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Introduction: The Lawyer as Counselor

People deal with lawyers out of necessity. And when people deal with lawyers, they often complain that lawyers are not people-oriented, that lawyers are out of touch with those they serve. Many lawyers and law students find that there is something in the study and the practice of law that leads us to know more about legal strategies and techniques, and less about the people law serves. We lawyers tend to become identified more with law and less with people, the public interest, social welfare, the common good.

This characterization of lawyers suggests something about who we are as lawyers, who we are as a profession, and what happens to us when we study and practice law. It is a characterization that presents a truth about lawyering, but it is not the entire truth of the matter. Many lawyers are sensitive, people-oriented professionals who relate to their clients as persons rather than problems. There are law-school courses on interviewing and counseling, negotiation, and mediation; there are clinical courses that involve one-on-one human-relations skills training; and there is in legal education a growing contingent of teachers who support and practice people-oriented humanistic lawyering. And we suspect that there are tough-minded lawyers who, from years of practice and exposure to clients, courts, and the law, become more rather than less sensitive to their clients. So it would not be accurate to paint lawyers (and law students) as uncaring, insensitive, and unreceptive to the idea that the practice of law is the practice of human relations.

To talk about legal counseling is to talk about lawyers as they appear to those they serve, and that image is crucial. We argue that counseling is the heart and soul of lawyering. The practice of law is *not*, for most lawyers, a mechanical, repetitive, routine activity. One becomes a student of law, and makes a life of the practice of law to escape the confinements and restrictions found in bureaucratic work. We find that students attracted to the legal profession in the hope that being a lawyer will offer meaningful and fulfilling work. If that ideal is to be more than rhetoric followed by disappointment, disillusionment, and burnout, it must describe a working truth about lawyering, a truth that makes it worthwhile to search for the intrinsic value in lawyering, an intrinsic value encoded in the image of the lawyer as a counselor.

We are aware that some lawyers and law teachers and law students have a different image of lawyers and a different sense of what lawyers do with clients. Some law teachers believe that knowledge of the law and the ability to apply substantive rules of law constitute the core activities of lawyering. We find no conflict in the knowledge, skills, and attitudes of the lawyer as counselor and the acquisition of knowledge of legal rules, and the technical expertise of an able lawyer. The counseling orientation to lawyering complements legal knowledge and legal

skills. Being a counselor while being a lawyer may, of course, create conflicts; most adventures in life are children of conflict, and, in some instances, the adventure of being a lawyer and counselor makes life difficult. Being a lawyer requires a life of knowledge, craftsmanship, skill, and virtue, but ultimately it is a life lived with those we serve.

The legal profession in the United States is not and never has been a homogeneous entity. We have never had a single model or image to portray the good lawyer, or, for that matter, the bad lawyer. This does not mean that anything goes in the practice of law; it means that lawyers may not always agree on what constitutes good lawyering and good counseling. Our point is that lawyering in America is not a uniform enterprise. Still, lawyers learn a body of knowledge and practice a craft as a community of practitioners. Law students learn a language, and according to some legal academics, a way of thinking, that set them apart. This doesn't make you a clone of the "typical" lawyer, but it can set you apart from non-lawyers, from clients, and even from yourself

We believe that there are persistent attitudes, beliefs, and values that can be identified and associated with American lawyers. The lawyering ethos and ethic give rise to a legal *persona*, a way of acting and holding yourself out to the world that identifies you with the craft and craftiness of lawyering. Clients and the public form perceptions of lawyers based on their interaction with lawyers who give credence to the professional mask and to the stereotypes of lawyers paraded before us in the media and popular culture. As members of the legal profession, we can adopt and relish the lawyer *persona* or resist it. At least we can become aware of its existence and how the lawyer *persona* infects and alters the image we have of ourselves and the work we do.

