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FOREWORD

LEGAL COUNSELING AS AN INTELLECTUAL DISCIPLINE

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In my prefatory remarks to this symposium I will first examine the factors that inhibit legal counseling as an intellectual discipline. Thereafter, I will discuss that some important aspects of legal counseling are invisible. Finally, I will conclude with the bold assertion that, in solving human problems, legal counseling sometimes is preferable to counseling in other disciplines.

I. INHIBITING FACTORS

In spite of groundbreaking scholarly contributions to legal counseling, ordinarily law school curricula do not include this subject. Rutledge Liles has pointed this out in his contribution.[1] The University of Florida College of Law curriculum is an exception. Since 1962 our College of Law regularly has offered a course in legal counseling. Because this course is always filled to capacity, the reason for curricular inattention to this subject clearly is not lack of student demand. We have, however, experienced difficulty in finding faculty members who consider themselves qualified or who are willing to assume the responsibility. This problem of staffing has ramifications that bear on counseling as an intellectual discipline and, beyond that, on law as an academic enterprise.[2]

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1. Liles, *Lawyers as Counselors: The Conflict Between Ordinary Morality and Practical Reality*, 42 FLA. L. REV. 479, 479 (1990).

2. Credit should be given to some of the pioneers of legal counseling, notably the life effort of Louis M. Brown, founder of the Client-Counseling Competition of the Law Student Division of the American Bar Association. *See, e.g.*, L. BROWN, LAWYERING THROUGH LIFE: THE ORIGIN OF PREVENTIVE LAW 157-68 (1986) (autobiography); L. BROWN, MANUAL OF PREVENTIVE LAW (1950); L. BROWN & E. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS (1978); *see also* Brown & Bonanno, *Interscholastic Mock*

In contrast to American law schools, perhaps one would expect European universities to be concerned with legal counseling as a field of theory, but the opposite is true. Contrary to the limited offering in the United States, the subject of legal counseling essentially is unknown in Europe. Despite this inattention, legal counseling might fit under the traditional heading of *Kautelarjurisprudenz*[3] — a term related to preventive law. On the other hand, the legal counseling problems that arise in European practice are identical to the problems the American lawyer faces. For instance, almost half a century ago, German lawyers were discussing the same topics covered in this symposium. When can one raise the statute of limitations and how should a lawyer counsel in this respect?[4] German lawyers also were concerned with local custom and courtesy as sources of professional ethics and counseling, so validly mentioned by Geoffrey Hazard in his comment.[5] Interactions with clients followed the same patterns as here in the United States.

Law professors' lack of interest or qualifications for counseling may stem from the training and careers of these professionals. In the United States, except at law schools of low academic status that have part-time practitioners on their faculties, many law professors have not had extensive client contact. The problem may have theoretical underpinnings that extend beyond practice and affect legal theory. In 1963 I told the late David Cavers that I had taught a course in legal counseling. In response, he wondered how to obtain the source materials for a counseling course and, even if lawyers would provide them, according to what standards could professors grade student performance. Regarding the grading, I saw no difference between evaluating

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Law Office Competition: A Description and an Invitation, 15 STUDENT LAW. 24 (Feb. 1970) (recounting how students learned lawyer-client interviewing skills to avoid potential litigation in the first law school mock law office competition). Among the other early proponents of legal counseling were Harrop A. Freeman, Robert S. Redmount, Howard R. Sacks, and Frank E.A. Sander.

3. Kautelarjurisprudenz is a branch of German legal scholarship, going back to Roman law sources, that is concerned with the prevention of controversies by appropriate measures, such as avoidance of ambiguities and precautionary clauses in contracts. 4 BROCKHAUS WAHRIG DEUTSCHES WORTERBUCH 105 (G. Wahrig, H. Kramer & H. Zimmermann 1982).

4. The considerations fall under the conceptual headings of *unzulässige Rechtsausübung* (illegitimate exercise of rights) or *venire contra factum proprium* (actions contradicting earlier behavior). German law is in these respects essentially unchanged. *Compare* O. PALANDT & B. DANCKELMANN, BURGERLICHES GESETZBUCH, Introduction 3 before § 194 BGB (7th ed. 1949) *with* O. PALANDT & H. HEINRICHS, BÜRGERLICHES GESETZBUCH, Introduction 5 before § 194 BGB (48th ed. 1989).

