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## The Role of Lawyers as Counselors

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# William and Mary Law Review

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## ARTICLES

### THE ROLE OF LAWYERS AS COUNSELORS

HARROP A. FREEMAN\*

#### EDITOR'S NOTE:

Please refer to p. ix for the introduction to the following article. Although written by the author as a single unit, the dedicatory nature of the introduction necessitates its separation from the main body of the article and its removal to the section dedicated to Dean Emeritus Dudley W. Woodbridge.

#### WHY TEACH COUNSELING IN LAW SCHOOL

Quite apart from the question whether counseling is a discipline within the law composed of a body of principles and content, and quite apart from an appraisal of the place of counseling within the legal profession and the attorney-client relationship (to which some attention will be given later), it is appropriate to ask whether counseling should and can be taught in law school.

There is currently within the law school world a considerable discussion of my 1964 casebook, *Legal Interviewing and Counseling*;<sup>1</sup> and something over twenty law colleges have now instituted counseling courses. Their reports are enthusiastic affirmance that counseling can be so taught, but at the same time a caution that we have a long way to go in teacher training, curriculum planning and student commitment. From my own teaching, I would second this observation: most of us teachers lack the training we should have (both theoretical and in practice); the course at best is a stepchild in the program; the students

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1. FREEMAN, *LEGAL INTERVIEWING AND COUNSELING* (1964).

still pass the subject by, as their bird-dog noses seek out the bread and butter courses. Let me explain, however, what I was trying to say in devising the book and in attempting to introduce this subject matter into the law school curriculum.

*First*, I was asserting that the original case method was instituted to get away from the sterile "lecture-textbook-treatise" instruction then in vogue, to cause the student to face law in action as actually practiced—law in the raw, but that the case method had lost its original insight and become as stereotyped and sterile as its predecessor. For it had become a study of law in the courts (in fact only in the appellate courts) and not law in the law office. We believed that a new instructional format had to be devised—a book of "cases" in the sense of "situations" which never got to court. Where better to start this move than in a general course in "counseling", the very form of law practice we were seeking to study. It was hoped that then similar materials might appear for other subjects: corporations, labor, taxation, etc. In fact, Erwin Griswold and I are currently working on such cases for taxation. It was not, however, until my national survey of counseling by lawyers, clergymen and doctors gave me the necessary contact with practicing lawyers willing to produce the cases that I felt able to start. Dean Griswold's Preface in *Legal Interviewing and Counseling*, catches the concept thus:

In a very real sense, this is almost as much a pioneering book as was Dean Langdell's *Cases on Contracts*. Just as the concept of that book flowered in the work of others who built upon it, we may hope that the approach taken here may likewise be fruitful, and that this may be the first of a long line of Casebooks based on non-appellate-court materials. If that result is achieved, legal education will at long last have broken the shackles which have tied it so firmly to the appellate court decisions, and many people will have occasion to be grateful. . . .<sup>2</sup>

*Second*, in recent years there has been an insistent demand on the part of alumni, practicing lawyers, that lawyer skills and the art of lawyering be taught. Various attempts at courses in professional practice, professional responsibility, instrument drafting, trial practice, *et cetera* have been tried. Some of these seemed to me to be worthwhile experiences and some seemed exercises in futility. All had the danger of being esoteric examinations of equity, personal reminiscences of a

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2. *Id.*, at x.

professor of how he did (or didn't) practice law, or courses in modernized techniques like those of a plumber. Since I had always considered that teaching a man to think law was better than teaching him to remember law, I had never been an ardent advocate of technique courses. Yet the demand for students to begin early to sense what a lawyer really did seemed to be justified.

My national survey of practicing professionals proved what I knew from my own experience: that interviewing, negotiating, counseling, and understanding clients, were a large part of every profession—and law perhaps most so. For many years medicine had methodically taught the diagnostic interview—even before medicine embraced psychiatry. It required its trainees to conduct interviews, to record them, to base diagnosis thereon; and it placed an experienced doctor in supervision and criticism at every point. Theological schools had many courses on the pastoral call, counseling and guidance. But law lagged far behind. An examination of lawyers' work seemed to me to center us precisely in the area where we were doing the least teaching.

