

The Lawyer As Counselor

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Introduction

Although persons going into the practice of law have many and diverse interests, there will be thrust upon all of them to some degree, tasks which are best described as counseling. This aspect of every professional relationship is the most difficult to perform, takes longest to master, and may be the source of the greatest distress as well as the most intense gratification. It is this complexly personal part of professionalism which can be slighted or ignored, stumbling or skillful, effective or defeating, but it cannot be avoided.

When a client enters a lawyer's office, he brings inside himself a more or less stereotyped image of what a lawyer is like, what he can and cannot do, and the manner in which he will be served by him. This *role* as defined by the layman, carries with it certain immutable characteristics which will greatly influence the nature of the relationship, and which must be fully considered as the technical problems of law are raised and resolved.

In addition to the images brought into the relationship by the client, the lawyer will also have a picture of himself, which will largely control the manner in which he performs his professional task. This self-image will be compounded of elements from the remote past, technical skills mastered during the course of learning to function professionally in the law, and many subtle tendencies which are more or less stereotyped and individualized techniques for coping with *all* interpersonal relationships and the emotional themes present therein.

When these two sets of preconceptions and patterned emotional processes are brought together in the context of a lawyer-client interview, the outcome can be more or less predicted in the context of any particular legal problem. Even such matters as the choice of the lawyer's legal tactics will be the product of this interaction, and will predispose the manner in which the case is handled. Though it is infinitely more complicated and therefore more allusive to describe, it is analogous

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to the process of mixing two known chemicals in a test tube and then measuring and analyzing the result. The nature of this interaction will be the principal focus of my comments here.

The Lawyer's Role

As briefly mentioned above, the role a person occupies is determined by the society in which it exists. The practitioner himself has little to do with its definition, nor can he freely modify it without running into serious difficulties. For example, lawyers have had considerable to do with shaping the physician's role through the laws of malpractice, contract, and assault and battery, which limit and define the ways in which a doctor may and must relate to a patient. Physicians may challenge and protest these definitions, but they have no freedom whatsoever to change them. While these more tangible aspects of role are also present for the lawyer, I wish to focus upon some aspects of his role which are not so frequently the subject of comment.

First of all, a lawyer as a professional, in contrast to an artist or artisan, has several characteristics which place upon him very specific role demands. First of all, he is the possessor and purveyor of highly technical knowledge and skill, which is the product of a long and involved educative process. Second, this technical information is so completely unintelligible and beyond the scope of judgment to laymen, that a client has no capacity to evaluate the professional skill or effectiveness of the lawyer and his work. Third, because of the two factors mentioned above, the client therefore places himself entirely in the hands of the lawyer and must *trust* that his best interest will be protected by him.¹ This weighty obligation is the motive force for the development by all truly professional groups, of a code of ethics which is self-administered by the professional group and which is dedicated to the protection of those served. These ethical limitations set the standards of practice and are the principal method for controlling professional efficiency. It should be clear upon a moment's reflection, that it is virtually impossible to control professional standards from without, since non-professionals will always suffer the same incapacity to assay professional activity accurately, as do patients or clients.

1. Brandeis, L. D. *Business—A Profession* 2 (1933). Watson, A. S. "The Psychology of the Professional Self-Image." 38 *Chemical and Engineering News* 84-88 (Mar. 1960).

Clearly this places lawyers as professionals, in a posture which shall cause them to be both revered and feared. Those who function in a manner which looks both omniscient and omnipotent, stand in close psychological proximity to the status of gods, and it is no accident that ancient civilizations inevitably defied both law-givers and healers. All who have functioned in a professional role have no doubt experienced many occasions in which they fairly glowed under the worshipful attitudes of patients or clients. I do not suggest that we should deny ourselves this pleasure, but I would urge that we be aware of the other side of this emotional axis. Gods with power to produce reverence must also be feared, and wherever there is fear, there will be latent hatred. Just as the ancient gods suffered frequent assaults from mortals below, so professionals will be common targets for the irrational anger created and propagated by the helplessness of the client relationship. This fear and potential fury may be assumed omnipresent as a potent source of complication in the lawyer-client relationship. In fact, one can safely assert that there are *always* problems in professional relationships due to this normal, irrational force, but skillful and competent professionals know how to deal with it either intuitively or consciously. I will have more to say of techniques for handling this force presently.

