

## Chapter 5

### The Client Interview

#### § 5.01 INTRODUCTION: SCOPE OF THE CHAPTER; OVERVIEW OF THE CHRONOLOGY OF AN INITIAL INTERVIEW

There are essentially three types of initial interviews, which differ according to the circumstances under which counsel is meeting the client and conducting the interview. The first type, which will be denominated the “full-scale interview,” is conducted without extraneous time pressures and covers all of the information that counsel will need to know in preparing for trial as well as for all pretrial and posttrial proceedings. This “full-scale interview” may take place in counsel’s office when the client first comes to see counsel, or at a detention facility when counsel goes to see the client at the behest of a parent or upon appointment by the court. The second type of initial interview is the one described in § 3.22 *supra*, in which counsel meets a newly arrested client at the police station and, because of the limited time and restrictive setting, must focus upon the crucial message to convey to the client at this point: that the client should refrain from making any statements to the police about the crime for which s/he was arrested. The third type of initial interview is the one described in § 4.07 *supra*, in which counsel meets the respondent on the day of the Initial Hearing and, again under rushed circumstances, must interview the client with a focus on information needed for the detention hearing and probable-cause hearing. In the latter two scenarios, the rushed interview that counsel conducts in his or her first meeting with the client will have to be supplemented by a later interview (in counsel’s office if the client is released; at the detention facility if s/he is not), in which counsel covers all of the elements of the “full-scale interview” that s/he was forced to neglect in the first meeting with the client.

A “full-scale interview” consists of essentially six separate stages:

1. The introductory phase, in which counsel introduces himself or herself to the child and parent, and explains counsel’s need for meeting with the child alone (see § 5.03 *infra*);
2. The initial phase of counsel’s private meeting with the child, in which counsel establishes rapport with the child, explains the attorney-client privilege, and discusses other preliminary matters (see § 5.04 *infra*);
3. Questioning of the client about the facts of the offense, defense witnesses, and other matters that counsel needs to know in order to prepare for trial and prepare pretrial motions (see §§ 5.06, 5.07 *infra*);
4. Eliciting the client’s social history, especially facts needed for the detention hearing if that hearing has not yet taken place (see § 5.08 *infra*);

5. Final instructions to the client about refraining from talking with the police or anyone else about the case and instructions about the importance of promptly relaying any new information to counsel (see § 5.10 *infra*); and
6. Upon completion of the separate interview of the client, further discussion with the parent or guardian, which counsel should conduct in the presence of the client (see § 5.11 *infra*).

## **§ 5.02 PREPARING FOR THE INTERVIEW**

Proper preparation for an interview is required if counsel hopes to achieve the objective of inspiring confidence and trust in the client. It is important that counsel be acquainted with the specific charges against the respondent and the elements of the charged offenses in order to avoid floundering when taking the client's story. Knowledge of the applicable penalty provisions is indispensable in order to answer the question – which the client will almost certainly ask – about what kind of a sentence the client is facing. If the interview takes place prior to the detention hearing, counsel should also be prepared to answer the client's questions about the likelihood of avoiding pretrial detention.

## **§ 5.03 THE INTRODUCTORY PHASE: EXPLAINING TO THE FAMILY THE NEED FOR COUNSEL'S MEETING WITH THE CLIENT ALONE**

### **§ 5.03(a) The Reasons for Meeting with the Client Alone**

In order to get the accurate account of the facts that counsel will need to investigate the case, counsel must meet with the client outside the presence of the child's parent or guardian. If the parent or guardian is present, the client may be afraid to speak truthfully about his or her participation in the crime, either because s/he is afraid of the sanctions the parent/guardian will impose or because s/he is afraid of disappointing the parent/guardian. Even those clients who admit involvement in front of the parent/guardian often minimize their involvement and distort the facts in order to present the best picture. Clients may be unwilling to admit even noncriminal conduct in the parent/guardian's presence if that conduct violates parental directives such as a curfew or an order to stay away from certain friends.

In addition to creating subtle impediments to accurate interviewing, some parents overtly intrude on the interview process, telling certain events from their own perspective and preventing the child from relating the events.

Moreover, the presence of the parent or guardian can have detrimental legal consequences. The vast majority of jurisdictions do not recognize a parent-child privilege. *See, e.g., United States v. Davies*, 768 F.2d 893, 896-900 (7th Cir. 1985); *Cissna v. State*, 170 Ind. App. 437, 439-40, 352 N.E.2d 793, 795 (1976); *State v. Gilroy*, 313 N.W.2d 513, 518 (Iowa 1981); *State v. Bruce*, 655 S.W.2d 66, 68 (Mo. App. 1983); *In the Interest of O.F.*, 773 N.W.2d

206, 210-11 (N.D. 2009); *DeLeon v. State*, 684 S.W.2d 778, 782 (Tex. Crim. App. 1984). See generally Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. REV. & POL'Y REV. 85, 90-102 (2003). Thus parents who wish to testify against their children and recount the child's incriminating statements are free to do so, and parents who do not wish to testify can be subpoenaed to testify against their will. Even in the few jurisdictions that have established a parent-child privilege, there are exceptions to the privilege, and thus counsel can never be confident that the privilege will shield statements made during an interview in the parent/guardian's presence. See, e.g., *In the Matter of Mark G.*, 65 A.D.2d 917, 917, 410 N.Y.S.2d 464, 465-66 (N.Y. App. Div., 4th Dep't 1978) (notwithstanding New York's common-law parent-child privilege, father could testify, over defense objection, to his son's admission of delinquency offense because the statement was not made "in confidence and for the purpose of obtaining support, advice or guidance" from the father, and the father did not "wish[ ] to remain silent and keep respondent's answer confidential").

### **§ 5.03(b) Explaining to Parents Why They Should Absent Themselves from the Interview**

If the initial client interview takes place in a detention facility or the juvenile detention area of the courthouse, the child's parent or guardian obviously will not be present during the interview.

If, on the other hand, the interview takes place in counsel's office, the client's parent will usually enter the office with the client. Counsel then confronts the difficult task of explaining to the parent counsel's need for a private interview with the client. The parent is likely to resist any explanation that his or her presence could bias the interview and will instead insist that the child feels perfectly comfortable in discussing any subject whatsoever in front of the parent. If counsel insists upon the biasing effect of the parent's presence, that insistence may produce nothing but ill will and intransigence on the parent's part.

In attempting to bring about the parent's departure, counsel cannot afford to anger or irritate the parent. Besides the obvious dictates of common courtesy, maintenance of a good relationship with the parent is essential because the parent will play a pivotal role in the determination of the child's pretrial status and posttrial disposition. Counsel may need to persuade a reluctant parent to keep the child at home in order to avoid pretrial detention or a disposition of incarceration. In addition, certain community-based programs demand the parent's involvement in the admissions interview and therapeutic programs, and counsel may need to talk the parent into participating.

Counsel should ordinarily begin the interview by meeting briefly with the child and parent together. During this group session, counsel should explain the nature of the charges, the potential consequences, and the chronology of the legal proceedings to come. Counsel then should describe the functions of a defense attorney in a delinquency case and explain, in the clearest possible terms, that counsel is the attorney for the child and not for the parent or for the

family as a whole. Having laid that groundwork, counsel can state the all-important bottom line: that, because the child is the client, counsel will need to meet with him or her alone to discuss the case.

Most parents will accept counsel's explanation of roles and the need for a private meeting between attorney and client. If the parent still is unwilling to absent himself or herself from the interview, counsel can explain the potentially detrimental legal consequences of the parent's presence. As explained in § 5.03(a) *supra*, most jurisdictions lack a parent-child privilege and even the few States that possess such a privilege have created exceptions to the privilege. Most parents will be amenable to absenting themselves from the interview once they understand that their presence could expose them to the risk of being subpoenaed to testify against the child.

#### **§ 5.04 COMMENCING THE PRIVATE INTERVIEW OF THE CLIENT: ESTABLISHING RAPPORT, EXPLAINING THE ATTORNEY-CLIENT PRIVILEGE, AND OTHER PRELIMINARY MATTERS**

##### **§ 5.04(a) The Importance of Establishing a Good Attorney-Client Relationship**

The first interview with a client in a delinquency case is probably the most important exchange that counsel will have with the client. It largely shapes the client's judgment of the lawyer. Any initial impressions counsel makes may be indelible. At the least, this interview will strongly affect all future dealings between the two. The lawyer's primary objective in the initial interview is to establish an attorney-client relationship grounded on mutual confidence, trust, and respect.

##### **§ 5.04(b) Putting the Client at Ease and Establishing a Relationship of Trust**

There are always difficulties in interviewing and relating to clients, whether they are adults or juveniles, because of differences in perspective – and possibly in goals – as well as whatever cultural, class, and racial differences may exist. When the client is a juvenile, the attorney-client relationship is further complicated by the age gap between counsel and client. Children often are reluctant to speak to adult strangers about anything important. A child may give different meanings to words and may make a host of assumptions about how adults (including adult attorneys) feel and act. A juvenile client may distrust the lawyer simply because s/he is an adult and thus reject the attorney's declaration that his or her loyalty is to the client and that s/he will carry out the client's wishes.

An understanding of the client's mind set is essential in striking up an attorney-client relationship. Counsel must remember that the client is a person in trouble and that the last thing s/he needs is more trouble from counsel. Counsel should therefore make the beginning of the initial interview with the client as undemanding as possible. Questions should be kept very simple until the client's abilities to understand questions, to think, and to articulate answers have been evaluated. Thereafter, counsel should keep well within the limits of the client's vocabulary

and comprehension skills. If the client's primary language is not English, and if counsel is not sufficiently fluent in that language, counsel should ordinarily try to obtain a disinterested interpreter rather than a member of the client's family who may intrude his or her own biases into the interview and before whom the client may be ashamed to tell the truth. Regarding professional interpreters, see Marcia Resler, *You Had Me at 'No hablo English': The Best Practices of Working with Interpreters*, 43-AUG THE CHAMPION 36 (2019).

Counsel should avoid displaying any indication that the client is making a bad impression or is at fault for failing to answer counsel's questions relevantly. Conversely, counsel wants to convey the sense that the client is doing well and is giving counsel helpful information. The client usually enters upon this meeting with certain preconceptions about lawyers that are far from favorable. These include the notions that lawyers are self-interested, uncaring, grasping, and untrustworthy. If the client is street-wise, s/he is also likely to hold the more specific belief that criminal defense lawyers only want to talk their clients into pleading guilty to save themselves the trouble of trying cases. Counsel should attempt to rectify, or at least alleviate, these preconceptions by showing genuine concern for the client as an individual human being – not just another faceless client in a parade of stereotyped clients – and by showing a willingness to work on the client's behalf.

To build rapport with the client, counsel should make use of any available personalizing touches. For example, in addition to asking the client's name, counsel should ask the client's nickname and, having learned the nickname, ask the client whether s/he would prefer counsel's using the nickname or the client's given name. Offering to do concrete things for the client (for example, if the client is in detention, offering to contact the client's family) is a more credible demonstration of counsel's willingness to work for the client than general self-touting professions of industriousness in the future. If the client evidences particular concern over the police officers' seizure of the respondent's cash or other personal property, counsel should promise to look into the situation and do whatever can be done to retrieve the property.

Perhaps the single most important impression to convey is that counsel views his or her own job as being exclusively to serve and help the client to the best of counsel's abilities. S/he should avoid giving the client any grounds for suspicion or confusion about the lawyer's role or loyalties or motives – doubts which may arise if the lawyer begins to ask for information without saying why s/he wants it. The client should be told that the lawyer's only purpose and only interest are to represent the client and that, in order to make sure that nothing is overlooked which could help the client, counsel needs certain information. If the relevance of counsel's questioning to the client's needs and interests is not perfectly obvious – obvious, that is, to a layperson, not a lawyer – counsel should explain why s/he is asking this or that.