5. Hazard, *Comment*, 42 FLA. L. REV. 461, 462-63 (1990).

legal counseling tests and other law examinations. Our exchange, however, had jurisprudential implications related to the fundamental question that also is repeatedly raised in this symposium: "What is the law, both in theory and practice?" Contemporary legal scholarship does not accept widely the popular belief that the law may provide solutions, if not answers, to a variety of social and individual problems. The vivid exchanges in the articles of this symposium bear witness to the absence of clear-cut answers.

From the legal scholarship perspective, as distinguished from popular expectations, arguably American law indeed is superior to European law because the former tends to be less predictable and tidy, despite its aspirations to the contrary. Perhaps law is at its best when it is chaotic and in a state of disarray. That state of the law forces both the lawyer and the legal scholar to abandon traditional analyses and to rethink issues from new perspectives while using previously learned techniques only as tools for thinking. Admittedly, legal counseling is an area of such apparent chaos, yet it is also an area of scholarly concern and practical significance. The essays in this symposium demonstrate this laudable combination, as shown by their intensity of argumentation and by their authors' sincerity and commitment.

In this year's Dunwody Distinguished Lecture, Thomas Morgan stresses the problem with the sources of legal counseling. He frames the issue by using a traditional source, the appellate case of *Zabella v. Pakel.*[6] Professor Morgan notes, however, that the relevant information on counseling originates in lawyers' offices where no record of conversations and interviews is kept, where no judicial supervision takes place, and where the participants largely are on their own.[7] Not only is an overwhelming amount of a practicing lawyer's time spent on legal counseling, but confidentiality as well as time constraints make collection of the data exceedingly difficult. Furthermore, the legal scholar collecting the information should have substantial personal experience with legal counseling and, perhaps in spite of this, a scholarly, rather than vocational, orientation.

The materials to be collected would consist of subjective accounts by attorneys with the clients properly disguised and the facts sufficiently altered to prevent disclosure.[8] These accounts often would re-

6. 242 F.2d 452 (7th Cir. 1957).

7. Morgan, *Thinking About Lawyers as Counselors*, 42 FLA. L. REV. 439, 440 (1990).

8. *See, e.g.*, H. FREEMAN, LEGAL INTERVIEWING AND COUNSELING (1964) [hereinafter LEGAL INTERVIEWING] (collecting cases); H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING: INTERVIEWING AND COUNSELING (1972) [hereinafter CLINICAL LAW TRAINING]

flect the attorney's biased view of his personal experience with "cases" that likely never resulted in litigation and somehow resolved themselves or became moot. The process might be purely internal to the law office, requiring no contacts with other parties. Sometimes it may lead to negotiations or other forms of private interaction. The lawyer is likely to advise the client in a way that will avoid litigation if at all possible.

Even where litigation is unavoidable, cases rarely reach the appellate level — the level of our ordinary scholarly discourse and even of our bar examinations. This hidden aspect of legal counseling, its lack of visibility, also should be brought into focus because this symposium deals largely with the rare instances in which appellate litigation ensues and questions of morality arise. These proceedings are sufficiently public to be open to scrutiny. I speak of questions such as whether a lawyer should plead the statute of limitations or obtain a default judgment against an absent attorney without at least attempting to notify the errant counsel first. I shall devote the balance of my foreword to the more submerged aspects of legal counseling.

II. LACK OF VISIBILITY

Of course, morality also is involved in the forms of office counseling in which the client presents a problem to the lawyer, although no court proceedings follow.[9] In a substantial number of these cases, the client is upset or in personal distress and, as Monroe Freedman recognizes, is indeed suffering.[10] Although the problem is then treated as legal, one should note that this classification ordinarily is made by the client, not the lawyer. This client is invariably a layperson who has decided to visit a lawyer rather than a minister or a psychiatrist. The lawyer regularly adopts this classification as if it were valid and proceeds on that basis. Because most human problems have legal components, the potential legal characterization usually is not too difficult.

In further examining the client's classification of the problem as legal, one should note also that certain types of persons, for instance, white middle-class males, are more likely than others to perceive their

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(same). Erwin N. Griswold has recommended that the case method used by the Harvard Business School should be adopted in law schools. *See* Griswold, *Preface* to LEGAL INTERVIEWING, *supra*, at IX-X.

9. *See, e.g.*, Brown, *Teaching the Low Visible Decision Processes of the Lawyer*, 25 J. LEGAL EDUC. 386, 387, 398 (1973); Griswold, *supra* note 8.