*Third*, even if our lawyer was never going to interview a witness, try a case before a jury, appear before a judge, advise a client beyond the most technical rules of law (and that definition just about rules out any legal practice), nevertheless he was in fact going to interrelate with people—a possible employer, clients, potential clients, voters, etc. Presumably those interrelationships should be as understood, as effective and as fulfilling as possible. For that to occur, one must have some knowledge, however acquired, of the conscious and unconscious forces operating—in short, of sociology and psychology. Since we found that our students were little trained in these areas and had probably not had those adjustments in large families, work experiences and early responsibility which might develop knowledge of human nature, I came to believe that some minimal exposure to current socio-psychological thought was necessary for an understanding of themselves, their colleagues, clients, or anyone else with whom they interrelated (fully as much as to grasp the problems which would knock at their door).

By centering on the LSAT, marks, academic standing and the law review, our law schools seemed to begin by selecting and continue by developing students strong in intellectualism, verbalization ability, and logic. But we also emphasized power, authoritarianism, rectitude, and wealth. This tended to downgrade the characteristics making for good interpersonal relationships and counseling: respect, affection, love (*agape*), sensitivity, intuition and observational ability, humanitarianism

and optimism. We came to the conclusion that the reason why judges rated at the top of all socio-economic professional rating scales, while lawyers rated well below doctors, clergymen, and engineers, was precisely because of the image we had created—as technicians, restricted in our knowledge to law, selling our knowhow for a fee, no longer the family or counseling lawyer.

I have concluded, from many articles and much research, that neo-Freudianism and psychoanalysis are not the best bases for counseling. On the contrary, the “happy mean” is the best counselor and counseling pattern—on directiveness, involvement, technical knowledge, personality, anxiety, psychological training, empathy and other dimensions. Therefore, non-specialist but trained persons like lawyers might well turn out to be the best counselors. So, we have urged law schools to test and counsel their students as to those traits related to good personal adjustments and counseling; to give an orientation course or courses in interviewing, socio-psycho dynamics and counseling; to develop our own book, audio-visual and other materials; to offer continuing education of the bar courses; to become aware of and share bibliographies of material on counseling from all the disciplines; to improve our selection of students and training of faculty; to study and alert lawyers to appropriate referral agencies for cases beyond their abilities. In short, I believe that counseling not only can, but must be taught.

#### MATERIALS ON INTERVIEWING, COUNSELING, SOCIO-PSYCHO DYNAMICS.

Although, in my study of law schools (99 of the 132 Association of American Law Schools' members), nearly all rated counseling of high importance to the profession, but few taught it and almost none believed that material for teaching was available. This set me out on a search for material. I found an immense quantity, and this resulted in the publishing in 1965 of *Counseling: A Bibliography with Annotations*<sup>3</sup> (nearly 9000 items); and, a small selected bibliography was included at the end of each chapter of *Legal Interviewing and Counseling*.<sup>4</sup> I concluded the material could best be presented and that the work of the lawyer could be subsumed under three topics: interviewing, socio-psycho dynamics and counseling.

*Interviewing* is used constantly by lawyers, news reporters, social workers, television “emcees,” doctors, teachers, employers, public opinion pollsters and many others. Specific instructions are often given (e.g. to pollsters) on just how to interview and avoid the usual pitfalls. Here

3. FREEMAN & FREEMAN, *COUNSELING: A BIBLIOGRAPHY WITH ANNOTATIONS* (1965).

4. FREEMAN, *op. cit. supra* note 1.

we are interested more in the over-all pattern—the theory underlying various types of interviewing—interviewing being defined as gaining information by face to face conference, on which to base action, advice or help. The better treatments on interviewing seem to agree on six or seven facets: recognition of pre-interview facts (the participants, roles, expectations, purposes, and goals); formulation of the interview technique or strategy; establishment of optimum empathy or interrelation; obtaining maximum information; synthesis and appraisal (structuring, correcting, further probing, analyzing, summarizing, and synthesizing); and, conclusion (opinion, counseling, therapy, and other use).