The client should be made to feel comfortable and secure in the presence of counsel. When explaining something to the client, it is usually better to ask "okay?" than "Do you understand that?" Whatever the client tells counsel should be received with interest and an attempt to understand, even if it does not appear relevant to the immediate tasks at hand as

counsel conceives them. Patience in hearing the client out is crucial, since under stress s/he will frequently be rambling and inarticulate. S/he should not be shut off without explanation – or at all, unless time is pressing; and, when s/he must be turned from one subject to another, counsel should explain the need to change the subject in a way that does not make the client feel foolish.

#### **§ 5.04(c) Giving the Client a Business Card**

As a means for establishing rapport and putting the client at ease, it is often useful to give the client a business card and to use the card as a prop to reinforce certain messages. Pointing out the lines on the card containing counsel's phone numbers, counsel should explain that s/he is giving the client the numbers so that the client can call whenever the client has questions or has information to impart to counsel. Counsel can say explicitly that it will be necessary for counsel and the client to keep in touch and to work together closely in fighting against the charges. This reinforces the message that counsel is there to help the client, and it also conveys the crucial idea that the client should inform counsel about any and all case-related information s/he can think of. Finally, it implicitly tells the client that the client will also need to make an effort to get along with counsel and to assist in finding witnesses and preparing the case.

#### **§ 5.04(d) Explaining the Attorney-Client Relationship**

A useful way to emphasize that counsel's sole interest lies in serving the client, without sounding like this is a sales pitch learned on a used car lot, is to find some obviously relevant, operational reason for describing counsel's role. Often the best occasion comes in connection with an explanation of the attorney-client privilege – an explanation that is independently necessary, in any event, in order to assure the client that s/he can tell his or her story to counsel in complete confidence. Counsel may say something like this, for example:

Now, I'm going to ask you to tell me some things about yourself and also about this charge they have against you. Before I do, I want you to know that everything you tell me is strictly private, just between you and me. Nothing you tell me goes to the police or the prosecutor or the judge or your parent(s) or anybody else. Nobody can make me tell them what you said to me, and I won't.

Maybe you've heard about this thing that they call the attorney-client privilege. The law says that when a person is talking to [his] [her] lawyer, whatever [he] [she] tells the lawyer is confidential and secret between the two of them. This is because the law recognizes that the lawyer's obligation is to [his] [her] client and to nobody else; that the lawyer is supposed to be 100 per cent on the client's side; that the lawyer is only supposed to help [his] [her] client and never do anything – or tell anybody anything – that might hurt the client in any way. The prosecutor is the one who is supposed to represent the government in prosecuting cases; and the judge's job is to judge the cases. But the law wants to make sure that – even if everybody else is lined up against an accused – there is one person who is not supposed to look out for the government but to be completely for

the person who's accused of the crime. That is the person's lawyer.

As your lawyer, I am completely for you. And I couldn't be completely for you if I could be forced to tell anybody else the things that you say to me in private. So you can trust me and tell me anything you want without worrying that I will ever pass it along to anyone else because I won't. I can't be questioned or forced to talk about what you tell me, even by a court, and I am not allowed to tell it to anyone else without your permission because I am 100 per cent on your side, and my job is to work for you and only for you; so everything we talk about stays just between us. Okay?

**§ 5.04(e) Settling the Roles of Attorney and Client and Explaining the Need for a Truthful Rendition of the Facts**

Counsel can further allay the client's suspicions by explaining that all of the fundamental decisions about the objectives of representation will be made by the client and not by counsel. Counsel should indicate that every major decision about how the defense will proceed – such as whether to go to trial or to offer a guilty plea – will be the client's to make: Counsel will keep the client advised of any developments in the case and, when decisions of any consequence have to be made, counsel will discuss all of the options with the client, so that the client can make well-informed choices. Counsel should explain that s/he will raise any defense that the law permits and will take any action necessary to protect the client's rights. But counsel should also mention that it will be counsel's role to make strategic judgments about how to investigate the case, how to formulate the defense in legal terms, and what evidence to present if the case goes to trial. Counsel should promise to talk with the client about issues of this sort, and to get the client's thinking about the best possible strategies to adopt, before counsel makes decisions that will necessarily depend, in the final analysis, upon counsel's legal training and experience.

The explanation of roles also provides a convenient opportunity for impressing on the client that counsel will need to get from the client a complete, truthful account of all of the facts relating to the case, in order to investigate and prepare for trial effectively. If counsel delays making this point until counsel begins asking questions about the circumstances of the crime and the client's involvement or non-involvement, the client may get the impression that counsel expects the client to lie and is warning the client not to. It's better to use counsel's preliminary explanations of attorney-client role relationships, near the beginning of the interview, to introduce the point that counsel's ability to defend the client effectively depends on the client giving counsel a complete, accurate, honest picture of the facts.

Having covered the roles of attorney and client, counsel can easily turn to the need for a full and accurate account of the facts that the client knows, believes, or can foresee that other people will believe concerning the crime, the client's whereabouts and behavior at the time of the crime, and the client's interactions with other persons (complainants and victims, potential co-respondents, individuals who may be charged as adult defendants, potential witnesses, police and other law-enforcement personnel) who may be involved in the case. Counsel should explain that

some clients think an attorney wants to hear only favorable information, but that that is incorrect and harmful to the client's defense. Unless counsel is told about every unfavorable fact that the police and the prosecution could try to show, counsel will be unprepared to challenge those facts, and counsel may develop a defense strategy that will fall apart instead of one that will work. Counsel can also mention that many people accused of a crime have gotten convicted precisely because they did not tell their lawyers about damaging facts that the prosecutor came up with at trial, catching defense counsel by surprise. Counsel should reassure the client that it is not counsel's job to judge the client, but rather to represent the client whether s/he is guilty or innocent, and that that is precisely what counsel intends to do. In addition to saying these words, counsel has to incorporate their message in counsel's own conduct and questioning style: Counsel must avoid giving any sign of moral condemnation of the client's conduct.

#### **§ 5.05 NOTE-TAKING DURING THE INTERVIEW: EXPLAINING THE NEED FOR TAKING NOTES; TECHNIQUES FOR TAKING NOTES IN THE LEAST DISRUPTIVE MANNER**

It is advisable to explain to the client early in the interview counsel's need to take notes. Naive clients will often be apprehensive about counsel's recording things they say which are incriminating or even merely embarrassing. They may fear that counsel will turn these notes over to the prosecutor or the judge or will disclose them to the client's parent or guardian. System-savvy clients will often fear that a record of what they told counsel in an initial interview will box them in against subsequent changes in their story.

An effective way of alleviating these concerns is by linking the explanation of note-taking with counsel's preceding explanation of the attorney-client privilege. Counsel should begin by saying: "I hope you won't mind if I take notes of some of the things you tell me" and then explain that these notes are only for counsel's own use, to help counsel remember details of what the client says. Counsel should tell the client that counsel will never show the notes to anyone else, and that no one – not even a court – can force counsel to show them the notes, because whatever counsel writes down is legally protected by the rule of attorney-client privilege. In this manner, counsel simultaneously reinforces his or her earlier explanation of attorney-client privilege by giving the client a concrete demonstration of how the privilege works in practice. It is also useful to tell the client that counsel understands that the client may later remember or learn information which differs from the client's present recollections, and that counsel's notes are only intended to record the client's best efforts to recall relevant facts at the time of this preliminary discussion.

When the client begins to relate relevant facts about his or her background or the circumstances of the offense, counsel will have a natural tendency to start taking notes immediately. This is a temptation to be resisted. Counsel does better to postpone writing or typing anything for a while after the client starts providing pertinent information, because looking the client in the eye and appearing interested in the client's words – not immediately falling into the role of indifferent stenographer – are the most effective techniques for

establishing rapport and encouraging recollection and disclosure. After engaging the client in a conversational run-through of the gist of the information counsel is seeking (or hearing the client out if s/he has a story s/he is anxious to tell), counsel can move on into note-taking mode by (a) asking “would it be okay now if I took some notes about what we’ve been discussing?”; (b) summarizing aloud the essential material that the client has thus far related, while counsel writes it down and asks, item by item, “have I got that right?”; and then (c) continuing with alternating periods of conversational interchange and this kind of note-taking.

In summarizing things the client has said and requesting his or her ratification of them while counsel takes notes, counsel should not preface this procedure with language like “let’s go back over what’s important” or “I want to get down the key points in what you’ve said.” These throat-clearing overtures imply that everything the client has said but counsel omits from the summary is *unimportant*, *not* “key.” The result of these inadvertently judgmental pronouncements is likely to be to leave the client miffed by counsel’s apparent dismissal of some matters that the client cares about, or to telegraph to the client, prematurely, that there is a particular version of the story that counsel wants the client to tell, or both. Deadpan formulas like “let me make sure I’m understanding what you said about [event *A*] or [topic *B*]” work best. As counsel summarizes and writes, s/he can ask clarifying or amplifying questions.

Long periods of writing in silence should be avoided. If an extended note has to be written, counsel should vocalize it as s/he writes and then ask the client, “Is that correct?” (At later stages of the relationship with a client, writing or reading notes silently for a protracted period may occasionally be useful for particular purposes – for example, to give the client a chance to absorb or think over a point without feeling pressured to respond quickly, or to unnerve a client who counsel believes is lying – but these are exceptions to the general rule that the client should not ordinarily be left hanging while counsel concentrates on counsel’s notes.) Once the client gets into the swing of his or her story, it is usually wise for counsel to take notes of every significant point while the client is talking. Excessive writing is ill-advised, however, because it impedes counsel’s ability to observe the client’s nonverbal expressions and also suggests that counsel is more interested in the facts than in the client as a person.

Perhaps the best way to take sufficiently detailed notes without excessive writing is to develop the knack of writing down key words and key phrases, using the client’s own language rather than translating it or summarizing it in counsel’s terms. *After the interview*, when counsel is alone, s/he can go over the notes while memory of the interview itself is fresh and can write out or dictate a lengthier, more detailed and coherent version of what the client said, together with counsel’s observations, interpretations, and impressions. Using the client’s exact words in the original notes will stimulate counsel’s recall of the things that were said before and after the noted words. Counsel should review the notes and prepare the refined interview report as soon as possible after the interview. When counsel has enough control over his or her schedule, s/he will find it useful to leave a half-hour or so free immediately following interviews for the latter purpose. This may appear profligate, but experience shows that it is more efficient than either trying to write out copious notes during an interview or trying to reconstruct the details of

information obtained in an interview by going over terse notes half a day or more after they were taken.

Detailed records of client interviews, particularly of interviews conducted shortly after the time of the offense with which the client is charged, are invaluable tools in defense work. They serve subsequently to refresh both counsel's and the client's memories. They can be used for a wide range of practical purposes: *e.g.*, to support counsel's representations of fact during efforts to convince the prosecutor to drop or reduce the charges or during plea bargaining; to support counsel's representations to the court in support of requests for continuances, state-paid investigative or consultative assistance, or *forma pauperis* subpoenas to gather defensive evidence; to support counsel's representations to the court in support of motions; to assist in preparing the respondent to testify. They will also be admissible at trial in the client's behalf if the prosecution seeks to create the impression that the client's trial testimony is a recent fabrication. In addition, notes will shield counsel from unwarranted attacks (such as inadequate representation and suppression of facts favorable to the defense) should the respondent ultimately be convicted.