The reality of a legal *persona* does not mean that there is not diversity and difference in styles found in the legal profession. The truth is that lawyers are citizens, neighbors, spouses, parents, even novelists and poets. It is when we work with clients and help them respond to their problems that we *become lawyers* and present ourselves to the world as we take on a *legal persona*—or take measures to avoid the *persona*.¹ As we become conscious of the mask, we learn how being a lawyer sets us apart—a distancing that is in part our own doing (even as it reflects an ideal associated with law—doing the work that lawyers do). In being apart—adopting the mask—we gain distinction and power, power to serve those who need our help

¹ We need to pause over this word *persona*. C.G. Jung borrowed the term from classical theater: A *persona* is a mask worn by an actor. It is, in psychology, "what one passes for and what one appears to be, in contrast to one's real individual nature." It "corresponds to one's personal environment, and to the community," in this case, both the legal profession, and the broader community that enfranchises and makes demands on lawyers to look and act like lawyers. "The persona is the cloak and the shell, the armour and the uniform, behind and within which the individual conceals himself—from himself, often enough, as well as from the world. It is the self-control which hides what is uncontrolled and uncontrollable, the acceptable facade behind which the dark and the strange, eccentric, secret and uncanny side of our nature remains invisible." Erich Neumann, *Depth Psychology and a New Ethic* 37–38 (New York: Harper Torchbooks, 1973) (1969).

and the distinction that makes it possible to act with autonomy and dignity, and whatever prestige, status, and financial well-being that happens to accompany our distinctive work. A side effect of this *persona* is that we become out of step with the world that surrounds us; we hold ourselves apart from those we serve.

A study of counseling is one way of addressing the lawyer *persona* and the odd way our profession both prepares us for and impoverishes our relations with those who seek our services. A study of counseling makes explicit what every course in law school, at some level, involves—human relations.

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Counseling exists in all professional disciplines—in the traditional professions of law and medicine; in education (in the teacher-student relationship and in specialized educational and vocational counseling); and in a wide array of business and service occupations. Insurance underwriters, bartenders, appliance sales people, employment security officers, and clerks in the courthouse all spend time counseling, as do social workers, nurses, physicians, and ministers.

Surveys suggest that lawyers spend much of their time in activities lawyers themselves describe as “counseling.” One study found that lawyers spend more time “interviewing” clients than in any other professional activity. Lawyers spend less time in court and doing legal research than one would assume; many lawyers spend no time in either place, and the average time spent in court and doing research has been estimated at less than ten percent of a work week. An average lawyer spends more than half of her time influencing, facilitating, and implementing choices that are made not by courts but by individuals or small organic communities like families, boards of directors, or a group of neighbors. That lawyering activity—influencing, facilitating, and implementing a client’s choices in the law office—is a good working definition for “legal interviewing and counseling.”

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

While counseling decisions are influenced by what is loosely called “legal thinking,” they are not confined to it. Counseling proceeds from whatever makes it possible to relate to another person, to listen to his or her story, to respond to the needs of that person. Law office decisions proceed as much from subjective and emotional factors as from rules of law. This is also, often, the case with decisions by judges or legislators—but the subjective in counseling decisions is more obvious, because it is not hidden in procedure, rational explanation, and attributed to the necessity of rules. Counseling decisions often clearly proceed from feelings—so much so that any accurate assessment of law office decisions must begin with the proposition that *feelings* are to law office decisions (by clients and by lawyers) what *facts* are to common-law appellate decisions.

Competence in counseling begins with two immediate questions, both directed to the lawyer: “What am I doing?” and “Where am I going?” These questions are directed to two crucial *dramatis personae*: I (lawyer) and Thou (client).

The I–Thou reference is frightening and complicated and turns on self-awareness and the ability to become aware of others. We argue that competence in counseling begins with self-awareness, and that introspective is a primary skill in counseling. But there can be no authentic self-awareness absent knowledge about people. The best resource for learning about people is you; the next best resource is another person, a person you care about, the person Martin Buber called Thou. These resources for learning are intertwined. That is one of the landmark discoveries of Freud’s psychoanalytic approach to psychology: I can learn about myself with the help of another.

