

LAWYERS AS COUNSELORS

A Client-Centered Approach

Second Edition

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Preface

This edition of Lawyers As Counselors builds on the client-centered approach that its predecessor editions have helped establish as the predominant hallmark of effective lawyer-client conversations devoted to problem-solving. We want to briefly highlight some of the principal additions and revisions that characterize this new edition.

The United States is increasingly a multi-cultural country, meaning that lawyers are more likely than ever to represent clients who identify with cultural backgrounds that lawyers are unfamiliar with. We have tried to address that trend in this edition with several discussions of “inter-cultural communication.” You will find the most detailed coverage in Chapter 2, which sets forth dimensions of culture difference that cultural anthropologists, psychologists and sociologists have identified. Here and in other chapters, we discuss and illustrate how you might respond when you believe that cultural differences might be affecting the effectiveness of interviewing or counseling. At the same time, discussions of cultural difference can all too often lead to embarrassing and misleading reliance on stereotypes. Thus, we stress throughout the likely presence of variations within seemingly narrow cultures, and the reality that clients who share a common cultural background do not necessarily reflect that culture’s values and traditions.

The counseling model that this book continues to set forth attempts to assure that clients have the opportunity to make sensible decisions that are satisfactory and in their best interests. At the same time, research continues to demonstrate that people’s decision-making capacities are often influenced by a variety of “irrational” reasoning methods that collectively are often called “Cognitive Illusions.” For example, the “Availability Heuristic” may lead clients to rely on single episodes that stick out in their minds, even though those episodes have little relevance to the clients’ problems. Chapters 17 and 18 discuss how Cognitive Illusions such as these may affect decision-making, and how you might respond when you detect a Cognitive Illusion at work.

This edition refines and we think improves on the earlier books’ discussions of interviewing strategies and techniques. For example, we no longer try to portray rather artificially what might happen during a single initial interview, and instead recognize that information-gathering may continue though a series of initial meetings. Moreover, we eliminate the suggestion that you should almost always temporarily terminate initial meetings in order to prepare for “theory development” questioning. We sincerely doubt whether that suggestion would have been popular with clients, or whether attorneys were likely to follow it. Also, this new edition provides a more complete picture of effective interviewing, describing

strategies and techniques for uncovering and combating harmful information. (See Chapters 7 and 8.)

This new edition is in many other ways a richer book than its predecessors. We have not simply added and subtracted, but rather have revised the original text to improve its organization, readability and timeliness. We hope that while remaining true to our original conception of client-centered lawyering we have produced a much-improved text. To the extent that we have not succeeded in our aims, we encourage you to let us know.

PREFACE TO THE FIRST EDITION

Like the earlier *Legal Interviewing and Counseling: A Client-Centered Approach*, this book also adopts a client-centered approach. More than a set of techniques, the client-centered approach is an attitude of looking at problems from clients' perspectives, of seeing problems' diverse natures, and of making clients true partners in the resolution of their problems.

Clients often complain that, "My lawyer doesn't listen to me." Behind this complaint lies the reality that clients' problems typically embrace both legal and non-legal aspects-e.g., economic, social and psychological aspects. But lawyers, trained to focus on problems' legal aspects, tend to pigeonhole problems along substantive law lines such as a "medical malpractice case" or a "real property subdivision matter." As a result, lawyers tend to miss much of what clients are trying to explain and accomplish. Our hope is that the client-centered approach can help produce decisions that take account of all aspects of clients' problems and thereby make the world a bit better for both you and your clients.

While retaining many of the earlier work's client-centered themes, we have tried in this book to move beyond it in several ways.

First, we have tried to be more explicit about the principles that constitute a client-centered approach. Set forth in Chapter 2 [now Chapter 1], these principles underlie many of the book's concepts and techniques.

Second, we examine interviewing (information-gathering) not as a separate task, but as an integral part of the counseling process. Because we see lawyers' principal role as helping clients solve problems, we approach interviewing as an opportunity to learn about problems from clients' perspectives as well as to gather legally salient data.

Third, in an effort to write a book that will be useful in nearly all attorney-client relationships, we examine counseling principles and techniques in both litigation and transactional contexts. Thus, some chapters focus primarily on litigation matters (e.g., Chapters 8, 9, 10 and 21) [now Chapters 6, 7, 8 and 18]; others on proposed business deals (e.g., Chapters 11, 12 and 22) [now Chapters 9 and 19]; while the remaining chapters illustrate concepts and techniques with examples drawn from both litigation and transactional matters.

Fourth, we set forth and explore an explicit counseling standard. Most notably, the standard (described in Chapter 15) [now Chapter 12] is process-based rather than content-based. That is, we do not attempt to define how much "actual awareness" of relevant factors a client should

have before making a decision. Rather, our standard encourages lawyers to engage clients in counseling dialogues during which clients' decisions, are preceded by joint examination of objectives, options and likely consequences. Since the state of clients' "actual awareness" is' unknowable, and the extent of counseling typically varies according to each client's unique circumstances, we think that our process standard is best suited to helping clients become active and knowledgeable participants in the resolution of their problems.

Finally, we recognize that in some circumstances, it is both proper and desirable for lawyers to give advice about what clients ought to do. Moreover, lawyers may even intervene in decisions when clients mis-predict their likely outcomes or when decisions are likely to have "immoral" consequences. The earlier book, perhaps in over-reaction to the tendency of many lawyers to tell their clients what to do, gave little comfort to those who thought that clients often expected and benefited from their lawyers' opinions. Taking what we now believe is a more realistic approach to advice-giving enables us to discuss how to give advice in a way that preserves client autonomy.

*

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To all of these colleagues, we express our gratitude for your friendship, support, professionalism and genuine respect for and interest in the work of lawyers. And in the event of a future edition, should you want to do some of the actual writing, that will be fine too.