In some jurisdictions, however, interview notes or reports may be discoverable by the prosecution and usable to impeach the client if s/he testifies at trial. See §§ 9.11, 27.12(b), 33.03 *infra*. When this is the case, counsel may be able to insulate these materials against disclosure by (1) including within counsel's written notes of the client's oral statements sufficient analytic and evaluative commentary to imbue the whole writing with "work product" protection, *see Upjohn Co. v. United States*, 449 U.S. 383, 397-402 (1981); and (2) not reading or submitting the notes to the client for approval after counsel has put them into final form (*cf. Goldberg v. United States*, 425 U.S. 94, 105-07 (1976)). For discussion, see §§ 8.10, 9.13 *infra*. Counsel can develop and employ a set of covert codes through which s/he – but not a judge who may later inspect the notes on a prosecutor's motion for discovery – can distinguish counsel's summaries and commentaries from phrases that are direct quotations of the client's words. (As simple a gimmick as consistently using "S/he states" and "S/he believes" to signal direct quotation, while using "S/he says" and "S/he feels" to signal other matter, will usually do the trick.) But, even with these precautions, "work product" protection is not completely guaranteed, particularly if the client testifies at trial (*see United States v. Nobles*, 422 U.S. 225, 236-40 (1975), discussed in §§ 9.10, 9.12, 9.13, 33.03 *infra*). Where disclosure to the prosecution is a possibility under local practice, counsel must weigh its risks against the advantages of preserving retrievable, contemporaneous documentation of client-interview material.

## **§ 5.06 INTERVIEWING THE CLIENT ABOUT THE FACTS OF THE OFFENSE**

In situations other than the rushed interview at the police station or on the day of Initial Hearing (see § 5.01 *supra*), counsel is advised to begin the substantive portion of the initial interview by asking about the facts of the offense charged. A client expects his or her attorney to be interested in the client's innocence or justification and in hearing about defense witnesses. Counsel's avoiding or even delaying these subjects may be viewed by the client as incompetent

lawyering or as a manifestation that the lawyer doubts the client's innocence.

While homing in on the facts of the offense, counsel's opening questions should avoid appearing to assume that the client knows anything about the crime itself, since the obvious corollary is that counsel thinks the client is guilty (or at least involved). A neutral way of beginning is by asking the client what the police say s/he did. A question like "Let's start with anything you know about what the police are saying happened" will usually prompt a narrative by the client, in which s/he will relate both the nature of the charges and the degree to which s/he has personal knowledge of the facts of the crime or, conversely, claims to know nothing about it. If s/he responds initially with nothing more than an abstract statement of the charges, counsel can follow up with "What led the police to think [that you're involved] *or* [that you did that], do you suppose?"

An effective way of conducting a fact interview is to employ a three-stage interviewing process:

1. Counsel should begin by inviting the client to tell the story in his or her own words, with few, if any, interruptions by the lawyer. This puts the client most at ease and gives the lawyer insight into what the client thinks is more and less important. It provides a collection of unsolicited details on which to cross-examine the client later if the lawyer suspects untruth. And it tells the lawyer something about how the client's mind works, how the client conceptualizes his or her situation, the client's concerns and attitudes, his or her intelligence and verbal ability. There is no sense in starting to ask questions that may be beyond the client's comprehension level or entirely at odds with what s/he thinks and feels the case is all about.
2. Once the client's narrative rendition of the facts is completed, counsel should go over the story again, aiding the client to remember and recount everything s/he can about the relevant events, conditions, things, and people. An effective way to tease out detail is to take up delimited blocks or parts of the client's story (bounded by a time period or event ["what happened that night before you left the house?" *or* "what was going on while you were with Sam?" *or whatever*] or by coherent topic lines ["how you and Sam came to be together that night" *or* "everything you remember about what the person you saw there looked like" *or whatever*]) and go through each block, one after another, using the journalistic "who, what, why, when, where, and how" approach to fill in specific, concrete observations omitted by the client when s/he related that block of information. A technique that works well with some clients is to cast all questions and answers in the present tense (for example: "and what do you do next?"), thereby stimulating the client's reliving of the experience.
3. In the third round of the interview, counsel should fill in additional details and

elicit explanations. Counsel should pick up on words used by the client in rounds one and two, asking the client to explain any terms that are unfamiliar to counsel. Counsel should elicit the names, street addresses, phone numbers, email and e-text addresses of any and all witnesses to the crime or related events that happened prior to or subsequent to the crime. If the client is unable to provide a full name, counsel should seek out any identifying information, such as the witness's nickname, social-media logo, place of employment, vehicle s/he uses, relatives, and friends. If the client is unable to provide a street address or phone number, counsel should ask the client where the witness hangs out or goes on particular recurring occasions ("goes bowling" or "shops for food," or *whatever*) so that counsel can arrange for the client or a relative or friend of the client to accompany counsel or a defense investigator to the spot and try to point out the witness. Counsel should also fill in any omissions or unclarity in the client's rendition of the events. Counsel can spot the less obvious omissions by putting himself or herself in the client's situation and deducing what the client would be likely to have seen, heard, and felt, as well as by imagining the natural consequences of the events described by the client.

In interviewing the client about the facts of the offense, counsel should refrain from overtly cross-examining the client unless the client is obviously lying and discovery of the truth appears immediately necessary for effective defense investigation. Blatant manifestations of distrust can irreparably injure the attorney-client relationship. Counsel will have ample opportunities later to put tough questions to the client, after the attorney-client relationship has solidified. See § 5.12 *infra*.

### **§ 5.07 INTERVIEWING THE CLIENT ABOUT FACTS NEEDED FOR SUPPRESSION MOTIONS**

To gather the facts needed for drafting and litigating suppression motions, counsel will need to elicit all of the information that the client knows about the police investigation of the case as well as the circumstances of the client's arrest, booking, and interrogation. Counsel should begin with any contact that the client had with the police in connection with the case prior to arrest – for example, investigative interviews that did not lead to arrest at that point in time, police searches of the client's house prior to the arrest, and police interviews with relatives or friends of the client prior to the arrest. Counsel then should take the client step-by-step through the sequence of events beginning with the police accosting of the client to arrest him or her, teasing out a detailed account of the arrest, police searches and seizures, administration of *Miranda* warnings, and interrogation. Thereafter, counsel should use the same sort of chronological approach to cover all of the details of the booking process and any interrogation that took place in the police car on the way to the station or at the stationhouse.

If the client was arrested on the scene rather than some days or months later, and if s/he has been in custody since the time of arrest, counsel also will want to record the articles of

clothing that the client is wearing and their colors. These could be highly significant in showing that the client's attire at the time of arrest did not match the complainant's and/or eyewitnesses' description of the perpetrator. If the client was not arrested on the scene, or if the client was released after arrest and thus has had an opportunity to change clothes prior to seeing counsel, counsel will need to ask the client to describe what s/he was wearing on the day of arrest (if s/he remembers) and to identify any witnesses who can corroborate the client's description.

### **§ 5.08 INTERVIEWING THE CLIENT ABOUT HIS OR HER SOCIAL HISTORY**

A full social history of the child – particularly home life, education, work record, and prior criminal record – is essential to much of counsel's work on the case. This social information plays a crucial role at the detention hearing (see §§ 4.17, 4.19 *supra*) and at disposition (see Chapter 38). It may provide the basis for seeking diversion (see Chapter 19) and can be a useful tool in plea negotiations with the prosecutor (see § 14.16 *infra*).

If counsel's first interview with the client takes place on the day of Initial Hearing, the interview will have to cover much of the client's social history (see § 4.07(a) *supra*), but the rushed circumstances of the interview will preclude comprehensive coverage. In the post-hearing interview counsel should pick up any details s/he missed in the earlier interview.

The checklist in § 5.13 *infra* suggests a host of topics to be covered in exploring the client's social history. The list includes the information needed to conduct the detention hearing, in the event that the interview takes place prior to Initial Hearing. See also § 4.07(a) *supra*. In going through the topics contained in the checklist, counsel should be alert to subtle indications of deep-rooted problems. For example, the way in which the client describes his or her home life may hint at the existence of child abuse or neglect. The client's description of his or her school history may suggest the existence of special educational problems that even the school has not yet noticed.

### **§ 5.09 COMPLAINTS OF BRUTALITY OR MISTREATMENT; OTHER CUSTODIAL COMPLAINTS**

If the client reports that s/he has been abused by the police, custodial personnel, or other inmates, counsel should promptly investigate these allegations. The client should be questioned in detail respecting the time, place, and nature of any official misconduct (including any failure by officers to prevent or stop or record abuse of the client by other inmates), its background, and the identity or description of all persons involved or present at the time. Observable contusions and lacerations on the client should be photographed in color. A private physician should be summoned to examine major injuries if possible; the county medical society or a civil liberties group, like the American Civil Liberties Union, can help find a physician for this purpose. Witnesses should be interviewed who last saw the client prior to arrest and who can testify concerning his or her physical condition at that time. Counsel should also investigate whether any police officers or facility guards who were involved in the incident sustained injuries of their

own, since the justification most commonly given for injuries to a client is that the officer or guard had to use force to effectuate the arrest or subdue an unruly prisoner.

As long as counsel takes these steps to avert the risk of further abuse and to gather evanescent evidence before bruises and memories fade, counsel can delay until later any decisions about what should be done to rectify injuries already inflicted upon the client. If there appears to be merit in an action for damages in a state court or in the federal courts under the Civil Rights Act, 42 U.S.C. § 1983 (*see Monroe v. Pape*, 365 U.S. 167 (1961); *Lombardo v. City of St. Louis, Missouri*, 141 S. Ct. 2239 (2021); and *see* § 3.18 *supra*) or under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 488 (1971) (*but see Egbert v. Boule*, 142 S. Ct. 1793 (2022)), counsel can subsequently speak with the client about the desirability of filing such an action, through counsel or some other attorney whom the client and his or her parent(s) select. *See, e.g., Kingsley v. Hendrickson*, 576 U.S. 389 (2015); *Atencio v. Arpaio*, 674 Fed. Appx. 623 (9th Cir. 2017). Sometimes the prospect of a civil-rights action can provide valuable leverage in plea-bargaining in the delinquency case; sometimes threats to bring such an action will arouse resentment and sour the bargaining atmosphere. Some clients will view the mention of a possible civil-rights action as a sign that counsel cares for their welfare and knows how to protect them; but there is a risk that by advertent to that possibility, counsel will raise unrealistic expectations on the part of the client or the client's parent(s) about the likelihood of success in § 1983 actions or about counsel's subsequent availability to file one. All told, counsel does best to restrict discussion during early client interviews to gathering detailed factual information regarding any abuse and any means for documenting it; s/he should not affirmatively broach the subject of civil litigation and – if the client brings up that subject – s/he should tell the client that the time is not yet ripe to talk about it.

