s attorney described the fact that a parent could choose any name at birth. Sometimes the attorneys discussed theoretical approaches that would have no hope of success, such as Polly seeking a criminal law expert to vacate a criminal conviction and asking the DA to charge a witness with perjury. The attorneys would do well to limit discussion of irrelevant facts or hopeless strategies. Even so,
one is left wondering if the clients understood and will be able to remember so much advice and information. They too must have felt as if they were drinking from a fire hose.

C. Best Practices in a Brief Advice Clinic

Based upon what we have learned from the fine-grained analysis of the four consultations, we are able to prescribe the following best practices for lawyering in a brief advice clinic and operating such a clinic.

1. Intake Forms

The Clinic should provide clients with an intake form and sufficient time to complete it. It should ask for both the client’s goals and an account of what has happened. The intake form should ask the client to identify what type of legal matter the client believes she has and what steps the client has taken to address the matter. The form may also ask the client to include written questions and identify the goals the client has for the brief consultation. A comprehensive intake form such as this may help the client focus and plan for the brief counseling session.

Attorneys should pay close attention to the written intake form that the client has completed and reference it throughout the consultation. All of the attorneys relied upon the intake form to some extent, and the interview was improved when there was greater reliance on the form, and hindered when the attorney forgot what it conveyed. During the course of the consultation, the attorney should verbally communicate to the client what she has learned from the form. Where the client has shared a narrative, the attorney should provide empathy or emotional reflection in response to that narrative.

The intake form is the client’s opportunity to introduce herself and her goals. Accordingly, some clients will try to save face by declining to give an account of the problems that have developed. Some clients may only list goals and questions to avoid telling an embarrassing (or long) story in writing. Some clients will present themselves in the best light, even if that means being less than clear about the facts and goals. The attorneys should expect this and adjust their interviewing techniques accordingly.

2. Introductions

In a brief advice clinic, neither the clients nor the attorneys appear to need or benefit from informal chitchat or ice breaking. It is sufficient to engage in brief introductions. When there is more than one person, the

80. See, e.g., Suzanne Griffiths, A Model Divorce Intake Form, 43 PRAC. LAW. 55, 55-56 (1997).
introductions should include identifying the client or clients and any companions the client may have brought.

3. Companions, Confidentiality, and Privilege

We have learned that clients often come to brief advice clinics with companions who are meant to help them. Companions may be there for moral support alone, to encourage the client to ask all of her questions, or to help the client remember all the advice. While the presence of a translator will not negate the attorney-client privilege, the presence of such a companion will. With the increased use of brief advice clinics and limited scope representation, there may be merit in amending the rules of evidence to permit the presence of such companions without negating the privilege.

Although the presence of such a companion will render the consultation not privileged, this will rarely be an issue that actually harms a client. There is much merit in the approach Addie’s attorney used—explaining the need to protect attorney-client privilege and thus the possible need to conduct some of the consultation in private without the companion.

Attorneys must seek strategies to ensure the companions are more help than hindrance. Addie’s companion was usefully involved in the consultation and was the least disruptive, perhaps due to the explanation about privilege at the outset. The attorney will need to ensure that the client directs the consultation, and that any inhibitions or disruptions that the companion creates are addressed by asking the companion to leave for at least part of the consultation.

4. Interviewing – Including a Narrative

If the client has provided a short narrative on the intake form, the attorney should reference it and indicate understanding of its contents. Further questioning or goal clarification should proceed from that point. Having a written narrative should allow the attorney to select the topics for further exploration.

Often, the client will not provide a written narrative on the intake form. In that case, the attorney should ask that the client briefly describe what has occurred that brings her to the clinic. Given that time is limited and that the client will want to take away some actionable advice, the attorney may want to ask the client to “use five minutes” to share her account. Failure to ask for and listen to a client narrative will usually (in three out of our four cases) result in clients inserting narrative explanations when they are able. As these inserted accounts may be only partially responsive to the questions

81. See FED. R. EVID. 502.
82. See id.
asked, the attorneys might not process what is shared (as appeared to happen in Vic’s case). The absence of a client-directed narrative may also result in interruptions and simultaneous talk, which also creates difficulties for the attorney trying to learn about the client and her matter. A brief narrative will be more efficient in the long run.

A client-directed narrative is also the best way for the client to reveal negative or face-threatening information.\(^{83}\) It is important to learn the negative information before beginning to offer advice, so that the advice given is applicable and so the client is not unduly embarrassed.

5. Interviewing – Goal Clarification

These clients were much more forthcoming and clear about their goals than they were about the facts. They shared legal goals (divorce, stepparent adoption) or real-world goals (get supervised visits taken off divorce decree). Three of the four clients did not need questioning to clarify their goals. When the legal goals make sense in light of the facts shared, goal clarification will not be necessary.

However, it would have been ideal for Polly’s attorney to inquire further about her legal goal of dismissing the Protective Order. Asking “Why do you want the Protective Order dismissed?” might well have led to a very different consultation about her desire to see her children and an exploration of approaches to bring that about. Accordingly, an attorney should inquire about the client’s ultimate goals when the client has shared only a desired legal outcome rather than stating what he wants changed in his lived experience.