Those who say that counseling is the business of psychologists, not lawyers, are being defensive and short-sighted. They deserve E.M. Forster’s bit of invective: “[M]an is an odd, sad creature as yet, intent on pilfering the earth, and heedless of the growths within himself. He cannot be bored about psychology. He leaves it to the specialist, which is as if he should leave his dinner to be eaten by a steam-engine. He cannot be bothered to digest his own soul.”²

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The training that goes into learning to be a counselor often focuses on feelings: how we feel about the client we are trying to serve, how we feel about the choices the client is making, how we feel about the use of law to help the client implement these choices, how we feel about the opposing lawyer, and how we feel about the law more generally and the life we have made for ourselves as lawyers. Counseling a client is influenced by what we bring to the relationship as well as what happens in face-to-face interactions. The past becomes the “trigger” of certain (sometimes predictable) feelings. The past has as much to do with feelings as the present. The past makes some feelings common, some occasional, and some unlikely. And it is also true that our feelings, what we are actually experiencing at the moment, or the feelings we have in being with another person, make us the kind of persons we are becoming. Empathy, the ability to put yourself in the shoes of another, to understand how he feels, and openness to and awareness of your own feelings are fundamental and basic *skills* in counseling.

Two Views of What It Means to be a Lawyer

The lawyer is a counselor when she listens to and talks with a client. We follow the view that all talking and listening is a kind of counseling, and that all conversations between client and lawyer involve counseling. All lawyers are, from this perspective, counselors. They may not be good counselors, they may not call what they do counseling, they may not appreciate this aspect of their work; they are still counselors. Counseling is inherent in the talking and listening that lawyers do when they are with clients. Counseling is so fundamental to lawyering that all lawyers do it, which means that counseling is something that every lawyer knows something about. And it is something that law students already know something about. When students talk and listen to each other, even in conversations about law, about their teachers, about summer jobs, about their lives and interests beyond law

² E.M. Forester, *Howard’s End* 319 (New York: Alfred A. Knopf, 1921).

school, they are providing counsel to each other. It requires no psychological training, special degree, or license to be a counselor. Counseling is an ordinary activity that we all engage in, an activity inherent in the conversations that go on in law offices and law schools.

Counseling as a subject studied in law school provides an occasion to learn how to hold on to the ordinary, generic notion of trying to understand another person and doing so by the way we have learned to understand ourselves. To study counseling, you will need to add some theory, devise some new skills, and explore the sensibilities needed when a lawyer decides to treat clients as persons rather than as problems. The risk and the deficiency—the lost opportunity—in treating our clients as problems is that the client’s concern is recast, by the lawyer, into narrow and manageable categories—manageable in the sense that the client’s concern is channeled into the legal system for solution. This channeling takes place when interviewing becomes getting the facts, and counseling becomes telling the client what the law is.

The interviewing and counseling that goes on in a narrowly defined, professional relationship consists of: (1) gathering the appropriate facts for the limited and obvious purpose of determining the nature of a problem; (2) securing the client’s aid in gathering additional facts and obtaining necessary documents; (3) explaining the nature of the problem in legal terms; (4) exploring alternative resolutions of the problem; and (5) determining how to proceed. By this description the lawyer’s role is straightforward, if not simple: Get the facts, define the situation as a problem, present alternatives, solve the problem (as defined). The counseling in this instrumental view of lawyering consists of surveying the facts, telling the client what the legal problem is and how the law regards it, and then presenting alternatives and consequences and the lawyer’s evaluation of an appropriate course of action. In this view, counseling is breathtakingly simple.

Following this instrumental view of a lawyer’s work, there is little need for collaboration with the client and little need for special training as a counselor. The activities that are ordinary and inherent in lawyering, in this view, are (1) eliciting facts, (2) reciting law, (3) minimized interaction with clients (and other people), and (4) presentations to decision-making tribunals. The lawyer doesn’t need special training as a counselor to accomplish these tasks. This is a view of lawyering that makes the psychology of counseling seem unnecessary, a business best left to psychologists. Law school training in “issue spotting” (interviewing) and reciting the law (based on one’s knowledge of the law) are the only skills necessary for this kind of lawyering.