Frequently, clients who are in custody complain about lack of medical treatment, exercise, food, and numerous other things. Most of these problems can be corrected administratively by informing the authorities in charge about them. Counsel should see the commanding officer on duty if the client is in a police station or the ranking administrator of a detention facility if s/he is detained. State-court relief may be available if the conditions of the client's confinement are substantially out of line with civilized standards. *See, e.g., Michaud v. Sheriff of Essex County*, 390 Mass. 523, 458 N.E.2d 702 (1983); *Wayne County Jail Inmates v. Lucas*, 391 Mich. 359, 216 N.W.2d 910 (1974), *subsequent history in Wayne County Jail Inmates v. Wayne County Chief Executive Officer*, 178 Mich. App. 634, 444 N.W.2d 549 (1989); *Facility Review Panel v. Holden*, 177 W. Va. 703, 356 S.E.2d 457 (1987); *Rokita v. Pennsylvania Department of Corrections*, 273 A.3d 1260 (Pa. Commonwealth Ct. 2022) (sustaining claims for relief under the federal Eighth Amendment and Americans With Disabilities Act in a case in which a prisoner seeks medical treatment for opioid addiction: “Rokita’s Eighth Amendment claim is stated simply. By Rokita’s averment, his opioid use problem has resulted in a medical diagnosis. Rokita’s substance use disorder might fall into any number of ‘serious’ categories: being diagnosed by a physician; being obvious to a lay person as requiring medical attention; affecting his daily activities; or causing unnecessary or chronic pain, etc. . . . Indeed, it is well understood that opioid addiction can result in extreme and potentially

dangerous withdrawal symptoms. But even greater risks can follow. Absent effective treatment during incarceration, relapses and overdoses upon release from incarceration are sadly common occurrences – such overdoses are the leading cause of death among inmates after their release. . . . It is thus conceivable that, should his claim be permitted to proceed, Rokita may be able to establish that he has a ‘serious medical need’ within the meaning of the Eighth Amendment.” *Id.* at 1269. “[T]he Department’s policy deprives Rokita of the benefit of a health service that could potentially be beneficial in treating his disability. . . . Under these circumstances, it is conceivable that Rokita could establish that he has been denied the benefit of a health service by a public entity, by reason of his disability, and that a claim is viable under Title II of the ADA.” *Id.* at 1275). Federal-court relief is available if:

- (A) those conditions expose him or her to a substantial risk of serious physical harm (*see, e.g., Mendiola-Martinez v. Arpaio*, 836 F.3d 1239 (9th Cir. 2016) (applying *Hope v. Pelzer*, 536 U.S. 730 (2002), to sustain the section 1983 claim of a pretrial detainee who was shackled and restrained during labor and postpartum recovery); *Sebastian v. Ortiz*, 918 F.3d 1301 (11th Cir. 2019) (sustaining the section 1983 claim of an arrestee who alleged that the arresting officer caused serious, permanent nerve injuries to his wrists and hands by applying unnecessarily tight handcuffs to him, with intent to punish him, after he refused the officer’s request to search the interior of his car following a routine traffic stop; the court emphasizes that he was “neither resisting arrest nor attempting to flee” (*id.* at 1305) and that his claim involved “serious and substantial injury intentionally and gratuitously inflicted on an individual of ordinary vulnerability” (*id.* at 1309)); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1064, 1069-73 (9th Cir. 2016) (en banc) (parsing *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), to uphold the grant of section 1983 relief to a pretrial detainee for violation of his “due process right . . . to be protected from harm at the hands of other inmates”); *LaBrec v. Walker*, 948 F.3d 836, 841 (7th Cir. 2020) (“[i]t is well established that prison officials face a duty to protect prisoners from violence at the hands of other prisoners,” citing *Farmer v. Brennan*, 511 U.S. 825 (1994)); *Westmoreland v. Butler County, Kentucky*, 29 F.4th 721 (6th Cir. 2022) (allegations that jail personnel failed to protect a pretrial detainee after he informed them that he was worried about violence from other inmates who had been told he was a snitch sufficed to state a claim of violation of due process); *Pittman v. County of Madison, Ill.*, 746 F.3d 766, 778 (7th Cir. 2014) (“When an inmate presents an officer with a request to see a crisis intervention person and the officer also is aware that the reason for the request well may be a serious psychological condition that is beyond the officer’s capacity to assess definitively, the officer has an obligation to refer that individual to the person who, under existing prison procedures, is charged with making that definitive assessment. The danger of serious consequences, including death, is obvious.”); *accord, Burke v. Regalado*, 935 F.3d 960 (10th Cir. 2019); *Sandoval v. County of San Diego*, 985 F.3d 657, 661-62, 667 (9th Cir. 2021) (allegations

that jail medical staff left a pretrial detainee “unmonitored for eight hours, despite signs that he was under the influence of drugs, and then failed to promptly summon paramedics when they discovered him unresponsive and having a seizure” stated a Due Process claim in a civil rights action: “Individuals in state custody have a constitutional right to adequate medical treatment.”); *Sanchez v. Young County, Texas*, 956 F.3d 785, 791 (5th Cir. 2020) (“[f]or pretrial detainees, . . . [the] rights [protected by the Fourteenth Amendment] include the right to medical care . . . and the right to be protected from known suicidal tendencies”); *De Veloz v. Miami-Dade County*, 756 Fed. Appx. 869, 877 (11th Cir. 2018) (“In this particular case, no party disputes that placing a female in the general population of a male detention facility created an extreme condition and posed an unreasonable risk of serious harm to the female’s future health or safety. Nor should they dispute this. It is abundantly clear to us that housing a biological female alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered.”); *Byrd v. Hobart*, 761 Fed. Appx. 621, 623-24 (7th Cir. 2019) (sustaining a claim for redress of unsanitary prison kitchen conditions: “contemporary standards require that officials ‘provide inmates with ‘nutritionally adequate food that is prepared and served under conditions [that] do not present an immediate danger to the health and well-being of the inmates who consume it.’” . . . ¶ . . . [W]here inmates have observed mice droppings, mice, and cockroaches literally in and on the food, a reasonable jury could conclude that the risk of harm to Byrd (who eats this food daily) is both substantial and obvious.”); *Coston v. Nangalama*, 13 F.4th 729 (9th Cir. 2021) (in a case in which prison authorities required an inmate to go cold turkey after he was found to have been hoarding and conveying to another inmate morphine pills prescribed to treat his degenerative joint disease, the inmate is entitled to a new trial because the district court erred in instructing the jury that deference should be given to the security-based concerns of prison officials); *Hardeman v. Curran*, 933 F.3d 816, 821-23 (7th Cir. 2019) (sustaining a claim that jail authorities violated Due Process by failing to provide inmates with adequate water for drinking and sanitation during a period when a water booster pump was being replaced: “Pretrial detainees may assert a conditions-of-confinement claim under the Fourteenth Amendment’s Due Process Clause. . . . ¶ For many years, we analyzed pre-conviction Fourteenth Amendment and post-conviction Eighth Amendment conditions-of-confinement claims under the same standard . . . . The Supreme Court put a halt to that equation, however, when it indicated that the interests of pretrial detainees and prisoners derive from separate sources and must be assessed differently. *See Kingsley* . . . . It is true that *Kingsley* directly addressed only claims of excessive force, and so some circuits have understood its holding to be confined to those facts. . . . We, however, have not taken that approach. Recognizing ‘that the Supreme Court has been signaling that courts must pay careful attention to the different status of pretrial detainees,’ we have held that a pretrial detainee’s claims of inadequate medical care ‘are subject only

to the objective unreasonableness inquiry identified in *Kingsley*.’ . . . ¶ The plaintiffs in this case suggest that we should extend *Kingsley* further from the medical context to the general conditions-of-confinement problem we have here. We see no principled reason not to do so. . . . ¶ . . . We therefore hold that *Kingsley*’s objective inquiry applies to all Fourteenth Amendment conditions-of-confinement claims brought by pretrial detainees.”); *Thomas v. Tice*, 948 F.3d 133 (3d Cir. 2020) (sustaining a claim that prison authorities violated the Eighth Amendment by unduly protracted detention of an inmate in a “dry cell” – a cell without access to any water, used for observation when it is suspected that an inmate has ingested contraband); *McClure v. Haste*, 820 Fed. Appx. 125, 128 (3d Cir. 2020) (a detainee placed in an excessively cold disciplinary segregation cell ripped the stuffing out of his mattress and crawled inside to keep warm; when returned to his regular cell, guards required him to sleep on the unstuffed mattress on a cement slab for more than 200 days; finding that these facts stated a claim for an Eighth Amendment violation, the circuit court notes that the Amendment forbids conditions of confinement that result in ““the denial of the minimal civilized measure of life’s necessities”” [citing cases that quote *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)] and that “[s]leep is critical to human existence, and conditions that prevent sleep have been held to violate the Eighth Amendment.” [ ]”); *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (finding an Eighth Amendment violation where correctional officers confined an inmate “for six full days . . . in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in “massive amounts” of feces’: all over the floor, the ceiling, the window, the walls, and even “packed inside the water faucet.” . . . Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. . . . Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.”)); or

- (B) the conditions are arbitrarily intrusive (*e.g.*, *Mulvania v. Sheriff of Rock Island County*, 850 F.3d 849 (7th Cir. 2017); *Ware v. Louisiana Department of Corrections*, 866 F.3d 263 (5th Cir. 2017); *Bearchild v. Cobban*, 947 F.3d 1130 (9th Cir. 2020); *Henry v. Hulett*, 969 F.3d 769 (7th Cir. 2020) (en banc) (holding that the Fourth Amendment protects prison inmates against particularly degrading and abusive strip searches: “Strip searches are ‘demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission.’” *Id.* at 778. “We conclude that a diminished right to privacy in one’s body, unlike a right to privacy in one’s property and surroundings, is not fundamentally incompatible with imprisonment and is an expectation of privacy that society would recognize as reasonable. We therefore join every other circuit to have addressed the question and hold that the Fourth Amendment protects (in a severely limited way) an inmate’s right to bodily privacy during visual inspections, subject to reasonable intrusions that the realities

of incarceration often demand.” *Id.* at 779. “We highlight that our holding today – that inmates maintain a privacy interest, although diminished, in their bodies – pertains to pretrial detainees and convicted prisoners alike.” *Id.*); or

- (C) the conditions punish constitutionally protected conduct such as the exercise of First Amendment rights (*Martin v. Duffy*, 977 F.3d 294 (4th Cir. 2020) (a complaint that a prison guard captain placed an inmate in administrative segregation in retaliation for his complaint of sexual abuse by another guard states a First Amendment claim); *cf. Burns v. Martuscello*, 890 F.3d 77 (2d Cir. 2018) (holding that a prison inmate may not constitutionally be placed in restrictive custody for refusing to serve as a snitch or to provide false information regarding a purported assault); *Fuqua v. Ryan*, 890 F.3d 838, 848-49 (9th Cir. 2018) (holding that the Religious Land Use and Institutionalized Persons Act [42 U.S.C. § 20000cc-1] requires a federal court to hear an administratively exhausted claim that a state prisoner was disciplined for refusing to work on a religious holiday); *Jones v. Van Lanen*, 27 F.4th 1280 (7th Cir. 2022) (allegations that prison officials retaliated against an inmate because the numerous grievances he had filed alerted them that he was planning to file a civil rights action complaining about his conditions of confinement state a claim of violation of the First Amendment); or
- (D) the conditions directly abridge constitutional or statutory rights (*e.g., Turner v. Safley*, 482 U.S. 78 (1987) (establishing the general rule that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests” and identifying “several factors [that] are relevant in determining the reasonableness of . . . [a] regulation at issue” (*id.* at 89): “First, there must be a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it. . . . Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. Moreover, the governmental objective must be a legitimate and neutral one. We have found it important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of the expression. . . . ¶ A second factor relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates. . . . ¶ A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . . ¶ Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation.” (*Id.* at 89-90.)); *accord, Thornburgh v. Abbott*, 490 U.S. 401 (1989); and *see Human Rights Defense Center v. Baxter County Arkansas*, 999 F.3d 1160 (8th Cir. 2021) (a jail’s postcard-only policy for nonlegal mail would violate the First Amendment rights of a publisher of legal