The Lawyer's Image of Self

The lawyer's contribution to the professional relationship is not only composed of all the personal emotional factors present in the client, but he also provides the complication produced by his need to perform a highly technical task. Because he has selected his own professional activity, there will also be a series of emotional needs, some of which are largely unconscious, which caused him to choose the profession of law.² Though we do not yet have well established information about these factors, it would appear that many select law as a vocation because it gives them opportunities to operate from a position of power and authority, as they organize, conceptualize, and manipulate the social forces known as law. To comment about this is not to criticize these impulses, for they are present in every human being in some degree. It is merely to emphasize that each of us in selecting our vocation, responds to inner

2. Watson, A. S. "On the Low Status of the Criminal Bar: Contributions of the Law School." 43 *Texas Law Review*, 289-311 (Feb. 1965).

needs and desires by seeking out tasks which provide probabilities for such gratification. These tasks may be of enormous social value, but the professional role necessitates, or at least makes desirable, some awareness of the manner in which these internal forces may enter into professional activities.

Another emotional factor which will be present in many professionals, is a powerful desire to be helpful to others and thus secure a supply route to sources of approval, affection, or love. All human beings need such guarantees of attachment to the group, and professional activities are one of the surest sources of supply for this need. However, such emotional need may become of such overriding importance, that it can distort the professional relationship and produce inappropriate decisions and actions. One of the burdens of professionalism, is to make occasional moves which by their nature are bound to be unpopular, even when they are desirable and ultimately helpful. This is reflected in the oft repeated protest of punishing parents, that "this will hurt me more than you." No child nor any client can recognize this while suffering pain or frustration, and it is only by hindsight and mature reflection that the truth of the statement and the reason of its offering can become known.

Another important need which can be gratified in the law and which may be a well forged portion of a lawyer's identity, is the wish to create orderliness in ideas, institutions, and relationships. While clearly of enormous social importance, if too urgent a pressure, it can result in premature limitation of hypothesis and result in constriction of viewpoint. No doubt all lawyers recall if their memory is jogged, early frustrations in their legal studies, when they first discovered that the "known certaintie of the law" even when stated by the venerable Coke, is chimerical at best. However, after overcoming initial panic, most learned how to be orderly about disorder, and thus restored a sense of well-being. I would suggest parenthetically, that perhaps some of this need for order, still rests latently in most, where it may occasionally cause problems through forcing premature decisions about clients, their needs, and their wishes.

Because of the psychological components of the lawyer's self-image described above, as well as other and perhaps more subtle ones, each lawyer has tended to select an area of professional activity which best suit the balance of his individual

needs. This empirically and perhaps gropingly effected result, has placed each lawyer in his position of best strength as well as greatest weakness. Strength, because it facilitates the use of the sharpest tools possessed; weakness, because it is closest to the built-in blindspots which emanate from the largely unconscious forces which led to the position from which each functions, and by which each is invisibly bound. To get behind this invisible net should be part of the lifetime educational goal of every professional. It is the road to both professional success as well as a sense of personal well-being.

Technical Demands Of Legal Counseling

As I have already stated, every legal task performed by a lawyer begins with the gathering and sorting of data from or about people. Since this necessarily involves the psychological process, it is relevant to be concerned with the question of *how* this process works as the task is carried forward. The manner and efficiency with which it functions, will profoundly influence the results produced. Most lawyers, during the course of their training, have been strongly urged and specifically conditioned, to try to eliminate emotions from their legal task. I would like to take categorical exception to this, and state flatly that such an admonition is not only impossible, but undesirable.

Let me hasten to say, that I do not disagree with the notion that emotions may get in the way and grossly distort the manner in which any task may be conducted. It is simply that they *cannot* be eliminated and furthermore emotions are the principle and most effective tool we have, for knowing what is going on in other people. Assuming that it is inevitable that there shall be emotions involved in one's legal activity, the question then becomes how to best control them. How far may one go without running serious risks of becoming overly involved with clients? How may these emotions be best handled so that the advantages may be maximized in recognizing a client's needs, while at the same time maintaining the psychological distance needed to see clearly what is going on? How may one improve skills for using these feelings? These and other questions involving interviewing-counseling process will be discussed below.