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As proof that we can maintain friendships outside the legal academy, we thank Dr. Felice Miller, Ph.D., for advice about cross-cultural communication.

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As this edition of the book progressed at somewhat less than the speed of light from tentative outline to nearly-finished book (the Completely Finished Book being the Holy Grail that has eluded authors from time immemorial), a few wonderful law students went through puberty, graduated from college and entered and in some cases graduated from law school just so they could spend hours in various libraries doing research and providing helpful perspectives on our ideas. At UCLA, special thanks to Katy Klinedinst for cheerfully pretending that we had clearly delineated the type of research help we needed and likely sources of information; your assistance was invaluable in bringing the work to fruition. Our sin-

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Our gratitude to the UCLA Academic Senate, the UCLA Dean's Fund, the Boston College Law School Dean's Fund, and Hale and Dorr, LLP for your generous financial support. We did our best to spend your money wisely.

Finally, Paul Tremblay thanks Linda, Chris and Jen, for their endless support, encouragement and patience. As a result, David Binder and Paul Bergman have to say something nice about Melinda and Andrea, respectively.

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February, 2004

**LAWYERS AS
COUNSELORS:
A Client-Centered Approach**

Second Edition

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Part One

INTRODUCTION TO CLIENT- CENTERED COUNSELING

Consisting solely of a single chapter, Part One explores the general nature of clients' problems and identifies the central components of client-centered interviewing and counseling processes for resolving them.

Chapter 1

CLIENT-CENTERED LAWYERING

* * *

John Crampton of Mid-Marine Insurance enthusiastically describes Mid-Marine's potential acquisition of Enterprises Inc., a small aluminum manufacturer. Gary Swartz of the Crestwood Home Owners Association frantically wants to enjoin a Crestwood property owner who, despite deed restrictions, wants to split his lot. Stephanie Belandis, Jacquie Bowman, and Jennifer Van Campen, representatives of the Brighton Tenants Union, cautiously describe their plans to purchase and renovate an abandoned building for use as low-income housing. Alex Combs sadly wonders how his arrest for burglary will affect his job and children. Louise Harris, manager of Blake County Water District, discusses the District's need to raise capital through a new bond issue. Marlene Fox excitedly describes a new record deal that Columbia wants her to sign. Phil Bondchefski, the CEO of Apex Steel, is furious that Apex has been sued for price fixing. Arlene Wagner, executive director of the local NAACP chapter, is concerned about renewing the chapter's lease. Helen Reston angrily relates that she was fired for reporting the company's practice of overcharging on government contracts. Charles Winnegar quietly states that he wants to make a will leaving nothing to his son. Grace Parker dispassionately expresses her desire to sell her \$750,000 lakeside vacation house without capital gains liability.

* * *

1. INTRODUCTION

Clients come to lawyers seeking help in solving problems. And as the opening examples suggest, the range of people and problems that you are likely to encounter as a lawyer is enormous. The array embraces differences in size, complexity, emotional content and legal status.¹ Some

1. By size, lawyers typically mean the amount at stake. Cf. Mark Galanter, *Mega-Law & Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS*, 156-57 (1983). Complexity, on the other hand, usually has no single mean-

ing. Cases are seen as factually, procedurally and/or legally complex. Factual complexity typically refers to matters involving a number of factual disputes, a large number of witnesses and a substantial amount of evidence. When terming a case legally com-

problems involve disputes over past events and others focus on planning for the future. Nonetheless, all of the problems have something in common—the clients hope that satisfactory solutions can be achieved with the aid of your lawyerly knowledge, skills and judgment.

Thus, no matter who your client, what the substantive legal issues or whether a situation involves litigation or planning, your principal role as a lawyer will almost always be the same—to help clients achieve satisfactory and effective solutions to problems. The process by which you facilitate the resolution of clients' problems—that is, the process of counseling—is the subject of this book.

This book sets forth a “client-centered” approach to counseling. The client-centered conception has its source in a perspective that legal problems typically raise both legal and non-legal concerns for clients, that collaboration between attorneys and clients is likely to enhance the effectiveness of problem-solving, and that clients ordinarily are in the best position to make important decisions. The book describes, analyzes and illustrates a variety of strategies and techniques that will enable you to carry out client-centered counseling.

Since the original precursor of this edition was first published over 25 years ago, client-centered counseling has become among the most broadly shared conceptions of lawyering in the country. You can use a client-centered counseling approach “across the board” to facilitate solutions in all legal counseling situations. For example, you can follow client-centered principles:

- In both transactional and litigation matters;
- In complex cases (e.g., securities fraud) and straightforward ones (e.g., collection on a promissory note);
- No matter what substantive legal issues a matter involves (e.g., wrongful termination case, construction defect litigation or stock purchase agreement);
- Regardless of a client's identity (e.g., individual, corporation, representatives of a loosely-knit community group); and
- When you and a client have a prior professional relationship as well as when you represent a client for the first time.

plex, lawyers use different criteria. Sometimes legal complexity encompasses the notion that the subject matter is intellectually demanding. (For a discussion of the substantive subject areas lawyers in the Chicago, Illinois area perceive as intellectually demanding, see Edward Laumann & John Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 AM.B.FOUND.RES.J. 155, 166–68. Or, the term may mean that the matter involves legal issues for which the substantive law is unclear or in a state of continual

flux (see *id.*) or needs to be modified or perhaps even reversed in order to protect the client. Or, legal complexity may mean that the substantive law involves a number of rules that are unfamiliar to all but those who are specialists in the particular substantive area. For example, even lawyers who have some experience in areas such as securities fraud, anti-trust or murder prosecutions, might well describe such areas as complex because of the number of rules with which one must be familiar in order to handle such cases.