
UPSCALE ACCUSATIONS

INTERVIEW

Teaching Note

I developed this exercise for my interviewing and counseling course –I’ve referred to it as “the Client Science Course, since the 2012 publication of my book by that name (with an unconscionably long subtitle). It is also available on the clientsciencecourse.com website (at least as long as someone maintains it).

This phase of Upscale Accusations is the initial lawyer-client interview exercise, involving age discrimination claims by a former employee against her long-time employer, with whom she helped set up the company. The exercise documents also ask the lawyer to explain attorney-client confidentiality and to discuss legal fees. [The second phase, *Upscale Accusations Client Counseling Exercise*, supplies additional facts found in discovery, fully analyzes the legal issues, and includes predictions regarding likely outcomes of preliminary motions and trial.]

In the initial interview, the lawyer must establish trust and rapport, and demonstrate understanding of the client’s perspective. This may present a challenge, as this client views himself as the “victim” of the terminated employee’s legal action (greed and vindictiveness, etc.). He has no regard for perspective of a 20+ year loyal employee terminated shortly after her return from heart surgery.

In fact, legal practice rarely presents one clear victim only. Lawyers sometimes see the pathos on the other side, as they hear the client’s story. They may find it difficult to refrain from expressing judgment – probably unwise at this stage. Other lawyers listen intently to their client’s expressed perspective – the narrative constructed to explain actions taken – and miss the underlying ambivalence and cross currents. They sometimes forget that business clients may struggle with financial risk, tough decisions, and complex human relationships. The lawyer is not a psychologist or a therapist, but listening fully is critical to the client relationship.

In this case, the business client’s narrative is likely to obfuscate his role in the termination decision, and to reveal conflicting emotions and relationships. The lawyer may not easily learn the complete facts where the client is inclined to distort or omit details to deflect responsibility. Yet the real facts matter, and the lawyer must learn them in order to (later) analyze the legal issues.

Helpful reading assignment

Before students practice with this or other lawyer-client exercises, I would have assigned my article: “Client Science: Advice for Lawyers on Initial Client Interviews” (2014). (I generally refer to this to as a supplement chapter for the *Client Science* book. Available on [Clientsciencecourse.com](http://clientsciencecourse.com) website and (I believe) SSRN, this piece merely synthesizes a raft



of other writing and research regarding establishing a client relationship, understanding the client's perspective (active listening), and techniques for fact gathering.

My article/chapter discusses Professor Linda Smith's confirmation that asking questions in a funnel sequence structured around legal issues is difficult for less experienced lawyers, who are likely to be less familiar with the landscape of legal issues a potential client might bring to an interview. Particularly if this case is used for first year or early second year students (any students who have not yet completed a basic corporations course), many will be unable to spot the legal issues for "funneling" questions. Students are therefore called upon to practice eliciting information without legal knowledge.

Chapter 4 of my *Client Science* book focuses on working with client emotions and would also be helpful for its discussion on "targeted active listening". Chapter 3, "Meaning Truths" would also be relevant even for the interview, and surely for the Client Counseling phase of the exercise.

Précis of the Upscale Accusations Interview Exercise

The attorney is a fourth-year associate in labor and employment law at a medium sized firm. He was delighted when a corporate partner referred this employment litigation matter facing his corporate client, Upscale Exhibits (a small business that designs historical and artistic displays). Your assistant scheduled the initial interview with a principal of Upscale. Prior to the interview, Upscale provided a copy of the complaint filed against it, alleging age discrimination. The attorney knows that the lawsuit must have been preceded by an Equal Employment Opportunity Commission (EEOC) action.

The instructions state that the attorney should be prepared to explain attorney-client confidentiality and legal fees. It puts the attorney's normal rate at \$175 per hour, but notes discounts when seconding a partner, as well as the possibility of adjustment to \$200 as he/she becomes more experienced. For extended litigation, the attorney can request a retainer, against which fees would be billed.

The client (representative) co-founded Upscale Exhibits and has been its main salesman and business mind. The co-owner, a college friend, was a graphic and interior designer - the "artiste." The plaintiff, Pat, had been a friend of the client's spouse and was on board from the beginning as the administrative/office manager. The business grew well.