Because of the factors enumerated above, becoming involved with clients produces high probability that even such concrete matters as choice of legal tactics, whether or not to

take a client, whether to negotiate or go to trial, which witnesses to use and which to shelve, which jurors to empanel and which to avoid, and in the last analysis, even which aspect of law to practice, will at least be partially determined by emotions of which the lawyer will be only vaguely aware or completely ignorant.

These omnipresent and disturbing emotional forces in the professional relationship, will place the legal counselor under constant internal pressure to resolve questions in a way which will tend to make him more comfortable, with at least some semblance of control in the variables. In practice, this results in premature decisions with curtailment of fact gathering. Tactical and strategic decisions will be drawn from insufficient and sometimes less-than-optimal data. Decisions of this sort can only result in poor practice which is likely to be less than effective for clients and far from satisfying to the lawyer. Let me emphasize, that these premature maneuvers are not the function of solvency, technical ineptitude, or lack of a conscientious interest in clients. Rather, they are due to the inner needs of a lawyer to alleviate anxiety by "settling matters." Also it should be emphasized, that many lawyers do not "feel" this anxiety since their training and experience has provided them with excellent means for avoiding this sensation and thus missing the more obvious clues to conflict in the situation. The desirable approach sounds paradoxical, since the optimal psychological posture for pursuing these professional problems is to be able to sustain comfortably, the discomfort of opened-ended situations. More will be said of this.

At this point, let me enumerate and describe briefly, some of the built-in emotional difficulties in the practice of law. I view these situations as conflict-producing to a degree which verges on the unbelievable, to most laymen. Most find it difficult to imagine that any human being can actually perform these tasks, because they run so counter to the ordinary operations and experiences most of us have. Before this description, it should be noted that most of these questions relate to ethical considerations and for this reason I would like to mention briefly something of the psychology of ethical functioning.

Following any particular set of "ethical canons," requires more than memorizing the rules. Rather it is a psychological process, deeply influenced by internalized behavior-responses which develop during the entire life span of an individual, but

which are most importantly structured during childhood days when all learn the difference between "right and wrong" in their own particular culture. These dogmatically stated propositions, are adhered to, not because of any understanding of intrinsic worth or social efficiency, but rather because to *not* follow them results in pain, rejection, loss of love, or on occasion, physical punishment and deprivation. They are viewed as unchallengeable, and are to be blindly followed. To follow them gives a sense of security and well-being, and to deviate causes overwhelming anxiety or extravagant activity to avoid the bite of conscience. This indoctrination process in childhood is efficient, essential, and universal. It demands and facilitates automatic responses which are in fact, efficiently adaptive during the early years of life.

The passage of time with growing sophistication and knowledge, brings these dogmatic presumptions about the nature of life and living, under progressive challenge. Slowly at first but more rapidly during adolescence, it is inevitable and indeed essential that dogma be transmuted to rationality, in any culture which permits, values, and necessitates creative intellectual exploration. Golden-lettered, stone-graven moral tenets of earlier years, must be re-examined and evaluated in terms of their social usefulness, so that instead of being dogmatic and tyrannical masters, they will become logical and useful servants to the process of fitting into and enjoying the social environment. One of the measures of maturity in our society (and indeed of mental health) is the degree to which this process has taken place. In relation to professional performance, it is essential that such regulating standards as ethical canons, be perceived as dynamic, process-positions. They are the evolved standards of limitation on the relationship, which must be constantly reinterpreted in the light of changing circumstances, but which may not be readily abandoned with facile arguments that "times and conditions have changed." Ethical concepts quite generally have a central process theme which goes beyond immediate circumstances but which must be implemented variously, according to changed situations. Clearly this demands capacity to perceive clearly and unshakably the social advantages and necessities for the ethic, in order that it will not be cast off too easily when its application becomes difficult or even psychologically threatening in the face of novel and new circumstances. Now let us

examine this principle in the context of several legal situations.