10. *See* Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. U.L. REV. 331, 331 (1987).

problems as legal and to visit a lawyer for counsel.[11] They also tend to be the group with whom a male lawyer traditionally has felt most comfortable, although such comfort may be less than desirable as a matter of social policy. Contemporary women, especially if they are young, may be more inclined than women thirty years ago to characterize their problems as legal. Consequently, these women may visit with a lawyer. The number of women entering the legal profession in recent years also may affect law as an essentially male reserve.[12]

Counseling is most effective if the counselor is able to identify with the client and the problem. Inevitably the identification follows social, educational, age, gender, and ethnic lines. As Thomas Shaffer emphasizes in this symposium, the actual problem may be religious.[13] Perhaps the client should have consulted a minister, although Shaffer suggests in his comment that lawyers themselves should openly acknowledge the religious elements of their activities.[14] Perhaps the client may be more appropriately cared for in the hands of a psychiatrist. Yet once the client enters a lawyer's office, the client's own classification of the problem as a legal one is likely to prevail.

Many clients cannot be referred to outside sources of assistance simply because a minister or psychiatrist would not be an individual whom they would ever consult. On the other hand, a middle-aged businessman might view going to a lawyer for help as the proper thing to do. Would it make sense to tell Howard Hughes that he should see a psychiatrist because his problem is psychiatric in nature, although he may be quite successful economically in pursuing his monomania? Is it appropriate for a lawyer to diagnose a client's state of mind in an effort to avoid assisting the client with problems that also have unavoidable legal dimensions? Because many clients, especially if they are distressed about some aspect of their lives, show symptoms of paranoia in various degrees, little may be left of the legal profession if lawyers referred these clients to supposedly better qualified professionals. The real irony develops in the fact that these clients would not likely seek the alternate advice.

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11. *See Tentative Report Summary — Counseling: A Study of Lawyers, Doctors and Clergymen*, in LEGAL INTERVIEWING, *supra* note 8, at 238 (lawyers primarily counsel men; clergy and psychiatrists mainly counsel women).

12. Spiros Simitis offered a seminar, "Is the Law Masculine?," at Yale Law School while visiting in 1985-86. He offered a corresponding seminar at the Johann Wolfgang Goethe Universität in Frankfurt, Germany, in the summer semester 1986, *"Ist Recht Männlich?"*

13. Shaffer, *Thinking Theologically About Lawyers as Counselors*, 42 FLA. L. REV. 467 (1990).

14. *See id.* at 467, 471-74.

A large-scale Missouri Bar report has asserted an overriding client need for friendliness in lawyers. The polled lawyers, on the other hand, thought that results, honesty, and efficiency, respectively, were most important to clients.[15] Counseling scholars should not overestimate this apparent clash of expectations. Still, even if the flaws in research techniques are discounted, an unmistakable subjective client need for friendliness emerges.[16] No doubt, the results to be achieved through a lawyer's activities, in addition to the lawyer's honesty and competence, are somewhat more significant than the clients seem to have indicated, but not as much as the lawyers were inclined to believe. Lawyers should further note that it would be deplorable if they truly underestimated the client's need for friendliness.

I stress these aspects of counseling in my foreword because, although they are largely invisible, they probably represent one of the most important aspects of a lawyer's duties, in terms of both time expended and social significance. The lawyer can greatly assist the client in the nonlegal areas, regardless of perhaps inadequate training. For instance, lawyers serve these invisible client needs by listening attentively to a client's confused story, even though any active "legal" advice may seem inappropriate. The client may have no one else to listen and, without such a sympathetic ear, the client may engage in an utterly foolish and self-destructive course of conduct. A recent example is the Wall Street arbitrager who, being implicated by Ivan Boesky for insider trading, set out with a loaded assault rifle allegedly to shoot the friend who had exposed him.[17] Some may classify this event as unavoidable but I would view it as a failure to provide legal counseling and perhaps even as a dereliction of a moral duty on the

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15. *See* Richter, *A Survey Report: What the Layman Thinks of Lawyers*, 9 STUDENT LAW. 7, 7-8 (Feb. 1964). For the full report, see MISSOURI BAR, A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT (1963).

16. This should not be confused with the objective characterization of a lawyer as a "special-purpose friend." *See* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1071-76 (1976).