As soon as the interviewee walks through the door or talks on the telephone, he and the counselor are engaged in mutual evaluation. The client has his own personality, problems, and needs. He is a speaking mouth in need of a listening ear. He has his prejudices, anxieties, repressions, defenses, fears, hostilities and communication ability. He has a picture of a lawyer: protected by the rule of confidential communication, member of a higher class, a symbol of respectability, representing the law or authority, logical and reasonable rather than moralistic or religious, not treating those who visit him as sick, probably a family man and a community leader. The client expects the lawyer to take the interview lead, bring out the essential facts to understand the client and his problem, compare these with the law and be able to communicate a solution or approach to the problem which the client could not have found on his own.

A great deal could be written about techniques and establishing interrelation. We can only sketch the roughest outline. The lawyer should be friendly and informal, but professional. He must be a sympathetic, interested and attentive listener; tolerant and non-judgmental; neutral as to the subject matter, concerned as to the person; empathetic and creating rapport; neither under- or over-involved emotionally; giving the feeling of working "with" rather than "for". The lawyer must put the interviewee at ease and committed to the interview. But, long before the lawyer has met the interviewee he will have decided many strategy questions: where shall I get the information, from whom; will this interviewee furnish it or show me where I can get it; will the atmosphere be hostile, friendly, intermediate—ambivalent or polarized; should I be "sponsored"; who is the best interviewer, the best place for interview, time, setting; how much information shall I try to get in one interview, several; how much existing information shall be shared, etc. Some interviewers use a check list on a given

problem. In all events, whatever techniques are used, we are trying to obtain the information wanted, motivate the giving of information, assure the accuracy of the giving, hear and observe fairly, record and evaluate wisely.

It may seem to state the obvious that interviewing is communication, but this can never be stated too often. You want the client's story; words are slippery tools. The client must use words which he thinks will convey his exact meaning (he will not); the interviewer must try to get the same connotations (he will not). Do not hesitate to go back and clarify meaning; watch for one-word or "escape" answers and for Freudian slips. Watch also for "body language"—the nods, smiles, grimaces, stammerings, blushes, shakes, tics, as well as the lighting of cigarettes, crossing of legs, and other nervous acts. Listening is both a receptive ear and an observant eye. And you must watch your own communication—speak to the client, speak slowly, speak clearly, and use language he will understand. Learn facilitators and inhibitors of communication; you may have to find an appropriate way to stop a man who has diarrhea of the mouth or to virtually mine the information from a shy and reticent interviewee. Interviewing is subject to the difficulties lawyers know so well as to witnesses and facts—forgetfulness, chronological inaccuracy, inferential error, faulty observation, inaccuracy or incompleteness of all reports, emotions and conclusions posing as facts. For memory is fickle and recall a thief. And it is the interviewer who must steer the interview past these pitfalls.

Good interviewing is all the things we have mentioned: an art, interpersonal relations, maximizing information flow, communication, questioning, selecting, empathy and sharing confidences, total confidentiality, timing, collecting, verifying, synthesizing, and framing hypotheses. But, in the end, interviewing like other relationships, is being yourself. Studies show that it is not the method, the techniques, the "school" of the interviewer, but whether he seeks the real client and shows his real self which determines success.

*Socio-Psycho Dynamics* is the term I have chosen to use to note that there has now occurred a confluence of sociological, psychological, and psychiatric thought into an integrated theory of human behavior and development, so that the intelligent professional of any calling can grasp its major concepts and make use of them in understanding personal relationships and problems arising therein. Some have advocated that the law schools teach courses in law and psychiatry. I did not feel that lawyers should be amateur psychiatrists—only better lawyers. In study-

ing theological schools we found that they had undertaken to train their graduates in clinics, just as psychiatrists were trained, and had now concluded that this was a false start. What a lawyer needed was a general understanding of modern sociological and psychological thought on such matters as: observation and environment, thought and learning, individuality and individual differences, motivation and adjustment, awareness-perception-identification, behavioral determinants or drives and guides, communication and persuasion, group processes and social influences, personality and learning theory, and maturing and developing.

