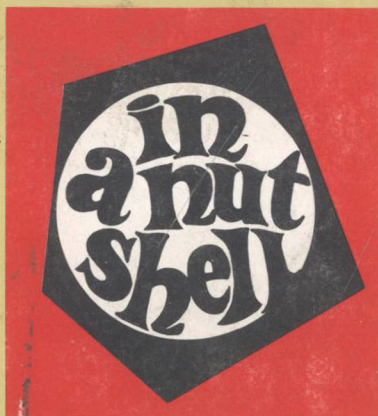


Legal Interviewing and Counseling



®

THOMAS L. SHAFFER

LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL

By

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ST. PAUL, MINN.

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To Joe and Jeanne, Dan, two Bobs, Lou, my brothers and sisters in the last of the Glips, and to legal counseling students by the ocean, across the sea, in the mountain, under the Dome, and in my heart.

*

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OUTLINE

| | |
|---|-------------|
| Dedication | V |
| Acknowledgements | VII |
| | Page |
| CHAPTER ONE: THE IDEA AND THE CAREER | 1 |
| Orientation | 7 |
| Content and Process | 19 |
| Initial Threats to a Working Relationship | 29 |
| Competition | 31 |
| Dependence | 35 |
| Dilemmas in the Ideal of Client Self-Determination | 39 |
| Lawyer's moral influence invoked | 42 |
| Client conduct which seems immoral to the lawyer | 44 |
| Client conduct which is illegal but seems moral | 46 |
| Client behavior seems not to serve the public interest | 47 |
| The Client as a Resource | 52 |
| CHAPTER TWO: FACTS IN LAW OFFICES (INTERVIEWING) | 64 |
| Approach | 68 |
| Environment | 84 |
| Ecology | 94 |
| Purpose | 97 |
| Arrangement of People | 102 |
| Territoriality | 104 |
| Contract | 105 |

OUTLINE

CHAPTER TWO: FACTS IN LAW OFFICES (INTERVIEWING)—Continued

| | Page |
|--|------|
| Devices and Obstacles | 116 |
| Listening | 116 |
| Questions | 119 |
| Things to Look For in Interviews | 125 |
| Principles | 128 |
| Non-Verbal Communication | 130 |
| Evaluation | 133 |
| Forms | 136 |
| Conclusion | 142 |

CHAPTER THREE: COUNSELING:

| | |
|---|-----|
| WHAT DO I WANT TO DO? | 144 |
| Companionship or Friendship? | 156 |
| Friend or Companion? | 159 |
| Dependence | 160 |
| Transference is a specialized instance of the ego defense of projection | 161 |
| Transference occurs commonly in all schools of psychotherapy and is funda- mental in Freudian and Jungian psy- choanalysis | 165 |
| Transference is not limited to psycho- therapeutic relationships. It may oc- cur in any relationship in which the transferring person feels trust toward the object of the transference | 174 |
| Transference often crosses sexual lines and may involve a reversal of genera- tions | 176 |
| Transference relationships may become exceptionally strong | 178 |

OUTLINE

CHAPTER THREE: COUNSELING:

| WHAT DO I WANT TO DO?—Cont'd | Page |
|-------------------------------------|-------------|
| Personal Climate | 180 |
| Self-Awareness | 181 |
| The Needs of Lawyers | 194 |
| Lawyer Differences | 195 |
| Client Reactions | 200 |
| Clues | 203 |
| Helper Traps | 206 |
| Moral Feelings | 208 |

| | |
|--|------------|
| CHAPTER FOUR: COLLABORATION | 234 |
| Collaboration | 236 |
| Pay-Off | 242 |
| Conflict of interest, although often denied or obscured by professional aspiration, is constant | 243 |
| Aspirations for the law as a social force conflict with the harm lawyers seem to cause in people's lives | 244 |
| The lawyer's sense of himself as a person is broader and deeper than his sense of himself as a lawyer | 244 |
| Models are vague | 245 |
| Preventive law | 252 |
| Interventions | 254 |
| Discrepancy | 255 |
| Behavioral Theory | 256 |
| Procedure | 256 |
| Relationship | 257 |
| Experimentation | 259 |
| Dilemma | 260 |
| Perspective | 261 |

