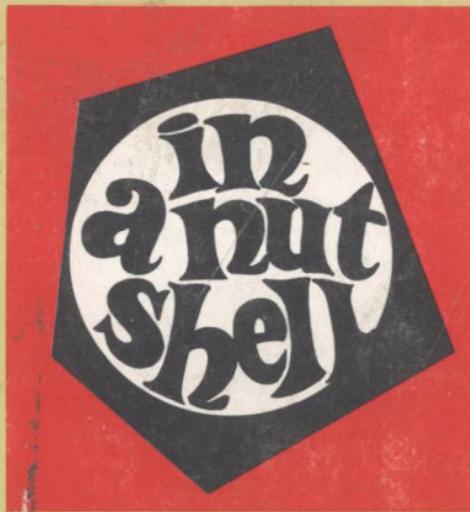


Legal Interviewing and Counseling



®

THOMAS L. SHAFFER

**LEGAL INTERVIEWING
AND COUNSELING
IN A NUTSHELL**

By

THOMAS L. SHAFFER

Professor of Law

University of Notre Dame

ST. PAUL, MINN.

WEST PUBLISHING CO.

1976

COPYRIGHT © 1976
By
WEST PUBLISHING CO.
All rights reserved

Library of Congress Catalog Card Number: 76-11446

Advisory Board

NUTSHELL SERIES

JESSE H. CHOPER

Professor of Law
University of California, Berkeley

DAVID P. CURRIE

Professor of Law
University of Chicago

YALE KAMISAR

Professor of Law
University of Michigan

ROBERT E. KEETON

Professor of Law
Harvard University

WAYNE R. LaFAVE

Professor of Law
University of Illinois

RICHARD C. MAXWELL

Professor of Law
University of California, Los Angeles

MICHAEL I. SOVERN

Dean and Professor of Law
Columbia University

CHARLES ALAN WRIGHT

Professor of Law
University of Texas

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.

*

V

ACKNOWLEDGEMENTS

Several sections in this book have been condensed and rewritten from my earlier work. This material, which is used here with permission, appeared originally at:

- 45 Notre Dame Lawyer 197 (1970);
- 57 American Bar Association Journal 123 (1970);
- 18 U.C.L.A. Law Review 844 (1971);
- Sixth Annual Institute on Estate Planning, University of Miami (1972);
- 17 American Journal of Jurisprudence 125 (1972);
- Seventh Annual Institute on Estate Planning, University of Miami (1973);
- Estate Tax Techniques (Lasser, ed.; Bender, 1973);
- 113 Trusts and Estates 568 (1974);
- 48 Southern California Law Review 721 (1975);
- 61 American Bar Association Journal 854 (1975).

ACKNOWLEDGEMENTS

I have borrowed thoughts and other authors' ideas in a number of places from informal papers, talks, and notebook material promulgated by the N.T.L. Institute for Applied Behavioral Science. Most of this material from other thinkers and authors is acknowledged as it appears in the text. However, some of the N.T.L. material (the outline of interventions in Chapter Four, for example, and some of the examples of blocks to creativity in Chapter Five) has been so thoroughly internalized (as the psychologists say) that I cannot recall its source well enough to acknowledge it. For all of that material, for the inspiration I have enjoyed from those who worked with me in N.T.L., and for Professor Morton Deutsch's seminal material on conflict (which is used with permission), I am deeply grateful.

At a number of places in the text, I quote from diaries compiled by my legal counseling students and from tape recordings made of counseling sessions (some by students, some by practitioners). These sources are necessarily confidential and, in some cases, are rewritten slightly to preserve confidentiality. In every case they are used with generous permission from lawyers, students, and clients, which I acknowledge with gratitude.

John Schaperkotter, of the University of Virginia School of Law, and Nancy Shaffer assisted

ACKNOWLEDGEMENTS

me with proof-reading and indexing, and the splendid staff at the University of Virginia School of Law prepared the manuscript. My thanks to them.

T.L.S.

Charlottesville, Virginia
Notre Dame, Indiana
April, 1976

*

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 fundamental in Freudian and Jungian psychoanalysis	165
Transference is not limited to psychotherapeutic relationships. It may occur 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 generations	176
Transference relationships may become exceptionally strong	178

OUTLINE

CHAPTER THREE: COUNSELING:

	Page
WHAT DO I WANT TO DO?—Cont'd	
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

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

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