The legal counselor in his professional operations, has from the offset a potentially difficult problem in that he must serve the best interest of his client, and at the same time maintain his responsibility to the bar. Thus he serves two masters who may have different goals and thus places him in the psychologically difficult position of balancing and judging the merits and relationships between these competing claims. I do not suggest that this is inappropriate or undesirable, but merely wish to point out that if one were to contrive a psychological situation which would produce great stress and anxiety, this set of circumstances could hardly be improved upon. This is greatly augmented by the fact that law, ethics of practice, and the authority of judges on the bench, all have great psychological potential for being cloaked in the same kind of blind and irrational authority, which is characteristic of the childhood conscience described above. When this occurs, rational approaches tend to be immobilized and press one toward automatic submission to the authority. When this happens and is side by side with the ideal of serving the client, internal conflict may be stirred up sufficiently to produce paralysis.

It is my impression from observing the legal process and most especially the relationship of lawyers to clients, that a great many decisions are made in response to these blind internal forces, and are detrimental to clients, or are seriously questionable in relationship to responsibility to the bar. Many lawyers resist discussing some of the more difficult questions which involve potential conflict in this area. They reject them with what I would call pseudo-callousness, in order to avoid this stress. For example, the problem of representing the unpopular client is often brushed aside with a rationalization. I do not personally believe that lawyers are less interested than most in the problems of other persons, and in many instances they are the most sensitive members of the community in regard to such questions. I merely put the notion, that they appear to fall strikingly into two groups which represent both sides of this question. They may be too quick and too casual in their judgments in order to avoid the difficult problems involved. On the other hand, they may have suffered through such trial-by-fire, and through maturing, will take the issues on rationally, and with enormous social responsibility. At any rate, it

hehooves the laymen to appreciate the fantastic difficulty that such a professional responsibility carries with it.

Another operation of the legal counselor, which can provide difficulty, stems from ramifications of the adversary method of trial. The necessity for aggressive statement of position is one of the built-in and fundamental ethical demands of the method, and it is essential that the lawyer argue his client's position as aggressively as possible with the facts he has at hand. This must occur regardless of whether or not he agrees with the position or action of his client. There is much psychological difficulty in this situation since it may result in the active espousal of a question which is diametrically opposed to one's own inner value system. One must possess considerable emotional maturity to accomplish this goal, without adopting some kind of psychological defense maneuver to deal with the anxiety created by holding a double position. One of the most common ways to handle an emotional conflict like this is to carry out a "compartmentalization" in which psychological attitudes are separated from one another and so may remain internally inconsistent. This defensive operation like all such, provides momentary comfort, but may be responsible for long range difficulty. It is not possible to turn off self-perception of these internal conflicts, without a concomitant desensitization to the subtlety of issues. To the lawyer-counselor, this can cause him to be overly prone to avoiding trial, so that he will not have to argue for an idea which he disapproves of, internally. He may thus overlook important considerations for his client through not looking far enough to see them as he busily struggles to justify early settlement and thus avoid trial. The opposite can also be true where counsel is inclined to "enjoy" fighting for causes (especially lost ones) and issues which would better be settled. They are thus dragged out and into the adversary proceeding, more to gratify the attorney's taste for battle, than to work out the best settlement for the parties. These tendencies, present to some degree in everybody, but possibly involving greater internal struggle in those who elect law as a career, are the constant source of social difficulties and institutional struggles. They should be the focus for special attention in those who practice law.

Another source of potential difficulty for lawyers, is that they always represent a partisan interest. While there are clear and cogent reasons for this, it also carries built-in difficulties

for the lawyer who must often function as a negotiator. To do this successfully he must be able to identify himself emotionally with both sides of a question in order to understand it well, and to negotiate skillfully. Internal self-doubts, especially those involving allegiance and loyalty, will create tendencies to disassociate from one side or other of the question, and there will be inaccurate and unbalanced understanding of the issues. This capacity to understand and identify at least transiently, which psychiatrists call "empathy," is one of the cardinal skills needed in the counseling process.³ However, it always involves potential conflict of the sort described.