Pat was indeed organized and detail-oriented and set up efficient processes. Not long before the downturn, with office operations running smoothly, the client gave Pat a promotion to account sales, while still supervising office management.

The recession hit Upscale hard, and business declined sharply. Upscale avoided layoffs because two salespeople left. However, two years ago, faced with continued business decline, Upscale's owners hired a business consultant to recommend changes to promote growth. That consultant



recommended that a youngish (32) fairly recent but talented employee, Jen, join the management team, freeing the owner for more sales and design.

While these changes were undertaken, Pat was on a medical leave for heart surgery. When the client told her over lunch, Pat wasn't happy but said she did not have the energy to make a fuss.

As Upscale Exhibits' revenues continued to be abysmally low, the owners decided assigned Jen the responsibility for evaluating which staff person to lay off. Jen concluded it should be Pat, and argued this persuasively. The client thought long and hard about it because of Pat's seniority and role in launching the company. It was also true that some of Pat's account clients had not been satisfied. The client terminated Pat "with a heavy heart." Pat's responsibilities were divided among other employees.

Pat declined the three-month severance offer and a month later filed an age discrimination claim with the EEOC. The client (foolishly) opted not to retain an attorney for the EEOC proceedings. The EEOC found reasonable cause and set up a conciliation session, at which Pat demanded \$500,000 and no negotiation progress was made.

The client was surprised Pat would sue and is outraged by the claim. He sees this as extortion and an effort to bankrupt the business, and "hates the idea of paying Pat a penny."

The client's instructions direct the role be played as defensive, self-righteous, and adamant about the decision, blaming events and everyone else, as if there were no choice. The client is told to emphasize stress and family financial pressures.

Role players are also asked to deliberately take on one of two client personality types: (1) The first type is someone reticent with information – reserved, perhaps shy (yet feeling stress), maybe a bit embarrassed. That client would not volunteer information or telegraph his state of mind. The role player is asked to permit little slips about what he might be feeling, but nothing obvious unless the lawyer explores it.

(2) The second type is a "real talker" who runs on with his story, not necessarily in logical or sequential order. The role player is asked to play it "over the top," as highly emotional, stressed, and emphatic that he has done nothing wrong. The lawyer's job will be to calm the client down, get the sequence of events and the facts, and elicit details. Whatever client personality is presented, the lawyer's challenge is to communicate understanding of and empathy for the dilemma.

On teaching with the Upscale Accusations interview

In my interviewing and counseling workshop, I've used Upscale as a final in-class exercise, after we've already covered all the course material and practiced with other simulations. Having the students work on Upscale at the end offers them the opportunity to "put it all together." In fact, I have usually done the Upscale interview in a fishbowl format, rotating pre-selected (and pre-warned) students in to demonstrate effective interviewing (and to



earn acting awards as clients). I moderate and, at periodic intervals, invite the audience classmates to comment and offer suggestions. Within the structure of my course, this enables the students to see how far they've come, and to recognize they now share a common language, and the ability to recognize what is effective and ineffective, and why. I do some coaching along the way, and often "encourage" (prompt and push) the student client actors to ramp up their performances.

Of course, this is just the place I've designated for Upscale Accusations within the structure of my course, and the method has worked within that structure. In fishbowl format, with lots of commentary and coaching, allowing for stop start and rotating in different students, this exercise easily takes an hour, often longer.

There's no reason Upscale Accusations couldn't be used wherever you want a fairly complex and realistic lawyer-client interview. However, as an exercise, with two-person groups of lawyers and clients, I estimate approximately half an hour. (If it takes less time, they haven't discussed all of the issues. In real life, it would take longer.) The length of the debriefing would depend upon how much was presented on interviewing beforehand: Will you introduce the elements of a successful initial interviews - what should be accomplished, with some mini-practice on some components - before they begin? If so, then the debriefing can focus on what was difficult to implement, how the clients responded, what seemed to work well. If you have not yet introduced those ideas, and seek to draw them out after students' attempts, the debriefing will be longer.

Note: Upscale Accusations could be used as an interactive interlude in an employment law or employment discrimination law course, as it certainly raises legal issues in employment and discrimination. So, please consider mentioning it to your doctrinal employment law colleagues. They might try it in their courses or seize the opportunity for a co-taught class session.