We can do little more here than point out some of the major modern thought. All analytical schools are based on some form of four concepts: determinism, the unconscious, goal directedness and a genetic approach. For the common sense picture of a single rational mind is substituted three levels—the conscious, preconscious, unconscious—paralleled by three aspects of personality (Ego, Super-ego and Id). We can think of the conscious Ego as reasonable-rational man; the preconscious Super-ego as moral man; the unconscious Id as amoral man. The unconscious is hardest to reach. According to classical Freudian theory, an event associated with painful emotional experience is “forgotten” into the unconscious from which it will later appear as unconscious behavior; the maturity of the individual determines what items can be dealt with consciously and what have to be regressed into the unconscious; dreams outline how rationality (Ego) is trying to handle the interior unconscious forces (Id) and the censorship or conscience (Super-ego) in the process of relating the day’s experience to the past. A successful dream achieves a harmony and is rarely remembered, while an unsuccessful dream is remembered and reveals to the psychiatrist the unadjustable. One can tell when the unconscious is operating by such rules as: it maintains the fantasy that it is omnipotent, operates solely to achieve pleasure, is uncontrolled by the normal rules of the game so that the same word may mean several things and space and time and the laws of logic can be freely juggled. But modern studies make it clear that not the unconscious but “intelligence” is the most human characteristic; it is made up of four components (abstraction, integration, specific expression and exploratory drive) each of which has been located in a specific part of the brain. Man is like UNIVAC, a purposive machine. He is merely supplied a goal or program; then no matter how or what the input, it is sorted, processed, fed back; a tentative output is tested against the goal, passed through a corrective feedback and brought out



as a corrected output. We must learn, as modern thought has, to apply these distinctions rather than the cruder concepts of early psychology. We might thus reclassify the primal force of sex (on which Freudianism was based) into this pattern: instinctual animal sex (promiscuous, procreative); intelligent sex (union in love so that both be fulfilled in body, mind and spirit); and pseudo-sex (exploitive or neurotic).

To understand psychological determinism is most important to lawyers and counselors. It has two meanings; the first or primary meaning is that no human behavior is accidental but determined in the scientific sense of cause and effect; the second tries to answer the question whether processes outside man so determine his actions that he is not a free agent. Though at one time Freudians argued that man had no free will, modern studies show that the Ego or control has at least semi-autonomy from both the Id and environment. Our jurisprudence and particularly our criminal law needs to think through its basic theories accordingly.

The modern concepts of Id, Ego and Super-ego should be understood in order to put into proper perspective the all too prevalent "popular" concept of Freud. Id is the almost completely unconscious, instinctual drives (not merely sex); it cannot be known directly but only through Ego reactions. Ego is the symbol for the psychic function of relating the inner and outer worlds, the Id and the Super-ego. It is now generally recognized that the Ego is learned, has its unconscious as well as conscious, and its own energy or drive in the reality principle. It operates through perception, memory, intellect, judgment, executing, testing and defenses. The Super-ego is equivalent to conscience, broadly understood, the internal voice of "ought", partly conscious and partly unconscious, partly rational and partly irrational. Increasingly we see that the mature person and society is the one who accepts the authority of conscience and reason rather than depend on external control.

Similarly, the personalities of those with whom we associate call our attention. A lawyer does not need an extensive knowledge of the tremendous literature on personality formation. But he should grasp the idea that all personality theories are some composite of such influences as: purposive qualities, unconscious determinants, association or contiguity, way of learning, hereditary factors, early developmental experiences, continuity or discontinuity, the holistic or "field" pattern, uniqueness or individuality, psychological and other environmental factors, group memberships, self concepts, and hedonism or effect—not simply one quality such as uniqueness. If one takes this broad view he will not be trapped into Neo-Freudianism where the total personality