self-help publications if it constituted a total ban against sending inmates those publications); *Whitehead v. Marcantel*, 766 Fed. Appx. 691 (10th Cir. 2019) (a complaint that prison authorities refused to allow an inmate to receive hardback books, books from non-approved vendors, information from the internet, and newspaper articles sent by mail states a First Amendment claim that requires the authorities to justify these restrictions by showing that they are reasonably related to a legitimate penological interest); *Jones v. Slade*, 23 F.4th 1124 (9th Cir. 2022) (although a prison regulation banning receipt of materials containing depictions of drugs, violence, sex and gang activity is found to be reasonably related to the legitimate penological interest of averting the encouragement of inmate misbehavior, the application of the regulation to forbid rap music while admitting other forms of media containing such depictions is not content-neutral under *Turner* and may therefore violate the First Amendment; also, the confiscation from an inmate of two religious texts by Elijah Muhammad is *prima facie* actionable as a possible violation of a right under RLUIPA to read Nation of Islam religious works during Ramadan); *Johnson v. Baker*, 23 F.4th 1209 (9th Cir. 2022) (RLUIPA requires that prison officials allow a Muslim inmate to possess scented oil for ablutions before each of his five daily prayers); *Haze v. Harrison*, 961 F.3d 654, 658 (4th Cir. 2020) (recognizing a First Amendment claim when jail personnel opened mail between an inmate and his lawyer and forwarded some of it to a prosecutor's office: "[o]pening an incarcerated person's legal mail outside of his presence can chill protected speech."); *Mitchell v. Peoples*, 10 F.4th 1226, 1228 (11th Cir. 2021) ("A simple rule has governed prison mail procedures in our Circuit for nearly 50 years: a prison official may not open an inmate's properly marked legal mail outside of his presence. . . . According to Mitchell, Detective Eileen Simpson ordered jail staff to confiscate and review all his incoming and outgoing mail. Following that order, J.M. Perkins, a jail officer and mail clerk, opened and read Mitchell's legal mail outside his presence. Mitchell complained, but the mailroom supervisor turned a blind eye, allowing the policy to proceed unchecked; he even threatened Mitchell to keep him from filing more grievances. Mitchell argues that all this conduct violated his First Amendment right to free speech and that it was clearly established that the officials' conduct was unlawful. We agree."); *Vogt v. Wetzel*, 8 F.4th 182, 184 (3d Cir. 2021) ("we join several of our sister courts and hold that, under the Supreme Court's decision in *Procunier v. Martinez*, 416 U.S. 396 (1974), prisons must notify inmates when their incoming mail is rejected"); *Leek v. Androski*, 2022 WL 1134967, at \*3-\*5 (10th Cir. April 18, 2022) ("Leek argues that he has sufficiently alleged access-to-courts claims. Prisoners do not have a 'freestanding right to a law library or legal assistance.' . . . Thus, to state an access-to-courts claim, the plaintiff must satisfy a 'threshold determination' that he or she has 'standing to assert' such a claim by alleging actual injury. . . . To establish actual injury, the plaintiff 'must show that any denial or delay of access to the court prejudiced him [or her] in pursuing litigation.' . . . ¶ Leek alleged that when he arrived at Lansing, he was

immediately placed in segregation in the restrictive-housing unit where there is no law library. Leek was informed that to obtain cases, he had to submit forms ‘requesting specific cases by cit[ation]’ and that ‘no law books would be delivered’ to the restrictive-housing unit. When Leek submitted forms requesting cases from the library, he received some cases but was informed that he could only request ‘three cases at a time’ and had to return them within one week. Some forms Leek submitted went unprocessed. And when Leek requested additional cases, prison officials would not provide any until he returned the ones he had previously requested. Consequently, Leek was consigned to respond to the district court’s show-cause order in *Scoggin* ‘with only the few cases, notes, and books he had in his personal property.’ Since then, the district court in that case (the same district judge who presided over this one) has dismissed the case for failure to state a claim. ¶ We conclude that the district court should not have dismissed Leek’s access-to-courts claim stemming from the impediments he faced in litigating *Scoggin* while at Lansing.”); *Jones v. Carter*, 915 F.3d 1147 (7th Cir. 2019) (applying RLUIPA to require prison officials to provide a Muslim inmate with halal meals that include meat); *Maye v. Klee*, 915 F.3d 1076 (6th Cir. 2019) (holding prison chaplains liable for violations of the First Amendment and equal protection when they refused to permit a Muslim inmate to participate in Eid al-Fitr, the end-of-Ramadan feast); *cf. Robbins v. Robertson*, 782 Fed. Appx. 794 (11th Cir. 2019) (sustaining a claim that prison authorities violated the First Amendment by failing to provide a Muslim inmate a nutritionally adequate vegan diet, causing him to become seriously ill; the court declines to elaborate the standards applicable to the inmate’s parallel Eighth Amendment claim); *Greenhill v. Clarke*, 944 F.3d 243 (4th Cir. 2019) (sustaining a claim that prison authorities violated the First Amendment and RLUIPA by refusing to allow a Muslim inmate to participate in televised prayer services and to maintain a beard of four inch length); *Byrd v. Haas*, 17 F.4th 692 (6th Cir. 2021) (recognizing that an Ifa prisoner may have claims under the First Amendment, Equal Protection Clause, and RLUIPA based upon the failure of prison authorities to permit group worship by members of his faith and their refusal to allow him to possess consecrated beads and other religious articles); *Fox v. Washington*, 949 F.3d 270 (6th Cir. 2020) (requiring prison authorities to justify their refusal to allow members of Christian Identity, a white separatist religion, to conduct communal worship and baptism; under RLUIPA, justification would require a showing that the prohibition of these religious practices is the least restrictive means available to further a compelling governmental interest.); *Ackerman v. Washington*, 16 F.4th 170 (6th Cir. 2021) (Corrections Department policies requiring Jewish Prisoners to eat vegan meals on certain Jewish holidays violate RLUIPA); *Ashaheed v. Currington*, 7 F.4th 1236 (10th Cir. 2021) (sustaining a claim that a Muslim prison inmate’s First Amendment free-exercise rights were violated when a prison guard, motivated by anti-Muslim animus, required him to shave his beard); *Williams v. Hansen*, 5 F.4th 1129 (10th Cir. 2021) (sustaining a claim that prison

authorities violated the First Amendment by banning Native American religious services for a period of at least nine days and possibly up to 30 days and by banning the use of tobacco in such services for 30 days after concluding that tobacco intended for religious services had been diverted for personal use by another prisoner); *Richey v. Dahne*, 733 Fed. Appx. 881 (9th Cir. 2018) (a complaint that prison authorities refused to process a prisoner’s grievance complaint against a guard because it contained the unflattering comment that the guard was “extremely obese” states a First Amendment claim).

Any physical abuse of an inmate that amounts to excessive force violates the Fourth Amendment even if the resulting harm is minimal. *Johnson v. City of Miami Beach*, 18 F.4th 1267, 1271 (11th Cir. 2021) (sustaining the section 1983 claim of an inmate who was deliberately elbowed in the face by an officer; the inmate had been verbally belligerent and initially refused to enter a jail cell but did not physically resist when pushed into the cell; an officer followed him into the cell and struck him in the face; the inmate “was later treated for a small laceration to his mouth.”) The potential for harm is a factor that enters into the determination of whether force is excessive. *E.g.*, *Young v. Kent County Sheriff’s Department*, 2022 WL 94990, at \*4 (6th Cir. January 10, 2022) (courts employ a “totality-of-the-circumstances test [that] balances . . . [the inmate’s] interest in bodily integrity against the . . . [jail officer’s] interest in safety, taking into account such factors as whether the . . . [officer’s] force was commensurate with the threat that . . . [the inmate] posed”). See § 23.07(d) last paragraph *infra* regarding police use of excessive force against arrestees.

Recourse to the courts is appropriate if requests for necessary medical attention are not promptly honored. In addition to state statutes and regulations that impose responsibility on custodial officers for the well-being of prisoners, the Due Process Clause of the Fourteenth Amendment requires that a prisoner’s serious medical needs be met by his or her custodians. *Estate of Perry v. Wenzel*, 872 F.3d 439, 453 (7th Cir. 2017) (under the Fourth and Fourteenth Amendment standards applicable to arrestees detained prior to a probable-cause determination, when “the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being”); *Estate of Clark v. Walker*, 865 F.3d 544, 553 (7th Cir. 2017) (recognizing, in the context of arrestees detained following a probable-cause determination, that “[t]he Supreme Court has long held that prisoners have an Eighth Amendment right to treatment for their ‘serious medical needs’”); *Sims v. Griffin*, 35 F.4th 945, 949 (5th Cir. 2022) (“[u]nder our caselaw, ‘[a] serious medical need is one for which treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required’”); *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1425 (11th Cir. 1997) (“the case law ha[s] made it clear that an official acts with deliberate indifference when he knows that an inmate is in serious need of medical care, but he fails or refuses to obtain medical treatment for the inmate”); *accord*, *Barton v. Taber*, 908 F.3d 1119, 1124 (8th Cir. 2018) (“In light of the evidence of Barton’s recent car accident, his severe intoxication, and his drug ingestion, we conclude that a jury could find that Barton was experiencing a medical need so obvious that a layperson would

recognize that he needed prompt medical attention”); *Dyer v. Houston*, 964 F.3d 374 (5th Cir. 2020) (sustaining a Due Process claim against police officers who, knowing that an arrested teen while strung out on LSD had banged his head some 46 times against the metal cage, windows, and rear seat of the patrol car *en route* to jail, failed to inform the jail authorities that he needed medical attention); *Adkins v. Morgan County, Tennessee*, 798 Fed. Appx. 858 (6th Cir. 2020) (“Based on the testimony that . . . [Adkins’ cellmate] informed . . . [a jail guard] of Adkins’s condition, a jury could find that . . . [the guard] was made aware of Adkins’s severe back and stomach pain, inability to walk, and incontinence [but responded that Adkins was “faking it”] and declined to take action until Adkins awoke completely unable to move his legs.” *Id.* at 862. “Adkins’s constitutional right to receive adequate medical care given the symptoms he exhibited was clearly established.” *Id.* at 864-65.); *Estate of Jensen v. Clyde*, 989 F.3d 848, 859 (10th Cir. 2021) (allegations that a jail nurse ignored the medical needs of an inmate stated an actionable claim: “Ms. Clyde was aware that: Ms. Jensen had opiates in her system; she looked sick and was ‘walking like a skeleton’; she had been soiling her sheets and had diarrhea; she had been vomiting for four days straight; and that she was unable to keep food or water down. We believe that these circumstances – particularly her self-report that she had been vomiting for four days and could not keep down water – present a risk of harm that would be obvious to a reasonable person.”); *Foster v. Maloney*, 785 Fed. Appx. 810 (11th Cir. 2019) (jail officials were obliged to provide medical attention for an inmate suffering visible signs of methadone withdrawal including elevated blood pressure, slurred speech and loss of body control); *Greene v. Crawford County, Michigan*, 22 F.4th 593, 607 (6th Cir. 2022) (allegations that jail officials failed to provide medical care to a pretrial detainee who displayed hallucinations and other symptoms of delirium tremens over a two-day period stated an actionable due process claim; “‘delirium tremens is a severe form of alcohol withdrawal and is unquestionably a serious medical condition within the meaning of the Fourteenth Amendment’”); *Colson v. City of Alcoa, Tennessee*, 2021 WL 3913040 (6th Cir. September 1, 2021) (allegations that a pretrial detainee complained of an injury to her knee by the arresting officer and that in the station house she fell down at one point, yelling “ow, ow my fucking knee” stated a claim of a sufficiently serious medical need, sufficiently obvious to a layperson as requiring a doctor’s attention, to support a due process claim of violation of the right to medical treatment, although the detainee was intoxicated and the jail personnel attributed her fall and her unsteadiness on her feet to inebriation); *Gordon v. County of Orange*, 888 F.3d 1118 (9th Cir. 2018); *Kindl v. City of Berkley*, 798 F.3d 391 (6th Cir. 2015); *Lance v. Morris*, 985 F.3d 787 (10th Cir. 2021); *Rife v. Oklahoma Department of Public Safety*, 854 F.3d 637 (10th Cir. 2017); see *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-45 (1983) (dictum) (“The Due Process Clause . . . does require the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police.”); accord, *Perry v. Bone*, 2021 WL 816939 (M.D. Ala. 2021); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (dictum) (“The mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment. . . . Indeed, the state concedes that respondent has a right to adequate food, shelter, clothing, and medical care. ¶ . . . [T]he right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause . . . [and] not extinguished by lawful confinement, even for penal purposes.”); *Collins v. City of*