17. *See* Stewart & Hertzberg, *How a Wealthy 'Arb' Enmeshed in Scandal Turned to Violence: Mulheren, Ex-Ally of Boesky Caught With Guns, Felt Persecuted and Betrayed*, Wall St. J., Feb. 22, 1988, at A1, col. 4. For recent developments in the case, see Cohen & Lambert, *Mistrial on 26 of 30 Counts is Declared in Mulheren Case*, Wall St. J., July 13, 1990, at B2, col. 3; Cohen, *Jury Convicts Mulheren on a Charge of Conspiracy, Three Counts of Fraud*, Wall St. J., July 11, 1990, at A3, col. 2. According to widespread beliefs, legal counseling is primarily relevant in marital and family matters. In fact, successful businessmen often engage in irrational behavior. For case histories from business practice, see LEGAL INTERVIEWING, *supra* note 8, at 171, 184, 200, 218; CLINICAL LAW TRAINING, *supra* note 8, at 333, 351, 356, 396. *See also* Bruck, *The World of Business: No One Like Me*, New Yorker, Mar. 11, 1991, at 40 (background information on trial of John Mulheren).

lawyer's part. Such an omission, however, may not reach the level of malpractice or even a violation of professional ethics. The law and professional ethics are only ethical minima. In that sense a lawyer could be responsible morally for lacking sufficient awareness of his client's unstable state of mind.

As lawyers, we should not underestimate the training that we have received. Throughout law school, we have been bombarded with hundreds of cases in which human beings were in personal distress in a great variety of situations. Even if the professor's emphasis was on traditional legal analysis, the facts of the cases could hardly go unnoticed without eventually building a reservoir of knowledge and experience that truly may have no equivalent in other disciplines. Even the law recognizes the capacity of lawyers as experts in social pathology by granting them the privilege of dealing with matters, not strictly legal in nature, that inevitably arise in the context of legal counseling. Consequently, lawyers in Florida, as other professionals, may deal with emotional problems as long as they do not hold themselves out to the public as being licensed to render psychological services.[18] In other states, such as California, attorneys are statutorily authorized to perform work of a psychological nature, provided they do not call themselves psychologists.[19] These legislative enactments recognize that it would be impossible to practice law without addressing the nonlegal aspects of legal controversies.

III. Legitimate Choice to Other Forms of Counseling

Let me conclude in the spirit of this symposium and invoke a number of jurisprudential hypotheses — not certainties by any means — concerning why a lawyer sometimes may be better qualified than other professionals to counsel when problems arise that are normal because they are within the scope of what may happen in an ordinary human life. I submit these hypotheses in deliberately short and apodictic form to stimulate further thought:

1. Law provides for short-term remedies, some sort of therapy in emergency situations. Other disciplines are not as well equipped to render short-term assistance.

2. A body of legal rules standardizes social processes. Even the most relaxed form of legal counseling adheres to these rules. No true equivalent for this sort of control exists in other disciplines.

3. Legal rules and policies may be ambiguous, but other theories and concepts are no less so.

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18. *See* Fla. Stat. § 490.014(1) (1989).

19. *See* Cal. Bus. & Prof. Code § 2908 (West 1990).

4. Legal counseling can be more directive than other professional advice would ordinarily dare to be.

5. Lawyers have a significant amount of discretion in the ways they treat their clients. Law attempts to channel this discretion. Furthermore, most people are aware of the discretionary element in general professional advice but often believe that law furnishes clear-cut answers. Even though mistaken, this belief may make legal advice more acceptable than other forms of assistance.

6. An essential theoretical element of law is that it provides for review. Legal counseling can be tested in court. Court decisions can be tested on appeal. No such review exists in other disciplines.

7. Certain personality types — for example, middle-class, middle-of-the-road, middle-aged businessmen — tend to classify their problems as legal. Because of a reluctance to seek other forms of treatment or help, these alternatives may not be accessible to them. In these instances, lawyers perform a valuable task of dealing with the problem regardless of its nonlegal nature.

8. Law provides for strict procedure. Other disciplines have no equivalent. Procedure tends to reassure lawyers and clients.

9. Although law may be establishment oriented, it does provide for due process and acknowledge the Bill of Rights. No equivalent for due process is provided elsewhere. Other disciplines tend to treat social deviation as neurosis or sin rather than as a possible right of the deviant to be protected.

10. Law can be used for social change, even though the process may be lengthy. Law, therefore, is better equipped than other disciplines to deal with social pathology.

11. While certain kinds of cases are primarily legal and others are primarily psychiatric, numerous cases have elements of both disciplines. In many of these mixed controversies, the therapeutic effect is better if society holds people responsible for their actions. Even though they actually may not be so, they slowly may change patterns and accept a fiction of free will as if it were real. Frequently, this may mean a "healthier" attitude. In this way, the lawyer perhaps can cure certain ills more effectively than can a psychiatrist.