is child-determined—corresponding to the oral, anal, phallic, genital stages (optimistic, orderly-hoarding, ambitious-envious, reality-balanced). He will be able to weigh out all the factors from childhood to the existing situation—the energy, tension, need, “valance” and force of the total field. That is to say that counselors, compared to Freudian analysts, may leave childhood experience to Freudian explanation but they will see many other equally important determinants of personality and behavior. They may thus see pre-school as development and the beginnings of personality within the family; pre-adolescence as acculturation within the school experience; adolescence as finding true self, sex, education and work with which to strive toward maturing; adulthood as socialization, achieving, responsibility and aging—and that from each period comes its special strengths and its problems. It is the as-complete-as-possible understanding of these factors which will make the good counselor and attorney.

*Counseling*, however, is not just knowing socio-psycho dynamics. Nor is it merely “giving advice”. We all know people who are always “giving” advice—and it is worth even less than what you pay for it. In good counseling there is something like “taking” counsel as well as “giving”. If we picture people as in three zones: normal societal life, within society but in trouble, lost to society; then lawyers are in that service group which meets clients in the middle zone between normal social life and social discard. This is the critical preventive zone and the lawyer is a key figure, capable of manipulating societal power and finding new alternatives. Our process of resolving problems which clients have not, cannot or will not solve for themselves, is the age-old method of getting all the facts, finding what solution the client desires, applying our knowledge of law and human dynamics to outline alternatives, making recommendations, and finally getting the client’s cooperation in accepting and utilizing some or all of the counsel.

My preferred definition of good counseling is:

An interpersonal relationship characterized by acceptance and understanding, whereby a counselor viewed as competent seeks to help a counselee, by intervention in a stressful situation, to develop insight, work through problems, make decisions and effectuate solutions, so as to move effectively and creatively in appropriate directions, with regard to his social life and societal milieu.

Each one of the above elements of the definition could be expanded into books. Enough has been said to block out the nature of each aspect.

## MUST THE LAWYER BE A COUNSELOR?

The first and obvious answer is: He is. Most states admit lawyers to the bar as "attorneys *and counselors* at law." Our national survey of lawyers showed that one-third of his time is taken in what he recognizes as counseling. But much more needs to be said than this.

*Every profession in fact counsels* and the professions are looked upon by clients as the chief source of counseling. Lawyers are sought out mainly by men; women take more of their problems to clergymen and doctors. If lawyers were not there to counsel most men would apparently go without. As we have said, lawyers have a different image and different role and tools. They are seen as logical-reasonable rather than moral-religious or sick-curative. They have knowledge of law and power manipulation, and a sizeable block of counseling requires just this adjunct.

*The lawyer must respond to the client's demand for counseling*—this may be even more important. One of the clear conclusions from our study of professional practitioners and clients was that a client selects a counselor (other than when due to chance, cost, lack of knowledge, etc.) by the way in which the client frames or is willing to face his problem or ask for help—as logical, legal, health, moral, etc. He may *need* another kind of counselor. The best may be right next door. But the client will not and cannot go there until he sees this as his need. Only the counselor to whom the counselee comes can act, and if turned away, the counselee will probably seek no one else and the client will go unserved. This is not only a matter of kind of counselor, of the specific counselor; it is also a matter of time. For success there must be counselee readiness; it is for many a difficult decision to seek counsel; they may not be able to generate the action at another time. Therefore, a counselor may have to counsel outside his field—and he must obviously know the how, when and whom of referral systems.

*The lawyer's time and advice are his stock in trade*, so runs the famous adage. Yet, you may be surprised to know that our survey showed the lawyer as most apologetic on this dimension. While the psychiatrist openly charges \$15-50 per hour for listening (or if the client is silent, just sitting), the lawyer wanted to assert he did more than listen and softened his \$20-25 per hour by insisting that he did over one-fifth of his work free. On the other hand, the lawyer had a higher degree of confidence in his counseling success than any of the other professions. He did, however, hasten to state that he "did" something—prepared a

contract, argued a case, laid out a tax plan—though admitting that the success of these depended on the success in interviewing-counseling. It is time we lawyers start being proud of our counseling, rather than apologetic.