*Harker Heights, Texas*, 503 U.S. 115, 127-28 (1992) (dictum) (“The ‘process’ that the Constitution guarantees in connection with any deprivation of liberty . . . includes a continuing obligation to satisfy certain minimal custodial standards.”); *Mitchell v. Kallas*, 895 F.3d 492, 499 (7th Cir. 2018) (recognizing an Eighth Amendment claim against a DOC mental health director for failure to provide hormone therapy for a transgender inmate: “Prison officials have been on notice for years that leaving serious medical conditions, including gender dysphoria, untreated can amount to unconstitutional deliberate indifference.”); *Williams v. York*, 891 F.3d 701, 707 (8th Cir. 2018) (“[an] inmate’s right to treatment for serious and painful dental conditions has been clearly-established for more than three decades”); cf. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989). And “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. The Courts of Appeals have plainly recognized that a remedy for unsafe conditions need not await a tragic event.” (*Helling v. McKinney*, 509 U.S. 25, 33 (1993)). (*Helling* is a prison case, but the law is clear that “[p]retrial detainees are entitled to the same, if not greater, medical care as are convicted inmates” (*Anderson v. City of Atlanta*, 778 F.2d 678, 686 n.12 (11th Cir. 1985)). See, e.g., *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (noting that a pretrial detainee’s “constitutional claims [of ill treatment in a jail facility] ‘arise[ ] from the due process clause of the fourteenth amendment and not from the eighth amendment prohibition against cruel and unusual punishment.’ . . . ([T]he more protective fourteenth amendment standard applies to conditions of confinement when detainees . . . have not been convicted [of a crime.]’”); accord, *Hopper v. Plummer*, 887 F.3d 744, 751-54 (6th Cir. 2018).).

When an inmate has a disabling medical condition, officials’ failure to accommodate the disability may also give rise to a claim under Title II of the Americans with Disabilities Act (42 U.S.C. § 12132). See, e.g., *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998); *Robertson v. Las Animas County Sheriff’s Department*, 500 F.3d 1185 (10th Cir. 2007); *Cadena v. El Paso County*, 946 F.3d 717 (5th Cir. 2020); cf. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998); *Brooks v. Colorado Department of Corrections*, 12 F.4th 1160 (10th Cir. 2021).

When counsel represents a vulnerable client who is at risk of assault by jailmates – sexual predators, violent aggressors, co-respondents with a grudge or an interest in coercing the client to corroborate their version of the facts – counsel should insist on having the client housed in quarters inaccessible to these dangers and protected from them when in common-use facilities. In addition to the case law in the preceding paragraph, there is a developing doctrine of “state-created danger” which has now been recognized by a significant majority of federal courts and which can be invoked in urging jail authorities to adopt adequate protections for such clients. See, e.g., *Irish v. Fowler*, 979 F.3d 65 (1st Cir. 2020) collecting the circuit precedents.

## **§ 5.10 CONCLUDING THE PRIVATE INTERVIEW OF THE CLIENT**

At the conclusion of the private interview with the child, counsel should give him or her the warnings set forth below. These warnings should be given, whether or not the client is in

custody and whether or not s/he has previously been given the same warnings. Counsel should advise the client to:

1. Say nothing at all to the police, tell them nothing under any circumstances, and reply to all police questions or approaches by saying that the client's lawyer has told the client not to answer questions or to talk with anyone unless the lawyer is present.
2. Tell police officers who start any conversation with the client or who make any requests of the client that they need to talk to counsel about whatever they want; show the officers counsel's business card (see § 5.04(c) *supra*) and tell them to phone or email counsel; and (if counsel has given the client a rights card (see § 3.22(b) *supra*)) show that to the officers as well
3. Handle approaches by prosecuting attorneys in the same way, and under no circumstances discuss any offer or deal with the police or prosecuting attorneys in counsel's absence.
4. Discuss the case with no one, including cellmates, co-respondents, adults who are being charged in criminal court with the same or connected crimes, lawyers for any such co-respondents or adult defendants, other purported juvenile or adult co-perpetrators, reporters, or any persons who may have been involved in events relating to the case or who may have information about those events; and tell anyone who wants to discuss the case or who has information about it to contact counsel.
5. Neither write nor sign any papers or forms requested by the police or prosecuting attorneys or relating to the case in any way.
6. Refuse (if the client is at liberty) to go anywhere with the police or with prosecuting attorneys who may ask the client to accompany them, unless they have an arrest warrant; and tell them that if they want the client to go anywhere or to do anything, they should contact counsel first.
7. Refuse (if the client is in custody) to participate in any lineup or to appear before any person for possible identification in counsel's absence; refuse to accompany the police or prosecuting attorneys to any place outside of the regular cell and recreation areas of the detention facility, except to court, in counsel's absence; object to any inspection of the client's body, physical examination, or test of any sort in counsel's absence; request permission to telephone counsel immediately in the event that the police begin any lineup or identification procedure, inspection, examination or test; and, if put in a lineup or exhibited for identification over his or her objection, observe and remember all of the circumstances (see § 3.19(d))

*supra*).

8. Refuse consent to anyone who may ask the client's permission to search the client's home or automobile or any place or thing belonging to the client (including items in the possession of the police), or who may request access to the client's cell phone, computer, camera, or other communications or recording device.
9. Respond to all accusations and to anyone who gives any evidence against the client or says anything against the client by stating that the client's lawyer has told the client not to talk to anybody unless the lawyer is present.
10. Telephone counsel as soon as possible if anything at all comes up relating to the case – if anyone whom the client does not know tries to talk to him or her about it; if the client hears that a co-respondent or adult defendant or other person involved in events relating to the case has snitched on the client; or if the client gets any new information or receives any communication from the court about the case.
11. If the client goes or is taken to court and counsel is not present when the client's case is called, tell the judge that counsel is supposed to be present and request that the judge wait for counsel to arrive (if the client knows that counsel is aware of this court date) or that the judge telephone counsel or permit the client to telephone counsel and inform counsel that the client is in court (if the client suspects that counsel does not know about the proceedings).

In some situations, counsel may decide that it is in the client's interest to make a statement to the police or to the prosecutor or otherwise to cooperate in their investigation. This is most common in cases in which counsel believes that the authorities can be persuaded to drop charges (see §§ 8.14, 9.06 *infra*) or in cases in which a favorable plea bargain appears to be negotiable (see §§ 14.15, 14.18 *infra*), particularly when the authorities and the client are considering the client's turning state's evidence and testifying against accomplices. Even if the client is contesting guilt and a trial appears likely, there are instances (rare, to be sure) in which the defense stands to gain by cooperating with the prosecution's evidence-gathering efforts. For example, defense counsel who has interviewed an eyewitness to the offense and is confident that the witness will not identify the respondent in a lineup may want to have a lineup held. Or if the respondent's story includes an admission of some incriminating facts (for example, presence at the scene of the offense or commission of the *actus reus*) but denies others (for example, taking any part in the *actus*, or having the requisite *mens rea*) or asserts facts supporting some affirmative defense (for example, self-defense, or mistake of fact), a written or oral statement to the police may be advised as the best means of putting the respondent's version of the facts before a judge or jury without the respondent's being subject to impeachment. (Prosecutors tend to present these incriminating admissions in their case-in-chief, even when they have ample independent proof of the facts admitted. And if the prosecution offers only a portion of the

respondent's statement, the defense is entitled to put the whole of it into evidence.) Thus adduced at trial – whether by the prosecution or the defense – the statement does not open the respondent up to either cross-examination or the sorts of impeaching evidence (see §§ 33.06, 33.09(a) *infra*) to which the respondent would be exposed if s/he told the same story on the stand in court. Counsel's decisions to cooperate in the staging of a lineup, to permit the client to make a statement, or to provide other evidence to the prosecution in these situations will, of course, qualify the general advice to the client described earlier. In all of these cases, however, counsel should be present during any face-to-face dealings between the client and the police or prosecutors, and counsel should examine any writing or physical evidence before it is turned over to them. The client should never be allowed to communicate with the authorities in counsel's absence. Hence it is best always to give the client the full roster of advice in this section without modification; then if circumstances justify exceptions to the general rules stated here, counsel can subsequently work with the client to decide upon these exceptions and to implement them.

If the client is in police custody at the time of the interview, counsel should not leave without first having the client personally tell a police officer, with counsel listening (and coaching if necessary), that the client does not wish to speak to the police or prosecuting authorities at any time in the future in the absence of counsel but wants to conduct all communications with the authorities from now on solely through the medium of counsel. See § 3.19(f) *supra*.

#### **§ 5.11 THE FINAL STAGE OF THE INTERVIEW: THE DISCUSSION WITH THE CLIENT AND HIS OR HER PARENT(S); FEE-SETTING; OBTAINING RELEASES OF INFORMATION**

After counsel has completed the separate interview of the client, counsel should bring the parent back into the room and talk with the client and parent together. It is essential that the client remain in the room during counsel's discussion with the parent. Since children are naturally disposed to believing that adults stick together, s/he would inevitably view his or her exclusion as motivated by counsel's intention to abrogate the attorney-client privilege and reveal to the parent everything the client said. Thus, excluding the child can undo whatever progress counsel has made toward establishing a good attorney-client relationship and quite possibly prevent any future meaningful relationship with the client.

The parent will naturally be curious about what counsel discussed with the client. Counsel can satisfy the parent's curiosity and simultaneously convey an important message to the client by seizing the opportunity for explaining the attorney-client privilege to the parent. After noting that counsel discussed the case with the client, counsel then should explain to the parent that the attorney-client privilege forbids counsel from revealing the content of that discussion to anyone, including, unfortunately, the parent. Counsel should furthermore explain that if the parent questions the child about the facts or about the child's discussion with counsel, the parent could learn facts (whether inculpatory or exculpatory) that would render the parent vulnerable to being subpoenaed as a witness for the prosecution. As explained in § 5.03(a) *supra*, the vast

majority of jurisdictions have no parent-child privilege, and even the handful of jurisdictions that recognize such a privilege make various exceptions to it.

There are numerous questions that counsel may need to address to the parent. If the parent is a potential witness in the case (for example, if the parent may be an alibi witness, or observed the crime take place, or was present during police interrogation when *Miranda* warnings might or might not have been given), counsel will have to conduct a factual interview of the parent, just as counsel would with any other factual witness. If the child was unable to provide certain background information, such as the names of prior schools s/he attended or the addresses and phone numbers of relatives or witnesses, counsel may be able to get the needed information from the parent. However, counsel should always inform the client during the earlier private session with him or her that counsel intends to ask these questions of the parent, and that s/he will ensure that the client is present during the interview of the parent.