The last example of difficulties which the lawyer-counselor needs to handle, has to do with the kind of intimacy which is involved in professional relationships. Due to the psychological tendency on the part of the client to invest the counselor with all sorts of power, authority, and a nearly magical belief in their helpfulness, there will also be a powerful tendency to bestow affection. These feelings largely are unrelated to truly personal involvement, and are mostly a function of the relationship itself. Therefore, for a lawyer to take advantage of them, would be quite as unethical as making personal use of the client's money or property which had been entrusted to him in the course of carrying out the professional role. These powerful and yet irrational emotions can be disquieting to say the least. They are capable of producing a variety of defensive maneuvers which may range from callous advantage-taking, to total withdrawal, carried out in blind, rationalized ways, or in the context of overt anger caused by the threat which such feelings may pose. One need not feel guilty about sensing internal responses to these emotional manifestations, nor indeed, is it unlikely or inappropriate that one should gain some pleasure and satisfaction from the allegation of affection displayed by the client. It is only in the area of action that the professional obligation exists, and it is therefore a matter of professional concern, that these feelings be handled in a way which will not interfere with professional obligations to the client.

With these illustrations of problems which come up in counseling, and with some suggestions of how they may interfere with professional relationships and goals, we may now

3. Katz, R. *Empathy* Glencoe: Free Press (1963).

turn to the question of how a lawyer can cope more skillfully and successfully with them.

Gaining Counseling Skill

There are a multitude of ways in which skill in the counseling process may be developed. Most of you have no doubt utilized the tried and true process of experience to promote this capacity. At the same time, experience may have locked you into various attitudes and procedures which ultimately defeat efficiency in the counseling process. While it is true that experience is the best teacher, it is only if the pupil has the capacity to perceive the questions and answers which the teacher puts forth. It is just at this point that personal blindspots such as those mentioned above, get in the way of the learning process.

The best way to gain skill in counseling, is through the help of a skilled counselor in going over one's own experience in counseling. As you may know, this is routine practice in the field of psychiatry, clinical psychology and social work, and there is no reason why it could not be utilized by lawyers as well. It should be possible for lawyers to seek assistance from skilled counselors, who could help them with specific situations from their legal counseling practice, by going over the case material and helping them to see the emotional issues which are present. I have on many occasions, helped lawyers analyze such material and it has usually been possible for them to see parameters of emotional activity and involvement of which they were not previously aware. Merely pointing them out helped clarify the nature of these interactive processes and permitted them to return to their client and explore the problems more fully and productively. Likewise, this kind of instruction could take place in groups, in which the group's discussions themselves would provide illustrative material to study the process of interpersonal communication with all of its emotional ramifications.⁴ Recently this kind of teaching has been employed in some law schools, including the University of Michigan, and it seems to offer useful means for mastering something of the technical interviewing skill as it relates to both the client and the interviewer. This kind of learning experience could be a useful inclusion in postgraduate and bar association educational activities.

4. Watson, A. S. "Teaching Mental Health Concepts in the Law School." 33 *Am. J. Ortho Psychiatry* 1: 115-122 (1963).

Another excellent source of assistance for understanding the nature of the lawyer-client interaction, may be found through consultation with persons or agencies skilled in the process of counseling-interviews. Here more is desired than mere diagnostic labelling, since the lawyer-counselor is desirous of specific cues on how to proceed in the matter at hand. It would seem useful for each lawyer to seek out and test some skilled interview-trained person to whom he could refer clients for exploration and consultative collaboration in dealing with emotional issues in cases. One should not expect to have such assistance immediately at hand, since the lawyer would have to "train" his referral source to understand something of the legal issues in which he is involved, so that the collaboration would be fruitful. This may raise questions in some of your minds, that clients would resist the idea of being referred to a psychiatrist, psychologist or social worker for fear they were accused of being "crazy." In my experience, a simple explanation of reasons is sufficient, since in fact, only the crazy would view technical assistance with their problems, as running counter to their self interest. I do not think clients generally protest this procedure, once they know it is for the purpose of helping their lawyer more clearly perceive the nature of their problems as well as available solutions.