In this instrumental approach to the lawyer-client relationship the client comes to be regarded as a necessary nuisance. A client comes in to the law office talking; maybe he is all talk. The problem for the lawyer is to cut through the talk to see if there is a problem that can be defined as a legal problem. Or perhaps the lawyer has trouble getting the facts: A second client schedules an appointment to talk about a problem. He enters the office and has difficulty establishing just what the problem is. He answers questions but volunteers only what the lawyer can pry out of him. (We pray for courtroom witnesses who will conduct themselves in this fashion, but this is not a witness.) Simply put, the client has trouble talking about his problem. Both clients are nuisances, but in both cases things get better once the lawyer gets the facts. Then she can get to work. The special skills a lawyer needs are skills for

abating a nuisance.

The lawyer with counseling skills has a radically different perspective when talking and listening to clients. One client's talking too much and another's reticence are not obstacles to be overcome. The way we (lawyers and clients, students and teachers) talk and listen tells us—if we notice—how we see the world and how we try to cope with the world we see. The judgment that some clients talk too much and other clients don't talk enough (to suit the work we try to do as lawyers) illustrates a point about the lawyer-client relationship. When the relationship is healthy, it is not a matter of the client talking and the lawyer listening. Maybe the client does not share the lawyer's ideas of how conversation should go. Maybe the client is hurt, angry, vengeful; the legal consultation can be a vehicle for reconciling the hurt or finding appropriate targets for anger and vengeance. One way to see all this is to view the situation from a different perspective: Suppose the client uses the lawyer, or attempts to use the lawyer, for ends other than what the lawyer sees as the legal resolution of the problem. The point is this: The client wants to be a person as much as the lawyer does. The client wants to be somebody (too). A lawyer either promotes or obstructs his client's need to be somebody, to be the kind of person who doesn't have the kind of problem he now faces.

Some examples: A financially secure husband in a divorce case may seek custody of his children to punish his wife; or he may feel guilty, want to concede or confess, pay money, avoid litigation. Another client is terrified at the thought of being in a trial, or being interrogated in a discovery deposition; he misrepresents the facts, trying (sometimes successfully) to deceive the lawyer. A third client cannot decide whether to settle or proceed to trial; her feelings are in conflict as she tries to protect some individuals, knowing that pursuit of the case will reveal information that everyone concerned would prefer to keep secret. In situations such as these, the distinction between whether the lawyer or client is talking while the other listens breaks down.

Another case is presented by the client who hires the lawyer not only to speak for him, but to make his decisions. A client may be ambivalent, confused, or otherwise unable to make a decision on her own. Our clients depend on us: "Mr. Shaffer, what would you do in this situation?" ("Doctor, would you have the operation if you were me?") Some lawyers make decisions for clients because their clients ask them to. Others make decisions for clients because they *assume* that is what the client wants. Still others make decisions for clients because it makes life easier than trying to find out what the client wants. Other lawyers simply do not trust clients enough to let clients make decisions for themselves.

In each of these situations, the client who tries to dictate to the lawyer and the lawyer who makes decisions for the client, there appears to be an imbalance in talking and listening; underneath the imbalance we may find an issue of trust. Clients sometimes learn that they cannot trust their lawyers. Lawyers sometimes learn that their clients are not to be trusted. In the worst of cases, both client and lawyer engage in active deception, each mistrusting the other.

Trust is as much a matter of who we are as of what we are doing. By that we mean that the issue of trust, a client's trust of the lawyer, and the lawyer's trust of the client, is present from the very beginning. Some of us (lawyers and clients) have trouble trusting anyone. The problem of trust is one that we—lawyers and

clients—bring with us to the counseling relationship, and it's a problem that gets addressed, in one way or another in the counseling we do. If we have difficulty with trust, it is going to present itself as a snag in our relationships, including relationships lawyers establish with their clients. The issue of trust calls for more than ordinary talking and listening. And it is when we experience the need to learn more about ordinary law office conversations, the need to transcend ordinary talking and listening, that we develop counseling skills, a way of listening and talking that is responsive—as instrumental legal thinking is not—to the needs of both clients and lawyers.