12. Legal processes provide for legitimate expression of aggression and hostility. It is difficult to behave this way elsewhere without inviting severe social and professional sanctions.

13. Mental health classifications may lead to indeterminate sentences. Few equivalents for this are given in law.

14. Mental health classifications and perhaps even religious classifications probably are more damaging to the sense of worth and adequacy than legal classifications.

15. Medical classifications are ill equipped to deal with ethnic cases and minorities. They are also ill equipped, perhaps even more so than laws, to deal with poverty.

16. The lawyer can be viewed as some kind of paraprofessional rendering social therapy. Any counseling has some therapeutic aspects. Counseling by lawyers is an important function because, compared with health-care professionals, their training is shorter and less expensive, and they may be more accessible.

17. Health-care professionals are involved little in politically communal processes while the lawyer is inclined to be politically active. The health professional essentially is oriented toward his or her individual patient despite efforts to broaden communal concerns. The lawyer often is interacting with others on behalf of the client. Other professionals do this to a lesser extent. Thus, external factors of a social ill may be neglected.

18. Law provides lawyers with the means to "cool out" people who have failed or incurred a loss.[20] These people can say to themselves, "I lost a case," or, "The judge was wrong." This process often is more acceptable to individuals than other more personal explanations of failure.

19. A lawyer has the capacity to ignore certain factors because they are "irrelevant." A lawyer is able to spot issues and to address only those issues. The legal mind works in a structured fashion, even if the lawyer merely listens to what a client says. Other disciplines are less likely to teach these important intellectual skills.

20. Legal education exposes the student to a greater number of "cases" than any other professional training. Even though the case method emphasizes legal rules, the student also becomes aware of the multitude of problems confronting clients.

21. Psychiatric therapy may stigmatize a person more severely than legal processes. It may create social distance between the patient and other persons. Because of its misplaced stigma, psychiatric therapy may mar a person's record more permanently than if the problem had been dealt with by legal means.[21]

22. In some situations, accepting therapy may involve an implicit admission of guilt. For example, this may occur if a suspected sexual

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20. This terminology is adopted from Goffman, *On Cooling the Mark Out: Some Aspects of Adaptation to Failure*, 15 PSYCHIATRY 451 (1952).

21. Law school admission and bar application forms, as well as insurance questionnaires, often require disclosure of psychiatric or psychological counseling. They do not ask whether the applicant has ever consulted with a lawyer.

offender visits a psychiatrist. If the same offender initiates legal processes against the accusing party, the offender creates an inference of innocence.

23. Contemporary law is built upon policies that protect the individual. Social value preferences, while protected by both law and to some extent other disciplines, are of disturbingly low visibility in nonlegal classifications of supposedly aberrant behavior.

24. Religious and psychiatric classifications imply intrapunitive measures on the part of the person concerned, while legal clients view their problems from an extrapunitive perspective, directed toward others. Within the American culture, society traditionally views resort to legal means of conflict resolution as more "healthy" than introspection.

25. Providing legal counseling generally is not viewed as treating the client, although in many cases the lawyer essentially is doing just that. Rather, society views legal counseling as a treatment of the client's legal problems. In theory, this view objectifies the process, removing it from the client's person.

26. Legal processes deal squarely with death and the normal consequences of death.[22] No other disciplines, not even religion, deal with death in this fashion. These disciplines, then, neglect important aspects of reality.

27. Et cetera.

My points assume that the lawyer involved in counseling is reasonably competent and honest. Let me stress also that I could easily submit a list, of equal length and perhaps less controversial, explaining why counseling through professionals other than lawyers[23] sometimes has advantages over legal counseling. This, however, is not my objective in the present context.

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22. *See, e.g.*, Shaffer, *The "Estate Planning" Counselor and Values Destroyed by Death*, 55 IOWA L. REV. 376 (1969); Shaffer, *Will Interviews, Young Family Clients and the Psychology of Testation*, 44 NOTRE DAME LAW. 345 (1969).

23. *See Tentative Report Summary*, in LEGAL INTERVIEWING, *supra* note 8. For the vivid account of a psychiatrist treating matters of an incidental legal nature, see Schmideberg, *On Querulance*, 15 PSYCHOANALYTIC Q. 472 (1946). *See generally* Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099 (1989) (analyzing feminist and other theories on the role of empathy in law and comparing legal and psychological reasoning).