In the last analysis, skillful interviewing is intimately related to self-awareness. It has long been known by professionals who spend their careers with people, that such self knowledge is a crucial ingredient to efficiency. For several millennia the physician has been told to "heal thy self," so that he may help others. I have no doubt that there have been similar admonitions made to lawyers. It is jokingly said, that the principal barrier to self-analysis rests in the blindness of the analyst. This is true, and yet at the same time, there are certain procedures which one can utilize to maximize the chances for discovering self truths. For example, one cue to inappropriate reactions arising from internal and irrational sources, is the presence of excessive emotion of any sort. By this I mean emotion which seems disproportionate to the event at hand. A client who for minor reasons can arouse intense anger, is probably touching into some unconscious attitude or feeling of the lawyer. Though the unconscious is by definition and character largely out of reach to conscious exploration, knowing that the feeling is irrational can lead one to take steps which may po-

tentially press one's thought process back in the direction of the source. Quite often such anger is touched off by behavior in others, which mirrors our own hidden internal feelings or ideas. Sometimes asking oneself the question, "do I have some of the same ideas or feelings?" will stir up fantasies and ideas which lead back to the source of the irrational emotion. The presence of this kind of emotion gives excellent cause to bring in another opinion in the exploration of the question. At least one can and should be highly skeptical of judgments made in the face of such feeling.

One can also become used to accepting all of one's emotional reactivity to others. This is one of the surest means for knowing what another person is doing. For example, a client who comes asking for advice, and then persistently raises questions which make it appear that the advice will not be followed, will cause the lawyer to feel annoyed toward his client. He may well assume that the client is bent upon alienating his counsel. This lack of success in getting help is in some way "wanted" by the client. Such an insight can open up lines of questioning which may reveal undercurrents of attitude and wish which will be crucial to the choice of legal tactics. These cues and others, are the sort of thing which one can be taught to perceive and manipulate, and they are the core of all interviewing skill, whether it be conscious and deliberate, or intuitive and artful.

Lastly, there is considerable conceptual knowledge now available about the interview process. There are numerous books and articles by psychologists and psychiatrists, on the interview process, which will give one at least an intellectual grasp of what to expect in this process.⁵ While not much of this has been written explicitly for lawyers, the concepts are directly applicable to the lawyer-client relationship and may be read with such application in mind. These may be sought out in libraries under such headings as interviewing, counseling, "transference-countertransference" and attitude surveys.

Is The Effort To Learn Justified?

One question which many readers may now have in mind, relates to whether or not the obvious effort to learn this skill will be justified. For my part, I do not think that it is possible

5. For example see: Freeman, H. *Legal Interviewing and Counseling*. St. Paul: West Publishing Co. (1964).

to perform adequately in the professional relationship without this skill. Secondly, I would suggest that a professional "needs" to know something of this material, in order to maintain his own sense of emotional well-being. I have indicated that the defenses against anxiety in the interviewing relationship tend to involve isolating oneself from the client or patient. This kind of isolation, carried to a sufficient degree for long enough, reinforces the defense, elaborates it to a greater degree, and ultimately deprives one of the very source of gratification needed by every human being to maintain a sense of vitality and worth. All of us begin life helpless, and come to relate security with intimacy to others. These pleasant sensations, necessary to life for so many years, can never be totally rejected. Every human being in one way or another, struggles to obtain and propagate such relationships. Professionals are no exception, and as noted above, one of the rewards and perhaps motivations for choosing a professional vocation, is the vicarious gratification of this need.

Secondly, the capacity to carry out these relationships smoothly and without undue anxiety, is simply a matter of efficiency. Emotional defenses like military ones, cost enormous expenditures of energy for their creation. To obviate their necessity, liberates such energies for more productive, creative, and satisfying investment. It permits broadening the scope of activities, by diminishing the number of situations that can produce the kind of anxiety which necessitate avoidance.

Finally, every person has a strong need to see himself as successful, adequate, and useful in his relationships to others. This is especially true of the professional, whose very activities are so intimately involved with other persons. In addition to any material gain achieved through professional activity, there is the perhaps more important need to feel that we have helped our clients and our patients. When we have successfully wended our way through the complex turmoil of another person's emotional life, permeated with the problems which are the focus of our technical skill, we experience a glow of inner satisfaction which surpasses any other reward we may have gotten from the process. In conclusion, I suggest that a systematic study and mastery of the psychological processes involved in counseling, will provide the optimal opportunity for achieving this kind of success.

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