Clients often come to brief advice clinics with multiple questions and various issues.\(^{84}\) The attorneys need to work to ensure that clients take away personalized advice that they understand and on which they are able to act. Therefore, it could be wise to ask what the client hopes to accomplish in the twenty to thirty minute consultation. If the attorney and client are able to agree upon a goal for the consultation, they may be able to focus on the most important or immediate issue and provide thorough personalized advice.

6. Interviewing Before Counseling

The attorney should interview sufficiently before beginning to advise the client. This can save time in the long run. Addie’s attorney did not solicit a narrative, but asked a dozen questions before beginning to advise about the first issue. She consistently asked questions before providing

\(^{83}\) See Smith, Always Judged, supra note 44, at 440-41.

\(^{84}\) Smith & Stratford, supra note 1, at 168.
advice. This consultation was the shortest, the most thorough, and included exclusively personalized advice rather than information. Diane’s attorney was able to identify a claim for alimony by asking only one question (“Do you have a big difference in your income?”).

These attorneys were oriented to discovering the status of the client’s legal matter and determining what the client needed to know as rapidly as possible. To do this, they relied heavily upon the intake form and court papers. While this is efficient, it is often not sufficient. Attorneys need to ask enough questions to ensure that they are properly analyzing the client’s situation and providing personal counseling rather than generic legal information.

Vic’s attorneys failed to ask about the Montessori school or the child’s age, and thus provided an opinion that was not well founded. They failed to ask about changes in circumstances, and consequently provided only information (and not personalized advice) about custody modification. Diane’s attorney never asked questions related to child custody, and therefore provided no opinion as to the strength of Diane’s custody case. Polly’s attorney did not ask what had happened since the Protective Order had been entered, and thus told her to make an argument that is likely to fail. Sufficient questioning will permit the attorney to give personalized advice rather than legal information that may or may not be germane to the client’s situation.

7. Personalized Counseling Instead of Information

Attorneys should resist the urge to provide general information about the law at the first opportunity. Volunteers with expertise may be tempted to lecture about the law, but they should resist this temptation. In Polly’s case, the attorney told her what to argue without interviewing to ascertain whether there was a factual basis for the argument. Once the client revealed negative facts, the attorney let the advice stand, rather than conducting a thorough interview and giving her candid advice about what might be possible. Similarly, Vic’s attorneys reviewed the divorce decree and opined that Montessori tuition was not covered. They failed to reconsider and adjust their opinions when the girlfriend revealed the school was a preschool “like day care.” If the client responds to legal advice by sharing negative facts, the attorneys should reconsider the advice and probably conduct further inquiry. Otherwise, the client will walk away with, at most, legal information that may not apply to her situation.
8. Counseling as Teaching

Counseling conversations will typically not be structured as a discussion of different alternative courses of action, with outcomes of each alternative predicted.\(^{85}\) Instead, the counseling conversations will be structured more as if the attorney is a teacher explaining the law and/or process to the client. The attorney’s advice should include an explanation of the applicable legal standard and a discussion of how the client’s facts meet (or fail to meet) that legal standard. The attorney will also focus on what the client needs to do and how the client needs to do it. Teaching the law and legal process is the most salient part of counseling in a brief advice clinic.

Where more than one approach or strategy is viable, the attorney should let the client know about the available options. However, this discussion of options will generally come later in some of the conversations, and may only apply to certain aspects of the client’s matter, as we have seen in these cases (e.g. parental termination vs. consent to stepparent adoption).

Attorneys should resist the temptation to explain all the law they know to the client. The client is not helped by information about the law that is not relevant to his particular matter. Including such information may make the attorney appear knowledgeable, but it unnecessarily lengthens the conference and can add confusion for the client. Similarly, attorneys should avoid lengthy explanations about approaches that have no possibility of success. The attorney should candidly advise the client when this is the case.

Finally, the attorney-teacher should ask for feedback from the client to ascertain the client’s level of comprehension. In learning whether the client is absorbing the advice and information, asking, “Do you understand?” is not as useful as asking, “Tell me what you plan to do next?”

9. Exit Forms

The attorneys and clinics should work to ensure that the client leaves with a clear explanation and identification of the next steps in the process, ideally in written form. The exit form should clearly identify what steps the client must take and the forms the client should file. It should include referrals to other useful sources of information the client may need. The client should have a useful take-away so she will not feel as if she has been drinking from a fire hose.

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85. See id.
10. Ongoing Limited Scope Representation

Finally, because of the number of issues pro se clients sometimes present,86 and due to the complexity of their matters, sponsors of pro se clinics should consider the possibility of ongoing limited scope service. If such an approach is possible, the advisor can initially discover the client’s situation and provide strategic advice about the first step. Then, once the client has completed the first step, he can come back for instructions and advice about the next step. In that instance, the sponsoring agency or attorney would have a record of what has been learned and conveyed in the first consultation and would be able to provide more effective and efficient advice.

If these steps are taken, clients attending brief advice clinics should feel as if they are drinking from a forceful water fountain, but not from a fire hose.

86. See id.