If counsel is going to handle the case on a fee basis rather than as court-appointed counsel for an indigent client or as a *pro bono* matter, counsel also will need to discuss fees with the parent. Misunderstandings about fees are a vexatious and unnecessary irritant, and it behooves counsel to come to an early and very clear fee agreement. After determining the nature of the case and the evidentiary and investigatory problems likely to be involved, counsel should calculate a fair fee and agree upon it with the parent. Fee-setting in a delinquency case is normally based on an advance estimate of the amount of time that will be necessary to handle the case and not on a post-audit hourly basis. What expenses are to be paid by whom and what exact stages of the process (that is, through to, but not including, trial; through trial; through a first appeal; and so forth) are to be covered by the fee should be explicitly stated and the agreement reduced to writing and signed. Counsel is cautioned to advise the parent that failure to pay the full fee before trial will result in counsel's withdrawal from the case; experience indicates that fees in delinquency cases, like fees in criminal cases, are hard to collect after trial, no matter what its outcome.

Counsel should ask the client and his or her parent to sign "Release of Information" forms so that counsel will be able to obtain records about the client from his or her school and other agencies that preserve confidentiality of records. The form signed by the client should contain wording such as the following:

#### RELEASE OF RECORDS AND INFORMATION

I, [name of client], am currently being represented by [name of counsel and counsel's organization or law firm].

I hereby authorize you to release to [name of counsel] and his or her law partners, investigators, social workers, and other employees, any and all records including (but not limited to) educational evaluations and school records (including my cumulative record folder and all its contents, all academic records, special education records, guidance

reports, anecdotal records, incident reports, records kept by the guidance counselor, and any other records maintained by the school), as well as medical, social, psychiatric and psychological records, and any and all records and reports prepared by social workers.

I understand that my right to confidentiality means that you cannot share this information without my consent. I fully understand that I am requesting that you reveal confidential information to the named individual(s). I feel that [name of counsel] will be able to use the material to help me, and I am authorizing the release of this information for that reason.

\_\_\_\_\_  
Signature of client

\_\_\_\_\_  
Client's date of birth

\_\_\_\_\_  
Date of Signature

The form signed by the parent or guardian should be entitled "Consent by Parent or Guardian to Release of Confidential Records and Information Pertaining to a Child" and should parallel the language of the client's release form, with the words "my child" substituted where appropriate. Before the client and the parent or guardian sign the forms, counsel should carefully explain the content of the forms and their legal effect. Counsel should explain that s/he may need the records in order to prepare for trial and in order to prepare motions. Since some clients will be apprehensive that counsel may show unfavorable records to the judge, counsel should reassure the client and the parent or guardian that counsel will keep the records to himself or herself unless they help the case, and only in that event will s/he show the records to the court. If the client continues to be apprehensive about counsel's disclosure of the records to the judge, counsel can offer to consult the client after the records have been obtained to verify that the client approves of counsel's decision to use the records. Counsel should also inform the client that counsel will not show the records to anyone outside the court system and that the court system must maintain the confidentiality of any records about a juvenile.

At the conclusion of the interview, counsel should explain to the parent and child the upcoming stages of the case, describe the actions counsel intends to take in investigating the case and preparing for trial, and schedule any further meetings that will be needed.

### **§ 5.12 SUBSEQUENT INTERVIEWS WITH THE CLIENT**

Usually the client must be interviewed on more than one occasion. In counsel's preparation for trial, facts will be discovered that were untouched in earlier interviews, and these must be reviewed and analyzed with the client. Increasingly, the client should be cross-examined

in a fashion that may range from counsel's mild expression of surprise at a contradiction to open incredulity and grilling, depending upon counsel's best judgment of what is necessary at once to preserve the lawyer-client relationship and to get the truth. Clients may lie to their lawyer for a variety of reasons (*e.g.*, fear of alienating the lawyer by revealing that the client actually committed the crime or some other act the lawyer might dislike; an attempt to cover up a family member's or friend's involvement; bad advice from cellmates or others about the need to withhold unfavorable information from counsel). If a client is to be saved from himself or herself, s/he must be made to tell counsel the truth. And whether or not s/he is lying, s/he must be confronted with any inconsistencies among the pieces of the story s/he is telling or between the client's story and other information obtained by counsel, since these inconsistencies may be exposed at trial.

One way to cross-question the client vigorously without creating the impression that counsel disbelieves or distrusts the client is to engage in an explicit exercise of role-playing, in which counsel first prepares and rehearses the testimony that the client might give in his or her own defense at trial and then plays prosecutor for purposes of cross-examining the client. This kind of dry run of cross-examination, as well as direct examination, will be necessary later, in any event, in any case in which the client is considering testifying at trial. (See §§ 10.09(c), (d), 10.10 *infra*). During the case-planning and investigative stages (see Chapters 6 and 8 *infra*) and before undertaking plea bargaining or deciding on a plea (see Chapter 14 *infra*), the same technique can be used to confront the client with any embarrassing holes or contradictions in the client's story while maintaining an attitude of complete confidence in the client's truthfulness, although "the prosecutor" will have some pretty tough questions to throw at the client. At some point during these interviews with the client, preferably near the time of trial when counsel has all the information that s/he will have at trial, the client should be given an objective appraisal of the case, with counsel avoiding unfounded optimism or pessimism.

### § 5.13 INTERVIEW CHECKLIST

The following checklist covers most of what the lawyer will have to learn from a client in order to develop an effective defense at all stages of a juvenile delinquency case from first contact through trial. It models a thorough interviewing process; more than a single interview will ordinarily be needed to gather all of the information it includes. When the charge is relatively minor, less extensive fact-gathering may be adequate. But counsel will do well to assume at the outset that all of the subjects flagged by this checklist need to be on the agenda; decisions to curtail coverage should be made deliberately only after counsel has enough of a sense of the case to be sure that it is safe to omit the matters listed in any specific area.

*(to be completed by attorney following the interview)*

Attorney's file no.: \_\_\_\_\_

Delinquency case no.: \_\_\_\_\_

Client's name: \_\_\_\_\_

Charges: \_\_\_\_\_

\_\_\_\_\_

Date and hour of interview: \_\_\_\_\_

Place of interview: \_\_\_\_\_

\_\_\_\_\_

Name of interviewer: \_\_\_\_\_

### **INTERVIEW SHEET**

**Name** (have the client spell even common names):

All aliases and nicknames:

Street address (if apartment or room, include number):

Phones, land and cell (and name of person whose phone it is, if not the client's own):

Email, e-text, and website addresses:

Date of birth:

Place of birth:

Place of residence at time of arrest:

Prior places of residence (from latest to earliest):

Residence:                      From (date):                      To (date):

### **Education:**

Name/location of school	Current Grade	Date last attended
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Frequency of Attendance:

Passing or Failing Subjects?

**Present and prior employment**, including summer jobs and part-time jobs) (separate notation of all employers if more than one):

Name of employer:

Street address:

Phone:

Email, e-text, and website addresses:

Type of business:

Narrative description of what the client does in the usual course of his or her work:

Hours and days of work:

Period of employment:

Reason employment terminated if client is not still employed in this job:

**Social security number:**

**Client's father:**

Name:                      Type of work:

Living       Deceased

If living:

Age:

Street address:

Phone:

Email, e-text, and website addresses

Employed:     Yes  No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses

Narrative description of what father does in the usual course of his work:

**Client's mother:**

Name:                      Type of work:

Living       Deceased

If living:

Age:

Street address:

Phone:

Email, e-text, and website addresses

Employed:     Yes  No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses

Narrative description of what mother does in the usual course of her work:

**Siblings:**

For each sibling:

Name:

Age:

Street address:

Phone:

Email, e-text, and website addresses:

Employed:     Yes  No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses

Narrative description of what sibling does in the usual course of his or her work :

**By whom was the client raised?** Indicate if parents were separated during any period of the client's childhood. If the client was raised by persons other than a parent, get data for those persons as for parents, *supra*.

**Immigration-related issues:**

Is the client a non-citizen? If so, what is his or her immigration status? (Even legal immigrants may be at risk of immigration consequences following an arrest or charge, either as a result of the unfavorable outcome of the delinquency case or merely because government officials learn of the client's non-citizen status. For discussion of potential immigration issues, see § 14.07 *infra*.) What is the client's nationality if not U.S.? Is the parent or guardian with whom the client lives a non-citizen? If so, what is his or her immigration status? What is his or her nationality? Has the client or his or her parent or guardian expressed concern about immigration problems if government officials learn of his or her non-citizenship status or whereabouts?

Has the client or his or her parent or guardian had contact with immigration authorities? If so, what is the name of any individual immigration agent known by the client to be involved, and what is that agent's title, office or department, street address, phone, email, e-text, and website addresses? If the names of individual agents are unknown, what is the name of the agency or department involved, and its street address, phone, email, and website addresses? Does the client or his or her parent or guardian have paper or electronic documents that would contain this contact information?

**Does (or did) the client use drugs?**       Yes       No

Type(s):

Since (date):

Present frequency of use:

Has the client received treatment for a drug problem or participated in any form of detoxification or rehabilitation program (including peer-group programs)?       Yes       No

For each occasion:

Describe treatment or regimen:

Dates of beginning and end of treatment or regimen:

Name of agency:

Address:

Phone:

Email and website addresses

Name(s) of counselor(s) or professional personnel:

Street address:

Phone:

Email, e-text, and website addresses:

Does the client or his or her parent or guardian have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

**Does (or did) the client use alcohol?**       Yes       No

Volume and frequency of use:

If heavy drinker, since (date):

Has the client received treatment for an alcohol problem or participated in any detoxification or rehabilitation program (including AA or other peer-group programs)??  Yes  No

For each occasion:

Describe treatment or regimen:

Dates of beginning and end of treatment or regimen:

Name of agency:

Street address:

Phone:

Email and website addresses:

Name(s) of counselor(s) or professional personnel:

Street address:

Phone:

Email, e-text, and website addresses

Does the client or his or her parent or guardian have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

**Client's physical and mental condition:**

Present physical disabilities:

Present physical illnesses:

Is client presently under medical care?  Yes  No

Doctor's name:

Street address:

Phone:

Email, e-text, and website addresses:

Serious physical injuries (and all head injuries):

For each injury:

Type:

Cause:

Date:

If hospitalized, name, street address, and city of hospital, and dates of hospitalization:

Name[s] of physician[s] and other individual professional personnel:

For each individual known:

Phone:

Email, e-text, and website addresses:

Does the client or his or her parent or guardian have paper or electronic documents that would contain identifying or contact information for this hospital or information about the client's treatment or performance?

Has the client ever been in a mental hospital or institution?  Yes  No

For each hospital or institution:

Name, street address, and city of hospital:

Admission date:

Discharge date:

Event[s] leading to hospitalization:

Diagnosis:

Name[s] of physician[s] and other individual professional personnel:

For each individual known:

Phone:

Email, e-text, and website addresses:

Does the client or his or her parent or guardian have paper or electronic documents that would contain identifying or contact information for this hospital or institution or information about the client's treatment or performance?

Has the client ever been found mentally incompetent by a court?  Yes  No

For each occasion:

Name and location of court:

Name of judge:

Name[s] of attorney[s]:

Date of adjudication:

Nature of proceeding:

Event[s] leading up to proceeding:

Does the client or his or her parent or guardian have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

Has the client ever been treated by a psychiatrist or psychologist?  Yes  No

For each treating professional:

Name:

Street address:

Phone:

Email, e-text, and website addresses:

Date treatment began:

Date treatment ended:

Circumstances leading to treatment:

Diagnosis:

Nature of treatment:

Does the client or his or her parent or guardian have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

Has the client ever undergone a psychiatric or psychological evaluation?  Yes  No

For each evaluator:

Name:

Street address:

Phone:

Email, e-text, and website addresses:

Circumstances leading to evaluation:

Diagnosis or result of evaluation:

Does the client or his or her parent or guardian have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

**Prior record** (all arrests, from latest to earliest and any pending juvenile [and, if applicable, adult] charges, in any jurisdiction):

Date of arrest:

Jurisdiction (city and State):

Charge(s):

Dismissal, diversion, or other resolution without trial or guilty plea:

Plea (guilty or not guilty; if guilty, of what charges):

Trial by judge or jury:

Name of judge:

Adjudication (guilty or not guilty; if guilty, of what charges):

Disposition:

Date disposition handed down:

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

Time served:

Institution:

Sentence of probation or parole:

from (date):                      to (date):

Names of all probation and parole officers:

Street address of each officer:

Phone number of each officer:

Email, e-text, and website addresses of each officer:

Was the client ever charged with violation of probation or parole conditions?