OUTLINE

CHAPTER FOUR: COLLABORATION—Cont'd

| | |
|-------------------------|------|
| Interventions—Continued | Page |
| Structure | 263 |
| Cultural | 264 |
| Logic | 266 |
| Solution-Seeking | 267 |
| Values | 267 |
| Systems | 269 |

CHAPTER FIVE: SOLUTIONS 277

| | |
|--|-----|
| Creativity | 279 |
| Block One: Fear of Failure | 280 |
| Block Two: Reluctance to Play | 281 |
| Block Three: Resource Myopia | 282 |
| Block Four: Over-Certainty | 283 |
| Block Five: Frustration Avoidance | 284 |
| Block Six: Custom Bound | 284 |
| Block Seven: Impoverished Fantasy | |
| Life | 285 |
| Block Eight: Fear of the Unknown | 286 |
| Block Nine: Need for Balance | 287 |
| Block Ten: Reluctance to Exert Influ- | |
| ence | 288 |
| Block Eleven: Reluctance to Let Go | 288 |
| Block Twelve: Impoverished Emotional | |
| Life | 289 |
| Block Thirteen: Unintegrated Yin-Yang | 290 |
| Block Fourteen: Sensory Dullness | 291 |
| Other People (Negotiation) | 293 |
| Competition may be inevitable but con- | |
| flict is not | 293 |
| Lawyer personality may determine re- | |
| sults | 301 |

OUTLINE

| | Page |
|--|------|
| CHAPTER SIX: TERMINATION | 303 |
| Tragic Termination | 305 |
| Referral | 312 |
| Personal Relationships | 316 |
| Assistance | 318 |
| Retained Communication | 319 |
| Counseling Professions | 319 |
| CHAPTER SEVEN: EPILOGUE ON LEARNING | 326 |
| Bibliography | 331 |
| Index | 339 |

LEGAL INTERVIEWING and COUNSELING IN A NUTSHELL

CHAPTER ONE

THE IDEA AND THE CAREER

Legal interviewing and counseling is what lawyers do, in an office where they see clients one or two at a time, with the door closed.

The likelihood is that lawyers do this more than anything else. One survey suggests that lawyers spend from 30 to 80 per cent of their time in activities the lawyers themselves describe as "counseling." Another says that lawyers spend more time "interviewing clients" than in any other professional activity. Lawyers spend much less time in court or in the library than law students think; many lawyers spend no time in

Ch. 1 *THE IDEA AND THE CAREER*

either place, and the average lawyer time spent in each place is less than ten per cent. It is probably the case that an average lawyer spends more than half of his time influencing, facilitating, and implementing choices which are made, not by courts, but by individuals or small communities (families, boards of directors, neighbors, people who love one another and people who don't). That professional activity—influencing, facilitating and implementing choices in the law office—is a sufficient working definition for “legal interviewing and counseling.”

For the most part this professional activity will not require other professional activity (drafting, advocacy, research), or, if it does, the other professional activity will take less time and energy than counseling. Another way to put this (and a clumsy way) is to say that the “problem” in legal counseling is often more non-legal than legal.

A better way to say that legal counseling is often “non-legal” would be to say that the “law” in legal counseling is a client's choice. The operative and authoritative legal decision is the client's, rather than a court's or a legislature's.

There is a difference here between *decision* and *doctrine*. Counseling decisions are as awesome, as authoritative, as binding, and often as final as decisions of courts or legislatures; but they are not doctrinal. They proceed from whatever

it is in a functional psyche which resolves doubts and questions and facts. Law-office decisions proceed from relatively more obvious emotional factors than is the case with decisions by judges or legislators. They often clearly proceed from love and hate—so much so that any accurate assessment of law-office decisions must begin with the proposition that feelings are to law-office decisions what facts—facts in the record—are to common-law appellate decisions.

Feelings are facts.

The decisions themselves are more important, more awesome, more binding on the human lives they affect, than decisions of courts or legislatures. My father's will may have more to do with what my life will be like than anything the federal court of appeals will ever do. The settlement of a serious personal-injury claim asserted by your client will mean more to him and to his family than the entire product of this session of the Congress. A decision taken tomorrow morning, in a law office, by the president of a large business enterprise who makes his decision in concert with his lawyer, and no one else, may mean more in the next year, to hundreds of employees and investors, than all of the law you will learn this semester.

Feelings are facts. That is a useful motto for this book. I am defensive about the motto, and I need to expand it. Defensive because I don't like the way it