Yes                       No

Date of violation and nature of violation charged:

Disposition of violation charge:

Does the client or his or her parent or guardian have paper or electronic documents that would contain identifying or contact information for the courts, judges, cases, prosecutors, defense attorneys, probation and parole officers involved or information about the proceedings and dispositions?

**Was the Client on Probation or Parole at the Time of this Arrest?**

Yes  No

On which of the above prior charges? (indicate by number):

Check whether probation  or parole

Amount of back time owed:

**Was the Client Under any Pending Charges at the Time of this Arrest?**

Yes

No

Which of the above prior charges was pending (indicate by number):

Form of conditional release on that charge:

If the client was on bail for that charge, obtain the data specified below under "Present custodial status / Bail."

Does the client or his or her parent or guardian have paper or electronic documents that would contain identifying or contact information for the courts, judges, cases, prosecutors, defense attorneys, probation and parole officers involved or information about the proceedings and dispositions?

**Was the Client Wanted for Arrest on Other Charges in any Jurisdiction at the Time of this Arrest?**  Yes  No

For each charge:

Jurisdiction:

Charge(s):

Nature of incident:

How client knows s/he is wanted:

Name of law enforcement agency involved, if known:

Street address:

Phone number:

Email and website addresses:

Officers involved, if known:

Street addresses:

Phone numbers:

Email, e-text, and website addresses:

Does the client or his or her parent or guardian have paper or electronic documents (such as a warrant or notice) that would contain identifying or contact information for the agencies and agents involved or information about the nature of the charges and status of proceedings?

Has the client consulted an attorney about these charges?  Yes  No

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

**Present custodial status:**

Jail or other detention facility (name and address):

I.D. number within the facility (if any):

Bail:

Where posted:

When posted:

Amount:

Form (cash, property, professional surety):

If bonding company:

Street address:

Phone number:

Contact person:

Email, e-text, and website addresses:

Who paid for the bail:

Has collateral security been put up?  Yes  No

If so:

Nature of collateral: \_\_\_\_\_

Amount secured: \_\_\_\_\_

Who put up the collateral: \_\_\_\_\_

Does the client or his or her parent or guardian have paper or electronic documents that would contain identifying or contact information for the bondsman and terms of the bond?

Other form of conditional release (describe):

**Facts relating to the offense charged and the client's connection with it or whereabouts and activities at the time of the offense; facts relating to the client's arrest and subsequent interactions with law enforcement agents:**

The client should be asked to tell everything s/he knows about the present charge, in chronological order: what s/he did, what happened to him or her, who was involved, when and how the client was arrested, and everything that the police have done with the client since arrest. At the conclusion of the client's story, counsel should ask questions – who, what, why, when, where, and how – for clarification. Before terminating the interview, counsel should be sure s/he knows at least the following:

**The client's version of the events on which the charge is based or, if the client denies involvement, where the client was and what s/he was doing at the time of the events on which the charge is based.**

Witnesses (indicate if immediate contact is advised for any reason):

Witnesses to the events on which the charge is based (including the complainant and persons who may be prosecution witnesses):

Alibi witnesses:

Background and character witnesses:

For each witness:

Name (get spelling and all aliases and nicknames):

Street address:

Phone:

Email, e-text, and website addresses:

Physical characteristics useful for identifying the individual:

Other information helpful in locating the witness (where does s/he go to school and/or work, where does s/he hang out, is s/he on public assistance, and so forth, as appropriate):

**Arrest:**

Who, what, why, when, where, and how?

For all officers involved in the event, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

Does the client or his or her parent or guardian have paper or electronic documents (such as a warrant or notice) that would contain identifying or contact information for the agencies and officers involved or information about the nature of the charges and status of proceedings?

Who was with the client when s/he was arrested? Were they also arrested? Get information as for witnesses, *supra*.

Was the client under the influence of drugs when arrested or had s/he taken drugs recently?  Yes  No

Was the client drunk when arrested or had s/he taken alcohol recently?  Yes  No

Was the client ill when arrested?  Yes  No If so, describe illness:

Was the client struck or roughly handled during arrest or thereafter?  Yes  No

If so, describe injuries:

Date and time of arrest:

Exact location of arrest:

Did the arresting officers have a warrant?  Yes  No

What did they say the charge was?

What questions did they ask the client?

What did the client tell them?

**Did the police at the time of the arrest or any other time take anything from the client's person, home, school, place of work, automobile, place where the client was, or from the premises or property of any other person?**  Yes  No

Things taken:

Did police have a search warrant?  Yes  No

Describe circumstances under which the things were taken:

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For all other persons present, get information as for witnesses, *supra*:

**Did the police make any other search of the client's person or possessions, or enter the home, school, place of work, automobile, or place where the client was, or search the property or enter the premises of any other person?**  Yes  No

Did police have a search warrant?  Yes  No

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For all other persons present, get information as for witnesses, *supra*:

**After arrest:**

Every location to which client was taken by police:

Exact times of confinement in each place:

Number of officers present in each place:

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

**Was the client interrogated?**       Yes       No

Where did the interrogation take place?

When and how long?

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For all other persons present, get information as for witnesses, *supra*.

Was a lie detector test given?  Yes  No

What specific questions did the officers ask? (This is often a good means of learning something about the prosecution's case.)

Did the police confront the client with any evidence against the client? If so, what:

Did the police tell the client that any person had incriminated the client or that any co-respondent or purported juvenile or adult co-perpetrator had confessed? If so, who:

Did the client tell the police anything?  Yes  No

Did the client make a written statement?  Yes  No

Did s/he sign it?  Yes  No

Did the client fill out or sign any forms?  Yes  No

Describe the forms:

What did the client say in any written or signed statement or in filling out any form? (The client should be asked to tell counsel everything s/he remembers, in detail.)

Did the client make an oral statement?  Yes  No

Was it tape-recorded or video-recorded?  Yes  No

Was it stenographically transcribed?  Yes  No

Did anybody write it out or take notes on it?  Yes  No

Other circumstances at the time of the client's statement, in detail:

What did the client say in any oral statement? (The client should be asked to tell

counsel everything s/he remembers, in detail.)

For each written or oral statement or form filled out:

Was the client previously warned:

That s/he had a right to remain silent?  Yes  No

That anything s/he said could be used against him or her?  Yes  No

That s/he had a right to a lawyer before making a statement?  Yes  No

That if s/he could not afford a lawyer, one would be appointed before any questioning?  
 Yes  No

What did the client say in response to these warnings?

Was the client asked whether s/he understood each warning?  Yes  No

How did s/he respond?

Was s/he asked whether s/he was willing to make a statement after having been given these warnings?  Yes  No

How did s/he respond?

Was s/he asked to sign a form or card with these warnings on it?  Yes  No

How did s/he respond to each warning, waiver, or question on the form or card?

**Did any co-respondent or purported juvenile or adult co-perpetrator confess or incriminate the client?** If so, everything the client knows about the person's:

Name (get spelling and all aliases and nicknames):

Street address:

Phone:

Email, e-text, and website addresses:

Physical characteristics useful for identifying the individual:

Other information helpful in locating the person (where does s/he go to school; where does s/he work; where does s/he hang out; is s/he on public assistance; and so forth, as appropriate):

**Was the client given any physical examination;** was a DNA or blood sample taken; was hair taken or combed; was a drug or alcohol test administered or body inspection of any sort made; was the client examined by a doctor or mental health professional?

Where:

When:

Describe the examination, test, or inspection:

For all persons present, everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

Did anyone say anything about what the examination, test, or inspection showed?

Yes       No

Was the client asked for permission to make the examination, test, or inspection?

Yes       No

How did s/he respond?

Was s/he told that s/he had a right to refuse or to have an attorney present?

Yes       No

How did s/he respond?

**Was the client exhibited in a lineup or brought, under any circumstances, before any person for identification?**                       Yes                       No

Where:

When:

Describe the situation:

All persons present (including police, identifying witnesses, other persons in lineup, co-respondents, adult defendants): everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

What did the police say to the identifying witness:

What did the identifying witness say:

Was the client asked for permission to put him or her in the lineup or to exhibit him or her for identification?                       Yes                       No

How did s/he respond?

Was s/he told that s/he had a right to refuse or to have an attorney present?                       Yes                       No

If so, how did s/he respond?

Was s/he asked to do anything during the identification procedure (walk around, turn to one side, gesture, speak)?  Yes  No

If so, what did s/he do or say?

Was s/he told that s/he had a right not to do these things?  Yes  No

If so, how did s/he respond?

**Was the client asked to reenact anything?**  Yes  No

If so, get the same information as for lineup and identification procedures, *supra*):

**Was the client asked to give permission for the search of any place or thing?**  Yes  No

Where:

When:

By whom was the request made?

For all persons present, everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For what place or thing was permission to search requested?

What was the search supposed to be looking for?

What was said to the client by the person requesting permission?

What did the client say?

Was the client told that s/he had a right to refuse permission?  Yes  No

How did s/he respond?

Was anything said about a search warrant?  Yes  No

What was the client told about the warrant?

**Prior judicial proceedings on the present charges:**

Has the client already appeared in court on the present charges?  Yes  No

For each prior court appearance:

When:

What court:

Name, street address or location, department and room number of court:

Nature of proceedings:

Who was present (names or descriptions of judge, prosecutor, police):

For all persons present (judge, court reporter, prosecutor, police, co-respondents, adult defendants, witnesses), everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

Were charges read or shown to the client?  Yes  No

What were they:

Was the client asked to plead?  Yes  No

What did s/he plead:

Who testified:

What did they testify:

Did the client testify?

What did s/he testify?

Was the client represented by a lawyer?  Yes  No

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

Physical characteristics useful for identifying the individual:

Does the client or his or her parent or guardian have the attorney's card or any paper or electronic documents that would contain identifying or contact information for the attorney or information about the nature of the charges and proceedings?

What else happened in court:

Was the client given a slip of paper or a form of any sort?  Yes  No

If so, where is it? (Counsel wants to obtain this form as soon as s/he can get it from the client or the client's family, since it will state the charges and next court appearance date)

more accurately than the client can remember them and will contain the court's case number.)

Are there any co-respondents, adults who have been charged in criminal court for the same or connected offenses, or uncharged, purported juvenile or adult co-perpetrators?

Yes  No

For each one, everything the client knows about the person's:

Name:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

If the person is in custody, where:

If at liberty, get information as for witnesses, *supra*.

What role did the co-respondent, adult defendant, or uncharged, purported juvenile or adult co-perpetrator play in connection with the offense charged, according to (1) the police; (2) the prosecutor; (3) the co-respondent, adult defendant, or uncharged, purported juvenile or adult co-perpetrator himself or herself; (4) any witnesses who spoke to the issue?

For each attorney who represented a co-respondent or adult defendant, everything the client knows about:

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

Physical characteristics useful for identifying the individual:

**Counsel should obtain:**

1. The client's and parent's or guardian's signatures on releases giving counsel the right to inspect all school, medical, psychological, and other agency records relating to the client (see § 5.11 *supra*);
2. Where appropriate,
  - (a) Information relating to bail (see § 4.27(a) *supra*).
  - (b) A signed retainer and fee agreement (see § 5.11 *supra*).